



**Stratham Zoning Board of Adjustment
Meeting Minutes
March 23, 2021
Municipal Center/Virtual Meeting/Conference Call
Time: 7:02 PM**

Members Present: Garrett Dolan, Chairman
Drew Pierce, Full Time Member (via conference call)
Bruno Federico, Full Time Member
Amber Dagata, Full Time Member (via conference call)
Richard Goulet, Alternate

Members Absent: Phil Caparso, Vice-Chair

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

1. Call to Order/Roll Call

Chairman Dolan called meeting to order and took roll call. Mr. Dolan asked Mr. Goulet to serve as a voting member for this meeting. Mr. Goulet agreed.

2. Approval of Minutes

a. February 9, 2021

Mr. Goulet made a motion to accept the February 9, 2021 meeting minutes as submitted. Mr. Federico seconded the motion. Motion passed unanimously.

3. Public Hearing(s)

Case #656B Rehearing, 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.

Mr. Dolan stated the applicant came before the board on 12/22/2020 to request 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.

Justin Pasay, Donahue, Tucker & Ciandella, introduced himself, representing Robert & Stephanie Cleary, Robert Cleary, property owner, and Sergio Bonilla, Mission Wetlands, and Henry Boyd, Millennium Engineering. Attorney Pasay explained the overview of the case before the board. Attorney Pasay explained the plans submitted to the board regarding this property and the Shoreland Protection Relief the Cleary's recently received from the State of NH. Attorney Pasay

45 stated this variance is regarding a 30'x49' addition proposed to the front of the Cleary's house in
46 the direction away from the river and in order to obtain that addition two forms of relief were
47 required; a special exception to expand a non-conforming structure and a variance to construct in
48 the Shoreland Protection District. The structure is non-conforming because it is located entirely
49 within the 150 ft. Shoreland Protection District identified in the Town Zoning Ordinance. On
50 December 22, 2020 the board granted to approve the special exception by a vote of 4:0 to expand
51 the non-conforming structure. On December 22, 2020 the board denied a variance from Section
52 12.6.1 of the Zoning Ordinance from the Shoreland Protection District by a vote of 2:2. In that
53 specific provision states structures cannot be erected within the Shoreland District which is 150
54 ft. off the river. A motion to rehear was approved in February 2021. Attorney Pasay stated the
55 property is 11.2 acres, the subdivision has been approved and the mylar will be signed shortly,
56 and then the property will be 8 acres. This property contains only a single family dwelling and
57 falls entirely within the 105 ft. Shoreland Protection District and was built before the District was
58 created. The footprint is approximately 5,400 square feet and combined with impervious surface
59 in the form of driveway, the property has a total of 8,293 square feet of impervious surface inside
60 the Shoreland Protection District. The proposal is to construct an addition (2-bedrooms, an
61 office, a family room, and expanded master bathroom) which totals approximately 1,300 square
62 feet of footprint. This would be a 16% increase to the impervious surface area inside the District.
63 The proposed project will make the property more in accordance with the Shoreland Protection
64 District ordinance than what exists there today. The Shoreland Protection District is aimed to
65 protect the river and the applicant's proposal will better protect the river than the existing
66 conditions of the property. Attorney Pasay explained the four specific purposes of the ordinance
67 in Section 12.3. Attorney Pasay stated the applicant will remove from the District, including the
68 footprint caused by the addition, 2,761 square feet of impervious driveway which equates to a
69 17% net decrease in the impervious surface area within the Shoreland Protection District on the
70 site that will promote surface water quality, aquatic and terrestrial habitat, preserve esthetic
71 values, and incur appropriate uses located along the shoreline. The applicant is proposing to
72 create a 755 square foot Shoreland Protection District enhancement area and nest boxes to
73 promote habitat.

74
75 Robert Cleary, 7 Boat Club Drive, stated he and his wife moved to the area three years ago to
76 start a family and he is a builder by trade. Mr. Cleary explained his family is looking to expand
77 their family and the current single level home is running out of space. Although the footprint is
78 large, the actual useable space in the home is not as large as appears on paper. Mr. Cleary
79 thanked the board for rehearing this case.

80
81 Henry Boyd, Millennium Engineering, introduced himself and gave an overview of the site. Mr.
82 Boyd explained the subdivision was approved by the planning board. Mr. Boyd stated NH DES
83 has issued a Shoreland Permit for the addition and the applicant is proposing additional
84 mitigation beyond that with the removal of the existing pavement. Mr. Boyd stated everything
85 being proposed is further away from the river than what is already existing. The existing
86 structure is at 101 ft. from the closest point to the river and the addition will move toward the
87 east. The pavement within the 150 ft. resource area will be removed and replaced with pervious
88 stone for infiltration. The condition left, without this approval, would be worse for the river than
89 if this variance is granted. The end result is a more friendly project for the resource. Mr. Boyd
90 explained there is a 48 square foot section of the proposed addition which will remain in the area.

