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p. 1-58

STATE OF NEW HAMPSHIRE

MERRIMACK, ss

SUPERIOR COURT

Case No. 217-2018-CV-00469

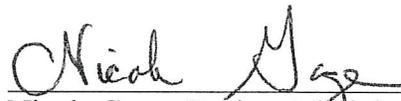
Spec Bowers

v.

New London Zoning Board of Adjustment

**CERTIFIED COPY OF RECORD OF THE
TOWN OF NEW LODNON ZONING BOARD OF ADJUSTMENT**

I, Nicole Gage, Zoning Administrator, on behalf of the Town of New London Zoning Board of Adjustment, hereby certify that the attached is a true, accurate and complete copy of the records of the Town of New London Zoning Board of Adjustment with respect to the appeal filed by Spec Bowers.



Nicole Gage, Zoning Administrator
Town of New London

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Part 1
Application

Bowers-
Application

To: Zoning Board of Adjustment, Town of New London, 375 Main Street

Name of owner/applicant: Spec Bowers

Mailing Address: PO Box 323, Georges Mills State: NH Zip: 03751

Home Telephone: 763-2369 Work Telephone: 763-2369 Cell: 454-4233

Email address: GMCottages77@gmail.com

Owner of property: SDB Investments, Inc.
(if same as applicant, write "same")

Location of property 1876 Newport Rd.

Tax Map Number: 041 Lot Number: 001 Zone: _____

A variance is requested from the provisions of Article: _____ Section: _____
of the Zoning Ordinance to permit See attached sheets

Facts supporting this request:

1. The variance will not be contrary to the public interest:

2. The spirit of the ordinance is observed: _____

3. Substantial justice is done: _____

4. The values of surrounding properties are not diminished; and:

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary
hardship.

TOWN OF NEW LONDON
SELECTMEN'S OFFICE
MAR 30 2018
ZBA 18-03 02
RECEIVED

A. For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(1) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;

and

(2) The proposed use is a reasonable one;

B. If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Owner/applicant(s) Signature: *Spencer Bowers III* Date: 3/30/18

NOTE:

This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

For questions or assistance in completing these forms, please contact:

Zoning Administrator

603-526-1246

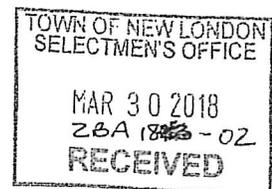
Email:

Or

Assessing Coordinator

603-526-1243

Email:



Background info regarding variance application

SDB Investments, Inc. is the owner of Georges Mills Cottages (GMC). Spec Bowers is the owner of SDB Investments.

GMC comprises 7 buildings - one large building with 7 apartments; a duplex; and 5 single family cottages. All are very close to the water - completely within 50 feet.

One cottage, the subject property, is in New London. It is a single-family residence on a lot that is zoned ARR.

The other 6 buildings are in Sunapee. The driveways are in Sunapee; the sewer system is in Sunapee.

The apartment house is mostly two stories, but partly three stories. The duplex is one and a half stories - the front is one story, the rear is two stories. The cottages are one story.

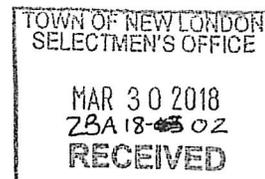
The subject cottage (Ladyslipper) is the smallest in square feet, and is the shortest in height. The bedrooms were too small to have closets, and there wasn't enough room to walk around the beds. The kitchen was very small.

I am entitled to rebuild the burnt cottage in the same footprint. The reason for seeking a variance is to rebuild it a little taller. Specifically, I seek relief from these provisions:

XX.B.1.a - "No ... vertical expansion of the existing structure shall be allowed." I want to add a second story.

XX.B.1.c.iii - "No change in the footprint (drip line) of the structure (within the Waterfront Buffer) will result from the new foundation."

XX.B.5.a - "... so long as the new Structure is a functionally equivalent use (with regard to number of Bedrooms)" I want to add two bedrooms.



A variance is requested from the provisions of Article: XX,

Sections:

- B.1.a, "No ... vertical expansion of the existing structure shall be allowed."
- B.1.c.iii, "No change in the footprint (drip line) of the structure (within the Waterfront Buffer) will result from the new foundation."
- B.5.a, "... so long as the new Structure is a functionally equivalent use (with regard to number of Bedrooms)"

of the Zoning Ordinance to permit:

- vertical expansion of the existing structure
- a one foot overhang of the second floor on the front side (away from the lake)
- an increase in the number of bedrooms

Facts supporting this request:

1. The variance will not be contrary to the public interest:

The requested variance would not change the footprint of the building. Adding a second floor and increasing the number of bedrooms would not threaten the public health, safety or welfare. Nor will it threaten other purposes of the ordinance, such as congestion in the streets, undue concentration of population, or water quality.

2. The spirit of the ordinance is observed:

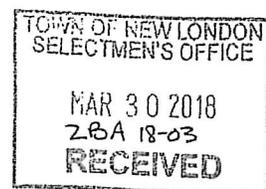
The proposed building is entirely in keeping with the character of the neighborhood.

The existing complex has buildings that are taller than the proposed building; just 50 yards away is a building that is similar to the proposed building; there is a much larger building with three stories just 100 hundred yards away.

Most other buildings on the lake have two or more stories.

The variance is consistent with a stated purpose: "Encourage those uses that can be appropriately located adjacent to shorelines."

The requested overhang would move the drip line farther from the water, which would further protect the lake by increasing ever so slightly the filtration of water through the soil.



3. Substantial justice is done:

The general public would realize no appreciable gain from denying this variance.

Denying the variance would result in substantial loss to the petitioner.

4. The values of surrounding properties are not diminished:

The changes in the context of the entire property are miniscule.

The changes would be barely noticeable from other properties.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

A. For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

(1) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and

(2) The proposed use is a reasonable one;

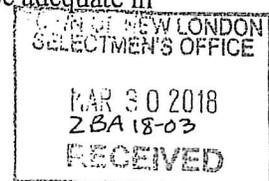
The property has these Special conditions:

- it is a small part of a larger complex
- the complex straddles town boundaries
- the driveway is in Sunapee and the complex connects to the Sunapee sewer, not NL.

(1) There is no fair and substantial relationship between the general public purposes of the restriction against extending upward or of increasing the number of bedrooms, and the specific application of those provisions to this unique property.

(2) The proposed use is a reasonable one:

The building would continue to be a single-family residence; it would be consistent with the character of the other buildings of the complex. All rooms, while still fairly small, would now be adequate in size.



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SELECTIONS OFFICE
MAR 30 2018
2018
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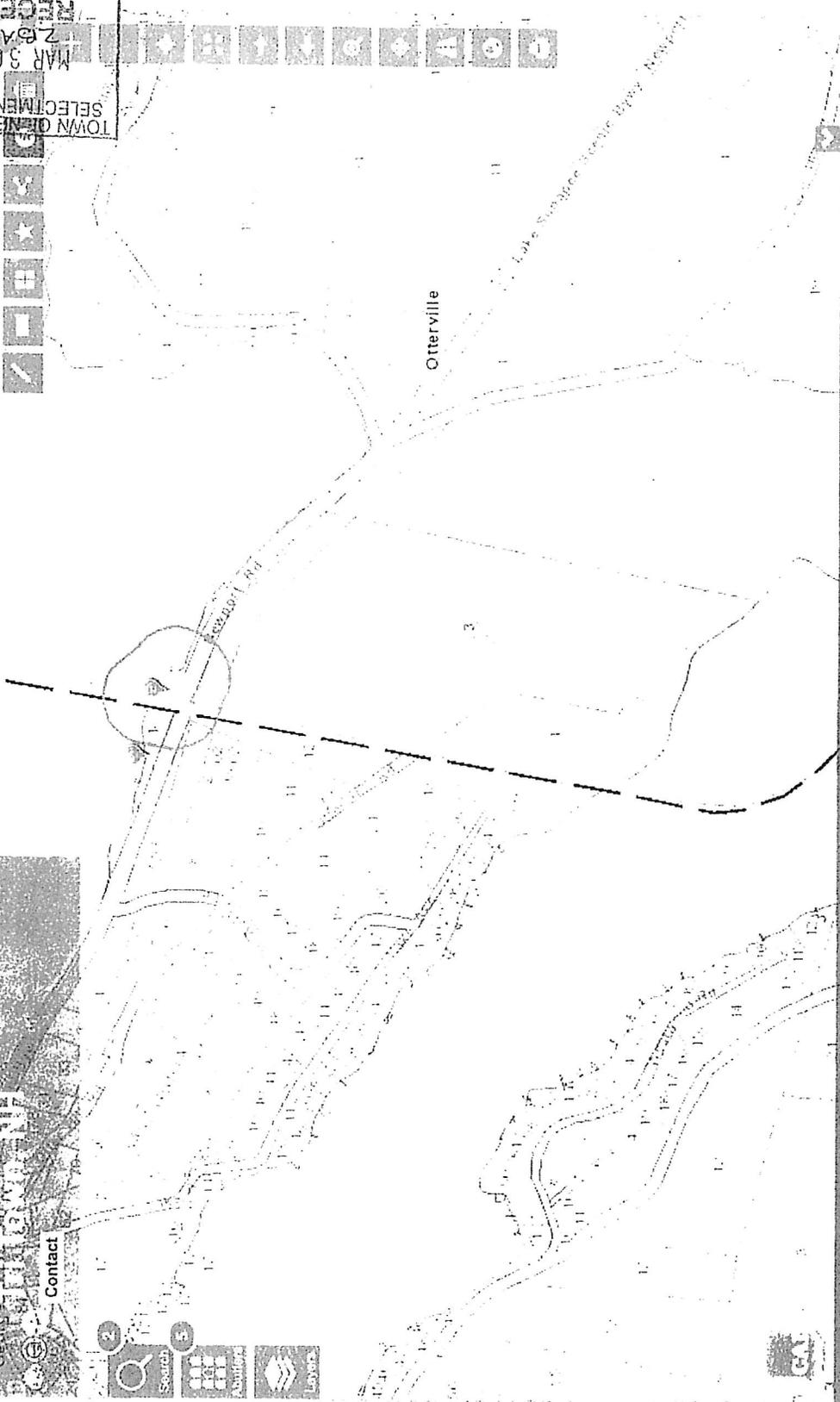


