

**Moultonborough Zoning Board of Adjustment
P.O. Box 139
Moultonborough, NH 03254**

Public Meeting

February 1, 2023

Minutes

Present: Members: Bob Stephens, Robert St. Peter, Nick DeMeo, Sean Poloian
 Alternate: David McDonough
Excused: Member: Michael Mills
 Alternates: Jerry Hopkins, Steve Buy
Staff Present: Bonnie L. Whitney, Administrative Assistant

I. Call to Order: Chairman Stephens called the meeting to order at 7:00 PM and led the Pledge of Allegiance. The Board Members and Staff then introduced themselves. Mr. Stephens appointed David McDonough to sit on the Board with full voting privileges in place of Michael Mills.

II. Pledge of Allegiance

III. Review/Approval of Minutes: 01/18/23

Motion: Mr. DeMeo made the motion to approve the January 18, 2023, minutes as drafted. Mr. St. Peter Seconded. The Motion carried with Mr. Stephens abstaining.

IV. Hearings:

1. Continuation of Public Hearing for Shore Realty Trust, Chester Dzioba Trustee (162-19) (46 Orton Lane) - Variance from Section 3.2.2.3

Mr. Stephens noted for the record that he was not present for the initial hearing that was held in December, however he did watch in its entirety, the stream of the meeting, and was up to speed on the discussions that occurred during that meeting and feels comfortable with participating this evening.

Mr. McDonough stated that he was not an alternate member of the Board at that meeting, but was present in the audience as a candidate to become an alternate, and is also up to speed on the case.

Daniel Muller, Jr., Esquire from Cronin, Bisson & Zalinsky, P.C. was present for the hearing this evening on behalf of Shore Realty Trust. Chester Dzioba, Trustee was present this evening. Also present for the hearing Joseph Maynard from Benchmark Engineering, Inc. who was the engineer on this case. Mr. Muller indicated that he was not present for the initial meeting, noting that he has reviewed the minutes and has an idea of the issue that was raised back in December. Mr. Muller stated that his focus was on that issue. The biggest issue in the December meeting was the issue of hardship. Specifically, there was a feeling among board members because the Trust also has another lot across the street (Lot 36) that has a garage that was no issue of a hardship per se.

Mr. Muller stated from his perspective, what is across the street really does not have any bearing on the application. The reason being is that variances focus on a particular parcel. The applicant is here on Lot 19. Mr. Muller commented that a while back, when the hardship standard was a little stricter and there were notions of involuntary mergers and such, sometimes back pieces of properties did come in to play. However, hardship under the definitions that exists today in the statute focus on the special conditions of the land in question, and whether those conditions, not conditions on another piece of property, make the

proposed use a reasonable one (*Rancourt v. City of Manchester*). That case interpreted the “Simplex” standard for hardship, which is the more relaxed standard.

Mr. Muller acknowledged that there may be concerns with the garage on Lot 36, but to the extent that there are any issues there, that is for the building inspector, as opposed to the zoning board.

Mr. Muller stated the focus here you have a piece of property, like many lakeshore properties, that has a limited area. It has some existing development on it including a shed that is currently within the setback. The proposal here is consistent with the notion of zoning, which is to reduce the nonconformity with the garage. The garage will be further back from the setback line. The encroachment will not be eliminated. A garage is a common accessory structure with residential uses, therefore making a reasonable use under the definitions of hardship in the statute. The Board should be focusing on Lot 19 and nothing else. Mr. Muller stated that he would answer any questions from the Board.

Mr. Stephens noted that the Board had previously made the determination that the project did not have the potential for regional impact at their meeting in December.

Mr. St. Peter stated that he did not agree with the statement that a different piece of property has no bearing. He noted that in his tenure on the board there have been many applications where applicants come in having a small piece of property and they would like to have a garage, but they don't have enough room for it. They come before the board because they own a piece of property across the street, and they want to put up a structure that is a secondary structure. The reasoning that persuades them to let the applicant have a garage on a piece of property that does not have a primary structure with it, is because they are right across the street. The spirit of the ordinance with not allowing just a garage on a piece a property was they did not want people buying a lot for all of their “stuff” and it becoming an eyesore. The logic that gets passed to the board about why you should allow someone to put a secondary structure on a piece of land without a primary structure is because they don't have any place to put it on their property where the primary structure is. Mr. St. Peter feels that the board very much does consider the other piece of property.

