

ZONING BOARD OF ADJUSTMENT

Wednesday, March 12, 2008
Belmont Corner Meeting House
Belmont, N.H.03220

Members Present: Chairman P. Harris; N. Patten, P. Oberhausen and L. Couture.
Alternates Present: E. Hawkins and P. Palombo.
Staff: C. Daigle and E. Murphy.

The chairman opened the meeting at 7p.m. and appointed E. Hawkins as a voting member for tonight's meeting. He thanked the Board for agreeing to this special meeting to expedite this variance request.

Abutters' Hearing – Charles and Marilynn Fowler: Request for a Variance of Article 5 Table 2 of the Zoning Ordinance to reconstruct an existing nonconforming structure closer (9.29') to the constructed road than allowed (50'). Property is located at 81 Tucker Shore Road in an "RS" Zone, Tax Lot 107- 009, ZBA # 0708.

Attorney Regina Nadeau and Mr. Charles Fowler presented the application.

Atty. Nadeau thanked the Board for having this special meeting for her clients. She explained that the Fowler's property on Tucker Shore Road does not have a buildable envelope because of the 50' setbacks from both the road and highwater mark. There is currently a small building on the property and the Fowlers want to redevelop the property and relocate the building so it fits more in compliance with the State and the local jurisdictions. She stated that there may be some interchanging of terminology. She reads the Zoning Ordinance to say that the 50' setback from the road is from the property line. The application was noticed for 9.29' but according to their surveyor the proposal is to 12' from the property line. It was noticed as 9.29' because it is the edge of the constructed road. When they were before the Board the last time they were approximately 5.5' from the edge of the approved roadway. The new proposal is to be at a minimum of 9' from the pavement and 14.37' and 11.29' from the legal ROW. They did their best to come up with a plan that is the best of both worlds. They tried to come up with a compromise to set the house in the middle of the lot so they treat each setback similarly but the State is saying if you have any area to meet their setback they don't care if there are wetlands or other setbacks, you must put the building behind the 50' setback. There is no leeway.

Atty. Nadeau continued to say they are aware of the garage proximity to the roadway and the Public Works Director's recommendation that it be a minimum of 28' from the road. The Land Use staff have taken pictures and are trying to make a point that there is a situation where there would need to be

17' or 18' to park a vehicle. She explained that the Fowlers have parked to the right or left of the existing unit and that is their intention now. She presented the Board with a different plan showing the specific parking areas and stated that there is no provision in the Zoning Ordinance to prohibit putting the parking spaces there. She thinks that a generic condition that they don't park in or on the ROW would address Public Works' concerns.

Atty. Nadeau addressed the criteria for granting a variance. The variance is not contrary to the public interest because they have a situation where they are balancing the value of getting out of the shoreland setback with encroaching further into the road setback. The negative for the roadside setback has been addressed by providing the two parking spaces. The hardship is two prong. One is that there is no buildable envelope on the property and the second part is whether the alternative proposed is the most reasonable. The square footage of the proposed building is not unreasonable. It doesn't take up more than 20% of the entire lot. This is a one story single family home that is a reasonable size. This is a reasonable proposal because they have to look at having to meet the State's regulations. The only alternative is a variance. It is within the spirit of the ordinance because contrary to the provision of the ordinance that speaks to road frontage setback, there are no other issues except line of sight and safety issues. The Shoreland setback criteria are specific to prevent overcrowding on the shore and to enhance water quality. Looking at the houses on either side you can see that pushing the house back will open up a view for the houses on either side. Substantial justice will be done because while trying to accommodate Public Works the public would benefit by pushing the house back away from the water. Granting the variance would not have a negative impact to the values of adjacent properties. They have notes from the abutters or they were actually present at the previous meeting showing their support.

P. Oberhausen wanted to know how they found the extra 5' that the survey shows. Atty. Nadeau stated that there were two different survey issues. One is that the pavement encroaches on the property by 2' or 3' so the question is are they measuring from the edge of the pavement or the property line. The other issue is twisting the house again from the way they previously had it gaining another 4' or 5'. P. Oberhausen questioned whether the road is encroaching on the Fowler's property. Mr. Brian Crockett stated that it varies. He stated that he set bounds for the Doyans who wanted the bounds set back 5' or 6' so they would not be hit by the plows. When they repaved the road they paved up to the granite bound.

