

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

Public Meeting

October 4, 2023

Minutes

Present: Members: Bob Stephens, Michael Mills, Anni Jakobsen, David McDonough
 Alternates: Jerry Hopkins, Nick DeMeo
Excused: Member: Sean Poloian
Staff Present: Dari Sassan, Town Planner; 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. He then introduced the members of the Board and staff to the public. Mr. Stephens appointed Jerry Hopkins to sit on the Board with full voting privileges in place of Sean Poloian.

II. Pledge of Allegiance

III. Review/Approval of Minutes: 08/16/23

Motion: Mr. Mills made the motion to approve the August 16, 2023, minutes as written. Ms. Jakobsen Seconded. The Motion carried with Mr. McDonough and Mr. Hopkins abstaining.

IV. Hearings:

1. Joseph & Victoria Callahan (160-7) (Black Point Road)
 Variance from Section 3.2.2.3

Mr. Stephens noted that the board was in receipt of an email request from the Applicant's requesting the withdrawal of their application for variance, as they are not moving forward at this time.

MOTION: Mr. Stephens made the motion to accept the withdrawal, without prejudice, for the variance application for Joseph & Victoria Callahan, Tax Map 160 Lot 7. Mr. Hopkins Seconded. The Motion carried unanimously.

2. Timothy & Michelle Curran (129-86) (244 Castle Shore Road)
 Variance from Articles 3.2.2.3 and 3.2.2.4

Mr. Stephens stated that this was an application for a variance from Articles 3.2.2.3 and 3.2.2.4 to remove an existing house and reconstruct the current non-conforming house in a slightly more conforming fashion.

Attorney Christopher Boldt of Donahue, Tucker & Ciandella, PLLC (DTC), Agent for the Applicants, was present representing the applicants. Michelle & Tim were present in the audience, as were Tom Murdough, architect and Brian Fitzpatrick, designer, both from Murdough Design.

Mr. Boldt commented that in conferring with Planner Sassan, one of the issues before the Board is whether they need relief for the side setback.

Planner Sassan referred to his September 29, 2023, staff memo in which he commented that in addition to taking a vote on potential regional impact, which he recommended that there was none, there were a couple of things that he identified.

First regarding the plan, requesting that the ZBA consider whether the plan that was submitted is in keeping with the Board's Rules of Procedure, specifically Section 16. Mr. Sassan noted that since preparing the staff report, he has had considerable communication with the Applicants agents. There is a survey plan and a plan prepared for the variance request. The variance plan is not stamped by the surveyor, Jim Hambrook. If the Board felt that was necessary, Mr. Hambrook would be willing to review that plan and stamp it. Mr. Sassan stated there is a survey, there is also a plan that is based on that survey, and notations have been added to address such.

Mr. Sassan added the other thing is that a question may reasonably arise as to why they need a variance for a deck that is going in the exact same footprint as the deck that is there now. The reason for this is that they discovered that prior to the current owners purchasing the property, a deck was placed without the necessary permits.

Originally, they had looked at the possibility of an Equitable Waiver of Dimensional Requirements, but they want to completely remove the existing deck and changing the elevation approximately 30 inches, and the equitable waiver would not cover that, therefore the request for the variance for the Lake setback. In addition, on the side, there is a proposed bulkhead. Mr. Sassan commented that in his mind, under the 20% rule, the bulkhead should be allowed without requiring a variance. The bulkhead does not come within 10 feet of the property line, it's not closer than the existing encroachment, and it is not equal or near the 20% rule.

Mr. Stephens asked that the Board determine whether this development has the potential of Regional Impact and take a vote on that determination. Mr. Stephens polled the Board asking members if they felt that this project for Timothy & Michelle Curran (129-86) would have any potential for Regional Impact? Mike – No; David – No; Anni – No; Jerry – No; Bob – No.

Mr. Mills questioned if staff knew what year the original structure was built? Mr. Boldt stated that the Tax Card says 1980. He believes that was for renovation, and it was constructed around 1960. The deck was added in the 2000's prior to his client purchasing the property.

Mr. Mills asked if it would clearer and more straightforward if they gave a variance for the deck on the existing building based on the state statute that says it was built before 1980 whatever, that they were entitled to a 12-ft deck off the front of the building, closer to the lake. If the ZBA issued that variance, then everything would fall under Article 7.5.5.

