D-R-A-F-T

ZONING BOARD OF ADJUSTMENT MEETING MINUTES
TUESDAY, JULY 8, 2008
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT: Jay Gooze; Jerry Gottsacker; Ruth Davis; Carden Welsh; Robbi Woodburn; Edmund Harvey; Sean Starkey

MEMBERS ABSENT:

OTHERS PRESENT: Tom Johnson, Code Administrator/Enforcement Officer; Victoria Parmele, Minutes taker

I. Approval of Agenda

There was discussion that the Sidmore application was a rehearing, in that the ZBA had denied the previous variance request, the Sidmores had asked for a new hearing and this had been granted.

Robbi Woodburn MOVED to approve the Agenda as submitted. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

II. Public Hearings:

A. **PUBLIC REHEARING** on a February 12, 2008 denial of a petition submitted by Evelyn Sidmore, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to install cement retaining walls for soil removal and erosion control on south end of the basement and north end, 8 feet east from original house stairs within the sideyard and shoreland setbacks. The property involved is shown on Tax Map 12, Lot 2-12, is located at 8 Cedar Point Road, and is in the Residence C Zoning District.

Attorney Tanguay said as a rehearing, he had to come back with the same plan that there had been before. He said the plan he would be discussing was therefore the plan that was before the ZBA in February. He said the essence of it was that on the south end of the house, the southwest wingwall had been cut back. He provided details on this, stating that to the extent that it remained, it would hold back the soil, and wouldn't be visible beyond the porch.

He said that on the southeast side, the wingwall had been cut back a little bit beyond the edge of the house, and said the remainder would be completely covered. He said it too would serve as a retaining wall to hold back the soil. He said that in this area on the southeast side, the ground would be raised higher than it was at the beginning, and said landscaping would serve as a screen to the Bates property. He noted that the landscaping plan was not quite ready.

Attorney Tanguay said the plan was also a restoration plan, which was very similar to this plan. He said Mr. Eckman was working with NHDES on this. He said the most recent meeting with the agency had been on June 30th, and said they were close to agreement. He said there would be a return of soil to the site equal to the material that had been taken out. He said the soil would be brought back in up to the patio area, where there would be retaining walls that would prevent soil from getting into the patio area. He said the opening from that area wouldn't be wider than five feet, and said people would be able to exit this area in a serpentine fashion, explaining that one wouldn't be able to look straight into the patio area because of the mounding that would be there. He said the applicant proposed that the patio as built would remain.

Attorney Tanguay said after the last hearing the Sidmores had been through with the ZBA, Mr. Johnson had written a letter, dated February 15, 2008, which had outlined what would be necessary to bring the existing construction up to the Ordinance requirements, if the variances were not granted. He said this would involve bringing the soil back to the original level, up to the house, which meant that at the house level, all of the wood framing material would have to come out, and would need to be replaced by something that would accept soil up against it. He said this would involve jacking up the house, and reinstalling cement or other material.

He said the letter also spoke about installation of window wells, and he said the net effect of this, if someone had to leave that space as a second means of egress, would be that the person would have to crawl under the porch above, open the window, climb into the window well, and up the ladder. He said the applicant believed that this was simply not a reasonably feasible alternative for fire safety, cost, and engineering reasons.

Attorney Tanguay said he understood that the ZBA didn't want to rehash a lot of material, but said to be fair to the Sidmores, he needed to go over some matters. He then handed out a document entitled "Request for Findings of Fact and Rulings of Law", and began to review this document in detail.

As Attorney Tanguay was speaking, Chair Gooze stressed that this was a rehearing for a variance, and said it was therefore important to stick with the five criteria for granting a variance as part of this public hearing process.

Attorney Tanguay said a problem was that the applicants had never been told what they were supposed to be asking for, with a variance application. He said the agenda that evening was similarly unclear. He said he didn't believe there was a sideyard setback issue, and said he thought the only issue was a shoreland setback issue. He also said he didn't believe there had been a violation of the Ordinance, and said he didn't feel a variance was in place or required. He asked that he be allowed to go through this document.

Chair Gooze said Attorney Tanguay could go ahead.

Attorney Tanguay read through the document, concerning his position that there had been no violation of the Zoning Ordinance, and that it was not clear now what the variance was for.

Chair Gooze said at the original variance request, in discussion about the original approval, there was much discussion about the shoreland and sideyard setbacks in terms of the entire way the house was being rebuilt. He provided details on this.

Attorney Tanguay spoke about the process of coming before the ZBA. He said in this particular case, when the applicants first came before the ZBA, the original letter said there was a shoreland issue and a sideyard, issue. He said the plan presented at that point dealt with those issues. He said at the public hearing, a member of the ZBA said there was a further issue, regarding an increase in the footprint and volume of the house in the shoreland area. He said at that point, further plans were submitted to the Board, based on revised calculations.