P. Harris wanted to know if the plan shows them encroaching in the 50' highwater mark setback. Atty. Nadeau used the plan to show the jog in the shoreland and stated that they meet the 50' setback. On the prior plan it showed an extra 8' but because of the jog they don't have it. E. Hawkins stated that when they were negotiating at the last meeting it was represented that they would move back 14' from the edge of pavement and they would meet with the Public Works Director. Atty. Nadeau explained that they thought they were 58' from the highwater mark so they assumed that they could move it back 8' to give them 14' but trying to make sure all jogs stay out of shoreland they could only get 5' or 6' so they ended up with 9.29' from the roadway. Mr. Crockett did talk to the Public Works Director and explained how they have changed it. Mr. Fortin's concern was having vehicles park in front of the garage and the back of the vehicles sticking out into the ROW. Mr. Crockett stated that he has talked to the Fowlers about this and that is why they put the parking spaces on the side of the garage and his vehicle will be parked inside the garage. Atty. Nadeau stated that they did ID the parking spaces on the new plan. If

approved it would be with the representation on where they would park

E. Hawkins stated that they have gone to extreme measures on the building site and parking to protect the environment but it has to be a balance between public safety concerns lessening congestion on the street, secure access for dangers, fires, or dangerous situations and impact to the water. This is a residential use, not an industrial use, it seems they have taken a lot of measures to come up with an unbalanced solution. The State's comments that you have to put it behind the 50' are unbalanced and the Town cannot be held prisoner by the State. Atty. Nadeau agreed and stated that she has sent an email out to lobbyists all over the State, landowners and legislatures, saying that she is arguing about lopping off corners of buildings to accommodate the curves of the shorefront. More often than not it has nothing to do with environmental quality. Because of the Shoreland Protection Act the law says that if you are going to redevelop the property the Commissioner "Shall" view the application for more nearly conforming and he "May" grant the waiver. The State has taken the position that they "Never" have to grant a waiver if they don't want to. They have said if there is 50' behind the setback line you have to find the way to make it work. The memorandum she sent out was to propose an amendment to that statute that the State "Must" approve a request from the 50' setback specifically to address the Town's issues. She has seen people spend tens of thousands of dollars requiring them to redesign the proposals to accommodate both jurisdiction of the State and Towns. This issue is being debated but it affects the Fowler's now.

The Fowler's have tried to redesign the proposal so that it is a reasonable size. They have tried to address the safety issues. It would be nice to put the house in the middle of the property but she doesn't believe that they could get approval from the State. The only option at that point would be to rebuild the house where it is now. P. Oberhausen stated that the lots are very small but the footprint is grandfathered they can use that footprint. Atty. Nadeau stated that they could but stated that the sites were developed years ago for small summer cottages. This existing building is very small 25' x 32.5'. The question is whether they are proposing a structure reasonable in size given today's standards. This is not a huge trophy house. P. Oberhausen wanted to know what would happen if in they future they wanted to put a bigger house or small mansion on the lot. They knew the size of the lot when they bought it. Atty. Nadeau stated that they bought the property 70 years ago when there wasn't a Shoreland Protection Act or Zoning. That is the hardship. They are asking for a reasonable footprint which is less than 20% coverage of the lot.

P. Harris stated that the State offers the same relief; they offer a variance. They discuss the same criteria as the Town does. The two ordinances have the same importance that is safety for the water and roadways. He is concerned of a precedent being set by allowing new construction close to the road and other impact to the neighborhood when others want to do the same thing. He referred to the letter received from Department Heads addressing safety concerns. The Town Administrator's concerns were about the distance proposed from the paved road surface. The property owner would be at personal risk for damage to his property. The Land Use Technician's concerns addressed parking and the lengths of vehicles not fitting in the driveway. Another concern R. Ball has is that the deed shows the lot 100' x 100' but the plan shows a larger lot. The Public Works Department Head has submitted his concern for safety. P. Harris stated that in respect to planning they are there to uphold the ordinance. He stated the

other structures along the road that are closer to the roads are not garages but shed. There is reasonable distance on the side to expand. Atty. Nadeau referred to P. Harris's comment that the State has the same requirement but the Statue say they "May" grant a variance but the Town's say they "Must" grant a variance if they meet the criteria. So the State has taken the arbitrary position that if there is room to meet the 50' setback they will deny the permit. As far as setting a precedent it is not the Town setting it but the State. The extra 5' is not going to have a viable impact on the water. E. Hawkins stated that the State has to come to a reasonable solution and have some flexibility when it is a residential use that would have a very small impact to water quality as opposed to a commercial or industrial use. There has to be a balance between the two setbacks. Even if the applicant wants to stay within the 50' setback they can pull it further from the road and expand towards the sidelines. The Board has to weigh all the factors. The result of this may be that they send a message to Concord that they need to come to a better balance and work together with towns. Atty. Nadeau stated that she read the Department Heads' comments and they seem to be more about personal property not the building. They are not concerned about plowing snow into the driveway but of having a vehicle parked in front of the garage. She reiterated the fact that it would not happen because the plan shows the two parking spaces alongside the garage.

Atty. Nadeau stated that the problem with this situation is Mr. Fowler started with the State Wetlands Bureau. He had an architect design, redesign, and redesign it again to meet the State regulations but he experienced resistance from the State and so applied to the Town. If he has to redesign it again it will cost him more money. He is not trying to be resistant but he is trying to be realistic to get the house built.

Mr. Allen Doyan, an abutter, stated that he supports the proposal. The Fowlers already have an existing 1 ½ story house. This is a retirement home and the garage is needed so they can get in and out of the car without slipping on ice. He explained that he has lived next door for 29 years and there has been new construction on the road when the State was more relaxed on the setback to the lake. There are many other garages closer to road than this proposal. The Fowlers have been accommodating by agreeing not to park in front of the garage. He stated that the Town has not done anything about people parking trailers in the road during the summer. The Fowlers are being very accommodating by agreeing to have all their vehicles off the road.

C. Daigle explained that the reason the abutters' notice was noticed with the setback being measured from the constructed road is because the definition of front setbacks is very clear in the ordinance. It states that the setback is "the distance from the extreme limit of a structure to all of the following: the public road Right of Way, the public road easement, the traveled or constructed public way, the private road Easement that serves more than two lots, the traveled or constructed private road that serves more than two lots." So the variance under consideration is 9.29' to the constructed road, not 11.29' to the property line.

C. Daigle referred to the pictures taken and submitted by staff which show other structures along the road that are close to the constructed road. The middle picture on the left shows a structure 9' from the pavement without doors facing the pavement. The snow bank created by plowing the road clearly

shows that the plow was winging snow towards the building, but then had to pull further out into the road to avoid the building. The picture in the lower left shows a building 14' away from the pavement, and the picture in the lower right shows a building with garage doors facing the street with 22' between the pavement and the building. In that last picture the Town car is parked showing it can fit between the pavement and the building.

C. Daigle addressed comments regarding preexisting buildings in the area versus the ones that have been permitted by the town. She stated that she has reviewed every variance or special exception that has been applied for or granted along the waterfront lots on Tucker Shore Road. There is a 25' roadside variance for a dwelling on lot 4. Mr. Doyan on lot 10 came in three times. He got a denial for joint water and road setbacks. He also got a denial for just a water setback. He then reconfigured the proposal and got a variance granted for a reduced waterfront setback. He put a lot of effort to design the proposal. At the end of the road there are four variances, the Couture property, across from the Couture property and the two Fournier properties. The Couture property and the one across the street are both road setbacks. The Couture property was for a 26.1' variance and the one across the street was a 14' variance to the traveled way. That was the closest road side variance granted. There are closer buildings, but they are preexisting and the doors don't face the road.

