

**MINUTES OF THE NEW CASTLE CONSERVATION COMMISSION**  
**Tuesday, March 3rd, 2020 – 5:00 p.m. (Public Safety Building)**

**Conditional Use Permit for work at 12 Cranfield Street.**

**Replacement of the Structure within 50 feet of shoreline buffer zone – Eldred's Boathouse, 180 Portsmouth Avenue.**

**Members Present:** Conni White, Chair, Lynn McCarthy, Vice-Chair, Beth Barnhorst, Tom Chamberlin, Darcy Horgan, Bill Marshall, Ron Pascale, Jim Rini, Brandon Tanguay.

**Members Absent:** Brian Mack.

**Others Present:** Sergio Bonilla, P.O. Box 4028, Portsmouth, NH; Mary Ann and Tim Driscoll, 4 Cranfield St., New Castle, NH; Jane Finn, 169 Portsmouth Ave., New Castle, NH; Retta Fitch, TMS Architects, 1 Cate St., Portsmouth, NH; Etoile Holzaepfel, 29 Laurel Ln., New Castle, NH; Marc Jacobs, P.O. Box 417, Greenland, NH; Steve Joselow and Margaret Lamb, 12 Cranfield St., New Castle, NH; Tim Phoenix, Hoefle, Phoenix, Gormley & Roberts, P.A., 127 Parrott Ave., Portsmouth, NH; Mary Ann Robbins, 115 Piscataqua St., New Castle, NH; Alex Ross, Ross Engineering, 1167 South St., Portsmouth, NH.

Chair White called the meeting to order at 5:08 p.m. and asked attendees to sign in. Ms. Barnhorst made a motion to approve the February minutes. Ms. McCarthy seconded. Motion carried unanimously.

**1. Applications.**

**A. Conditional Use Permit for work at 12 Cranfield Street.**

Ms. Fitch and Mr. Bonilla presented the revised plans for 12 Cranfield Street. Mr. Joselow and Ms. Lamb would like to have one car garage built off the side of the existing house. 40% of the garage would be within the 50 foot buffer. The garage would be 28 feet from the street. In exchange, the large impervious deck in the back would be removed, resulting in a 464 square foot, 13.3% reduction in impervious surface area, all of which is within the previously disturbed 100 foot buffer. At least six feet of waterfront plantings would be added as well.

Ms. Barnhorst appreciated the way the garage looked aesthetically, but asked why it could not be moved forward closer to the street. Ms. Fitch commented that she wanted the garage to be the secondary thing seen from the streetscape. She pointed out the grade change, which is about one foot. Ms. Horgan stated that moving the garage forward would also not be feasible given the Historic District Commission restrictions. Ms. McCarthy felt that there was no other place for the garage to go, and loved that the driveway would be pervious. Ms. White noted that the question that the Conservation Commission was focusing on was whether the structure would be a garage or just a storage shed. If the Applicants wanted a storage shed, this could potentially be located

outside the 50 foot buffer. Mr. Bonilla stated that the Applicants have been trying to accommodate the Commission's concerns that would improve the current site and increase infiltration.

Etoile Holzaepfel presented planting ideas for the site. All plants would be salt tolerant, and most would be native. The Montauk daisies that are already on the property would be re-used. Ms. Holzaepfel is looking into shade-tolerant plants given the large tree in the yard. She pointed out the desire to ensure that the plants would not be tall, which would block the ocean views. She felt that bayberry and rose plum would be too tall for the water's edge, as they grow eight to ten feet tall. Ms. Holzaepfel would like to have a blend of woody plants and native perennials such as beach pea and seaside goldenrod.

