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**OGUNQUIT ZONING BOARD OF APPEALS
MEETING MINUTES
October 9, 2014**

CALL TO ORDER - 6:00 PM

Members Present: Jay Smith - Chairperson
Glenn Deletetsky - Vice Chair
Peter Griswold - Secretary
Mike Horn
Doug Mayer
Jerry DeHart (1st Alternate)

Also present: Scott Heyland, Code Enforcement Officer
Maryann Stacy, Recording Secretary

Mr. Smith noted that a quorum was present.

ACCEPTANCE OF MINUTES – August 28, 2014

**Mr. Horn Moved to Accept the Minutes of August 28, 2014 Meeting as Submitted.
HORN/MAYER 5:0 UNANIMOUS**

UNFINISHED BUSINESS - None

NEW BUSINESS –

Jim Manning and Barbara Dailey – 22 Russell Way – Map 15 Block 53 Lot 5. Request for Reconsideration of the Board’s August 28, 2014 Denial of an Application for a Fifteen Foot (15’) Dimensional Standards Setback Relaxation to construct a deck, egress doorway, and exterior stairs at the rear of a single family dwelling, and extending to the property line.

Mr. Smith asked if there was anyone on the Board who felt he had a conflict of interest sufficient to disqualify him from hearing and deciding this case in an unbiased manner. No one did.

Mr. Smith asked the Board members to consider whether this case met the criterion for reconsideration. He noted that any party aggrieved by a decision made by the Board may petition the Board to reconsider. Mr. Smith reminded the Board members that a decision in favor of reconsider is based upon at least two criterion, which are established by Maine Statute, Town Statute, and Zoning Board of Appeals By-Laws. He asked if the resubmitted application contains sufficient factual errors, or did the Board follow any improper procedure, or did the Board act beyond its jurisdiction?

Mr. Smith also asked if the Board in any way misinterpreted the Ordinance or failed to follow proper procedure, or was its original decision based upon faulty information.

Mr. Smith pointed out that Article XI of the Board's By-Laws addresses the concept of reconsideration and states that:

"Any party aggrieved by a decision or order of the Board or a Board Member may petition the Board to reconsider a decision.

The Board may reconsider a decision only if:

- 1) The record contains significant factual errors due to fraud or mistake, regarding facts upon which the decision was based;*
- 2) The Board misinterpreted the Ordinance, followed improper procedures or acted beyond its jurisdiction; or*
- 3) If a second application for a variance on property where a variance was previously denied is substantially different from the previous one."*

Mr. Smith asked the Board members to consider whether or not there was crucial information, not available at the time of the original hearing that is available now, has there been a substantial change of circumstances since the original vote?

He posed the question: Does the Board have substantial new information which was not made available to the Board at the original Hearing? Mr. Smith confirmed that all members were in attendance at the first Hearing, and the vote was unanimous in denying the application.

Mr. Smith stated that any discussion, regarding reopening the case, requires a procedural motion from a Board member who voted in the affirmative to deny the original application. He noted that the motion requires a second, it is debatable, it is not amendable, and requires a vote after discussion.

Mr. Griswold Moved to reconsider the case based upon new information which was not available when the Board met the first time.

GRISWOLD

Mr. Mayer asked if the Board is aware of any new information.

Mr. Smith responded that the Board members received a new packet of information and he asked if, in Mr. Mayer's opinion, any new information was included in this packet?

Mr. Mayer responded that it would depend on whether or not the reconsideration request is based upon medical necessity. If that is the case then there is new information.

For purposes of discussion, Mr. Mayer seconded Mr. Griswold's Motion:

Mr. Griswold Moved to reconsider the case based upon new information which was not available when the Board met the first time.

GRISWOLD/MAYER

Mr. Smith noted that the Board would discuss reconsidering the case, the meeting is not open to the public at the moment, and the Board will debate whether or not to hear the case. He noted that it was incumbent upon the Appellant to provide any and all information one week before the Meeting. He confirmed that the motion on the floor is whether or not to reconsider the Board's August 28th Decision to deny the application.

Mr. Horn disagreed that the information provided is new, he argued that the information provided by the applicants in the most recent packet is only additional information and is not "new". He reminded the Board that the Applicant stated at the August 28, 2014 Meeting that there was a member of the household with a medical condition and that was the reason for the request to place the deck on the rear of the house. All the Board has been given as a basis for reconsideration is a bit more information about the medical condition.