Mr. Muller commented that he understood that circumstance, and that was a distinct circumstance, a variance from the definition of accessory structure or use. Under Moultonborough's ordinance, an accessory structure generally has to be on the same lot as the principal structure. If someone is coming to the board and they're effectively saying, “I want you to treat these together”, that's not the case here. Lot 19 has a house, an accessory shed. The other lot (Lot 36) is a separate lot of record. It has a house, maybe not completed yet. Members interjected that there is not a house on Lot 36. It is a garage, which Mr. Dzioba represented to the board, and is using it in conjunction with the primary property that he was seeking a variance on.

Mr. St. Peter referred to other examples they have run into. When they are considering both pieces of property, it's when they are being used in conjunction with one another.

Mr. Mullers understanding is that the one thing that is on Lot 36 is there is a tractor that is used throughout the neighborhood to plow snow. He was not sure that that rises to the level of essentially using it in conjunction with another property if it's generally used around the neighborhood for not only himself but others. Mr. St. Peter responded that the applicant was directly asked that question at the prior hearing and it was answered in the affirmative. Mr. Dzioba was using the garage on Lot 36 in conjunction with his home on Lot 19. That is where the board expressed that they did not see the hardship, and how the two lots got tied together.

It was Mr. Mullers understanding that there is a septic approval for Lot 36. Mr. Dzioba stated the septic system is in and they have an Operation for Approval (CA2006082247A). Mr. Muller feels that this is a slightly different scenario. You don't put a septic system in for an accessory structure. He may still need to put the house on the property, but there has been something done that brings it a little further along in the process of making it separate. The approval for operation was issued in 2010. Mr. Poloian noted that

the building permit expired in 2015. Mr. Dzioba stated the building permit was issued in 2008 for the garage/basement for a four-bedroom house. He installed the foundation at the time could not afford to finish the rest of the house. There is a dug well on the site also.

Mr. Stephens questioned why the board was continuing to talk about a property that was not on the application before the board. Members St. Peter and Poloian replied because it is being used in conjunction with the property. Mr. Stephens commented that hardship is with the land, not with the person. He feels that the board is missing the point when they start talking about hardship to a person. There is hardship that is created because of the conditions of the land. Mr. St. Peter commented a hardship of not being able to have a garage, when you have a garage, is not a hardship. A lengthy discussion ensued regarding instances when the board had (or had not) considered another piece of property that an applicant had when considering hardship.

Mr. Muller stated the question under the Simplex standard essentially is “do the conditions of the lot in question make the proposed use reasonable”. That in a nutshell from the Rancourt case is what they say the standard is. You look at the conditions here, the existing development, size of the lot. They are replacing one existing nonconforming accessory structure (shed) with something that will reduce the non-conformity as it will be further away in the setback. Mr. Muller noted that he understood the point that Mr. St. Peter brought up, the accessory use, because Moultonborough’s ordinance prohibits people from having an accessory structure on a different lot than the principle structure. Mr. Muller noted there could be several circumstances where this could apply. An owner may not be able to get an accessory structure on the main lot due to impervious surface or other issues. If you have a different lot, you may be looking to put it there. To Mr. Muller the issues are different. The issues here are different.

Chairman Stephens opened the public hearing for public input and noted there was none.

Mr. McDonough asked Mr. Maynard if they had looked at any alternate locations on the lot where they could put a garage. Mr. Maynard stated that the leach field was preventing them from sliding the structure any further in that direction. When he prepares an application, especially from the shoreline perspective, he tries to make things better by improving drainage, and setbacks. This plan has done all of that. This property was developed prior to shoreland protection and has no drainage measures. They are adding drainage measures for the new structure.

Mr. McDonough questioned the use of the structure, other than the use as a garage. Will there be a second story? Mr. Dzioba replied there is only an attic. Mr. McDonough questioned if there would be any living space above the garage? Mr. Dzioba stated no. Mr. Maynard commented there were never any plans for living space. They would had to have put a septic tie in as part of the shoreland application. It was never any part of the proposal. Mr. McDonough specifically asked if it would be used as a game room? Mr. Dzioba replied that it was just an attic. The proposed garage is 1 ½ stories, attic space only. No living space.

Members questioned the distance between the proposed garage and the house. It was noted the distance was 16-ft. Mr. DeMeo questioned if you could access the water front side of the home through that area? He noted his concerns with access to the lake side of the house.

