

D-R-A-F-T

**ZONING BOARD OF ADJUSTMENT
TUESDAY, MARCH 13, 2007
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.**

MEMBERS PRESENT: Chair Jay Gooze; Vice Chair John deCampi; Ted McNitt; Linn Bogle; alternate Michael Sievert; alternate Jerry Gottsacker

MEMBERS ABSENT: Myleta Eng; alternate Ruth Davis

OTHERS PRESENT: Zoning Administrator Tom Johnson; Minutes taker Victoria Parmele

I. Approval of Agenda

Chair Gooze noted that Mike Sievert would serve in place of Myleta Eng, who was absent that evening. He also said Mr. deCampi would serve as acting secretary that evening in place of Ms. Eng.

Chair Gooze said there was a letter from applicant Joe Caldarola requesting withdrawal of Agenda Item II A. He asked if there was any reason why the Board should not accept this withdrawal, and there was no response.

John deCampi moved to approve the Agenda as published, with the exception of the deletion of Agenda Item II A. Ted McNitt SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings:

- A. **PUBLIC HEARING** on a petition submitted by Joseph Caldarola, Portsmouth New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-55(F)(6) of the Zoning Ordinance to permit the inclusion of soils with slopes between 15% and 24% in the useable area calculation of a parcel of land. The property involved is shown on Tax Map 10, Lot 7-0, is located on Bagdad Road, and is in the Residence B Zoning District.

Withdrawn

- B. **PUBLIC HEARING** on a petition submitted by Jeffrey P. Christensen, Durham, New Hampshire for an **APPLICATION FOR VARIANCES** from Article XII, Section 175-54 and Article XIV, Section 175-74 of the Zoning Ordinance to enclose an approved deck on an existing, non-conforming structure within the Shoreland Protection Zone. The property involved is shown on Tax Map 20, Lot 1-0, is located at 595 Bay Road, and is in the Residence C Zoning District.

Chair Gooze asked what was different about this application, compared to what had been discussed by the Board before.

Attorney Sharon Somers, representing Mr. Christensen, summarized the applicant's previous applications before the ZBA. She noted that the Board approved on July 11, 2006 the construction of an open deck and the covering of a portion of an existing deck. She said a subsequent application brought forward was to screen the entire side of the building facing the water, also noting other relief had been requested. She said this application was denied, and then appealed.

She said what was being proposed now was to take a portion of the open deck that was previously approved in July and screen it, and in addition, to put a roof on the easterly side and screen that as well. She said she viewed this proposal as an amendment to the previous approval granted by the Board in July, as well as a new request for some relief on the easterly side of the house. She said one of the reasons this application had been filed was to try to resolve the present litigation.

Attorney Somers said the thought was that it would be helpful for the Board to do a site walk in order to observe the improvements that had been made to the property, and to try to get the context for the discussion on the deck and the garage. She said the applicant would like it if the hearing could be reconvened in April to address the garage variance. She said Christian Smith of Beals Associates had done a revised drainage analysis to reflect the additional roof area.

Chair Gooze said he would like to see the garage area, but said he was not sure he needed to see the porch area, because he felt he knew this situation well. He said he would like to do a site walk for the second variance request regarding the garage. He asked the other Board members how they wanted to handle this.

Mr. deCampi said he had walked this property three times, and didn't really want to walk it again. He said he found the garage application troubling because he didn't really know the details of it from what had been provided.

Mr. Bogle said he didn't think he needed a site walk, stating that he had been at the property at least four times, so had a pretty good idea what the deck situation was.

Mr. Johnson noted that some of these site walks were for an application submitted by a previous owner of the property, and that there had only been one site walk with Mr. Christensen.

Mr. Sievert said he thought they should do the variance application for the deck that evening, and do a site walk for the garage.

Mr. McNitt said he agreed, stating that he would like to do the site walk in order to get a feeling for the bulk and other details of the proposed garage.