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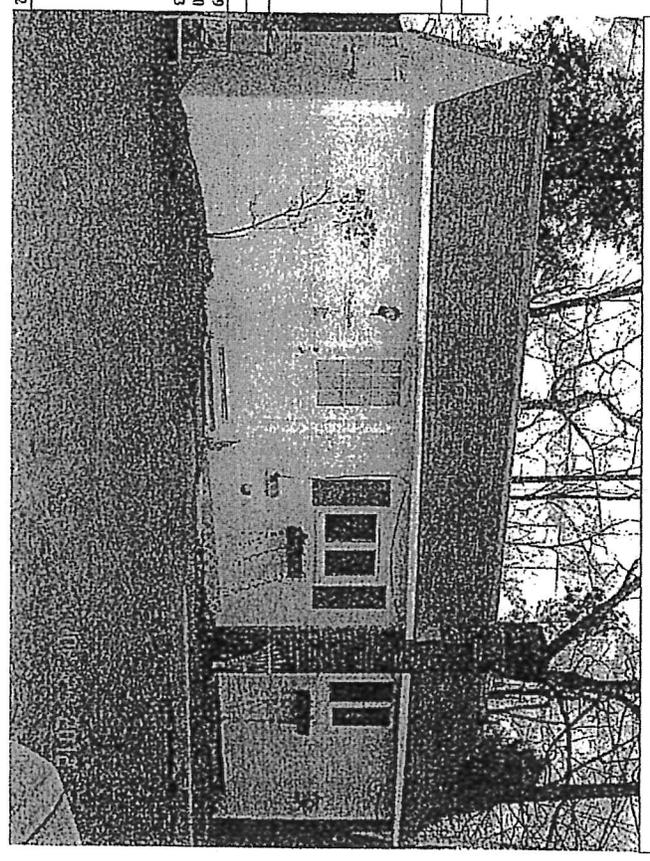
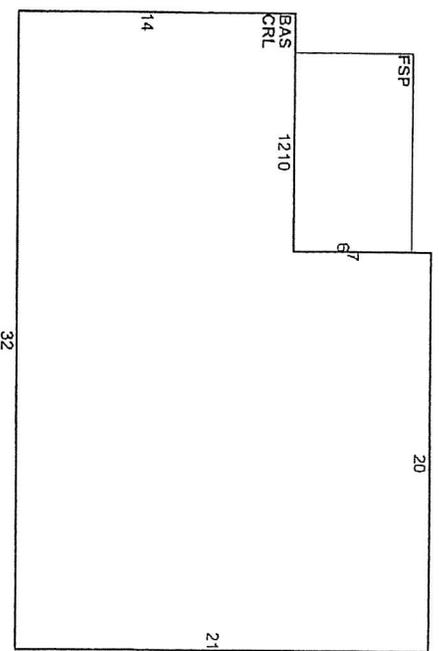
CONSTRUCTION DETAIL			CONSTRUCTION DETAIL (CONTINUED)		
Element	Code	Description	Element	Code	Description
Style	36	Camp			
Model	01	Residential			
Design/Appral	04	Average +			
Stories	1	1 Story			
Occupancy	1				
Exterior Wall 1	13	Pre-Fab Wood			
Exterior Wall 2					
Roof Structure	03	Cable/Hip			
Roof Cover	03	Asph/F Gls/Cmp			
Interior Wall 1	02	Wall Brd/Wood			
Interior Wall 2					
Interior Flr 1	09	Pine/Soft Wood			
Interior Flr 2					
Heat Fuel	03	Gas			
Heat Type	03	Hot Air-no Duc			
AC Type	01	None			
Total Bedrooms	02	2 Bedrooms			
Total Bathms	1				
Total Half Baths	0				
Total Xtra Fixtrs	4	4 Rooms			
Total Rooms	01	Old Style			
Bath Style	01	Below Avg			
Kitchen Style	01				

OB-OUTBUILDING & YARD ITEMS(U) / XF-BUILDING EXTRA FEATURES(B)										
Code	Description	Comment	YB Units	Unit Price	Yr	Grd	Dp Rl	Cnd	%Cnd	Apr Value

BUILDING SUB-AREA SUMMARY SECTION						
Code	Description	Living Area	Gross Area	Eff. Area	Unit Cost	Undeprcc. Value
BAS	First Floor	588	588	588		46,379
CRL	Crawl Space	0	588	0		0
FSP	Screened Porch	0	60	15		1,183
Tot. Gross Livable Area:		588	1,236	603		47,562

MIXED USE		
Code	Description	Percentage
1010	Single Fam MIDL-01	100

COST/MARKET VALUATION		
Adj. Base Rate:	78.88	
Net Other Adj:	47,562	
Replace Cost:	1,000	
AYB:	47,562	
EYB:	1,954	
DEP Code:	1,981	
Rebuild Rating:	A	
Year Remodeled:		
Dep %:	33	
Functional Obshne:	0	
External Obshne:	0	
Cost Trend Factor:	0	
Condition:	0	
% Complete:	47	
Overall % Cond:	27,400	
Apprais Val:		
DEP % Ovr:		
DEP Ovr Comment:		
Misc Imp Ovr:		
Misc Imp Ovr Comment:		
Cost to Cure Ovr:		
Cost to Cure Ovr Comment:		



Google Maps



Map data ©2018 Google 20 ft

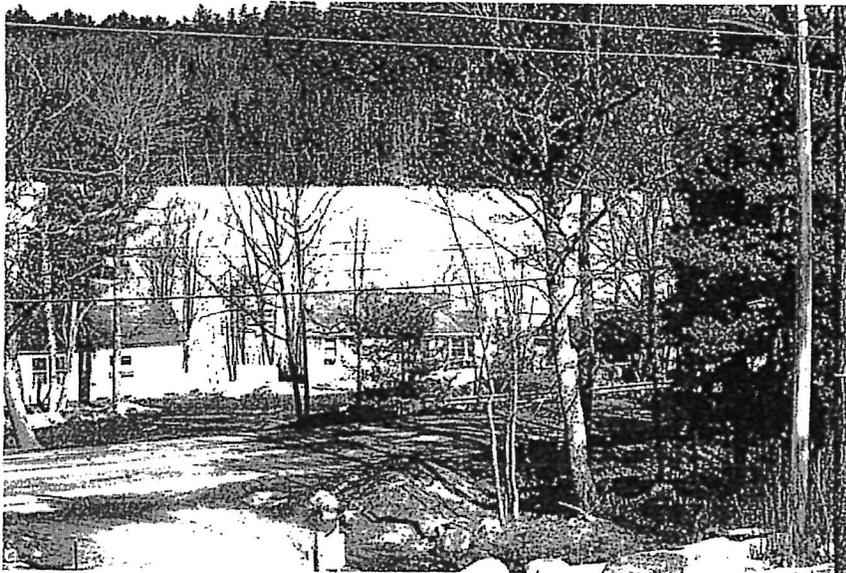
<https://www.google.com/maps/@43.4297246,-72.0565099,69m/data=!3m1!1e3>

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SELECTMEN'S OFFICE
MAR 30 2018
ZBA 18-0302
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The subject property (burned down) and the neighboring building:



View from neighbors' driveway. Burnt building is barely visible on right. From neighbors' building, it is completely obscured by trees.

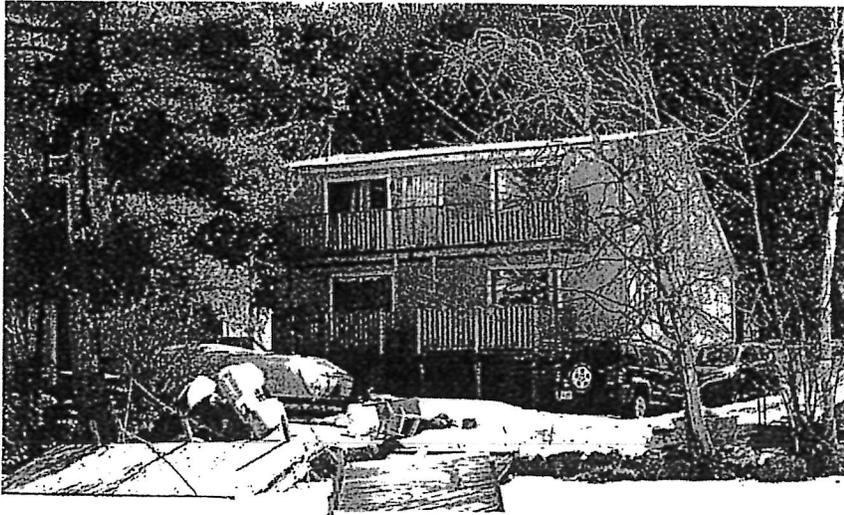


TOWN OF NEW LONDON
SELECTMEN'S OFFICE
MAR 30 2018
26A 18-0302
RECEIVED

This view also from the neighbors' driveway shows the next two buildings to the left of the previous photo. The building on the left is two stories tall in the rear.



This is the two-story building in the previous photo, taken from the lake side. This building is about 50 yards from the subject building.



TOWN OF NEW LONDON
SELECTMEN'S OFFICE
MAR 30 2018
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This is the rightmost building (as viewed from the lake side) of the complex. It is about 100 yards from the subject building.

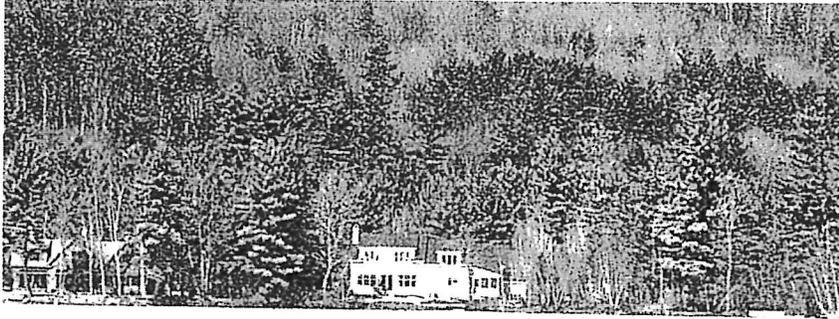


These are neighbors from across the lake. As you can see they are 2-3 stories tall.

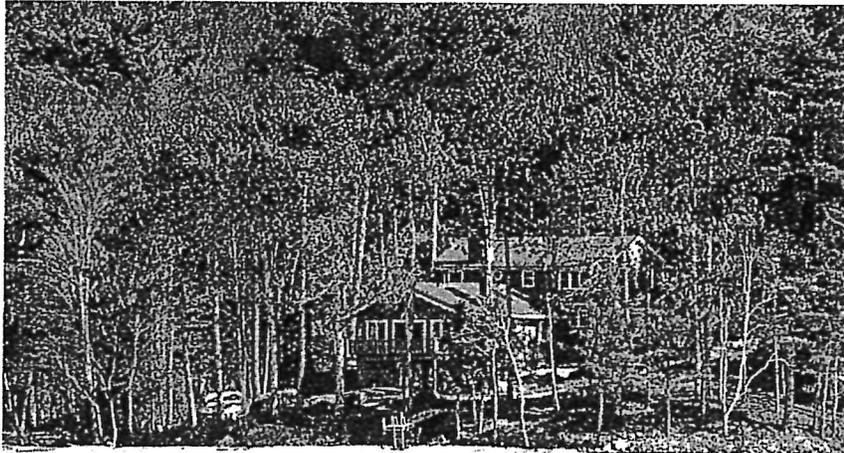


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SELECTMEN'S OFFICE
MAR 30 2018
26A18-0302
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Another neighbor across the pond. Two stories tall and much larger than the subject property.



