

**OGUNQUIT ZONING BOARD OF APPEALS
MEETING MINUTES
JULY 14, 2011**

CALL TO ORDER - 7:00 PM

Mr. Smith called the Roll with the following results:

Members present: Jay Smith – Chairperson
 Larry Duell – Vice Chairperson
 Mike Horn
 Roy Wooldridge
 Doug Mayer – 1st Alternate

Members Excused: Glenn Deletetsky– Secretary

Mr. Smith confirmed that a quorum was present, and that the Agenda would be followed as posted.

Mr. Smith noted that in the absence of Mr. Deletetsky Mr. Mayer would be a full voting member for this meeting.

ACCEPTANCE OF MINUTES - October 28, 2010

Mr. Wooldridge Moved to Approve the Minutes of the October 28, 2010 Meeting as Submitted.

RW/ 5/0 UNANIMOUS (no 2nd required)

UNFINISHED BUSINESS - None

NEW BUSINESS –

- 1. DAVID HANSON - HANSON PROPERTIES, LLC – One Acorn Lane (Map 7 Block 45). Variance Appeal Under Article 5.2.B.2.a. Request for residential setbacks to be applied to lot in the RD/GBD2.**

Mr. Smith asked if there was any Board member who felt he had a conflict of interest sufficient to disqualify him from hearing, and deciding, this case in an impartial manner. There was no one.

Mr. Smith confirmed that the Board had standing/ jurisdiction to hear this case.

David Hanson addressed the Board as the representative for Hanson Properties, LLC. Mr. Hanson provided an overview of his June 17, 2011 letter to the Board as well as the contents of

his application *(both of which will be archived in the Applicant's file at the Ogunquit Land Use Office)*.

Mr. Duell asked when the Applicant purchased the property; he noted that the Ogunquit Tax Card indicates that it was purchased in 2002.

Mr. Hanson confirmed that it was purchased by Hanson Properties, LLC in 2002.

Mr. Horn asked for the square footage of the proposed new structure.

Mr. Hanson responded that the floor plan of the building is 472 square feet. He agreed that the square footage is not on the plans provided to the Board.

Mr. Horn responded that according to his calculations the structure's total square footage will be 1,406 square feet +/- which does not exceed the allowed 30% lot coverage.

Mr. Smith added that given that the lot in question is 4,690 square feet it appears that the proposed plan does not exceed the allowable lot coverage.

Mr. Wooldridge noted that even in the RD there has to be a 25 foot setback for the portion of the house in the GBD2. He suggested the Applicant may need another variance for that portion of the house.

Mr. Hanson responded that it would have to be more stringent than he has indicated in the GBD2. He added that the Code Enforcement Officer labeled the drawing with 15 feet and he (Mr. Hanson) did not change it and show 25 feet in the GBD2. If he had shown 25' for the portion in the GBD2 it would make the area of eligibility even smaller and the property even less developable.

Mr. Smith asked Mr. Lempicki to explain the use of 15' vs 25' setback.

Mr. Lempicki responded that the Residential portion of the Hanson lot abuts another Residential property which is why the setback is only 15'. If it abutted a commercial property the setback would be 25'.

Mr. Mayer asked if the use of the property as a residence, or a commercial, property is relevant.

Mr. Hanson responded that the property has historically been used as a seasonal rental, until it became too run down to rent to seasonal guests, at that time it began to be used as employee housing which is its current use. The Appellant's intention is to return it to seasonal rental status with a possible sale in the future.

Mr. Wooldridge reminded the Board that there is nothing to prevent any single family residence from being rented, as long as it is only rented for single family use.

Mr. Horn added that it can not be used as a place of business, or as an extension of the Juniper Hill Inn.

Mr. Lempicki informed the Board that Hickory Hill Lane does not wrap around the property as indicated on the Town's maps. The area between the Juniper Hill Inn and this property is fully vegetated with trees. The only access to this property is from Acorn Lane.

At 7:25 p.m. Mr. Smith called for input from the public. He asked if there was anyone who wished to speak for, or against, this application.

Janet Anderson, 32 Hickory Hill Lane (Map 7 Block 44) stated that she is generally in support of this proposal however she is concerned about the preservation of the natural setting of this neighborhood. She would not like to see any of the trees removed.

Mr. Horn suggested she work with the applicant to come to a mutually satisfactory agreement. He also noted that the applicant is well within the rear setback requirements and he is legally entitled to put the house where it is.

