

**MINUTES OF THE NEW CASTLE ZONING BOARD OF ADJUSTMENT**  
**Tuesday, March 26<sup>th</sup>, 2019 – 7:00 p.m. (Town Hall)**

**Members Present:** Todd Baker, Chair, Mark Gardner, Ben Lannon, Alyson Tanguay.

**Members Absent:** John Fitzpatrick, Rebecca Goldberg, Margaret Sofio.

**Others Present:** Beth Barnhorst, 14 Pit Lane, New Castle, NH; Bonnie Brown, 164 Portsmouth Ave., New Castle, NH; Stephen Eldred, 180 Portsmouth Ave., New Castle, NH; Charles Hoyt, Charles Hoyt Designs, 893 Ocean Blvd., Rye, NH; R. Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, P.A., 127 Parrott Ave., Portsmouth, NH; Alex Ross, Ross Engineering, 1167 South St., Portsmouth, NH.

Chair Baker called the meeting to order at 7:09 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 a variance from Sec. 7.3.1 for replacement of a non-conforming structure with an increase in volume over the original boathouse.

Attorney Phoenix provided an overview of the case history. His involvement with the case started on August 30, 2018 with the Applicant's request for setback relief and expansion of volume and size of the existing, nonconforming boathouse. Mr. Eldred's original intent was to repair the existing boathouse, but upon further investigation, it was determined that it would be nearly impossible to repair the structure given its poor condition. The original application was to lift the boathouse in order to comply with FEMA regulations, while increasing the size of the interior walls and volume, which would result in a total volume increase of approximately 19.5% over the existing building. This application was denied, and Attorney Phoenix submitted a Request for Rehearing at the October 17, 2018 meeting. The Request for Rehearing was granted, and the application went before the ZBA again on December 18, 2018. At that meeting, the front setback variance, with 12.15 feet existing and 13.44 feet proposed, was granted.

Attorney Phoenix presented a supplemental filing with an updated plan and newly designed footprint of the boathouse. He noted that after the last ZBA meeting, Charlie Hoyt and Alex Ross worked closely with Mr. Eldred to come up with a design that would meet FEMA requirements while not requiring such a large increase in volume of the boathouse. The new plan has a front setback of 14.44 feet to the roof overhang, which is an improvement to the 13.44 feet that the Board previously approved. The existing boathouse is 784 square feet, and the new submission has the boathouse at 666 square feet, compared to 735 square feet in the original submission. This is approximately 9% smaller than the original submission, and 15% smaller from the existing building. Further, the previous volume increase was approximately 19.5%, which has been reduced to 1.3% volume increase in the latest application.

The building is currently in a flood zone elevation of 11 feet per FEMA. Mr. Ross noted that FEMA regulations call for the bottom of the lowest supporting member of the structure to be above the flood zone. The first floor is currently at an elevation of approximately 9.5 feet, and the proposal would have the first floor at 13 feet above sea level. Mr. Ross estimated the framing

to be approximately 12 inches deep, and emphasized the importance that all framing be well above the flood level. Therefore, the minimum amount the first floor could be raised is approximately 1.5 feet. Mr. Hoyt pointed out that the proposed design is narrower and has a shorter wall and hip roof, which creates a less imposing design than the existing boathouse. The previous design had a 9 foot wall height, whereas the current design has the wall height at 8 feet.

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:*

One of the purposes of zoning ordinances is to promote the general health, safety and welfare of the community. The Master Plan requires a just balance between the enjoyment of private property and the health, safety and welfare of the community. The objectives of the Master Plan include keeping New Castle primarily residential and protecting the unique character of the Island. Attorney Phoenix argued that the application has met these requirements because the proposed boathouse would be an accessory building to an owner-occupied home and the proposed structure would do a better job at protecting the Island character than the current dilapidated building. He added that the wetland and shoreline area would be improved once the project is complete because the impervious surface area would be decreased and the impacts to the wetlands would be temporary, as noted in a letter previously submitted by wetlands scientist Marc Jacobs.

Attorney Phoenix argued that the application is not a matter of aesthetics, although the new design is aesthetically better looking than the current boathouse. He emphasized that the question at hand is whether the *variances*, not the project, would alter the essential character of the locality. Attorney Phoenix added that Mr. Eldred will need to go before the Town Planning Board for a conditional use permit to build in the wetland buffer, the Historic Commission for the design of the boathouse, the NH DES for a wetland permit, and the Conservation Commission for review of the application. He concluded that a 1% increase in volume, primarily to meet FEMA requirements, does not threaten the public health, safety and welfare of the community.

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

The building is badly in need of repair, and the proposed building is less imposing. The proposal is designed tastefully, and would not diminish the values of surrounding properties.