This neighbor is on the New London side of the pond.



TOWN OF NEW LONDON
SELECTMEN'S OFFICE
MAR 30 2018
20A-18-0302
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Part 2
Decisions



TOWN OF
NEW LONDON, NEW HAMPSHIRE

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4-17-18
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4-18-18

ZONING BOARD OF ADJUSTMENT
(ZBA)
NOTICE OF DECISION
Meeting Held Tuesday, April 17, 2018

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.

Motion passed in a vote 4-1 to DENY the request for a Variance based on the failure to meet the hardship requirement #5.

Nicole Gage
Zoning Administrator
Town of New London

Variations and Special Exceptions shall be valid if exercised within two (2) years. Refer to RSA 674:33, Powers of the Zoning Board of Adjustment, for the specific language. Persons who are aggrieved by the decision of the ZBA are advised to seek legal counsel as they deem appropriate and to review applicable laws including but not limited to RSA 677 Rehearing and Appeal Procedures; RSA 674:33 Powers of the Zoning Board of Adjustment; RSA 676:5 Appeals to Board of Adjustment; RSA 676:3 Issuance of Decision and other NH State Statutes and Laws which may apply. This notice is for general informational purposes and in no way shall convey any legal advice.

- 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 TO DENY THE VARIANCE WAS APPROVED UNANIMOUSLY 5-0.**

Nicole Gage
Zoning Administrator
Town of New London
June 27, 2018

Variances and Special Exceptions shall be valid if exercised within two (2) years. Refer to RSA 674:33, Powers of the Zoning Board of Adjustment, for the specific language. Persons who are aggrieved by the decision of the ZBA are advised to seek legal counsel as they deem appropriate and to review applicable laws including but not limited to RSA 677 Rehearing and Appeal Procedures; RSA 674:33 Powers of the Zoning Board of Adjustment; RSA 676:5 Appeals to Board of Adjustment; RSA 676:3 Issuance of Decision and other NH State Statutes and Laws which may apply. This notice is for general informational purposes and in no way shall convey any legal advice.



TOWN OF
NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT
(ZBA)
NOTICE OF DECISION

You are hereby notified that on July 18, 2018 the New London Zoning Board of Adjustment (ZBA) held a public hearing for the following case:

1. **PUBLIC HEARING for Case #ZBA18-06. Applicants Continuum Development & Attorney James Callahan and Owners New London Hospital Association** request a Variance for Height per Article II, Section 5 of the New London Zoning Ordinance to permit buildings to exceed the 35 foot height limitation in connection with a proposed development for a senior living community (planned unit development). The lot is located on County Road in the R-1 (Residential) zone and is identified as Parcel ID 072-017-000.

After hearing testimony, and reviewing the contents of the application materials submitted:

A MOTION was made and duly seconded to grant the height variance from Article II, Section 5 as requested by the petitioners to exceed the 35' foot height restriction, but no taller than the 47-foot height represented in the plan dated 6/20/2018 with the following conditions:

1. maintain and enhance the woodland buffer of mature trees and additional planting between the proposed project and existing neighborhoods, to the fullest extent possible, consistent with any recommendations and conditions of the Planning Board; and
2. they continue to pursue good faith discussions with Lyon Brook regarding a Memorandum of Understanding in an effort to reduce concerns with drainage, night sky lighting and landscape buffers.

MOTION PASSED 5-0 and the variance was granted.

In addition, on July 18, 2018 the New London Zoning Board of Adjustment considered a Motion for Rehearing concerning:

2. **Case #ZBA18-02 (Motion for Rehearing - 1876 Newport Rd., Parcel ID 041-001-000, SDB Investments, Inc.)**

MOTION was made and duly seconded to deny the motion for rehearing because the Board has a perfect right to clarify our record during the appeal period and the Board has no evidence that any unlawful or unreasonable activity occurred. **MOTION PASSED 5-0 and the request for rehearing was denied.**

Nicole Gage
Zoning Administrator
Town of New London

Variances and Special Exceptions shall be valid if exercised within two (2) years. Refer to RSA 674:33, Powers of the Zoning Board of Adjustment, for the specific language. Persons who are aggrieved by the decision of the ZBA are advised to seek legal counsel as they deem appropriate and to review applicable laws including but not limited to RSA 677 Rehearing and Appeal Procedures; RSA 674:33 Powers of the Zoning Board of Adjustment; RSA 676:5 Appeals to Board of Adjustment; RSA 676:3 Issuance of Decision and other NH State Statutes and Laws which may apply. This notice is for general informational purposes and in no way shall convey any legal advice.



TOWN OF
NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT
(ZBA)
NOTICE OF DECISION
Meeting Held Tuesday, August 7, 2018

You are hereby notified that on August 7, 2018 the New London Zoning Board of Adjustment (ZBA) held a public meeting to consider an Amended Motion for Rehearing for the following:

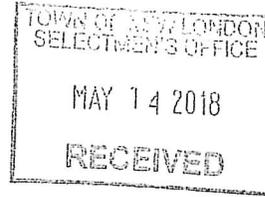
1. Case #ZBA18-02 - 1876 Newport Rd., Parcel ID 041-001-000, SDB Investments, Inc.

MOTION was made and duly seconded: Applicant Spec Bowers has filed an amended appeal based on RSA 677:2. However, RSA 677:2 requires that two conditions be met: Those conditions are that both the minutes of the meeting and the decision must not have been filed within 5 business days of the date when the decision was made. However, both the decision and the minutes were filed in a timely fashion. Therefore, the application is not timely and cannot be heard. The ZBA heard the applicant's July 6 motion for rehearing on July 18. The Board voted to deny the rehearing and that concludes this case. The Amended Motion for Rehearing is denied. **MOTION PASSED 5-0**

Nicole Gage, Zoning Administrator
Town of New London
August 8, 2018

Variances and Special Exceptions shall be valid if exercised within two (2) years. Refer to RSA 674:33, Powers of the Zoning Board of Adjustment, for the specific language. Persons who are aggrieved by the decision of the ZBA are advised to seek legal counsel as they deem appropriate and to review applicable laws including but not limited to RSA 677 Rehearing and Appeal Procedures; RSA 674:33 Powers of the Zoning Board of Adjustment; RSA 676:5 Appeals to Board of Adjustment; RSA 676:3 Issuance of Decision and other NH State Statutes and Laws which may apply. This notice is for general informational purposes and in no way shall convey any legal advice.

Part 3
Motions for
Rehearing



STATE OF NEW HAMPSHIRE

Merrimack County
ZBA #18-02

New London
Zoning Board of Adjustment

MOTION FOR REHEARING PURSUANT TO RSA 677:2

NOW COMES Spec Bowers, of PO Box 323, Georges Mills, New Hampshire 03751, by and through counsel, John P. Rab, Esq., and says as follows:

1. This Motion is related to property located at 1876 Newport Road, New London, New Hampshire.
2. On April 17, 2018, the Board of Adjustment considered an application for a variance from Article xx, Sections B.1.a, B.1.c.iii and B.5.a of the New London Zoning Ordinance to permit a vertical expansion of a structure damaged by fire, a 1-foot overhang of the second floor on the front side of the structure, and an increase in the number of bedrooms.
3. On April 17, 2018 the Board of Adjustment voted to deny the application.
4. The action of the board of Adjustment was unlawful and unreasonable, and it is respectfully requested that the board grant a rehearing on this matter for the following reasons:

In rendering its decision the board chose not to deliberate or vote on all five of the criteria that are required to be considered for a variance as set-forth in RSA 674:33 (b). Rather, the board decided to solely consider and rule on the "requirements of the unnecessary hardship provision." The board's deliberation and vote not only failed to consider all five variance criteria, it failed to deliberate and vote on the separate criteria set-forth in RSA 674:37 I, (b) (5) in denying the application for a variance. Consequently, the board's vote and decision to deny the variance was unlawful and unreasonable and will not sustain judicial review.

RSA 674:33 I, (b) (5) provides:

Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

- (i) For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

- a. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
 - b. The proposed use is a reasonable one.
- (ii) If the criteria in subparagraph (i) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it. The definition of “unnecessary hardship” set forth in subparagraph A shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.

Both sections (i) and (ii) of this provision requires the board to initially consider and clearly decide on the record and make findings of fact on whether or not the property under consideration is subject to any “special conditions” that “distinguish it from other properties in the area.” In its deliberation as described in the minutes of the meetings the board did not even fully consider the basic issue of whether or not “special conditions” existed which would mandate that the board engage in the analysis of the remaining subparagraph to make a determination whether or not an unnecessary hardship exists under either RSA 674:37 I, (5) (A) of B. The board merely voted to “Deny the request for variance, as its fails to satisfy the requirements of the unnecessary hardship provision” without making any findings of fact or providing a clear record of the reasons for the denial. The board’s failure to fully consider, deliberate and make findings of fact with respect to the request for a variance denies the applicant any meaningful judicial review of the decision.

The New Hampshire Supreme Court has strongly recommended, and has required in many instances, that specific findings be stated by a board of adjustment in consideration of an application for a variance. In the case of *Alcorn v. Rochester*, 114 N.H. 491 [1974], the supreme court remanded a decision of the board of adjustment stating that “... *the failure of this board to disclose the real basis of its decision prevented the plaintiffs from making the requisite specification and thus denied them meaningful judicial review.*” See: The Board of Adjustment In New Hampshire, A Handbook For Local Officials, December 2017, NHOSI, Section III-14. In that decision, the supreme court cited, as authority, Anderson, American Law of Zoning where it stated at 20.41 [1977]: “*In general, a board of adjustment must, in each case, make findings which disclose the basis for its decision. Absent findings which reveal at least this much of the process of decision, the reviewing court may remand the case to the board for further proceedings. Thus a bare denial of relief without a statement of the grounds for such denial will be remitted to the board for further action. A decision granting a variance will be remanded if the board fails to make findings which disclose a basis for its determination.*”

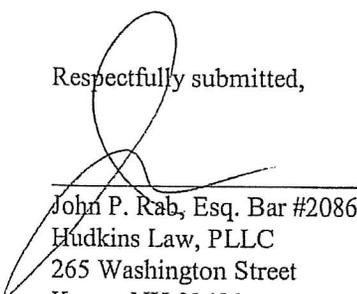
“General fairness to all parties concerned and reinforced by New Hampshire Supreme Court decisions, strongly indicates that the board should prepare a statement of its reasons. Since the decision of the board of adjustment is so important, it is necessary for both the appealing party and the municipality to have a clear record of what occurred. . . The board should state all the reasons for its decision to allow for proper review if that should be necessary. . . The reasons may be found defective if they omit an issue essential to the decision made by the board. The courts are generally unwilling to assume that a basic issue was resolved unless the reasons for the decision are clearly stated.” The Board of Adjustment In New Hampshire, A Handbook For Local Officials, December 2017, NHOSI, Section III-15.