Fred Lynk, 21 Hickory Hill Lane (Map 7 Block 39). Mr. Lynk asked if the Applicant might use the existing building footprint but go up another story. Mr. Lynk is happy to hear that the Applicant intends to use the property for residential purposes. He agreed with Ms. Anderson that it is important to maintain the natural setting particularly the very large, very old oak tree at the rear of the property. Mr. Lynk pointed out that most of the other homes in the neighborhood are small cottages and he is concerned about the impact of a large home being built in their midst. His last concern was the access which will be required for large construction equipment to come into the area. He noted that access to Acorn Lane is off of Green Needle Lane which is a private road and he asked if the Applicant has been given permission from the Ogunquit Riverview Assoc. to use it for this purpose.

Mr. Smith asked if Mr. Lynk was a neighbor or a direct abutter.

Mr. Lynk responded that he is not a direct abutter but he is very close.

Mr. Smith noted that Mr. Hanson is present and is now aware of the neighbors' concerns which may be outside the jurisdiction of this Board. Construction details fall under the purview of the Planning Board. That being said Mr. Smith confirmed that this Board does have the authority to impose conditions such as buffering, if appropriate for the case.

Mr. Smith asked if Mr. Lempicki has been inside the existing building and if there are any existing code violations.

Mr. Lempicki responded that he has been inside a portion of the building but not the entire thing, there is a water problem which has caused a stench and it is structurally not as sound as it might be.

Mr. Smith asked if there are any building code violations.

Mr. Lempicki responded that when this structure was built the Town of Ogunquit was part of Wells and there was no building code.

Mr. Smith closed the public portion of the Hearing at 7:35 p.m.

Mr. Smith summarized that this is a case involving a property which is divided between two zoning districts (RD and GBD2) with approximately 50% of the land in each district. The total parcel is less than one acre. Based on current definitions this property contains a non-conforming building on a non-conforming lot, and portions of the building do intrude into the setbacks regardless of which district's standards are applied.

Mr. Horn remarked that the Board needs to determine what portion of the structure is in which district so that they can establish the applicable setback requirements.

Mr. Mayer referred to Zoning Ordinance Article 1.4.D, which states that:

*“Where a zoning district boundary line divides a lot or parcel of land in the same ownership of record at the time such line is established by adoption or amendment of this Ordinance, **the use regulations applicable to the less restricted portion of such lot may extend not more than 50 feet into the more restricted portion.** This provision shall not, however, be applied when the more restrictive district is a Resource Protection District or the Shoreland Overlay District, nor when the less restricted portion lies within the Downtown Business District. The space and bulk regulations of the district shall apply to the land within those districts and are not subject to the 50-foot provision.”*

Mr. Smith noted that from a homeowner point of view, the more restrictive district in this case is the GBD2. Therefore Mr. Smith's interpretation is that the use regulations that apply to the Residential District (RD) trump the ones of the GBD2, or put another way this is a lot where the use rules for the RD apply.

Mr. Lempicki agreed.

Mr. Smith asked Mr. Lempicki - if the “use” regulations allow flexibility when a property is split between two districts; can the same be said for “dimensional” requirements as found in Table 703.1?

Mr. Lempicki responded that the Ordinance doesn't specifically address this circumstance.

Mr. Smith agreed and suggested the Board might call this a gray area which gives them room for interpretation. He summarized that the Applicant has the right to call this property “Residential” based on Section 1.4.D, and the Applicant's intent is to not make this a commercial property but to keep it for residential use. Mr. Smith extrapolated that the Dimensional Requirements follow the Use Requirements. Mr. Smith acknowledged that the Board may be breaking new ground with this interpretation.

Mr. Horn agreed with Mr. Smith and noted that if the Board imposes GBD2 standards upon this property there will be a setback violation, however if the Board agrees with Mr. Smith's line of reasoning and applies the standards of the RD to this property then it does meet all standards and no variance is required.

Mr. Duell pointed out that following this logic no variance is required, only a motion to overturn the Code Enforcement Officer's denial of the building permit.

**Mr. Horn Moved to Uphold the Appellant's request that Residential Setback standards be applied to One Acorn Lane (Map 7 Block 45).
HORN/WOOLDRIDGE 5/0 UNANIMOUS**

Mr. Smith stated for the record that this decision is based upon the Board's interpretation of Section 1.4.D of the Ogunquit Zoning Ordinance, as well as the Board's interpretation that Dimensional Requirements are a subset of Use Requirements as outlined in Table 703.1.