Mr. Smith pointed out that the Appellant had made it very clear that he did not want to base the application on a medical condition. Even though the Board attempted to prompt him to discuss it, the Appellant was very clear that he did not want to discuss medical issues.

Mr. Horn stated that all the Board has in front of it now is an enlargement, or explanation, of what was referred to, but not fully explained at the last meeting. Mr. Horn expressed his belief that what the Board has been given is not new information.

Mr. Smith asked if it was "extensively greater" than what the Board had at the first Hearing.

Mr. Horn responded that it was greater; however he did not feel that the doctor's letter clearly spelled out the problem or the treatment.

Mr. Smith suggested the Board differentiate between the quality of the information and the fact that the Appellant seems to be basing the request for reconsideration on a medical issue which was not the basis for the Board's decision on August 28th.

Mr. Mayer pointed out that there is a letter from a doctor which the Board did not have at the first Hearing and he (Mr. Mayer) considers it to be new information.

Mr. Griswold agreed.

Mr. Deletetsky agreed that some of the letter's content is new information.

Mr. Horn disagreed, he contended that the "new information" is only an extension of the information provided at the August 28th Hearing.

Mr. Smith stated that, based upon the fact that the initial Hearing was not based upon the medical condition of the Applicant, he is in favor of reconsideration. The medical condition was mentioned but it was not considered as part of the decision process. The Board had no right to consider it then because the Applicant made it very clear that he did not want the Board to consider it.

Mr. Smith called for a vote.

Mr. Griswold Moved to reconsider the case based upon new information which was not available when the Board met the first time.

GRISWOLD/MAYER 4:1 (Mr. Horn Dissenting)

Mr. Smith stated that the Board has determined that the case has standing and he opened the public portion of the hearing and asked who would speak on behalf of the Appellant.

Sandra Guay, Attorney for the Appellant addressed the Board. She noted that bringing medical information into a public forum is a difficult thing to do and it was the Applicant's hope, at the first hearing, that only a limited amount of information would have to be discussed. However the Applicant is now willing to provide additional information. She noted that the board members currently have a letter from a medical doctor in front of them; the letter indicates what is needed for long term treatment. She stated that there is nothing more to add to that other than the recommended treatment for this particular patient.

Ms. Guay agreed that it is very difficult to get a variance under the "hardship criteria", which is why the State Legislature came up with the "practical difficulty test". Particularly for people when dealing with their primary home and there is a setback variance that is required. The Practical Difficulty test is a relaxed standard from the Hardship Test and it doesn't need to meet the hardship criteria that the other variances require.

Ms. Guay referred to the first standard which states that the need for the variance is due to the unique circumstances of the property and not to the general condition of the neighborhood. Ms. Guay disagreed with the Board that the property is not unique. She pointed out that the house is a very long thin house. The reason the house is shaped that way, and it's the only one in the neighborhood that is shaped that way, is because of the road that comes into the lot, and the wetlands which surround the building envelope. She noted that out of the approximately 24,000 square feet of the lot, only about 12,000 square feet is net buildable. The rest is wetlands that cannot be disturbed.

Ms. Guay pointed out in order to meet the setbacks for the road and the T-Turnaround the house was forced up against the rear setback line. She noted that this is a unique situation which is why she looked at the other houses in the neighborhood to see if there were any others with this

situation. There were none, this is the only one. It is for that reason that she believes that this property is unique from all the other properties in the neighborhood and that it does pass the first standard which states that the need for the variance is due to the unique circumstances of the property and not to the general condition of the neighborhood.

The next standard Ms. Guay addressed states that *the practical difficulty is not the result of action taken by the petitioner or a prior owner*. She noted that the Board determined that the practical difficulty here was the deck. She disagreed suggesting that the practical difficulty is not the request for the deck but rather, what it is about the property that makes what they want to do impossible.

Ms. Guay noted that the house was not built by this applicant, nor was it built by the previous owner; it was built three owners ago. There was no anticipation at that time that this diagnosis would come forward and that any treatment plan would require eastern exposure which is in the back of the house where the setback line is.