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

Special conditions exist that distinguish the property from others in the area, specifically that the existing building is within the wetlands setback and cannot reasonably be placed elsewhere. The setbacks burden the building, while the proposed structure would be further back from the water. There is also no fair and substantial relationship between the ordinance and its application in this instance. The proposal is a smaller building with a very small increase in volume, and less overall impervious area. The proposed use is reasonable. It is in a residential area where accessory structures are permitted, so the proposed use is therefore reasonable. Attorney Phoenix added that although it is not a zoning issue, Mr. Eldred is willing to stipulate that the proposed boathouse not be used as a dwelling unit.

5. *Substantial justice is done:*

There is no benefit to the general public that outweighs the hardship to the Applicant by denying the variance. The design is pleasing and fits in with surrounding buildings. The proposed structure is within keeping of the area and the Applicant's home.

Ms. Tanguay raised concerns about the photographs distributed that intended to show the existing boathouse and the proposed boathouse. She pointed out that the scale of the existing and proposed boathouse view entering New Castle is off, which makes the proposed design look smaller than it actually would be. Mr. Hoyt responded that the images are not completely accurate given the software used, but the overall idea is to show that the proposal is less imposing than the current structure. Attorney Phoenix noted that when comparing the edge of the boathouse to the edge of Mr. Eldred's house, in general, more of his house is visible with the proposed design.

Ms. Tanguay asked about the current foundation of the boathouse and how it compares to what would be used with the proposed structure. Mr. Ross commented that the current foundation consists of concrete piers that support the existing building. The concrete is falling apart as a result of poor construction and salt air. The goal is to have a new, safe structure that complies with FEMA, state and local regulations and protects the wetlands buffer. The boathouse must be designed to let water pass and re-pass, so Mr. Ross designed the proposed structure to be open underneath with concrete supports to hold up the building and thin stone veneer break-away walls. It is important that the framing is properly anchored to the concrete piers. There would be no concrete pour basement and no concrete, solid walls underneath. Ms. Tanguay acknowledged that the building needs to be raised so it is not in the tidal area, but pointed out that the proposed design would still have boat storage in the tidal area. She also noted that the letter provided by Mr. Jacobs that testified to the measures that will be taken to protect the wetlands makes no mention of the project's temporary impacts to this sensitive area. Attorney Phoenix responded that what the walls are made of is not a zoning issue and should not be part of the volume calculations.

Questions were raised about the volume calculations provided by Mr. Ross. The existing boathouse is rectangular, whereas the proposal would not be a perfect rectangle, which makes it difficult to calculate the exact square footage, according to Mr. Ross. He stated that the volume calculations include the overhang and the cupola, which is approximately four feet high, but do not include anything below the first floor level.

Members of the public were then given the opportunity to speak. Beth Barnhorst expressed that the Conservation Commission's initial concerns were that plants that were supposed to be restored on the property were instead taken out when the Applicant built his home. She felt that the "boat" portion of the boathouse is the last thing that is even being discussed right now, which speaks to the underlying concerns of the true intentions for the building. She voiced concerns about plumbing being added to the building and the impacts this could have on our coastline moving forward. Ms. Barnhorst questioned whether it is necessary to have a cupola as part of the proposed design, and stated that she did not feel the Applicant had demonstrated hardship. She added that it would be helpful to see an overlay of the current and proposed boathouses.

Chair Baker read a letter submitted by Jane Finn, who resides at 169 Portsmouth Avenue but could not be present at the meeting. Amongst Ms. Finn's concerns about the proposal was the change in use of the boathouse. She felt that the building would be going from a shed-like boathouse for storing boats and equipment to something substantially more. The boathouse was never intended to be used for a living space. She stated her opposition to adding plumbing and felt that it was not necessary to have plumbing for boat storage. Ms. Finn did not believe New Castle should be setting the precedent of granting building variances on sensitive wetlands that are protected. She questioned the need to build boat storage underneath the building, and felt that this storage space should be included in proposed square footage calculations. She added that the proposed boathouse would change the view and character of the coastline from both the water and the road and surrounding properties. Lastly, Ms. Finn commented that although Attorney Phoenix argued that the proposal would result in a reduction of impervious surface area, in fact, the Applicant has taken actions without permission that have significant negative impacts on the wetlands, including adding curbing and clear-cutting trees on the property.

Chair Baker also read a letter from Ann Finn Mayer, whose father was the previous property owner and built the original boathouse. Ms. Mayer attested to the original purpose of the boathouse, which she described as an unfinished garage-like space with electricity used to store boats. She expressed concerns that the Applicant's proposal would be substantially changing the boathouse both in height and in interior design to be a cottage-like building.

Attorney Phoenix reiterated that Ms. Barnhorst, Ms. Finn and Ms. Mayer are focused on uses that are not zoning issues. He stated that Mr. Eldred has the right to put in plumbing and added that he agreed to create deed restrictions so that the boathouse does not turn into an accessory dwelling unit in the future. He noted that zoning ordinances allow for the structure to be used for any purpose incidental to the home. The boats have to be stored under the structure rather than in it because of FEMA requirements and given the difficulty in lifting the boats up five feet into the building. Overall, there would be a smaller footprint area, less impervious coverage, and better wetland buffer plantings. In response to concerns about the volume calculations, Attorney Phoenix felt that the Board could approve the proposed volume increase without the storage area underneath being included.