**2. MARK MACLEOD – 57 Bayview Ave. (Map 10 Block 14-A-2).
Variance Appeal Under Article 5.5.2.B.2.c. Request to relocate a non-conforming house to less non-conforming location, enclose existing deck, and place house on a full foundation. No building footprint enlargement is proposed.**

Mr. Smith asked if there was any Board member who felt he had a conflict of interest sufficient to disqualify him from hearing, and deciding, this case in an impartial manner. There was no one.

Mr. Smith confirmed that the Board had standing/ jurisdiction to hear this case.

Mr. MacLeod informed the Board that his wife was diagnosed with Multiple Sclerosis in 1997. They purchased the property at 57 Bayview Avenue in 2006 and at that time they were somewhat concerned about her future ability to negotiate the stairs as her disease progressed. From 2007 to 2010 Mrs. MacLeod's condition deteriorated significantly. She is often confined to a wheelchair and she is now all but unable to access the 2nd floor of the house which they intend to make their year round residence.

Harvey Wells addressed the Board as the Applicant's representative. Mr. Wells gave the Board a brief overview of the proposed architectural plans. The proposal involves the construction of a full basement to replace the existing crawlspace. The Applicant will take this opportunity to bring the building more into conformity. By moving the building to its proposed location they will reduce the non-conforming lot coverage by approximately 1%.

The Applicant is asking to enclose the existing deck which will become a bedroom and a bathroom for Mrs. MacLeod. Other than the enclosing of the deck, with a slight addition into the rear setback, there will be no exterior changes to the building.

Mr. Wooldridge asked how the basement will be used, and whether or not it will be used as a bedroom.

Mr. Wells responded that it will be a full basement as permitted by the Town Ordinance and the IRC Code. It will not be used as a bedroom or sleeping area.

Mr. Smith asked for confirmation that the intent of the basement is not for living space.

Mr. Wells confirmed this.

Mr. Duell added that the basement could be structurally remodeled for use as living space by installing a bulkhead and/or window-well, however Town Ordinances make it clear that this is not allowable in this case.

Mr. Smith noted that the Applicant has responded that there is no intent, at this time, to make the basement into living quarters, however the Board has to consider any future occupants who may have other ideas.

Mr. Wooldridge pointed out that under the Town Zoning Ordinance the only thing residents can enclose, without it being considered an addition to habitable space, is a porch, which is defined as a deck with a roof. Clearly this applicant is asking to enclose a deck. The enclosure of this deck to make more habitable space will require the Board's making an exception, however the Board may base such an exception on medical necessity.

Mr. Wells responded that the extent of the encroachment will be about two feet (2') out and ten feet (10') across. This is the only portion of the deck that the Applicant is asking a variance for.

Mr. Smith noted that the Board may want to debate this. He added that relocation of a non-conforming property triggers several other issues. He wondered if the Americans With Disabilities Act might apply.

Mr. Duell asked about the dogleg which is indicated on the bottom left corner of the plans.

Mr. Wells responded that the dogleg will be part of the final construction. They do not intend to change the building's configuration except for the enclosing of the deck. The proposal is to raise and rotate the building.

Mr. Smith confirmed that the Applicant will not be demolishing and rebuilding, but rather will be lifting and rotating the building and placing it on a new foundation.

Mr. Wells agreed.

Mr. Lempicki interjected that every dwelling is required to have a four foot (4') frost wall.

Mr. Mayer pointed out that a portion of the property seems to be in the Shoreland Limited Residential District.

Mr. Lempicki responded that there are two lots in this parcel, and the dwelling in question is on the back lot. The front lot is in the SOD. Thus part of the land area is in the SOD, but the MacLeod's house is in the RD.

Mr. Duell asked if this is a condo.

Mr. Lempicki responded that it is. The owners share the land in common but the two buildings are under separate ownership.

Mr. Mayer noted that due to the proximity to the Shoreland District the water table may be less than four feet from the surface. He asked what will happen if they hit the water table while excavating the new foundation.

Mr. Lempicki responded that they will have to have the soil tested to see where the water table is, and if they go too deep they will have to have a sump pump running constantly. They may be able to have a full cellar or they may end up with a crawlspace.

