

Members Present: Vice Chairman-Marcella Perry; Charles Westen; Lyndon Avery and Alternate; Timothy Kinnon, Selectman's Representative Patricia Fuller.

Member absent: Chairman-Richard Quindley and Keith Chamberlain

Others Present: Town Attorney, Sean Tanguay; Town Planner, Kathy Menici; Secretary, Stephanie N, Verdile and others as identified below.

Call to order: Vice-Chairman- M. Perry called the meeting to order at 5:30 p.m. She announced that the Board would be going into non-public session to confer with Town Counsel before the meeting would begin.

Motion made by L. Avery, seconded by C. Westen to adjourn and go into non-public session to confer with Town Counsel, motion carried with all in favor.

M. Perry announced that the purpose of the meeting is for Board deliberations and decisions on the following cases and she asked K. Menici to read into the record the cases.

APPLICATIONS FOR PUBLIC MEETING:

K. Menici read the cases into the record as follows:

Case#ZO5-14

Map 53, Lot 3

Motion for a Rehearing

Robert Gayner Trustee

62 Temple Drive

Application submitted by Walker & Varney P.C. on behalf of property owner Robert Gayner Trustee for a Rehearing on Case#ZO4-23 regarding the April 7, 2005 ZBA decision upholding the Cease & Desist Order issued by the Town of Alton Building and Code Officer on September 28, 2004. 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.

The Board deliberated as follows:

M. Perry spoke about notes she will be referring to based on the input from the Town Attorney and notes from the previous meeting minutes referencing the case.

She said the first issue for the re-hearing on the Administrative Appeal is based on the following questions.

- 1) Does Section 228 govern the height of structures behind the natural shoreline of the Lake?
- 2) Do the restrictions, if any, serve any legitimate zoning purpose?

She spoke about the first question and said there is a sub-question asking "what is shoreline?".

C. Westen read the definition of shoreline from Webster's 9th New College Dictionary, "The line where the body of water and the shore meet".

M. Perry asked, does it mean the original shore before dredging, as is argued by the applicant or is it the new shore after the dredging is complete as the Building Official states. She said does the word have some meaning as the phrase "natural shoreline" used by the applicant in his argument.

She spoke about the first point, referring to Section 228, clearly provides that a boathouse cannot exceed a height of 15' beyond the "full lake level". She said "full lake level" means the greatest extent of water level touching the land and shore of the lake where ever that happens. She said the definition that C. Westen read from the dictionary explains that. She said the height limitation extends to the entire building located within the 30' of the shore of the Lake under Section 227.

She said the applicant argues that the shore is the "natural shore" before his excavation and dredging expanded into the Lake. She said the applicant is mistaken, the setback is measured from the shore, which is commonly defined in dictionaries and commonly understood to mean "that place where the water meets the land". The "shore" is where ever this occurs, after all lawful and permitted excavation and dredging has occurred. She said when the applicant excavated and dredged out the Lake; he created a new shoreline. She said this is an important fact, because the measurement for setbacks have to made from the new shoreline he created, not from the shore that no longer exists. She said a contrary result would be absurd, especially when the safety purposes of the setbacks are known.

She spoke about the second question "Do the zoning restrictions establishing setbacks from the Lake, which is Section 227, and on the height of boathouses, Section 228, serve legitimate zoning purposes?"

She said that based on her experience and knowledge, setbacks are established in zoning ordinances generally to protect public safety and that in this case this is a very important point. She said the public respondents including: police, fire and EMT's should have unimpeded access to all sides of the building incase of an emergency. She said the setbacks from the Lake are extremely important because water impedes safety and the safety personnel do not work well in water, especially cold water, ice conditions, and depths of 4-6 feet in this case outside the boathouse. She said emergency personnel need the setback space to stay out of the water and off ice. She said generally lakeside areas, generally slope down to the water, which makes access difficult and also lakeside areas are usually remote from streets and driveways serving the remainder of the lot. She said, each of these factors helps to create difficulty and impediment to access. She said for public safety reasons you have to assume that at times the only access, in any given case, is from the water's edge and if that is the case then the restrictions are more then reasonable and are in fact necessary.

M. Perry said in this case, public safety is an issue and it is a very important issue. She said because of the above stated reasons, she has found that the setback measures from the lakeshore after dredging are legitimate and the Code Enforcement Officer is correct.

She said the height restriction on the boathouse is also legitimate for much of the same reasons as the setback issues. She said a boathouse in an exception to the general setback restrictions. She said the zoning ordinance allows boathouses and wharves within the 30' setback area along the water's edge. She said this is obviously because boathouses and wharfs can only be located on the water. She said it is very important that the relaxation of the rules is acceptable because the boathouse is limited in height to only 15' above the high water level of the Lake and therefore, is more easily accessible and is not likely to be used for a residential use.

