



TOWN OF NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT (ZBA) MEETING MINUTES Monday, June 11, 2018 6:30 PM

MEMBERS PRESENT: Douglas W. Lyon (Chair), W. Michael Todd, Katharine Fischer, Frank Anzalone, Ann Bedard, Bruce Hudson (Alt.) Heidi Lauridsen (Alt.), Stan Bright (Alt.)

STAFF PRESENT: Nicole Gage, Zoning Administrator

1. Call to Order – Chair Lyon called the meeting to order at 6:30PM.

2. Roll Call – Chair Lyon called the roll.

The five voting member are present and will be voting on the case.

3. Rehearing of Case #ZBA18-02 – Spec Bowers, Applicant / SDB Investments Inc., Owner. Located at 1876 Newport Road. Tax map 041-001-000. Zoned Agricultural & Rural Residential (ARR) in the Shoreland Overlay District. Pertaining to the rebuild of a cottage damaged from fire. *Request for a Variance from Article XX, Sections B.1.a, B.1.c.iii and B.5.a to permit a vertical expansion of the structure, a 1-foot overhang of the second floor on the front side (away from the lake), and an increase in the number of bedrooms.*

A multipage supplemental document was distributed. Chair Lyon gave members an opportunity to review the information.

The board met on May 23, 2018 and the decision was made to rehear the case. This will be de novo which means it is a new hearing but it does not preclude the board from considering evidence or material presented at the original hearing.

In summary, a building burned down and under the zoning regulations, the applicant has the right to rebuild the building exactly as it was, prior to the fire. If he chose to do this, there would be no need for a variance. The applicant wishes to make several changes to the building. It was clarified that the changes being requested are for the addition of a second story for an additional bedroom and have withdrawn the request for a change in footprint. There is no overhang and the foundation is not being expanded. There will be a total of three bedrooms.

Attorney John Rab attended the meeting to represent Spec Bowers. He presented the following: It is important to note that the request is minimal as this is an additional bedroom and a second floor on an existing footprint. It increases the appeal of the property and makes it more modern and better than what was there before. It is non-conforming but they are asking to expand vertically on that.

The building does not alter the essential character of the neighborhood. It meets the public interest criteria.

The spirit of the ordinance is observed because in no way does this conflict with the goals of the zoning ordinance. He cited the overlay district purposes and this fits within that meaning.

Substantial justice – the loss to the applicant is not outweighed by any benefit to the public. The public is not harmed in any way and by preventing this expansion and keeping it as a one story building in that area has no benefit to the public. The proposed use is consistent with the present use in the area. This is

an odd property as it is sitting on the edge of Sunapee within a complex of 7 buildings including 14 units and a building right near it that is three stories high. A two story building is consistent with the present use of the area.

Mr. Bowers distributed photographs and noted that the original application should be part of the record as well. The photos show the complex and the surrounding areas.

The values of surrounding properties will not be diminished by improving this building and the essential character of the neighborhood is not changed. They will be building a more appealing structure and increase the value of the surrounding property.

The unnecessary hardship criteria is always the most difficult when looking at zoning. The Simplex case from several years ago changed the view of unnecessary hardship to make it more compatible with constitutional law. This was to allow the landowner to be able to do something that is reasonable and rational with respect to the zoning ordinance. The relationship test and the reasonable use tests are now used. In order to get to that standard, there have to be special conditions of the property that make it a unique setting. It doesn't have to be different from every other property and it doesn't have to be so special that there is no other property like it. There just has to be special conditions that make it situate differently and it doesn't have to be the shape of the land, setbacks or wetlands. It can be the setting of the property in the neighborhood.

Mr. Rab stated that in this instance, it is a unique setting. It is in a complex and right on the edge of New London. A few feet the other way would be in Sunapee and Mr. Bower would be able to do what he wants to do with a special exception. It is on Sunapee water/sewer.

Mr. Rab pointed out that this will not set a precedent as each situation is unique.

By building this second story, it won't interfere with the surrounding habitat, congestion or with the quality of the lake water. It doesn't cost New London anything more and the water/sewer system won't be overburdened. This is what the zoning ordinance is meant to protect. There is no rational relationship between that provision of the ordinance and the harm that is trying to be prevented. No DES permits are required.