The third standard Ms. Guay addressed is *no other feasible alternative to a variance is available to the petitioner*. Ms. Guay noted that the property owners have spent a great deal of time working with the Code Enforcement Officer looking for alternatives. They investigated purchasing land from a neighbor which was not possible because it would make that lot nonconforming. There are no other alternative locations which would provide eastern exposure.

In addition to the new medical information Ms. Guay requested reconsideration for those three review standards as well.

Mr. Smith noted that at the previous meeting it was determined that the property was purchased by the Applicants in 2009 and the diagnosis was made in 2010. He asked what transpired between 2010 and 2013 with regards to the Applicant's handling of the medical condition?

Ms. Guay responded that this was between the physician and the patient, however at some point the doctor developed the treatment plan.

Mr. Smith asked what has happened which now makes it imperative to have an outside deck, as opposed to some other treatment plan?

Ms. Guay responded that the doctor has advised one hour early morning sunlight with enough room for callisthenic exercise. She noted that illnesses progress and change over time and the doctor may have altered the treatment plan.

Mr. Smith advised that if any of the Board's questions violate any doctor patient confidentiality he asked Ms. Guay to let them know. He pointed out however that the physician's letter was addressed "to whom it may concern" and it also has a sentence which states that if there are any further questions "feel free to call".

Mr. Smith again referred to any alternatives to a deck. He noted that if the doctor was present he would ask why a deck is the only solution to the patient's problem.

Ms. Guay stated that she does not believe that it is appropriate to debate the patient's diagnosis, she noted that she isn't qualified to discuss a physician's determination of treatment. She pointed out that the doctor is clear about the importance of eastern exposure and the rear of the house has the only eastern exposure. She informed the Board that the Applicant is willing to scale back the size of the requested deck, the Applicant only wants enough space to be able to do what the doctor recommends.

Mr. Smith responded that the Board is required to consider whether or not there are any other alternatives to the Applicant's request for a deck. He wondered about what alternative treatments the Applicant has tried and if a deck is the only alternative.

Mr. Mayer noted that the letter from the doctor is dated over a year ago.

Ms. Guay responded that it is probably misdated that it should be dated 2014.

Mr. Mayer asked if there are any differences between morning and afternoon sunlight.

Ms. Guay responded that she does not know.

Mr. Mayer asked what is east of the Applicant's home, is it a wooded lot?

Mr. Manning responded that it is a wooded lot however there are sections where a great deal of light comes through. The thicker wooded area is more to the southern end of the property behind his.

Mr. Griswold noted that this development was built in 2001, he suggested that there may have been changes to the "wetlands" and asked if the Maine DEP has confirmed the determination that the Applicant's property does in fact still contain wetlands. He asked if it is feasible to get DEP confirmation of the extent of wetlands on this site, because if it is not wetlands and is buildable then there is the option to place the deck elsewhere.

Ms. Guay responded that they relied on the approved subdivision plan. She noted that wetlands are generally protected so that they do not change. She agreed that it is possible to get DEP to revisit the site, however it was not that long ago and it would be unlikely that the wetlands have receded. She added that wetland determination was stamped by a soil scientist when the plan was approved.

Mr. Griswold stated that the Board does not know for sure. He also noted that past variance approvals granted for medical reasons required the removal of the approved addition if the medical condition changed or if the person requiring the structure were to vacate the home.

Mr. Smith responded that a handicapping condition that goes away either through the person getting well or vacating the property then the structure should be removed. He used the example of a handicapped ramp which can be located in a setback but it would have to be removed when the person who it is built for no longer requires it.

Mr. Smith responded to Mr. Griswold's comments regarding the wetlands. He noted Article 2 of the Windward Subdivision Documents which requires DEP involvement if there is ever any change in the designation of the wetlands. He noted that this property includes a "covenant area" which includes not only wetlands, but streams, etc and may not be developed in perpetuity without DEP approval. Mr. Smith also noted that for the Board to suggest that the deck could be relocated flies in the face of the doctor's recommendation that the patient requires eastern sunlight.

Mr. Mayer noted that the Board has three types of Variances which they may consider. This case was originally presented as a Relaxed Dimensional Standards Variance request. He asked if it is now being presented as a Disability Variance.

