

**MINUTES OF THE NEW CASTLE ZONING BOARD OF ADJUSTMENT**  
**Tuesday, December 15, 2020 – 7:00 p.m. (via Zoom)**

**Members Present:** Todd Baker, Chair, John Fitzpatrick, Mark Gardner, Rebecca Goldberg, Ben Lannon, Alyson Tanguay, Matt Taylor.

**Members Absent:** Margaret Sofio.

**Others Present:** Steven Baker; Russ Bookholz, Town Building Inspector/Code Enforcement Officer; Matt Cardin; Brent Cole, Granite Engineering; Paul Dobberstein, Ambit Engineering; Mary Ann Driscoll; Robert Durkee; Jeremy Eggleton, Orr & Reno; Monica Kieser, Hoefle, Phoenix, Gormley & Roberts, P.A.; Timothy Phoenix, Hoefle, Phoenix, Gormley & Roberts, P.A.; Steven Riker, Ambit Engineering; Donna and Paul Urbanek.

Chair Baker called the meeting to order at 7:03 p.m. Voting members of the Board are Ms. Goldberg, Mr. Lannon, Mr. Fitzpatrick, Mr. Gardner, and Chair Baker. Ms. Tanguay and Mr. Taylor are alternates.

**1. Overview of Zoom Meeting checklist.**

Chair Baker informed attendees that the public body is holding an emergency meeting electronically pursuant to Executive Order 2020-04, Section 8, and Emergency Order #12, Section 3.

**2. Case 2020-03. Paul and Donna Urbanek have appealed the September 23, 2020 New Castle Planning Board approval of a lot line adjustment between Cynthia and Robert Durkee, owners of Map 11 Lot 26, and Steven and Cindi Baker (Co-Trustees), owners of Map 11, Lot 27. The Urbaneks are also requesting that the ZBA require the Durkees to obtain a special exception for a dock permit.**

Mr. Urbanek presented a slideshow highlighting changes that have taken place to neighboring properties since they purchased their home at 49 Laurel Lane nine years ago. The Urbaneks' home is their retirement home, with Mr. Urbanek set to retire next year. He expressed concerns about the Planning Board approving the lot line adjustment without taking Durkees' intentions for a dock into consideration. Mr. Urbanek noted that he previously spoke in favor of the Durkees' 16.2 foot frontage variance request for the Durkees to be able to push their house closer to the street. The Urbaneks thought that privacy would be maintained because the area between the homes was to remain undisturbed and buffer plantings were supposed to be implemented. At the time of the dock proposal in 2019, the Durkees also proposed having an impervious driveway. The Urbaneks were not opposed to the impervious driveway but were concerned about water runoff issues. Mr. Urbanek contended that his driveway access has been impacted from the Durkees' frontage variance that was granted.

Mr. Urbanek explained how 80% of the proposed dock would be within the 20 foot setback area between his property and the Durkees. He stated that the dock location would be detrimental to the Urbaneks' privacy and home values, and provided a broker price opinion of Terri Golter attesting to these issues. The lot line adjustment would enlarge the property line extended area by at least 100%. Mr. Urbanek pointed out that he and his wife have been cooperative thus far in the development of 51A Laurel Lane, but they cannot support the dock application and believe that the Town Ordinances must protect abutters' property rights.

Jeremy Eggleton of Orr and Reno presented on behalf of the Urbaneks. Attorney Eggleton argued that the New Castle Planning Board failed to take into consideration the proposed use of the new lot that arises from the lot line adjustment. He cited a case from Oregon in which the Oregon appellate court ruled that the Planning Commission should have taken proposed use into account in its decision to grant or deny a lot line adjustment. Attorney Eggleton explained that whether the proposed use was in conformity with the zoning requirements for that particular zone is a pertinent question for the Planning Board to ask and answer in its own deliberations about the propriety of the lot line adjustment. He pointed out that John Chagnon, an engineer and surveyor hired by the Durkees, stated that the purpose of the lot line revision was to avoid the need for a variance. Attorney Eggleton added that normally Applicants coming before the Planning Board would have come before the ZBA first or determined that zoning relief is not needed.

