



**Stratham Board of Adjustment
AGENDA
February 9, 2021
Time: 7:00 PM**

The public may also access this meeting at the date and time above using this conference call information. Please dial **1-800-764-1559** and input **4438** when prompted for a user pin/code. Please follow the Chair's instructions delivered at the meeting in order to register comments during the public meeting.

If at any time during the meeting you have difficulty hearing the proceedings, please call 603-772-7391 ext. 180.

1. Call to Order/Roll Call/Seating of Alternates

2. Approval of Minutes

- a. December 22, 2020

3. Public Meeting

The Board shall decide whether to grant or deny the application for rehearing of:

Case #656B, Robert & Stephanie Cleary, 7 Boat Club Drive, Map 08, Lot 39, Residential Agricultural Zoning District, represented by Justin Pasay, Donahue, Tucker & Ciandella, 111 Maplewood Avenue, Portsmouth, NH.

On December 22, 2020 the applicant had requested a Variance from Section XII: Shoreland Protection District: (overlay), Article 12.6.1(a), of the Stratham Zoning Ordinance in order to construct a 30'x49' residential addition. The Variance was denied by the vote of the Zoning Board of Adjustment.

4. New Business

5. Other Business

6. Adjourn

Note(s):

1. Materials related to the above meeting are available for review at the Municipal Center and during normal business hours. For more information, contact the Stratham Building/Code Enforcement Office at 603-772-7391 ext.180.
2. The Zoning Board of Adjustment reserves the right to take items out of order and to discuss and/or vote on items that are not listed on the agenda.



Stratham Zoning Board of Adjustment
Meeting Minutes
December 22, 2020
Municipal Center/Virtual Meeting/ Conference Call
Time: 7:00 PM

Members Present: Garrett Dolan, Chairman
Drew Pierce, Full Time Member
Phil Caparso, Full Time Member
Richard Goulet, Alternate

Members Absent: Bruno Federico, Full Time Member
Amber Dagata, Full Time Member

Staff Present: Shanti Wolph, Code Enforcement Officer/Building Inspector

1. Call to Order/Roll Call

Chairman Dolan called meeting to order at 7:05 PM and took roll call. Mr. Dolan asked Mr. Goulet to be a voting member for this hearing. Mr. Goulet accepted. Mr. Dolan stated the applicant has the option of opting out of the meeting tonight to have their presentation heard by a full board consisting of five (5) members. Attorney Justin Pasay stated the applicant will accept proceeding with the quorum in place.

2. Approval of Minutes

a. November 10, 2020

Mr. Caparso made a motion to accept the November 10, 2020 meeting minutes as submitted. Mr. Goulet seconded the motion. Motion passed unanimously.

3. Public Hearing(s)

Mr. Caparso made a motion to limit the meeting time of tonight's hearing to 10:00 pm and to continue the hearing to the next available date. Mr. Goulet seconded the motion. Motion carried unanimously.

- a. Case #656A, Robert & Stephanie Cleary, 7 Boat Club Drive, Map 08, Lot 39, Residential Agricultural Zoning District, represented by Justin Pasay, Donahue, Tucker & Ciandella, 111 Maplewood Avenue, Portsmouth, NH.

The applicant requests a Special Exception from Section V, Article 5.1.3 of the Stratham Zoning Ordinance to expand a non-conforming structure, i.e. construct a 30'x49' residential addition.

Justin Pasay, Donahue, Tucker & Ciandella, representing the applicants Robert and Stephanie Cleary of 7 Boat Club Drive, Map 8 Lot 39, introduced Mr. Cleary and Sergio Bonilla of Mission Wetland and Ecological Services LLC, wetland scientist, assisting the applicant on the NH DES Shoreland application both are present.

Attorney Pasay stated the applications are straight forward and the entirety of the house is located within the town's shoreland protection overlay district which is a line that is drawn 150' from the shoreline of the Squamscott River. The existing house was built before the zoning ordinance provision regarding the overlay district and is therefore a non-conforming use, a use that was formerly permitted but is no longer permitted based on the zoning ordinance changes. The special exception relates to the expansion of the non-conforming use, and the variance relates to the shoreland protection district which states a structure cannot be erected within the shoreland protection district. The net result of the proposal is going to be a decrease of the impervious surface area within the Shoreland Protection Overlay District by 17 percent. With the addition being added, a lot of impervious surface, the current driveway, is being removed and will be replaced with crushed stone or pervious pavers that will infiltrate water. The net result will be a property that is in more compliance with the overlay district ordinance than it currently exists today.

Attorney Pasay referred the board to Exhibit 1 to explain the overall layout of the property. The property is bound to the left by the Squamscott River, to the east by Boat Club Drive, and is situated with a long driveway which leads to the existing house. Attorney Pasay explained the location of the town's overlay shoreland protection district cuts into the existing structure. Attorney Pasay explained the location of the proposed addition and the location of the proposed "shop" which is a barn that is part of the Cleary's overall master plan for the property. Attorney Pasay stated the "shop"/barn is not part of this application before the board. Attorney Pasay noted the NH State 250' shoreland line, to the right of the proposed "shop"/barn. Attorney Pasay stated the addition and a portion of the driveway are within 150' town shoreland protection district. The "shop"/barn is within the NH State 250' shoreland line. Attorney Pasay stated the applicant is before the board this evening just for the addition, which consists of 2 bedrooms, an office, a family room, and an extension of the existing master bedroom. Attorney Pasay explained the applicants have pursued a state shoreland permit for the entire property, which the state has approved. Mr. Dolan asked for confirmation that this property has been subdivided. Attorney Pasay stated yes. Mr. Dolan questioned why the subdivision line does not appear on the plan before the board. Attorney Pasay explained the plan before the board was completed prior to the approval of the subdivision plan, which was under appeal and recently was settled but not yet recorded. Mr. Wolph explained to the board that there currently there is only one lot until the subdivision appeals are resolved. Attorney Pasay explained the benefits of removing impervious surface within the shoreland district. Attorney Pasay reiterated there will be a net reduction in the impervious surfaces that is within the 150' line from the Squamscott River. This will allow the property to be in greater conformance with the town zoning ordinance than the property exists today. There is currently 8,293 square feet of impervious surface inside the 150 ft. line which includes a portion of the driveway and the entirety of the house. The addition is proposing to add 1,315 new square feet of impervious surface within the district. The total increase is 16 percent which will total 9,608 square feet within the town's overlay district. The Cleary's are proposing and requesting a condition on the special exception and variance approval that they remove the entirety of the impervious driveway area within the town's 150 foot line which is a sum of 2,761 square feet and to replace it with pervious pavers or crushed stone or materials that will infiltrate water. The reduction will total over 1,400 square feet of

97 what currently exists. The new total of impervious surface will be 6,847 square feet which is
98 a 17 percent of what is currently on the property. Attorney Pasay stated allowing the property
99 to remain in the current state is a worse condition, and contrary to the current zoning
100 ordinance, than what the applicants are proposing.

101
102 Sergio Bonilla, Mission Wetlands, reiterated he completed a thorough assessment of the
103 wetlands in July 2019. Mr. Bonilla discussed the delineation of wetlands shown on the plans
104 before the board. Mr. Bonilla pointed out the communities of vegetation associated with the
105 wetlands. Mr. Bonilla stated the objectives to protect the environment and to maintain water
106 quality there is a 17 percent decrease in impervious surface area and there is no impact to any
107 aquatic habitat. The terrestrial habitat associated with the proposal is previously disturbed
108 maintained landscaped lawn area, none of the natural vegetation will be impacted. The
109 properties along the Squamscott are unique settings and the Cleary's are proposing to improve
110 on the area. Mr. Bonilla stated there is no direct impact to the wetlands associated with the
111 Shoreland Protection Overlay District and the only impact is to the buffer zone of that tidal
112 wetland. Mr. Bonilla stated the impacts have been minimized and only in previously
113 disturbed areas and away from the resource and the applicant is proposing to reduce the
114 pervious surface area. The mitigations are in the form of decrease the impervious and silt
115 control will be in place during construction.

116
117 Mr. Wolph asked Mr. Bonilla to confirm the 150 ft. Shoreland Protection District line of
118 delineation would not include or encompass the proposed addition. Mr. Bonilla stated if this
119 was a bank delineation of the Squamscott River this would not be an issue, it is the fact that
120 the ordinance defines it and encapsulates the title. Mr. Wolph stated the board needs to be
121 aware that the addition will fully within the Shoreland Protection District and will be required
122 to have a special exception or variance. Mr. Pasay explained the town's 150 ft line on the
123 plan on Exhibit 1.

124
125 Mr. Dolan stated the special exception should be delineated first based on the criteria and then
126 proceed to the variance, if required.

