

**TOWN OF ALTON
ZONING BOARD OF ADJUSTMENT
APPROVED MEETING MINUTES
July 6, 2017**

The following members were present:

Steve Miller, Chairman
Paul LaRochelle, Vice-Chairman
Lou LaCourse, Clerk
Paul Monziona, Member
Tim Morgan, Member
Reuben Wentworth, Selectmen's Rep.

Others present:

John Dever, III, Code Enforcement Official
Jessica A. Call, Recording Secretary

I. CALL TO ORDER

Steve Miller called the meeting to order at 6:00 p.m.

II. APPOINTMENT OF ALTERNATES

Steve Miller stated there was no need to appoint any alternates because a full Board was present.

III. STATEMENT OF THE APPEAL PROCESS

The purpose of this hearing is to allow anyone concerned with an Appeal to the Zoning Board of Adjustment to present evidence for or against the Appeal. This evidence may be in the form of an opinion rather than the established fact, however, it should support the grounds, which the Board must consider when making a determination. The purpose of the hearing is not to gauge the sentiment of the public or to hear personal reasons why individuals are for or against an appeal, but all facts and opinions based on reasonable assumptions would be considered. In the case of an appeal for a Variance, the Board must determine facts bearing upon the five criteria as set forth in the State's Statutes. For a Special Exception, the Board must ascertain whether each of the standards set forth in the Zoning Ordinance have been or will be met.

IV. APPROVAL OF THE AGENDA

Steve Miller asked John Dever, III, if there were any changes to the agenda, he stated, there were none.

Tim Morgan moved to accept the agenda as presented.

Lou LaCourse seconded. Motion PASSED by a vote of (5-0-0).

V. CASE TABLED FROM MAY 4, 2017 MEETING

Case # Z17-07 Patrick Wood, Esq., Agent for Ronald Rubbico	Map 37 Lot 43	Variance Lakeshore Residential (LR) 8 Notla Lane
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Present were Patrick Wood, Esq., Agent for the Rubbico’s, Ronald Rubbico, and his wife, Nancy Rubbico.

Steve Miller asked if DOT had been notified as an abutter to this application, John Dever, III, stated that he received a call from Dave Silvia, NH Department of Transportation, and he had no issues with this application. Steve Miller asked if the elevation plan had been provided, John Dever, III, stated that it was in their packet.

Tim Morgan moved to accept Case # Z17-07 as complete.
Lou LaCourse seconded. Motion PASSED by a vote of (5-0-0).

Patrick Wood, Esq., referred the Board to the elevation plan, and to the original subdivision plan. He also mentioned the aerial photo, which showed how dense the foliage was on the Rubbico’s property. There was a picture of the site which showed a large tree on the left hand and a propane tank. The proposed garage was superimposed onto the picture so the Board would get an idea of where the garage would be built in comparison to the propane tank and the large tree. He further indicated that the survey showed dimensions of the garage and the setbacks.

Patrick Wood, Esq., stated that the shorefront property had a camp on it in the past, then years later, the property between 28A and the shorefront lot was conveyed to the Rubbico’s. He stated that their new house had to be built within the same footprint of the existing house. There were a number of rain gardens installed on the property, and the other important aspect was the leach field was moved to the opposite side of the land on the north side, 150 feet from the shore with a 75 foot setback. The proposed garage was 24” x 41”, approximately 5 feet from Route 28A and 12.5 feet from the edge of Notla Lane. The Rubbico’s received a letter from a neighbor stating they had no issues. Patrick Wood, Esq., stated that there was a 25-foot setback from the right-of-way, and because of the location of the leach field, the garage needed to be put towards the North side of the property. He stated that Notla Lane was not very wide and parking on the street created some issues. He thought that allowing the Rubbico’s to build a garage would provide safety to visitors to not have to park on the street, plus it provided storage because they could not build a basement due to the constraints from the State. The Rubbico’s were working on making the house their permanent home and they would need two bays to park their vehicles, the 3rd bay would be important, especially to prevent congestion on the street.