Findings of a board of adjustment must be more specific than a mere recitation of conclusions, and board decisions will be reversed if it fails to adequately support its implicit or explicit findings. See, Cormier v. Town of Danville Zoning Board of Adjustment, 142 N.H. 775 (1998). The purpose of requiring a board to make findings is to provide the reviewing court with a means of determining whether the decision of the board is reasonable. See, Foote v. State Personnel Commission, 116 NH 145 (1976). A reviewing court needs finding of basic facts to understand administrative decisions and to ascertain whether the facts and issues sustain the ultimate result reached. Society of Protection of New Hampshire Forests v. Site Evaluation Committee, 115 NH 163 (1975).

In this matter it is clear that the board did not fully consider and deliberate on the variance request, failed to make adequate findings of fact which support the denial of the variance and failed to state adequate grounds for the denial. Therefore, it is incumbent on the board to grant the applicant a rehearing on the request for a variance.

Respectfully submitted,

Dated: May 11, 2018



John P. Rab, Esq. Bar #2086
Hudkins Law, PLLC
265 Washington Street
Keene, NH 03431
#603-357-1007

STATE OF NEW HAMPSHIRE

Merrimack County
ZBA #18-02

New London
Zoning Board of Adjustment

MOTION FOR REHEARING PURSUANT TO RSA 677:2

NOW COMES Spec Bowers, of PO Box 323, Georges Mills, New Hampshire 03751, by and through counsel, John P. Rab, Esq., and says as follows:

1. This Motion is related to property located at 1876 Newport Road, New London, New Hampshire.
2. On June 11, 2018, the Board of Adjustment considered an application for a variance from Article xx, Sections B.1.a and B.5.a of the New London Zoning Ordinance to permit a vertical expansion of a structure damaged by fire and an increase in the number of bedrooms.
3. The June 11th hearing was a result of a previously filed Motion For Rehearing which was related to a denial of a variance by the board solely on the grounds that it failed "to satisfy the requirements of the unnecessary hardship provision." (April 17, 2018 hearing)
4. At the June 11th hearing the board denied the variance solely on the grounds that it violated the spirit of the ordinance.
5. The draft minutes of the meeting stated:

IT WAS MOVED (Doug Lyon) AND SECONDED (Michael Todd) to deny the variance request for the reasons discussed, that primarily, the consensus is that the spirit of the ordinance was violated that that related to three criteria, Public Interest, Spirit of the Ordinance and Substantial Justice. Also some members felt the hardship criteria has been met. THE MOTION WAS APPROVED UNANIMOUSLY 5-0.

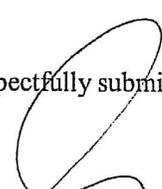
6. The vote to deny the variance solely on the basis of violation of the spirit of the ordinance comports with the recollection of the applicant and his counsel.
7. For reasons presently unknown to the applicant and counsel, the board subsequently met on June 26, 2018 for "Clarification of Motion/Decision from June 11th rehearing."
8. The board then made material changes to the original motion that was approved by the board on June 11, 2018.
9. The board issued a Notice of Decision on the matter on June 27, 2018 which expanded the

stated grounds for denial over and above the basis for denial at the April 17, 2018 hearing and what was voted at the June 11, 2018 hearing. Therefore, the filing of this Motion for Rehearing is required. See, Dziama v. City of Portsmouth, 140 N.H. 542 (1995).

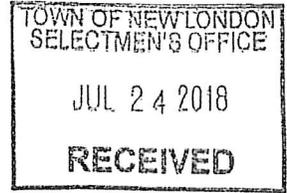
10. The action of the Board of Adjustment was unlawful and unreasonable and it is respectfully requested that the board grant a rehearing for the following reasons:
 - a. The second meeting was unlawfully held and resulted in an improper and unlawful revision of the record and of the original vote of the board.
 - b. The board's decision was unlawful and unreasonable in that it used incorrect legal standards and put additional burdens of proof on the applicant over what is required by law and statute.
 - c. The board's decision dated June 27, 2018 was inconsistent with its deliberations and vote of June 11, 2018.
11. The applicant reserves the right under RSA 677:2 to amend this Motion For Rehearing, including the grounds therefor, within 30 days after the date the decision was actually filed which was June 27, 2018.

Respectfully submitted,

Dated: July 6, 2018



John P. Rab, Esq. Bar #2086
Hudkins Law, PLLC
265 Washington Street
Keene, NH 03431
#603-357-1007



STATE OF NEW HAMPSHIRE

Merrimack County
ZBA #18-02

New London
Zoning Board of Adjustment

AMENDED MOTION FOR REHEARING

NOW COMES Spec Bowers, of PO Box 323, Georges Mills, New Hampshire, and says as follows:

1. This Motion is related to property located at 1876 Newport Rd., New London, NH.
2. In our Motion for Rehearing dated July 6, 2018, we reserved the right under RSA 677:2 to amend that motion within 30 days of the decision filed on June 27, 2018.
3. Without waiting for the end of 30 days, the board denied our request for hearing. We respectfully request the board to reconsider that denial with the information in this amendment.
4. In its decision from the June 11 hearing, as later modified by its meeting of June 26, the board made multiple errors of law:
 - a. The ZBA erred as a matter of law regarding the public interest and the spirit of the ordinance.

The Zoning Board Handbook (henceforth Handbook) provides this guidance to Boards:

"For a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's basic zoning objectives. There are two methods to answer this question:

1. Examine whether granting the variance would alter the essential character of the neighborhood; or
 2. Examine whether granting the variance would threaten the public health, safety or welfare."
- Handbook p. II-12

This reading is affirmed in multiple court decisions.

"[T]o be contrary to the public interest . . . the variance must unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives. One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality. . . . Another approach to [determine] whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare." MALACHY GLEN ASSOCIATES, INC. v. TOWN OF CHICHESTER (2007)

"A variance is contrary to the public interest or injurious to the public rights of others if it "unduly, and in a marked degree conflict[s] with the ordinance such that it violates the ordinance's basic zoning objectives."

""[o]ne way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality." Id. (quotation and

citation omitted). "Another approach . . . is to examine whether granting the variance would threaten the public health, safety or welfare." *Id.* ROBERT FARRAR & a. v. CITY OF KEENE (2009)

"Thus, to be contrary to the public interest or injurious to the public rights of others, the variance must "unduly, and in a marked degree" conflict with the ordinance such that it violates the ordinance's "basic zoning objectives." *Coderre*, 251 A.2d at 401.

"One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would "alter the essential character of the locality." ...

"Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare." *CHESTER ROD AND GUN CLUB, INC. v. TOWN OF CHESTER* (2005)

The ZBA failed this standard in at least two respects:

1) it did not examine whether granting the variance would "alter the essential character of the locality." There is ample evidence that adding a second story would not alter the character of the neighborhood in the slightest.

2) it did not examine whether it "would threaten the public health, safety or welfare." There is no rational basis for the Board to think that adding a second story (while remaining in the same footprint and staying under the height restriction) would be any threat at all.

Additionally, the Board did not provide any facts to support its assertion that the variance would violate the ordinance's basic objective.

"the law demands that findings be more specific than a mere recitation of conclusions." *EUGENE A. CORMIER v. TOWN OF DANVILLE* (1998)

"Mere conflict with the terms of the ordinance is insufficient." *HARBORSIDE ASSOCIATES, L.P. v. PARADE RESIDENCE HOTEL, LLC* (2011)

b. The ZBA erred by using the wrong standard to determine substantial justice.

The Board claims that "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." But that is not the standard for deciding Substantial Justice.

The Board compares the Status Quo Ante with the status after the Board denies a variance, claims they are the same, hence there is no loss. If that were the proper comparison, then every single application would fail Substantial Justice because the Board could claim there was no loss, hence no injustice. A Board could tell the applicant, "Keep your property the same as it is now. There is no loss because your property is unchanged. Any loss by the general public outweighs your zero loss, therefore your application fails Substantial Justice."

The proper comparison is to compare the status if the application is approved vs. the status if the application is denied. Clearly, the applicant will benefit from approval of the variance. So the question for the Board is to determine whether any loss to the general public outweighs the benefit to the applicant.

In Malachy (<https://www.courts.state.nh.us/supreme/opinions/2007/malac31.pdf>), for instance, the trial court found and the supreme court agreed that

"Since the project is appropriate for the area and does not harm its abutters, or the nearby wetlands, the general public will realize no appreciable gain from denying this variance." Both courts found that the applicant had established Substantial Justice. MALACHY GLEN ASSOCIATES, INC. v. TOWN OF CHICHESTER (2007)

In Farrar (<https://www.courts.state.nh.us/supreme/opinions/2009/farra062.pdf>), the courts found that

"the proposed use would not alter the character of the area, injure the rights of others, or otherwise undermine the public interest" and thus "granting the variance would work substantial justice". ROBERT FARRAR & a. v. CITY OF KEENE (2009)

In both cases, the courts decided that Substantial Justice was served because if the variance were approved there was no appreciable loss to the general public that could outweigh the benefit to the applicant.

In Harborside (<https://www.courts.state.nh.us/supreme/opinions/2011/2011103harborside.pdf>), the ZBA found that

"In the justice test, there is no benefit to the public that would outweigh the hardship on the applicant if the variance[s] were denied."

The court noted with approval that "the ZBA correctly focused upon whether the general public stood to gain from a denial of the variance." HARBORSIDE ASSOCIATES, L.P. v. PARADE RESIDENCE HOTEL, LLC (2011)

Perhaps the simplest way to determine Substantial Justice is to use the formulation in the Handbook, p. B-2:

"Substantial justice is done. [Explanation:] The benefit to the applicant should not be outweighed by harm to the general public."

This application fits the fact patterns of all three cases above. The addition of a second story would not alter the character of the area, would not harm its abutters, or in any way cause harm to the general public that could outweigh the benefit to the applicant.

c. The ZBA erred by ignoring the definition of "hardship" provided in statute and in case law.

The ZBA invented its own definition of hardship - "there is no hardship because all waterfront properties in New London are burdened with the same waterfront buffer requirements" - rather than use the statutory definition of hardship.

RSA 674:33 I.b.5.A defines "hardship" in terms of whether the proposed use of property is reasonable given the special conditions. The statute defines "necessary" as "[Does a] fair and substantial relationship exist between the general public purposes of the ordinance provision and the specific application of that provision to the property"?

The Simplex decision (<https://www.courts.state.nh.us/supreme/opinions/2001/simpl013.htm>) set the standard for determining whether there is hardship:

"We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property. Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others." SIMPLEX TECHNOLOGIES, INC. v. TOWN OF NEWINGTON & a. (January 29, 2001)

Rancourt (<https://www.courts.state.nh.us/supreme/opinions/2003/ranco002.htm>) affirmed this standard:

"We thus adopted an approach that was more considerate of a property owner's constitutional right to use his or her property."