He said the Kaiser plans did deal with footprint and volume issues, but didn't show a basement, which wasn't part of the issues before the Board. He said they also didn't show the garage on the north side of the house, and didn't show the south end of the house with the walkout. He said the plans submitted to the ZBA in 2006 were never violated, on the issues that were before the Board. He said there were things that showed up in 2008, when one got to the construction plans. But he said these were issues that were not relevant to the Board in the first place. He said no approvals were ever granted for the garage, and said no approval was necessary. He said the garage did not show up on any plans presented to the Board in 2006; the use of the garage was not relevant to the Board's inquiries in 2006; and it was not depicted on any plans. He said the same applied for the south side elevation.

He said the ZBA's attorney in the Bates appeal stated that to the extent that there were any "discrepancies" between what was shown to the ZBA in 2006 and what was built in 2008, these "discrepancies" were not "violations of the previously granted variances." He said the Town, in the documents filed with the court, had stated that the construction contemplated by the Building Permit did not constitute a violation of the Zoning Ordinance, or a violation of the previously granted variances.

He said the question therefore was why the Sidmores were before the ZBA, if there had been no violation of the Ordinance, or the prior variances. He said part of this problem was that the applicants hadn't gotten clear specification at any time as to what the issues were. He provided details on this, including details on what the Sidmores had gone through in trying to work with the process.

Attorney Tanguay spoke in some detail about the fact that the applicants had thought the sideyard setback had been addressed, as of the November 2007 hearing. He said he felt Section 175-74(A)(1) concerning the shoreland setback was the only issue that was close to being one that should be before the ZBA. He said what happened in 2007 during construction did not involve any new building, structure, enlargement, or modification of an existing building or structure extending into the shoreland setback, beyond that which was approved by the prior variance. He said there was therefore no violation of the Zoning Ordinance, and said he had a real issue with what they were there to talk about.

But he said that from the February 2008 ZBA meeting, he knew that the Board thought there was a sideyard setback issue and a shoreland setback issue. He said he would deal with these. Attorney Tanguay then went through the variance criteria as they applied to this application

Attorney Tanguay read through and provided additional details concerning the numbered Items in the "Request for Findings of Fact and Rulings of Law".

He read through and commented in items 43-45 concerning how the public interest criterion was met with this application. He discussed some recent court decisions on the public interest: Malachy Glen Associates, Inc. v. Town of Chichester; and Chester Rod & Gun Club v. Town of Chester. He noted that the Court had said that the requirement that a variance not be contrary to the public interest was related to the requirement that it be consistent with the spirit and intent of the ordinance.

He said the Durham ZBA had found in February that the variance requests were not contrary to the public interest. He said having found this, the Board needed to then find that it was consistent with the spirit of the Ordinance, based on the Malachy Glen case. He then reviewed and commented on Items 46-50 concerning how the variance request met basic zoning objectives, something the Malachy Glen case had considered in some detail.

Concerning the hardship criteria for an area variance, he read through #51-53 regarding the fact that special conditions existed that a literal enforcement of the provisions of the Ordinance would result in unnecessary hardship. He reviewed items #54-58, concerning the issue of whether there were reasonably feasible alternatives to the sliding glass doors. As part of this, he provided an estimate from D & D Homes, and a letter from Eckman Engineering which indicated that the total cost of meeting the requirements would be approximately $40,000.

He said such a cost was an undue financial burden to the landowner. He noted that a letter from Mr. Eckman said reconstruction as suggested by Mr. Johnson was not a reasonably feasible alternative, would violate the structural integrity of the building, and would require extended work in the shoreland protection area without any resulting benefit. He noted that Mr. Eckman had said the proposed soil restoration plan would result in gentler slopes, which would allow greater infiltration of water into the soil, and less likelihood of any runoff reaching the bay.

Attorney Tanguay spoke in great detail about 56 (d) concerning fire safety, and the Code Officer's letter of February 15, 2008 requiring replacement of the doors with windows and window wells. He said that merely satisfying the Safety Code, as the Code Enforcement Officer had proposed, with window wells, when an obviously safer route was available and already in place, was not a reasonably feasible alternative.

He provided three fire safety documents concerning this issue, and also said Pease Fire Captain Randy Rouleau was present to answer any questions the Board might have concerning this issue. He also provided letters from the Fire Chief and the Fire Inspector that concluded that the code could be satisfied by building window wells, but that the code was exceeded by doing what was on the ground at the Sidmore property.

Attorney Tanguay next reviewed items #59-62 concerning the spirit and intent of the Ordinance, noting as he had previously that having found that the variance was not contrary to the public interest, the Board must find that it was consistent with the spirit of the Ordinance, as the two were co-extensive.

He reviewed items #63-64 concerning the substantial justice criterion, and how it was met with this application. As part of this, he said the proposed use was consistent with the area's present use, so there would be no harm to the public. He said that in fact, the public would be harmed if the variance was not granted because of the potential harm to the shoreland, and the potential fire safety concerns, given the extreme burden upon the landowner, both in terms of cost and in terms of the issue of the structural integrity to the home.

Concerning whether granting the variance would diminish the value of surrounding properties, addressed in Item #65, he said the Board had found on numerous occasions that this would not be the case. He also noted letters on file from residents of the neighborhood who agreed that the new home would not diminish the value of surrounding properties. He provided details on this, noting that four of these people had written additional recent letters that there was no decrease in the value of surrounding properties. He read through some of these letters.