Chair Lyon commented that in the waterfront buffer the whole purpose of the waterfront buffer and the rules that are in the zoning ordinance is to prevent expansion. He is questioning if it is contrary to the public interest because it unduly conflicts with the basic zoning objective. The basic objective of the waterfront buffer is to prevent expansion so this is an issue. The spirit of the ordinance relates to public interest as well and asks fundamentally the same question. Does the variance violate the basic zoning objectives?

For substantial justice, it needs to be determined if the other four criteria can be met.

The surrounding property values is an area that the board has wide discretion.

The hardship criteria is the most difficult and one rule is if the hardship is shared equally by all property owners than no ground for a variance exists. All in the AAR district are burdened by the same criteria.

The reasonable criteria doesn't guarantee the applicant the maximum return, it guarantees a reasonable return and the applicant can rebuild exactly what he had before and have the same return that he had before. The Chair is questioning if the primary motivation is to increase the revenue from the property. All residents in this district have the same burden so it is a stretch to say this is a hardship. It should also be considered that if all the properties in the area were granted the same variance, it would have a cumulative negative effect on the area.

Mr. Rab noted that this is not allowing for expansion into the overlay district. This property is already there and is a legal footprint. Expansion is prohibited unless they can show there is no rational relationship between that provision and what the zoning ordinance intends. The zoning ordinance

doesn't want expansion into the overlay district but it is there already. The ordinance doesn't allow further building next to the lake, damage to the lake water or septic systems close to the lake. It is there for control, but with an upward expansion on the same footprint, there is no rational relationship to what the zoning ordinance is trying to do. There is no fair and substantial relationship to prohibiting a second floor of that building to the goals of the zoning ordinance.

Frank Anzalone stated the zoning is clear. It speaks about no vertical expansion of structure.

Mr. Rab addressed the reasons why the ordinance prohibits expansion. It is because the intent of the ordinance seeks to avoid overburdening septic and seeks to protect, maintain and enhance the water quality of the lakes, and avoid disrupting aquatic habitat.

Density was addressed and because of the way it is situated, Mr. Rab would like the board to consider this is a special circumstance. The property is unique. Michael Todd argued that there hasn't been anything said that distinguishes the physical characteristics of the land in a way that makes the application of the ordinance unreasonable. Mr. Rab stated it doesn't have to be physical characteristics; it can also be the setting and its environment.

Mr. Todd reiterated that Mr. Bowers can rebuild the structure exactly as it is and doesn't need a variance. He will get a reasonable return and reasonable return does not mean maximum return. He would like an explanation as to why this desire to create a two story structure does not arise from the plight of the landowner. Mr. Rab stated it doesn't have to be the plight of the landowner. It doesn't mean he's suffering a financial hardship. It means the zoning provisions have no fair and substantial relationship to the goals of the zoning ordinance. The return is not the issue. He wants a building that is more appealing.

Chair Lyon stated the way the regulations are written, the whole purpose is to avoid expanding the properties in that area. He read "while a single addition to a house might not greatly affect the shore front congestion or the overall value of the lake as a natural resource, the cumulative impact of many such projects might well be significant. For this reason, uses that contribute to shorefront congestion and overdevelopment could be inconsistent with the spirit of the ordinance." There is a reasonable use of the property that is allowed without a variance and that is to be rebuild what was there before the fire. What is being requested is an expansion which in his judgment seems to violate the spirit of the ordinance.

Mr. Rab stated that this expansion doesn't alter the essential character of the neighborhood. The neighborhood has multi story buildings. He believes the height restriction is so that people aren't building houses that will block other people's view of the lake. It isn't due to overburdened septic or congestion.

Mr. Todd made the following observations which were not refuted by the applicant:

- The structure is entirely located within the waterfront buffer (within 50 feet of the shore).
- The AAR zone requires 200 feet of road frontage. This only has 117 feet of road frontage.
- The AAR zone requires a four acre minimum and this lot is only ¼ acre.
- The property was built in 1954. This predates the zoning ordinance.

Ann Bedard expressed her concerns regarding the rebuilding and how to protect the water.