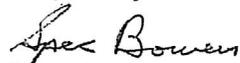
"Under Simplex, applicants no longer must show that the zoning ordinance deprives them of any reasonable use of the land. Rather, they must show that the use for which they seek a variance is "reasonable," considering the property's unique setting in its environment." BONNITA RANCOURT & a. v. CITY OF MANCHESTER

Likewise, Harborside (<https://www.courts.state.nh.us/supreme/opinions/2011/2011103harborside.pdf>):

"to establish unnecessary hardship under the first definition set forth in RSA 674:33, I(b) (5), Parade merely had to show that its proposed signs were a "reasonable use" of the property, given its special conditions. HARBORSIDE ASSOCIATES, L.P. v. PARADE RESIDENCE HOTEL, LLC (2011)

In these three court cases - indeed, in every zoning case since Simplex - the test for hardship is whether the proposed use is "reasonable". If an ordinance interferes with a property owner's constitutional right to reasonable use of his property, that is a hardship.

Respectfully submitted,


Spec Bowers

dated: July 24, 2018

Part 4
Minutes



TOWN OF
NEW LONDON, NEW HAMPSHIRE

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4-17-18
Minutes

ZONING BOARD OF ADJUSTMENT (ZBA)
MEETING MINUTES

Tuesday, April 17, 2018 at 6:30 PM

Town Office, Sydney Crook Conference Room, 375 Main Street

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

MEMBERS ABSENT: Ann Bedard, Stan Bright (Alt.)

STAFF PRESENT: Nicole Gage, Zoning Administrator

OTHERS PRESENT: Spec Bowers, Dave Robinson

1. Call to Order - Chair Lyon called the meeting to order at 6:30pm.
2. Roll Call – Welcome new members. Frank Anzalone, previously an alternate, is now a regular member. There are three new alternates, Bruce Hudson, Heidi Lauridsen and Stan Bright.
3. Review Minutes of March 21, 2018

IT WAS MOVED (W. Michael Todd) AND SECONDED (Katharine Fischer) to approve the minutes from the March 21, 2018 meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

4. 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.

Spec Bowers attended the meeting to discuss a variance to rebuild a cottage damaged from fire. He owns George's Mills Cottages which includes this cottage. The town line goes through the property so this one cottage is in New London and all the rest of the buildings are in Sunapee.

Mr. Bowers is seeking the variance to make the building taller. There is no change to the footprint and he would like to increase the number of bedrooms. Mr. Bowers presented the following information in support of his request for a variance:

1. The variance will not be contrary to the public interest.

The requested variance would not change the footprint of the building. Adding a second floor and increasing the number of bedrooms would not threaten the public health, safety or

welfare. Nor will it threaten the other purposes of the ordinance, such as congestion in the streets, undue concentration of population or water quality.

2. The spirit of the ordinance is observed.

The proposed building is entirely in keeping with the character of the neighborhood.

The existing complex has buildings that are taller than the proposed building; just 50 yards away is a building that is similar to the proposed building; there is a much larger building with three stories just 100 yards away.

Most other buildings on the lake have two or more stories. The variance is consistent with a stated purpose: "encourage those uses that can be appropriately located adjacent to shorelines." Mr. Bowers feels these uses are boating, swimming, fishing.

The requested overhand would move the drip line farther from the water, which would further protect the lake by increasing ever so slightly the filtration of water through the soil.

3. Substantial justice is done:

The general public would realize no appreciable gain from denying this variance. Denying the variance would result in substantial loss to the petitioner. Any loss to the petitioner that is not outweighed by a gain to the general public is an injustice.

4. The values of the surrounding properties are not diminished:

The changes in the context of the entire property are miniscule.
The changes would be barely noticeable from other properties.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

A. For purposes of the subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (1) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
- (2) The proposed use is a reasonable one:

The property has these special conditions:

- It is a small part of a larger complex
- The complex straddles town boundaries
- The driveway is in Sunapee and the complex connects to the Sunapee sewer, not New London.

- (1) There is no fair and substantial relationship between the general public purposes of the restriction against extending upward or of increasing the number of bedrooms, and the specific application of those provisions to this unique property.

(2) The proposed use is a reasonable one:

The building would continue to be a single family residence; it would be consistent with the character of the other buildings of the complex. All rooms, while still fairly small, would now be adequate in size.

The cottage could be built as it was and no variance would be required. There were no issues renting it as it was, although it was the least popular cottage to rent. The bedrooms were very small. It will still be a single family residence and is in character with the other buildings.

The reason for the one foot expansion is for a better layout for the bedrooms. It gives protection over the front door.

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

DISCUSSION:

This is a rental unit. At certain times of the year it is short term vacation rental and can also be an off season rental from September through May.

Chair Lyon provided the following summary:

This building is part of a complex that is isolated from other properties. He doesn't feel it is contrary to public interest. The spirit of the ordinance is to protect the waterfront and it appears the petitioner has gone to great length to minimize impact on water quality. It clearly is a substandard structure. Although it can be rented, the question is if this provides an opportunity to make it closer to current standards in terms of sizes of rooms. It doesn't appear that there is any substantial benefit to the public to deny this variance. The values of the properties are not diminished and most of the properties belong to Mr. Bowers and are isolated from others. This brings us to the fifth criteria which is the hardship criteria. The special conditions of the property that distinguishes it from other properties in the area is that it is unique in the sense it is a complex of buildings. Given the rules of how the zone is governed, the only way he can build a building more in keeping with modern code is to go up. So this suggests there is some uniqueness although this could be argued.

Mr. Todd wanted to note that it will increase the concentration of the population. It would double the amount of people that are currently there. This calls into question whether or not it is contrary to the public interest, regardless of whether people can see it.

The spirit of the ordinance falls under the definition of permitted uses within the shorefront overlay buffer which is boathouses and docks. He can't argue for an expansion even though it's preexisting, non-conforming.

The existing unit can be rebuilt and rented so there will be a return on investment. The question is does loss mean denial of maximum gain? Mr. Todd feels the structure can be rented as is and it isn't a loss if he isn't granted additional bedrooms.

Mr. Todd doesn't feel there has been any evidence put forth that suggests that the physical characteristics of that lot are any different than any other lakefront lot and all of the lots are subject to

the same restrictions of the shore land overlay district. This lot is not exempt. He does not feel they should grant the variance.

Ms. Fischer agrees with Mr. Todd regarding the hardship issue.

Mr. Anzalone feels the fact that this lot is almost unbuildable makes it different from all the other property. Mr. Todd feels that's a reason to rebuild it the way it was without expansion.

**IT WAS MOVED (W. Michael Todd) AND SECONDED (Katharine Fischer) to DENY the request for variance, as it fails to satisfy the requirements of the unnecessary hardship provision.
THE VARIANCE APPLICATION WAS DENIED 4-1.**

5. Other Business

IT WAS MOVED (Frank Anzalone) AND SECONDED (Bruce Hudson) to elect Doug Lyon as Chair of the Zoning Board of Adjustment. THE MOTION WAS APPROVED UNANIMOUSLY.

IT WAS MOVED (Frank Anzalone) AND SECONDED (Bruce Hudson) to elect W. Michael Todd as the Vice Chair of the Zoning Board of Adjustment. THE MOTION WAS APPROVED UNANIMOUSLY.

6. Motion to Adjourn

IT WAS MOVED (Doug Lyon) AND SECONDED (Michael Todd) to adjourn. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 7:40pm.

Respectfully submitted,

Trina Dawson
Recording Secretary
Town of New London



TOWN OF
NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT (ZBA)
MEETING MINUTES
Tuesday, May 23, 2018
6:30 PM

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

MEMBERS EXCUSED: Ann Bedard, Stan Bright

STAFF PRESENT: Nicole Gage, Zoning Administrator

- 1 Call to Order – Chair Lyon called the meeting to order at 6:31PM.
2. Roll Call – Chair Lyon called the roll.
3. Review Minutes of May 7, 2018

IT WAS MOVED (Michael Todd) AND SECONDED (Heidi Lauridsen) to approve the minutes of the May 7, 2018 meeting. THE MOTION WAS APPROVED UNANIMOUSLY

4. REQUEST FOR REHEARING for 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. Original hearing for a variance was held April 17, 2018.

The purpose of this meeting is to discuss the request for a rehearing of the Spec Bowers case.

Nicole Gage stated that this is a meeting to decide whether the board wants to grant the request for a rehearing. Mr. Bowers did request a copy of the recording from the meeting in April. If the Zoning Board votes to hold a rehearing, it will possibly be held on June 11, 2018. Ms. Gage spoke with our attorney and if the Zoning Board chooses to rehear the case, all five criteria will be specifically addressed in the motion. In the motion from Hudkins Law, in paragraph number four, there is a reference to voting on each criteria, but we are not required to do that.

Procedurally, if a new hearing occurs, it will be de novo, meaning a brand new hearing. There could be new testimony and discussion. In the de novo hearing, the minutes need to address each criteria and every member should have an opportunity to weigh in on each so it has been discussed.

Chair Lyon also discussed section 20, pages 77 and 78 of the Zoning Ordinances. There was previous discussion about voluntary and involuntary replacement. In this material, it doesn't talk about voluntary and involuntary replacement but on page 78 it references legal non-conforming buildings destroyed by fire or other natural disaster. It doesn't talk about involuntary demolition but it clearly states natural disaster.

Mr. Todd and Ms. Gage worked on language to add checkboxes on the application so it clearly states voluntary or involuntary replacement as the rules are different on this. Ms. Gage considered adding the

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language, "is the building non-conforming, pre-existing." She can make that recommendation but most applicants won't know this at first. The intent of involuntary/voluntary was to force the applicant to realize there are two sets of rules and requires different paths.

Chair Lyon stated most of the cases come through the Planning Board. Ms. Gage has begun to put together a summary of the cases and perhaps moving forward, she can expand the summary to include the specific nature of the property and how it relates to the zoning ordinances.

For the hearing, it needs to be clear what portion of the regulation is under consideration. Mr. Todd stated the choices under the ordinance are governed by fact. The facts are what happened to the building. That analysis controls which section of the ordinance applies. In this instance, the applicant would be limited to relief only under 25A.

Frank Anzalone would like the Selectmen to address the 20 day appeal. Ms. Gage thought this would be addressed in the zoning amendment and/or in the Zoning Board Rules and Procedures. Chair Lyon stated we need to change the rules and procedures to conform to state law. This is something the Zoning Board can do.

Chair Lyon stated that in the notice of decision in the Spec Bower case, the request for a variance was for article XX, B.1.a, B.1.c.iii and B.5.a and they don't all apply. Mr. Todd stated that when the application gets to them, they can decide the section that is applicable and state in the opinion "we decline to reach the petitioners arguments" and discuss the others at another time. Ms. Gage recommended that Mr. Bowers request these. In section B, the first paragraphs need revision and it needs to be renumbered. Chair Lyon summarized that as part of Ms. Gage's case study, she will tell them in her judgment, what regulations are involved in order to help guide them in reviewing the case. These case summaries are very helpful. Chair Lyon stated the applicants seem to be better prepared when they come before the board.