Mr. Rini stated that he would be willing to approve the shed outside of the 50 foot buffer. Mr. Chamberlin felt that the proposed garage width of 24 feet could be reduced, but felt that it was significant that the Applicants would be taking out so much impervious structure right along the water. He struggled with the fact that the Applicants would be adding structure within the 50 foot buffer, especially given that the whole bulkhead is not currently there. Ms. White pointed out how the Applicants are improving the property with the added plantings. She added that they are willing to take out all of the decking in the back along the seawall and instead just have a path. Ms. McCarthy was happy with the plan and felt that the Applicants have done a lot in mitigation. She emphasized the importance of give and take, and how the proposed patio would be pervious and much smaller. Ms. Barnhorst commented on setting precedent for future applications. She felt that the plan was very attractive, but she struggled with the fact that there were other alternate locations or resizing that would be possible. Ms. Horgan noted that a Board decision does not set a precedent, and that each case is assessed individually.

Ms. Holzaepfel pointed out that part of the house is already within the 50 foot buffer, and most is within the 100 foot buffer. Mr. Bonilla added that the proposed driveway is approvable according to the NHDES. Neighbor Mary Ann Driscoll stated that she does not have a garage and that it is possible to not have one on the street.

Ms. White asked if the Applicants would be willing to go back and make another proposal for a shed, or if they would prefer the Commission make a motion tonight so that the Application moves onto the Planning Board. Mr. Joselow commented that the proposed garage would be going over what is already impervious, and he felt that he and his wife were conceding a lot by removing the deck. Ms. Lamb stated that she would like the Commission to vote on the case so that they could move forward in the Application process.

Mr. Chamberlin motioned to recommend approval of the plan as drawn by Millennium Engineering Inc., dated March 3, 2020, at 12 Cranfield Street (Map 17, Lot 33), conditioned upon the future approval of a detailed landscaping plan. Ms. McCarthy seconded. Three members voted in favor and four voted against. The motion did not pass, and the Application will next go to the Planning Board.

**B. Replacement of the Structure within 50 feet of shoreline buffer zone – Eldred's Boathouse, 180 Portsmouth Avenue.**

Instead of presenting the case, given that the Commission has already seen the Application several times, Ms. White stated that Commission members would ask questions and then would open the discussion up to the public.

Ms. White asked about the position of the pump station, and pointed to a picture of a king tide that Mr. Chamberlin had brought in. Ms. White questioned why, given the rising sea levels, which are expected to rise 0.5 to 1.3 feet by 2050, not including a king tide or storm surge, the pump station would not be placed closer to the main house. Mr. Ross replied that the pump station is just a septic tank and can be designed so that it is anchored properly and watertight. He equated it to the sewer line along Portsmouth Avenue. Mr. Ross added that they did look at alternate locations, but as discharge leaves the structure, it needs to flow by gravity into the tank. The NHDES approved the location, and the Applicant would meet with the Town Water and Sewer Commission again to finalize plans. Ms. White inquired about the material that makes the tank watertight to the sea, because if it is concrete, that would be highly destructible. Mr. Ross stated that the tank will have a membrane around it and certain seals on the hatches to make it a watertight structure.

Mr. Tanguay asked why, if the proposed use is just a boathouse, the Applicant would have a need for septic and utilities. Mr. Ross commented that the structure has had a bathroom of sorts in the past, and when the house was built, there were plans to bring utilities down to the boathouse. Mr. Tanguay asked why utilities are necessary when the main structure is just 100 feet up the street. Mr. Ross replied that the owner would like the ability to wash feet or use the bathroom when he and his family are down by the water.

Mr. Ross presented a revised rendering of the existing and proposed structure. Mr. Rini asked about the deck, specifically whether the square area of the current versus proposed deck are the same. Mr. Ross responded that they worked on reducing the square footage in the footprint of the proposed structure. The existing structure has a 144 square foot ramp and a 112 square foot deck. The proposed structure does not have a ramp and would just have a 119 square foot deck. Ms. Barnhorst asked if the new deck would be covered, and pointed out what appeared to be a 30 inch roof overhang in the proposal. Mr. Ross said that a portion of the deck would be covered, and that the overhang has been calculated into the total square footage. In addition, he noted that there is an infiltration trench in the stormwater management plan. The existing building footprint is 784 square feet and the proposed is 666 square feet. The existing boathouse does not have much of a roof overhang, but it does have steps and a ramp in front, according to Mr. Ross. He stated that these proposed features are in the NHDES wetland permit as well. There would be a 200 square foot decrease in impervious surface area overall.

