

APPROVED Augst 3, 2006

Called to Order: Meeting called to order by Marcella Perry 6:50 p.m. on June 27, 2006

Members Present: Timothy Morgan, Marcella Perry, Timothy Kinnon, Angela Bystrack, Paul Monzione, Town Counsel Attorney-Jim Sessler, Planning Assistant-Monica Jerkins, Town Code Official Brian Boyers, and Recording Secretary-Carolyn Schaeffner

Approval of Agenda

Motion by Angela Bystrack to amend the order of business, seconded by P. Monzione. No discussion.
Vote unanimous

Other Business:

1. Old Business:
Letter on cell towers - FYI
Discussion on Lakes Region Planning annual meeting. Angela Bystrack attended the meeting and thought it was interesting on a large scale. Talked about impacts on the whole state and all six New England towns on growth management and changes that occur economically in a lot of different area. A. Bystrack felt the meeting was very informative.
2. New Business: None.
3. Correspondence:
Received two letters from applicants for alternate positions.
The Board of Selectmen appointed these two applicants to the ZBA.
The new members were invited to attend the meeting because they need to get some experience.
P. Monzione – My status on the board is currently as an alternate and are these two individuals appointed as alternates?
M. Perry – Yes, they were appointed as alternates
P. Monzione As we are currently configured do we have 4 permanent and three alternate members?
M. Perry –If you are interested in becoming a fulltime member you should let the Selectmen know that.

M. Perry – Tonight we were handed a letter from Attorney Varney and if the board wants to take the time to read the letter without comment while we wait until 7:00pm and then we will make the decision as to which way to go.
4. Any other business that comes before the Board. None presented.

Statement of Appeal Process: The purpose of this hearing is to allow anyone concerned with an appeal to the Board of Adjustment to present evidence for or against the appeal. This evidence may be in the form of an opinion rather than established fact. However, it should support the ground that the board must consider when making a determination. The purpose of this hearing is not to judge the sentiment of the public or to hear personal reasons why individuals are for or against an appeal, but all facts and

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opinions based on reasonable assumptions will be considered. In the case of an appeal for a variance, the board must determine facts based upon the five criteria, which as set forth in the state statute. For a special exception the board must ascertain whether each of the standards set forth in the Zoning Ordinance has been or will be met.

The case tonight is on two points - hardship and substantial justice.

Appointment of Alternates: none appointed.

Case #Z05-06

Map 53, Lot 3

Variance

Robert Gayner Trustee

62 Temple Drive

Application submitted by Walker & Varney P.C. on behalf of the property owner Robert Gayner Trustee for a request for a Variance from Dimensional Requirements in order allow the height of a boathouse in excess of 15' as required by the 2006 Alton Zoning Ordinance Article 300, Section 328A [2005 Alton Zoning Ordinance Article 200, Section 228A] height restrictions for boathouses. The property is located at 62 Temple Drive in the Lakeshore Residential Zone, the Town of Alton Shoreland Protection Overlay District and the State of New Hampshire's Shoreland Protection District.

Present for this case Robert Varney from Walker and Varney out of Wolfeboro, NH. I represent Robert Gayner, he is the trustee and the applicant in this matter.

R. Varney - This matter has been before this board on a number of occasions. We appeal an unfavorable decision on 2 of the 5 criteria for an area variance to the Belknap County Superior Court and Judge Smuckler remanded the matter back to the board for reconsideration based on his findings and rulings. I have given the board a copy of Judge Smuckler's order from May 1, 2006. I thought I would also give you a copy of the VOHSA decision because I am going to be pretty much focused on those two points. The board has already found that granting this variance and the variance sought is a relief from Section 228A of the Alton Zoning Ordinance which provides boathouses no more than 15' above the lake level. The top of this boathouse roof would be 34' above lake level at its peak not including the cupola that is on it. We are after a straight area variance and the two remaining issues before you are substantial justice and hardship. Substantial justice is not a much litigate test under the statute. The fact is, we were only able to find one case of any recent vintage where substantial justice was even discussed and that was Harrington v. the Town of Warner. Judge Smuckler was very familiar with that case because he was the trial judge, so he knew more about it than I or the Town's Attorney did, but he made it pretty clear that based on the findings in that case and the Supreme Court's decision that the issue of substantial justice is one which is inherent in the project itself. It has nothing to do with the board's interpretation of behavior by an applicant or whether he is a deserving figure or whether past behavior would disqualify him from the board's consideration. I think that is right and that is what I had argued to the board and I think that Ms. Perry and Mr. Kinnon remember that. I was unsuccessful at the time but I think Judge Smuckler has correctly found this and you will be guided by his decision. I know I argued to the court that I had never heard of a case where a variance had been found not contrary to public interest consistent to the spirit and intent of the ordinance and that it did not diminish surrounding property values.