IT WAS MOVED (Doug Lyon) AND SECONDED (Michael Todd) to grant the rehearing request. THE MOTION WAS APPROVED UNANIMOUSLY 5-0.

5. Other Business - None

6. Motion to Adjourn

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

The meeting was adjourned at 7:35pm.

Respectfully submitted,

Trina Dawson
Recording Secretary
Town of New London

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TOWN OF
NEW LONDON, NEW HAMPSHIRE

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6-11-18
final minutes
available 6-27-18

ZONING BOARD OF ADJUSTMENT MINUTES
(ZBA)

Monday, June 11, 2018 at 6:30 PM

Town Office, Sydney Crook Conference Room, 375 Main Street

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

MEMBERS EXCUSED:

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.

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. He 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. It 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. They don't want 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 they don't want expansion. It is because they don't want overburden septic and want to protect, maintain and enhance the water quality of the lakes. They aren't going to disrupt 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 stated the following findings of fact:

- 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 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, I concur.

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). He 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 variance request for the reasons discussed, that primarily, the consensus is that the spirit of the ordinance was violated and that relates to three criteria, Public Interest, Spirit of the Ordinance and Substantial Justice. Also some members felt the hardship criteria has been met. 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 8:19pm.

Respectfully submitted,
Trina Dawson
Recording Secretary
Town of New London



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6-11-18
Draft Minutes
available 6-18-18

ZONING BOARD OF ADJUSTMENT MINUTES
(ZBA)

Monday, June 11, 2018 at 6:30 PM

Town Office, Sydney Crook Conference Room, 375 Main Street

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

MEMBERS EXCUSED:

STAFF PRESENT: Nicole Gage, Zoning Administrator

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

Draft

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.

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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.

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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.

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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, I concur.

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.

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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 8:19pm.

Respectfully submitted,
Trina Dawson
Recording Secretary
Town of New London



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ZONING BOARD OF ADJUSTMENT (ZBA)
MEETING MINUTES
Tuesday, June 26, 2018
3:00 PM

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

MEMBERS EXCUSED: Frank Anzalone, Bruce Hudson (Alt.)

STAFF PRESENT: Nicole Gage, Zoning Administrator

OTHERS PRESENT: Spec Bowers

1. Call to Order – Chair Lyon called the meeting to order at 3:00 PM.
2. Roll Call – Chair Lyon called the roll. The four voting members present (Lyon, Todd, Fischer, and Bedard) will be voting today; Stan Bright (Alternate) will sit in for Frank Anzalone.
3. Minutes

IT WAS MOVED (Doug Lyon) AND SECONDED (W. Michael Todd) to approve the minutes from the May 23, 2018 meeting with no changes. THE MOTION WAS APPROVED UNANIMOUSLY.

The board reviewed the June 11th minutes, made minor edits, and clarified the decision for ZBA Case #18-02.

IN A MOTION made (Doug Lyon) and duly-seconded (W. Michael Todd), the Zoning Board of Adjustment voted 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.

Stan Bright asked for clarification on how notices of decisions are created. Chair Lyon explained that the Zoning Administrator writes the decision, it is reviewed by the Chair, and then it is compared to the draft minutes as soon as they become available.

IT WAS MOVED (Doug Lyon) AND SECONDED (W. Michael Todd) to approve the minutes from the June 11th minutes as amended. THE MOTION WAS APPROVED UNANIMOUSLY.

4. Other Business

The Board reviewed the upcoming meeting schedule. Chair Lyon recommended trying a permanent meeting schedule for the 1st and 3rd Tuesday of the month. If no applications are received by a deadline, which would be established a few weeks prior to the meeting, the meeting will be cancelled. Chair Lyon asked members to get back to Ms. Gage by tomorrow with availability for the proposed meeting dates.

5. Motion to Adjourn

IT WAS MOVED (W. Michael Todd) AND SECONDED (Ann Bedard) to adjourn. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 3:34 pm.

Respectfully submitted,

Nicole Gage
Zoning Administrator
Town of New London



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6-26-18
Draft Minutes
- available 7-2-18

ZONING BOARD OF ADJUSTMENT MINUTES
(ZBA)

Tuesday, June 26, 2018 at 3:00 PM
Town Office, Sydney Crook Conference Room, 375 Main Street

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

MEMBERS EXCUSED: Frank Anzalone, Bruce Hudson (Alt.)

STAFF PRESENT: Nicole Gage, Zoning Administrator

OTHERS PRESENT: Spec Bowers

1. **Call to Order** – Chair Lyon called the meeting to order at 3:00 PM.
2. **Roll Call** – Chair Lyon called the roll. The four voting members present (Lyon, Todd, Fischer, and Bedard) will be voting today; Stan Bright (Alternate) will sit in for Frank Anzalone.
3. **Minutes**

IT WAS MOVED (Doug Lyon) AND SECONDED (W. Michael Todd) to approve the minutes from the May 23, 2018 meeting with no changes. THE MOTION WAS APPROVED UNANIMOUSLY.

The board reviewed the June 11th minutes, made minor edits, and clarified the decision for ZBA Case #18-02.

IN A MOTION made (Doug Lyon) and duly-seconded (W. Michael Todd), the Zoning Board of Adjustment voted 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.

Stan Bright asked for clarification on how notices of decisions are created. Chair Lyon explained that the Zoning Administrator writes the decision, it is reviewed by the Chair, and then it is compared to the draft minutes as soon as they become available.

IT WAS MOVED (Doug Lyon) AND SECONDED (W. Michael Todd) to approve the minutes from the June 11th minutes as amended. THE MOTION WAS APPROVED UNANIMOUSLY.

4. Other Business

The Board reviewed the upcoming meeting schedule. Chair Lyon recommended trying a permanent meeting schedule for the 1st and 3rd Tuesday of the month. If no applications are received by a deadline, which would be established a few weeks prior to the meeting, the meeting will be cancelled. Chair Lyon asked members to get back to Ms. Gage by tomorrow with availability for the proposed meeting dates.

5. Motion to Adjourn

IT WAS MOVED (W. Michael Todd) AND SECONDED (Ann Bedard) to adjourn. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 3:34 pm.

Respectfully submitted,
Nicole Gage
Zoning Administrator
Town of New London



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ZONING BOARD OF ADJUSTMENT (ZBA)
MEETING MINUTES
Wednesday, July 18, 2018
6:30 PM

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

MEMBERS EXCUSED: Frank Anzalone

STAFF PRESENT: Nicole Gage, Zoning Administrator

OTHERS PRESENT:

Mike Black, Continuum

Wayne Morrill, Jones & Beach Engineering

Attorney James Callahan

Sarah Adams, Marketing Director

Mark Wheeler, Project Architect

1. Call to Order – Chair Lyon called the meeting to order at 6:30PM.
2. Roll Call – Chair Lyon called the roll. Heidi Lauridsen and Bruce Hudson will be voting members tonight and Chair Lyon will recuse himself as he is the Chairman of the Board for the New London Hospital. Vice Chair Michael Todd will lead the meeting.
3. Review Minutes from June 26th

IT WAS MOVED (Michael Todd) AND SECONDED (Anne Bedard) to approve the minutes from the June 26, 2018 meeting with one change. THE MOTION WAS APPROVED UNANIMOUSLY.

4. PUBLIC HEARING for Case #ZBA18-06. Applicants Mike Black of Continuum Development & Attorney James Callahan and Owners New London Hospital Association request a Variance for Height per Article II, Section 5 of the New London Zoning Ordinance to permit buildings to exceed the 35 foot height limitation in connection with a proposed development for a senior living community (planned unit development). The lot is located on County Road in the R-1 (Residential) zone and is identified as Parcel ID 072-017-000.

Nicole Gage distributed two documents for the Board to review. One was a letter from Roger Paquin and the other was a letter from Whitney Associates, an appraisal firm.

IT WAS MOVED (Michael Todd) AND SECONDED (Anne Bedard) to recess the meeting to review these documents. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting reconvened and was called to order to review a variance for height per Article II Section 5 of the New London Zoning Ordinance.

There was concern that a proper abutter notice had not happened. Chair Todd asked to review the abutter list. There was concern that Lyon Brook was not noticed. It was listed under a trust so it was mailed to that address. A handwritten notice was sent this time to the association office but in the past it has gone to the address of the trust. The mailing address needs to be updated so the association office appears on the list. Nicole Gage stated they were notified in the proper amount of time.

Attorney James Callahan attended the meeting representing Continuum. Mr. Callahan is an attorney from Peterborough, New Hampshire. He provided an overview of the intended Senior Living Facility project. Mr. Callahan then addressed the variance criteria as follows:

1. The variance is not contrary to the public interest – Public interest regarding public expenditure for water, sewer, roads and life safety will not be impacted. It will be paid for by the applicant. The hospital invited Continuum here. There is a community need as they have closed the Clough Center which provided care. A number of elder residents are relocating to other communities which provide a greater range of services. It's important for the vitality of the community and the hospital to have these services in town and it is in the public interest. When residents leave the area, you lose vital members of the community and also potential donors that help with the sustainability of these operations.
2. The Spirit of the ordinance is observed – The two functions served by a height restriction are a life safety function and an aesthetics function. Mr. Callahan stated that from a life safety perspective, the buildings won't have any adverse impact and won't violate the spirit of the ordinance. The building will be equipped with a sprinkler system and will have fire rated walls. They will be accessible to fire apparatus.

The height will be 47 feet which exceeds the ordinance by 12 feet. The width of the gable is 56 feet. They understand this will have an impact on the aesthetics in the area. The topography of the site is sloping and it is the right side of the building that exceeds the height restriction. When you drive into the driveway, it doesn't look overwhelming due to the slope. It is a difficult site to develop due to the wetlands and varied topography. They have done several site revisions. If the building was built with a flat roof they wouldn't need a variance. Wayne Morrill went to the site and floated a balloon to the height of 47 feet. There is a thick canopy and vegetation buffer. The balloons weren't visible from most areas but they would be from Lyon Brook.

Mr. Callahan stated a meeting was held with Lyon Brook today to talk about issues affecting Lyon Brook and have agreed in principle to come up with a memorandum of understanding to address concerns that were raised. Continuum wants to be good neighbors and will be managing the healthcare aspects of this project. The memorandum of understanding will have bullet points to address lighting, draining, and landscaping. It will be an evolving process.

Mr. Todd commented that one of the criteria for the spirit of the ordinance is whether or not it will alter the essential character of the locality. Mr. Callahan stated that given the proximity of the hospital which is a substantial building, there is a lot of commercial activity. It won't alter the characteristics. On Parkside Drive, it is more wooded and residential but they are zoned properly for the use. He feels it will blend and not be overwhelming.

Mr. Todd asked if this project would increase the population density in any measurable way. Mr. Callahan stated it would increase the density of this lot since there is nothing there. As a taxpayer in New London, this is the type of project you would want.