Attorney Somers said that regarding the garage variance, they had more information to provide concerning where the setbacks would be. She said the garage had been located entirely in the

front yard setback, but also noted that in talking with the builder, it had been determined that the height of the garage would exceed the 20 ft restriction. She said Mr. Christensen would therefore need to come back with another variance application for this, so the garage couldn't be addressed completely at the present meeting anyway.

Chair Gooze said the Board could address the deck at the present meeting, and since another variance was needed for the garage, this should be done at a later meeting. Board members agreed that a site walk for the garage would be helpful.

Attorney Somers handed out an improved site plan, and provided details on what was proposed. She said Mr. Christensen wanted to extend the roof over a portion of the previously approved deck, and to screen in a portion of the approved structure, in order to have a screened in area of a deck and to have a main entrance that was protected from winter elements. She said the screened area was not going to be living space.

She explained that the screening required a supporting roof structure, and said Mr. Christensen was asking that approximately 80 sf of the approved open deck be covered by a roof to enable screens to be installed. She said the applicant's builder had advised that the roof over the portion of the deck on the easterly side of the house would be problematic unless it was part of a larger roof over the easterly side of the house. She said that since the existing 71 sf of existing deck on the easterly side of the house would function as the main entrance to the building, a roof covering was necessary to avoid snow and ice accumulation in the winter months.

Attorney Somers said that in terms of the variance criteria, the hardship was that given the location of the property, without a screened in area, it was difficult to enjoy the deck area in summer months because of mosquitoes and other bugs. She also said the added roof area was necessary to facilitate full enjoyment of the building, given the sun.

She said the building sat on an irregularly shaped lot that sloped toward the water, and noted that the Board had agreed with the applicant on July 11, 2006 that the lot configuration and the topography precluded siting a deck or porch outside of the setback area. She said having a screened in area of a deck and a main entrance protected from winter elements were both consistent with single family use on a lot.

She said the approved drainage scheme for the property would still provide protection to the lot and Great Bay. She also said Mr. Christensen had made this property his primary residence, so was very aware of the need to use the property in a way that was consistent with the use of neighboring properties.

Attorney Somers said granting the variance would not be contrary to the public interest because the applicant was merely seeking to screen in a portion of the previously approved deck and/or existing deck. She said the basic objectives of the Zoning Ordinance were to protect water quality, maintain wildlife habitat, and protect shoreland resources. She said the applicant's proposal did not conflict with these objectives because it did not alter the essential character of neighborhood properties, many of which had screened decks. She said the proposed drainage system ensured that no public health and safety issues would arise.

Attorney Somers said in granting the variance, substantial justice would be done because denying the variance would not be outweighed by any gain to the general public. She said the property would be improved by the architectural design for the deck that was approved by the Board on July 11, 2006. She also said the drainage proposal approved on that date would still provide protection, even with an increase in roof area. She said no adverse impact to the environment would result, and said the general public would not be injured if an amendment to the July 11, 2006 variance was granted.

Attorney Somers noted that the intent of the Shoreland Overlay District was to protect the quality of the Town's surface waters, in order to protect health, safety and maintain wildlife habitat, and to conserve and protect shoreline and upland resources. She said the drainage system on the applicant's property was sized to accommodate the increase in roof area contemplated by this request, so granting this variance would not have an adverse impact on the preservation of the shoreline.

She also said that the applicant was aware of the issue of how homes looked from the water, and had worked with a local architect to create a design that screened in a portion of the originally approved plan and created an attractive roof line over the screened area. Attorney Somers said the proposed screened in portions of the deck, in conjunction with the architectural design of the roof, would be aesthetically appropriate for the neighborhood, and would not diminish property values.

Mr. Bogle asked if the applicant considered this to be an expansion of the existing footprint.

Attorney Somers said no, stating that what was proposed was within the line of the deck. She said the pictures that had been provided to the Board were meant to provide a sense that the applicant had tried to design this in a pleasing matter. She said the modifications were needed in order to make the deck usable.

Chair Gooze asked if gutters would go on each end of the roof.

Attorney Somers said yes, there would be a gutter system, noting that this kind of detail had not been provided in order not to confuse things. She said a drainage channel, which was already in place, would go the length of the building. She noted that Mr. Johnson had looked at the drainage system.