Attorney Tanguay summarized that all of the variance criteria had been met. He said Mr. Eckman and Mr. Rouleau were available to answer questions.

Chair Gooze asked Mr. Eckman when he had gotten involved with the new proposal to NHDES.

Mr. Eckman said he got involved once the Sidmores received the letter of deficiency from NHDES.

Mr. Gottsacker asked Fire Captain Rouleau what his experience was with crawl space accessibility, when there was snow on the ground.

Mr. Rouleau said the code said that snow and ice couldn't block an egress, and said it wasn't feasible for a member of a fire department coming to Durham to come with a shovel for this kind of situation. He said it would be considered an un-accessible egress in that situation.

Mr. Gottsacker asked Mr. Rouleau what his experience in general was with dealing with window wells.

Mr. Rouleau described what was involved in using window wells for both access and egress. He said it functioned like a chimney, and could be a very hot and uncomfortable situation. He said window wells were not as good for egress as what was there now, the sliding glass doors. He said the code indicated this.

Chair Gooze asked why the code allowed window wells, in that case.

Mr. Rouleau said the code stated what was best, and also what was acceptable. But he noted that the code said that if there was a sliding glass door, a secondary means of egress wasn't necessary. He said that was probably why the Durham Fire Inspector said it exceeded the code.

Chair Gooze asked if there were any members of the public who wished to speak for or against this application.

Steve Kavleage, 2 Cedar Point Road, said there was no home in the area that had a better vantage point of the Sidmore home than he did. He said he was ecstatic and very appreciative of what they had done with the property. He said that regarding the fire safety issue, he was concerned that the ZBA would consider having the Sidmores remove the sliding glass doors. He asked them to imagine a situation where someone, perhaps someone disabled, was trapped in the house because the ZBA had made the Sidmores take the doors out.

8:20 – 8:30 recess.

Attorney Shulte first noted none of the four recent letters from neighbors were written by abutters to the property. He also said that Mr. Kalvelage couldn't see the southern end of the Sidmore property that was of concern.

He said the ZBA had previously voted to deny this variance that was being asked for now, and he said nothing had changed, including the basic premise, that the information presented to this Board in 2006 was at best incomplete. He reviewed this information. He noted that Attorney Tanguay had provided pictures at one point, which showed what the property would look like with a doublewide house on it. He said this picture showed the garage underneath on the north end.

He said photos were also shown of the new house superimposed on the site, taken from the water. He said these photos showed the house as being on grade with all of the existing landscaping. He said Attorney Tanguay had acknowledged that this was not what was built, and was not what had been applied for. He said that Mr. Johnson had said that he had recognized discrepancies between the plans given to the ZBA in 2006 and to him in 2007, and that he had put qualifying language in the building permit that said the applicants needed to come see him to work things out.

Attorney Shulte said in the Minutes of the October 2007 ZBA meeting, a Board member said these photos were helpful. He said Board members had thought the project was too big initially, which was why it was turned down. He said these photos had persuaded the Board that this house, sitting on grade, with the landscaping plan, showed that the house wouldn't overwhelm the neighborhood. But he said that wasn't what happened.

He said some time after the Sidmores got the approval in the fall of 2006, they decided to do something more, to excavate about 300 cubic yards of fill that they didn't need to excavate. He handed out photos Mr. Eckman had taken as part of his work, because the land was so close to the water. He said these photos showed two important things, that it was not necessary to excavate any soil in order to construct a foundation for the property.
He also said there weren't wingwalls in these photos, when the foundation was originally laid and certified. He said they were not essential to the structural integrity of the building, and said architect Art Guidano had said the wingwalls had nothing to do with the support of the house. He said the foundation plan provided by Mr. Eckman showed that the porch was supported on piers.

He said the other thing that didn't change from February 2008 to now was that the applicant at the time didn't give the Board sufficient information to determine whether the proposed project was too big, or if it was appropriate to the locale. He said because the Board didn't get this information, it shouldn't be asked now to justify something contrary to what had already been approved.

He said a ZBA member had said in February that the application was substantially increasing the use on the south end of the property, with the patio, walkout, and the excavation of all that soil. He said a Board member had said the density of the use at that end of the property was at least doubling, and perhaps more, because it became a main access in and out of the apartment. He said a Board member had said that since this construction took place within the setback, it increased the impact on the neighbors.

Attorney Shulte said another ZBA member had said the purpose of setbacks was to protect abutters from uses that were too close. He said another said the amount of disturbance of the shoreland was extensive, and that there were feasible alternatives, which would not impact the shoreland.

He said Attorney Tanguay had focused on the window wells that evening. He said this egress/access approach was acceptable, stating that while there might be problems in bad weather, there could also be problems with sliders in bad weather. But he said a key point was that this means of egress/access wasn't the only alternative available.

He said the issue wasn't how to maximize the apartment use or rental use. He said the only issue to consider was to think of it as if it hadn't been built, and at what the alternatives were. He said among these were sprinkling of the building, or a secondary means of egress within the building itself – an interior stairway. He said this could be done without needing a variance at all, and said both were sanctioned by the code. He said the applicants therefore couldn't pass the hardship test.