Ms. Guay responded that it is not being changed, and she asked the Board to consider the last paragraph in Section 5.2.B.2.A of the Zoning Ordinance which states that "*As used in this subsection, "practical difficulty" means that the strict application of the ordinance to the property precludes the ability of the petitioner to pursue a use permitted in the zoning district in which the property is located and results in significant economic injury to the petitioner.*"

Ms. Guay suggested that if the petitioner has to move because her doctor is saying she needs something which she cannot get at her home, that would be a significant economic injury.

Mr. Mayer asked for confirmation that this application is not being considered under the disability variance.

Ms. Guay confirmed that it is not, because it would have very specific statutory requirements that do not apply in this case.

Mr. DeHart asked if any changes have been made to the plan.

Ms. Guay responded that it has not been altered.

Mr. Mayer asked if there are any other homes in Windward built right up to the setback line.

Ms. Guay responded that she doesn't see any lots similar to the applicants'.

Mr. Smith referred to the definition of Practical Difficulty which has to do with the petitioner's ability to pursue a use permitted in that particular zoning district. He noted that there is nothing that is going to preclude the use of residential family. If the Board considers the economic injury where the use (residential family) cannot be pursued, Mr. Smith suggested that there is nothing that will come of the Board's decision which will preclude that use. Economic injury comes into play when the owner cannot even use the land.

Ms. Guay responded that when the applicant cannot use the land it is the hardship test under the stricter variance requirements, when there is no practical use for the land the owner will lose all economic benefit if it can't be used. The Practical Difficulty is a more relaxed standard.

Mr. Smith expressed his belief that there may be alternatives to eastern sunlight. He suggested that the physician's letter may be a little strict in his statement that the "only" solution is eastern sunlight. Mr. Smith stated that the Board has a mandate to protect the setback. If there is any other way than to violate the setback then the Board must explore it. Mr. Smith suggested modifications to the structure or alternative treatments. He also noted that relocating the deck is an alternative.

Mr. Smith expressed appreciation for the Applicant's willingness to reduce the size of the aggravation into the setback.

Mr. Horn disagreed. He stated that a reduction of the size of the deck does not change the fact that it is a violation into the setback.

Mr. Deletetsky asked "why a deck"? Mr. Deletetsky stated that a person can get easterly sun exposure without a deck.

Ms. Guay responded that the trees behind the house and the level of the house require a deck to access the morning sunlight.

Mr. Deletetsky asked about a patio accessed from the basement.

Mr. Mayer pointed out that the doctor's letter says nothing about a deck.

Mr. Manning stated that the basement is a walkout basement and early sun does not reach ground level in the back of the house. A six to eight foot elevation would make a huge difference.

Mr. Deletetsky asked about a rooftop deck.

Mr. Manning responded that this would work.

Mr. Mayer expressed concern that this is not a disability variance, and the lack of a deck is not an economic hardship.

Mr. Griswold asked if the applicant has any disability to climb stairs.

Ms. Guay responded that there is not. She also noted that significant alterations to the structure of the house, such as a roof deck which would require cutting into the roof structure would be a significant economic hardship.

Mr. Smith asked if there were any additional questions for the applicant. There being none the Public Portion of the Hearing was closed at 6:55 p.m.

Mr. Horn summarized that this request for reconsideration requires the Board to review three of the five standards which the Board found to be not met at the last Hearing. He holds with the Board's previous determination that they are not met. He also asked if the medical considerations currently put forth are sufficient to allow a variance to the setback. Mr. Horn expressed his belief

that there are alternatives to a deck and this new information does not rise to the level of reversing the Board's August 28th decision to deny the variance.

Mr. DeHart asked where the Board can question a doctor's diagnosis.

Mr. Smith responded that the Board is not questioning the doctor's diagnosis. The question is whether or not outside exposure is the only alternative, and if a deck is the only way to get that.

Mr. Smith went on to say that the Board could grant the variance with the stipulation that the structure/deck must be removed if the medical condition no longer requires it or the applicant moves. The Board might also suggest the alternative of steps from the basement to a patio.

Mr. Heyland stated that steps in the grade would be permissible.

Mr. Mayer asked if a deck might be cantilevered from the second floor.

Mr. Heyland responded that it could not, the setback extends vertically and all overhangs are considered. He also noted that structural changes which might effect the height of the building may not be acceptable to the homeowners' association.

