

These minutes were approved at the June 14, 2005 Meeting.

**ZONING BOARD OF ADJUSTMENT
MEETING AGENDA
TUESDAY, FEBRUARY 22, 2005
TOWN COUNCIL CHAMBERS – DURHAM TOWN HALL
7:00 P.M.
Continued from February 8, 2005 meeting**

MEMBERS PRESENT: Vice Chair Jay Gooze, John deCampi, Linn Bogle, Myleta Eng

MEMBERS ABSENT: Chair Henry Smith, Ted McNitt, Michael Sievert

OTHERS PRESENT: Interested Members of the Public

MINUTES PREPARED BY: Victoria Parmele

I. Approval of Agenda

Board Vice Chair Jay Gooze served as Chair for the meeting. He noted there were 3 regular members present, and said one alternate was present, Myleta Eng, who would be a voting member at the meeting.

Mr. Gooze asked the applicant, Mr. Bubar, if he wanted to continue the hearing to a future meeting, given the fact that some ZBA members were not present. After some discussion. Mr. Bubar said he would like to proceed with the hearing. Mr. Gooze noted that three votes would be required in order to approve this application for variance.

Linn Bogle MOVED to approve the Agenda as submitted. The motion was SECONDED by John deCampi, and PASSED unanimously 4-0.

II. Public Hearings

- A. **PUBLIC HEARING** on a petition submitted by James & Lisa Bubar, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XIV, Sections 175-73 and 175-72(A) of the Zoning Ordinance, and Sections 175-74(A) and 175-76(A) of the proposed Zoning Ordinance to allow for the building of a new single family home within the shoreland setback. The property involved is shown on Tax Map 11, **Lot 11-6**, is located at 4 Old Piscataqua Road, and is in the Limited Business Zoning District.

Attorney Charlie Tucker spoke for the applicant. He noted that architect Bill Schoonmaker was present, along with the applicant, and said Mr.

Schoonmaker would explain what they wanted to do on the ground, and then he would address the variance criteria.

Mr. Schoonmaker spoke before the Board, and noted he had provided some supplemental drawings of the proposed project. He said the property in question was located off of Route 108, out near Route 4, and said the lot had been carved out by Roger Jaques in 1998-99, as part of a subdivision. He described the subdivision that had been developed, and noted that the Oyster River was south of the property, also explaining that a tidal marsh portion of the river abutted much of the southwestern side of the property. He said the present house on the property was situated roughly in the middle of the lot, about 185 ft. from the lot line near the Oyster River, 77 ft. from the sideyard setback, 145 ft. from the property line abutting Route 108, and about 55 ft. from the other sideyard setback.

He said the Bubars wished to encroach into the 125 ft. setback from the tidal area, because they desired that their house not be on the highest portion of the site. He said they wanted it to let it slip down the sloped portion of the site, in order to minimize the profile of the house from the Oyster River and put some distance between the house and the adjacent duplex. He also explained that for health reasons, the applicants wanted a one-story house, as opposed to a two-story house, which would require an elevator.

He described a drawing he had provided showing various orientations of the house on the lot, based on different setback requirements. He noted that the sideyard setbacks had increased based on the most recent Zoning changes, and said the new 50 ft. sideyard setback really diminished what was buildable within the lot, by about 60%.

He said because of the 50 ft setback and the 125 ft setbacks, the lot was very long and narrow, and said the proposed design suggested that if the applicants could put some distance between the two buildings, and slide down the slope a bit, they could get a one story house with less bulk, less height, and could maintain a lower profile.

Mr. deCampi asked if the acreage for the whole lot was 1.46 acres, and was informed that it was. He also asked if it met the RC zone acreage and was informed that it did not, and noted that one of the reasons for a small building envelope was because the lot didn't meet the current lot size requirements for the RC zone. He asked why the 50 ft. and 125 ft. setback restrictions forced a two story house, and if the applicants instead could have a one story house with perhaps a walkout basement.

Mr. Schoonmaker explained that the grade was such that one would have to really work to get a walkout, and he provided details on this.

Mr. deCampi said he still didn't see why it had to be a two-story house in that position on the lot.

Mr. Schoonmaker said in order to get the square footage the Bubars required, it would either have to be 25 ft wide and 80 ft long, shaped like a box car, or become a two-story house.

