

**Town of New London
Zoning Board of Adjustments
October 26, 2010
APPROVED**

Members Present: Doug Lyon, Laurie DiClerico, W. Michael Todd, Courtland Cross, Jeff Horten

Also Present: Peter Stanley (Zoning Board Administrator)

Mr. Lyon called the **MEETING TO ORDER** at 7:30pm. Chair Green had recused himself from this session and so Mr. Lyon announced that he would be chairing the meeting. He indicated that the night's hearing was a continuation of a meeting which had been requested by Timothy and Karen Anderson, who were repealing an administrative decision, as stated below.

Chair Lyon noted that the meeting had been properly noticed and was being recorded.

SPECIAL EXCEPTION

**Timothy and Karen Anderson
26 Beaver Point
New London, NH 03257**

Tax Map: 106 Lot: 008

PURPOSE OF THE REQUESTED WAIVER

Appeal for an Administrative Decision as permitted by Article XXI, Sections E and F of the New London Zoning Ordinance regarding an order to remove parts of a deck that were originally constructed in violation of the zoning ordinance.

Chair Lyon said since last week they have had a number of clarifications. There was a request by board members that they obtain copies of the hearing minutes that addressed this case 14 years ago. They also requested the subsequent ZBA hearing minutes to make sure that the minutes from the initial hearing had been approved. Both of these items were obtained. They were also interested in obtaining the minutes from the Board of Selectmen's meeting referenced in the case. Unfortunately, no minutes pertaining to this case could be found. Ed Taylor, a member of the Board of Selectmen during this hearing 14 years ago, had been approached and he could not recall any details of the case. Chair Lyon said they could conclude that there was no additional information they could get from the Board of Selectmen.

Chair Lyon noted that there was a case that Mr. Todd referenced, which supported the opinion of Town Counsel, that the ZBA had wide latitude to make decisions and their pervue was not to say yes or no to the Zoning Administrator's decision. Mr. Todd said that his intent in forwarding the case to the members of the ZBA was to give some background on what it means to conduct a de novo review and what their procedures and powers are in such a case. This is a subject of which they have jurisdiction so they have authority to resolve it.

Chair Lyon said that the situation is that they are required to make a decision. He asked if there was anyone on the board who would like to ask additional questions of Mr. Anderson or Mr. Stanley to gather and/or review information. He wanted to make sure that everyone had an opportunity to ask questions.

Ms. DiClerico asked Mr. Stanley what he meant when he said that the town would not take any enforcement action. Mr. Stanley said that because the Board of Selectmen took action on their own, out of their framework of authority and granted a permit, the ZBA would look foolish taking Mr. Anderson to court to enforce the removal of the deck. Town Counsel has advised against taking the Andersons to court over this. Mr. Stanley added that there have been numerous cases found in the town where errors were made by the Board of Selectmen. No judge would find for the Town in these cases because the Board of Selectmen had given permission. Mr. Stanley explained that these sorts of things don't happen anymore. Where things have been ordered to be removed due to violations, they have been removed. In this case, there is no standing order for removal. He added that the only possible solution is to remove the offending portion of the deck. The whole point of the regulations of the waterfront is to protect water quality.

The decision made by the Board of Selectmen, although outside the framework of their legal authority, did in fact make a reasonable quid pro quo, which is not a legal basis for the decision. They required the Johnsons to have a porch that was even closer to the water be removed. If they look at the objective of the ordinance, which is to protect water quality, they are now assaulting the water front and water quality in a way that makes no sense in this stage of the game. It has been 14 years.

Mr. Todd said that he is fine with this logic but there was another point he wanted to ask of the candidate. He wondered if when he purchased the property if they had a realtor operating in his interest. Mr. Anderson answered in the affirmative and indicated that the seller had the same representation, although from a different realtor. Mr. Todd asked Mr. Anderson if he read a seller's disclosure. Mr. Anderson said that he had. Mr. Todd said that he asks this because the sellers are duty-bound to disclose any abnormalities of the property during the sale. If the agent knew about any abnormalities, they are supposed to disclose them and are required to keep these disclosures in the file. Given that the present purchaser has found this mess after doing their due diligence, they have found faults all around for this issue not being disclosed during prior sales. Mr. Todd asked what the Master Plan says about water quality and wondered how the ZBA should address those concerns. Do they want to make a ruling that furthers that goal?

