

This set of minutes was **APPROVED** at the **October 14, 2008** meeting

ZONING BOARD OF ADJUSTMENT MEETING MINUTES
TUESDAY, SEPTEMBER 9, 2008
TOWN COUNCIL CHAMBERS - DURHAM TOWN HALL
7:00 P.M.

MEMBERS PRESENT: Chair Jay Gooze; Jerry Gottsacker; Ruth Davis; Sean Starkey;
Ed Harvey; Robbi Woodburn

MEMBERS ABSENT: Carden Welsh

OTHERS PRESENT: Victoria Parmele, Minutes taker

I. Approval of Agenda

Mr. Starkey was appointed to vote on the approval of the Agenda.

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

II. Public Hearings:

- A. LIMITED PUBLIC REHEARING FOR THE CONSIDERATION OF LANDSCAPING** 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 and to build a walk-out patio in the same area. 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 there were 4 regular members present, and explained that Mr. Harvey could sit in as a voting member to bring the number of ZBA members up to 5 for this Agenda item. He said Mr. Harvey was familiar with the case, having been on the Board in recent months. He said the alternative was to only have 4 voting members, but noted that if the subsequent vote was 2-2, this would not be cause for rehearing. He asked Attorney Tanguay what the applicant's preference was.

Attorney Tanguay spoke before the Board on behalf of the Sidmores, and said they were fine with having Mr. Harvey serve as a voting member. He then discussed the fact that at the July 8th meeting, the ZBA had approved the criteria for granting the variance, but had continued the public hearing subject to a landscaping plan that was being developed. He said at that meeting, the Board had said it wasn't going to open the hearing again, but said it had since decided to reopen it on a limited basis, after talking to its attorney. He said the Sidmores were fine with this.

He said the detailed landscaping plan that had now been provided by the applicants did what they had said it would do. He provided details on this, noting among other things that there was now a serpentine-like path exiting the patio area, so there was no straight view into that area. He said the landscaping in the direction of the neighbor had been sloped a bit higher, and said native plants had been included there on the plan. He said there was nothing in writing from DES yet concerning the plan, but said the applicants had been told that the plan appeared to be consistent with DES's approach.

Chair Gooze noted that the wingwalls on the right, facing the patio, would be essentially cut off under the porch, and covered with a berm that would be at a level so that the berm would be above the head of someone standing on the patio. There was discussion on how high the hedges on top of the berm would be. There was also discussion on what would happen with the left wing wall. It was noted that a section of this wingwall would be removed, and that the remaining wing wall would have a berm on top of it. It was also noted that the wingwall would be able to be seen from the patio looking out, but would not be able to be seen, looking into the patio area.

Ms. Woodburn said not all of the plants on the landscaping plan were native, but said this was ok. She asked if DES had wanted all native plants to be provided.

Mrs. Sidmore described the discussion she had with DES concerning plantings, which had resulted in the choice of plants for the landscaping plan.

Ms. Woodburn said Durham's regulations allowed non-native plants to be included, but said she wasn't sure whether DES would require all native plants. She said this was simply something to be aware of.

Mrs. Sidmore said they would provide whatever plants the Town and DES required.

Attorney Tanguay asked that the Board accept the landscaping plan, contingent upon DES approval of this plan.

Chair Gooze asked where erosion control matting would be provided.

Attorney Tanguay noted that the applicants' engineer wasn't present, but said the level of detail DES required concerning erosion control would be provided.

Ms. Woodburn explained that this was to insure that erosion control was provided for in the drawing, in case the site needed to be stabilized.

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

Attorney Schulte represented the abutters, the Bates, and said it was his understanding that they were present, in part, to determine if this landscaping plan satisfied the hardship criterion.

Chair Gooze said for the most part, the Board had been concerned with the spirit and intent and public interest criteria at the July 8th meeting, because of sideyard and shoreland protection issues. He said the Board hadn't taken the final vote on the variance criteria at that meeting, and had asked to see the landscaping plan in order to allow it to vote on all of the criteria.