Patrick Wood, Esq., stated that a house without a garage was unusual. By allowing cars to be parked in the garage, they would be keeping the lane open for emergency vehicles. To the North of the proposed garage, there was a culvert on Notla Lane and it ran down to the Rubbico’s new house. He stated that the Rubbico’s could reconfigure the drainage from the culvert, so the water would run down and be contained in the new drainage that is part of the new house. Patrick Wood, Esq., stated that by taking a decades old camp and replacing it with a new house with updated codes made it safer. The Rubbico’s were also installing a geo-thermal and heating/cooling system. Substantial justice would eliminate the congestion and would not cause harm to the general public, but would be detrimental to the applicants. Building the proposed garage would not diminish surrounding properties, it would get cars off Notla Lane, and it fit well within their property. Unnecessary hardship, there was no way anything could be built, not even a shed without getting a variance. The Rubbico’s thought that the garage was an integral part of the property. They could not build the garage attached to the house because of the State’s 50-foot setback. Patrick Wood, Esq., stated that this was a unique situation and it would warrant the granting of the variance.

Steve Miller pointed out that Reuben Wentworth, Board of Selectmen member, was seated in the audience.

Paul LaRochelle asked if there was a 50 foot setback on the Notla Lane side of the house and whether or not the Rubbico's talked to the State to see if they could build the garage on the opposite side of the house, therefore relieving the request for a variance to one of the setbacks. Paul LaRochelle also mentioned that he plowed snow on that road during the winter and was familiar with the layout of the street. Patrick Wood, Esq., stated no, but if the proposed garage was built on that side, it would be a huge impact to the lake. Patrick Wood, Esq., pointed out that there were rain gardens in place, a patio, and drainage from the culvert would be redirected, therefore minimizing the water runoff into the lake. Mr. Rubbico stated that the State was strict about the setbacks in that they could not cut down trees, etc. Patrick Wood, Esq., stated that the Rubbico's procured a permit from the State to build the garage as they were proposing. Mr. Rubbico stated that he had talked to a person who was familiar with environmental law, and stated that it was unlikely that the State would approve this option. Patrick stated that part of the area in front of the garage would be for snow removal, and the snow could be pushed towards the leach field. Paul LaRochelle mentioned that now there were more people living year round on that street, and it was critical to have the road cleared of snow throughout the winter.

Paul Monzione thanked Patrick Wood, Esq., for the accuracy and completion of the application. He also stated that he was thinking the same thing that Paul LaRochelle was thinking regarding the side boundary line setback issue and right-of-way setback issue. Paul Monzione thought that if there was some encouragement from the State, it might make it easier to make a decision. He stated that the Board would be allowing a violation without getting some answers from the State. Patrick Wood, Esq., stated that there was a steep decline next to the house and it would impact the lake, plus there would be no water treatment area before draining into the lake if they were to put in on the Southerly side as the Board was proposing. Paul Monzione determined that the Rubbico's would be choosing the less impact route instead of even going before the state.

John Dever, III, spoke up about the layout of the property and shared that there was an approximate 35% slope on one side of the property and on Notla Lane down to the shore, there was a 50% slope, which would make it an approximate 15-16 foot garage foundation. The Rubbico's were limited to how many trees they could cut by the State. Paul Monzione noted that by looking at the plan, Mr. Rubbico's mother owned the lot to the North side of their property, and what, if any, issues would come up if another person owned the lot. Paul Monzione pointed out another issue he had, which was snow removal. He stated there was only 12 feet from the edge of the road to the proposed garage and wondered how would that impact snow removal. Patrick Wood, Esq., stated that the area of snow removal would be the leach field, and the Rubbico's would not push snow onto the other property. Paul LaRochelle stated that snow removal happened on both the North and South side of the street. Patrick Wood, Esq., stated there would be enough space for snow storage. Paul LaRochelle mentioned that the Northerly section of the neighbor's lot could become buildable, and if there were two structures within the setbacks, it could create a safety hazard.

Paul Monzione stated that on page 3 of the plan, it referred to redirecting stormwater. Mr. Rubbico stated that the State wanted them to place a dry well with some rip rap to prevent the stormwater from going directly into the lake. Mr. Rubbico also mentioned that the power lines would be placed underground.