M. Perry – We are dealing with just these two.

R. Varney – I know

M. Perry – That is what we want to stick to.

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R. Varney – Exactly and what I said was and this is to my point Ms. Perry, is that making have made those three findings, I have never heard of a case where substantial justice had not also been found. That was the point I was making. I think that when you weigh that, the fact that there has never been a single objection by a single abutter to this project and I think the board itself having seen the comment from the board in the past having seen the project, The impact of this project is wholly benign. There is nothing about this that would be harmful to any person, public or private right. I think the substantial justice prong is met and I would hope you would make an affirmative finding on that. I don't know how you wish to proceed. Do you want to go through that one first Madame Chair and I could respond to questions on it?

M. Perry – That is fine if you want to start with that one, I have no questions on it.

R. Varney – I didn't know if you wanted to vote on that one now.

M. Perry – No, we will take the deliberation up all together.

R. Varney – Since there are no questions on that, I will move right into the hardship. As you know from BOCCIA, the standards for establishing a hardship are significantly laxer from establishing a use variance test set forth in the Semplex case. Two parts of these: 1. is the variance needed to enable the applicant's proposed use given the properties special conditions. Judge Smuckler has found there are special conditions and he commended to your attention the fact that this property slopes back sharply from the shoreline then levels off because of the existence of the old railroad line. He also commended to your attention that there used to be a station on this property, the site of a former inn. What is the use that the applicant wishes to make? What the applicant wishes to do is to replicate and incorporate in his roof design a station house replica. That is what he is seeking to do. The only way he can do that given the topography of the land and the nature of your ordinance, which physical perimeters are measured from to water line not from the ambient terrain around the building. The only way he can accomplish this is through a variance. I think the first prong is very easily met. The second prong is can the benefits sought by the applicant be achieved by some other reasonably feasible method? The benefit is not to build a boathouse. The benefit is to incorporate the station house design in the roofline of the boathouse. That's the benefit and I think that is the source of much confusion the board had when they first considered this. Most of the reason given were, "you can put a boathouse here, so you don't need a variance." What is being sought is the incorporation of this design into this structure. How can he do this accept through a variance? The only other way would be to excavate the shoreline. Bring the shoreline down to a level where he could make the track appear to go in front of the boathouse. It's simply not a feasible alternative. The only reasonable alternative available to this applicant is an area variance of the type sought. I have Mr. Gayner here available to answer questions.

T. Kinnon – Mr. Varney, if I recall discussing the other options for the structure, one of the other options we had discussed was that the track bed extended for some distance on the applicant's property and the other alternative would be to have the station away from the water front. It could be further away.

R. Varney – Again, Mr. Kinnon, this is a misunderstanding of what he is seeking to do. He is seeking to incorporate the design in the boathouse. That is the benefit he is seeking. He is not seeking the right to build a station and the right to build the boathouse, he is seeking to incorporate the two together. Having made those findings has me met the hardship test and the test is, is it feasible to incorporate those two

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any other way with or without a variance? Is the variance necessary given the perimeters of the ground, which makes it impossible to keep it 15' above the water.

T. Kinnon – One of the things that somewhat concerns me is that you just incorporated the terms boathouse and structure, so if we did grant this, this could be considered a boathouse. That was one of the terms would couldn't pinpoint what this was being called.

M. Perry – I think because the permit was pulled for a boathouse, that is what Mr. Boyers and everyone had to go on. The permit was for a boathouse and no other permit was pulled except the permit for the boathouse. No variance was asked for and this is what we have to call this building.

R. Varney – This is a boathouse and that is what Judge Smuckler had found. I had argued unsuccessfully on an unrelated aspect that isn't a boathouse and I am prepared to abandon that but I am certainly not arguing that tonight.

P. Monziona – The question for us is to determine whether a variance is needed to enable the proposed use given the properties special conditions under BOCCIA decision and the proposed use that you are seeking is indeed a boathouse with an architectural design of a station. Is that what you are saying?