Attorney Schulte said his concern was with the hardship criterion, and said from Board comments at that meeting, the concern was that they might be going astray in applying the standards that needed to be applied regarding satisfying the hardship criterion. He said assuming this was a dimensional variance being requested, the applicants clearly needed a variance for the patio, and the retaining walls. He said the hardship test was that the applicants needed to show that they couldn't have the excavation and the retaining wall without getting a variance. He said the abutters conceded this, but said the question was whether the second part of the hardship criterion, - whether there was a reasonable alternative to satisfy the proposed use, had been met.

He said there had been discussion at the previous meeting that the sliding glass doors were the best approach, but he said this wasn't the test. He said the issue was regarding secondary egress, and whether the sliding glass doors were the only way to obtain egress, or if there was another reasonable way to attain that. He said the Fire Inspector from the Durham Fire Department was present to address that issue, and he spoke in some detail about a prior conversation the Fire Inspector had had with the Sidmores as to what egress requirements there would be for a new basement apartment planned as part of their new home that was. He said there had been discussion that window wells would be appropriate.

Attorney Schulte said the landscaping plan was being presented now as if the only way the applicants could have a basement apartment was to have the walkout design. But he said there were other alternative approaches to satisfy the secondary egress requirement that were clearly in play for this application.

Chair Gooze said the Board had already gone over the egress issue, and he said he didn't want to open this up again. He asked Attorney Schulte to restrict his discussion to the landscaping plan, and to whether there was something on it that would interfere with the abutters' property and with the shoreland area.

Attorney Schulte asked if this meant that he couldn't provide evidence that the landscaping plan was not the only way to satisfy the variance criteria.

Mr. Gottsacker said the Board had already approved the Minutes for the meeting where the egress discussion had occurred. He said there had been testimony by the officer from the Pease Fire Department, and the Board had made its decision on this issue.

Ms. Woodburn said the Board had discussed the reasonableness of the sliding glass doors as compared to other means of egress.

Chair Gooze said it would be a different story if it could be proved that the landscaping plan raised safety issues.

Attorney Schulte asked about the possible perspective that the landscaping plan perpetuated the impervious cement slab in the shoreland setback and sideyard setback and therefore impacted them, and that this could be remedied with a different approach to egress.

Ms. Woodburn said the Board did need to consider that.

Attorney Schulte said there was a reasonable alternative, although it might not be the best one, or the prettiest one. He said there was an alternative to serve the same function, and to eliminate the concrete.

Ms. Woodburn said the Board had discussed the reasonableness of the different alternatives, and had felt as a Board that this present approach, especially the pulling of the offending retaining walls out of the setback, making sure the berms were there, installing the plants, and a plan that would accomplish this, was a reasonable solution.

Attorney Schulte said that wasn't the test for a reasonable solution.

Chair Gooze said at the last meeting, if the Board had had this landscaping plan, it would have made its decision. He said the retaining wall issue had already been discussed. He said the Board's attorney had felt that the landscaping plan represented new evidence, so the hearing should be re-opened. But he said he didn't want to rehash the previous issues, and asked Attorney Schulte to deal with the landscaping plan itself.

Attorney Schulte said when evaluating reasonableness, there needed to be something to make a comparison with. He also said this landscaping plan perpetuated the concrete slab in the shoreland zone.

Chair Gooze said Attorney Schulte's second statement was pertinent to the landscaping plan, and said it would be taken into consideration.

Attorney Schulte said he thought Chair Gooze was cutting off relevant evidence. He then said that the landscaping plan didn't accurately depict the conditions on the property today. He also said the plan did not show a shed that the Sidmores planned to relocate within the area to be landscaped, and said there was documentation concerning this.

It was noted that this was a separate issue, and that there was no application before the Town concerning it.