Christian Smith, of Beals Associates, provided details on the drainage system for the site. He said the infiltration trench and the distribution pipes were in place. He said gutters were still proposed for the roof areas, and would be attached to the drainage system.

He also said he had looked at the additional imperviousness that would result from the garage, and said there would still be modest reduction in runoff as compared to the existing conditions, by virtue of collection of runoff and letting it infiltrate. He said the garage had been taken into account in the design, so the drainage issue wouldn't have to be revisited later.

Mr. deCampi asked how long the trench would be good for, and Mr. Smith said that since it would just be handling roof runoff, it should last a minimum of 25 years.

Chair Gooze asked if the silt fence and hay bales were in place, and was told they were.

Mr. McNitt asked if areas that up to now had been decks would have open floors.

Attorney Somers said the flooring on the new sections would be what was there now. It was noted that the spacing between the floor boards was 3/16 inch.

There was further discussion regarding what the screened deck would involve.

Mr. McNitt asked how one could distinguish what was proposed from living area.

Attorney Somers said the screened in area would be primarily used in the summer. She also said it made sense to have glass panels installed there in the winter to keep the snow out, but said it was not designed to be used as living space.

Mr. McNitt noted that the ZBA had reluctantly approved the reconstruction of this building on the original footprint. He said he was concerned about the incremental nature of this, where more was being asked for over time. He noted he was in complete sympathy regarding the mosquitoes and sun issues.

Attorney Somers said she had not been present for the beginning of the application process Mr. Christensen had gone through, but said she was trying to present things as a package now. She said she couldn't speak to the prior applications, but could speak to the fact that this Board had determined that because of the lot configuration, there was not a lot of flexibility regarding the deck.

She also said she thought she could state with relative certainty that if Mr. Christensen got through this current variance process, and got some comfort from the elements, this was all the relief he was looking for. She said this was only intended to be a small house, and said he wanted to be able to enjoy it. She said it didn't make sense to have a deck but not be able to enjoy it.

Mr. Sievert asked what case was in court right now.

Attorney Somers provided details on the various matters that had come before the Board, and where they had gone after this. She explained that the original proposal was an entire wrap around deck, and noted that a lot of what the initial battle was about concerned the corner piece of the building near the water. She said the applicant had also asked originally to roof over the entirety of the portion of the building facing the water. She said this had now been scaled down, in part to resolve the pending litigation.

Mr. Bogle said this was the seventh time the Board had had to deal with this property, and said each time, something more was being asked for. He read from RSA 483:B-11 regarding the issue of decks/open porches, and said as he read this, what the applicant was proposing was a closed

porch, in that it would have sliding screens and glass panes in winter that closed it off. He said he didn't think that it met the State's criteria.

Attorney Somers quoted a March 22 2005 memo from NHDES that referenced that section of the Statute and discussed what constituted a three season porch. She said the agency indicated that a three season porch, which was allowed, was screened in, but was not enclosed and was not heated, and did not have insulation and insulated windows installed. She said NHDES did not view what the applicant was proposing to be in violation of that Statute.

Mr. Johnson confirmed this, stating that he had discussed this issue with Doris Wiggins of NHDES.

Attorney Somers noted that the floor was open, which underscored that this was not an enclosed space. She said an open porch was permitted up to a maximum of 12 ft toward the reference line.

Chair Gooze closed the public hearing. He said he was still not quite sure what was different about this application, but said he was willing to accept the idea that it was in fact different. He said he felt the variance request met the hardship criterion, but said for him, the issue was whether what was proposed would damage the environment.

Mr. deCampi said this situation was a self-created hardship. He said when the property was acquired by Mr. Christensen, the long deck approaching the stairs wasn't there, and he said if he hadn't applied for the deck, this situation wouldn't exist. He provided further details on the fact that he didn't feel the hardship criteria had been met.

He said he didn't think what was proposed met the public interest, in that it would add bulk in an area that was incredibly close to the water. He said the Board allowed the building to be rebuilt because it was going to be done exactly the way building already existed. He said that subsequently, the Board was being asked to approve more and more extensions to the building. He referred to this as a "slice of salami" approach.