Chair Lyon agreed with Mr. Todd and thought it was extremely likely that the Johnsons did not disclose anything because they had a building permit and didn't think they had done anything outside of it. Mr. Todd said that it is his prejudice against realtors that causes him to assume that they may have known about the abnormality.

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

Chair Lyon agreed that they have a mess before them after a course of errors that have been made with this property. Remedying the errors would be a waste of their time and they need to make a rational decision. He felt the wisest choice would be to allow the current structure to remain and prevent a situation in which if the current structure were removed, it would obviate the porch, which would put them in greater non-compliance, could be put back. For him, the spirit of the ordinance would be met if they left the status quo the way it is.

Mr. Horten said that the logic played out this same way for him. He had this same view in the past meeting and he felt the deck should remain.

Ms. DiClerico agreed that they should allow the structure to continue the way it is.

Mr. Cross said he didn't feel there was any malice or forethought here and thought it was a series of errors that were not malicious in intent. The situation, having been in existence for 14 years, and peacefully it seemed, and not doing any damage to the waterfront, he thought should be left alone.

Mr. Todd summarized the logical points they had to make:

They have to agree with Mr. Stanley that the deck is non-conforming. Given the fact that the owners cannot apply for another variance for the same reason, they can't ask to do this again. The Town, on advice from Town Counsel, is not going to enforce the removal of the deck, and anything further is just going to result in more activity within 50' of the shoreline, which could be an overall detrimental effect. If they leave it as is, they won't disturb the 50' buffer, won't have to go to court, and won't have to deal with a second request for a variance on the same issue. He felt they were boxed into the only option they had, which was to leave it be.

Chair Lyon said he would like to make it clear in the decision the reasons for this and what the argument is. It seemed to him that Mr. Todd had laid out the case for this. Their finding is the same as Peter's, but their relief is different.

Mr. Horten said that for the benefit of the new buyers, his belief and understanding is that should they have a need to replace the deck at some point, the length and size of the deck would be replaceable in its present form. Mr. Stanley said that if they voluntarily remove the deck, they may not replace it in the town of New London. They may repair and maintain it, but not replace it. Mr. Stanley said the footprint of the structure must be maintained at all times. They may not tear it down, but they may repair it. Even if destroyed by fire, it must remain in the same footprint.

IT WAS MOVED (Michael Todd) AND SECONDED (Jeff Horten) to accept the finding of the Zoning Administrator that the current structure is in violation. However, the ZBA declines to support the order for removal and therefore amends the finding of the Zoning Administrator to allow the structure to remain as it is for the following reasons:

- 1. The current owner is barred from seeking a variance for the non-conforming structure since the exact same variance request had been heard in July of 1996, as presented by the previous owner.**
- 2. The Board of Selectmen erroneously approved a building permit in August of 1996, instead of referring the case back to the ZBA for appeal. As a result, a more non-conforming segment of the structure was demolished and the violation was allowed to continue. On advice of legal counsel, the Town would be unlikely to prevail in an enforcement action against the Appellants, and declines to pursue it.**
- 3. The previous owner was not forthcoming regarding the legal status of the property in his disclosure to the Appellants, prior to their purchase. The previous owner had what he thought was a legal Building Permit signed by the Board of Selectmen and may not have been fully aware of the continued violation.**
- 4. Article XVI, Section A of the Town of New London Zoning Ordinance clearly states that the purpose of the Shoreland Overlay District regulation is to “Protect, maintain and enhance the water quality of the lakes”.**

THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 8:30pm.

Respectfully Submitted,

Kristy Heath, Recording Secretary
Town of New London