127
128 Attorney Pasay explained there are two areas of the zoning ordinance which articulate criteria
129 for special exception. Article 5.1.3 specifically addresses the expansion of non-conforming
130 use. The proposed addition is within the 150 ft. Shoreland Protection District and the house is
131 a non-conforming use formally permitted. The zoning ordinance states a special exception
132 can be applied for to expand the non-conforming use under Article 5.1.3 if the criteria is met.

133
134 The first criteria is that the proposed expansion cannot intrude any further into any setback
135 area than does the existing structure. Attorney Pasay stated this requirement is satisfied as the
136 applicant is not intruding into any setback area of front, rear, or side setback and there are no
137 setback violations. Attorney Pasay explained that to the extent the applicant is intruding into
138 the Overlay District and away from the Squamscott River.

139
140 The second criteria is that the expansion must have no further adverse impact on the view,
141 light, and air of any abutter and this is satisfied because the applicant is insulated from any
142 abutters.

143 The third criteria that the expansion must not cause property values to deteriorate. Jameson
144 Dustin, Bean Group real estate agent, provided an analysis in enclosure 8 and explains this
145 will not have a detrimental effect to surrounding property areas.

The fourth criteria to not impede existing rights of access or egress is satisfied as there are no impacts to access or egress rights on this property.

The fifth criteria that the portion of the proposed expansion which will intrude into the setback must, in no event, exceed the footprint square footage of that portion of the structure which presently intrudes into the setback regardless of the number of applications made over time and under this subsection. Attorney Pasay stated that, generally, cases before the board that a reviewing this criteria are literally encroachments into the setback and a structure that is already non-conforming to a front, rear, or side setback and this is not the situation before the board. The existing footprint of the building is 5,400 SF and the proposed addition is adding 1,315 SF which is less than a quarter in size of the existing building and the proposed addition meets this criteria.

The sixth criteria that, in the event the non-conforming structure contains a commercial use, there must be no adverse impact on access, traffic, parking, lighting, or other safety or visibility features of the existing structure. This criteria is satisfied and the property is strictly a single family, residential use and will continue as such.

The seventh criteria that a special exception, under this subsection, may be granted only as to expansions into the side, front, and rear setbacks and is not available for expansions which violate height restrictions of this ordinance. Attorney Pasay states this provision usually pertains to a non-conforming structure which violates the setback and the applicant is not in a setback and this criteria is satisfied. The addition will be to the front of the existing structure and within the setbacks and no proposed violation to the town's height requirements under the zoning ordinance.

Attorney Pasay stated the first criteria under 17.8.2.c that the proposed use meets the standard provided by the board and the particular use permitted by special exception. Expansion of non-conforming structures are permitted by Section 5.1.3 if the criteria is met.

The second criteria states no hazard to the public or adjacent property on account of any potential fire, explosion, or release of toxic materials will occur as a result of the approval of the special exception which is also satisfied with the straightforward 1,300 SF addition onto an existing single family use and no incidents of these items.

The third criteria that no detriment to the property values in the vicinity or change in the essential character of a residential neighborhood on account of the location or scale of buildings and other structures, parking areas, access ways, odor, smoke, gas, dust, or other pollutants, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles, or other materials will occur. This criteria is met by a real estate brokers opinion of value and the structure is insulated by hundreds of feet in either direction to any abutters and the proposed addition is conservative and will add 1,300 SF of footprint to the structure itself with no evidence before the board that would substantiate a finding of detriment to property values and the use will be single family residential as it currently exists.

The fourth criteria states there will be no creation of a traffic safety hazard or a substantial increase in the level of any traffic congestion in the city as a result of the proposal being proposed. This criteria has been satisfied as the traffic will remain as is currently on the property and no increase.

The fifth criteria that the use will not result in excessive demand on municipal service, including water, sewer, waste disposal, police, fire protection and schools. The use remains

the same as the property currently enjoys and is serviced by private septic and well water and no increase demand on municipal services caused by this project.

The sixth criteria that no significant increase of storm water runoff onto adjacent property or streets as a result of the proposed use. Attorney Pasay explained the building on the property is insulated by hundreds of feet and currently not contributing storm water to the property the result of the project will be a reduction of impervious surface in the shoreland protection district by 17 percent. Significantly more water will be infiltrating into the ground by virtue of this project than what currently exists.

Mr. Caparso asked for confirmation that the reduction in impervious driveway surface area is to just to the 150 ft. line shown on the plan. Attorney Pasay explained that Exhibit 4 shows the driveway and impervious surface that is being discussed. The existing total amount of driveway located within the 150 ft. is 2,809 SF and 2,761 SF will be removed and no longer be impervious and will be pervious to infiltrate ground water. Attorney Pasay explained the issue with ground water and wetlands in general is storm water runoff and impervious surface cannot go into the ground and pushes it elsewhere. Storm water management protocols and best management practices handles where water goes after it hits an impervious surface. A pervious surface, where water can go into the ground, alleviates that issue because it goes directly into the ground and is the biggest consideration there is for the protection of the wildlife and the aquatic resources in that zone and more water will go into the ground because of what is being proposed and what currently exists. Mr. Bonilla explained the wetlands and slopes on the plan. Mr. Wolph stated a project of this size is marginal compared to a commercial building of significant size to mitigate and allow for the displacement of the wetlands elsewhere.

Mr. Dolan asked for any public comment in opposition to the application.

David Kisver, 9 Boat Club Drive, his belief is that expansion can occur in the waterline shoreline zone but you cannot go out in the shoreline zone and stay within the confines of the property. Mr. Kisver asked what the project is giving back beside the 17 percent of impervious surface and there is no hardship being created in not allowing it. Mr. Wolph and Mr. Dolan explained the board is currently hearing the special exception, not the variance. Mr. Kisver does not agree that this proposed addition fits with the setback variance criteria.

Hearing no objections, Mr. Dolan asked if the board had questions for the applicant regarding the special exception. No questions were brought forward. Mr. Dolan asked the board if the factors in Section 5.1.3 exist in order to grant the special exception. Mr. Caparso made a motion to close the open portion of the hearing. Mr. Pierce seconded the motion. Motion passed unanimously.

Mr. Dolan opened the hearing to board comments. Mr. Dolan explained the board 5.1.3 requirements need to be satisfied before the board can move on to the requirements of the special exception. Being no comments from the board, Mr. Caparso made a motion to close the discussion. Mr. Goulet seconded the motion. Motion carried unanimously. Mr. Dolan stated the board must find the following factors to exist before issuing such a special exception:

A. The proposed expansion must intrude no further into any setback area than does the existing structure; Mr. Caparso voted yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce yes.

- 250 B. The expansion must have no further adverse impact on the view, light, and air of any
251 abutter; Mr. Caparso yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce yes.
252
- 253 C. The expansion must not cause property values to deteriorate; Mr. Caparso yes, Mr. Dolan
254 yes, Mr. Goulet yes, Mr. Pierce yes.
255
- 256 D. The expansion must not impede existing rights or access or egress; Mr. Caparso yes, Mr.
257 Dolan yes, Mr. Goulet yes, Mr. Pierce yes.
258
- 259 E. The portion of the proposed expansion which will intrude into the setback must, in no
260 event, exceed the footprint square footage of that portion of the structure which presently
261 intrudes into the setback, regardless of the number of applications made over time under
262 this subsection; Mr. Caparso yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce yes.
263
- 264 F. In the event the non-conforming structure contains a commercial use, there must be no
265 adverse impact on access, traffic, parking, lighting, and other safety or visibility features
266 of the existing structure; Mr. Caparso yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce yes.
267
- 268 G. Special exception under this subsection may be granted only as to expansions into the
269 side, front, and rear setbacks and is not available for expansions which violate height
270 restrictions of this ordinance; Mr. Caparso yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce
271 yes.
272

273 Mr. Dolan stated the special exception criteria has been met for the expansion of a non-
274 conforming structure and the board will move onto Section 17.8.3.c. The planning board
275 criteria has already been met. Special exceptions shall meet the following standards;
276

- 277 1. Standards provided by this ordinance for the particular use permitted by special exception;
278 Mr. Caparso yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce yes.
279
- 280 2. No hazard to the public or adjacent properties on account of potential fire, explosion, or
281 release of toxic chemicals or materials; Mr. Caparso yes, Mr. Dolan yes, Mr. Goulet yes,
282 Mr. Pierce yes.
283
- 284 3. No detriment to property values in the vicinity or change in the essential characteristics of
285 a residential neighborhood on account of the location or scale of buildings and other
286 structures, parking area, access ways, odors, smoke, gas, dust, or other pollutant, noise,
287 glare, heat, vibration, or unsightly odor, outdoor storage of equipment, vehicles, or other
288 materials; Mr. Caparso yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce yes.
289
- 290 4. No creation of traffic, safety hazard, or a substantial increase in the level of traffic
291 congestion in the vicinity; Mr. Caparso yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce
292 yes.
293
- 294 5. No excessive demand on municipal services including, but not limited to, water, sewer,
295 waste disposal, police and fire protection, and schools; Mr. Caparso yes, Mr. Dolan yes,
296 Mr. Goulet yes, Mr. Pierce yes.
297
- 298 6. No significant increase of storm water runoff onto adjacent property or streets; Mr.
299 Caparso yes, Mr. Dolan yes, Mr. Goulet yes, Mr. Pierce yes.
300

Mr. Dolan stated the requirements for granting a special exception has been met. The board has the option to institute appropriate conditions on granting a special exception and asked if the board members would like to set any special conditions for this approval. Mr. Wolph stated the board could make a condition for the applicant to complete the pervious surface area as stated in the application.