The Chair asked if there were any additional questions from the board. Hearing none, the board went into deliberative session to discuss each of the criteria for the granting of a variance at 7:42 PM and came out of deliberative session at 8:37 PM.

During deliberative session members discussed each of the criteria for the granting of a variance. Mr. Stephens questioned if the members agreed with the statement that there was no change in the boards position and response for criteria 1, 2, 3 & 4 from the previous hearing. Mr. St. Peter and Mr. Poloian felt that after further discussion their responses may be different. It was the decision of the board to review each of the five criteria again. It was noted that at the prior meeting, the board had not addressed criterion 1, 2, 3 & 4. They had only focused on the consideration of the hardship issue in Criterion #5.

Mr. St. Peter noted his concern with the applicant's statement for Criterion 1, which was "Setback ordinances, which is what our requested relief is for, are in place to provide adequate separation between dwellings. On lake lots this is not always an easy task." Mr. St. Peter noted that he originally focused on the shed and understood what the applicant was requesting. He did not realize they were taking a small shed, remove it, and possibly grant the right to build a very large garage, very close to the lot line. There is a wooden fence, with the abutters home right on the other side of the fence. The two structures will be very close. He questioned if this were a safety concern. Part of the required 20-ft setback is for a buffer in terms of fire safety. Members discussed the distance between the proposed garage and the abutting home. It was noted that the abutter was not present at the meeting, nor had they submitted any abutter opposition to the Land Use Department.

Mr. Poloian questioned if the applicant could remove the walkway, slide the garage over, and attach it to the house. That would bring it away from the setback and may eliminate the need for a variance. There was prior testimony that the distance between the proposed garage and dwelling was approximately 15 or 16 feet. The members reviewed the plan discussing possible options to relocate the garage that would either lessen or negate the need for the variance. Members asked if elevations plan for the garage were provided. Members were split 2 to 3 on Criterion #1 in that the variance would be contrary to the public interest due to safety concerns with the lack of separation between large buildings, only 18 feet apart. The members that felt that the granting of the variance would not be contrary to the public interest as the abutters home was built prior to the adoption of the zoning ordinance and the construction of the proposed garage. For the same reasons as referenced for the first criterion, members were split 3 to 2.

Substantial justice is done as there would be a clear loss to the Applicant that is not outweighed by any gain to the community by denying the request to construct the proposed garage.

Members were split 2 to 3 on Criterion #3. The proposal is to remove a very small, 1 story shed and to replace it with a very large 1 ½ story garage. The garage will be located very close to the abutting property line where there is an existing home on the property line. Two members felt that this would decrease the value of the abutting property. It was mentioned again, that the abutter did not submit any information to the Board regarding concerns they had with the variance request. It was noted that the diminution of value was the opinion of each individual board member. A few members felt that the abutters would be looking out their windows at virtually a wall, the side of a large garage. It was noted there are instances where a home is constructed in front of an existing home that then prevents a view of the lake. There is no recourse unless there is a view easement. Mr. DeMeo felt that new construction, a new driveway, pervious pavers, and cleaning up the area will not diminish values of the neighborhood.

Members had two questions that they would like to have answered. The Board came out of deliberative session to ask the applicant or his agent to reply to those two questions only. Mr. Stephens asked what the existing square footage of non-conformity is there now versus the proposed square footage for the future. And are they able to move the proposed garage closer to the existing house, hence making the nonconformity less nonconforming.

Mr. Joseph Maynard stated that he scaled the nonconformity off the plan. He added that the abutting neighbors' structure is 6.3 feet off the property line. Approximately 9' x 16' of the existing shed is located in the setback, or 144 square feet. The area of the proposed garage to be located in the setback is approximately 6' x 44', or 264 square feet, for an increase of approximately 120 square feet. It was noted that the 120 square feet was with respect to the square footage within the setback area. Mr. Maynard clarified that the area of the abutting home that is along the mutual property line is technically not living space. It is a utility shed with a washing machine in that section which is closest to the lot line.

Mr. Stephens stated the second question was relating to move the proposed garage closer to the existing dwelling. What prevents the applicant from making this less nonconforming? Mr. Maynard stated the issue is with the septic system in the front yard is a mounded system. In order to push the driveway and structure in that direction they would have to excavate into the side slopes or the septic system area. Mr.