Mr. Sassan responded that the issue is that the deck was placed around 2006. Mr. Mills replied correct. If they had come to the ZBA for a variance at that time, the board would have issued it based on the state statute, which they have honored in multiple cases. Mr. Stephens commented that there never was an ordinance function, but the board characteristically looked at it following the states guidelines. Mr. Mills noted that the ZBA has issued variances for decks added to buildings that were built before 1986, as long as they didn't exceed 12-ft, multiple times. He then asked if this application would be a lot cleaner if they issued a variance for that existing deck on the existing building now as it sits? Then the variance would carry through 7.5.5 and an equitable waiver does not.

Mr. Stephens commented that could be part of the thought process, your analysis process in adjudicating this. Mr. Mills felt that this would take a lot out of this and makes it a very, very easy conversation. Mr. Sassan noted that he did not have a problem with that.

Mr. Hopkins spoke to the request for relief for the bulkhead in the side setback, asking if there was a section in the ordinance that permits stairs in the setback. Mr. Sassan commented that bulkheads were considered differently. Mr. Stephens added that if they are a means of egress then yes, asking if there was living space in the basement. It was stated no. Therefore, it does not meet that section of the ordinance.

A lengthy discussion ensued regarding Mr. Mills suggestion that the board look at adjudicating the deck on the existing structure as it currently sits today. Once that has been done, that then solidifies that footprint for the expansion under Article 7.5.5.

Mr. Sassan stated a variance is specific to not just the area of footprint, but the nature of the thing that occupies said footprint. If the Board issues a variance for a deck, there are some constraints as to what can be done with it. The only difference that is being proposed in this place is a change in elevation of approximately 30 inches. The elevation change is not enough of a difference to say the variance did not cover it. If the proposal was to turn it into two stories, the board would say no as that was not what they sought a variance for. Mr. Stephens noted that the Board would be looking at the current footprint of the deck and recognizing when looking at the current ordinance when they construct it. Could they cover it, make it a three season porch, or whatever? Mr. Sassan added that there would be some limit to what someone could do with a footprint that was obtained through a variance. Mr. Mills commented that that type of change is also covered in Article 7.5. Mr. Sassan stated no. Article 7.5 speaks about nonconforming structures. Once you receive a variance for something, it is not nonconforming. It is not a nonconforming use.

Mr. Boldt reminded the Board that the existing deck is narrower than the proposed as they are moving the house back slightly. He wanted to make sure that whatever method they get approval for, that they are getting approval for the proposed structure, not the existing. Mr. Sassan reiterated that it is no longer nonconforming once the variance is in play. It's still within the spirit of what the ZBA's approving. Mr. Mills' sense is if they were to grant a variance for the deck, it is permitted by variance. The remainder of the structure still has some nonconforming area, which they are not dealing with the deck, and the bulkhead falls within the 20% of the nonconforming area.

Mr. Sassan so long as it is clear that the board is approving the proposed deck, the board may approve the existing deck, it would be allowed. Mr. Mills stated if the existing deck was permitted by variance beforehand and was not constructed without a permit, they would not be here as everything else would be covered under the replacement in-kind.

Mr. McDonough confirmed that if the board were to go the route of discussing the variance for the existing deck, and the variance was granted, then Mr. Boldt would be looking for the board to note the new proposed deck so that it is clear that they do not need to come back for other relief for what they proposed. Mr. Boldt indicated that he asked for the Lake setback variance back largely on what staff has identified through the building permit process. He reiterated they were looking for the proposed structure to be ultimately what the board approves.

Mr. Boldt stated the only thing necessary for the proposed house was if the board determined they needed a side setback for either the existing footprint or the bulkhead, that is why they are asking for it. Mr. McDonough asked if they would be looking for a finding fact by the Board that with respect to the proposed house that it was in compliance with the zoning ordinance? Mr. McDonough stated the reason he asked was because if the application for a variance doesn't speak to Article 7.5.1, it speaks to the setback issues. Unless

the board was going to go through and take a vote on the specifics of the application as submitted, then the board does need to make findings of fact consistent with an approval of the existing house being torn down. Mr. Stephens agreed and also a statement about the fact that the bulkhead did not constitute square footage in excess of the allowed right of 20% of an existing nonconforming component.

Mr. Sassan referred to Staff Comment #2 which could provide the wording for a finding. Members agreed with the language as noted in the staff memo.