Mr. Smith pointed out that this is a Code issue.

At 8:15 Mr. Smith closed the Public Session.

Mr. Smith summarized that this case involves the relocation of a non-conforming structure on a non-conforming lot. Mr. Smith referred to Article 3.3.D of the Zoning Ordinance which states that: *"A nonconforming structure may be relocated within the boundaries of the parcel on which the structure is located provided that the site of relocation conforms to all setback requirements and provided that the applicant demonstrates that the present subsurface sewage disposal system meets the requirements of State law and the State of Maine Subsurface Wastewater Disposal Rules, or that a new system can be installed in compliance with the law and Rules."*

Mr. Horn pointed out that the Applicant's variance request is based on Article 5.2.B.2.c which states that: *The board may grant a variance to an owner of a dwelling for the purpose of making that dwelling accessible to a person with a disability who resides in or regularly uses the dwelling. The board shall restrict any variance granted under this subsection solely to the installation of equipment or the construction of structures necessary for access to or egress from the dwelling by the person with the disability. The board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the person with the disability lives in the dwelling. For the purposes of this subsection, a disability has the same meaning as a physical or mental handicap under 5 MRSA, §4553 and the term "structures necessary for access to or egress from the dwelling" is defined to include railing, wall or roof systems necessary for the safety or effectiveness of the structure.*

Mr. Horn reminded the Board members that this provision has always been restricted to things such as access doorways and ramps etc. and that it has always been fairly restrictive. He also noted that section of the Article which states that the Board may impose conditions on the variance, including limiting the variance to the duration of the disability or to the time that the

person with the disability lives in the dwelling. He pointed out that in this case the changes resulting from this proposed request could not be removed.

Mr. Smith briefly reopened the public portion of the procedure and asked the Appellant why he based his application on Article 5.2.B.2.c.

Mr. MacLeod responded that this was the only section of the Ordinance he could find which addressed disabilities.

Mr. Smith agreed that the Town Ordinance is directed at things such as ramps which may be temporary and can be removed when the disabled person is no longer living in the home. He also noted that the Americans With Disabilities Act (ADA) is very specific with regard to specifications for building code, however it is primarily directed toward public access to public buildings. When private homes are involved the Town's Ordinance takes precedence. He asked Mr. Lempicki if he has dealt with other codes which cover interior alterations to buildings for this type of purpose.

Mr. Lempicki responded that he has been involved in alterations to bathrooms, but primarily ADA alterations involve ramps and widening of doorways etc.

Mr. Wooldridge remembered this Board granting a variance for an overhang to prevent winter ice building up on a stairway. That variance was based on the Life Safety Code.

Mr. Smith agreed, and noted that this appellant did not mention the Life Safety Code however the Board might allow the Appellant to amend his application to include Life Safety. He reminded the Board members that they have, in the past, allowed appellants to do this. He also agreed that the Article the Appellant cited is very restrictive regarding the granting of variances, restricting them primarily to the installation of equipment for ingress or egress.

Mr. Smith returned to Article 3.3.D and noted that it allows for the relocation of a non-conforming structure on a non-conforming lot, and he pointed out that this proposal will reduce the nonconformity, and he challenged the Board to find a way to grant this application in order to help this family.

Mr. Horn asked if there was a time constraint on this application.

Mr. MacLeod responded that weather is his primary concern, winter could push his construction into next summer. They would like to begin construction as soon as possible so that they can move in this year. This is because of his wife's health as well as their financial situation. It would be difficult for him to maintain two homes for another year.

Mr. Wooldridge asked if the Appellant couldn't enclose the porch without moving the house.

Mr. Smith noted that one of the six standards upon which a variance may be granted is "is there any alternative?", and he noted that the answer in this case would be Yes. This would be a "NOT MET" which automatically generates a denial. The only thing that could trump this might be the

medical / ADA issue. Mr. Smith also reminded everyone that the discussion still needs to come back to the relocation of the structure which, according to the Ordinance, should bring the structure back into conformity.

Mr. Smith also pointed out that if the Board grants this variance request and the Appellant sells the property after the changes have been made, the Board may have allowed for an upgrading of property under false pretenses. He confirmed again that the Board can not grant the requested variance based upon the Article cited by the Appellant on his application.

Mr. Duell noted that the ordinance allows for relocating a building in the Shoreland if it makes it less non-conforming. But he noted that this structure isn't in the Shoreland.