Steve Miller asked Patrick Wood, Esq., what the unnecessary hardship was for a three-car garage, because there was no statute stating they would be entitled to one. Patrick Wood, Esq., stated that the configuration of the land around the garage would not allow another space to have a visitor park, unless they were blocking access to and from the garage. Steve Miller asked if they built a standard 24' x 28' garage, how less non-conforming would it make. Patrick Wood, Esq., stated they would still have to apply for a variance on one of the setbacks.

Lou LaCourse asked if there was an existing driveway. Mr. Rubbico stated that the current driveway was only a construction driveway. Lou LaCourse stated that if there was a driveway, they could park in it. Patrick Wood, Esq., stated that the driveway would be difficult to maneuver in the winter due to the slope of it. Paul LaRochelle stated that if it was maintained properly, it should not be an issue.

Steve Miller opened public input. No public input. Steve Miller closed public input.

Patrick Wood, Esq., in his closing statement, stated that he thought they met the criteria and asked the Board if they had concerns or suggestions.

DISCUSSION:

Steve Miller stated that there could be some alternatives, but they would reach the point to where it would be a hardship on the applicant more than the Town would. Tim Morgan stated that the suggestion of two bays did not take care of the issue of the setbacks. Paul Monziona stated that making it smaller would only get rid of the side setback. John Dever, III, stated that looking at the boundary plan, regardless of the setbacks, the 25-foot setback continued alongside the whole road. Paul LaRochelle commented on the driveway and thought that once construction was complete, it would accommodate about three vehicles, but they would only be able to drive in and back out. Lou LaCourse was concerned which would have the lesser impact, if it was reduced, it would not be in the setback at all, but they would have to build into the hill and he was a little torn on that thought. Lou LaCourse asked if there was an ability to shift the garage to the South side near the septic system, Patrick Wood, Esq., stated that was where the septic field was. Mr. Rubbico stated that they pushed the septic as far South as they could within the approval from the State.

Steve Miller closed discussion and moved the Board onto the worksheet.

Lou LaCourse stated that the variance **will not** be contrary to the public interest. He stated the property had a significant hill, which was an issue. Steve Miller stated that there was an effort to get cars off Notla Lane and still left space for emergency vehicles, and it also improved drainage.
All Board Members agreed.

Steve Miller stated that the request **is** in harmony with the spirit of the Zoning Ordinance, the intent of the Master Plan, and with the convenience, health, safety, and character of the district within which it is proposed. He stated that it was a single-family residence and the use of a three-car garage was a reasonable one, and it was reasonable to expect to have a place to put storage.
All Board Members agreed.

Paul LaRochelle stated that by granting the Variance, substantial justice **will** be done. He thought they did a great job with the project and were doing anything they could to take care of water runoff. Tim Morgan stated that the benefit to the applicant far outweighed the detriment to the Town. Steve Miller stated that the garage would eliminate a hazardous condition in regards to emergency access.
All Board Members agreed.

Tim Morgan stated that the request **will** not diminish the value of the surrounding properties. He stated there was no testimony to the diminished value of the property.
All Board Members agreed.

Paul Monziona stated that for purposes of this subparagraph, “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (i) **No** fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;
- (ii) The proposed use **is** a reasonable one.

He stated this particular property was in between two rights-of-ways and there was no way to construct a structure on that area of the lot without encroaching into the setbacks. In addition, given the topography there was nowhere to relocate the garage on the lot. He thought that a garage was a reasonable use for this property. Lou LaCourse thought that since the other lot would not see much construction, he agreed. Paul LaRochelle stated that he did not totally agree with everyone and he wanted to see a denial from the State, but he also believed the State would say no. All Board Members agreed.

**Paul Monzione moved to accept Case # Z17-07.
Paul LaRochelle seconded. Motion PASSED by a vote of (5-0-0).**

Steve Miller asked if the picture depicting the location of the proposed garage was to be made an integral part of the application. Paul Monzione stated that any evidence that was provided to the Board would be binding.

VI. NEW APPLICATIONS

Case # Z17-15 Jonathan H. & Nancy J. Downing, Applicant Melba F. & Kristina A. Oickle, Trustees of the Melba F. Oickle Rev. Living Trust of 2006, Owners	Map 32 Lot 44	Administrative Appeal Residential/Commercial (R/C) 4 Barr Road
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Present were Jonathan H. and Nancy J. Downing.