Ms. White stated that Eben Lewis at DES showed 4,318 square feet of improved land, including discharge from the house's daylight drain that is going directly into the wetland at the bottom of the property. There would be buffer plantings upland and more trees. She felt that this is a great example of what the Conservation Commission can show people in terms of improvement to their properties. She believed that the improvement to the property outweighed the new boathouse structure.

Mr. Tanguay commented that according to our Town Ordinances, nothing should be constructed within the 50 foot buffer. In going through the conditions that would be in a recommendation to the Planning Board from the Conservation Commission, he did not believe that the Applicant met many, if any, of them. For example, the use of the site could be done outside the buffer. There is a lot that the Applicant could do that would have less of a detrimental impact. For the Commission to signify that they approve the case and that it is a good thing for the community and the environment, he felt that that would be a disservice. If the DES has jurisdiction over the application, they can outweigh the Commission, but that is a question of law for a court to decide, not the Commission. By applying the Ordinances, Mr. Tanguay stated that there is no way he could approve the case.

Mr. Ross noted that if the structure in question were a brand new building, this would be a totally different case. The entire lot is within the 250 foot buffer, and the proposal calls for the structure to be moved as much as possible while retaining the existing property and building. Ms. Barnhorst stated that accessory structures should not exceed 12 feet, be serviced by pipelines, or be bigger than the existing structure, according to the DES.

Attorney Phoenix stated that the Conservation Commissions, State, Zoning and Planning Boards have to balance their interests with the owner's property rights. If it hadn't been for the FEMA 50% requirement, Mr. Eldred would have fixed the existing building. Attorney Phoenix does not think the case is as simple as determining whether or not this building fits the Town Ordinances. Rather, it is important to consider whether the efforts to get the rest of the property to be more protective of the river and surrounding environment are enough, which he felt they were sufficient.

Ms. Horgan asked Attorney Phoenix about grandfathered property rights. The structure would be moved back about seven feet, which Mr. Ross noted worked best with the existing curb cut driveway and lot topography. Ms. Horgan asked if the structure would still be grandfathered given that it would be moved off its foundation. Attorney Phoenix replied that the Applicant has grandfathered rights to the building and is not conceding these rights by moving the structure. The nonconformities have already been approved by the Zoning Board and will soon go before the Planning Board during this process.

Mr. Rini commented that the location selected for reconstruction seemed to be partly dependent on the existing driveway. Mr. Ross said that this is partially correct, but was also dependent on grade changes and the positioning of the house on the hill. Ms. White asked about possibly moving the structure up 50 feet in order to be in compliance, given that Mr. Lewis had stated that the structure must be moved that distance in order to have plumbing. Mr. Ross replied that Mr. Lewis concurred that the proposal met DES regulations.

Mr. Ross recently met with Norman Houle of the Town Water and Sewer Commission. He plans on going back before the Commission to finalize plans in the next few weeks. Ms. Horgan asked about the notes from the Water and Sewer Commission requiring that the tank be a minimum of 500 gallons. Mr. Ross noted that the tank would be the smallest size possible and will meet the 500 gallon requirement. Ms. Horgan inquired whether a 500 gallon tank would be sufficient to accommodate an Accessory Dwelling Unit (ADU), to which Mr. Ross responded that it would need to be a 1,000 or 1,250 minimum gallon tank in order for the structure to be used as an ADU.