She said the height restriction is imposed so that boathouses are limited to one story and access is therefore made much easier by ladder and foot for emergency personnel, even from the waterside.

She said the height restriction realistically limits the building to one story and this serves to limit the conversion of boathouses to residential uses on a second floor at some time in the future. She said if this were not the case and if conversions happened, access would be much more difficult.

M. Perry said because of the above stated reasons, she finds that the height restriction for boathouses at 15' above the Lake level is legitimate.

M. Perry made a motion to deny the appeal for a rehearing on Case# ZO5-14 for the reasons stated above, including safety and for the restricting of use of the property at a further time. C. Westen seconded the motion.

Board discussion on the motion:

T. Kinnon spoke about the NH Planning and Land Use Regulation Manual 2004-2005 Edition. He said that New Hampshire does not use the term “shoreline”, they use the term “reference line”. He read the definition from the manual from page 246, citing “RSA 483-B:4, XVII (b) For artificially impounded fresh water bodies with established flowage rights, the limit of the flowage rights, and for water bodies without established flowage rights, the waterline at full pond as determined by the elevation of the spillway crest.” He said the spillway crest for Lake Winnepesaukee is 504.’ He said that would mean to him that the waterline is at 504’ wherever the water may be. He said it does not address whether it is man made or naturally occurs. He said he believes once the property has been dug back they have established a new reference line.

C. Westen said that Section 227 & Section 228 are clear and have no ambiguous statements in them and stand on their own. He said the new shoreline was requested by the applicant and agreed to and permitted by the NH DES. He said there is no question where the shoreline would be. He said it would appear to be a misrepresentation of the facts to say that shoreline did not change. He said it is important that there be a public safety standard so that local and municipal emergency aid responders will know what they will be dealing with should a need arise when for them to be called.

L. Avery said he agrees with the statements made by T. Kinnon and by C. Westen. He also said the ordinances are there for a reason and they are clearly stated. He said the setbacks are needed for emergency access for people and equipment as well as the height restriction are set forth so that building would not impede any visual affects from anyone that may build behind them. He said that is the law on the books and that is what they have to go by. He said one of the questions the applicant had asked was about the legitimate reasons (for the restriction) and he said the Board has stated before, that this ordinance was intended to govern structures such as this and yes it is, the ordinance governs all structures.

M. Perry asked for any further discussion, there being none, she called for the vote and the motion carried with all in favor.

M. Perry asked K. Menici to read the next case into the record.

K. Menici read the case into the record.

Case#ZO5-15

Map 53, Lot 3

**Motion for a Rehearing
62 Temple Drive**

Robert Gayner Trustee

Application submitted by Walker & Varney P.C. on behalf of property owner Robert Gayner Trustee for a Rehearing on Case#ZO5-05 regarding the April 7, 2005 ZBA decision denying the property owners request for an Equitable Waiver from Dimensional Requirements in order to maintain the height of a boathouse in excess of 15' as required by the 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.

M. Perry said that following appears obvious, in her opinion, from the evidence that was presented:

- 1) When the applicant had applied for the boathouse building permit, he already had formulated plans for a larger building.
- 2) The applicant did not show or discuss the larger plans with the Building Official when he filed his application.
- 3) At the time of making the application, the applicant wanted a larger building. The instance where he was pursuing it further with the State(NHDES) showed he was pursuing the larger building.
- 4) The applicant did know that the Building Official approved all plans that are submitted. He knew the place to meet with the Building Official was at Town Hall. The applicant never came into Town Hall and showed or dropped off the larger building plans to the Town Official and these are pretty basic procedures; nor did he ever mail the plans directly to the Building Inspector.
- 5) The applicant testified he spent a lot of time having larger building plans approved by the State and once they were approved by the State, he never took the time to bring them to the Building Official, even though the State approval cautioned him that Town of Alton approval was still necessary.
- 6) He never called the Building Official and directly told him that he was changing the original plans.
- 7) The one phone call that the Board heard about that was made to the Building Official was to discuss setbacks and the intent of that discussion, is disputed by the Building Inspector.
- 8) She said the applicant told the Board that he had a witness to the phone conversation and that he repeated everything that was said by the Building Inspector to the witness.
- 9) She said there was no other reason to have a witness listen into the conversation at that time and the one thing that was not said, in this telephone conversation, was that the plans had changed and therefore he did not ask if a new application needed to be made.

She said based on all those reasons the applicant's testimony is unbelievable.

10) In the phone call made to the Building Official after the plans were changed, the applicant asked what the applicable setbacks were from the shoreline. Apparently, the Building Inspector answered generically, he answered the questions that were asked but nothing specific to the case. She said there is no evidence that the conversation got into the detail of where does the shoreline start when there has been dredging and excavation of the Lake that creates new shore. She said this could have been done, if the actual plans had been submitted to the Building Inspector.