Mr. Caparso made a motion to grant the Special Exception with the following condition;

1. The applicant shall replace the impervious driveway surface within the Shoreland Protection Overlay District and replace with a pervious surface material and subsequently provide a certification of completion by a qualified individual.

Motion to approve the Special Exception with condition passed unanimously.

Mr. Dolan explained the applicant has 30 days to appeal the granting the special exception and moving forward prior to the 30 day timeline will be at the applicant's own risk.

Mr. Caparso made a motion to close case #656A. Mr. Goulet seconded the motion. Motion passed unanimously.

- b. Case #656B, Robert & Stephanie Cleary, 7 Boat Club Drive, Map 08, Lot 39, Residential Agricultural Zoning District, represented by Justin Pasay, Donahue, Tucker & Ciandella, 111 Maplewood Avenue, Portsmouth, NH.

The applicant requests a Variance from Section XII: Shoreland Protection District: (overlay), Article 12.6.1(a), of the Stratham Zoning Ordinance in order to construct a 30'x49' residential addition.

Attorney Pasay stated the applicants are willing to dispense with the factual and context here if the board agrees for the purposes of remedy and efficiency that the presentation previously provided with the special exception is the same presentation that would be provided for the context of this variance. The variance application is very closely tied to the special exception application previously discussed and Attorney Pasay would like to explain the variance criteria and a detailed discuss of the property and proposal is not necessary. Mr. Dolan stated the board may want to hear the presentation regarding the setback of the structure, impact on shoreland protection district of the impervious area, etc. Mr. Caparso agreed.

Mr. Pasay asked the board to reference Exhibit 1 which is the plan that depicts everything that is being proposed. Mr. Pasay stated this parcel is currently 11.2 acres and once the subdivision is recorded it will be approximately 8 acres. The existing structure on the plan is well insulated by hundreds of feet from the boundaries of the specific property. The existing structure in its entirety is located within the town's shore land protection overlay district, which is a 150 ft line from the shoreline of the Squamscott River to the upland extent which proceeds on the plan from left to right. Mr. Pasay stated the actual 150 ft line is located to the left of the proposed "shop" on the plan and proceeds south, before eventually heading east in a manner that mirrors the other wetland line located on the plan, which is the 250 ft State of NH shoreland line and 250 ft from the shoreline of the Squamscott River. The proposed addition to the existing structure which is 30x49 ft will accommodate (shown on Exhibit 7) two additional bedrooms, an office, a family room, and extended master bedroom. The footprint is large and one story. The building is not well suited to expand up due to the cathedral ceilings in the center there would be two distinct second floor areas. The addition

will be, in its entirety, located within the town's shoreland protection overlay district. The square footage of the building footprint is 1,315 SF and the existing building square footage is 5,400+/- . The total square footage, including the existing impervious surface area of the driveway within the town's shoreland protection district it totals 8,293 SF. The addition will bring the total to 9,600 SF. The applicant is proposing to remove approximately 2,761 SF of impervious driveway surface area located within the town's shoreland protection district which will be a net reduction of 1,446 SF, 17 percent, of the impervious surface area within the shoreland protection district. Attorney Pasay stated the proposed structure is well insulated from the road and neighbors. Attorney Pasay explained the result of this proposal will be a property in greater conformity with the zoning ordinance and more compliant the Shoreland Protection Overlay District than currently exists.

Mr. Bonilla stated there will be no impact to the wildlife corridor or any previously undisturbed areas. The impacts of this proposal are limited to those areas that have been previously disturbed or that are maintained lawn area. No natural vegetation is required to be removed and avoidance, minimization, and mitigation is proposed in the form of the 17 percent reduction in the shoreland protection overlay district. Mr. Bonilla stated that best management practices will be exercised during construction.

Mr. Dolan asked if the board had any questions for the applicant. Mr. Dolan asked for confirmation that the applicant is requesting a variance from Section 12.6.1. Mr. Wolph stated yes.

Attorney Pasay stated a variance, by definition, is approval to do something that is not allowed by the letter of the law. Mr. Dolan stated the applicant is requesting to improve the condition of the soils and infiltration of water into the aquifer and protected zone. Attorney Pasay stated yes, and the variance, from a legal perspective, is a constitutional safety valve. A regulation on the books that is being applied in a manner to a property that is not advancing the purpose of the regulation then a variance should issue. A local regulation should not stand in the way of the reasonable exercise of ones own property rights. Attorney Pasay stated it is the board's determination whether it makes sense to apply regulation Section 12.6.1 to this property and the applicant does not believe it does. Attorney explained the legal question is whether or not the variance conflicts with the zoning ordinance in a marked degree. The mere conflict with the zoning ordinance is not sufficient to say no to the first two variance criteria. The variance will not alter the essential character of the neighborhood. The variance will not threaten the public health, safety, or welfare. If the answer to those questions is no, the Supreme Court states the first two criteria of the variance have been met. The Supreme Court has also stated that in making this determination the ZBA should consider the intent of the zoning ordinance. The general purpose provisions of the zoning ordinance is to protect public health. The general point of the Shoreland Protection Overlay District is to protect the environment; water quality, wildlife, and aquatic vegetation. Attorney Pasay stated the proposed addition is not contrary and the net result of what is proposed will result in a property that better fulfills those purposes than what currently exists. Attorney Pasay explained the proposed addition will not alter the essential character of the neighborhood; it will beautify the property, improve the ecological and environmental perspective, and will be consistent with the character of the neighborhood. Attorney Pasay stated the net result of the property, after the work is complete and the impervious surface area is removed, it will be a property more closely aligned with Article 12 of the town zoning ordinance than currently exists. Attorney Pasay stated there is no discernable benefit to the public with in denying the variance request and will advance the public interest with regard to the environmental perspective. Attorney Pasay stated the applicant provided, Exhibit 8, a letter from Jameson

403 Dustin, Bean Group real estate agent, who stated there will be no impact to the surrounding
404 property values. Attorney Pasay explained literal enforcement of the provisions of the
405 ordinance will result in an unnecessary hardship. Special conditions of this property, which
406 distinguish it from properties in the area, there is no fair and substantial relationship between
407 the point of the regulation and its application to this project. Attorney Pasay explained the
408 special conditions is the size of the property, larger than properties in the area, and the
409 location of the building itself, which is entirely within the town's 150 ft shoreland protection
410 district, as well as the properties ability to accommodate exactly what is being proposed.
411 Attorney Pasay explained physical improvements of a property can constitute the basis of a
412 hardship. The existing building was constructed close to Squamscott River and is now non-
413 conforming because it is located within the 100 ft from the shoreline and the actual building
414 presence entirely in the 150 ft is the hardship. Attorney Pasay explained this regulation does
415 not make sense to apply to this property because it will not advance its purposes. Attorney
416 Pasay stated the variance criteria has been met and requests the same condition on the
417 approval that the board provided on the special exception to remove the impervious surface
418 area within the 150 ft of the shoreline and replace with pervious surface area.

419
420 Mr. Dolan asked if there were any comments from the public in opposition of the variance
421 application.

422
423 David Kisver, 9 Boat Club Drive, stated the applicant's description of a "small" impact will
424 create a big impact. Mr. Kisver stated the present location of the property to the water does
425 not agree that creates a hardship. The Harborside reference is a commercial property and
426 does not have the same comparison to a homeowner that does not have a business that exists
427 in the same fashion as a hotel.

428
429 Jay Ward, 10 Boat Club Drive, stated he does not see that this application consists of a
430 hardship. Mr. Ward stated when his property was built he questioned the town to build closer
431 to the river and was denied by Terry Barnes that under no circumstance a home could be built
432 within 150 ft. because the hardship criteria was not met. The Cleary home was built near 50
433 years ago and served three (3) previous owners well.

434
435 Mr. Pasay explained the Harborside reference was regarding the hardship criteria requires a
436 two prong analysis; are there special circumstances and, if there are special circumstances is
437 there a reasonable basis to apply the regulation because of the special circumstances. The
438 Harborside reference stands for the proposition that in the first determination determining
439 whether or not there are special circumstances it is ok to consider the actual physical
440 improvements on the property as special circumstances and is the situation here. Mr. Ward
441 may not have been able to build within the shore land protection district new, without the
442 variance, but this property is existing and no improvements on building can happen without a
443 variance and is clearly distinct from the situation that was addressed by the abutters.
444 Mr. Caparso made a motion to close the public portion of the hearing. Mr. Goulet seconded
445 the motion. Motion carried unanimously.