According to Attorney Eggleton, there are dimensional requirements under the Town Zoning Ordinance Section 6.3 that were not addressed by the Applicants. Section 6.3 details the special exception requirements for docks, specifically 20 foot setbacks on either side of the dock from the property lines and 60 feet of shoreline. The Applicants' lot is not in conformity with these dimensional requirements of the Zoning Ordinance. Attorney Eggleton acknowledged that the nonconforming lot is grandfathered, but stated that the lot line adjustment will increase the intensity of use of a lot that is already undersized. He argued that the Planning Board did not apply the Zoning Ordinances when they should have. He stated that the ZBA has the duty to either send the case back to the Planning Board, or condition the Planning Board's approval on the Applicants coming before the ZBA to get a special exception. Attorney Eggleton noted that the Applicants argue that the special exception requirement is preempted by State law, specifically in Lakeside Lodge, Inc. v. Town of New London. However, that decision is limited to the facts of that specific case, which was dealing with a pre-existing dock that already had DES approval.

Attorney Eggleton outlined objections to the calculations presented by John Chagnon at the Planning Board meeting. The Town Ordinance requires 60 feet of shoreline frontage, though the Ordinance does not define this term. Under DES regulations, the tidal shoreline frontage is calculated by averaging the length of the shoreline as measured against all twists and turns of the physical ground combined with the line to line distance of the two pins at the edge of the shoreline. Attorney Eggleton argued that Mr. Chagnon calculated the tidal shoreline frontage only by the length along the shoreline and not by doing the average. If this had been calculated properly, the shoreline frontage would have averaged to 52 feet, which is not sufficient per the Zoning Ordinance requirements. Attorney Eggleton also pointed out inconsistencies with the measurements as shown on various maps of the lot over the years, from the original subdivision map from the 1950s to a map from 2012, which both show the shoreline frontage as 40 feet. He

felt that an independent survey of the lot line should be required to ensure compliance with the Zoning Ordinance.

Brent Cole of Granite Engineering presented a survey prepared by a surveyor hired by the Urbaneks. The survey was based on the lot line adjustment plan. Mr. Cole argued that based on this lot configuration, a dock could not be constructed to meet the requirements of Section 6.3.2.2e of the Zoning Ordinance. Attorney Eggleton requested that this survey be added into the record, which Chair Baker permitted.

Attorney Eggleton noted that the Planning Board should have required a copy of the latest dock plan in making their decision, as it remains unclear where precisely the dock will be located. He added that he had sent a few proposed alternative plans to the Durkees' Counsel that would be acceptable to the Urbaneks.

Matt Cardin presented on behalf of the Urbaneks. He came up with two dock designs that fit within the parameters of the DES requirements, the right to wharf out requirements of the Durkees and Bakers, and the visual requirements of the Urbaneks. Mr. Cardin acknowledged that he had limited environmental information in creating these designs. One design would be a float configuration with a shared dock between the Durkees and the Bakers. He felt that the DES would consider shared docks in a favorable sense. The other design would be a fixed pier closer to the Bakers' property with parallel floats to the shoreline that would contain multiple boat slips. Both options would provide two substantial boat slips for both the Durkees and the Bakers.

Attorney Eggleton stated that the Urbaneks are not seeking an advisory opinion because the ZBA has the power to condition the Planning Board's approval on the Applicants coming before the ZBA to get a special exception. He pointed out that the Applicants clearly believe the Zoning Ordinance applies since the purpose of the lot line adjustment was to get the 60 feet of shoreline frontage required. The Urbaneks are concerned that if the Applicants are not required to come before the ZBA to get a special exception, the case will proceed to the State DES for approval.

Ms. Goldberg asked about where the dock permit is procedurally with the DES. Attorney Eggleton believed that application is delayed and that the Durkees filed a renewed application after a previous one was denied. He also pointed out questions at the DES about whether the New Castle Conservation Commission had approved the dock. Attorney Eggleton explained the Town and State requirements for a dock application. He concluded that the Town requirements are not in contradiction to the DES requirements and therefore are not preempted.

There were discussions about what the Planning Board considered in making their decision. Attorney Eggleton cited the minutes of the September Planning Board meeting in which the Board was advised by Town Counsel to not consider future use in the lot line application. He did not feel that the code enforcement officer or the ZBA could unilaterally decide not to enforce the Zoning Ordinances without a court decision on that point.

Mr. Fitzpatrick felt that the ZBA does not have an actual application that they can act on, and questioned how the Board could decide on something that has not been put before them. Attorney Eggleton agreed that the posture is unusual. He noted that the Urbaneks are not asking the ZBA to make a decision on the special exception, rather, they want to make sure the

Applicants come before the ZBA to evaluate the special exception issue. He added that the Town Ordinance clearly has rules regarding docks, so the Board cannot abdicate these responsibilities. Attorney Eggleton cited RSA 676:5 subsection 3 and explained that the ZBA can act as an authority by imposing additional conditions to the Planning Board's decision. He felt that every lot line adjustment needs to be reviewed to determine whether the Zoning Ordinance has an application in those particular circumstances. In the Durkees' case, the Ordinances do apply according to Attorney Eggleton.

Ms. Tanguay asked about the code enforcement officer enforcing the special exception requirement in Section 6.3.1 of the Zoning Ordinance. She also asked why the Durkees' application was filed to the DES before the special exception process was initiated. Attorney Eggleton stated that the ZBA has the option to compel compliance and could compel the code enforcement officer to issue a written statement, which would then be brought before the ZBA. He expressed concern that the application is already in the hands of the DES without having been granted a special exception, and that this issue could fall through the cracks.

Chair Baker stated that Attorney Eggleton's concern seemed to be that the Planning Board should have required consideration of a special exception, but the Planning Board was not considering a dock. He asked how the Planning Board made an error if they did not take jurisdiction over something that is not in their purview. Attorney Eggleton responded that it is the duty of the Planning Board to look behind the lot line adjustment application to see what is going on. Chair Baker pointed out that Attorney Eggleton should be asking the code enforcement officer to determine if a special exception needs to be done. He felt that Attorney Eggleton is asking the ZBA to compel the Planning Board to consider something that they were instructed by Town Counsel not to consider.

Russ Bookholz, Town Building Inspector and Code Enforcement Officer, stated that there is no application in his office to send for approval or denial at this time. He reiterated that Town Counsel believes the question of the dock is preempted by State law.

Mary Ann Driscoll shared concerns that Town land use boards are not providing input on dock applications. She researched and found that it is possible to file a dock application with the DES and not with any Town boards. Ms. Driscoll felt that this is an issue for an island town like New Castle to consider, and that the Town should be providing more input to the DES.

Attorney Timothy Phoenix of Hoefle, Phoenix, Gormley & Roberts, P.A. presented on behalf of the Durkees. He stated that Attorney Eggleton's latest memorandum should have been submitted sooner so that he could have adequate time to respond. Attorney Phoenix asked if the Urbaneks had gotten a special exception when they installed their dock. Mr. Urbanek responded that he had an email from Stu Levenson from 2011 when he applied for the dock and Mr. Levenson had informed him that a special exception was not required. Attorney Monica Kieser of Hoefle, Phoenix, Gormley & Roberts, P.A. pointed out that Section 6.3.1 regarding special exceptions for docks has been in the New Castle Zoning Ordinance since 1993, and therefore was in effect when the Urbaneks applied for their dock in 2011. Attorney Phoenix added that it was interesting that the Urbaneks were told they did not need a special exception for their dock, yet they are now arguing that the Durkees are taking the position that State law preempts Town regulations. He stated that it was entirely unreasonable for the Durkees to have to get a special exception when

the Urbaneks did not. Attorney Phoenix argued that the Urbaneks' dock is technically in place illegally and should be dismantled until they obtain a special exception from the ZBA.

Attorney Phoenix pointed out that the Urbaneks put their dock at the far northeastern side of their lot, which is in direct view of the Durkees' home. Furthermore, the cove already has approximately five docks, and given its relatively small size, every neighbor in that area sees these docks. He felt that the Urbaneks did not have the right to take away the Durkees' property rights and reiterated that no special exception is needed. Attorney Phoenix cited the Lakeside Lodge case which preempts towns' rights to control anything related to water. Contrary to what Attorney Eggleton argued about this decision being limited to the facts of the particular case, Attorney Phoenix asserted that quotes in the decision, as well as subsequent analyses by the New Hampshire Municipal Association and by Attorney Maureen Smith, who is Attorney Eggleton's colleague at Orr & Reno, show that it is not limited to that particular case. The legal analysis from the Lakeside Lodge case can be taken and applied to other situations to show that municipal regulation is preempted by the State.