Mr. Deletetsky asked why the sunlight exposure has to come directly from behind the home? He noted that a walk on the beach in the morning would provide full easterly exposure. He voted to reconsider because of the medical letter but he is left wondering why a deck needs to be certain size, and if it has to be a deck, and does it have to be where the applicants want to put it?

There was discussion regarding the possibility of tabling the application pending additional medical information. It was determined that further time would not be productive.

Mr. Smith noted that the Board is walking a line between compassion and being in strict compliance with the statutes.

Mr. Mayer noted that if the Board were to agree to the variance it must be with the condition that the deck be removed if the medical condition ceases, or if the applicants vacate the property. He noted that someone would be responsible for seeing that this is done. In addition there are conditions which may be set by the Windward Homeowners Association.

Mr. Deletetsky noted that there were conditions in place when the Windward Subdivision was Approved that were more stringent than other subdivisions. The building envelopes were more restrictive because the open space requirements were more restrictive. Mr. Deletetsky questioned how a new Code Enforcement Officer somewhere down the line is going to be able to track these types of required removals.

Mr. DeHart pointed out that the variance with the removal condition may be added to the deed. Variance Certificates are attached to the deed.

Mr. Horn asked if there is a medical necessity to build a deck, or is there an alternative way for the Applicant to obtain direct sunlight?

The Board agreed that treatment may require direct sunlight, however a deck is not the only alternative to achieve that.

Mr. Griswold agreed with Mr. DeHart in his discomfort probing further into the medical condition of this applicant. The Board needs to look at the request which is not for disability, and the Applicants failed the test at the August 28th Hearing. Regardless of the Board's compassion for the applicant this application appears to be clear.

Mr. Horn Moved to Uphold the Original (August 28, 2014) Decision to Deny the Variance Request.

HORN/DELETETSKY 5:0 UNANIMOUS

Mr. Smith informed the Applicant that the Board has upheld the denial for a request for a variance.

CODE ENFORCEMENT OFFICER BUSINESS – None

OTHER BUSINESS –

Planning Board, Boarding House Discussion Input

The Board discussed the Planning Board's work regarding the control of Boarding Houses in Town.

Mr. Smith suggested that there are two issues under discussion:

- 1) Is the definition of Boarding House correct?
- 2) Where do Boarding Houses belong?

Mr. Smith noted that there is a need for housing for summer staff. In the past hotels and other large businesses provided staff dormitories and other housing. Over time these large businesses have done away with providing housing for their staff and summer workers are responsible for finding their own places to live.

Mr. Smith suggested to the Board members that if they have an idea on language for the Boarding House Definition they submit it to the Planning Board individually. He noted that there may be a relaxing of control over the behaviors and activities of occupants of Boarding Houses. He asked the Board to consider the implications of in-house managers.

Mr. Heyland noted that the problem is the activity of several individuals living in a single family house which by default is characterized as a single family home rental. The goal is to have houses containing several seasonal workers living together classified as a "boarding house" which has certain areas in town where it is not allowed, such as a residential neighborhoods.

Mr. Heyland noted that the original proposal was to change the definition of “family”. He noted that there is difficulty defining “family” without alienating someone.

Mr. Smith asked if boarding houses are inspected or approved by someone.

Mr. Heyland responded that if they are built, or used as a boarding house there is a different set of criteria for Life Safety than that of residential single family homes. He noted that the Meadomere boarding house has a full sprinkler system, fire alarm system, several means of egress to meet the Life Safety Code.

Mr. Heyland informed the Board that there will be a Planning Board Workshop regarding this issue on October 27th and the Zoning Board Members are welcome to attend and participate.

Mr. Heyland noted that other towns’ definitions note no more than five unrelated persons living together in a residential neighborhood. The true concern is overcrowding. While there are limitations as to how many people can live within a certain amount of space it is difficult to regulate.

Mr. Griswold suggested the imposition of the Life Safety Code could be used to control overcrowding and unregulated boarding houses.

It was suggested that there might be a long term plan put in place to require hotels and other large businesses to provide appropriate housing for staff.

Mr. Smith again encouraged Board members to provide their opinions and suggestions to the Land Use Office for dissemination to the Planning Board.

ADJOURNMENT –

Mr. Griswold Moved to Adjourn at 7:45 p.m.
GRISWOLD/MAYER 5:0 UNANIMOUS

Respectfully Submitted


Maryann Stacy
Recording Secretary

Approved on March 5, 2014