Fire Chief Jay Lyon commented that there are several buildings in town that are taller. One concern is being able to reach the roof for the purposes of ventilation. Continuum intends to put a sprinkler system in the buildings so his concerns are greatly reduced. It's not the height of the ladder that is the issue, it is the reach. There is a maintenance road planned so the apparatus would be able to have 360 degree access. In this case, the ladder truck would reach the windows of the top level, but not the roof.

Chief Lyon does not have an issue if the variance is granted. There is not a threat to the health, safety and welfare of the community.

3. Substantial justice is done – The question is would the public benefit of not allowing this project be outweighed by the hardship. There has been more than a year of planning to develop this site. Given the financial models that affect the development of this site and the need for this building, there are tight margins. If this building doesn't work will it have an adverse impact on the viability of this project? Mr. Callahan stated it is an important factor.

Mr. Doug Lyon added that one of the aspects of the projects is that it has to be saleable and marketable to the public. If a flat roof is put on the building, it will be substantially less attractive and will not market. Flat roofs aren't great in New Hampshire and one of the issues is that it needs to be an attractive building. A redesign would be a big deal and may not work.

4. The values surrounding the property are not diminished – A letter was submitted from a licensed appraiser and came to the conclusion that this project wouldn't have an adverse impact on the value of surrounding properties.
5. Literal enforcement of the provisions of the ordinance will result in unnecessary hardship-

Chair Todd clarified that this is a dimensional variance, not a use variance.

Part 1 asks if there is a fair and substantial relationship between the general public purposes of the ordinance and the specific application of that provision to this property. Mr. Callahan stated that this was covered in the spirit of the ordinance section where it talks about the purposes of this ordinance are to identify life safety concerns and Chief Lyon addressed that. The site itself has varied topography with a lot of wetlands. One of the other considerations was the geotechnical components of the property. They have optimized the site as well as it can be. The height is critical to house people in one location for healthcare reasons and underground garage parking.

In preparation for this meeting, Mr. Callahan looked at the town's master plan. It's contemplated within that plan that a senior living facility is needed. Chair Todd argued that this is a use argument, not a dimension argument. Mr. Callahan stated it is a use but the scope and size of the building is necessitated as a function of the use so it is worthy of consideration. It cannot be done any other way as it has shared facilities such as dining and recreation.

Chair Todd asked what the physical characteristics of this site were that specifically distinguish it from others in the area. Mr. Callahan noted the topography is quite varied as it is hilly and there are numerous wetlands. There was no other spot to locate the facility. They wanted proximity to the hospital and there is nothing else available.

Mr. Todd commented that all of the surrounding area is R1 and has the same topography.

Mr. Callahan stated the single largest factor is the proximity to the hospital. Mr. Todd argued this is not a physical characteristic. Mr. Callahan disagrees and thinks the proximity of this site to the hospital is enormously important and it is distinguishable from other properties in New London. Many iterations of the plan were done and nothing else could be done.

Mr. Callahan stated that if you look at this in its totality, you can't have the other uses without this facility.

Anne Bedard asked about taking a level off the top. Sarah Adams stated that it would mean taking 6 units off of the independent living side and then you would lose 26 units of assisted living and extended care. It would also change the economic viability of the project.

This is a public/private partnership to develop this site to enhance the quality and long term viability of the hospital and to benefit the residents of the town.

Anne Bedard inquired about the cupolas. There was discussion if they were included in the height regulations. Continuum stated they would be willing to remove them.

Bruce Hudson asked if the buildings could be set deeper in the terrain. Mr. Black stated they are trying to limit the amount of ledge they have to blast.

Doug Lyon summarized the five criteria issues. The first one has to do with public interest and he would argue that the public interest far outweighs any conceivable harm to the general public. They will go to great lengths to improve the aesthetics for nearby neighbors.

The spirit of the ordinance has to do with safety and aesthetics. Chief Lyon has already testified that the safety issue is not relevant. As far as aesthetics, this isn't even an issue for most people in the community. For those that are located proximate to the area, continuum will go to great lengths. The memorandum of understanding will deal with concerns that neighbors have.

Substantial justice deals with loss to the individual versus gain to the public. There is a huge gain to the public and denying the variance would be a huge loss to the applicant. There is no indication that the loss to the applicant is outweighed by any substantial public benefit by denying the variance.

In terms of the value of the property, it has been dealt with by the expert testimony.

For the hardship criteria, the special conditions of the property are that 35% of it is unusable due to wetlands and steep slopes. This forces the location of this building onto only one part of the property. Because the footprint can't be expanded due to the special conditions of the property, the height is necessary. The one building is necessary in order to programmatically provide the kind of care that has been talked about. Mr. Lyon argues that all of the criteria have been met and substantial evidence has been given.

IT WAS MOVED (Bruce Hudson) AND SECONDED (Heidi Lauridsen) to discuss. THE MOTION WAS APPROVED UNANIMOUSLY.

DISCUSSION:

Mr. Todd asked what the essential character of this locality is. It is characterized by it being a hospital area with large buildings and is buffered by a condominium association. It is residential. A large percentage is wetlands and unbuildable.

Will it threaten the health, safety and welfare of this locality for the people in town by granting a variance to exceed the height restriction by 134%? Ms. Bedard stated it will not. The issue is if it can be set in a rural enough setting so it isn't an issue for the neighbors. It appears it is set far enough from County Road but possibly not on the Parkside/Lyon Brook portion of it. A 35 foot building would stand out as well.

Bruce Hudson commented on the contour and elevation changes. From the high side to low side and from a perception standpoint, you may not see the additional height.

Chair Todd asked if the board feels it will alter the essential character of the neighborhood. Mr. Bright stated yes, there will be an impact. Katharine Fischer discussed the traffic and its impact. Anytime there is a large development this is a factor.

The viability of the project is governed by the package in which it comes. The big building has to be a certain way to accommodate the services for the people living there.

In the R1 district, the space is limited. In this given area, it is within the density requirement by 3 units.

Substantial Justice involves loss to the petitioner if it is denied versus an overall gain to the public. Is the public going to gain anything if we deny the height restriction? It's clear that if it is denied there is considerable loss to the petitioners. The community was disappointed when the Clough Center closed. The board agreed there was a gain to the public by granting the variance.

If you look at the surrounding property values on a map, there is conservation land, the outing club and Knights Hill Park, power lines and commercial property. This use that is proposed is residential.

This is a dimensional variance. We have heard the hardship argument and testimony about the character of the 48 acre parcel. It is riddled with wetlands and steep slopes. There are special characteristics. Will applying the 35 foot ordinance result in an unnecessary hardship to the applicants? Doing this will not give them the density required to make it a viable project. Given the totality of the project it has to be a package deal. Does the application of the height restriction interfere with the reasonable use of the property? Ms. Lauridsen stated they have made a strong case that it does.

Ms. Bedard feels it is good use of the property and it is well laid out given the topography and the wetlands.

IT WAS MOVED (Michael Todd) AND SECONDED (Bruce Hudson) to grant and approve the request for a height variance per Article II, Section 5 of the New London Zoning Ordinance to permit the building to exceed the 35 foot height limit but no taller than 47 feet as presented on the plan dated June 20, 2018 in connection with a proposed development for a senior living community (planned unit development) located on County Road subject to the following conditions: that they maintain and enhance the woodland buffer of mature trees and additional plantings between the proposed project

and existing neighborhoods to the fullest extent possible consistent with any recommendations of the planning board, and continue to pursue good faith discussions with Lyon Brook Condominium regarding a memorandum of understanding, in an effort to resolve concerns related to drainage, night sky lighting and landscape buffer. **THE MOTION WAS APPROVED UNANIMOUSLY 5-0.**

5. Motion for Rehearing, Case #ZBA 18-02, 1876 Newport Rd., Parcel ID 041-001-000, SDB Investments, Inc.

A letter from Attorney John Rab was distributed. Chair Lyon spoke with counsel and was advised to address page 2, number 10, A, B, C of the document.

- A. The second meeting was unlawfully held and resulted in an improper and unlawful revision of the record of the original vote of the board. This is untrue. We have a right to reconsider, during the appeal process, and clarify the motion. There was not revision of the record there was a clarification of the motion.
- B. The Board's decision was unlawful and unreasonable and used incorrect legal standards. The legal standards are not listed so there is not enough evidence to evaluate this contention.
- C. The decision was inconsistent with deliberations and vote on June 11, 2018. The clarification was made in order to make the decision more in keeping with the discussion.

He has not met any reasonable contention that a rehearing is applicable.

IT WAS MOVED (Doug Lyon) AND SECONDED (Michael Todd) to deny a request for a rehearing. THE MOTION WAS APPROVED UNANIMOUSLY.

6. New ZBA meeting schedule

Nicole Gage distributed an updated meeting schedule.

- 7. Other Business - None
- 8. Motion to Adjourn

IT WAS MOVED (Chair Lyon) AND SECONDED (Michael Todd) to adjourn. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 8:52 pm.

Respectfully submitted,

Trina Dawson
Recording Secretary
Town of New London



TOWN OF
NEW LONDON, NEW HAMPSHIRE

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ZONING BOARD OF ADJUSTMENT (ZBA)
MEETING MINUTES
Tuesday August 7, 2018 at 6:30 PM

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

MEMBERS EXCUSED: Frank Anzalone, Bruce Hudson

STAFF PRESENT: Nicole Gage, Zoning Administrator

OTHERS PRESENT:

Mike Black, Continuum

Wayne Morrill, Jones & Beach Engineering

Attorney James Callahan

Luke Hurley, GES Inc.

Pat Deragon, Ray Deragon, Alison Trow

1. Call to Order – Chair Lyon called the meeting to order at 6:30PM.
2. Roll Call – Chair Lyon called the roll. Chair Lyon will recuse himself for the public hearing as he is the Chairman of the Board for the New London Hospital. Vice Chair Michael Todd will lead that part of the meeting.
3. Review Minutes from July 18, 2018

IT WAS MOVED (Michael Todd) AND SECONDED (Ann Bedard) to approve the minutes from the July 18, 2018 meeting. THE MOTION WAS APPROVED UNANIMOUSLY.

4. PUBLIC HEARING for Case #ZBA18-05. Applicants Mike Black of Continuum Development & Attorney James Callahan and Owners New London Hospital Association request a Special Exception for Wetlands Crossing, per XIII, E.1 to allow wetlands impact and crossing in connection with a proposed development for a senior living community (planned unit development). The lot is located on County Road in the R-1 (Residential) zone and is identified as Parcel ID 072-017-000.

Chair Lyon stated that a spreadsheet was previously distributed. Michael Todd prepared a summary of various cases on special exceptions. He did a similar one for variances. This is public information so if anyone wants a copy, please see Nicole Gage, Zoning Administrator.