There was discussion about this. Mr. Schoonmaker demonstrated further on the diagrams what the problem was with the lot. He noted that when the Bubars bought the property, it was zoned Limited Business and was now zoned RC.

Mr. Gooze noted it was now a nonconforming lot.

Mr. Bubar said the tidal marsh was also the Town's drainage area for runoff, noting the culvert in that area. He said the construction of the house on public water and sewer, with natural gas, would mean it would not be a problem environmentally. He also noted the scenic vista aspects of the application.

Mr. Schoonmaker said the applicant's contention was that having a lower structure, lower down on the slope, would present a better view from the river, which fit with the goals of the shoreland protection zone, and was better than what the current zoning would impose.

Mr. Gooze asked if the applicants would still be before the Board even if the zoning hadn't changed and Mr. Schoonmaker said probably, because they would rather not be 10 ft. from the neighbor.

Attorney Charlie Tucker spoke for the applicants. He said granting the variance wouldn't diminish surrounding property values, noting that the new house would probably benefit the duplex next door.

He said granting the variance would benefit the public interest, because as seen from Route 108, the new one-story house would have less bulk. He said that part of the purpose of the shoreland protection zone was that when a person was on the river, looking at the shore, he or she would see more green and less building. He also noted that the tidal marsh area on the southwestern border of the property had a small stream which was not navigable.

Attorney Tucker said this was an area variance that was being requested, given the special configuration of the property, which was long and narrow. He said it was a strange shaped property, and the only part that could be built on was a narrow strip. He also said it was a legitimate lot size when it was created, so the change in zoning was another special condition.

Concerning the second criterion for an area variance of whether the applicant could achieve the goals in some other way, Attorney Tucker said a house could be built on the property, but it would have to be long and narrow, or two stories. He said this would be a personal hardship for the applicants, because both had disabilities, and said they needed to be able to live on the ground floor.

He said granting the variance would do substantial justice, because the applicants would be able to build what they wanted, the residential use was allowed and it fit into the area, and in fact would fit in better, lower down on the slope.

He said granting the variance would not be contrary to the spirit and intent of the Ordinance, which included protection of the Oyster River, because the setback that would be encroached upon was not a setback from a navigable waterway, but rather from a marsh area. He said the house would be set back well from the river itself.

Mr. deCampi asked if the applicants owned the land the house was on, and was told they did.

Mr. Gooze asked if any members of the public wished to speak for or against the application.

Arnett Taylor, owner of property next door, said he knew the property in question well. He provided details on the original 3 lot subdivision that was done for the properties in this location, including his house, and noted there were some tough constraints on the properties. He said that in addition to what had already been said, failure to grant this variance would ultimately have a negative impact on his own property.

He said the lot to the west of the property in question had been granted a 50 ft. setback from the Oyster River by court decree, so this application was consistent with what was going on in the neighborhood. He also noted that a similar variance was approved for a property on Bay Road, which allowed a 2,000 ft. addition that was all located in the shoreland zone. Mr. Arnett said as an abutter, he was fully supportive of this application.

Mr. Bogle said the variance given the Jaques was for placing a house on an approximately 4 acre lot, when this was just one piece of property. He said they then subdivided this lot into 3 parcels.

There was discussion about this.

Mr. Bogle said the court case occurred after the subdivision.

Mr. Taylor said the prior owners of the property in question had clear-cut much of the parcel, which had created some serious drainage issues. He said that between himself and the Bubars, they could solve these problems. He said that allowing the variance would allow the natural drainage to occur down the slope, as opposed to having to do artificial drainage into river.

Mr. Taylor also said the wetland variance being requested related to Baird's Creek, which he questioned was even a tidal marsh. He said most of the water flow into there came from drainage from a nearby pond and sheet flow from Route 4.

Mr. Bogle said the line the applicants were requesting a variance from was the high tide line. He said that even though it was labeled as a tidal marsh, when the tide was high, it was the high tide line. He noted that the illustration provided showed the corner of the house set back 55 ft. from the high tide line, rather than the 125 ft.

Mr. Gooze received clarification that water and sewer were available to the property.

He asked if anyone else wished to speak for or against the application. Hearing no response, he closed the public hearing.