Mr. Smith asked the Board to consider the criteria under Section 5.2.B.2.a. He suggested that it would be difficult for the Board to find that Standard iv is "Met".

Mr. Duell pointed out that there are two definitions for "relocation", one for the Shoreland District which strictly states that "relocation conforms to all setback requirements to the greatest practical extent" and another for non-conforming lots which states that the relocation must meet all dimensional requirements.

There was some discussion regarding the use of the deck as access for Mrs. MacLeod should she require wheelchair accessibility.

Mr. Smith asked for the Appellant's permission for the Board to modify his appeal in order to make a decision based upon Article 5.2.B.2.a rather than the originally requested Article 5.2.B.2.c.

Mr. MacLeod agreed.

The Board reviewed the six standards which must be met under Section 5.2.B.2.a:

- i. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood;*
- ii. The granting of a variance will not produce an undesirable change in the character of the neighborhood and will not unreasonably detrimentally affect the use or market value of abutting properties;*
- iii. The practical difficulty is not the result of action taken by the petitioner or a prior owner;*

The Board agreed that Mrs. MacLeod's illness creates the difficulty and is not the result of any action taken by her or Mr. MacLeod.

- iv. No other feasible alternative to a variance is available to the petitioner;*

Mr. Smith reminded the Board that the Petitioner's proposal will make the structure less non-conforming.

- v. *The granting of a variance will not unreasonably adversely affect the natural environment;*
- vi. *The property is not located in whole or in part within the shoreland zone.*

Mr. Smith noted that the Board very much empathizes with the Appellants and wants to assist them, however the Board must abide by the requirements of the Ordinance. He noted that the problem arises from Standards i and iv.

Mr. Smith asked if there is an existing bath on the first floor.

Mr. MacLeod responded that there is a small bathroom on the first floor but it is not large enough. There is also a small room on the first floor which could be used as a bedroom however it is also very small, there is no closet, and the doorways are not wide enough. Neither room is suitable for someone using a walker or wheelchair.

Mr. Mayer agreed that leaving the house on the existing foundation is less feasible.

Mr. Horn Moved to Consider the Appellant's Application under Article 5.2.B.2.a rather than the originally requested Article 5.2.B.2.c, with the Appellant's permission.
HORN/WOOLDRIDGE

Mr. Smith confirmed with the Appellant that he agrees to the substitution of Article 5.2.B.2.a for Article 5.2.B.2.c.

Mr. MacLeod agreed

Mr. Smith restated Mr. Horn's motion:

**Mr. Horn Moved to Consider the Appellant's Application under Article 5.2.B.2.a rather than the originally requested Article 5.2.B.2.c, with the Appellant's permission.
HORN/WOOLDRIDGE 5/0 UNANIMOUS**

The Board reviewed the six standards of Section 5.2.B.2.a and found that all six have been met.

Mr. Horn Moved to Grant the Appellant's Variance Request under Article 5.2.B.2.a with the conditions that:

- 1. there will be no aggravation of any nonconformity, and in fact the proposal will lessen existing non-conformities;**
- 2. the practical difficulty noted in subsection iii of Article 5.2.B.2.a is solely driven by Mrs. MacLeod's medical condition;**
- 3. the expansion of the basement shall in no way be considered to be an expansion of the habitable living area. The basement shall not be allowable living space for any future occupants.**

HORN/WOOLDRIDGE 4/1 (Mr. Duell Dissenting)

Mr. Wells thanked the Board for its diligence and compassion in this matter.

CODE ENFORCEMENT OFFICER BUSINESS – None

OTHER BUSINESS –

Mr. Wooldridge noted that it is time to elect officers and to confirm the Board's By-Laws.

Mr. Wooldridge Moved to Retain the Board's sitting officers: Mr. Smith as Chairman, Mr. Duell as Vicechair, and Mr. Deletetsky as Secretary.

WOOLDRIDGE/HORN 5/0 UNANIMOUS

Mr. Wooldridge Moved to Accept the Board's By-Laws as written.

WOOLDRIDGE/HORN 5/0 UNANIMOUS

ADJOURNMENT –

Mr. Wooldridge Move to Adjourn at 9:18 p.m.

WOOLDRIDGE/HORN 5/0 UNANIMOUS

Respectfully Submitted

Maryann Stacy
Recording Secretary

Approved on September 1, 2011