

ATKINSON ZONING BOARD OF ADJUSTMENT
21 Academy Avenue
Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall
Tuesday, November 10, 2009

Present: Frank Polito, Chairman; Hank Riehl, Vice-Chairman; Sandy Carter;
Glen Saba; Susan Miner; (Sam Zannini – not voting)

Chairman Polito called the meeting to order at about 7:30P.M.

Approval of Minutes:

The Board reviewed the minutes of October 14, 2009. Mr. Saba made a motion to accept the minutes. Mr. Carter seconded the motion and they were approved. Ms. Miner abstained.

Correspondence

Incoming

1. Bob Jones memo to Selectmen dated 10/22/09 re: 8 Valcat Lane, Map 22, Lot 47.
2. Bob Jones memo to Mr. & Mrs. Daniel Osborn dated 10/23/09 re: 8 Valcat Lane, Map 22, Lot 47.
3. Zoning Budget printout dated 10/31/09.
4. Robert Perreault, 12 Main Street, Map 5, Lot 45 dated 11/5/09 re: Request for extension of Special Exception granted by ZBA 4/9/08. **Ms. Miner recused herself. The Board reviewed the request and determined that the Variance granted did not expire but the terms of the Special Exception are that it expires in one year. Mr. Carter made a motion to deny the request for an extension, without prejudice because the Special Exception does not allow for extensions and the Board has no authority to do so. Mr. Riehl seconded and it was unanimously approved (with Mr. Zannini voting).**
5. Home Business Application for Arthur Anderson, 4 Washington St, Map 9, Lot 27 for Wholesale Dealer business 'Satco Realty Trust'. **Mr. Carter made a motion that based on the application as presented the application was exempt. Mr. Saba seconded and it was unanimously approved. Mr. Riehl executed the documents from the State.**
6. State of NH Dept. of Safety, Motor Vehicle Division dated 11/6/09 re: Arthur Anderson Wholesale Application.

Outgoing

1. William Grimes Recorded Deed Addendum documents for 2 Lisheen Drive land, Map 15, Lot 5.
2. Memo/Notice for ZBA meeting date change notice dated 10/21/09.
3. Legal Notice for meeting of November 10, 2009.

4. James Miller dated 11/9/09, Home Business renewal notice for 79 Maple Avenue, Map 14, Lot 12.
5. Michele Dugdale dated 11/9/09, Home Business renewal notice for 11 Old Coach Road, Map 7, Lot 199-34.
6. Robert Williams dated 11/9/09, Home Business renewal notice for 45 Sawyer Avenue, Map 3, Lot 68.

Public Hearings – 7:35 P.M.- Continued from October 14:

Michael Zedalis request for Variance from Article 410:8 of the Zoning Ordinance to permit construction of a 12'x38' deck, 64' from prime wetlands (36' variance) as opposed to the required undisturbed buffer area of at least 100' on property located at 4 East Road, Map 10, Lot 5, TR2 Zone.

Abutters list was read with the following present:

Michael Zedalis

Mr. Polito recapped the last hearing and stated there were two separate issues on this property. The first being the deck to the rear of the house, which predates Mr. Zedalis' ownership of the property. This was built without the benefit of a permit or Variance to the wetlands. The second is the deck to the side of the house over the driveway, without a permit. Adjacent wetlands are now designated as Prime Wetlands. Mr. Polito said he a conversation with DES, Sandra Matfeld. Mr. Zedalis had sent an email to Shirley, which said the prime wetlands were not really enacted until October 10, 2009. Even though the Town approved them at the March vote, that approval only sets off the process to apply to the State. The State did not accept the application and designation until October. According to DES rules and regulations, work that is done prior to the designation is grandfathered. The back deck as described clearly falls into that category of being grandfathered as to the prime wetlands. The Situation with the side deck is not clear. Mr. Zedalis got one answer which was slightly different than the one Mr. Polito got, based on their explanations. Mr. Polito thought it might be grandfathered and asked that the applicant send pictures and a letter detailing precisely what is there. They may or may not take jurisdiction. Mr. Polito stated that the applicant should get a sign-off from Code Enforcement stating that this was there before October 10th. Mr. Zedalis said the Stop Work Order was dated September 28th. Mr. Zedalis said he had a conversation with a Sandy Crystal that day and was given the same response. He will need to put together a package and submit to DES to see if this is exempt. Ms. Miner, Mr. Carter and three members of the Conservation Commission were present on a site walk. Ms. Miner asked if he went before the Conservation Commission and Mr. Zedalis stated he did. The Board did not have a letter from the Conservation Commission. Mr. Polito stated that under Shoreline Protection you are allowed to go 12 feet beyond the reference line, which does not apply under prime wetlands regulations. The Board discussed different options with which to proceed, including bifurcating the application to deal with the back deck as a separate