446
447 Mr. Wolph stated the applicant is seeking relief from the wetland section of the ordinance and
448 the board needs to have finding of fact relevant to the variance criteria.

449
450 Mr. Caparso stated Mr. Kisver and Mr. Ward make a good point and this is precedent setting.
451 When the applicant argues the property cannot be used being within this zone and the board
452 accepts that argument then every homeowner within that zone can make the same argument
453 and development into the wetlands will occur when it shouldn't. Mr. Dolan stated each case

that comes before the board is to be decided on its own merit and not on the basis of precedent or potential future cases coming before the board. Mr. Pierce questioned when the original structure was built. Mr. Cleary stated 1980. Mr. Pierce questioned when the Shore land Overlay Protection District was established. Mr. Dolan stated 1991-92. Confirmation that the Shore land Overlay Protection District was established after the existing home was built. Mr. Wolph clarified that the applicant is not proposing to build into the wetland. Mr. Wolph stated a building inspector does not have the authority to tell an applicant that they do not meet the criteria, only to deny a building permit and then the applicant has the right to apply to the zoning board for a variance.

Mr. Caparso made a motion to close the deliberation and vote on the variance before the board. Mr. Goulet seconded the motion. Motion closed unanimously.

The board moved to vote on the criteria.

No variance shall be granted unless all of the following conditions are met:

- i. The variance will not be contrary to the public interest. Mr. Caparso voted no, Mr. Dolan yes, Mr. Goulet no, Mr. Pierce yes.

Finding of Fact: Mr. Caparso stated the applicant has not provided enough evidence to support the argument of not being contrary to the public interest. Mr. Dolan stated the mitigating circumstances do show the impact is not significant and does meet the public interest. Mr. Goulet stated it is contrary to the public interest. Mr. Pierce stated it is not contrary to the public interest because the pervious area will be increased, the structure is proposed to be built further away from the existing structure.

- ii. The spirit of the ordinance is observed. Mr. Caparso no, Mr. Dolan yes, Mr. Goulet no, Mr. Pierce yes.

Finding of Fact: Mr. Caparso stated the spirit is not being observed due to building in the protected area. Mr. Dolan stated the spirit is observed because mitigation techniques are being implemented to protect the district. Mr. Goulet stated the spirit of the ordinance is not being observed due to not good stewardship as the ordinance is there to protect the environment and the applicant is only providing minimal mitigation. Mr. Pierce stated the spirit of the ordinance is observed because the applicant would remove more overall environmental impact then they would be adding.

- iii. Substantial justice is done. Mr. Caparso no, Mr. Dolan yes, Mr. Goulet no, Mr. Pierce yes.

Finding of Fact: Mr. Caparso stated substantial justice is not being done to the town with regards to the wetland protection ordinance. Mr. Dolan stated justice is done to the property owner. Mr. Goulet stated there is not enough public gain to override the impact of the proposal. Mr. Pierce stated justice is done by allowing the property owner to have real property rights and reduce the overall impact to the surrounding wetlands and S.P.D.

- iv. The values of surrounding properties are not diminished; Mr. Caparso yes, Mr. Caparso yes, Mr. Goulet yes, Mr. Pierce yes.

Criteria passed unanimously.

- 501 v. Literal enforcement of the provisions of the ordinance would result in an unnecessary
502 hardship. Mr. Caparso no, Mr. Dolan yes, Mr. Goulet no, Mr. Pierce yes.

503 *Finding of Fact: Mr. Caparso stated the specific application on the property the applicant*
504 *didn't establish the hardship clearly enough. Mr. Dolan stated the hardship exists due to*
505 *the home being built prior to the S.P.D being established and the legislation came after the*
506 *existing house. Mr. Goulet stated the applicant didn't meet the bar of the "hardship*
507 *criteria". Mr. Pierce stated the applicant did meet the bar of the hardship, because to build*
508 *somewhere else on the property would be a financial hardship and the S.P.D. was created*
509 *after approval and construction of the home.*

510
511 The variance is denied due to lack of majority votes. The applicant has the opportunity to
512 appeal this decision.

513
514 **4. New Business:** The board discussed the need for new board members.

515
516 **5. Other Business:** None

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518 **6. Adjournment**

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520 Mr. Caparso made a motion to adjourn at 9:30 pm. Mr. Goulet seconded. Motion passed
521 unanimously.

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546 *Note(s):*

- 547 1. Materials related to the above meeting are available for review at the Municipal Center during normal business hours. For more information,
548 contact the Stratham Building/Code Enforcement Office at 603-772-7391 ext.180.
549 2. The Zoning Board of Adjustment reserves the right to take items out of order and to discuss and/or vote on items that are not listed on the
550 agenda.



TOWN OF STRATHAM

INCORPORATED 1716
10 BUNKER HILL AVENUE - STRATHAM NH 03885
VOICE (603) 772-4741 - FAX (603) 775-0517
www.strathamnh.gov

02/01/21

RE: **7 Boat Club Drive**
Map 08 Lot 39, Zone: R/A
Rehearing of ZBA 656B –Variance

Staff Review

Please recall, at the December 22, 2020 Stratham Zoning Board of Adjustment (ZBA) Hearing, applicants Robert & Stephanie Cleary of 7 Boat Club Drive, represented by Attorney Justin Pasay, requested both a special exception and a variance in order to permit them to construct a 30' x 49' residential addition. The ZBA granted the special exception (allowing expansion of a nonconforming use) but the requested variance from Section XII: Shoreland Protection District: (overlay), Article 12.6.1(a) (allowing construction of a structure within the Shoreland Protection District) did not pass. Two members voted in favor of granting the variance, and two members voted in opposition to granting the variance.

The applicants have **requested a rehearing** of Case #656B, regarding the decision on the variance. They have not requested a rehearing of the special exception decision.

When a Motion for Rehearing is received, within 30 days the ZBA must decide to either grant the request for a rehearing or deny it. The decision is made by the ZBA at a **public meeting**, not a **public hearing**, and therefore no testimony or other information from the public should be accepted (except for the motion for rehearing itself).

The rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the Superior Court. The ZBA should grant the Motion for Rehearing if the ZBA believes one or more technical, legal or other mistake(s) were made in its original decision. **There is no requirement that new evidence be presented in order to grant a rehearing.**

Even if it does not believe any mistake or error was committed, if in considering the Motion for Rehearing the ZBA feels it would like to add additional or different reasons for denial of the original request for the variance, the ZBA should grant the motion for rehearing, hold a new hearing on the variance request, and include their additional (or different) reasons in a new denial decision.

Attorney Pasay has prepared a detailed letter explaining why he believes the rehearing is necessary and why the request for the rehearing should be granted. Each member of the ZBA should carefully review this letter and consider at least these reasons in making the decision about whether to grant the rehearing. You are not limited to the reasons that are stated in

Attorney Pasay's Motion for Rehearing and may grant the rehearing to correct any mistakes or errors in the original decision as you see fit.

If the ZBA decides to grant the rehearing, you must set the date for the new hearing. It is recommended that the rehearing be held within 30 days of the decision to grant the rehearing. Notice to the public and abutters of the new public hearing is provided in the same manner as for the original hearing, and on the date set, a new public hearing is held.

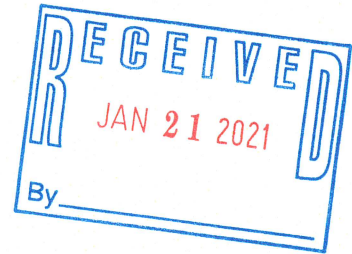
If the ZBA decides not to grant the rehearing, the applicants will be informed of this decision and they will then have 30 days to appeal the original decision to Superior Court.

Sincerely,

Shanti Wolph
Building Inspector/Code Enforcement Officer
603-772-7391 x180
swolph@strathamnh.gov



TOWN OF STRATHAM
10 Bunker Hill Avenue · Stratham, NH 03885
(603) 772-4741 · Fax 603-775-0517
www.StrathamNH.gov



ZONING BOARD OF ADJUSTMENT
APPLICATION AND INSTRUCTIONS FOR THE FILING OF A
MOTION FOR REHEARING

Within thirty (30) days after any order or decision of the Zoning Board of Adjustment, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, **specifying in the motion for rehearing the ground therefor**; and the Board of Adjustment, may grant such rehearing if in its opinion good reason therefor is stated in the motion. This thirty (30) day time period shall be counted in calendar days beginning with the date following the date upon which the board voted to approve or disapprove the application.