Vice Chair Todd stated exceptions are not the same as variances. Exceptions provide relief from the operation of the ordinance. In this instance, the ordinance prohibits the crossing of wetlands. The conditions that are imposed in the ordinance for crossing wetlands by special exception must be met or the special exception can't be granted. The conditions cannot be waived.

Attorney Jim Callahan stated there are special criteria in section 21 and asked if they could dispense with it. Chair Todd stated he wouldn't dispense with them as some may apply peripherally to the effect of the crossing of the wetlands. He is primarily interested in the provisions in XIII, E.1.

Mr. Callahan stated a wetland scientist and an engineer are here to discuss the wetlands in detail.

Section XIII E of the ordinance states the applicant must demonstrate to the Zoning Board of Adjustment that there is not a layout of the access way, driveway, street or utility line which

conforms to your zoning regulations and does not cross the wetlands and proposed crossing will create the least impact on the wetlands compared with other crossing locations. This will be the standard to focus on. There is a precondition in our ordinance that the applicant must first have gone to the Conservation Commission. This happened on January 17, 2018. No response was received back from the Conservation Commission. The New Hampshire Wetlands board and the Soils Conservation Service also did not reply. They did receive notice so that requirement has been met.

Based on feedback that Jones and Beach Engineering received at the January 17, 2018 Conservation Commission meeting, they did more design work and reduced the impact. Originally, the affected square footage was 7,500 of impact. This has been reduced by 20-25%. This has been a heavily engineered site and there have been approximately 30 redesigns of the project.

Ian McKinnon of Jones and Beach Engineering attended to address the four wetland crossings that have been identified. There were many alternative layouts but this layout resulted in the best locations for flow through the site, for connecting the site and with regards to elevation and width of wetland areas, provided the smallest possible impact.

Grass stabilized slopes and retaining walls reduced the size of the crossings. They are currently designed with HDPD pipe and are designed with the 50 year storm event. The standard is generally 25 year storm for road crossing culverts but they felt a 50 year storm was a proper sizing.

Wetland impact 1 is in a high point in the wetland. This pipe is designed solely as an equalizer pipe between the road way. There isn't consistent flow through this area.

Wetland impact 2 is near the corner of the building and under the main access way. This is the tallest elevation wise from wetland to finish surface. To reduce slopes on the high side of the crossing they will put in a retaining wall so there isn't impact to the wetland further down. This was realigned to reduce the impact size.

Wetland impact 3 is behind the building and the access behind this building is restricted for life safety. The fire and police departments will have access but it will not be a regularly traveled roadway. Pedestrians can also use this access way.

Wetland impact 4 is the largest crossest in terms of what it sees for flow. That watershed extends up towards the hospital and some storm water runoff comes off Newport Road. The hospital has a porous employee parking lot and some existing storm water infrastructure but the water ultimately comes through this site. The pavement that will be used for all roads will be standard asphalt. This wetland is closest to Parkside Drive. This was designed with four, smaller 12 inch pipes because it is a wider crossing and they wanted to keep the impact down as this allowed for a lower road elevation. The pipes have open ends on both sides so as long as water is moving it shouldn't freeze.

Luke Hurley of Gove Environmental explained that crossings 1, 2 and 3 aren't flowing wetlands. Where they get narrow, it concentrates and then drains downhill. They pick the narrowest points to go through for lesser impact. It's important to maintain the functions and values of the wetlands. The goal is to maintain the natural flowing system that goes from the top to the bottom of the site. The large wetlands are all staying intact.

There won't be any direct runoff from the roads and parking areas into the wetlands. There are ponds located on the property to slow water down.

All the roof runoff will be detained and infiltrated.

Mr. McKinnon identified where all the ponds will be located. The roof water is controlled in standard chambers underground. There is a system under the parking lot as well. There is a larger pond that pretreats the water and detains the water before entering the wetland. The water is being slowed down by going through multiple systems. The water flow is controlled.

There are concerns about the culvert on Parkside. Some preliminary work has been done for recommendations to the Department of Public Works. Mike Black stated they are discussing this with the review peer engineers to come up with an improvement for flow across Parkside Road.

On this entire site there is no sheet flow as all of the roads are curbed or pitched inward. There is no direct runoff so no sediment or salt running directly into the wetlands. It will go through the storm water features scattered among the site. They are required to meet the predevelopment conditions and are not adding any additional flow to the pipes.

The hospital property contributes to the wetland and then this development will. It will continue to handle the hospital runoff and they have worked to slow the runoff within their disturbance. With all of this development, this area can still sustain the runoff.

The post run off cannot be more than the pre run off and in some cases it is actually less.

Vice Chair Todd asked if there was any other layout that would have less impact, cross them fewer times and affect fewer square feet. Mr. McKinnon stated this is the best option and have chosen all the narrowest locations to cross and have crossed them only once.

The units that will have a basement will have a standard foundation drain. The foundation drains are obtaining water that is already in the ground and they don't collect flow. There isn't a need to slow water down and the ground water level isn't at the footing. It is there as for emergencies if there are heavy rain events.

Alison Trow discussed her concerns about heavy water flow. She feels the culvert needs to be replaced on Parkside as it is not adequate. Her concern is that she already has water issues and this will add to it. Will there be more water coming down. Mr. McKinnon stated there are two requirements they have to meet for the site design. One is the peak flow for the site which determines how much water and volume comes off the site. They have to meet or reduce the precondition on both of these. They cannot increase the volume coming off the site.

IT WAS MOVED (Katharine Fischer) AND SECONDED (Anne Bedard) to close the public hearing. THE MOTION WAS APPROVED UNANIMOUSLY.

IT WAS MOVED (Heidi Lauridsen) AND SECONDED (Stan Bright) to discuss. THE MOTION WAS APPROVED UNANIMOUSLY.

Vice Chair Todd noted that the applicant must demonstrate to the board that there is no other layout with less impact. Ann Bedard stated they have met this and the evidence is sufficient.

They also have to ascertain that where these wetland crossings have been identified, that evidence has been presented to sustain a finding that they are done with the minimum impact possible. Ms. Fischer stated they have been convincing that they have spent the time and done the work to lead to that conclusion.

In addition to those specific conditions, there are others that need to be met. Item 21G on page 81 was identified and Ann Bedard stated she is concerned that there isn't more information from the Department of Public Works regarding this. We have the applicants' word that they are working with them and she hopes that happens. Vice Chair Todd stated if there isn't sufficient evidence to sustain a finding, we can give them an opportunity to produce further answers and the hearing could be continued.

Attorney Callahan suggested that they consider that at the Planning Board level, making an approval conditioned upon the Planning Board working in conjunction with peer review engineering on these concerns. The plan will be more heavily scrutinized. Vice Chair Todd is concerned that if they grant a special exception and the plan changes they have to come back to the Zoning Board anyway. They

will have forgone the right to impose conditions that they may see fit in granting the special exception. They need all the information they can get now.

Mike Black commented that the culvert issue on Parkside is an existing condition and Continuum brought it to the town's attention. The special exception relates to wetlands crossings and doesn't relate to these culverts. Ms. Bedard appreciates this however, she objects to not hearing from our Department of Public Works. These other things need to be looked at as well.

IT WAS MOVED (Michael Todd) AND SECONDED (Stan Bright) to suspend the discussion pending a presentation on 21 G. THE MOTION WAS APPROVED UNANIMOUSLY.

The public hearing has been reopened to for the purposes of discussing 21 G and related points on these four wetland crossings.

This use is permitted by special exception and it has been heavily engineered. The issue that has arisen is the impact of the water flow based on the inadequacy of the town culvert on Parkside. Two licensed professionals testified today that there will not be an impact on the property. The runoff and the drainage on the site will be improved as a result of the systems put in place. Condition A- this involves the use and they will be in harmony with surrounding area because they won't be adding more water to it.

Condition B – the impact on wetlands on these crossings is minimal and is improved.

Condition C – the use is specifically allowed and it is.

Condition D – Adequate and lawful facilities for sewage disposal, water supply, drainage. This has been addressed.

Condition E – The use will not be detrimental to vehicular or pedestrian traffic. This has been met.

Condition F – The proposed special exception conforms to all other requirements of the ordinance.

Condition G – the use will not be detrimental to the character of the neighborhood. Internally the effects of this project will be an improvement. A concern was flagged by the applicant by being proactive and being a good neighbor. This is a complicated project on many levels. It's unclear who would pay for the upgrades but that will be discussed. An agreement could be put together between the town and the applicant to identify a process to move this forward on an efficient basis.

Condition H – use is compatible with the spirit and intent of the ordinance. The purpose of this overlay district is to protect wetlands and they have mitigated the impact.

Doug Lyon stated that the request is for a special exception for wetland crossings. The issue that is stalling this discussion is a preexisting condition in the town that is of concern. We've heard testimony that nothing that will happen on this site will increase the flow of water across Parkside. That means that this site is not going to contribute to the problem that already exists. Penalizing this project for a preexisting problem is not fair. Continuum has gone to exceptional lengths to say they will work with the town to try to alleviate that problem which is more than reasonable. He suggests that the special exception be approved with the understanding that Continuum, in good faith, will work with the DPW to try to alleviate what they can. He doesn't agree with putting a condition on this that adds to the burden of the project by requiring the project to address conditions that existed in the town prior to this, especially when the project is adding nothing to that problem.

Vice Chair Todd doesn't think its right to deny the Board advice of their own expert before making their decision. Mr. Lyon is suggesting that there will be peer review as part of the Planning Board.

Ann Bedard stated that since it has now been brought to our attention that we don't have crossings that can accommodate any increase in flow. She is suggesting that they have some way of knowing it will be addressed as now we know the culverts are undersized to accommodate the flow. She

However, both the decision and the minutes were filed in a timely fashion. Therefore, the application is not timely and cannot be heard. The ZBA heard the applicant's July 6 motion for rehearing on July 18. The Board voted to deny the rehearing and that concludes this case. The Amended Motion for Rehearing is denied. **MOTION PASSED 5-0**

Spec Bowers stated that when the ZBA met on June 26, 2018 you thereafter amended the minutes to incorporate the substitute motion that you made on June 26. The minutes were modified long after the June 11, 2018 meeting so that gives me 30 days to amend the motion.

Chair Lyon stated that on the advice of counsel, the ZBA is rejecting that argument. Mr. Bowers asked if counsel was aware that the minutes were modified after. Chair Lyon stated yes.

Nicole Gage and Chair Lyon discussed the distribution of information between meetings. In many cases it is appropriate but sometimes it is not. As a result, any information to be distributed between meetings will go through Ms. Gage directly.

6. New ZBA meeting schedule

The new schedule has been distributed. The August 21, 2018 meeting has been cancelled.

7. Other Business - None

8. Motion to Adjourn

IT WAS MOVED (Chair Lyon) AND SECONDED (Michael Todd) to adjourn. THE MOTION WAS APPROVED UNANIMOUSLY.

The meeting was adjourned at 8:34 pm.

Respectfully submitted,

Trina Dawson
Recording Secretary
Town of New London