91
92 Sergio Bonilla, Mission Wetlands, introduced himself and overview of the past hearing and the
93 site. Mr. Bonilla explained the 17% reduction in impervious area is a substantial amount to give
94 back to offset the impact of the 1,300 square foot addition. Mr. Bonilla stated the applicant is

95 proposing extra mitigation to treat the storm water naturally prior to surface runoff towards the
96 river. Mr. Bonilla explained fruit bearing shrubs with thicket forming capability to sure for food
97 for wildlife, mammals, and furs; flowering shrub to compliment the area to attract more
98 butterflies and moths to improve the wildlife habitat and provide for the fresh water forest and
99 wetland inhabitants. The applicant is also proposing to install some nest-boxes for birds and
100 small mammals. Mr. Bonilla read the submitted table for plantings and nest-boxes to better
101 advance the objectives and goals of the Shoreland Protection District to the board. Mr. Bonilla
102 reiterated the existing conditions versus what the applicant is proposing as a reasonable addition,
103 and proposed mitigation is advancing the goals of the Shoreland Protection District.
104

105 Mr. Dolan asked for board comments. Mr. Goulet asked for explanation of the location of 7A and
106 7B. Attorney Pasay explained the structure will be on 7A. Mr. Goulet stated the board is hearing
107 the application as the 11 acre parcel. Mr. Wolph explained the planning board has approved the
108 subdivision and it is relevant to consider the remaining parcel and not consider this application as
109 the entire 11 acres.
110

111 Attorney Pasay gave an overview of the applicant's proposal. The applicant is proposing a 1,300
112 square foot impervious surface area addition to the front of the house that currently has residential
113 landscape and taking away 2,800 square feet of impervious surface. The applicant will be adding
114 750 square feet of enhancement area, oriented and designed to further and advance the objectives
115 of the ordinance and nesting boxes will also be added. The variance relief is to balance the
116 public's interest in the zoning ordinance against the property owner's right to exercise his/her
117 constitutional property rights. Attorney Pasay stated the objectives of granting the variance are to
118 protect the surface water, protect and preserve the habitat, preserve and enhance the esthetic values
119 and encourage uses appropriately located which the applicant's proposal helps these objectives
120 occur on this property better than what is existing currently. The board needs to answer the
121 following questions: does/will the proposal alter the essential character of the neighborhood; and,
122 does/will the variance threaten the public health, safety, and welfare. Attorney Pasay stated the
123 1,300 square foot addition will not alter the essential character of the neighborhood it will be
124 consistent with the character of the neighborhood and will beautify the property, and it has been
125 explained at length why the proposal will enhance this property more in conformity with the
126 zoning ordinance and Shoreland Protection District. Attorney Pasay stated when the loss to the
127 applicant is outweighed by a gain to the public it is an injustice for the applicants. The public
128 gains nothing from denying the variance because the proposal itself is going to advance the zoning
129 ordinance, which is the public. Attorney Pasay stated there will be no detrimental, environmental
130 impact caused by this proposal and it will lead to a beautified property and will enhance property
131 value of this property and surrounding properties will benefit as well. Attorney Pasay explained
132 the property is larger than surrounding properties, the building is completely located inside the
133 Shoreland Protection District, and the nature of the area proposed to be improved is already
134 disturbed with residential vegetation and landscaping. The properties ability to accommodate the
135 proposal in a way that advances the purpose and objective of the zoning ordinance are a special
136 condition. The zoning ordinance states no structure is to be erected in the Shoreland Protection
137 District and the applicant is proposing to reduce the footprint of structure in the District and the
138 hardship criteria is satisfied. Attorney Pasay stated the applicant is open to similar conditions
139 proposed on the Special Exception approved by this board that requires inspection and
140 certification of removal of the impervious surface and installation of pervious surface installed
141 prior to Certificate of Occupancy.
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143 Mr. Dolan asked if any board members had questions regarding the proposed request for a
144 variance. Hearing none Mr. Dolan opened the floor to questions from the public.