NH RSA 677:3 Rehearing by Board of Adjustment, Board of Appeals, or Local Legislative Body-
A rehearing shall be granted only if:

- (1) the petitioner has new, relevant evidence to submit;
- (2) the petitioner raises new, relevant legal issues that were not considered at the original hearing; or
- (3) the Board feels it may have made a prejudicial, technical or legal error in its original decision.

The Board shall either grant or deny a rehearing within thirty (30) days of receiving the request or may suspend the order of decision complained of pending further consideration. Appeals to the NH Superior Court may be taken pursuant to NH RSA 677:4, as amended, within thirty (30) days after the action complained of has been recorded.

I HAVE READ THE ABOVE, AND HEREBY FILE THIS MOTION FOR REHEARING AND HAVE ATTACHED MY WRITTEN STATEMENT (MOTION) CONCERNING THE FOLLOWING:

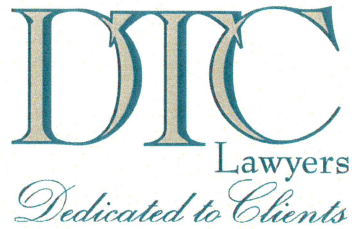
ZBA Case # 656B Property Address 7 Boat Club Drive

The decision was rendered by the Zoning Board on: 12 / 22 / 2020
Date

Signature of person(s) requesting rehearing:

Justin L. Pasay [Signature] 01/21/21
Full Name (Print) Signature Date

Full Name (Print) Signature Date



CELEBRATING OVER 35 YEARS OF SERVICE TO OUR CLIENTS

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NICHOLAS R. AESCHLIMAN

21 January 2021

Gary Dolan, Chair
Zoning Board of Adjustment
Town of Stratham
10 Bunker Hill Avenue
Stratham, NH 03885

Re: Motion for Rehearing, Case #656B

Dear Chair Dolan and Board Members:

Robert and Stephanie Cleary (the “Applicants”) appeared before the Stratham Board of Adjustment (“ZBA”) on 22 December 2020 seeking a Special Exception from Section V, Article 5.1.3 of the Stratham Zoning Ordinance (the “Zoning Ordinance”) to expand a non-conforming structure, i.e., their home located at 7 Boat Club Drive, which is further identified as Town Tax Map 8, Lot 39 (the “Property”), by constructing a 30’ x 49’ residential addition on the front of their house (the “Proposed Addition”) which is in the Town’s Shoreland Protection Overlay District (the “Shoreland District”). The Applicants also sought a variance from Section XII, Article 12.6.1(a) of the Zoning Ordinance to construct the Proposed Addition within the Town’s Shoreland District as the Shoreland District Ordinance prohibits the erection of structures within the Shoreland District. The ZBA approved the Applicants’ Special Exception Application by a unanimous 4-0 vote. The ZBA denied the Applicants’ Variance Application by a vote of 2-2. This letter constitutes the Applicants’ Motion for Rehearing in Case #656B, which is the Variance case, in accordance with applicable law.¹

We appreciate the ZBA’s time and consideration. Due to the complexity and nature of the case, we respectfully request that the Town of Stratham forward this Motion for Rehearing to it’s Town Counsel so that Town Counsel may consult the ZBA upon review and consideration of same.

Executive Summary

The context behind the Applicants’ Variance Application is the reason why variances exist in the first place, to prevent unconstitutional takings and to preserve one’s rights and interest in the reasonable use of their own land. This case constitutes the rare situation where granting a variance actually advances the purpose and objectives of the applicable Zoning

¹ See RSA 677:2.

Ordinance more than the status quo. Despite this, and despite granting a Special Exception to expand the Applicants' home within the Shoreland District, the ZBA denied the Variance Application. In denying the Variance Application the ZBA erred by:

- 1) Misapplying the public interest and spirit of the ordinance prongs of the statutory variance criteria.
- 2) Misapplying the substantial justice prong of the statutory variance criteria.
- 3) Misapplying the unnecessary hardship prong of the statutory variance criteria.
- 4) Ignoring and/or substituting unsupported personal feelings for uncontradicted expert testimony.
- 5) Making contradictory findings within the Special Exception and Variance contexts.

Under the circumstances these errors were mistakes of law and unreasonable. As such, the ZBA should grant this Motion for Rehearing so that it may apply the correct standards and analyze the Applicants' Variance Application in accordance with applicable law.

Applicable Standard

The rehearing process in New Hampshire is designed to afford the ZBA an opportunity to correct mistakes before an appeal is filed with the Superior Court.² It is also oriented toward the notion that the ZBA should have the first opportunity to correct any action taken, if correction is necessary before an appeal is filed.³ The fundamental question is whether or not the ZBA overlooked any evidence, made any mistake of law, or whether there is new evidence available which was not otherwise available at the time of the hearing. If the ZBA determines that any of its actions constitute mistakes of law or were unreasonable, the ZBA should grant a rehearing to correct those actions.

Analysis

I. Overview

a. Foundational Context

By way of brief overview, and as substantiated by all the plans and data that were presented to the ZBA, the Property is 8.1 acres in size and is bound to the west by the Squamscott River, to the east by Boat Club Drive, and to the north and south by other residential properties. The Property was developed in the mid-1980s with a single-family dwelling and has been maintained as such, with residential landscaping, since that time. The entire existing single-family dwelling on the Property, with a total footprint of 5,484 SF, is located within the Town's Shoreland District, which, by definition, includes the area of land within 150 feet from the Squamscott River.⁴ In fact, the single-family dwelling was built before the Town adopted the Shoreland District Ordinance. Additionally, the Property contains 2,809 SF of impervious

² 15 Loughlin, New Hampshire Practice, Land Use Planning and Zoning, §21.19 (4th Ed.)

³ Id.

⁴ See Zoning Ordinance, § 12.5(a).

driveway surface within the Shoreland District. As a result of these site conditions, the Property contains a total of 8,293 SF of existing impervious surface area within the Shoreland District, and the home constitutes a nonconforming structure under the Zoning Ordinance.⁵

To facilitate a growing family, the Applicants planned to improve the Property by constructing the Proposed Addition and they sought and obtained a State of New Hampshire Shoreland Permit to construct the same. The Proposed Addition is planned to consist of two additional bedrooms, an office, a family room, and an extended master bathroom, and will create 1,363 SF of footprint/impervious surface area, as depicted in the floor plans and renderings provided to the ZBA. Of the 1,363 SF addition, however, 48 SF of same will be constructed over existing impervious driveway surface. As a result, the total proposed increase of impervious surface area within the Shoreland District created by the Proposed Addition is approximately 1,315 SF.⁶ With the Proposed Addition, the total approximate impervious surface area within the District would increase by approximately 16% to approximately 9,608 SF.⁷ **However, to offset the additional proposed impervious surface area within the Shoreland District caused by the Proposed Addition, the Applicants proposed to remove 2,761 SF of impervious driveway surface within the District and replace the same with pervious crushed stone, gravel, or other pervious materials, which would permit the infiltration of water.**

Pursuant to the Applicants' proposal, the removal of the existing impervious driveway surface in the District will result in a greater than 17% (1,446 SF)⁸ net decrease in impervious surface area within the District on the Property (the "Mitigation Proposal").

Pursuant to Section 5.1.3 of the Town's Zoning Ordinance, nonconforming structures may only be expanded via special exception from the ZBA. The Applicants' single-family dwelling is non-conforming because it is located entirely within the Town's Shoreland District. Accordingly, the Applicants filed a Special Exception Application to expand a non-conforming structure (the "Special Exception Application"). Additionally, however, Section 12.6.1(a) of the Zoning Ordinance prohibits the "erection of structure[s]" within the Shoreland District, which is why variance relief from that provision was also sought by the Applicants (the "Variance Application").

⁵ Defined by Section 2.1.47 of the Zoning Ordinance as "use of land, building or premises which is not a use permitted by the provisions of [the Zoning Ordinance] for the district in which such land, building or premises is situated."

⁶ +/- 1,363 SF Proposed Addition footprint minus 48 SF overlap with impervious driveway area.

⁷ +/- 8,293 SF existing impervious surface area plus +/- 1,315 SF proposed additional impervious surface area.

⁸ +/- 8,293 SF existing impervious surface area plus +/- 1,315 SF proposed additional impervious surface area less +/- 2,761 SF impervious driveway area.

b. Hearing

Though the minutes are not yet available online⁹, at the hearing on 22 December 2020, the Applicants presented a detailed factual overview of the Property and of the Applicants' Mitigation Proposal.

The Applicant's wetland scientist, Sergio Bonilla of Mission Wetland & Ecological Services, LLC (the "Wetland Scientist") then provided a comprehensive analysis of the Property's wetlands and of the Town's Shoreland District Ordinance, with a specific reference to the Ordinance's objectives. The Wetland Scientist explained that the objectives of the Shoreland District Ordinance were to: 1) promote the preservation and maintenance of surface water quality in Stratham, 2) conserve the protect aquatic and terrestrial habitat associated with intertidal and riparian areas, 3) preserve and enhance those aesthetic values associated with the natural shoreline, and 4) encourage those uses that can be appropriately located adjacent to shorelines.¹⁰

Importantly, the Wetland Scientist offered significant expert testimony regarding the Applicant's plans for the Proposed Addition, to include the Mitigation Proposal that would decrease the total impervious surface area within the Shoreland District on the Property, and concluded to the ZBA that the Applicants' proposal would result in a property that is more compliant with the terms of the Shoreland District Ordinance and better serving the objectives of that Ordinance than the existing conditions of the Property. The Wetland scientist went on to explain that denying the requested variance would not advance the objectives of the Shoreland Ordinance because the Property was already improved with the single-family dwelling and corresponding residential landscaping. Specifically, the Wetland Scientist testified that the Proposed Addition to the front of the home would have no impact on the water quality of the Squamscott River¹¹ and would have no impact on the aquatic and terrestrial habitat associated with the intertidal and riparian areas.¹² Further the Applicants presented considerable evidence and argument that the Proposed Addition would not compromise the aesthetic values associated with the natural shoreline and was not inappropriate by virtue of the exiting dwelling on the Property and the Mitigation Proposal.¹³

After a lengthy factual presentation, the Applicants, via undersigned counsel, addressed the individual Special Exception criteria contained within both Section 5.1.3 of the Zoning Ordinance and Section 17.8.2(c) of the Zoning Ordinance which are as follows:

- The proposed expansion must intrude no further into any setback area than does the existing structure (Section 5.1.3(a))

⁹ The Applicants reserve the right to supplement and/or amend this Application once the minutes to the December meeting are available.

¹⁰ See Zoning Ordinance, § 12.3. The Applicants' Applications and presentation also specifically described the Zoning Ordinance's general purposes and those of the Shoreland Protection District Ordinance in Section 12.2.

¹¹ Zoning Ordinance, § 12.3(a).

¹² Zoning Ordinance, § 12.3(b).

¹³ Zoning Ordinance, §§ 12.3(c)(d).

- The expansion must have no further adverse impact on the view, light, and air of any abutter ((Section 5.1.3(b))
- The expansion must not cause property values to deteriorate (Section 5.1.3(c))
- The expansion must not impede existing rights of access or egress (Section 5.1.3(d))
- That portion of the proposed expansion, which will intrude into the setback must, in no event, exceed the footprint square footage of that portion of the structure which presently intrudes into the setback, regardless of the number of applications made over time under this subsection (Section 5.1.3(e))
- In the event the nonconforming structure contains a commercial use, there must be no adverse impact on access, traffic, parking, lighting or other safety or visibility features of the existing structure (Section 5.1.3(f))
- A special exception under this subsection may be granted only as to expansions into the side, front, and rear setbacks, and is not available for expansions which violate height restrictions of this ordinance (Section 5.1.3(g))
- The proposed use meets the standards provided by this Ordinance for the particular use permitted by special exception (Section 17.8.2(c)(i))
- No hazard to the public or adjacent property on account of potential fire, explosion, or release of toxic materials (Section 17.8.2(c)(ii))
- No hazard to the public or adjacent values in the vicinity or change in the essential characteristics of a residential neighborhood on account of the location or scale of buildings and other structures, parking area, access ways, odor, smoke, gas, dust, or other pollutant, noise, glare, heat, vibration, or unsightly outdoor storage of equipment, vehicles or other materials (Section 17.8.2(c)(iii))
- No creation of a traffic safety hazard or a substantial increase in the level of traffic congestion in the vicinity (Section 17.8.2(c)(iv))
- No excessive demand on municipal services, including, but not limited to, water, sewer, waste disposal, police and fire protection, and schools (Section 17.8.2(c)(v))
- No significant increase of storm water runoff onto adjacent properties or streets (Section 17.8.2(c)(vi))

Additionally, the Applicants specifically requested that the ZBA impose a condition of approval that required them to remove the impervious driveway surface within the Shoreland Protection District and replace the same with a pervious surface material, all to accomplish the Mitigation Proposal and advance the objectives of the Shoreland District Ordinance on the Property.

Thereafter, there was a brief public comment period before the ZBA quickly deliberated and unanimously found, by a vote of 4-0, that all of 13 special exception criteria listed above had been satisfied by the Applicants and the Special Exception was granted. The ZBA imposed the requested condition of approval.

The ZBA then took up the Applicants' Variance Application. The Applicants summarized the contents of the factual and expert testimony tendered to the ZBA during the

Special Exception Application hearing.¹⁴ The Applicants, via their counsel, then walked through the five individual statutory variance criteria and elaborated on the meaning and application of each, as described by the New Hampshire Supreme Court.¹⁵ The Applicants applied the facts of the case to the statutory variance criteria and concluded that the Variance Application squarely meets all five criteria and should, therefore, be granted.

After a short public comment period, the ZBA began its deliberation process.

c. Deliberation on Variance Application

The vote on the Variance Application was split 2 – 2 and therefore constituted a denial. Two members (Chair Dolan and Drew Pierce) determined that all five statutory variance criteria were satisfied by the Applicants. The two remaining members present (Phil Caparso and Richard Goulet) found that the Applicants did not satisfy the public interest, spirit of the ordinance, substantial justice and unnecessary hardship prongs of the statutory variance criteria. Initially, the Board simply voted on the individual variance criteria with no analysis. Thereafter, Shanti Wolph, the Town's Building Inspector/Code Enforcement Officer urged the Board to memorialize the basis of their votes via discussion of each of the criteria. The basis of Mr. Caparso and Mr. Goulet's findings on the four relevant variance criteria are discussed below.¹⁶

i. Public Interest

Regarding the public interest prong of the variance criteria, Mr. Caparso remarked that:

- Section 12.6.1(a), prohibiting the erection of structures within the Shoreland District was put there for a reason.
- Granting the Variance Application would be overturning the law.
- No hardship was presented and there wasn't a substantial enough case.
- The Application did not pass the test.

Mr. Goulet remarked that:

- The Application is contrary to the public interest and letter of the law.
- His overall perspective was that the Application doesn't meet the letter of law.
- The Zoning Ordinance states that you cannot build within the Shoreland Protection District.
- The proposal is therefore contrary to the public interest.

¹⁴ The Applicants register their request, to the extent that this case must be appealed to the Superior Court, that the Certified Record include the minutes from the Special Exception presentation as the cases were inextricably connected.

¹⁵ This analysis was undertaken in great detail within the Applicants' Variance Application.

¹⁶ The Applicants reserve the right to supplement and/or amend this analysis once minutes to the meeting are available.

ii. Spirit of the Ordinance

With regard to the spirit of the ordinance prong of the variance criteria, Mr. Caparso remarked that:

- The Shoreland Protection District Ordinance was put in place for a reason to begin with.
- This application is not like other variance applications where an applicant is requesting a slight deviation from an ordinance.
- This application constitutes building on protected wetlands.
- The Applicants' presentation does not take away fact that their proposal is to build in a protected zone.

Mr. Goulet stated that:

- The spirit of the ordinance is environmental stewardship.
- The ordinance is there to protect the environment.
- The mitigation proposed by the Applicants is minimal.
- The Applicants' proposal doesn't leave the property better than it is now.
- The Applicants' proposal doesn't override the spirit of the ordinance.

iii. Substantial Justice

With regard to the substantial justice prong of the variance criteria, Mr. Caparso remarked that:

- The Applicants knew or should of known that they were buying a house that was within the Shoreland District.
- Granting the Variance Application will be setting a precedent.
- The Town placed an importance on protecting the Shoreland, otherwise the Town would not have passed the Shoreland District Ordinance.
- The ZBA should give justice to the Town and protect the wetlands.

Mr. Goulet stated that:

- The Application does not constitute enough public gain.
- The spirit of the ordinance is to protect the environment, which overrides the Application.

iv. Unnecessary Hardship

With regard to the unnecessary hardship prong of the variance criteria, Mr. Caparso remarked that:

- The Applicants did not "break the link" between the public purpose of the Shoreland District Ordinance and its application to the Property.
- The Town passed the Shoreland District Ordinance for a reason.

- There is not enough hardship.
- The Applicants bought the property knowing it was within the Shoreland Protection District.
- There is no hardship to the Town.
- There are 100-150 homes with similar situations in Stratham and granting this application would set a precedent.
- He was unwilling to make precedent.

Mr. Goulet remarked that:

- A variance is a high bar.
- The case for a variance was not made strong enough.
- Mitigation is minimal.
- The case isn't strong enough.

II. Legal Error

In denying the Applicants' Variance Application while approving the Special Exception Application the ZBA made several mistakes of law and as a result, that decision is illegal and unreasonable and the ZBA should grant a rehearing so that it may have the opportunity to correctly apply the law.

a. The ZBA erred by misapplying the public interest and spirit of the ordinance prongs of the variance criteria.

As detailed by the Applicants in the Variance Application and as presented by undersigned counsel to the ZBA at the public hearing, the New Hampshire Supreme Court has indicated that the requirement that a variance not be contrary to the public interest is coextensive and related to the requirement that a variance be consistent with the spirit of the ordinance. As such, these first two variance criteria are addressed together.¹⁷

A variance is contrary to the public interest and the spirit of the ordinance only if it "unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives."¹⁸ "Mere conflict with the terms of the ordinance is insufficient."¹⁹ Moreover, these cases instruct boards of adjustment to make the determination as to whether a variance application "unduly" conflicts with the zoning objectives of the ordinance "to a marked degree" by analyzing two questions: 1) whether granting the variance would alter the essential character of the neighborhood and 2) whether granting the variance would threaten the public health, safety or welfare²⁰ and to make that determination by examining, where possible, the language of the Zoning Ordinance.

¹⁷ See Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 580 (2005); Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102, 105-06 (2007); and Farrar v. City of Keene, 158 N.H. 684, 691 (2009).

¹⁸ Chester Rod & Gun Club, 152 N.H. at 581; Farrar, 158 N.H. at 691.

¹⁹ Harborside Associates, L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011)

²⁰ Id.

In this case, the Wetland Scientist provided significant expert testimony that the Applicants' proposal would make the Property more compliant with the Shoreland District Ordinance than it is today, and that denying the variance would not advance the stated objectives and purposes of the Shoreland District Ordinance, which he described.²¹ These conclusions were supported by the Applicants' Mitigation Proposal which will result in a Property with significantly less impervious surface within the Shoreland District (17%) than exists today. Further, the Applicants provided significant testimony, analysis and argument that unequivocally indicates that the Proposed Addition will neither alter the essential character of the neighborhood nor threaten the public health, safety or welfare, which are the relevant considerations in this context under New Hampshire law. The evidence offered in this context was uncontroverted and unchallenged. There is no evidence to the contrary in the record of this case.

Despite this, Mr. Caparso and Mr. Goulet both concluded that neither the public interest nor the spirit of the ordinance prongs of the variance criteria were satisfied. These conclusions were reached without mentioning or analyzing the relevant legal standards. Further, both Mr. Caparso and Mr. Goulet stated that these two prongs of the variance criteria were not met because, among other things, the Shoreland District Ordinance was enacted "for a reason," or words to that effect. In New Hampshire, the mere fact that an applicant is seeking a variance from the express provisions of the Zoning Ordinance is not a valid reason for denying the variance.²² Rather, ZBA members are compelled to analyze variance applications pursuant to the statutory variance criteria and the Supreme Court case law which has interpreted them, which simply did not happen here.

As is indicated by the uncontradicted evidence that was presented to the ZBA, the Applicant's Proposed Addition is in keeping with the public interest and spirit of the underlying Zoning Ordinance because granting the Variance Application will not alter the essential character of the neighborhood, it will beautify the Property and the neighborhood. Further, granting the Variance Application will not threaten the public health and safety, it will further advance the specific objectives of the Shoreland District Ordinance which is in the public interest by, among other things, significantly reducing the impervious surface within the Shoreland District on the Property.

In light of these circumstances, the ZBA's deliberation and analysis within the context of the spirit of the ordinance and public interest prongs of the variance criteria constitutes a mistake of law and was unreasonable. A rehearing should be granted on these grounds alone.

b. The ZBA erred by misapplying the substantial justice prong of the variance criteria.

As detailed by the Applicants in the Variance Application and as presented by undersigned counsel to the ZBA at the public hearing, "perhaps the only guiding rule [on this

²¹ These arguments were also made in the Applicants' Variance Application narrative.

²² See Malachy Glen Associates, Inc., 155 N.H. at 107; Harborside Associates, 162 N.H. at 514.

factor] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice.”²³ In short, there must be some gain to the general public from denying the variance that outweighs the loss to the applicant from its denial.

At the hearing and in its filings, the Applicants presented considerable uncontroverted evidence and expert testimony regarding the public interest in ensuring that the Property become more compliant with the Town’s Shoreland District Ordinance, as well as the clear evidence of the benefit derived by the Applicants from the requested variance. Succinctly, the Applicants are able to reasonably use their property as they please in a manner that advances the Shoreland District Ordinance’s objectives.

Despite this uncontroverted evidence and the relevant standard, Mr. Caparso and Mr. Goulet found that the substantial justice prong of the variance criteria was not satisfied. More specifically, Mr. Caparso’s analysis was rooted in the conclusions that the Applicants knew or should have known that the home was in the Shoreland District, that granting the variance will set a precedent, that the Town would not have passed the Shoreland District Ordinance unless it was placing an importance on protecting the Shoreland, and that the ZBA should give justice to the Town and protect the wetlands. Similarly, Mr. Goulet’s denial was rooted in the conclusion that not enough public gain was presented by the Applicants and the spirit of the ordinance is to protect the environment, which overrides the Application.

These conclusions are inconsistent with the uncontroverted facts presented to the Board and improper considerations under the substantial justice prong of the variance criteria under New Hampshire law. First, as the Applicants explained at length, the Proposed Addition will not be impacting any wetlands, as the proposal is to build an addition to the front of the house in the buffer area. Further, the net result of the Proposed Addition after application of the Mitigation Proposal, will be a property that has 17% less impervious surface within the Shoreland District than it currently has. As improved, the Property will protect the environment more than it does right now as the Wetland Scientist attested to.

Additionally, considerations regarding the setting of precedent, whether the Applicants were aware of the Property’s location within the Shoreland District, the basis for the Town’s adoption of the Shoreland District Ordinance, and whether the Applicants’ proposal presented enough public gain, are improper under New Hampshire law because they ignore the applicable standard of review in this context, which is whether any loss to the Applicants in denying the variance is outweighed by a gain to the general public.

Clearly, substantial justice is accomplished and there is no gain to the general public in denying a variance where, like here, the result of a variance will actually advance the objectives of the underlying Zoning Ordinance more than the existing conditions and status quo. The ZBA’s finding to the contrary was a mistake of law and unreasonable.

²³ Malachy Glen, *supra*, citing 15 Loughlin, *New Hampshire Practice. Land Use Planning and Zoning* § 24.11, at 308 (2000) (quoting New Hampshire Office of State Planning, *The Board of Adjustment in New Hampshire, A Handbook for Local Officials* (1997) (quotations and citations omitted).

c. The ZBA erred by misapplying the unnecessary hardship prong of the variance criteria.

As detailed by the Applicants in the Variance Application and as presented by undersigned counsel to the ZBA at the public hearing, there are two options by which the ZBA can find that an unnecessary hardship exists:

- (A) For purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:
- (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
 - (ii) The Proposed use is a reasonable one.

or,

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

At the hearing and in their filings, the Applicants explained to the ZBA that the “special conditions” of the Property for purposes of the unnecessary hardship criterion include the size of the Property, which is significantly larger than the surrounding properties, the location of the single-family dwelling completely within the Shoreland District, and the Property’s ability to accommodate the Proposed Addition in a manner that will ultimately reduce the impervious surface area within the Shoreland District and advance the objectives of the Shoreland District Ordinance, making literal enforcement of the same unreasonable.

Further, the Applicants directed the ZBA’s attention to Harborside Assocs. v. Parade Residence Hotel, where the New Hampshire Supreme Court upheld the Portsmouth Board of Adjustment’s finding that the physical improvements on a property, in that case the size of a building when compared to other buildings in the area within the context of sign variance request, could be considered “special circumstances.” Affirming the analysis of the Board of Adjustment, the Supreme Court stated:

The [Respondent] is not attempting to meet the ‘special conditions’ test by showing that its *signs* would be unique in their settings, but that its *property* – the hotel and conference center – has unique characteristics that make the signs themselves a reasonable use of the property.²⁴

²⁴ Harborside, 162 N.H. at 518 (emphasis added). Cf Farrar, 158, N.H. 689 (where variance sought to convert large, historical single use residence to mixed use of two residence and office space, size of residence was relevant to determining whether property was unique in its environment).

The Applicants argued to the ZBA that like the size of the building in Harborside, and the size of the residence in Farrar, the Property's physical characteristics and improvements in this case make the Proposed Addition reasonable under the circumstances. More specifically, the Applicants advanced the argument that the Property is large and insulated from abutting properties, making expansion of the existing dwelling abundantly reasonable. Further, the entirety of the single-family dwelling is located within the District as a nonconforming use, which makes any expansion of same impossible without a variance. However, based on the Applicants' proposal to remove the impervious driveway surface area within the District, expansion of the house can be reasonably obtained in a manner that actually advances the general purposes of the Zoning Ordinance and the express purposes and objectives of the Shoreland District Ordinance by, among other things, significantly reducing, by 17%, the impervious surface area within the Shoreland District, beyond the existing conditions.