He said the question wasn't whether the Sidmores should be allowed to have an apartment in the house, but he said this didn't mean that the ZBA had to bend the rule. He said the applicants could provide egress/access within what the building code, life safety code and the Zoning Ordinance allowed.

Regarding the appearance of the building and the site, the drainage, and the impact on the shoreland, Attorney Shulte said Attorney Tanguay's presentation suggested that they all should be thankful to the Sidmores for violating the law.

He said Attorney Tanguay had said when the applicants sought the variance in 2006, they never discussed with the Board what would happen in terms of construction on the south end of the building. He said to some extent that was true, in that they didn't say they would be excavating; putting in wingwalls, a patio, and sliding glass doors. He said they did say a number of things, including that the building would be put as far back from the water as possible. He read through Minutes of previous meetings concerning this and other things.

Attorney Shulte said if the cost now for the Sidmores was to restore the site, this was not the ZBA's fault or the Bates' fault. He said the Bates had supported the new building, but he said if they had been told about the excavation and extra activity that would occur at the basement area, they

wouldn't have sent the letter they had sent. He said he thought it was likely that the ZBA wouldn't have approved the variance application at that time, with all of the information it now had. He said it was fair to hold the Sidmores to what they had said they would do.

Attorney Shulte reviewed the variance criteria. He said concerning the hardship criterion, that there were clearly alternatives, and said Mr. Guidano, would speak about this.

Regarding the spirit and intent of the ordinance criterion, he said the ZBA had made substantial findings about this last time, including the substantial impact on the neighbors, the poured patio within the setback, the wingwalls, etc. He said the proposed plan the applicants were talking to NHDES about called for new retaining walls parallel to the end of the house, so the patio area could be protected.

Concerning the substantial justice criterion, he said Attorney Tanguay had said there would be no harm to the public. But he said hundreds of cubic yards of soil had been removed unnecessarily from the shoreland, as indicated by their own photographs. He said if this hadn't been done, all of the disturbance there for the last year wouldn't have happened, and the site would have been in a lot better condition than it was now.

Chair Gooze asked if Board members had any questions for Mr. Shulte.

Mr. Gottsacker noted that Attorney Shulte had said it was not necessary to excavate the soil, and he asked for clarification on this.

Attorney Shulte said he had said it was not necessary to excavate all the area in front of where the sliding doors were, at the south end of the building. He said they didn't have to take out that hill in order to build the house, and only had to take it out if they wanted to do more than what they told the Board they were going to do, - to build the full walkout

Art Guidano, AG Architects, said there were two primary issues regarding the hardship issue he had been asked to address, - the structural integrity issue, and building codes. He said his goal was to return the grades o the original grade without the walkout and without the need for a variance.

He said he had practiced architecture for 32 years and had done numerous projects, including high-rise buildings and other complex facilities. He said he also had training as a fireman and had fought fires. He said he therefore understood what was safe, from both of those perspectives.

Regarding the issue of structural integrity, he said the only purpose of the wingwalls in the design was to allow regrading, to permit the full height walkout basement. He said whether they were removed or not would not effect the structural integrity of the house. Regarding the foundation wall, he said that based on drawings he had seen, the structural system was fairly straightforward. He said the foundation walls provided support down the two sides, and said down the center line, there was either a beam or columns.

He said the framing issue was that the house came in two parts, and these parts were set on the three bearing walls. He said the wall at the south end of the building was not a bearing wall, although he

noted there was a bearing column at the center of that wall. He said a photo taken during construction showed several items. He said the wingwall underneath the porch didn't support the porch or the foundation of the house. He also said 75-80% of the wall where the sliding glass doors were was open glass, and he said that was not a bearing wall. He said there might be some headers above the window, but said they were not structural

He said if the house were not built, and even now that it was built, it would be easy to build a foundation wall and grade against it without having to do all the excavation and having walkout doors. He provided details on this. He said that structurally, it would be feasible to take out the sliding doors and put in a concrete wall underneath where the sliders now were. He said if the walls were full height, the house would have to be jacked up, or it could be partial height, in which case it wouldn't have to be jacked up. He provided details on this.

Mr. Guidano said the building had already been carried down the road, and he said it could be lifted again. He said that structurally, it probably had more capability than a stick built house. He gave examples of situations where he had been involved with houses that were jacked up, with hardly any damage, and said it was common practice. He said if it needed to be done, there was nothing to prevent it. He also said this might not need to be done, by building a partial height retaining wall for the foundation.

He said there were numerous solutions that could have been approached without requiring removal of the soil, to allow the basement to function as an apartment, without impacting the neighborhood and the Bates.

He said he agreed window wells were not the safest means of egress and access, but said they were acceptable. But he said there were two other alternatives to this. He said sprinklers were one, and with them, a secondary egress wasn't needed. He noted that fire departments preferred them to anything else. He said if there were such a system for the Sidmore house, egress wouldn't be needed at the lower level. He said a second alternative was a second stairway in the house, and he provided details on this.