Attorney Schulte said his point was that this represented a piecemeal approach used by the applicants. He also spoke in some detail about an access ramp on the southeast corner of the property, which would pass through the area to be landscaped. On another issue, he said the arborvitae that was proposed didn't screen the view of the patio from the Bates' house, and simply blocked the Bates' view up the river. He also said the Sidmores had planted a fence where the arborvitae was now proposed, and DES had made them take it down. He said this had been a spite fence, whose only function was to block the view, and said the arborvitae was intended for the same purpose.

Attorney Schulte said the Bates felt there were other ways to address the egress issue with less impact. He said he didn't think the variance should be granted at all, but said if it was granted, it should be done in a way that didn't harm the neighbors, and he also said there should be a requirement that a fence could not be put in.

Chair Gooze asked Attorney Schulte whether he was asking that if the Board did decide the landscaping plan was acceptable, that he would like to see that a 15 ft section of arborvitae would not be a part of that plan.

Attorney Schulte said yes, and said there also should be a specific condition that the Sidmores would not be permitted to construct a fence. He also asked that other plants that would block the Bates' view of the river should not be allowed. He said the Board shouldn't approve the landscaping plan at all, but said if it did, it should not allow something that would harm the neighbors.

Bruce Bates, 10 Cedar Point Road, said that throughout this entire process, the Sidmores had done what they had wanted to do. He said if the Board approved this variance application, he wanted to know if there would be enforcement to make sure this landscaping plan was achieved; - that these plants would be put in place, and that the land would be restored.

Attorney Tanguay said he would limit his remarks to the landscaping plan, and said his understanding had been that they all would be limited to only those issues. He said he had heard the argument that the plantings would be infringing on the Bates, but said this plan had been provided because the Bates had complained about the patio infringing on their privacy.

Ms. Woodburn noted that the plan showed a proposed cistern and an infiltration system, and said her understanding was that both of these were considered to be structures, which would require variances.

There was discussion that this was the first time the Board had seen these details. Attorney Tanguay said the applicants' engineer had included these things on the plan. He said perhaps it could be made a condition of approval that the Board was not granting a variance for these things.

Attorney Schulte said the Sidmores original approval in 2006 was based on the premise that a drainage system, including a special system to deal with roof runoff, would be constructed to deal with the expanded impermeable area. He said if they were not going to put this in, they would not be in compliance with the original variance approval, and he said that based on this, he didn't think the Board could approve the present variance request that evening.

Mrs. Sidmore said the engineer had put these things on the drawing for DES, as additional measures that were above and beyond what was required. But she said the system they had already installed was great. She said they were not planning to put the additional drainage structures in.

Chair Gooze said these structures could therefore be ignored for purposes of the present variance application.

There was some discussion on how drainage issues had been addressed in the previous applications concerning this property.

Ms. Woodburn said if the Sidmores had a certificate of occupancy, the drainage system must already be in place. She said it needed to be confirmed that what the Sidmores had said would be installed was actually put in, and she said it also needed to be confirmed that what was on this landscaping plan now was above and beyond that.

Ellen Bates, 10 Cedar Point Road, said the reason they were all present was to look at the landscaping plan to address egress. She said the egress the Board had originally voted on was approved by the Fire Department, and she asked how the ZBA could decide that this egress wasn't good enough, and could say the applicants could develop the whole south end of the building. She said the need for this landscaping plan was not the issue.

Chair Gooze said it was in fact the issue before the Board that evening.

Ms. Davis asked for details on the handicap ramp, and Mrs. Sidmore explained that it was a temporary way to allow her mother to have access to the house once a week, during months when the conditions were not too slippery. She provided details on this, and said this had nothing to do with the landscaping issue.

After some discussion on this by the Board, Chair Gooze concluded that this issues didn't have anything to do with the landscaping plan.

Attorney Schulte asked to submit several documents related to the egress issue, stating that at some point, this case was going to court.