C. Daigle addressed the comment about the size of the building in relation to the lot. She compared the size of the lot and the existing building to 24 other properties on Tucker Shore Road along the lake. The Fowler's property is the second to the smallest comparing lot size to building size. The new proposal which is a 2,080'sf footprint would place them 16th out of 24 which seems reasonable based on this comparison alone. But the Fowlers also have the 6th largest lot which gives them more room to each side where many of the other lots where variances have been granted have narrower lots. She agreed the Board is required to consider the cost of alternatives that are suggested but she was not sure that redesigning a proposed building to make it longer and narrower would be costly or unreasonable.

C. Daigle stated that something the Town has problems with is that the people that come before the Board may have the best intentions, such as not parking in front of the garage, but when the current owners move or sell the property the situation changes. These variances go with the property and the Board has to look at the future. C. Daigle pointed out that the Fowlers are also not allowed three driveways as the new plan submitted tonight proposes. The driveway regulations only allow two. They could request an exception to that; but it is a small lot to grant three driveways.

C. Daigle stated that the Town's experiences with DES has also been different from what is being represented by the applicant. It is true that the rules are changing and there is no certainty at this time as to what will occur as of April 1st, but the Board has had many applicants come before them that have gone to DES. Those applicants have also received resistance but they have persevered, worked with DES and have come back with a plan where they do encroach beyond the primary setback but they've made other changes to reduce the square footage, or reduce concrete, or replanted some areas or planted trees. Through that mitigation effort they have received their Shoreland Waiver to rebuild some portion of the building beyond the primary line. The rules are changing, but no evidence has been

submitted that the applicant can't get a DES waiver. They have not been denied. There is no evidence of a denial and the law is in flux. We do not know how the law will affect this proposal after April 1st.

C. Daigle wanted to clarify whether the applicant is giving up the footprint they currently have with this proposal to rebuild a new structure. Mr. Fowler stated that he will not build anything in the grandfathered footprint. The house is currently on a tree stump and three pieces of lumber. C. Daigle clarified that there will be no deck built above that grandfathered footprint.

C. Daigle displayed a copy of the tax map and indicated that it showed that the distance between most of the homes and the water on the south side of Tucker Shore road was very consistent and that moving this structure to within 9' of the road might result in it being out of character with the neighborhood. When looking at the special conditions standards, there is not a lot on the south side of Tucker Shore Road that has a legal building envelope so that's a restriction shared by all the lots. The Fowlers have a wider property than others in the area.

P. Oberhausen wanted to know if the Fowlers took the existing house and extended towards the road would that affect the Shoreland Protection. C. Daigle stated that from their experience DES has allowed reconstruction in the same footprint especially if you do something in mitigation.

L. Couture wanted to know why they didn't consider the distance from the garage to the street when they were designing their plans. Mr. Fowler stated that the problem is the interpretation of the 50' from the irregular shoreline. They tried to get it in the center. This is the 4th design to address everyone's concerns. There is a 6' gain over what they presented last time. They added the 6' but by twisting the building they got the 9.29' and 14' on one side. They tried to balance everything. This is the best they could do.

P. Harris questioned the number of driveways. Mr. Fowler stated that he will eliminate one of the three proposed driveways. There is no regulation that says he cannot park along side the lake. P. Harris stated that he can't park along the shoreland and referred to RSA 483-B:11. His biggest concern is that it would alienate other people who have to meet the criteria. There is concern about altering the character of the locality and the health, safety and welfare of others. There have been concerns from the Board about the expansion of camps into homes. They will keep expanding until they become cities. Roads will have to be improved and widened, houses will increase in size and be close together. His concern is the problems that are created by the close proximity to the road. This is a small lot. The neighbors have come forward with their support but he has concerns with public safety. What will happen if an emergency vehicle has to get to the property? Will they have to first back the vehicles into the street to allow emergency access. Most lots in the residential single family zone have grandfathered rights but they have to consider the wetlands and slopes on their property when trying to rebuild. New construction has to consider the zone they are in.

L. Couture stated that when she went for her variance her proposal was for 14' from the road and she was denied because it was too close to the road. She went back and reconfigured the design and that is when she started understanding the reasons for zoning. She didn't think she was causing any problems

to anyone but looking back she understands why it had to be done.