Mr. Stephens summarized what the board was debating over is to suggest that the applicant come in with the new structure and request a variance for the deck in the proposed location. Notwithstanding any rights to the existing deck because it was illegally constructed. Mr. Mills reworded that, saying that the board is giving a variance for the existing building to have that deck. Mr. Stephens noted the existing building did not require a variance when it was originally built. After the mid 1980's the previous owner had a deck constructed without permission. The existing house is by definition conforming. Even though the sideline dimensions have changed by ordinance, it has made a portion of the house, under current code, nonconforming, and not a part of this conversation. Just the deck, on the existing structure,

Members discussed whether or not they had a different weight in their evaluation on a deck that was built in the mid 80's, without being permitted, and was by the standards then, perhaps acceptable, certainly by the state in their 12-ft rule but was never allowed by the Ordinance under a 12-ft rule.

Mr. Mills stated that he had a different weight for an old house, that by state statute, added a deck to the front in the nonconforming area that he does a new building violating the nonconforming area.

Mr. Boldt proceeded at this time, clarifying that the board was asking that they discuss the variance standard for the deck, adding that if they had done it right in 2006, then they would not have been here. Mr. Stephens commented that was not 100% correct, as he did not recall that the Ordinance ever allowed for a dimensional characteristic of a deck within a setback without a variance.

Mr. Boldt indicated that he was asking the Lake setback variance for the deck. The application as submitted is still good, and the board is going with the determination that a side setback is not necessary.

Mr. Sassan suggested the board make a motion to address the side setback at this time.

MOTION: Mr. McDonough made the motion that the Board find that the Applicants (Timothy & Michelle Curran, Tax Map 129, Lot 86) request for relief from Zoning Article 3.2.2.3 (20-foot side setback) is not required on the easterly side the proposed building footprint occupies existing nonconforming area, with the exception of a bulkhead occupying approximately 30 square feet. The bulkhead does not come within 10 feet of the property line. According to the calculations provided in the applicant's Exhibit B, the new areas of encroachment meet the requirements of Zoning Article 7.5.4.1. Based upon the above findings of fact the Board determined that a variance is not required for the side setback. Mr. Hopkins Seconded. The Motion carried unanimously.

Mr. Boldt then spoke to the setback within the 50-ft of the existing deck, that is 39.9 inches, that they are proposing to replace as part of the project with nothing closer than the 39.9 inches. Mr. Boldt stated that the Applicants have received a DES Shoreland Permit (2023-0188) for the project.

Mr. Boldt addressed each of the criteria for the granting of a variance.

Criterion one is met as this is an existing deck, has been there and if it were done correctly back in 2006 it may well have met the standards. It has been there long enough that it technically meets the equitable

waiver standards, but because they are tearing down the current structure and deck, he believes that it is better to come for the variance.

Criterion one is met as the proposed project will not change anything. The neighborhood will look at it the same. The view from the Lake will be the same, the setback is exactly the same distance, and it does not threaten the public health, safety or welfare.

Criterion two, spirit of the ordinance, is viewed as the exact same standard as Criterion one.

Criterion three, substantial justice is done as there is no gain to the public that outweighs the loss to the Applicant from its denial. There is no gain to the public by a denial.

Criterion four, diminution of surrounding properties. The deck will be in the same place and the house is moved back slightly; therefore, the project will not diminish property values.

Criterion five, unnecessary hardship. Looking at the special conditions of the property that distinguishes from others that make this variance needed and what are the specific purposes of the zoning ordinance provision that they are seeking relief from, and does it make sense to apply to this project, and this project reasonable. Mr. Boldt referred to his narrative which lists the special conditions. Mr. Boldt noted the large boulders on the roadside of the house, which is why the proposed house cannot be moved back to make the deck comply.

In closing Mr. Boldt noted that the applicant has received the necessary DES approval. The proposal is for a footprint that is currently existing. They are asking for relief for the Lake setback for the deck and have it be tied into the plan as presented and the project as a whole can be viewed as having met whatever requirements the Board imposes on them for the relief. Mr. Boldt answered any questions from the board.

Mr. McDonough questioned the status of the plan, asking if they were looking for an additional certification from the surveyor, or was Mr. Sassan satisfied with what he had received. Mr. Sassan replied that he was satisfied. The question was raised as the board had recently adopted a change to its Rules of Procedure, specifically addressing plan requirements. He thought given the newness of that rule, it made sense to bring it up. Knowing now what he does, with respect to the plan he would not have brought this up. They have an existing 2023 conditions plan (Exhibit B) from Hambrook Surveying.

Mr. Stephens opened the hearing for public input.