David Kisver, 9 Boat Club Drive, stated the precedent this variance sets will allow anyone who falls in the Shoreland Protection District to build. Mr. Kisver does not agree this is a hardship, and the true hardship would be for the original owner who purchased the property prior to any municipal changes. An owner purchasing property knows what they are buying so this does not constitute a hardship. The reduction in impervious material is misleading, as removing driveway material for a house with tons of concrete, lumber, asphalt roofing is ludicrous and shouldn't be considered a reduction in impervious material. The conditions for a hardship argument, this being a special conditions or special property. The property is 8.1 acres when it's split and is certainly not larger property than some in the immediate neighborhoods. Mr. Kisver stated the plan does not show the barn/shed that was previously drawn on earlier plans. Mr. Kisver stated he does not agree with a commercial building on the property and where it is located. Mr. Kisver stated he opposes this variance and addition and doesn't trust this project and feels a potential commercial building will be next. Mr. Kisver stated he was willing to discuss this as adults until Mr. Cleary verbally assaulted him outside, after the last hearing.

Attorney Pasay explained the board is creating an administrative record tonight and personal anonymous and subjective beliefs aside, the law is what the law is. The board knows there is no such thing as precedent before the ZBA or a defacto free-pass because a variance may be granted for this property. There are very unique circumstances that have been detailed, at length, with regarding to this project and the great length the Cleary's are taking to offset the total impacts which are relevant to water and water resources, like impervious surface, but going well beyond to offset the impacts to make a property which is far greater in the context of the Shoreland Protection District than what is there today.

Hearing no more public comments, Mr. Dolan asked for the board to begin deliberation of the proposal.

Mr. Federico stated he is pleased to see there is mitigation occurring with this proposal. Mr. Goulet stated his discomfort with condition #5, special conditions of the property. Mr. Goulet does not agree the applicant presented a strong enough case to support a special condition other than stating it's an 11 acre parcel of land, which is really only 7 acres. Mr. Goulet stated this should be unique from surrounding properties. Attorney Pasay stated the written analysis provided individual physical characteristics and the body of case law in NH that speaks to special conditions, generally the discussion is topography or grade or size of the parcel or something along those lines, and the Harborside Case from Portsmouth, NH is because the Supreme Court stated physical improvements on a property can be looked at, not just the physical characteristics. The whole building is inside the Shoreland Protection District and the notion that the building inside the District has to be balanced against the Cleary's ability and desire to exercise their property rights. Attorney Pasay explained this case is about reducing the square footage of impervious surface and the surface doesn't matter if its pavement, a concrete slab, or a gable roof. Attorney Pasay stated the end result of this proposal is property which better serves what the public hoped for when they voted for this ordinance. Mr. Goulet questioned what makes this property unique. Attorney Pasay stated the statute says "properties in the area" and doesn't specify abutting properties. The Cleary's property, which sits inside 150 feet from the river, is a tiny fraction of properties in Stratham, NH. Attorney Pasay explained the board needs to consider the point of the zoning ordinance which is applicable to the entire town. Attorney Pasay stated the "non-conformity" in the special exception context was the location inside the Shoreland Protection District and this board universally found the 17 criteria inside the special exception ordinance were met and many of the criteria overlap with the variance criteria.

Mr. Boyd stated the reason for the ordinance is to protect the river and resources. NH DES has looked at this proposal and has already signed off. Mr. Boyd stated this house is entirely sitting within the jurisdiction and the property owners cannot do anything with it which makes this property unique. Mr. Boyd explained what is being proposed is further away from the river yet within the resource and clearly is unique and the property owner cannot do anything without relief from the board. Mr. Bonilla reiterated the measures being taken for the Shoreland Protection enhancement area to try to capture opportunities to compliment the area. Mr. Goulet questioned why this property is unique to surrounding properties. Mr. Dolan stated the uniqueness of the parcel is the fact that the structure is entirely located in an established Shoreland Protection District and without relief granted by a variance the property owners do not have an opportunity to make proper use of their property rights. Mr. Federico stated if the home did not exist in the beginning the owner would not be able to build 250 feet from the shore, but when an ordinance is enacted after the house exists, you are creating a hardship for the owner and it creates the uniqueness of the property. Mr. Goulet stated he is not comfortable with the size of the property listed on the application. Attorney Pasay stated, in general, looking along River Road and Boat Club Drive, this property is very large at 8 acres or 11 acres. Attorney Pasay pointed Mr. Goulet to the special conditions page on 9 and several criteria are referenced; the size of the property, location of the single family dwelling completely within the District, the nature of the area to be improved as already being disturbed inside the resource area, and the property's ability to accommodate the proposed addition. Attorney Pasay stated the board's duty is to provide justice and help a property be better serving the purpose and intent of the ordinance or not.