Hearing no further comments, Chair Baker closed the public meeting at 8:20 p.m. and opened the discussion amongst Board members.

Ms. Tanguay noted that the proposed boat storage area would be nearly 1,000 extra cubic feet, which she estimated would bring the net volume increase to roughly 13%. Chair Baker added that although the latest proposal shows a volume increase of 1.3%, the proposed structure would be a much taller building that is not insignificant. He felt that in reviewing the five criteria for zoning relief, it is important to focus on if the Applicant has demonstrated a hardship that warrants the changes proposed. Ms. Tanguay believed there is no demonstrated hardship in the case at hand. She raised concerns about adding new plumbing in a flood zone area. Chair Baker pointed out that putting a bathroom in the boathouse is not as much of a public health concern for the ZBA to address as it is a concern for the Planning Board and Conservation Commission.

Mr. Lannon stated that ideally, the boathouse would not exist, but this would not be fair to the Applicant. He felt that the Applicant cannot do nothing, for this will result in the boathouse

falling into the water. On the other hand, there likely is not a new building that will satisfy everyone. The boathouse will be bigger given that it needs to be raised to meet FEMA requirements, which creates the issue of volume increase and perceived change in the size of the building. Mr. Lannon felt that the overall impact of the proposal from a visual perspective has been reduced compared to the last plan presented. He concluded that it is not the Zoning Board's position to determine what happens in the structure, as these are issues that will come up before other Town Boards.

Mr. Gardner agreed with Mr. Lannon's points, adding that the zoning ordinance being requested is negligible at this point. He felt that the issue before the ZBA is not whether to build the boathouse in the flood zone, and reiterated that the application should have gone before the Planning Board first. Mr. Gardner agreed with Attorney Phoenix's assertion that the ZBA cannot argue the issue of potential use of the structure.

Chair Baker felt that the variance would not be contrary to the public interest. While the spirit of the ordinance is not to build in a flood area, the Applicant in this case is trying to rebuild an existing structure. He felt that substantial justice is done because the Applicant's argument is fair and justified about repairing an old boathouse, which would not diminish the values of neighboring properties. For Chair Baker, the question comes down to the hardship to Mr. Eldred. Chair Baker stated that the Applicant has a real hardship in repairing the boathouse because of FEMA requirements. However, he questioned whether it is necessary to raise the elevation of the boathouse approximately nine feet when measuring to the cupola, when the floor only needs to be raised 1.5 feet to comply with FEMA requirements. Mr. Ross clarified that the calculations allow for a cushion in the actual construction of the boathouse. Attorney Phoenix also reminded members that Mr. Eldred does not need a height variance, and reiterated that the hardship to the Applicant is that he needs relief in order to rebuild the structure.

Mr. Lannon added that the hardship is that the Applicant has to do something or else the structure will deteriorate even more and create a worse situation. Ms. Tanguay questioned whether doing nothing would, in fact, be worse than the temporary impacts of the proposal in the sensitive wetlands area. She also raised concerns about what would happen below the first floor and the framing required to support storing the kayaks. She struggled with voting on what is really a theoretical design being presented. Members discussed whether the area below the first floor should be factored into the overall volume calculations in the proposal.

Chair Baker stated that the ZBA should not discourage property owners from maintaining their homes, but that the problem is the fact that the boathouse is within the wetland setback. He questioned whether Mr. Eldred is doing the least required in order to comply with FEMA regulations, and whether the Applicant has enough hardship to support the proposed plan. Chair Baker noted that it would be worthy of a hardship if the Applicant were building a structure that is more similar to the structure that would be destroyed, but felt that the Applicant is taking the opportunity to build something that is more of a liberty than is warranted.

Mr. Lannon noted that as far as zoning issues are concerned, the application presented is not contrary to the public interest and the spirit of the ordinance, it would not diminish property values, and literal enforcement would create hardship to the applicant. He felt that the proposed use is reasonable, there is no design that would satisfy all parties, and the proposal allows the

building to be improved from its current condition. Mr. Lannon motioned to approve the application as submitted for a variance from section 7.3.1 for replacement of a nonconforming structure with an increase in volume over the existing structure, with the requirements that the building not be used as a residence and that the cupola be removed. Mr. Gardner seconded the motion. The motion passed by a vote of three to one.

## **2. Approve Minutes.**

Mr. Gardner moved to accept the December 2018 minutes as submitted. Mr. Lannon 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, April 16, 2019 at 7:30 p.m.

## **4. Adjournment.**

There being no further business, Chair Baker moved to adjourn the public meeting. Mr. Gardner seconded. The motion carried, unanimously, and the meeting adjourned at 9:10 p.m.

Respectfully Submitted,

Meghan Rumph  
*Secretary*