Steve King, member of the Conservation Commission was present representing the Commission. He noted the Con Com has concerns with stormwater runoff which contains sediment, oil and gas from the road chemicals applied to lawn and garden areas. The Con Com recommends that a stormwater management plan be in place, and made the following suggestions:

- Construct stone filled trenches around the perimeter of the house and deck to catch runoff from the roofs and other flat areas.
- Plant bushes or other vegetation between the deck and the shoreline as this area is flat and barren with little vegetated cover.
- Construct swales or stone filled channels to the right side of the house to contain runoff from the impervious driveway.
- Construct a perched beach where the current beach is located. The sand area shows erosion from water flowing across the lawn and into the lake.

Mr. Boldt stated that the applicants have received the necessary DES Shoreland Permit (2023-01888). He noted that they are reducing the impervious coverage from 29.25% down to 19.23%.

Mr. Stephens 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 7:47 PM and came out of deliberative session at 8:05 PM.

During the deliberative session members discussed each of the criteria for the granting of a variance from Article 3.2.2.4. The members agreed that granting the variance would not be contrary to the public interest as the project would not “alter the essential character of the neighborhood: or “threaten the public health, safety or welfare” because there is an existing deck there now. For the same reasons as referenced for the first criterion the variance observes the spirit of the Ordinance. 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 deck. The proposed deck will not diminish surrounding property values as it will not change the character of the neighborhood, as there is currently an existing deck, and it will be new construction adding value to the Applicant’s Property and the value of the surrounding properties in keeping with the lake-side residential character of the neighborhood. There is not a fair and substantial relationship between the general public purpose of the ordinance provisions and the specific application of that provision to the property because had the then owner applied for a variance when the deck was built using the states allowance of a 12-ft deck in the setback, the then board would more than likely approved that request, therefore it would be a unreasonable hardship to deny the current request, and the proposed use is reasonable as the deck already exists. The proposed use is reasonable.

There was no further input from the Board or public. The voting members were Mike, David, Anni, Jerry, and Bob.

MOTION: Mr. Mills made the motion to grant the request for a variance from the provisions of Section 3.2.2.4 for Timothy & Michelle Curran, Tax Map 129, Lot 86, to remove an existing non-conforming house & deck and reconstruct a new more conforming house & deck to be located no closer than 39’9” from the lake where 50-ft is required with the following conditions: 1) Structure limits shall be located and pinned in accordance with this approval by a NH licensed surveyor prior to construction. 2) Project shall obtain necessary state and local permits, to include approval of a town building permit and NH DES Shoreland approval. All conditions of such permits shall be perpetually complied with, and all necessary inspections shall be successfully completed prior to use. 3) An approved building permit must be obtained prior to commencing construction and all necessary inspections shall be successfully completed prior to use. 4) All representations made by the applicant and applicant’s agent shall be incorporated as a condition of approval. 5) The applicant and owner are solely responsible for complying with the conditions of approval. 6) Per RSA 674:33, approval expires on 10/4/2025 if use is not substantially acted upon. Mr. McDonough Seconded. The Motion carried unanimously.

Mr. Stephens noted the right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

VI. Correspondence: - None.

VII. Unfinished Business:

1. Review and possible authorization for the Chair to sign the formal Notice of Decision for August 16, 2023, granting of a Variance for Stephen C. Francis for a parcel located at 100 Toltec Point Road (Tax Map 132, Lot 9).

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on August 16, 2023. There were no changes made to the document.

MOTION: Mr. Mills made the motion to approve the formal Notice of Decision as written for Stephen C. Francis for a parcel located at 100 Toltec Point Road (Tax Map 132, Lot 9), and staff to mail said notice to the applicant or applicant's agent. Ms. Jakobsen seconded. The Motion carried three (3) in favor (Mills, Jakobsen, Stephens), none (0) opposed, and two (2) abstentions (McDonough, Hopkins).

2. Mr. Stephens noted the upcoming Land Use Law Conference, Saturday October 14th (9:00 am – 3:00 pm) for Planning Board and Saturday October 21st (9:00 am – 3:00 pm) for Zoning Board that NHMA is holding. Registration link here [2023 Land Use Law Conference \(cognitofrms.com\)](https://cognitofrms.com)

3. Mr. Sassan noted that there were no new submissions or continued hearings for the October 18th meeting date. Chairman Stephens cancelled the Zoning Boards regularly scheduled meeting of October 18, 2023.

VII. Adjournment: Mr. Stephens made the motion to adjourn. Mr. McDonough Seconded. The Motion carried Unanimously, and the Board adjourned at 8:21 PM.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant

NOTICE: These DRAFT Minutes have not been formally approved by the Zoning Board of Adjustment. Please contact the Land Use Department after the next meeting of the Moultonborough Zoning Board to learn if any corrections, additions, or deletions were made.