Stephens specifically asked why can't the proposed garage be pushed closer to the existing structure, hence reducing the square footage in the setback by reconfiguring a little bit as necessary to avoid having to mess with the septic system. Mr. Maynard replied because of the septic system and the side slopes of it, he cannot manipulate that space between the structure and the leach field. Mr. Poloian and Mr. St. Peter questioned why the garage could not be attached to the existing structure, eliminating the need for the variance. Mr. Dzioba noted that there are two bedrooms, each with two windows along that side of his home. It was noted that there could still be one window in each bedroom if the garage were to be moved and attached. The other option would be to move it so there was a 5-ft separation between the structures. Either way, the applicant would still be looking at the side of their garage. With a 5-ft separation there would still be egress.

Members returned to deliberative session to continue reviewing the remaining criteria. Mr. Stephens noted that the applicant has indicated that they have challenges with implementing suggested changes as discussed. Therefore, they will be adjudicating on the application as it has been presented.

Mr. Stephens noted the increase in the intrusion into the setback was approximately 120 square feet. Mr. St. Peter commented that was an increase in the nonconforming area, asking if that meant that the proposal is not "less nonconforming" as indicated by the applicant's attorney? Mr. Stephens stated in terms of the square footage the new garage would in fact be less nonconforming. The ordinance by right allows a 20% increase of the existing nonconformity (144 sq ft) approximately 25 square feet, and they are proposing 120 square feet, which is a net of approximately 90-95 square feet.

The members moved on to the last criterion, unnecessary hardship, which was discussed at length. Mr. St. Peter stated that when someone has an opportunity to locate a structure less nonconforming than what they are seeking relief for, he does not feel that the hardship has been met. The board is not precluding the use of a garage if they say that they don't like it that close to the lot line, and the lot would allow you to move it. When the lot doesn't allow you to move it and the board does strict enforcement of the ordinance, they would be precluding the person from having a structure that is a reasonable use. Mr. Stephens questioned what were the unique conditions of the lot that precludes it from moving it further away from the lot line. Mr. St. Peter and Mr. Poloian feel that there is nothing that precludes them from moving it. That is not what the testimony that was given by applicant's representatives. Mr. St. Peter commented that what he heard was that is the way they would like it to be laid out, and if they were to lay it out as suggested it wouldn't work with where the leach field is. Mr. St. Peter did not hear that if they reconsidered the shape of the garage and moving it closer to the house that it still would be impossible to do. Mr. McDonough commented that he thought the applicant had considered possibly shifting the garage, but because of the location of the septic field and the slopes, that that was not possible.

Mr. St. Peter feels that the hardship is about whether or not the land allows you to do something reasonable. The applicant would like to locate the garage as presented, however that will make it more nonconforming than the shed already is. Mr. DeMeo noted that there are windows on the side of the home in which other members have suggested to attach the garage, or locate it 5-ft from the house.

Mr. Stephens rephrased what both Mr. St. Peter and Mr. Poloian were describing was not engineering a resolution to this request, only expressing their thoughts based on information provided that there may be some comprisable alternative to reducing the amount of intrusion into the setback.

Mr. Stephens summed up what the feeling of the board was regarding the hardship criterion. It appears that the board agreed that there is an opportunity to have the garage on the lot, maybe not in its current proposed condition. The applicant may be able to reduce the encroachment. Members unanimously agreed that the applicant failed to meet the hardship criteria as there is an alternative on the property.

Upon returning to public session, Attorney Muller requested a brief recess to allow a few minutes to confer with his client. Mr. Muller returned to the Board noting that he did not agree with the hardship analysis as discussed as it was focused on the more restrictive definition. After a discussion with Mr. Dzioba, they are willing to relocate the garage 2-ft over. He explained how they came about with the

relocation. There was a lot of discussion about connecting the garage to the existing home, without giving thought to legal implications in doing so under the Shoreland Protection Act. If you connect it, it all becomes one principal structure and they are then subject to all the restrictions on principal structures under the Shoreland Protection. In addition, it was Mr. Muller's understanding that there is a 3-ft overhang, and if you get it too close to the existing dwelling, all the water is going to be dumped there. There are existing utility lines in between the two structures. The applicant is willing to try and move it over to make it more conforming, but not sure that practically they could offer much more.

Mr. Stephens asked if the applicant was looking for a continuance? Mr. Dzioba commented they made an offer. The Board could offer something that is greater than what the request was, they have applied for 12-ft, and are willing to go to 14-ft. That would put the separation between the abutters home and the proposed garage at 20 feet. If the Board were to except their offer of 14-ft it would eliminate the need to refile and come back another month from now.