Mr. Doyan stated that the variances along the road are the reason the State has gone to the extent that they have to redefine the Shoreland Protection Act. It is because of the various Boards, like this one, that have granted variances from the lake. They have pushed people off the road and closer to lakes. What has happened in the past is the reason the State is pushing through this stiff law. There is a lot of controversy out there about if they will be allowed to build in the 50' setback from the lake. The State doesn't want towns pushing people towards the lakes. The existing or previous variances with mitigation pushed houses closer to lake and now they won't allow it.

P. Harris stated that in the past developers chose to buy property and cut it up into many lots and now the residential single family zones requires 1 acre. He stated that people have bought the smaller lake lots and now want to develop them as year round residences. Mr. Doyan stated that the Fowlers didn't do that. It has been in the family for 70 years and they are trying to do the best they can. They are stuck with the size lot they have.

P. Oberhausen stated that if we allow existing grandfathered houses to encroach more on the road it can continue to happen down the street. The only thing they would gain is more houses down the road. The Fowlers have a grandfathered house which they can redo in the existing footprint and not be involved in the Shoreland Protection Act. He would not like to see everything pushed onto the road.

The chairman asked if anyone in the audience had any further questions or comments. There being none, he closed the public hearing.

BOARD ACTION – CHARLES AND MARILYNN FOWLER:

MOTION: E. Hawkins moved to deny a Variance of Article 5 Table 2 of the Zoning Ordinance to reconstruct an existing nonconforming structure closer (9.29') to the constructed road than allowed (50') for the following reasons.

1. The area Variance will not decrease surrounding property values because no factual evidence exists to support that claim.
2. A Variance is contrary to the public interest because the proposed limited setback from the edge of road pavement could threaten public safety by creating roadway congestion and hindering activities during fire, panic, or other dangers.
3. Denial would not result in unnecessary hardship to the owner because special conditions do exist in that the subject parcel is a nonconforming lot, but it is not different than any of the other parcels in that area, and ample room exists to construct the proposed design in a much more balanced configuration that could mitigate both environmental concerns, with an improvement to what exists to Lake Winnisquam and setback concerns from Tucker Shore Road.
 - A. the Variance is not needed to enable the applicant to construct the development as designed in concept due to special conditions of this

- particular property.
- B. the benefit sought by the applicant can be achieved by some other reasonably feasible method because the applicant has several options to achieve their desired objective for a home of that size through simple repositioning or redesigning of the proposed structure for a much more balanced result.
4. A Variance will not result in substantial justice being done because the applicant's loss, that is redesigning of the project, either within or without of the waterfront setback is outweighed by a gain to the general public in optimizing safety considerations and roadway congestion.
5. A Variance will not observe the spirit and intent of the ordinance because it would conflict both in light of zoning goals and the underlying Master Plan, in the provision of public safety, roadway congestion and activities during fire, panic, or other dangers.

The motion was seconded by N. Patten and carried. (5-0)

OTHER BUSINESS:

BOARD'S ACTION - MINUTES:

P. Harris made a motion to approve the minutes of February 27, 2008 with the following changes:
Page 4 paragraph one last sentence should read
"E. Hawkins stated that the reasonable use criteria doesn't come into play since the Boccia ruling."

The motion was seconded by N. Patten and carried (4-0-1) P. Oberhausen abstained.

STAFF REPORT:

JOINT MEETING:

C. Daigle on behalf of the Planning Board invited the Zoning Board to a joint meeting of the Planning Board, Board of Selectmen, Conservation Commission and the Zoning Board to discuss the plans for the upcoming year and to bring new members up to date on current projects. The meeting will be April 14th at 7 PM.

ALTERNATE MEMBERS:

MOTION: E. Hawkins moved to reappoint P Palombo as an alternate for a three year term. The motion was seconded by N. Patten and carried (5-0).

CUSTOMER SURVEY:

C. Daigle explained that the Land Use Office is designing a customer survey to see how we can better service customers. The surveys will be available in the Land Use Office and on the website. They surveys can be mailed back or dropped off in the drop off box. Surveys will be mailed to applicants after

their cases are closed for their input.

ADJOURNMENT:

MOTION: On a motion by L. Couture, seconded by P. Oberhausen, it was voted unanimously to adjourn at 8:30p.m. (5-0).

Respectfully submitted,

Elaine M. Murphy