Attorney Tanguay said if this information wasn't relevant, it shouldn't be a part of the record.

Chair Gooze said this information would not be part of the Board's discussion that evening.

Jerry Gottsacker MOVED to close the public hearing. Robbi Woodburn SECONDED the motion.

Chair Gooze said he reserved the right to open the public hearing again for informational purposes.

The motion PASSED 5-0. (Mr. Harvey was a voting member)

Chair Gooze said the Board needed to decide if the landscaping plan, without the infiltration system and the cistern, met with the Board's approval, and allowed it to grant the variance being requested, with or without conditions. He said his feeling was that the consensus of the Board had been that it wanted the landscaping plan so it could be sure everyone was protected, and that the spirit and intent of the Ordinance and the public interest criteria were met. He said he was pretty comfortable with this plan because of the berm, which would prevent one from seeing into the patio area.

Ms. Davis said she thought one objective of the plan was to address people on the water looking in toward the property, and another was to obscure the view of the patio by the Bates, in order to lessen

the impact on them. She said the Board hadn't discussed the issue of landscaping possibly obscuring the Bates' view of the water. Ms. Woodburn, Chair Gooze, Mr. Gottsacker and Mr. Harvey agreed.

There was discussion by the Board on the fence issue. There was also discussion on the grading shown on the landscape plan, including the berms. Mr. Gottsacker noted that the plans showed that looking inland from the Bay, the landscaping and grading did a good job. He said it was the grading that really made the difference.

Ms. Davis noted that the vegetation looking out of the Sidmores' house was lower vegetation, but that for the Bates view, the plants at the property line would be higher and could potentially obstruct the Bates' water view.

Chair Gooze said he had thought the arborvitae would make a good hedge, but was now hearing that they blocked the view. There was discussion of the view from Bates' house.

Ms. Woodburn noted that a fence had previously been placed where the arborvitae hedge was proposed, and said it was something similar to the effect of the arborvitae. She said she could understand the idea of putting the arborvitae in because they added some buffering, but said she also understood that this would cause a disruption of the view. She said the issue was whether there could be some kind of balance, in terms of buffering that wouldn't impact the view.

Chair Gooze said he didn't feel the hedge was necessary as a buffer to the patio.

Mr. Harvey said he saw this as a temporary kind of buffer as compared to grading.

Ms. Woodburn said that in the context of this application, and as a ZBA member, she thought the hedge did a great job of buffering. But she said a question was whether the Board wanted to promote this plan with the hedge on it.

Mr. Gottsacker noted that visual impacts weren't really addressed in the Ordinance, but he said buffering was addressed in the Ordinance.

Mr. Harvey said he still saw landscaping as temporary, but Ms. Woodburn said landscaping was not considered to be temporary, stating that if it was taken down, it had to be put back in. Mr. Harvey said he realized that was true, but said there was also the issue of enforcement.

Chair Gooze said because this was the shoreland area, he felt the Board did have the right to put in conditions concerning having less disruption in that area. He said he would therefore feel more comfortable not having the hedge, and said he wanted to be fair to everyone.

There was discussion on the fence issue, and about whether the Board was supposed to be discussing this. It was noted that if a fence was under 6 ft, it wasn't regulated. The Board agreed that the fence was a separate issue.

Chair Gooze said that considering the spirit and intent of the Ordinance, and the public interest, he thought this was a good plan. He said he was looking at this as if it was a brand new application, and said he would have no qualms about denying the application if he thought a few egress windows was the best way to go in terms of providing egress. But he said he thought the applicants' egress was a feasible way to do what they wanted to do. He said he thought the hardship criterion was met, and

said he felt all of the other variance criteria were now met. He said he didn't think the hedge was necessary, and would like there to be a condition that it would be taken out of the landscaping plan, at least at that height.

Mr. Harvey said what he had been looking for in a landscape plan at the last meeting was grading. He said the hedge seemed to be above and beyond that, and started to seem like overkill.