Mr. Stephens replied in his mind, the Board would be approving an application drawing conditioned that the setback be 14-ft from the property line verses 12-ft as currently proposed. Mr. Dzioba commented that he has had other Boards do that over the years, where they have granted a similar situation. He gave an example in which the applicant gave an offer, it was accepted, it's a condition of approval, and an as built will need to be done anyways as part of the building permit process when using the variance criteria that was granted. So long as it meets the 14-ft setback it conforms to the approval.

Ms. Whitney noted that the applicant has received a DES Shoreland Impact Permit (2022-00632) based on a plan that was submitted as part of the application package, questioning if a revision to the project would require an amendment to that permit? Mr. Dzioba replied that he would amend the permit with DES if that was the case. The change will not affect any of the impervious coverage as they are only sliding the structure over.

Mr. Stephens noted the challenge they are facing is that the Board had a lengthy deliberative session where they discussed the considerations, and one of the comments made during deliberative session was in fact the possibility that the building could be moved to make it less non-conforming. There was no specific number that they were willing to approve. That would mean the Board would have to go back into a deliberative session to discuss the "offer".

Mr. St. Peter noted his concern that the Board had been presented to by the applicant, the plan as presented, and as presented this does not show a hardship, and the fact that the Board felt there is considerable space to move it to make it less nonconforming. The applicant offered two feet, and he does not think that is considerable. That would not change his vote on hardship. Two feet is not making a real effort to place a garage on this piece of property in a less non-conforming location as possible.

Mr. Stephens stated, if a motion were to be made, it would be based on a structure being 14-ft verses 12-ft from the property line. That could be covered in a motion, without the need to go back into deliberative session. He did not know if the outcome would be any different. The Applicants attorney noted potential utility considerations, roof overhang, and water.

Mr. McDonough noted his appreciation for the applicant conferring with counsel and returning with an offer. He would be interested in seeing more of an effort made to come up with a new plan, and spend more than ten minutes determining that the maximum is two feet. Mr. St. Peter agreed with Mr. McDonough.

Mr. Poloian commented that he did not understand the issue with the water runoff as it is already shedding water. Moving the building over does not change that.

Mr. St. Peter stated the Board can vote on the application as presented or the applicant may request a continuance.

The Board did not have the information before them to make a decision on moving the structure two feet. On behalf of his client, Mr. Muller requested the Board continue the hearing.

Motion: Mr. DeMeo moved to continue the public hearing for Variance request for Shore Realty Trust, Chester Dzioba Trustee (162-19) to April 5, 2023. Mr. Poloian seconded. The Motion carried unanimously.

V. Correspondence: - None

VI. Unfinished Business

1. Review and possible authorization for the Vice Chair to sign the formal Notice of Decision for the January 18, 2023, granting of a special exception for Christopher & Deirdre Maroun for a parcel located at 362 Whittier Highway (Tax Map 135 Lots 8 & 9).

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on January 18, 2023. Mr. McDonough had questions relating to the two draft decisions before the Board this evening. He noted the cases were similar to each other and suggested changes that would include findings in each of the two for consistency. Members reviewed the suggestions and agreed with the proposed amendments.

MOTION: Mr. Poloian made the motion to approve the formal Notice of Decision as written for Christopher & Deirdre Maroun for a parcel located on Tax Map 135 Lots 8 & 9, 362 Whittier Highway, and staff to mail said notice to the applicant or applicant's agent. Mr. DeMeo seconded. The Motion carried with Mr. Stephens abstaining.

2. Review and possible authorization for the Vice Chair to sign the formal Notice of Decision for the January 18, 2023, granting of a special exception for The R2 Companies, LLC for a parcel located at 7-11 Marvin Road (Tax Map 103 Lot 11) Owner of record Paul G. & Mary E. Lavasseur.

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on January 18, 2023. Based on the prior discussion, Members agreed with the proposed amendments as suggested by Mr. McDonough.

MOTION: Mr. DeMeo made the motion to approve the formal Notice of Decision as written for The R2 Companies, LLC for a parcel located on Tax Map 103 Lot 11, 7-11 Marvin Road, and staff to mail said notice to the applicant or applicant's agent. Mr. McDonough seconded. The Motion carried with Mr. Stephens abstaining.

VII. Adjournment: Mr. Stephens made the motion to adjourn. Mr. DeMeo Seconded. The Motion carried Unanimously, and the Board adjourned at 8:52 PM.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant