

TOWN OF CENTER HARBOR  
ZONING BOARD OF ADJUSTMENT

Hearing

Monday September 10, 2018

7:00 p.m.

Chair Bernie Volz called the meeting to order at 7:00 p.m. Present were members Jean Melony, George Lamprey, Anthony Avrutine. Alternate members Karen Ponton, Susan Patz, Stephany Marchut Lavallee and Clerk Aimee Manfredi-Sanschagrinn. In the audience Ken Ballance Code Enforcement Officer, ZBA's Attorney Laura Spector-Morgan, Attorney Springer representing applicant Mark Sudbey, John Stephens, Mark Stephens, Brie Stephens, Bill Ricciardi, Jill Weed and Ben Bare.

I. **MINUTES**

Karen Ponton motioned to accept the June 11, 2018 minutes as written. Seconded by Jean Meloney. All were in favor minutes pass.

**Voting Members: Bernie Volz, Jean Meloney, George Lamprey, Anthony Avrutine, Karen Ponton**

II. **HEARING – VARIANCE MARK SUDBEY 103-015 PROPETY LOCATED AT 24 DEW POINT LANE**

Chair provides rules of protocol to all of those in attendance, stating if there is dialogue with the Board it is to go through the Chair.

Clerk announces the case before the Board is an application for Variance submitted by Mark Sudbey. Mr. Sudbey's case is being presented by his Attorney Johnathan Springer under case number 2018-0910. The application was submitted on August 21, 2018, and was hand delivered to the office. No other correspondence for the Board. Notice was posted in the Post Office, Town Office, Library, Town's Website and the Laconia Daily Sun.

Chair asks the applicant's Attorney if he would like to enter the application in its entirety into the record Attorney Springer states yes. Application entered into the record, applicant is asked to present his case.

Attorney Springer announces himself for the record and provides a summary of the application for the Board and the public in attendance. Attorney Springer is representing the applicant Mark Sudbey. Attorney Springer is joined by John Stephens of Stephens Landscaping. Attorney Springer presents a full size plan to review with the Board, a reduced copy was submitted with the application. The full size plan shows the side setbacks from the property lines. Attorney Springer states the question about side setbacks was raised in the previous hearing and I thought addressed but as it was raised again we placed that information on the plan.

The property in question is 24 Dew Point Lane owned by Mr. Sudbey. Mr. Sudbey purchased the property from Mr. Battaini on April 27, 2018. Mr. Battaini in turn purchased the property in 2014 that was when Stephens Landscaping became involved. Prior to Mr. Battaini purchasing the property there was an existing patio area on the property and we are not sure who built it or when it was installed. According to our notes, the patio was approximately 587 sf of impervious surface. To our understanding, Mr. Battaini was never told the patio was illegal or not in accordance with the Town's Zoning Ordinance. I understand today it still very well be that it is illegal but in fairness to the current property owner, the previous property owner and Stephen's Landscaping, they had an existing patio that was impervious and Mr. Battaini decided to expand that area. They received approval from NH DES but mistakenly did not apply for a variance with the Town for they believed the DES permit was all they needed. When it was brought to the attention of Mr. Battaini that was not the case Mr. Battaini filed a variance application with this Board and I think as everyone knows, that variance application was denied. We have appealed that decision to the Superior Court but we put that on hold and stayed that case in order to come back before the Board with a revised plan to address some of the issues.

Attorney Springer continues, the original patio has approximately 1423 sf of impervious surface. This new plan removes much of the impervious area and turns much of it into pervious service which we believe again to be a very important point. We are proposing to remove the existing blue stone patio and revegetating that area with grass. We are removing the impervious surface around the grill and replacing with grass and some stepping stones. The sand lock joints are being removed from the upper patio which then makes it pervious allowing rain to go through the joints and filter out. The cross section, as Mr. Stephen's can speak to, has material underneath which is pervious. By taking out the sand lock joints and replacing it with pea stone the entire upper patio becomes a pervious service. A new driveway infiltration trench will be installed.