Attorney Phoenix pointed out that the Zoning Board and DES decisions specifically stated that the structure could not be used as an ADU, binding to current and future homeowners, even though a homeowner has a right to have an ADU on his or her property in this zoning district. Ms. Horgan asked how this would be proven in the future. Ms. Horgan asked further if these decisions by ZBA and NHDES would hold legal water as they prohibit a homeowner's right. Attorney Phoenix stated that there is no need to have a recorded instrument to prove this, as it is shown in the Town meeting minutes. He added that the ZBA decision is final because the Applicant did not appeal the decision within 30 days, so he conceded his property rights. Even if the property is transferred to a different owner, the new owner would have to come before NHDES, ZBA, Conservation Commission, and Planning Board all over again to request an ADU. Ms. Horgan asked if there is a way of strengthening the decision. Attorney Phoenix stated that this could be done in a deed restriction, but records of restriction are sufficient because they are kept at the Town Hall. Mr. Ross added that on the DES list of conditions, it specifies that the structure cannot be an ADU. Ms. Horgan felt that this stipulation would be very helpful to put on the plan. Mr. Tanguay recommended that a restrictive covenant or an amendment to the deed be recorded so that subsequent owners would be on notice.

Ms. McCarthy asked if Mr. Ross discussed the proposed pump tank with DES. He responded that this was discussed and that the tank setup is on the approved set of plans. Ms. McCarthy strongly disapproved of the tank location. Mr. Ross pointed out that Mr. Lewis was onsite several times and reviewed the list of conditions that the Water and Sewer Commission wanted. Mr. Lewis was satisfied with the location, according to Mr. Ross. He stated that other locations would still require a chamber.

Mr. Rini stated that if he scaled the drawing, about 20 feet of the proposed structure is still within the 50 foot buffer, when Mr. Lewis had suggested it be moved completely out of the 50 foot buffer. Mr. Ross commented that the structure cannot be pushed back more because of the driveway and grading, and reiterated that Mr. Lewis was satisfied with the plans.

Jane Finn, of 169 Portsmouth Avenue, pointed out that the current driveway was not there when the Applicant purchased the property from her family. She stated that the driveway was dirt and has since been made gravel by the current owner. Ms. Finn felt that the driveway affecting the location of the proposed structure is a self-imposed restriction. She also stated that there was never a bathroom in the boathouse, and it is disingenuous to say otherwise. Mr. Ross noted that the current driveway is pervious, and the plan is to have pervious pavers to allow infiltration. Ms. Finn raised the issue of whether this application represented a change in use. Ms. Horgan pointed out that adding a bathroom does not result in a change of use which would not be permitted according to the Zoning Ordinance. If a new use for a structure is allowed in the district, then it is not considered a change in use. Attorney Phoenix added that the use was and still will be residential, even if some activities to be done in the structure will change slightly.

Mr. Tanguay motioned to not recommend to the Planning Board approval of the project per the plans prepared by Ross Engineering, dated December 18, 2019, due to a number of reasons including, but not limited to: 1) the proposed use can feasibly be carried out on a portion of the lot which is outside of the 50 foot tidal buffer; 2) the design, construction, and maintenance of the proposed use does not minimize the detrimental impact; 3) there is a feasible alternative to the proposed use that has a less detrimental impact on the tidal lands; and 4) the proposed use may

create a hazard to public health, safety and welfare due to the loss or degradation of wetland, surface waters, or potential contamination of ground water. Mr. Rini seconded. Ms. McCarthy commented that she would be more apt to approve the structure without the utilities. The motion to not approve the boathouse passed with five in favor and two against.

Ms. White explained that the Conservation Commission is giving a negative recommendation to the Planning Board, but it is up to the Planning Board to take the Commission's decision into consideration and make its own decision.

## **2. New Business.**

None.

## **3. Unfinished Business.**

None.

## **4. Announcements.**

The April meeting will be held at the Town Hall on Wednesday, April 1<sup>st</sup>.

## **5. Adjourn.**

Ms. Barnhorst moved to adjourn the meeting. Mr. Pascale seconded. The motion carried, unanimously, and the meeting adjourned at 7:06 p.m.

Respectfully Submitted,

Meghan Rumph