Chair Gooze asked if Mr. deCampi thought the drainage system was adequate.

Mr. deCampi said the drainage system was a band aid, and said eventually, it would silt up, and the impervious cover would still be there shedding water into the bay.

Mr. Bogle said he agreed with most of what Mr. deCampi had said. He said bugs were hard to accept as justification for roofing over a deck, and said he didn't think this constituted a special condition or hardship in terms of approving this.

Mr. Bogle said that regarding the spirit and intent criterion, this house sat out almost on the edge of the embankment, falling away to the water line. He reviewed the previous applications made by the applicant. He said that given the position of the house on the edge of the embankment, there was the issue of water quality impacts on the shoreland zone, as well as the issue of the aesthetic appearance of the property from the water. He said he thought it was contrary to the spirit and intent of the Ordinance to keep building this property up.

Mr. Sievert said he didn't think this was a band aid approach. He said circumstances changed, and said the owner had every right to use the property. He said perhaps this was a compromise the applicant was looking for.

He said that regarding the hardship, mosquitoes seemed to be a hardship for everyone. But he said the real hardship was the lot itself, and the location of the house that sat there. He said the applicant would never have been able to build what was already there, and perhaps rightly so. But he said it was reasonable to get some extra deck use out of the building, and noted that it appeared to meet the State RSA.

He said he felt the variance request met the purposes of the shoreland overlay district, and noted that he didn't think it could be said that what was proposed would damage the scenic view from the water, given that the house was already there. He also said he thought this house was located in a cove area, and sat low, so perhaps this made it less visible from the water.

Mr. Sievert said he didn't think the spirit and intent of the Ordinance was to enlarge properties, and build next to the water, but said he didn't think this was necessarily what the applicant was doing, in that no additional living space was being created. He said it expanded the usable space, and said a 3 season porch was not usable living space. He said he was on the borderline concerning the spirit and intent criterion, but said in meeting the purposes of the shoreland overlay, he thought it did meet the spirit and intent criterion.

Mr. Sievert said granting the variance wouldn't decrease property values, and said he agreed with what Attorney Somers said about substantial justice being done. He said he felt this variance request was reasonable, and said he could vote in favor of granting it.

Mr. Gottsacker said he didn't think it should be assumed that there was devious intent on the part of the applicant. He also said he had decks, and understood the issue of dealing with snow in winter, especially in regard to an entrance to a house.

Mr. McNitt said this was a tough application for the Board. He said he had felt from the start that the cove where this house was located was one of the nicest places in Durham to put a house, but had also regretted that the existing house there essentially hung over the water. He said the previous owner wanted a big house, and the Board asked him to move it back. He said this applicant didn't want that, and wanted what had been there to stay where it was. He said the Board had approved the reconstruction of the building in the same place, although reluctantly.

Mr. McNitt said he was not worried about the slice of salami approach, but said he was concerned that there was an expanded house that was not only in the shoreland zone, but was practically in the Bay itself. He said there were only a handful of houses that were exposed to the Bay to the extent that this one was. He said he didn't think aesthetics was the biggest element to be considered, but he said it was one of them. He said he also thought that the applicant had done a lot to ameliorate putting a roof on the edge of the shoreland. He said he also appreciated the mosquito issue, and said putting himself in the shoes of the applicant, he too would want the deck enclosed all the way down.

He said any basis for refusal on his part was that this would be against the spirit and intent of the shoreland protection overlay. But he said the house was there, and said the question was how far the Board went in terms of allowing it to change.

Chair Gooze said he felt the variance request met the hardship criterion, in that the variance was needed to allow use of the property for what the applicant wanted to do. He said this couldn't be achieved by anything else that was reasonable. He said he didn't think this was a self imposed hardship, noting that it was tough to say that these days.