R. Varney – Yes

P. Monziona – That is what we consider when we talk about substantial justice and unnecessary hardship.

M. Perry – I don't have pictures but there are pictures down stairs and they purport to a replica of a station that was either on the property or in town. What I am going to ask the board to do is adjourn for a moment and go downstairs to the lobby and we will take a look at the stations that were in town. There are pictures of all of those stations and I would like everyone to take a look at them.

M. Perry – We were still on hardship.

P. Monziona – Madame Chair, I would like to make a recommendation that the record show that there was some discussion on the first floor between Attorney Varney and Mr. Gayner with regard to the photograph of the Mount Major Station and all of the stations that are in that display.

M. Perry – And the varying heights and designs of those stations. Do you have further questions on hardship?

A. Bystrack – Does hardship pertain to what exists or to what is created?

M. Perry – I think if we are going to ask those questions and you will need those in deliberations that we should convene and ask our attorney and then reconvene if you have those specific questions and want them answered.

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J. Sessler – I think the ground rules for this hearing are that we treat this as if the building doesn't exist and it is an application of new and we don't look at the past history of how we got to where we are today, if that helps answer your question.

A. Bystrack – That is what I am trying to do. I also needed one more clarification as well. It is confusing for me where it falls and maybe the Code Inspector can answer the question. If the shoreline is dug back 30 feet, does that apply at the boathouse height or 30 feet off the shore because it is altering the shoreline of Winnepesaukee, or does it apply to a structure back 30 feet from the shore. It is confusing because is it the shore now? There is a 15-foot and a 35-foot, depending on which one you are talking about. There is confusion between the boathouse and structure.

J. Sessler – That is really not the issue today. It is assumed at least for the purposes of the variance that it needs the variance for the height restriction with the setback from the water. That doesn't mean they can seed it, but that is not the issue today so put that out of your mind and just assume it needs the height variance.

R. Varney – That is what we are seeking, a variance from 228A, which is 15' from the water.

A. Bystrack – OK because I was getting confused between the two things.

P. Monziona – I kind of hate to ask this question, is there not an architectural rendering of the proposed structure?

R. Varney – Yes, you have photographs.

M. Perry – Mr. Boyers, do you have that as part of the package in Town Hall?

B. Boyers – Yes, it is in the file.

A. Bystrack – Are there pictures available as to what the replica station was supposed to look like?

M. Perry – That is the replica.

J. Sessler – I don't think we should get into that. That is getting into the past history. That's not part of the ground rules for today's hearing.

M. Perry – Does anyone have any more questions for the applicant as far as hardship? Hardship, if it is self-created, it is more difficult for the applicant to prove. Given their reasons for the type of building they want on this piece of property, as far as the layout of the land, are there any other questions on either hardship or substantial justice?

M. Perry – When we talk about substantial justice, are we talking about substantial justice for the applicant or for the applicant and any owners who are going to own the property after this point in time. Substantial justice to other members or other people on the waterfront, substantial justice to whom?

R. Varney – I am looking at you to find that granting the application does substantial justice.

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M. Perry – For whom

R. Varney –For everyone. Granting substantial justice is it doing some unknown harm to some individual, is there something about this application that is unfair to some specific individual, is there something onerous inherent in this application. It has nothing to do with Mr. Gayner or the person who may by from him. It has only to do with the project itself. Would granting this application be an act of substantial justice.

M. Perry – Very good answer.

T. Kinnon – That is actually one of my biggest concerns. Granting this particular variance, what the repercussions are going to be down the line, it seems like a very straightforward request. There was a train station on the property and he wants to replicate it fairly close to where it was. There is no denying that there was something there previously. Simply to say that there was something there previously there and want to put it back after the Zoning Regulations go into existence.

R. Varney – You have an ordinance and it has spirit and intent, it has public policy considerations and there are neighbors that are going to be effected one way or the other. The checks and balances you are concerned with Mr. Kinnon are met. You do not have to meet them with each criteria. I think that you will find without much question that it will do substantial justice. The real issue for you is the hardship test is now much reduced than what it use to be.

M. Perry – Mr. Varney, because you have brought up public policy, I am going to expound on that a little bit. Public policy in regards to the reason that this ordinance is in place is for several reasons. One is public safety and safety serves as access for the applicant as well as any other applicant or other resident of this facility and project. It has to do with the public's interest in keeping similar type of view shed along the waterfront. The criteria the board has used in the past is to look at the flavor of the neighborhood. To look at what is around. We look at the types of variance and the types of properties in that area. I went and took pictures of boathouses on the lakefront on both sides of the lake.

