

APPROVED

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**MINUTES OF THE NEW CASTLE ZONING BOARD OF ADJUSTMENT
Tuesday, December 18th, 2018 – 7:00 p.m. (Town Hall)**

Members Present: Todd Baker, Chair, Mark Gardner, Rebecca Goldberg, Ben Lannon, Margaret Sofio, Alyson Tanguay.

Members Absent: John Fitzpatrick.

Others Present: Beth Barnhorst, 14 Pit Lane, New Castle, NH; Bonnie Brown, 164 Portsmouth Ave., New Castle, NH; Jim Cerny, New Castle, NH; Stephen Eldred, 180 Portsmouth Ave., New Castle, NH; Jane Finn, 169 Portsmouth Ave., New Castle, NH; Charles Hoyt, Charles Hoyt Designs, 893 Ocean Blvd., Rye, NH; Marc Jacobs, Certified Wetland and Soil Scientist, P.O. Box 417, Greenland, NH; Maggie Kennedy, P.O. Box 2122, New Castle, NH; R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, P.A., 127 Parrott Ave., Portsmouth, NH; Peter Rice, 11 Atkinson St., New Castle, NH; Alex Ross, Ross Engineering, 1167 South St., Portsmouth, NH; Conni White, 54 Neals Lane, New Castle, NH.

Chair Baker called the meeting to order at 7:00 p.m. and asked attendees to sign in.

Rehearing of Case #2018 – 05. Applicant Stephen Eldred, of 180 Portsmouth Ave, has requested that the Board rehear his application for variances from Sec. 4.2.1, Table 1: Density and Dimensional Regulations for relief from the required 20 ft. front yard setback and from Sec. 7.3.1 for replacement of a non-conforming structure with a 19.5% increase in volume over the original boathouse.

Attorney Timothy Phoenix presented Applicant Stephen Eldred's resubmission of his previously denied application seeking variances for the rebuilding of a boathouse. In the Request for a Rehearing of the ZBA's August 30, 2018 Variance Application denial, Attorney Phoenix stated that the Notice of Decision issued by the ZBA cited that the Applicant had not met the criteria showing that granting the variance would result in substantial justice, and that granting the variance is not contrary to the spirit of the ordinance. However, the Board, according to Attorney Phoenix, unanimously motioned to deny the requested variances on the grounds that the application is not in keeping with the spirit of the ordinance and that the Applicant failed to establish unnecessary hardship through denial of the application. He concluded that the Board's motion and its Notice of Decision do not conform, and that the Board misapplied the "Ordinance required zoning-based use of the proposed structure, instead focusing on physical use, aesthetics and wetland issues beyond the Board's purview".

The current boathouse has traditionally stored bikes, kayaks and garden furniture in the winter. However, Attorney Phoenix stated that the building was found to be dilapidated, with replacements needed for the roof, parts of the floorboards, and 30% of the siding shingles. Mr. Eldred had originally intended to just lift the building to meet FEMA regulations, but after speaking with engineer Alex Ross, it was decided that the whole structure should be re-done given its poor condition.

Attorney Phoenix stated that the primary concerns expressed from Zoning Board members in the ZBA's denial of the application in August were focused on the sensitivity of the area and the intensification of use, which are based on conditional use permits and therefore fall under the purview of the Planning Board. Mr. Eldred would still need to go before the NH Department of Environmental Services, the New Castle Conservation Commission, and the New Castle Historic District Commission. Attorney Phoenix also addressed concerns about initial plans showing an accessory dwelling unit (ADU), but reiterated that this is not a ZBA issue. He further stated that Mr. Eldred is willing to stipulate that the proposed boathouse would not be an ADU or any sort of living unit, but the Applicant would still want a bathroom as part of the new structure. The issue of having a bathroom would be a Planning Board issue, not for the ZBA to adjudicate. Attorney Phoenix added that Mr. Eldred is not required to stipulate that he will not have an ADU, but he hopes it will address some of the Board members' concerns.

The Applicant would like to use the proposed boathouse for storage for boats and kayaks, as well as for family use as a gathering area after being on the water. All disturbance would be temporary in nature, and would be necessary to replace the building. Attorney Phoenix argued that the only difference would be the digging required to put in a water line for the bathroom. Charlie Hoyt, who has been working on designing the structure, pointed out that the current boathouse has a deck and large windows, which are evidence that the original boathouse was intended to be used for gatherings as well. Mr. Hoyt looked at the existing boathouse to get an idea of the footprint, and used historic buildings in New Castle to get inspiration for his design. The proposed structure would be in keeping with the proportions of the existing boathouse.

The current boathouse is 784 square feet, whereas the proposed structure would be 735 square feet, with a 130 square foot deck, 73 square feet of stairs and pervious pavers for the driveway. There would be no ramp. The first floor elevation would be raised from 9.46 feet to 13 feet, in compliance with FEMA requirements. The roof height would be 23.38 feet from average grade, excluding the cupola, which would add an additional 4.5 feet. The structure would be moved back roughly four feet to improve the front yard setback, which would make the boathouse 13.44 feet from the setback to the overhang, and 16.20 feet from the setback to the wall. The building currently has a shallow roof slope, and the proposal calls for a change in roof pitch of about 40%, which would raise the roof approximately eight feet. The proposed structure would result in a volume increase of 19.5%.