**Paul LaRochelle moved to accept Case # Z17-15 as complete.
Steve Miller seconded. Motion PASSED by a vote of (5-0-0).**

Jonathan H. Downing stated that the Barr farm abuts the property of the Oickle’s. His great uncle owned it for many years then his father and his uncles purchased it from the Barr’s. In 1998, the Downing’s acquired the property from his father and two (2) uncles and they still live there on Barr Road.

Nancy J. Downing stated that she was affected by this situation and thought that a decision was made in error. Mr. Downing stated that he did not receive John Dever, III’s, further comments until 3:30 p.m. this afternoon. Mrs. Downing read from her response dated July 6, 2017:

“Under Appeal from an administrative decision: The review should encompass not only Section 320 A. 2, but 320 A.4. Specifically, in addition to Section 320 A.2, we are also appealing the abandoned ‘non-conforming use’ to include Section 320.A.4; Expansion of use. The record should also show the Appellants’ objection to the Code Enforcement Officer carrying out his own staff review when the Appeal arises as a result of his decisions.

ISSUE #1. ABANDONMENT:

In case law, abandonment is described as: “the relinquishment, giving up or renunciation of an interest,

claim, civil proceeding, appeal, privilege, possession, or right, especially with the intent of never again resuming or resurrecting it.”

SECTION 320A.2. of the Town of Alton’s Zoning Ordinance, as previously read into the record, states: “Any nonconforming use which is abandoned shall not be re-established or resumed”. Abandonment occurs (in part) when the nonconforming use is replaced with another use, with no proven intent on the part of the Owner to continue its operation.

The appellants contend the use was replaced by another use, therefore constituting ABANDONMENT. That is, the original use of the “Lamplighter Cottages” was for rentals, whether on a daily, weekly, or seasonal basis. This use was discontinued when Gordon and Melba Oickle purchased the property in 1996 and the “Lamplighter Cottages” sign was removed. The rental use was changed to private use when, according to the Oickle family member’s statements to the Code Enforcement Officer: “since taking ownership the cabins have not been rented, although they have been used annually by the family”.

Hence, the use of a seasonal rental cottage colony to personal use by the family constitutes abandonment of use. The appellants further contend the Drafters of the Ordinance did not envision “Multiple dwellings on a non-conforming lot”. The Zoning Board of Adjustment should be reminded the subject property consists of less than 0.4 of an acre and has a three bedroom residence and three additional cabins, each with a minimum of one bedroom.

Therefore, the contention is not that the cabins themselves have been abandoned for a period of eighteen months, but that the owners replaced the use, with no proven intent to continue its operation by their own admission. Abandonment of use.

ISSUE #2. EXPANSION OF USE:

As outlined in the Complaint Form, dated November 21, 2016, at least two of the cottages have been converted to year-round residences; the cottages have been insulated, and have had year-round, frost free, water installed. In addition, electrical upgrades have been made. No permits were found in the file. The Code Enforcement Officer’s NOTICE OF VIOLATION, dated 18 April 2017, reiterates these facts. Following the gradual conversion of the abandoned seasonal cabins into year-round residences, the cabins have been rented on a year-round basis (i.e., including the winter months). Parking has been accessed via Barr Road, which is a Private Road, and to which no easements are afforded in the Oickle’s chain of title.

In summary, the appellant’s position is: The Town of Alton Zoning Ordinance has been adopted and amended from time to time by the citizens of Alton for the purpose and authority as outlined in Section 110 of the Zoning Ordinance, and therefore it should be adhered to. It shall not be the Code Enforcement Officer’s option to negotiate agreements. In addition, the use of a “Substantial Justice” standard, which Mr. Dever refers to in his 12 June 2017 letter to Attorney Brook on the subject matter, is employed only by the Zoning Board of Adjustment when application for a variance has been made and has no relevance to violations of the ordinance.

As citizens of the Town of Alton, we expect the spirit and intent of the Zoning Ordinance to be adhered to without feeling aggrieved.

Therefore, the appellants recommend the Zoning Board of Adjustment make a decision for the Violators

to immediately cease the abandoned and expanded non-conforming use, and to further let the record clearly state, if and when the property is marked then it is represented solely as a three bedroom residence with three abandoned cabins or other buildings, not to be construed as a multi-dwelling complex, and not to be inhabited for seasonal and/or year-round use.”