There was discussion between Mr. Guidano and ZBA members concerning the stairway option. Mr. Guidano explained that a stairway coming up from the basement would be perfectly acceptable as long as it exited to the outside without going to the upstairs.

Robin Mower, Faculty Road, said she didn't know the Sidmores or the Bates. She said she thought there had been a fairly minimal discussion on impacts to the shoreland, that evening, although noting that it had been said that the Sidmores would actually be improving the shoreland. But she said conservation experts would argue that any manmade, artificial alteration was never preferable to naturally functioning wetlands. She said in this instance, someone had violated the Ordinance, and then had claimed that what they wanted to do was better for the shoreland. She provided details on this, and said granting the variance would be rewarding scofflaw behavior.

Mr, Eckman said the Sidmores' home had been delivered in six pieces. He said if it was lifted in place now that the house had been put together, there was a lot more at stake. He said if a full height foundation wall was put in, the house would have to be jacked up and set back down. He said with a

half wall, the load would still have to be transferred to that half wall. He said settling, and crookedness could still be a problem if this were done.

Mr. Eckman said that concerning another point that had been made, there were no impacts to wetlands as a result of this project, and said they were in the shoreland protection area.

Regarding the structural part of the end wall, he said D & D Homes had said at the last meeting that the center footing had columns, but at the end it spanned to the end wall. He said there was a beam that sat at the middle of the wall between the doorways and the windows. He said the point load was at the middle, and would have to be lifted slightly if a foundation was put in. He said he had not said it was an end bearing wall.

He said he wasn't involved with the structural aspects of the project, so didn't want to comment on the structural issues concerning the wingwalls.

Attorney Tanguay provided additional points. He said there was no issue of impacting wetlands, and said this area had been fill to begin with. He said what the abutters were after was to restore the original grade without a walkout, without a door, and a safe means of egress. He said Attorney Shulte had said the plans provided to the Board in 2006 were incomplete. But he said these plans were entirely complete, for the issues that were before the Board. He said there was nothing in those plans that was in any way misleading.

He said the comment that the Sidmores had said the house would be built on grade was simply not so. He noted that the plans from Kaiser didn't show the bottom part, including the garage. He said the garage was never in any of the plans that were before the Board, but he said this didn't mean that the garage was wrong, and a variance was needed.

Ms. Davis said she recalled that the purpose of showing the photos to the Board previously was to demonstrate the scale of the proposed home.

Attorney Tanguay said they were talking about footprint and volume, and did a rendering that involved superimposing the new house from the manufacturer on the location of the old house.

There was discussion that there weren't views of the side of the new house because the renderings were done from photos that showed the house from the front.

Ms. Woodburn said the architectural elevations presented as part of the original variance showed clearly that the finished grade of the south end was going to be a foot or two below the porch. She said to hear Attorney Tanguay say that what was built was the same as what was in the drawings for the original variance was unbelievable.

There was discussion on the elevations for the garage. It was determined subsequently that there were no elevations for the garage.

Ms. Woodburn said the critical area was the shoreland setback, and said the finished grade had to be shown, accurately, in the architectural drawings.

There was discussion between Chair Gooze and Mr. Tanguay about NHDES's involvement in this project. Attorney Tanguay said NHDES had expected that any soil that was removed would be returned, and the applicants had expected that they wouldn't have to return the soil.

Chair Gooze said when the Board had those plans, it was going with the understanding that NHDES also had the plans, and felt they knew what was going on. He provided details on this.

In answer to a question from Mr. Gottsacker, Attorney Tanguay said the wingwalls on the southwest side had been cut, at a 45-degree angle, but he said the wingwalls on the southeast side had not been cut yet.

Ms. Davis asked what part of the retaining walls the applicant was asking for variances for, and Attorney Tanguay demonstrated this. He said these wingwalls didn't present a structural issue for the house, but said they held back the soil.

Mr. Welsh said he thought that part of the patio was in that same setback area, and that it wasn't just the wall that needed the variance.

There was discussion that the patio was directly underneath the porch, and didn't extend beyond it.

Carden Welsh MOVED to close the public hearing. Jerry Gottsacker SECONDED the motion.

Ms. Davis asked what form of egress the prior basement apartment had. Attorney Tanguay said the existing apartment only had a way out at the garage end.

Mrs. Sidmore provided details on this, stating that it was built to code at that time.

The motion PASSED unanimously 5-0.
Recess 9:20-9:22 pm

The Board started deliberations by discussing whether variances were required for the sideyard and/or the shoreland setbacks.

Mr. Welsh said he wasn't sure about what variances were required.

Ms. Woodburn said she felt a variance was needed for the sideyard setback, but said she wasn't sure about the shoreland setback. She provided details on this, noting that she had personal experience of trying to interpret the Ordinance concerning shoreland disturbance. She said in that situation, she had decided to go for a variance given that uncertainty, and had received it.

Mr. Gottsacker said the safest approach was to treat them as though they did need variances.