Board members expressed concern over the large volume increase. Chair Baker and Mr. Gardner asked whether the boathouse could be designed without increasing the volume. Ms. Tanguay pointed out that the 19.5% increase in volume does not even include the 175 square feet in boat storage underneath the proposed structure. Mr. Gardner questioned how the proposed volume increase is not in violation of the Town Zoning Ordinance Section 1.0, which calls for the promotion of "the health, safety, and general welfare of the community". Attorney Phoenix pointed out that the proposal is on a smaller footprint, and the square footage of the structure would be reduced, in addition to the removal of the existing ramp.

Attorney Phoenix went through the five criteria for zoning relief.

1. *The variance will not be contrary to the public interest; and*
2. *The spirit of the ordinance is observed:*

Attorney Phoenix noted that removing the old boathouse, which is already falling apart and has to be raised to be compliant with FEMA regulations, is promoting the health, safety, and general welfare of the community. Slightly less than half of the proposed height increase is to meet FEMA requirements, while a little more than half of the increase would be to raise the interior wall about one foot. Granting the variances would not alter the essential character of the area. The proposed boathouse would be an improvement because it would be a smaller footprint that is further away from the wetlands, and the project proposal would decrease impervious lot coverage. There must be a just balance between the rights of the Applicant to enjoy his private property and protecting the general welfare of the community.

3. *The values of surrounding properties are not diminished:*

Attorney Phoenix argued that allowing the “raising and beautifying” of the building would not affect surrounding property values because no other houses are in close proximity to the site of the proposed boathouse. Furthermore, there is no diminution of property value because the property owner would be affected no differently than the general public.

4. *Literal enforcement of the provisions of the ordinance would result in unnecessary hardship:*

Since the structure is in a residential zone, the use is permitted and therefore is deemed reasonable. Special conditions exist because of the structure’s proximity to the Piscataqua River and the wetland buffers, and because the building has always been in violation of codes. The existing building is closer to the river and surrounding property lines than the proposed building. The setback requirements are, in part, to create air, light, space, and sightlines, while the height restrictions are to prevent overbulking and over-massing. There are no neighboring homes near the building, so it is not reasonable for Mr. Eldred to comply with this, and he does not need a height variance.

5. *Substantial justice is done:*

Substantial justice will be done by granting the variance, as the building needs to be replaced, and the Applicant seeks to improve the structure to get more use out of it. Denying Mr. Eldred’s right to better enjoy his property would be a loss to him, and there is no benefit to the public by denying the variance.

Mr. Gardner asked if there was any feasible alternative location for the boathouse. Mr. Ross responded that there was none because of the 100 foot median high tide line, the steep slope on the property, and the existing trees that would have to be cut down. Ms. Goldberg inquired about the existing septic line on the lot, which is on public water and sewer. Attorney Phoenix noted that the waste from the boathouse would run into the Town line, which would have to run in the wetland buffer zone. This would have to go before the Town Planning Board for a conditional use permit.

Chair Baker echoed Board members’ concerns that the proposal is not insignificant. He specifically noted that the structure would be functional with a reduced volume, and that the building would be roughly 12 feet higher (including the cupola) in a sensitive area when it could only be 3.5 feet taller. He added that per the New Castle Master Plan, the purpose of limiting the expansion of nonconforming buildings is to limit overbuilding in Town. Chair Baker

acknowledged that there are special conditions on the area given the location of the boathouse and the FEMA regulations.

Mr. Eldred spoke about his intent of the boathouse, noting that he originally just wanted to fix the existing structure, but raising the building to meet FEMA requirements will cause it to collapse. He can't leave the building as is, but can't raise it without rebuilding it. He estimated that it would cost at least \$220,000 just to raise the boathouse to meet FEMA requirements. He emphasized that he does not want to irritate neighbors, and that he wants to make the building look better given that it is located in a high profile area at the entrance to the island. Mr. Eldred reiterated that he would not have the proposed boathouse be a living unit.

Ms. Tanguay asked if Mr. Eldred would be willing to lower the walls in the proposal by a foot. Mr. Eldred felt he should not have to do this, and questioned whether the ZBA was being fair and equitable to him. Mr. Lannon commented that because of the location of the structure and the large change in volume, lowering the walls a foot would likely make a significant difference. Ms. Tanguay wondered if Mr. Hoyt used 3D massing to see what the proposed structure would look like. Mr. Hoyt responded that he did not do this, and acknowledged that the design could be different to fix the building to make it FEMA compliant, while also making it less volumetric. This could be done by altering the roof pitch and wall height of the design.

