

**GILFORD ZONING BOARD OF ADJUSTMENT
MINUTES
MAY 23, 2017
CONFERENCE ROOM A
7:00 P.M.**

The Gilford Zoning Board of Adjustment met on Tuesday, May 23, 2017, at 7:20 p.m. in Conference Room A.

Chairmen- Scott Davis led the Pledge of Allegiance.

Present members were; Chairman Scott Davis; and Regular members Andy Howe, Bill Knightly, Ann Montminy and Glen Aldrich.

Members absent were; Vice Chairman- Stephan Nix, and Alternate Larry Routhier left due to there being a quorum.

Also present were David Andrade, Code Enforcement Officer and Sandra Hart, Technical Assistant.

S. Davis introduced the application.

**1. John & Maureen Cronin
Application #2017000135**

The applicants are requesting a Variance pursuant to Article 5, Section 13 to allow a 196 square foot floating deck to be located 28 feet from the front property line where a 50 foot front setback is required, at 7B Roberts Road on Tax Map & Lot #242-182.002 in the Resort Commercial (RC) Zone and the Aquifer Protection Overlay District.

Presentation

John Cronin went over the back ground of how they obtained the property. He said that in December he started to think about landscaping and went to the New Hampshire Department of Environmental Services and they told him that they should probably get a landscape architect. He then drew a map of the property for everyone to see. He went over the location of where they thought where they would place the patio, but were told no by the DES and they thought that placing it in front of the barn would be better. They suggested a floating patio that is eighteen (18) inches and that will be level, save money and look nice. They are about twenty eight (28) feet to the front property line Thirty Three (33) feet to the road. After that he spoke to Dave Andrade, Building Inspector to see if they could do this, and D. Andrade said that they would need a variance. He did look at the zoning ordinance with regard to a landscaping item and he asked D. Andrade to see if this was a landscaping item, but was told that he should go to the Zoning Board of Adjustment. In looking at the character of the neighborhood he can see why this is Resort Commercial (RC) zone.

J. Cronin read the facts supporting the request for a variance:

Granting the variance would not diminish the values of surrounding properties.

Minutes approved at the July 25, 2017 meeting.

The purpose of zoning is protecting the health, safety and welfare of the community while respecting a property owner's right to use and enjoy this or her property free from unreasonable government regulation. The State of New Hampshire adopted comprehensive Shoreland protection legislation that aims to serve the same purpose to protect the health safety and welfare of the community. The proposed project is a simple 14' x 14' floating patio that will honor and respect the state requirement that prohibits new structures within fifty feet of the water line. In terms of values, the immediate neighborhood is dominated with structures within the fifty (50) foot setback. The floating patio will not alter the essential character of the neighborhood. When the property was purchased in August of 2016, the building was in disrepair and had been neglected for many years. The floating patio is part of a comprehensive effort to improve the value of the property that will have a positive impact on surrounding property values. The floating patio will be twenty-eight (28) feet from the property line and thirty-two (32) feet from the road.

The floating deck is consistent with the spirit and intent of the Zoning Ordinance:

The purpose of a Zoning Ordinance is to protect the health, safety and welfare of the community. The drafters of the Ordinance established the Resort Commercial Zone (RC). The resort commercial zone appears to be located along the shore and vicinity of Lake Winnepesaukee. The drafters of the Ordinance are required to consider existing conditions when drafting an Ordinance. However, the focus is typically on the regulation of new construction. Around Robert's Road and Robert's Cove most uses are residential. The subject property has existed for many years and in this area of the floating patio there is a setback of only a few feet. This condition has existed for over 100 years and is a benchmark a prior non-conforming use. The floating patio will not increase the non-conformity of the setback. Our sense is the fifty (50) foot setback was aimed at new commercial uses which are understandable. A fifty (50) setback for residential along the waterfront together with the (50) shore front setback borders on confiscatory. The area of the floating patio was recommended by the DES. A paved patio is allowed without permit from the town but in this case, would require blasting or removal of ledge. A review of the immediate area reveals numerous homes and trailers all within the setback. The town, although not required to do so does, does not observe the side setbacks in the RC zone placing smelly dumpsters within five (5) feet of the side setback and within fifty (50) feet of the protected Shoreland. The floating patio will not change or impact the essential character of the neighborhood.

Granting of the variance is in the public interest.

The grant of the variance is in the public interest. The legislature and drafters of the Ordinance recognized the drafters can never get it perfect. The Ordinance empowers the Zoning Board of Adjustment to grant variances in the proper case. The variance power is necessary to maintain the constitutionality of the Ordinance and insulate the taxpayers from expensive and time consuming land use litigation. The public interest prong and the spirit and intent prong of the variance test are often considered together and if the proposed use does not alter the essential character of the neighborhood it meets both prongs.

Due to special conditions of the property, there is a hardship that warrants relief.

The property has special conditions that require the floating patio to be constructed within the setback. The location of the patio was initially property to be between the house and the waterfront. The DES agreed to undertake a preliminary review of the plan, proposing a porous paver patio, that was no more non-conforming than the existing conditions. The DES proposed the patio be located to an area outside the fifty (50) foot Shoreland setback to an area adjacent of the barn. When the proposed site was analyzed, several ledge outcroppings were discovered that would require equipment or blasting to remove. A floating patio was recommended to avoid the need to disturb the rocks and excavate within the Shoreland protection zone. The Ordinance is also a hardship as it

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fails to address the existing residential uses in the zone and the front setback of fifty (50) feet in the Roberts Road area is not necessary to protect the health, safety, and welfare of the community.