issue. Mr. Carter was surprised there was no input from the Conservation Commission based on extensive conversations with Mr. Zedalis during the site walk for possible mitigations. Mr. Carter said that it appeared to them that the construction would have virtually no impact on the wetlands. Mr. Dziechowski appeared at the hearing. Mr. Polito reiterated his conversation with DES. Mr. Dziechowski said that based on the site walk, they would recommend that DES issue a waiver to permit it if they do take it under jurisdiction. Mr. Saba questioned the process and Mr. Polito explained if the State does not take jurisdiction this is strictly a zoning issue. If they do take jurisdiction then the applicant would need to make application to the State for a waiver. The Board agreed this should go to DES before they took any action, and the applicant agreed.

Ms. Miner made a motion to continue the hearing to the December 2009 meeting without prejudice. Mr. Riehl seconded the motion and it was unanimously approved.

Public Hearings – 7:57 P.M.- Continued from October 14:

Daniel and Margaret Osborn request for Special Exception as specified in Article VII, Section 700:1 of the Zoning Ordinance for statutory relief to modify condition of previous Variance granted 6/13/07 on property located at 8 Valcat Lane, Map 22, Lot 47, RR3 Zone.

Before the hearing commenced Mr. Polito stated that the applicant had asked him to recuse himself because of conduct that she felt was prejudicial. He read a letter from Mrs. Osborn's attorney to him. Mr. Polito reviewed and read RSA 673:14 regarding the disqualification of a member and asked the Board for a non-binding vote on whether he should recuse himself even though the applicant did not have a Statutory right to ask that he recuse himself. ***Mr. Carter made a motion that Mr. Polito not recuse himself based on the discussion and the examination of RSA 673:14 and the determination that it did not apply to him. Mr. Riehl seconded the motion and it was unanimously approved. Mr Polito announced he would not be recusing himself.***

Abutters list was read with the following present:

Elaine Vaillancourt, Big Island Pond Association by Noreen Mercier, Maggie Osborne, Individually and as Trustee; Ms. Davis

Ms. Davis told the Board that she was not properly notified for this hearing, nor had she ever been notified of past hearings and wanted to know if the proceedings were legal. She had confirmed with Shirley in the Planning Office that she was indeed an abutter and should have been notified. Mr. Polito explained that if she felt she were not adequately prepared she could ask for a continuance, but since she was there, she now had the opportunity to participate. A member of the audience asked if this were an illegal hearing and Mr. Polito

stated he was not an Attorney and would not address the issue. The Board discussed the issue and told Ms. Davis that although she should have been notified and there may be an issue the Court would look to see if there was irreparable harm done. She was present at this hearing and the Board felt they could continue, but warned Mrs. Osborn about the omission and potential impact in any Court proceeding. Mrs. Osborn stated that it was an error, and not intentional. Ms. Davis contended she had no knowledge or notice of any prior proceedings with this property. Mr. Carter asked if there were anything that would have required preparation of this abutter. He asked if this were totally new to her and if she had no knowledge of what goes on at the property. He said these were all issues as to whether or not harm was done. There was considerable discussion on the technical issues of notice.

Mr. Polito asked Mrs. Osborn if she wanted to proceed with the hearing based on the lack of abutter notice and the potential issues in Court. Mrs. Osborn stated it was not intentional, apologized to Ms. Davis and said she would review the abutters list for future issues and asked to move forward.

Mr. Riehl made a motion that the Board continue with the hearing. Mr. Carter seconded and it was unanimous.

Mrs. Osborn said she was respectful of the Chairman's decision not to recuse himself. She is asking for relief of one of the conditions that was placed on the granting of the original variance. They are looking for relief for the removal of the bunk/boat house based upon new information that removal of the bunk house would do significant damage to the property value. There are also new stringent guidelines for demolition permitting and it would cost \$3,000.00 to remove the structure from lot. Mrs. Osborn provided some pictures of the lot showing the bunk house. The only true relief the applicant feels she has is this application to allow the bunk/boat house to remain. The lot has 195 feet of lake frontage and the photos showed the Board what the bunk house looks like as well as the newly constructed house. Mrs. Osborn wanted to remind the Board that the lot the house was built on had originally been three separate lots. The new main house structure sits back 50' from the lake. The old main house structure was 20' from the lake. The bunk/boat house fits in the very far corner of the combined lots. Mrs. Osborn contended that the status of the structure was never determined in any previous hearings. One of the conditions of the Variance was to remove it. Mrs. Osborn contended that at the previous hearings there were discussions that there may be some relief to come back and discuss changing that structure at a future time. She contended that although its full removal was a condition of the approved variance, the door was left open to revisit the status. She acknowledged the Board had said this would be at the applicant's own risk. Mrs. Osborn said in speaking with Environmental Services about the best option, she said they believed this was a grandfathered structure and could be torn down