MAKE SURE YOU KNOW WHERE THIS GOES

Ms. Davis said that concerning the shoreland setback, the purpose language addressed soil disturbance

Ms. Davis noted that the existing Ordinance addressed structures in the shoreland area, but she said the previous version of the Ordinance said on grading could take place there. She said that had been taken out. She said the question came down to whether excavation beyond normal construction envelopes was allowed.

Chair Gooze said he felt the Board should be addressing this. He also said he felt the Board needed to address the sideyard setback. He provided details on this, noting that the reasons the courts gave concerning the public interest and the spirit and intent of the Ordinance didn't really address issues like a swimming pools right underneath a neighbor's window. He said he thought the purpose of sideyard setbacks was to address things like this.

Mr. Welsh said he agreed the Board had to address that. He asked if the Board agreed with any of the reasons Attorney Tanguay had said that the variance wasn't needed.

There was discussion.

Chair Gooze said he felt the reasons for the variance had been spelled out.

Mr. Welsh said it was hard for him to follow the logic as to why the variances wouldn't be needed, and if they were needed, why the situation was any different than was the case in February.

There was further discussion.

Ms. Davis asked whether when the variances were granted for the house, and for the porch, that meant the Board didn't have jurisdiction underneath the deck. She also asked if the variance only involved the portion of the retaining wall that went out from the deck. There was discussion.

Mr. Welsh said the Board had felt last time that by building the patio underneath, the applicants were increasing the density.

There was discussion about whether it was the use that was of concern, or if the concern was a structure within the sidyard setback.

Mr. Johnson said a patio on grade was not a structure, unless the applicant planned to put a screened room on it in the future. He noted that if this were in the shoreland area, a permit would be needed from NHDES. There was discussion about whether a variance was needed from the Town for soil disturbance, etc, as part of putting in the patio.

Chair Gooze said a problem he had with this application was whether, if the applicants had come in with all of these plans the first time, he would have been willing to grant the original variance. He said a key question was what happened when someone got approval for a porch, and then built something underneath it. He said he felt the applicants clearly needed to come back for this variance.

There was discussion as to whether a retaining wall was a structure. Mr. Johnson said retaining walls weren't in the definition for structure, but said under the building code, a retaining wall four feet or higher was a structure. Mr. Gottsacker read the definition of structure. Ms. Davis said she thought a retaining wall was a structure because one couldn't pick it up and move it.

Ms. Woodburn asked Mr. Johnson whether, if someone wanted a five-foot concrete retaining wall, he called it a structure, and Mr. Johnson said yes.

Chair Gooze asked if the sliding glass doors could be considered a modification of the existing building. There was discussion. It was noted that they were discussing page 112 of the Zoning Ordinance.

Jerry Gottsacker MOVED that we believe a variance is required for this application. Chair Gooze SECONDED the motion, and it PASSED 4-0-1, with Carden Welsh abstaining.

Property values

Mr. Gottsacker noted that the Board had talked about this with previous applications from the Sidmores.

Substantial justice

Chair Gooze said this had to do with the difficulty of the land being outweighed by the public interest. He summarized that the Board appeared to be ok with this.
There was discussion on what the Board was deliberating on. It was agreed that the two issues were the retaining walls as shown in this plan, and the disturbance of the soil. Jerry said Chair's idea was a good one, to assume that the applicants wanted to do this, and not that the work had already been done.

Chair said a lot of what had been said that evening was the cost of what it would be to take this out and put something else in. He said he felt strongly that this was not the way to look at this, because then anyone could say this. he said the equitable waiver had already been discussed, and didn't nave to do with this. He said economics came in terms of what was a reasonably feasible alternative, assuming that none of the work had been done.

IT was agreed to go through the variance criteria for installation of the retaining walls and soil removal and erosion control……

Ms. Woodburn said what was shown on the ___ plan would not diminish the value of surrounding properties. Others agreed.

Chair Gooze noted that the substantial justice criterion meant the discomfort to an individual landowner would be outweighed by the public interest. He said that to him the public interest was the shoreland, in this instance, and Ms. Woodburn agreed.

Mr. Gottsacker said he thought the public interest pertained to fire and safety. He said the whole purpose of codes was to address this. He said if an applicant was coming to the Board and saying he wanted egress, sliding doors seemed like a better way to go than window wells. He said with this reasoning, he felt the application met the substantial justice criterion.

Other Board members agreed that this criterion was met.

Chair Gooze noted that the spirit and intent of the Ordinance and the public interest criteria were somewhat combined now. He said in terms of the spirit of the Ordinance, it seemed obvious that the sideyard setback was meant to protect the neighbors.

Mr. Welsh said that was what the Board had said in February.

Chair Gooze said a question was whether this plan was good enough to protect the neighbors.

Ms. Woodburn said in this proposal, there was not a patio where there would be a big party. She said she hadn't understood previous discussion by the Board that the use of this patio would represent an increase in volume, and would mean there would be people out there making a nuisance of themselves to the neighbors.

Mr. Gottsacker said this design mitigated some of the concerns like that, which had been expressed early on.

Chair Gooze said if the hedges were a bit taller, that did mitigate the problems. He said he had more of a problem with the hardship criterion.
Mr. Welsh said the patio was there so people could sit out there and watch the river. He said if he lived there, he would spend his time there.