Mrs. Downing stated that the work done on the cabins took place on November 2015, at which time John Dever, III, was the Code Official. She also stated that there were no building permits pulled, and therefore, if there were any permits sought, the State would have required a septic system to be built to today’s standards. Mr. Downing stated that he ran into someone that rented from the Oickle’s and stated that he had rented from them in 2011.

Steve Miller asked John Dever, III, for his statement.

John Dever, III, stated that he tried to get his additional comments out as soon as he could, and the reason he was the one writing up the response to the Downing’s appeal was because the Town Planner was on vacation, normally the Town Planner would be the one to do the write up. He stated that the Oickle’s had continued to use the rentals for family members and during the discussion with Jim Sessler, Esq., Town Counsel, they determined the use had been abandoned, but the use of the cabins as rentals had not been abandoned. Steve Miller asked if this was a verbal or written discussion, John Dever, III, stated, verbal. John Dever, III, detailed the fact that a zero (0) bedroom included everything, the kitchen, living room, and bedroom were one room, like a studio apartment. He sent out the Notice of Violation and met with Mr. and Mrs. Oickle and Ms. Dodge on site. In discussing the use, they had been occupied during the winters by family members. John Dever, III, stated that when they took their seasonal residence and turned it into a year-round residence, it required a Special Exception, but back in 2009, the previous Code Official instructed them to make the changes without obtaining one. He also shared that the 300 gallon concrete septic tank had been pumped on a regular basis and wondered why there were no complaints filed back then about these changes.

Paul Monziona asked a question about the process of this application. He was concerned that under the State Statute, an applicant had the right to appeal a decision of the Code Official, but what did the regulation mean exactly. He stated that the Administrative Appeal process stems from an interpretation of what the Code Official determined what an ordinance meant. Paul Monziona stated that he was not sure if whether the Board had the jurisdiction to rule on an appeal on a determination on facts and not an interpretation of an ordinance.

Steve stated if there was a dispute of facts, the issue was another matter. Tim Morgan stated that it appeared that the issue was the interpretation of the word “use.” He wanted to seek some legal guidance from Town Counsel before he could make a decision.

Steve Miller agreed that they needed legal advice to find out if the Board could even hear the application in the first place. He asked the Board if they should table the case in order to get some advice. Paul Monziona stated that a Code Enforcement’s interpretation of an ordinance was appealable to the ZBA and thought that the Downing’s might have to appeal to Superior Court.

Mr. Downing stated that he would like the Board to move forward. Mrs. Downing stated that she made a complaint back in November, but it was not addressed until April of this year.

Steve Miller stated that the Board was unsure if they could provide a legal decision. Paul LaRochelle stated that he thought that the Board should hear from the witnesses who were present. Steve Miller stated he was uncomfortable that since they were now unsure if the Board should hear the case to begin with.

Paul Monzione moved to table Case # 17-15 to the next meeting to allow the Board to seek legal counsel as to what the Board's role was.

Steve Miller seconded. Motion was PASSED by a vote of (5-0-0).

VII. OTHER BUSINESS

1. Previous Business:

- a. John Dever, III, shared that in regards to Case # Z17-11, David Livingston's Special Exception, that after speaking to Jim Sessler, Esq., Town Counsel, he stated the Board did the right thing in delaying their decision due to the pending DES investigation.

2. New Business:

- a.

3. Approval of Meeting Minutes: June 1, 2017

Paul Monzione moved to table the minutes of June 1, 2017, to the next meeting.

Tim Morgan seconded. Motion was PASSED by a vote of (5-0-0).

4. Correspondence. None.

VIII. DISCUSSION

Paul Monzione asked John Dever, III, to set up a meeting with Jim Sessler, Esq., Town Counsel, in order to discuss the jurisdictional issue regarding Case # Z17-15, Administrative Appeal.

Steve Miller noted that the next Zoning Board of Adjustment meeting would be held on August 3, 2017.

IX. ADJOURNMENT

At 8:20 p.m., Paul Monzione moved to adjourn.

Tim Morgan seconded. Motion PASSED by a vote of (5-0-0).

Respectfully submitted,

Jessica A. Call
Planning Secretary

Minutes approved as amended: August 3, 2017