and replaced within the same footprint. The applicant is not seeking to do this but rather stay within the spirit and intent of the original Variance. She believed the Variance conditions were put in place to alleviate the non permeable surfaces. She felt it did not make sense to tear down a structure at a cost of \$3,000.00. She presented a tax card indicating the value placed on the structure was 12,300.00 and was taxed at that amount. This is a 10 x 20 structure, which is assessed as a 10 x 10 structure. There is a financial hardship, and denial of reasonable use of the property. She said this should not be looked at as a shed, but a structure that has been there for over 70 years. Mr. Carter said the tax card indicates the market value of the structure is actually \$831.00. Mrs. Osborn said the features are calculated at \$12,000.00, which includes all of them. The Board concurred that the value placed on the bunk house was \$831 and other features on the card are not germane. Mrs. Osborn had included a letter in the package from one of the original owners who attested to the fact that the bunk/boat house had been there and predates some of the zoning. Again Mrs. Osborn stated at the original hearing the applicant was told he could come back at his own risk to revisit the issue. Mr. Riehl questioned Mrs. Osborn on whether she was a party to the original variance granted the Mallons and Mrs. Osborn disclosed that the Osborns and Mallons had been partners in that property at the time but it was now solely owned by the Osborns. Mrs. Osborn claimed that under 674:19, applicability of zoning ordinance; the zoning shall not apply to existing structures or the existing use of any building. They were not changing the use of the property. They did remove three other sheds from the property, a lot of debris, and the house was moved back to be 50' from the lake. They put in a state of the art septic system which was even upgraded from the conditions placed on it at the granting of the variance. She provided information of Shoreline Protection and believed the use and/or replacement of the bunk/boat house was allowed under the Act. The applicant's desire was to have the condition removed from the Variance so the bunk/boat house could be used in the manner it was intended for.

There was considerable discussion regarding Ms. Osborn's assertion that the bunk house has status as a preexisting non conforming structure. The Board pointed out that the bunk house, the cottage, and other aspects of the property had status as pre-existing non conforming uses prior to the Mallon's application for variance and its approval. The Mallons (now the Osborns) could have continued to use the property and the structures as they had been; including the original house, sheds and the bunk house, for seasonal use. However, as soon as they proposed changes to their non-conforming use, they lost that status by trading it for what they were asking for in the variance application. The Board pointed out that you can't single out one aspect of the property and separate it from the other non-conformances. It was pointed out by the Board that the Mallons desired a change in use of the property from seasonal to year-round with a large home on it. In exchange for doing so, they agreed to make some aspects of the property more conforming to zoning. Those included removal of the bunk

house and other out buildings, new state approved septic system, minimizing non permeable surfaces, and a roof runoff infiltration system.

Mr. Saba pointed out that the Osborn's have already benefited from the granting of the variance and now they want to change one of the conditions that the board imposed; without which the variance might not have been granted. Mr. Carter pointed out that the bunk house was one aspect of the property that was least conforming; because it was within several feet of the water and it was used for inhabitation by people.

There was considerable discussion about Mrs. Osborn's contention that the Board said the Mallons could come back regarding the boat/bunk house. Mr. Polito read the minutes from 2007, which are incorporated herein by reference. Mr. Riehl made a motion to affirm that while special status was granted to finishing the basement as spelled out in the original motion to approve the Mallon's variance, no special status was conferred to the bunk house and that there was no door left open to revisit the taking down of the bunk house beyond the normal 30-day appeal period. Mr. Carter seconded the motion and it passed unanimously. The Board pointed out that when the Mallons expressed a strong desire to keep the bunk house (at the June 07 hearing), the Board offered to continue another month to give the Mallons the time and opportunity to work with an engineer and the state and to come back to the Board with new/additional information regarding the bunk house. The Mallons declined and ultimately accepted the removal of the bunk house in the variance discussions and subsequent approval by the Board.

There was considerable discussion about the need for Mrs. Osborn to pass the test of Fisher v. Dover. Mrs. Osborn contended that the cost of removal was a notable change of circumstances because of a change in the law regarding demolition. When the Board asked Mrs. Osborn to give the specific citation including the date of enactment, she was unable to do so **While no one could confirm new demolition regulations would apply, Mr. Riehl told Mrs. Osborn that even if there were new regulations, the Mallon's and Osborn's delay in removing the bunk house would be the primary reason they may be facing higher demolition costs.**

Mr. Polito also pointed out that a change in cognition is not a change in circumstances. Because one doesn't realize or fully understand something at the time of approval and then realizes it subsequently is a change in cognition, it is not a change in circumstances. A change of circumstances is a material change in the facts that were used in the decision to grant the variance and these facts must be categorized as not knowable at the time of the approval. An applicant's omissions or mistakes do not constitute a change in circumstances.