Chair Baker acknowledged comments about several other docks in Town not requiring a special exception, and stated that these appear to be violations of the Zoning Ordinance. Attorney Phoenix replied that although the Zoning Ordinance provision about the special exception exists, it cannot be applied. The State has determined that property owners have the right to wharf out as long as they comply with the State requirements. He also noted that the Town Building Inspector/Code Enforcement Officer was advised that the State preempts the Town.

Mr. Gardner asked about Attorney Phoenix's opinion on New Hampshire following the Oregon case law that Attorney Eggleton had cited. Attorney Phoenix responded that the Oregon case is a case of first impression in New Hampshire and does not apply in this case. In the Oregon case, the Court said that the Town's Ordinance contained specific criteria with which to evaluate lot line adjustments. The consideration of a lot line adjustment required consideration of these other issues, which the New Castle Ordinances do not require. Attorney Phoenix continued that the New Castle Planning Board followed the Subdivision Regulations and did not apply or consider the Zoning Ordinances, which are silent on whether future use of a property must be considered. He stated that the residential lot use and the lot line adjustment are not creating further nonconformities, so the lot line adjustment is permitted by law. The Urbaneks were also able to share their concerns at the Planning Board's public hearing, even though the Durkees' minor lot line adjustment application did not require a public hearing be held.

Attorney Kieser emphasized that the Town has no jurisdiction to say anything about what happens in the water. She outlined how the application has followed the procedure by going to the Planning Board for a lot line adjustment and conditional use permit to address other site impacts. The Durkees also went before the Conservation Commission to get further input on the proposal as part of the conditional use permit process and the DES process.

Attorney Kieser presented pictures of the buffer plantings that the Durkees previously installed. Mr. Durkee spoke and noted that the Urbaneks' pictures did not show the current situation. He commented that he bought the house as is and did not own the house when the trees were cut down along the property line with the Urbaneks. The houses on the Laurel Lane extension were built at the bottom of a hill, so water runoff is to be expected. Mr. Durkee stated that the buffer

plantings were put in at his expense because of the Urbaneks' concerns about privacy. Mr. Durkee noted that he and his wife are full time residents, whereas the Urbaneks are only part time residents in New Castle. He argued that the Urbaneks' dock takes up 50% of the Durkees' view. The Durkees wish to take advantage of the waterfront property that they acquired.

Chair Baker asked for Mr. Durkee's opinion about the dock proposals shared by the Urbaneks' engineer. Mr. Durkee responded that the Urbaneks had refused input on the dock up until recently. He did not believe that the dock proposals would be allowed given the vegetation that the structure would have to go over. He felt that the Urbaneks were asking him to go above and beyond by sharing a dock with the Bakers. Attorney Phoenix added that while he appreciated the Urbaneks' effort to find common ground for the Durkees' dock, it was unreasonable to involve a third party, the Bakers, and the Durkees did not have the right to do so.

Attorney Phoenix argued that the Urbaneks gave an interpretation of Terri Golter's opinion, but her letter did not provide a direct opinion. He felt that the affect of docks on surrounding property values is quite minimal because it is generally understood that people will likely put in docks in the future given the waterfront location. He also added that the diagrams presented by the Urbaneks' engineers were taken from the Ambit Engineering plans prepared for the Durkees. According to Attorney Phoenix, it seemed that Mr. Cardin and Mr. Cole made their own conclusions about plans that they did not prepare, certify, or confirm that they were done to scale. He questioned the accuracy of the latest diagrams presented on behalf of the Urbaneks.

Paul Dobberstein of Ambit Engineering discussed the original permit plan and explained the nature of the water boundaries changing constantly. Steve Riker of Ambit Engineering clarified that the original dock application was never denied and is still pending with the DES. He explained that the Conservation Commission submitted comments to the DES, but the DES does not require Town approval. Mr. Riker noted that many of the rules and requirements being discussed are State DES rules, and he questioned whether that falls under the purview of the Town Planning Board or ZBA. He stated that the alternatives presented had significantly more square footage over the water than the Durkees' proposed dock, which would be 401 square feet. In addition, the specific locations for these alternatives have marsh elder, which is a state endangered plant, so the dock would not be able to be located there anyways. Mr. Cardin commented that his plans were not to scale and were simply conceptual designs.

Attorney Phoenix concluded that the Durkees' proposed dock is located in that particular spot because it would have the least impact on protected species. He asserted that the Planning Board made no mistake because they did not apply anything under the Zoning Ordinance, and State law preempts Town requirements for a special exception. He pointed out that the Conservation Commission did not opine on the Durkees' dock because it is not in their jurisdiction to do so.