Hearing no further comments, Mr. Dolan asked for motion to close the public hearing and deliberate. Mr. Goulet made a motion to close the public hearing. Ms. Dagata seconded the motion. Motion carried unanimously.

Mr. Dolan stated to be eligible for a variance the proposed use must meet all five (5) of the conditions in RSA 674:33.

b. 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. Dolan stated the granting of the variance would not be contrary to the public interest because the project, as proposed, will enhance the Shoreland Protection District and mitigate the impact of water quality and habitat in the District. Mr. Federico agreed. Mr. Goulet stated the applicant's proposal is not contrary to the purpose of the ordinance or the objectives of the Shoreland Protection District. Ms. Dagata agreed. Mr. Pierce agreed. Criteria passed 5:0

ii. The spirit of the ordinance is observed.

Mr. Dolan stated the spirit of the ordinance is observed by the applicant recognizing the fact they occupy in the Shoreland Protection District and will mitigate the impact on the District. Mr. Goulet agreed giving the mitigation the applicant is proposing. Mr. Federico agreed. Ms. Dagata agreed. Mr. Pierce agreed. Criteria passed 5:0

244 iii. Substantial justice is done.

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246 Mr. Dolan stated the property owner's entire residence is located in the Shoreland
247 Protection District Overlay and no changes can be allowed without the application of a
248 variance. Denying the variance would not constitute substantial justice to the property
249 owner and the mitigation circumstances proposed by the applicant would grant substantial
250 justice to the town seeing the project is a betterment upon completion. Mr. Dolan stated
251 substantial justice is done to both the property owner and the town. Ms. Dagata agreed.
252 Mr. Goulet agreed there is no gain to the general public from denying the variance. Mr.
253 Federico agreed. Mr. Pierce agreed. Criteria passed 5:0.

254
255 iv. The values of surrounding properties are not diminished, and

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257 Mr. Dolan stated enhancing of the residence would not diminish the property values of
258 surrounding properties and there is no indication that this would be the case. Mr. Federico
259 agreed. Mr. Goulet stated there was professional input that supports this criteria. Ms.
260 Dagata agreed. Mr. Pierce agreed. Criteria passed 5:0.

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262 v. Literal enforcement of the provisions of the ordinance would result in an unnecessary
263 hardship.

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265 1. For purposes of this subparagraph, "unnecessary hardship" means that, owing to
266 special conditions of the property that distinguish it from other properties in the area:

267
268 a. No fair and substantial relationship exists between the general public purposes of
269 the ordinance provision and the specific application of that provision to the
270 property; and

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272 Mr. Dolan stated the literal enforcement of the provisions of no building on the site per
273 the zoning ordinance would result in an unnecessary hardship to the property owner in
274 not being able to effectively utilize their property rights. Ms. Dagata agreed. Mr.
275 Federico agreed. Mr. Goulet stated he does not believe the applicant has sufficiently
276 demonstrated that this is a unique property given the special conditions language. Mr.
277 Goulet explained there are several lots as surrounding properties and questioned if
278 those structures are within the 150 foot. Mr. Pierce agreed with Mr. Dolan. Criteria
279 passed 4:1.

280
281 b. The proposed use is a reasonable one.

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283 Mr. Dolan agreed the proposed use is reasonable expansion of the property in the
284 Shoreland Protection District so the property owner can utilize their property rights and
285 will mitigate the impact of that utilization on the Shoreland Protection District. Ms.
286 Dagata agreed. Mr. Federico agreed. Mr. Pierce agreed. Mr. Goulet does not agree.
287 Criteria passed 4:1.

288
289 Mr. Dolan stated the criteria for granting a variance has been met.

293 Conditions of Approval:

- 294
- 295 1) Remove 2,761 square feet of impervious driveway surface within the Shoreland
- 296 Protection District (The District) and replace it with pervious stone and stone reservoirs
- 297 which will result in a greater than 17% (1,446 square feet) net decrease in impervious
- 298 surface area within the District on the property.
- 299 2) Provide Shoreland Protection District Enhancement Area Plantings as depicted in
- 300 Enclosure 4A provided by Mission Wetland and Ecological Services LLC.
- 301 3) Install two (2) pole or sapling-mounted nest boxes as depicted in Enclosure 4A provided
- 302 by Mission Wetland and Ecological Services LLC.
- 303 4) Prior to granting a Certificate of Occupancy an as-built plan shall be provided by Mission
- 304 Wetland and Ecological Services LLC to the Building Inspector. As-built shall indicate
- 305 completion of items 1-3.
- 306

307 Mr. Federico made a motion to GRANT the variance for Case #656B with the four (4)

308 conditions listed above. Ms. Dagata seconded the motion. Motion carried unanimously.