Mr. Polito thought it would be prudent of the Board to allow the applicant the opportunity to bring factual information to substantiate her claims, based on the

fact that there was a likelihood this could be litigated depending on the outcome. If the applicant were claiming there were new circumstances and there was now some new requirement concerning demolition, then she needed to cite the statute/case law. Mr. Carter agreed the board should entertain a continuance. Mr. Saba did not think there was any new information that the Board had not considered.

Mr Riehl stated he was uncertain whether the applicant's use of a Special Exception application was appropriate in this matter. Mr. Polito indicated that the form of their application was entirely up to the applicant and her attorney and the Board cannot offer legal advice.

Ms. Miner made a motion to continue to the next regularly scheduled hearing to afford the applicant the opportunity to provide the factual information regarding her contention that there has been a change in circumstances, i.e. the cited case, chapter and verse and Statute, if any. Mr. Riehl seconded the motion and it was approved. Mr. Saba opposed the motion.

Public Hearings – 9:28 P.M.- Continued from October 14:

Timothy Dziechowski request for Special Exception per Zoning Article IV, Section 490:1 to allow a 33% reduction in frontage to create a 5.7A lot with 134' frontage on property located at 109 Maple Avenue, Map 18, Lot 71, RR2 Zone.

The Abutters list was read with the following present:

Mr. Dziechowski; Kevin Hatch, representing Mr. Dziechowski; Mr. Leon Artus; William Woodard

Ms. Miner recused herself.

The Board reviewed the revised plan and recapped the minutes of the last hearing.

Mr. Hatch went over the application. There is less than a 1/3 reduction, there is greater than 200' at the building line, which exceeds both Special Exception requirements.

Mr. Leon Artus expressed concern that a new house would look right down on his property and was concerned about water flow. Mr. Polito stated that although he could sympathize, the ordinance was clear that if the requirements were met the Board must grant the Special Exception. He also noted that other concerns and issues could be addressed during the Planning Board approval process. Mr. Hatch said Mr. Dziechowski was cognitive of the concerns and was willing to work with neighbors in placement of the house and that the Planning Board approval would deal with water flow issues.

Mr. Saba made a motion to approve the request to allow a 33% road frontage reduction to the 5.51 acre lot, shown as "proposed lot 71", on the revised plan of November 9, 2009 based on all of the Special Exception criteria having been met. Ms. Miner seconded and it was unanimously approved.

Public Hearings – 9:50 P.M

Shawn Meuse for Robert Allen request for Variance to Article IV, Section 410:8b of the Zoning Ordinance to permit permanent concrete slab for temporary garage 26' (74' variance) from wetland as opposed to the required 100' on property located at 9 Emery Drive, Map 16, Lot 32 RR3 Zone.

The Abutters list was read with the following present:

Shawn Muese representing Robert Allen; Marc Jordan; Michael Daily

The existing slab is 20 x 36, but Mr. Jones confirmed there is no requirement for any type of building permit for concrete slabs. It is his contention however that based on the size of the enclosure and his belief that it was fastened to the slab that this is a garage.

Mr. Polito stated the slab does not fall under any zoning and there is no requirement for setbacks to the wetlands. Mr. Muese said this was used for storage of snowmobiles, patio furniture, tractors, lawn mowers, etc. When asked if any cars were stored he said there were at times. Mr. Muese said this was a removable tent that was not a permanent structure, but had been there for some time. He claimed it was not fastened to the concrete, but only held down by sheer weight.

The Board thought because if the enclosure was smaller it might not be considered anything more than some type of shed, which would be allowed.

Mr. Allen said this has been there for at least five years, without being moved and that he has seen cars being stored in it. Mr. DiMaggio said this is not a garage and that the Board made a big mistake in not allowing the applicant to build a garage when it was applied for several years ago. The Board discussed that it was better to have these types of items stored on top of a concrete slab instead of the ground, especially being close to wetlands, but they needed to determine if it was a garage. Mr. Dailey was not concerned and thought it was better to have everything inside, out of the weather conditions and on the slab.

The Board made a motion that based on the testimony, pictures and an equivalency test; this was determined to be a garage.

Mr. Allen made a request for a continuance to the next hearing.

Mr. Riehl made a motion to continue to the next regularly scheduled hearing, Mr. Carter seconded and it was unanimously approved.

Motion to adjourn was made and seconded. Mr. Polito adjourned the hearing at 10:30 P.M.

Respectfully Submitted

Minutes transcribed from tape

Rebecca Russo