The argument followed, therefore, that due to the special conditions of the Property, there is no fair and substantial relationship between the public purposes of the underlying ordinance and its specific application to the Property because the Applicants' proposed improvements are consistent with the public purposes of the Zoning Ordinance and Shoreland District Ordinance as they facilitate reasonable use of the Property while advancing those ordinances' express purposes to protect the environment and public health and welfare. Rephrased, the Applicants argued that strictly enforcing the underlying Shoreland District Ordinance by denying the variance will not advance the public purposes of the ordinance, but granting the requested variance will. As noted above, these circumstances present the foundational reason variance relief exists, to prevent an unconstitutional taking and to preserve one's rights and interest in the reasonable use of their own land.

This argument was corroborated by the Wetland Scientist and no evidence to the contrary was presented to the ZBA.

Despite this argument and the uncontroverted evidence before it, Mr. Caparso and Mr. Goulet determined that the unnecessary hardship prong of the variance criteria was not met. Specifically, Mr. Caparso once again remarked that the Shoreland District Ordinance had been enacted for a reason, that there are 100 – 150 homes in Stratham with similar situations and that granting the Variance Application would create a precedent, that there was no hardship to the Town, and that the Applicants did not “break the link” between the public purpose of the Shoreland District Ordinance and its application to the Property and knew or should have known that the house was within the District. Mr. Goulet remarked that variances were a high bar, that the case for a variance was not strong enough, and that mitigation is minimal.

Mr. Caparaso and Mr. Goulet's conclusions were reached without discussion or mention of the applicable standard and were based on improper conclusions. It is a mistake of law to base a decision on a variance on the fear of setting precedent, or because the proposal conflicts with the express terms of the Zoning Ordinance, as mentioned above. Further, the issues of whether or not there is any hardship to the Town, whether or not the Applicants knew the home was within the Shoreland District when they bought it, and whether or not the Proposed Mitigation was sufficient in the eyes of the ZBA, are irrelevant considerations within the context

of the unnecessary hardship prong of the variance criteria. The correct question, foundationally, is whether it makes sense to apply this specific Zoning Ordinance to this specific property under the specific circumstances of the case. That analysis simply did not take place. Moreover, rigidly applying Section 12.6.1(a) to the Property in this case surely does not make sense because the Proposed Addition will actually lead to the Property being in greater conformity with the Shoreland District Ordinance than it is today.

In light of these considerations, the ZBA's deliberation and analysis within the context of the unnecessary hardship prong of the variance criteria were illegal and unreasonable.

d. The ZBA erred by ignoring uncontradicted expert evidence.

In New Hampshire, decisions by members of land use boards must be based on more than the mere personal opinion of its members, and while Board members may base their conclusions upon their own knowledge, experience and observations in addition to expert testimony, they may not simply choose to ignore expert advice, especially if it is uncontradicted.²⁵ Further, land use boards cannot "supersede the specific regulations and ordinances that control the . . . process with their own personal feelings and then justify their reasoning through the application of general considerations."²⁶

In this case, there was expert evidence and advice from the Wetlands Scientist that the Applicants' Addition Proposal would make the Property more compliant with the Shoreland Protection District and further advance the objectives and purpose of the Shoreland District Ordinance than the Property does today. These conclusions were supported by the Applicants' Mitigation Proposal which will result in a Property with significantly less impervious surface within the Shoreland District (17%) than exists today. This evidence was not contested and there is no evidence to the contrary in the record.

Despite this uncontroverted expert testimony, Mr. Caparso and Mr. Goulet repeatedly stated that the Shoreland District Ordinance was enacted for a reason, that its reason was to protect the environment, and that the Applicants' proposal was contrary to those reasons and did not provide sufficient mitigation to offset its impact.

These conclusions are unsupported by the facts of this case, unsupported by any evidence in the record, and completely contrary to the only expert evidence and analysis that was provided. These conclusions constitute the personal feelings of these ZBA members and these conclusions have superseded the evidence presented and the legal standard the Board is required to apply. They are also the result of ignoring the only expert evidence and advice available. As a result, they constitute mistakes of law and are unreasonable.

Under the circumstances, the ZBA should grant the Applicants' Request for Rehearing to correct these analyses.

²⁵ *Condos East Corporation v. Town of Conway*, 132 N.H. 431 (1989); 15 Loughlin, §28.10.

²⁶ *Dartmouth College v. Town of Hanover*, 171 N.H. 497, 514 (2018)

e. The ZBA erred by making contradictory findings within the Special Exception and Variance contexts.

The ZBA made contradictory findings by granting the Applicants' Special Exception Application to expand their non-conforming home into the Shoreland District but denying the Applicants' Variance Application to erect a structure within the Shoreland Protection District. This is improper as a matter of law and the only way to resolve the contradiction is to grant the Variance Application at a rehearing.

While the Town's applicable special exception criteria, outlined above, are distinct from the statutory variance criteria in this case, both analyses involve several overlapping and critical considerations to include whether the proposal will cause adverse impacts, whether the proposal will effect surrounding property values, whether the proposal will change the essential character or characteristics of the residential neighborhood, and whether the proposal will have other public implications due to the nature of the use, etc.

In unanimously granting the Special Exception Application, the ZBA expressly found that the Proposed Addition would not cause an adverse impact to abutters, would not cause property values to deteriorate, would not constitute a hazard to the public, would not change the essential characteristics of a residential neighborhood, would not constitute other forms of public nuisance, and would not create a demand on municipal services, as all of those considerations are express special exception criteria under the Zoning Ordinance.²⁷

However, in denying the Variance Application, the ZBA found that the public interest and spirit of the ordinance prongs of the criteria were not met, which is tantamount to a conclusion that the Proposed Addition will alter the essential character of the neighborhood and/or threatened the public health, welfare or safety. These two determinations are inconsistent and cannot both be true as a matter of law.

Similarly, in finding that the substantial justice prong of the variance criteria was not satisfied, the ZBA implicitly determined that the gain to the public in denying the variance outweighs the loss to the Applicants in the same. Again, this conclusion is inherently inconsistent with the ZBA's determination in the special exception context. It cannot be true that both the public interest is not effected by expansion of the Applicants' home in the Shoreland District via special exception and the public interest in denying the Variance to permit the erection of the Proposed Addition in the Shoreland District outweighs the Applicants' interest in its approval.

Finally, despite recognizing the inherently benign nature of the Proposed Addition in light of the Property's unique circumstances and the Applicants' Mitigation Proposal in the special exception analysis, the ZBA failed to apply these determinations to the consideration of whether a fair and substantial relationship exists between the general public purposes of the

²⁷ See Zoning Ordinance, §§ 5.1.3, 17.8.2(c).

Shoreland District Ordinance provision in question, and its application to the Property within the unnecessary hardship context. The ZBA's conclusion on the unnecessary hardship criteria is therefore inconsistent and contradictory to its conclusion within the special exception context because if it is reasonable to expand a non-conforming structure into the Shoreland District, there is no fair and substantial relationship between the purpose of Section 12.6.1(a) of the Zoning Ordinance and its application to the Property in this case.

Once there is a contradiction in the predicate factual findings, two disparate findings cannot stand. It is irrational to make opposite factual findings about the same subject simultaneously, and a decision which does so must be reversed.²⁸ For example, a person cannot be alive and simultaneously dead. A car cannot be black and simultaneously white. In this case, the Proposed Addition on a nonconforming structure cannot be consistent with the neighborhood and public interest and simultaneously inconsistent with the neighborhood and threaten the public health and welfare. Similarly, the Proposed Addition cannot both be deserving of a special exception to expand a nonconforming structure under the unique circumstances of the Property and the proposal and be violative of the unnecessary hardship variance criteria.

Here, it is unquestionable that there are two contradictory factual findings. However, the dilemma should be resolved as a matter of law. The Supreme Court has held that when one finding is appealed and a second finding is not appealed and they are contradictory, the unappealed finding takes precedence and the finding under appeal must be conformed to the unappealed finding.²⁹ Applying this rule, as the Special Exception was granted but not the subject of a request for rehearing, the ZBA's decision within the Variance context should be conformed at a rehearing to that of the ZBA's perspective in the Special Exception context.

Conclusion

Thank you very much for your time and attention and please do not hesitate to let me know if there are any comments, questions or concerns.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC



Justin L. Pasay
JLP/sac
cc: Robert & Stephanie Cleary (email only)
Sergio Bonilla

²⁸ See Appeal of Lemire-Courville Associates, 127 N.H. 21, 32 (1985); In re: Montplaisir, 147 N.H. 297, 303 (2001).

²⁹ See Appeal of Boyle, 169 N.H. 371 (2016).