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310 **4. New Business**

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- 312 1) Mr. Wolph discussed the approvals at 217 Portsmouth Avenue, Legacy Lane, and the board's
- 313 concern of a possible violation their agreement with regards to have all parking off-street for
- 314 the businesses that were approved by the board. The two approvals for that parcel; a cottage
- 315 colony for their goat farm which has not constructed yet and a small store. Mr. Wolph
- 316 explained to the board he has been in touch with the police chief, town administrator,
- 317 members of the Select Board, the town planner, and others staff members regarding overflow
- 318 parking from the property onto Portsmouth Avenue consistently. Mr. Wolph also received
- 319 video of the last event and cars parked along Portsmouth Avenue. Mr. Wolph spoke with the
- 320 property owner regarding the parking and there is a lot interest in their farm and that type of
- 321 activity. Mr. Wolph stated Agritourism in the State of NH comprises many activities that are
- 322 a byproduct of farm use. The goat yoga has nothing to do with their cottage colony so there is
- 323 no violation with that approval, the store is not attracting 100 shoppers at one time so they are
- 324 not violating that approval. The issue is the number of vehicles so Mr. Wolph had the
- 325 property owner reach out to the Police Department and they were instructed that no special
- 326 event permit is required but all vehicles are required to have at least two (2) of their tires in
- 327 the shoulder of the road and not on the asphalt, as well as enough room between the cars door
- 328 and the white line so people can get out safely. Mr. Wolph reached out to NH DOT Division
- 329 6 since Portsmouth Avenue is a state highway and explained the situation. Mr. Roger
- 330 Applegate stated NH DOT does not have an enforcement mechanism or staff to police the
- 331 roads, Stratham is a self-policing town, adequately staffed, and if the Town of Stratham
- 332 would like "no parking" signs installed NH DOT would install the signs. Mr. Applegate
- 333 questioned if the town has a preference and stated the state's preference is that no vehicles are
- 334 ever parked on the shoulder of any state highway, but there is no law other than parking
- 335 within 30 feet of an intersection, parking near a hydrant, or if a vehicle is turned in the wrong
- 336 direction. Mr. Wolph stated the property owners are currently not breaking any laws or
- 337 approvals and would like to have a policy created by the board. Mr. Federico voiced concern
- 338 with the board taking any action against Agriculture or Agritourism. Mr. Federico suggested
- 339 property owners having an activity must be required to have authorized people or a police
- 340 detail to ensure safety. The board discussed the parking restrictions discussed during the prior
- 341 approvals. Mr. Wolph stated the board has discussions regarding parking but no conditions
- 342 for parking were placed on the notice of decision for the approval. The board questioned if

343 goat yoga was considered agriculture. Ms. Dagata and Mr. Federico discussed the yoga was
344 brought in by the property owner to help business. The board questioned whether the yoga
345 instructor is licensed and if it is considered its own business being run from the property. The
346 board questioned whether the yoga was considered a home occupation or a commercial
347 business or something different. Mr. Dolan stated if the property owner is not running the
348 classes they are hiring someone from the outside for this work. Mr. Federico stated the
349 property owner is allowing this person to use the property for a business. Ms. Dagata
350 questioned if there are regulations from a property owner renting out their land. Mr. Dolan
351 stated the yoga is a commercial business in a residential district that does not qualify. Mr.
352 Wolph stated he would reach out to the Attorney General to research whether goat yoga is
353 considered agritourism.

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355 Mr. Federico asked if 291 & 293 Portsmouth Avenue have authority to have the bank sign
356 displayed on the property. Mr. Wolph explained he took a picture and will contact the bank
357 to have it removed.

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359 Mr. Federico questioned what is happening with Burger King. Mr. Wolph stated a permit
360 was pulled to reconstruct the roof and he has requested more information from a structural
361 engineer stating the conditions are suitable to rebuild and doesn't constitute a full tear down.

362 **5. Adjournment**

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364
365 Mr. Dolan made a motion to adjourn at 9:23 pm. Mr. Goulet seconded. Motion passed
366 unanimously.

388 *Note(s):*

- 389 1. *Materials related to the above meeting are available for review at the Municipal Center during normal business hours. For more information,*
390 *contact the Stratham Building/Code Enforcement Office at 603-772-7391 ext.180.*
- 391 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*
392 *agenda.*
393