Ms. Davis said if this plan were to come to the ZBA now (for the first time) as part of an area variance application, she would vote to approve it based on the plan that the Board was now looking at, with the shielded patio and landscaped berms. She said what was proposed would look nice, and would shield the view of the patio. She said she too would like to see the arborvitae hedge taken out of the landscaping plan, because it would impact the neighboring property too much. She said the application met all five variance criteria, and said she would vote in favor of granting the variance.

Ms. Woodburn said she agreed totally with what Ms. Davis had said.

Mr. Harvey provided details on why he too thought the hedge should be removed from the plan.

Chair Gooze stated again that the seasonal access ramp had nothing to do with the landscaping issue.

The Board agreed that conditions of the approval would be that the hedge would be removed from the landscaping plan, and that the cistern and infiltration field now shown on the plan would also be removed.

Robbi Woodburn MOVED approve the Application for Variance from Article XII, Section 175-54 of the Zoning Ordinance, for the property located at 8 Cedar Point Road, in the Residence C Zoning District, 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 and to build a walk-out patio, as shown on the stamped plans received by the Town dated September 2, 2008, with the exclusion of the proposed hedge of arborvitae, the proposed cistern and the proposed infiltration system. Jerry Gottsacker SECONDED the motion, and it PASSED unanimously 5-0.

III. Approval of Minutes – August 12, 2008

Page 1, under Members Present, should say Chair Jay Gooze; also should say “Robbi Woodburn arrived after the public hearing”.

It should be stated under Approval of the Agenda that Ed Harvey and Sean Starkey were appointed as voting members in place of Robbi Woodburn and Carden Welsh.

Page 2, 4th full paragraph, should read “The Board determined that the upstairs....”

Page 3, bottom paragraph, should read “..and that he had no concerns that granting the variance...”

Page 5, bottom paragraph, should read “Mr. Gottsacker noted that a copy of the updated version...”

Jerry Gottsacker MOVED to approve the August 12, 2008 Minutes as amended. Ruth Davis SECONDED the motion, and it PASSED unanimously 5-0. (Mr. Harvey and Mr. Starkey were voting members, while Ms. Woodburn was not)

There was discussion as to whether DES approval was needed as part of the ZBA approval, and it was agreed that when the ZBA approval was sent to the applicants, a reminder should be included

that if DES didn't approve the landscaping plan and further revisions were required, additional review by the ZBA might be necessary. It was also agreed that something should be said concerning the importance of being sensitive to the shoreland area, in making future improvements to the property.

IV. Other Business

B. Next Regular Meeting of the Board: **October 14, 2008

There was discussion about the Fall Law Lecture series. There was also discussion about the Bates' current court case against the Town.

The Board then discussed the issue of enforcement in Durham. Chair Gooze said he had noted, in going around Town, that some of the decisions by the ZBA were being ignored by property owners. He said the community needed to be more aware of this, and said there needed to be discussion on this with the Town Council, especially regarding occupancy situations. He said this wasn't Code Officer Tom Johnson's fault, noting that he couldn't possibly get to every property. He said he wasn't sure whether this was a discussion for the ZBA, but said he would make a plea to the Council to make the ZBA's decisions more enforceable.

Chair Gooze said he was still checking with the engineer to see if the drainage for the Christensen property had ever been completed. He said he would like the ZBA to get a presentation on this, to see if the follow-up had occurred.

Mr. Gottsacker said there was no process in place for something like this, and said such a process needed to be written down. He said that presently, the only practical process was for Mr. Johnson to respond to a compliant. He also said more community education was needed on regulations like the 3 unrelated rule.

Chair Gooze said he and Mr. Gottsacker should talk about this idea of having a better kind of process.

Ms. Woodburn said it would also be a good idea to let people know that they could access these regulations online.

V. Adjournment

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

Adjournment at 9:00 pm

Victoria Parmele, Minutes taker