Ms. Barnhorst expressed concern that the proposed boathouse would be larger and require plumbing where there is not current any. She was also concerned with managing the property when it sells, specifically regarding the potential for the boathouse to be turned into an ADU. Given the extreme flooding in the area, the boathouse should be moved in her opinion. She sighted the precedent the boathouse would be setting for the rest of the island. In response to Ms. Barnhorst's concern about managing the property after it sells, Attorney Phoenix stated that it is possible to do a deed restriction, which would be in the Town records.

Ms. Finn questioned the large proposed height increase. While she agreed that the Applicant should be able to raise the boathouse 3.5 feet to meet FEMA requirements, she felt that the proposal would make it difficult to see over the boathouse when coming over the crest. Attorney Phoenix responded that the general public is not entitled to such view.

The public meeting closed at 8:24 p.m. and Chair Baker opened the discussion amongst Board members.

Ms. Goldberg stated that she still has a problem with the volume increase, which is a big change in her opinion. She added that she is very sensitive to Mr. Eldred's property rights, but felt that there are quite a number of public interests represented in the Zoning Ordinances and the Master Plan that are critical to the Board's decision on whether to grant the requested variances. Ms. Sofio noted that the burden of proof is on the Applicant to meet all five major criteria for zoning relief. She pointed to the public interest in the zoning ordinances that the ZBA must take into account, and concluded that she would feel uncomfortable granting the requested variances based on the Application presented before the Board.

Mr. Lannon highlighted the importance of the site to many people given its public location, and felt that this has generated debate over the proposal. While he appreciated Mr. Eldred's intent to

do the right thing, he did not feel that the proposed changes were minimal. Mr. Lannon stated that he is struggling most with the need for the increase in volume of the boathouse, and thought that the Applicant could accomplish his goals of having the boathouse while taking into consideration the concerns of the community.

Ms. Tanguay commented that the identity of New Castle is in some ways is tied to what happens on the Applicant's lot, given that the boathouse is the first thing many people notice when entering Town. She considered the proposed increase in volume to be a substantial change, and felt that the proposed boathouse looked to be on a different scale than the existing boathouse, which she felt is minimal. She emphasized the importance of taking into account the precedent that granting the proposed variances would set, and felt that the Board must be mindful of this and the perceived volume of the proposal.

Mr. Gardner reiterated his opinion that the Planning Board should have seen the Application before the ZBA. He noted that the engineer confirmed that it is a possibility to meet the FEMA requirements while needing less variances. Attorney Phoenix commented that it is standard to get zoning relief before going to the Planning Board, and that the Town Building Inspector directed the Applicant to go before the ZBA first.

Chair Baker stated that he is sympathetic with the Applicant and his unique situations. He emphasized the importance of boathouses to the island community. He cited difficulty understanding the hardship for the proposed volume increase, and felt there could be a less impactful volume increase.

Chair Baker noted that the front setback variance could be granted because the proposed footprint is less nonconforming. The Board could discuss stipulating that the volume increase in the building would be just enough to meet FEMA requirements, or the Board could vote on the application as it was presented. Ms. Sofio proposed continuing the hearing until after the application goes before the Planning Board.

A brief recess was taken at 8:49 p.m. and concluded at 8:54 p.m. Attorney Phoenix stated that the Applicant would like the Board to vote on the setback variance requested. Mr. Hoyt calculated that if the walls were lowered by one foot, it would result in a 768 square foot reduction, which would be an overall volume increase of about 10% as opposed to 19.5%. Therefore, the request for a variance from Section 7.3.1 for the replacement of a non-conforming structure with a 19.5% increase in volume over the original boathouse will be tabled.

Members went through the five criteria for zoning relief from Section 4.2.1, Table 1: Density and Dimensional Regulations. Chair Baker, Mr. Lannon, and Mr. Gardner each found that the variance is not contrary to the public interest, the spirit of the ordinance is observed, the values of surrounding properties are not diminished, literal enforcement of the provisions of the ordinance would result in unnecessary hardship, and substantial justice is done. Mr. Lannon added that the building has special conditions and that the change in the front setback would have a minimal impact, which Mr. Gardner noted would also make the structure less nonconforming.

Mr. Gardner motioned that the request for front setback variance, with 12.15 feet existing and 13.44 feet proposed, be granted premised upon the arguments put forward by Attorney Phoenix and the Applicant, and that the structure's footprint remain as is or become less. Mr. Lannon seconded. The motion passed with three members in favor. Ms. Goldberg and Ms. Sofio abstained from voting.

2. Approve Minutes.

Mr. Gardner moved to accept the November 2018 minutes as submitted. Ms. Sofio seconded. The motion carried unanimously.

3. Set Date of Next Meeting.

Chair Baker announced that the next Zoning Board of Adjustment meeting will be held on Tuesday, January 15th, 2019 at 7:00 p.m.

4. Adjournment.

There being no further business, Mr. Lannon moved to adjourn the public meeting. Mr. Gardner seconded. The motion carried, unanimously, and the meeting adjourned at 9:25 p.m.

Respectfully Submitted,

Meghan Rumph
Secretary