M. Perry said that in addition to the facts states above, she finds the following:

- 1) The applicant needed to apply for what he wanted to build and he did not.
- 2) The applicant needed to fully inform the Building Official of what the building plans are and he did not do so.
- 3) Any significant changes have to be reviewed with the Building Inspector before construction is begun, the applicant did not do so.
- 4) The applicant did not do what was required of him when there was a request to change plans. It was done over the phone not by the required way, which is to come into Town Hall, meet with the Building Inspector and present a plan and present a new application for the changes that he is requesting.
- 5) Asking general questions about setbacks over the telephone when the Building Inspector did not have plans is not in any way sufficient detail to justify reliance.
- 6) It is unreasonable to assume that plans originally approved by the Building Inspector can be altered or changed with the new plans not being directly given to the Building Inspector to review.
- 7) Having plans approved by the State and mailed to the Selectman's Office does not meet the requirement of having new plans approved in advance by the Building Inspector and that is the applicant's realm of responsibility.
- 8) The applicant is responsible for keeping the Building Inspector informed of changes. She said that if the applicant chooses to talk to the Building Inspector over the phone about his plans and did not provide full details of those plans and intentions, the applicant assumes misunderstandings and mistakes, such as have occurred.
- 9) The applicant should have shown the Building Official the new plans before proceeding to build and mailing them to the Selectman's Office is no substitute.

M. Perry said because of the above reasons she believes the Boards original findings should stand.

M. Perry made a motion to deny the motion for the rehearing for Case#ZO5-15, based on the above reasons, seconded by L. Avery

Discussion on the motion:

T. Kinnon said that Mr. Gayner testified that he did not receive proper or good service from the Code Enforcement Officer/Building Inspector. He said he would play devil's advocate and say he did not receive good service that still is no reason for a property owner to build whatever they want to build in the Town of Alton. He said if they do not receive good service from the Code Enforcement Officer then they should go to the Town Administrator if they do not receive good service there then can go to the Board of Selectman and if they still do not receive good service, there are State avenues they can follow. He said that he is not saying that Mr. Boyers did not provide bad service, he wanted to point out that there are other avenues Mr. Gayner could have followed. He said for Mr. Gayner to say that one phone call to the Town of Alton is sufficient, after spending well over a year with the state application process, is a slap in the face to the Town of Alton. T. Kinnon said he should have spent much more time with the Town of Alton and if he was unhappy with the service that he was getting from Mr. Boyers there were other people he could have talked to and he should have.

L. Avery agreed fully with T. Kinnon.

C. Westen said the applicant, his agent, or builder did not call for inspections as listed on the building permit. He said this shows a disregard for the rules and regulations of the Town of Alton. He said what appears to be a garage on the back of the boathouse was added with no application for it and this shows a blatant and utter disregard for the process. He said based on the application and the approved plans it appears there has been a blatant disregard made by the applicant, agent, or builder for what he intended to build and did build. He said there was no revision of the plans and there is no reason to have one and apparently only phone call to the Building Official witnessed if not to mislead the official or misrepresent the call and its facts. He said the applicant must apply for what he wanted to build and if there are major changes are made, than the applicant needs to re-apply. He said it is the applicant's responsibility to get approval for changes and get inspections done before proceeding with the project and this was not done.

L. Avery agrees and said the plans that are on file are clearly not what was built and the applicant went outside the realm when he did that. He said he should have come into Town Hall instead of relying on one phone call based on the project of this magnitude. He said a yes over the telephone is not an answer to go and build what the applicant wants.

M. Perry said that even the NHDES noted that the applicant had to come back to the Town of Alton, L. Avery Agreed and said that was stated.

M. Perry called for the vote and the motion carried with all in favor.

K. Menici read the case into the record.

Case #Z05-16

Map 53, Lot 3

Motion for a Rehearing

Robert Gayner Trustee

62 Temple Drive

Application submitted by Walker & Varney P.C. on behalf of the property owner Robert Gayner Trustee for a rehearing on Case#ZO5-06 regarding the April 7, 2005 ZBA decision denying the property owner's request for a Variance from Dimensional Requirements in order allow the height of a boathouse in excess of 15' as required by the 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 State of New Hampshire's Shoreland Protection District.

M. Perry spoke about the one of the questions that is asked on Variance request applications and that the Board had voted on before and that is whether it was consistent with the Spirit and Intent of the Ordinance. She said she wants to clarify that when the Board found that application was consistent with the Spirit and Intent of the Ordinance, all she meant was that the boathouses are generally allowed and with the exception of the height and the setbacks of this project, it would be allowable.