The use is a reasonable one. A larger paver patio is allowed in the same exact area without the need for a variance. The floating patio will be raised a minimal amount (8"-20") due to the grade and the need to avoid the ledge. The existing barn shields the patio from public view.

Substantial Justice will be done if the variance is granted:

This prong of the variance test is grounded in equity. If the variance is denied, we will be harmed as we will be required to blast and excavate earth to construct a paved patio that will provide the same utility and visual impacts as the floating patio. Another harm arising from the denial of the variance is the opportunity and economic costs related to an appeal and constitutional challenge to the application of the RC setbacks to pre-existing residential uses. The harm to the public if the variance is granted is none. The floating patio and paved patio will have the same impact on neighbors. Neither will be seen by any of the public from Robert's Road as it is shielded from view by the existence of the prior non-conforming barn that is already legally located in the setback.

The focus of this application is on the variance. However, in the event the appeal is denied, a statutory appeal will only consider appeal matters that were raised before the Zoning Board of Adjustment. Administrative Appeals are rarely granted at the local level. With a building official as skilled and experienced as Mr. Andrade, I suspect few, if any, have been granted during his tenure. Nevertheless I raise the following points for the Honorable Board to consider if the variance is denied. Under the Brookside case, the Supreme Court found the Zoning Board of Adjustment may consider, in the first instance, whether a variance is even needed. This analysis can and should be done whether a filing was made for an Administrative Appeal. Please consider the following points.

1. The floating patio is a reasonable expansion of a prior non-conforming use. The purpose of a setback is to prevent overcrowding and visibility from public streets. The proposed floating deck will be fastened to the pre-existing, non-conforming barn. The floating patio will not increase bedrooms or dwellers at the site and will not be visible from the street. The setback for this property, prior to the adoption of the Ordinance, is about three (3) feet. The floating patio will not increase the non-conformity and a building permit should issue without the need for a variance.

2. The ordinance allows one landscaping item in the front setback. The Ordinance allows for one landscaping item in the front setback. The Ordinance does not define the term "landscaping item." It would not be a shrub or grass or plantings. The patio is part of a landscaping plan and its use, design and location are substantially related to the landscape. Landscaping items can be interpreted to mean a gazebo, swing set, planting shed, floating patio or any other item that enhances the landscape. If the Honorable Board finds the floating patio is a landscaping item, a variance is not required.

J. Cronin submitted a letter from Mark McKeon, Real Estate Broker for the record.

A. Howe said that he has a problem with the fact that there is no certified plan with exact numbers and information. D. Andrade said that the plan from the state gives you the boundaries and we do have a full size plan in the file. A. Howe asked if he could have the setbacks added to the plan. J. Cronin said that if you make that a condition then yes he can have the engineer do that. D. Andrade said that the deck is behind the barn so you can't see it and the applicant did give a great

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explanation of the simplex rules. Due to this being a floating patio it will not be attached to the barn, so a condition should be added that he can't expand it or add a roof to it.

S. Davis asked about the easement that looks like it will be covered with the proposed floating patio.

J. Cronin said that it provides access to the neighbors dock and right now she doesn't use it, but he told her that she is allowed to walk over it. So, is it a walking easement asked S. Davis, yes it is replied J. Cronin.

J. Cronin explained the condo situation and the limited common area and the only thing that is common on this particular condo is the driveway. There is no association and there aren't any condo fees; you pay your own way.

A. Montminy thought that it was a very reasonable use of the property and many the properties in that area don't meet the setbacks.

A. Howe asked if he needed a variance or not with regard to the landscaping and what is your opinion D. Andrade. D. Andrade replied that the applicant wouldn't be at the meeting if he didn't need a variance. He said that according to the landscape definition, over the last 20 years and before that the rule was that anything placed there permanently is a structure and the town says that you can't place a structure in the setback. He then went over what over a few examples and differences between temporary and permanent structures. He also said that the state allows an accessory structure in the setback, but we don't which he explained.

S. Davis asked about the actual construction of this deck. J. Cronin said that it would be precast footings that aren't drilled into the ground and it would be 2' x 8's like any typical deck and trex will be on the rest which he explained. D. Andrade stated that the key words were that it'll be anchored.

Deliberation(s)

John & Maureen Cronin
Application #2017000135

Motion made by A. Howe, seconded by A. Montminy, to grant the Variance request for Application # 2017000132 for John and Maureen Cronin with the following condition:

- 1) This floating deck shall not be expanded upon and no roofs or sides added to it.
- 2) That the applicant pursues the neighbor to grant her passage if need be over the floating deck.
- 3) That the applicant submits an updated engineered plan to the Planning and Land Use Office that includes the setbacks noted on the plan.

The board finds that the Requirements for a Variance under Article 12, Section 12.1 have been met as presented by the applicant.

There being no further discussion the members were polled.

Glen - yes

Ann - yes

Bill - yes

Minutes approved at the July 25, 2017 meeting.

Scott – abstained
Andy - yes

Motion carried.

MINUTES

April 25, 2017

Motion made by A. Howe, seconded by B. Knightly to approve the minutes of April 25, 2017.

Motion carried.

ADJOURNMENT

Motion made by A. Howe, seconded by G. Aldrich to adjourn the Zoning Board of Adjustment meeting of May 23, 2017 at 7:31p.m. Motion carried with all in favor.

Respectfully submitted,

Sandra Hart, Secretary