He said the key variance criteria were the public interest, and the spirit and intent of the Ordinance. He said from the standpoint of what the property looks like from the water, anything to make it look better was a good thing. He said he felt the erosion issue had been taken care of, although noting he agreed that the drainage system only would last for a certain period of time. He said he felt the spirit and intent of the Ordinance was met in this instance. He also said that given that the property was already there, he thought there was a balance in terms of public and private interests.

Mr. deCampi said he thought approving this application would set a bad precedent because the property was located so close to the water. He said if the Board granted this variance, it would be giving the applicant permission to violate the Ordinance by granting additional impervious cover.

Mr. McNitt said he was more likely to approve a variance for the area that needed protection for the snow.

Mr. deCampi said he agreed, but said it was still a self-created hardship

Mr. Bogle also said he agreed with Mr. McNitt.

There was further discussion about runoff issues, and how long the system should be expected to last.

Mr. Gottsacker said the drainage analysis report stated that there would be a lower rate of runoff as result of the system than there was before it was installed, and said he therefore didn't understand the concern about runoff.

Mr. deCampi said gutters could get plugged, which meant that the water would go right over the edge into the Bay. He said this would most likely happen, so close to the water, and said it was a very fragile situation.

There was discussion that a key issue here would be maintenance of the drainage system.

Mr. McNitt said another key issue was what Mr. deCampi had said about setting a precedent, in the shoreland area. He said he thought that when the Board first agreed to allow the house to be restored on the existing footprint, and not pushed back, a precedent had been set. He said that

therefore, the bigger the Board allowed this apparent living space to be, the bigger the problem would be in the future.

Mr. Bogle said by the Board's previous approval, a screened porch would be rebuilt, which would provide protection from bugs. He said he therefore questioned whether more screened porch was necessary.

Mr. Gottsacker asked whether, conversely, allowing some additional screened porch made that much of a difference.

Mr. Bogle said the Board had been working to avoid roofing and encroachment near the water.

Chair Gooze noted that with a number of shoreland properties, they had been moved back. He said the issue was whether the Board thought it was or was not harmful to the public interest and the spirit and intent of the Ordinance to increase the screened porch area. He said he was considering the precedent issue, and thinking that perhaps granting this would mean there was too much screened porch for this area, and that there was already a screened porch area that was allowed. He said if he would be flexible on anything, it would be on the east side of the building.

There was discussion that the Board could perhaps grant a portion of the variance.

Chair Gooze re-opened hearing. He asked Mr. Christensen what he thought about that approach.

Mr. Christensen showed how he needed to be able to tie in the roof system, stating that there would be problems if this was not done correctly.

Chair Gooze determined from the applicant that granting a variance for just the easterly portion of the property was not what he was asked for.

John deCampi MOVED to deny the Application submitted by Jeffrey P. Christensen, Durham, New Hampshire for Variances from Article XII, Section 175-54 and Article XIV, Section 175-74 of the Zoning Ordinance to enclose an approved deck on an existing, non-conforming structure within the Shoreland Protection Zone, because it does not meet the hardship, and spirit and intent of the Ordinance and public interest criteria, based on the Board's discussion prior to the vote. Linn Bogle SECONDED the motion.

Mr. deCampi said the application failed to meet the hardship criterion because it was a self-created hardship. He said he also thought granting the variance was not in the public interest because it would set a very bad precedent to allow additional construction of any magnitude this close to the shoreland. He said he didn't think the request met the spirit and intent of the Ordinance because there was a risk of additional silting of the Bay from runoff, because this house was so close to the water.

Mr. Bogle said there was already a 15.5 ft. deck that would be screened to give protection from bugs, so he didn't see any hardship concerning bugs. He also said he didn't see as hardship the fact that an additional 10 ft. of deck could not be roofed and screened. He said granting the

variance request would be contrary to the public interest in terms of the precedent that would be set, and the ratcheting up of the property. He noted that the applicant had presented pictures of other shoreland properties that encroached to a greater or lesser degree, but he said there was no evidence as to whether these properties were legal.

Mr. Bogle said he didn't think it was in the public interest to allow further encroachment, almost to the water's edge. He noted that the Board had been much stricter with some other cases where the buildings involved were not nearly as close to the water as this one.