Robert Varney, attorney for the applicant, spoke and said they object and they have not appealed the Board's decision on the Spirit and Intent that was the final vote of the Board.

M. Perry said ok she made that statement because that was part of their deliberations as this discussion is.

M. Perry spoke about the first issue being "Substantial Justice" for the Variance.

- 1) She said that the applicant applied for and received approval to build a fully

conforming boathouse which would satisfy all the functions of this type of use. She said he wanted to build a 2-slip boathouse and he still can build a 2-slip boathouse that fully conforms to the ordinance.

She said he does not need the non-conforming design to obtain a 2-slip use. She said the Variance is requested because of the applicant's deviation from the approved plan and the personal desire for a particular design. The deviation was made only by the applicant's personal desire to have his boathouse designed like a very large train station with enough height to be able to accommodate a second floor. She said the design looks nothing like any train station in Alton or in the surrounding towns that she is familiar with. She said further, the connection of this property to early railroads is very remote the only connection is most of the properties in this area were serviced by a rail line that passed over their property. She said there was never a train station or depot at this property. She said the applicant's desire to have a train station design could be accommodated in other ways. She said a design to allow height is a workable option. The design without the area to accommodate a second floor and still be within the setback and height restrictions is more than possible as the building permit showed.

She said it is a serious mistake to waive the provisions of the ordinance merely on the desire of an applicant for a particular design. When function isn't the issue, as in this case, where you have a 2-slip boathouse and the desire for a particular design should not control the granting of a Variance, especially when the properties connection to the railroad is so remote.

She said like the question of "Substantial Justice" she said there is no "Hardship" in this case.

- 1) There is nothing unique about the property that requires a design of a larger and higher boathouse.
- 2) The applicant has demonstrated that he can design and build a fully functional, 2-slip boathouse that conforms fully to the ordinance.
- 3) The need to expand is not dictated by the uniqueness of the property but solely by the owner's personal design desire.
- 4) The property never had a train station on it merely had a rail line passing through it and it is not unique because many properties in the area had the same basic connections to the rail line and there was no depot on the property. The only that is unique is the applicant's personal design desires.

Motion made by M. Perry, seconded by C. Westen to deny Case#ZO5-16, based on the reasons stated above.

Discussion on the motion:

L. Avery said the structure that he has on top of his boathouse now could have been put anywhere else on the property it did not need to be located where it is. He said there is no "Hardship" because it could have been moved to a different spot, clearly.

C. Westen said the desire is for a particular use of a 2-slip boathouse and the use can be accomplished regardless of what the design is. He said there are no unique or unusual characteristics of the land that would require this type of design. He said if the Board granted Variances based on people's desires for a particular design then the Board is walking a slippery slope and there would be no need for zoning. He said why does the boathouse need to be high enough to accommodate what appears to be a second story-the

design function of a 2-slip boathouse can be built at 15’.

T. Kinnon said that the only hardship here is the one that Mr. Gayner has created. He said Mr. Gayner’s desire to put a “replica” of a train station over a boathouse and call a replica of a train station rather than a boathouse that has created the hardship. He said there is no hardship inherit with the land because there is sufficient land and area on the property to locate the replica elsewhere. He spoke about the “Substantial Justice” variance criteria. He said he doesn’t believe substantial justice would be done by granting the variance. He said the ZBA needs to weigh the considerations of the Town of Alton when they consider “substantial justice” and not just the property owner or the applicant. He said that justice for the Town of Alton would be for this variance not to be approved.

M. Perry called for the vote and the motion carried with all in favor.

R. Varney said that since M. Perry clearly read from her notes the whole time he wants them made as part of the record.

M. Perry said they are her personal notes and that the Secretary is taking minutes and the meeting is being recorded.

R. Varney wants the record to show that he asked that M. Perry to release the papers she was reading from for the entirety of her statements and that M. Perry refused.

M. Perry said that the meeting is being taped and the Secretary is taking minutes.

R. Varney asked if M. Perry drafted those notes herself and M. Perry said yes.

S. Tanguay said M. Perry does not have to answer the question by Attorney Varney and that Attorney Varney’s position is clear on the record as to his request and S. Tanguay wants to move on.

T. Kinnon spoke about adjusting the minutes and he said there is a significant error in the minutes from the June 29, 2005 Gayner Re-hearing. He said that it appears that the testimony for Case#ZO5-15 was put under Case#ZO5-16 and vice-versa.

L. Avery, C. Westen and M. Perry said yes the meeting went backwards and the minutes are correct.

Motion made by C. Westen, seconded by L. Avery to approve the minutes as presented from June 29, 2005, motion carried with all in favor.

Motion made by C. Westen, seconded by T. Kinnon, to adjourn at 6:25 pm, motion carried with all in favor.

Respectfully submitted,

Stephanie N. Verdile
Secretary