Attorney Eggleton responded that no one objected to the Urbaneks' dock and the Town never asked them to get a special exception. Ms. Urbanek added that the Town has jurisdiction over protecting abutting property owners' rights.

Chair Baker closed the public hearing at 9:49 p.m. and opened discussion to the Board. He reminded the Board that the criteria for this appeal is whether the Planning Board made a determination based on the Subdivision Regulations of the Zoning Ordinance that is incorrect.

Ms. Goldberg commented that she is very sensitive to the importance of transparency and felt frustrated by some of the administrative processes that seem to lack transparency. She appreciated Ms. Driscoll's comment about the Town needing a mechanism to have input with the DES. Overall, Ms. Goldberg did not believe that the Planning Board erred in making their decision to grant the lot line adjustment, and they were correct to not consider use. She stated that the ZBA's jurisdiction as an appellate board is extremely limited and the ZBA should deny the Urbaneks' request. Ms. Goldberg added that it is going down a slippery slope to ask Boards to consider the intentions of applicants.

Mr. Lannon felt that the arguments presented were complete and that both sides had valid points. He was disappointed that neighbors could not come to an agreement, but acknowledged that there are not resolutions to every problem. He stated that the Planning Board was within their bounds to grant the lot line adjustment, and agreed with Ms. Goldberg that there is no reason to overrule the Planning Board.

Mr. Fitzpatrick stated that the presentations for both sides were well done, but felt there was no manifest Planning Board error for the ZBA to correct. He added that he is persuaded by the State preemptive argument.

Mr. Gardner commented that it seemed that the ZBA is being asked to consider something that to date, State law has not opined on, referring to considering the ultimate intended use in a lot line adjustment application. He did not feel that it was appropriate to rely on the Oregon case to set a new precedent in New Hampshire, as that would be up to the NH Supreme Court. Mr. Gardner concluded that he would deny the appeal request for the reasons previously cited by other ZBA members.

Ms. Tanguay questioned why the special exception for docks is in the Town Zoning Ordinance if it is not being enforced, and said that this shows the vulnerability in the Ordinance that this provision is being disregarded regularly. She stated that she did not see any error on the part of the Planning Board and the decision they rendered.

Mr. Taylor also questioned why the special exception is in the Ordinance if it is not being used. He could not support the Urbaneks' requests.

Chair Baker commented that given how the land curves, it makes it difficult to share space and creates a tough situation. He did not believe that the Planning Board made an error in granting the minor lot line adjustment. Regarding the other question of demanding a special exception, Chair Baker felt that there were other avenues and an appeal was not the appropriate avenue. He believed that the issue should have gone before the Town's Code Enforcement Officer instead.

Mr. Gardner motioned to deny the appeal of Paul and Donna Urbanek premised upon the reasoning and legal arguments set forth in the memorandum of law submitted by Hoefle, Phoenix, Gormley & Roberts, P.A. Mr. Fitzpatrick seconded. Ms. Goldberg, Mr. Lannon, Mr. Fitzpatrick, Mr. Gardner, and Chair Baker all voted in favor. The motion carried unanimously by a vote of five to zero.

**3. Case 2020-04. Mark Rettstatt, owner of 21 Old Bay Road (Map 4, Lot 3-30), has applied for a variance from Section 4.2.1 Table 1 to permit relief from side setbacks to install an outdoor kitchen.**

Mr. Gardner motioned to table Case 2020-04 of Applicant Mark Rettstatt to the next ZBA meeting. Mr. Fitzpatrick seconded. Ms. Goldberg, Mr. Lannon, Mr. Fitzpatrick, Mr. Gardner, and Chair Baker all voted in favor. The motion carried unanimously.

**4. Approve Minutes.**

Mr. Lannon moved to accept the November 2020 minutes as submitted. Ms. Goldberg seconded. Ms. Goldberg, Mr. Lannon, Mr. Fitzpatrick, Mr. Gardner, and Chair Baker all voted in favor. The motion carried unanimously.

**5. Set Date of Next Meeting.**

Chair Baker announced that the next Zoning Board of Adjustment meeting will be held on Tuesday, January 26, 2021 at 7:00 p.m.

**6. 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 10:08 p.m.

Respectfully Submitted,

Meghan Rumph  
*Secretary*