Mr. deCampi noted the Board had previously received an application for the same property that it had turned down. He said he was not necessarily opposed to granting some relief to the applicant, but said he felt the relief being asked for was excessive. He said he would have no problem reducing the setback to the duplex back to 10 ft., if this was requested. But he said he would have trouble reducing the setback requirement to less than 100 ft, because ultimately the marsh area drained into the Oyster River and Great Bay. He said the property was buildable, even observing the setbacks.

Ms. Eng said she agreed with Mr. deCampi that there were other options. She said it would be contrary to the spirit and intent of the Ordinance to allow this variance to be granted. She said the shoreland was a valuable resource, and needed to be protected.

Mr. Bogle said he agreed with Mr. deCampi and Ms. Eng, and said he thought the house could be set back farther than was being asked for. He said the lot was buildable, although the location allowed might not provide the exact setting the applicants would like. He noted the variance request from the Harveys concerning this property, which had been rejected by the Board the previous February. He said he had compared their site plan to this one, and found the present plan more intrusive of the shoreland area than theirs'. He said again that the house should be set back further, perhaps closer to the duplex. He said this might require granting some relief, but said he couldn't vote for the present application.

Mr. Gooze went through the variance criteria as they related to this application. He said he did believe the application met the special conditions hardship criteria for an area variance, but concerning the second hardship criterion, he said it bothered him when he heard that the applicant couldn't achieve the goals in some other way. He also said he wasn't sure it would be a financial burden if the variance was not granted. Mr. Gooze said that overall, he believed the application didn't meet the hardship criteria.

But Mr. Gooze said that even if he did think the application met the hardship criteria, he agreed with the reasoning of other Board members that granting the variance would be contrary to the public interest, and would not meet the spirit and intent of the Zoning Ordinance.

Mr. Gooze read through a portion of the purpose and intent of the shoreland overlay protection district: “to protect the Great Bay estuaries from pollution by its tributaries or from uses of its shoreland”. He said that was why the Board voted against the previous variance request on this property and he said he felt nothing had changed on this.

He said perhaps there were other ways this building could be done, although he said he was not sure it could be done in a way where it was completely out of the shoreland zone. But he said he was not sure it was up to the Board to say what would be allowed.

Board members discussed whether they could perhaps give the applicant a setback distance that would be acceptable.

Mr. Bogle said he would prefer to see a plan, taking seriously into account the 125 ft setback, and said the setback should be no less than 100 ft.

John deCampi MOVED to deny the APPLICATION FOR VARIANCE from Article XIV, Sections 175-73 and 175-72(A) of the Zoning Ordinance, and Sections 175-74(A) and 175-76(A) of the proposed Zoning Ordinance to allow for the building of a new single family home within the shoreland setback, because granting it would be contrary to the public interest, and also because it did not totally fulfill the hardship criteria, and did not meet the spirit and intent of the Zoning Ordinance. The motion was SECONDED by Linn Bogle, and PASSED unanimously 4-0.

Mr. Gooze said the applicant had thirty days to appeal this decision, or to come back with another proposal.

III. Board Correspondence and/or discussion

Board members noted that the Barnhorst case had gone to Superior Court.

IV. Approval of Minutes -- January 11, 2005

Page 1 Bottom paragraph, should read “He said that Mr. Bogle did talk about the accessory apartment, and did vote to deny..”

Page 2, top paragraph, should read, “Mr. Gooze said he had gone over these provisions....” Also, page 2, 3rd full paragraph should read “..Attorney Bolt’s interpretation...”; Also, bottom paragraph should have a period at the end.

Page 4 , 4th paragraph, should read “Mr. Jasper said...”; also, 5th paragraph, the word borders should be spelled “boarders”. This word should also be corrected throughout the document

Page 5, 9th paragraph should read “...when the property was co-ed”; also, 11th paragraph should read “...thought the applicant was right, and...”

Page 6, 2nd paragraph should read “...would suggest the applicant came before the Board as a fraternity house, and...”

Linn Bogle MOVED to accept the January 11, 2005 minutes as amended. The motion was SECONDED by John deCampi, and PASSED unanimously 4-0.

V. Other Business

Mr. Gooze noted that the next ZBA meeting would be held on March 8th .

Adjournment

John deCampi MOVED to adjourn. The motion was SECONDED By Jay Gooze, and PASSED unanimously.

Adjournment at 8:00 pm

John de Campi, Secretary