Chair Lyon stated they are being asked to allow the owner to expand the property in a way that is clearly prohibited in the ordinance. He wants to accurately and fairly apply the criteria.

Mr. Rab stated that height restrictions pertain to air, light and view. The height restrictions are there so you can't block light and air. In this instance, he feels this doesn't apply. Nicole Gage noted there is a house within 10-15 feet of this property. Mr. Todd stated it also impairs the view of public passerby's. There will also be congestion aggravated by a second story as you are doubling the size of the unit.

Mr. Bowers mentioned that other properties on the lake are larger and taller than his. What he is doing is reasonable considering the neighborhood. It was noted these may be on bigger properties.

IT WAS MOVED (Michael Todd) AND SECONDED (Frank Anzalone) to discuss. THE MOTION WAS APPROVED UNANIMOUSLY.

Chair Lyon summarized that the criteria, public interest and spirit of the ordinance are related. He agrees with the applicant that he only has to demonstrate there is no harm to the public interest. He thinks the fundamental issue is whether the variance being considered is in conflict with the basic zoning ordinance. The same is true with the spirit of the ordinance. The issue is whether the variance violates those basic zoning objectives.

The substantial justice issue states that the loss to the individual can't be outweighed by a gain to the general public. In this instance, the applicant has the right to rebuild without any variance. Clearly he has a reasonable use that is allowed without a variance at all.

With regards to surrounding property values, in this case— no testimony has been supplied, but common sense says it would be difficult to make a case there would be a decline in property value. For the hardship criteria the two uses are the reasonable use criteria and the substantial relationship between the general public purpose of the ordinance and the specific application of the property. On the reasonable use criteria it seems there is a reasonable use for this property without any variance and it is specifically allowed in the ordinance to rebuild. He does think when it comes to the general public purpose of the ordinance he struggles with why that doesn't go back to the same spirit of the ordinance issue that was discussed under public interest and spirit of the ordinance.

Katharine Fischer agrees with the conclusion and would like to emphasize the spirit of the ordinance. It does not follow the spirit of the ordinance because the ordinance, with regards to bedrooms, is designed to clearly guard against density. This proposal does not fit the spirit of the ordinance. With respect to the other items, she concurs.

Mr. Anzalone stated that as far as hardship, he feels differently. This is an unbuildable lot, except to build what was previously there,) where there is 2 bedrooms and he's asking for 3 it isn't unusual to see a three bedroom home. The spirit of the ordinance is an issue, specifically the height. There is a reason for this height restriction in the waterfront buffer and in this case, because it is by the lake, there is a restriction and it could be to control congestion.

Mr. Todd has an issue with the unnecessary hardship (reasonable use). The applicant is allowed to build the existing cottage and that is a reasonable use of the property. Mr. Todd stated by not granting the variance we are not denying him reasonable use of the property.

Ms. Bedard stated agrees with Mr. Anzalone regarding B.1.a. Our zoning ordinance in b.1.a is very specific on the restriction

Ann Bedard stated it is black and white in the zoning about the height and it is very specific about this.

IT WAS MOVED (Doug Lyon) AND SECONDED (Michael Todd) to deny the request for variance for the following reasons:

- **The variance requested is not in the public interest because it conflicts with the basic zoning objective of preventing building expansion in the waterfront buffer.**
- **The variance requested also violates the spirit of the ordinance by allowing building expansion in the waterfront buffer.**
- **Substantial justice is not an issue because the applicant has the right to rebuild the destroyed cottage as it was, so there is no loss to the Applicant.**

- **There is no hardship because all waterfront properties in New London are burdened with the same waterfront buffer requirements. On the issue of diminution of property values, no evidence was submitted to suggest diminution of property values. THE MOTION WAS APPROVED UNANIMOUSLY 5-0.**

4. Other Business

Nicole Gage reminded the group there is a joint meeting with the Planning Board on July 10, 2018 at Whipple Hall at 6:30PM. This is an educational presentation from New Hampshire Housing and Finance Authority on workforce housing.

5. Motion to Adjourn

IT WAS MOVED (Bruce Hudson) AND SECONDED (Frank Anzalone) to adjourn. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 8:19 pm.

Respectfully submitted,

Trina Dawson
Recording Secretary
Town of New London