Bob Gayner – One of the reasons that I chose to do this was because of the uniqueness of the property. One of the questions is will this open a Pandora's box? This required approval from the state historical society and also from the wetlands bureau and it was based on the fact that they wanted to keep one of the last continuous rail bed open. In order to meet this it had to had substantial run of the old open rail bed and it had to have the rail station sited on the property. To the best of my knowledge there are no other properties on the shore of Alton where there was a rail station with racks remaining. There are a number of boathouses on the lake and I think the board needs to remember when the ordinance was put in place. The state decided no more boathouses over the water and required all of the property owners excavate into their own property to put boathouses in. When they did that, they allowed flat roofs.

R. Varney – You have already decided the issue of public policy that it is not contrary to public interest and that it is within the spirit and intent of the ordinance.

M. Perry – That has to do with substantial justice for owners and subsequent owners bearing on the reason for the ordinance.

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R. Varney – Then I will bring to your attention that there is a great deal of frontage, which is an unusual amount of frontage. There are no site line affects on neighbors, there have been no objections by the neighbors. It is the site of an old railroad station and the site of a track that is a special circumstance.

M. Perry – It is definitely not unique because all along that waterfront is track line.

Paul Monziona – Just going back to the ruling by the Superior Court. The second prong of this “whether the benefit sought could be achieved by another reasonably foreseeable method.” Mr. Varney you discussed why that isn’t the case here because of the excavation work and altering the terrain in order to achieve the same thing, which would be unreasonable and cost prohibited. What about the idea of altering the architectural design by scaling it down or altering that? Is that a reasonable method of achieving the same result?

R. Varney – As you read BOCCIA it says, because there are other things an applicant might choose to do it is not a reason to deny the application.

P. Monziona – Because of the dimensions in order to accommodate the use of the boathouse that it has to be this size. If you took an architectural design of a station, the exact boathouse that you have design, if you scaled it down, is that something that can’t be built?

R. Varney – Physically it could be built, but the dimensions of the structure are chosen for a set of reasons, its setback from the water, its appearance from the lake.

M. Perry – The fact is that it should be considered in the area variance hardship calculations whether an area variance is needed to enable the applicant’s proposed use of the property given the conditions of the property. I think the applicant has a boathouse there and that is his proposed use of this building. I suspect that it is only can be a boathouse.

R. Varney – Yes, per state permit there are no living quarters and it can only be a boathouse.

M. Perry – Going along with your thinking Mr. Monziona. If they were looking for a variance because of the special uniqueness of the property, the proposed usage of this building is a boathouse.

R. Varney – It is an architectural decision. As long as the criteria is met they can ask for a variance.

P. Monziona – Can a benefit be sought by the applicant be achieved by some other reasonable method?

R. Varney – Gayner is doing the seeking. Would granting this application, having made those findings, and knowing what else you know about it, would that be substantial justice and can he do this without a variance. No. And is there some other feasible way without a variance that he can do it. If he brought in several large pieces of earth moving equipment and worked all summer he probably could. I think you will agree that it is not feasible or reasonable. That’s our argument.

M. Perry – Any other questions? Seeing none I will open this up to the public. Anyone wish to speak in favor of this application. Is there anyone wishing to speak in the opposition of the application? Seeing none we will close the public portion of this and go into deliberations. If anyone feels that they have

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questions or doubts, that we would like to confer with the attorney on, I would like to take a recess and if you have broad questions, we will take a few minutes and speak to the attorney. We will adjourn to the Heidke room.

The board reconvened.

Motion made by M. Perry that this would not substantial justice, seconded by T. Kinnon 1 in favor, 3 opposed, and 1 abstention.

Motion made by P. Monziona that this would do substantial justice, Seconded by T. Morgan 3 in favor, 1 opposed, and 1 abstention.

P. Monziona – I feel that this has been discussed comprehensively with regard to the criteria regarding the variance.

M. Perry – I feel that there is not a hardship and this could have been done in another manner.

Motion made by T. Kinnon to approve the variance for the applicant's proposed use and special conditions, seconded by P. Monziona, 3 in favor, 1 opposed, and 1 abstention.

Discussion regarding the cell tower meeting.

P. Monziona has a matter regarding July 6th meeting, which he owns a lot in the Timber Ridge Association.

Motion made by P. Monziona to adjourn, seconded by A. Bystrack. There was no discussion and the Vote was unanimous.

Respectfully submitted,

Carolyn B. Schaeffner
Recording Secretary