There was discussion that the landscape plan, as part of an approval, would address the issues.

Chair Gooze said he would be comfortable with this, if the landscaping was there.

Ms. Woodburn said she thought DES would require it. She said if the grading and landscaping plan were done in the way shown in the plan, any negative impact of a social nature under the deck would be mitigated, so this would not be contrary to the public interest.

There was discussion on the plan, including the grades that showed mounding, the plantings, etc. that would mask the end of the house.

Chair Gooze said concerning the hardship criterion, the issue was whether there were other feasible ways to do this. He said he agreed that there were, and said the egress windows were the least of what he would want to see as a means of egress. He noted that one door could provide egress, rather than the sliding glass doors.

Ms. Woodburn asked how feasible the Board felt adding a stairway or sprinkling were.

Mr. Gottsacker said he would discard the idea of sprinklers, for a residential home. Ms. Woodburn noted that the national code was moving in the direction of requiring sprinklers in residences.

Mr. Gottsacker said for him, the egress issue came down to either providing a stairway or the sliding glass doors.

Chair Gooze said what the owners wanted to do was to come out into the patio area, as there means of egress. He said he was leaning toward something with good hedges and landscaping. But he said because he didn't have a final idea of what it would look like, he wasn't sure he could vote for this. He said if he could find the right thing to protect the neighbors, still provide access, etc., he could support this.

Mr. Gottsacker said if he heard Chair Gooze correctly, he had said he could support the variance request if the right condition could be developed. Mr. Gottsacker said he agreed with this, and said they needed to figure out what the condition was.

Chair Gooze said it was 10:00 pm, but said it was fair to hear the next application that evening, if the applicants wanted this. The applicants (the Lenharths), said they did want their application to be heard that evening.

Ms. Woodburn said she didn't want to address this application right now with a condition. She said just handing in the drawings was not enough. In answer to a question from Chair Gooze, she said with the right conditions, she would be ok with the size of the patio. She said it sounded like the Board was moving in the direction that if the impacts were mitigated with grading and landscaping, it could approve this variance. She said the only thing they weren't there yet with was concerning the hardship criterion.

Mr. Welsh said landscaping lasted until the property changed hands, and said someone might decide to cut down the vegetation to get back the view. He said there had to be grading, and said it was hard to tell from the plan how much grading there would be. There was discussion on the grading.

Mr. Gottsacker said Mr. Welsh's point was a good one. He said using the grading was key because it was fairly permanent.

Mr. Tanguay said the photo had previously been provided with great reluctance. He said that while it provided a general idea, it was not accurate to the plan. He said the plan was accurate, and said the photo was not, and showed the area as being more open than the plan showed it to be. He said the landscape plan wasn't quite complete.

Ms. Woodburn said the Board had to address the hardship criterion. She said she agreed with Mr. Gottsacker that it went back to fire and safety, but asked if there were other methods that would not require a variance, or impact the shoreland setback, which provided the egress that this whole thing was based on.

Mr. Gottsacker said it came down to putting in a stairwell or this plan. He said if he were going for a variance, he would like the option of the sliding glass doors, with a little private patio.

Ms. Davis said they were asking for a variance for the retaining walls, and not the best way to provide egress.

Chair Gooze said the Board had already decided that the variance was for the whole thing, the patio, egress, etc.

Ms. Woodburn said the retaining walls were holding back the grade, so the doors could be there for egress. She said the question was whether either window wells, stairs or sprinklers were more reasonable than sliding glass doors.

Mr. Gottsacker considered what kind of egress would make the most sense if his mother in law lived at this house.

Chair Gooze said in terms of the hardship, a question was whether the applicants were saying it was just the egress they wanted, or egress in the way that was there now. He said if this was what they wanted, and they needed a variance to do it, the courts these days were saying that this was a hardship.

Mr. Gottsacker said if it were his son at this house, he would still rather have the sliding doors as access than the stairway.

There was discussion about sprinklers, how much they cost, and what the problems and advantages with them were. Mr. Welsh said $5,000 wasn't bad compared to the $40,000 the Board had heard it would cost for the major reconstruction work.

Chair asked if there were any Board members who disagreed that the variance application would meet the _____criterion, with this plan grading and adequate landscaping.

Mr. Welsh said his emphasis was on the grading. He discussed the particulars of the plan, and said he thought the _____ criterion would be satisfied, for the sideyard setback.

Chair Gooze said the question was whether there was another feasible way to give the applicants what they wanted.

Ms. Davis said the application was all about egress, but she said the Board was approving giving an area variance for the structures. She said she did feel denial of the variance would be an unnecessary hardship, with this plan.

Mr. Gottsacker said he agreed, and said his concern was the condition. Chair Gooze and Mr. Welsh agreed as well.

Chair Gooze said he thought the Board was in agreement that the variance application met the criteria, with this plan for grading. But he said he would like to see the landscaping plan, and

suggested there should be some wording that the landscaping would have to be reviewed every year. He said perhaps they could at least start out that way.

Mr. Gottsacker said they could grant the variance, with the condition that the Board would see the landscape plan at the next ZBA meeting.

Mr. Johnson said the Board could continue the hearing, with direction to the applicant to provide a revised site plan and landscaping plan.

Mr. Gottsacker said he just didn't want to have to argue this case all over again.

Mr. Johnson said it sounded like the Board had made a decision. He said they could get the plans from the applicants, and could request a revised Photoshop drawing.

Ms. Woodburn said there should also be a revised landscape plan based on the grading plan the Board was looking at.

Mr. Gottsacker received clarification that in continuing the hearing, they were just continuing the deliberations on this application.

Chair Gooze said if it turned out that the landscaping plan was good enough, the Board would grant the variance, and he said if it wasn't good enough, the application would be denied.

Ms. Davis spoke about how the site and surrounding area hade changed as a result of the project, and said she hoped that if this variance were granted, it would be restored to a continuous, scenic area. She noted that this would be completely out of the Board's jurisdiction.

Jerry Gottsacker MOVED to continue the public hearing on an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to install cement retaining walls for soil removal and erosion control on south end of the basement and north end, 8 feet east from original house stairs within the sideyard and shoreland setbacks, for the property located at 8 Cedar Point Road, in the Residence C Zoning District, with the request that the Sidmores provide a final landscaping plan, and indication of acceptance of this plan by NHDES . Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

B. **PUBLIC HEARING** on a petition submitted by William H. Lenharth, Durham, New Hampshire, for an **APPLICATION FOR VARIANCE** from Article XII, Section 175-54 of the Zoning Ordinance to build a barn/garage within the sideyard setback. The property involved is shown on Tax Map 6, Lot 12-8, is located at 55 Newmarket Road, and is in the Residence B Zoning District.

Mr. Lenharth provided details on what was proposed with this application. He said among other things that the barn/garage it would be located 28 ft from the road. He said the driveway that was already there would continue to be used.

Ms. Woodburn said more dimensions were needed on the plan.

Mr. Johnson said he had realized that a variance would also be needed, because there was a third accessory structure on the applicant's undersized lot.

After detailed discussion, it was agreed by the Board and Mr. Lenharth that he would come back with the full variance request, and with the dimensions on the plan.

Jerry Gottsacker MOVED to continue until the ZBA's next meeting, in August, the public hearing on a petition submitted by William H. Lenharth, Durham, New Hampshire, for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Zoning Ordinance to build a barn/garage within the sideyard setback, for the property located at 55 Newmarket Road, in the Residence B Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

II. Board Correspondence and/or Discussion

A. **REQUEST FOR REHEARING** on a June 10, 2008, denial of a petition submitted by Evelyn Sidmore, Durham, New Hampshire, for an **APPLICATION FOR EQUITABLE WAIVER** from dimensional requirements of the side yard setback and the shoreland setback for the new construction of a home. The property involved is shown on Tax Map 12, Lot 2-12, is located at 8 Cedar Point Road, and is in the Residence C Zoning District.

Chair Gooze said the Board had received a letter concerning this request for rehearing. He said he was not distributing it to the Board because public testimony wasn't taken as a part of a request for rehearing. He said if the request was granted, the letter could be resubmitted.

Chair Gooze then said this request for rehearing came down to whether the Board had made an error in its decision on the equitable waiver application.

Mr. Gottsacker said his vote on the equitable waiver had come down to an individual interpretation of the Ordinance. But he said this didn't mean that the ZBA had made an error.

Chair Gooze said he had read the materials from Attorney Tanguay, and didn't see anything new. He read from the Board of Adjustment materials on equitable waivers, p. 24, "..that the statue does not impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them, or the compliance of property inspected by them".

He said this was very straightforward, and said he felt Mr. Sidmore could have asked Mr. Johnson to come out to see what they were doing, and to consult with him, when the building was delivered.

Mr. Gottsacker said while there was a disagreement by the Board about the decision itself, this didn't mean that the Board had made an error.

Ms. Davis said she agreed that the Board did not make an error in how it had decided on the equitable waiver application. Other Board members agreed as well.

Jerry Gottsacker MOVED to deny the request for rehearing on a June 10, 2008 denial of a petition submitted by Evelyn Sidmore, Durham, New Hampshire, for an APPLICATION FOR EQUITABLE WAIVER from dimensional requirements of the side yard setback and the shoreland setback for the new construction of a home, for the property located at 8 Cedar Point Road, in the Residence C Zoning District. Carden Welsh SECONDED the motion, and it PASSED unanimously 5-0.

Mr. Johnson said the letter Chair Gooze had spoken about didn't have to go into the file, since the request for rehearing was denied.

IV. Approval of Minutes – No Minutes

V. Other Business

A.

B. Next Regular Meeting of the Board: **August 12, 2008

Chair Gooze provided details to the Board about the court case the Bates had brought.

VI. Adjournment

Jerry Gottsacker MOVED to adjourn the meeting. Robbi Woodburn SECONDED the motion, and it PASSED unanimously 5-0.

The meeting ADJOURNED at 10:45 pm

Victoria Parmele, Minutes taker