He said the spirit and intent of the Ordinance was to try to control encroachment on the water's edge, and said he didn't think the application met this. He said the issue of impacts on the values of surrounding properties was a wash, in this instance.

Mr. Bogle said he wished the Board could deal with the two parts of the variance separately.

Mr. Sievert said he felt the variance application met the five criteria, and said he didn't think that putting a roof over a deck that already existed was an encroachment.

Mr. McNitt said he would support the motion, for the reasons others had given. He also said he considered that there was enough hardship that he would support the variance request regarding the east portion of the property.

Chair Gooze said he had decided that the hardship criterion was not met in this instance, although noting he would be willing to grant a variance concerning the easterly side of the property. He said he would not be willing to grant a variance concerning the water side, and noted that there was already some protection from bugs on that side. He said the issue of whether the spirit and intent and public interest were met depended on whether the drainage system was adequate, over time, but he said it was not a permanent solution. He said he therefore did not feel the variance request met these criteria.

The motion PASSED 1-4, with Mike Sievert voting against it.

Ted McNitt MOVED to approve the proposal to the extent of the section on the east side of the house, and not the section on the south side of the house. Linn Bogle SECONDED the motion.

Mr. deCampi said he had no problem with this, if it meant the issues with the applicant could be resolved by doing this. He said if not, he saw no reason to grant this when there was a legal suit hanging over the Board's head.

Chair Gooze noted that the Board had been told by Mr. Christensen that what the Board had included in the motion was not what he was looking for.

The motion PASSED unanimously 4-1, with Mr. deCampi voting against it.

- C. **PUBLIC HEARING** on a petition submitted by Jeffrey P. Christensen, Durham, New Hampshire for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to build a garage within the front yard and side yard setbacks. The property involved is shown on Tax Map 20, Lot 1-0, is located at 595 Bay Road, and is in the Residence C Zoning District.

There was discussion that there would be site walk of the property at 5:30 pm on March 27, 2007.

Ted McNitt MOVED that Agenda Item II C be continued to the April 10, 2007 ZBA meeting. John deCampi SECONDED the motion, and it PASSED 5-0.

III. **Approval of Minutes –**

December 12, 2006

I NEED TO LISTEN TO THE TAPE FOR THIS; I DIDN'T HAVE MY COPY OF THOSE MINUTES AT THE MEETING

January 9, 2007

Page 2, 4th paragraph, should read "...the former property owner said it was..."

5th paragraph, should read "...that laid out three different..."

Page 3, 5th paragraph, should read "...if the Board decided that there could be..."

Page 4, 3rd paragraph from bottom, should read "...Mr. deCampi said he did feel it was..."

Page 5, 3rd paragraph from bottom, should read "...would go with grandfathering with 5 occupants..."

Page 6, bottom paragraph, should read "...some of the applications were likely..."

Page 12 – PLEASE SEE THAT PAGE - I NEED TO CHECK THE VIDEOTAPE

Page 15, should read "Otho Wells, 65 Bagdad Road"

Page 16, 4th paragraph from bottom, should read "...done concerning a buffer to the front along Bagdad Road." Next sentence, should read "amenable"

Page 18, 2nd paragraph, should read "in terms of the 100 ft setback..."

John DeCampi MOVED to approve the January 9, 2007 Minutes as amended (PENDING CHECKING THE VIDEOTAPE). The motion was SECONDED by Jerry Gottsacker, and PASSED unanimously 5-0.

V. **Other Business**

VI.

- A. Next Regular Meeting of the Board: **April 10, 2007

Chair Gooze noting the upcoming OEP conference in April.

There was discussion about proposed increases in ZBA fees. Mr. Johnson explained that a fee structure had been established that addressed some of the staff time needed to deal with various ZBA related matters.

There was discussion that the SAE case was over, and that there was a letter regarding this.

IV. Adjournment

John deCampi MOVED to adjourn the meeting. The motion was SECONDED by Linn Bogle and PASSED unanimously 5-0.

Adjournment at 9:40 pm

Victoria Parmele, Minutes taker