The revised plan removes everything within 50' of the lake and between 50'-75' of the lake it reduces the impervious surface from approximately 1400 sf to 51 sf. We believe that is important because we are seeking a variance from Section 5: 3:1 which states that a single patio shall be allowed per lot within the 50'-75' of the shoreline assuming that it meets the following criteria one of which is that it does not exceed 150sf in foot print. It's important to understand that the term patio is a defined term in your ordinance Section 2:2:25 (reads definition from ordinance). The materials outlined in the definition are all impervious services and we believe that the intent is that when read the definition with Section 5:3:1 that we don't want 150 sf of impervious surface. That's why when you build your patio and you use brick, pavers, gravel, stone or any comparable material, that's all impervious surface and therefore, if it's in excess of 150 sf you cannot do that. This patio is not impervious it's pervious sand therefore it's not running afoul of the section that says a single patio has to be less than 150sf which again is because the patio is defined as impervious surfaces.

The original patio there when Mr. Battaini purchased the property did not fit that definition, honestly the revised or existing patio there now does not but this proposal does.

I just want to go through the criteria for the variance. From the previous decision, the board found on Criteria 1 that there would be no diminution of value to surrounding properties. Again, understanding this is a new case this plan with even less of a footprint will have that same finding. The next two criteria are usually viewed together, in our opinion the basic objection in Section 5:3:1 is to reduce run off, reduce impacts on the lake and we think this plan does it and we think the last plan did as well. Criteria 4, the general public actually benefits from this plan we are proposing now because of better drainage and control of the water. We think that the loss to the property owner if this not allowed and he has to rip up this whole thing is so severe that it does not counter balance gained by the public. Criteria 5, a couple different arguments here. I think the variance makes for a more controlled way for run off. The shape of the property is unique, it does catch a lot of run off and this is an excellent way to control it. The use is a reasonable one as patios are allowed under the ordinance. This is a permitted use we are proposing it's just a question of what the footprint should be. We believe special conditions exist in approving the variance.

Chair asks if there are any questions.

**Susan Patz:** There seems to be a lot of grass and it may be challenging to grow grass in that area. What kind of fertilizers are used to maintain that lawn?

**Mark Stephens:** There is a 100' set back in the Town on the lake and we use an organic program there.

**Susan Patz:** I'm curious to the perviousness of the stones. So in between the stones what is that material?

**John Stephens:** It's a pea stone base and crushed stone.

**Chairman:** And per the definition it's still made out of stone. The definition of the patio said stone and this is still stone. The definition does not say continuous stone so I want to point out the definition is pretty vague. We don't know if this is an improvement over what the ordinance intended.

**Attorney Springer:** I read the definition as a patio being impervious.

**Ken Ballance:** I wrote the ordinance and what was intended was to give an area which historically, nothing was allowed ever. It was to give the property owner an area, pervious or impervious it didn't matter, in which to utilize. The 150 sf came down as a fairly small unobtrusive area for it to be done. There was never any intent to whether it was to be pervious or impervious. What you take out of the 50' set back, the ordinance deals with the 50'-75', that kitchen area is inside 50' of the shoreline and we don't allow anything period.

**Chairman:** Do you have any qualified specialists that have answered the question about the run off?

**Attorney Springer:** Mr. Stephens.

**Chairman:** It's nice that you are reducing the proposal but we are coming from our original standpoint which is there is nothing on the ground at the location. What may have been there before technically is not legal so we need to approach this as what was there before any of this was started. While you're comparing what is there now to what you are proposing and it's reducing the impact, we are still looking at this as what should have been zero square feet to what you are proposing which is 949 sf. We are looking at this application as 150 sf is permitted nothing has been disturbed and the applicant is looking for 949 sf.

**Attorney Springer:** I guess I would answer that two ways. The State of NH approved the larger impervious footprint, they would not do that if it would negatively impact run off into the lake. This is less than that approval significantly, that is number one. Number two, John Stephens can address the point in terms of what I just said. The existing conditions were an improvement in terms of drainage and run off, this proposed plan is an even bigger improvement because it does do away with virtually all of the impervious surface.

**John Stephens:** A pervious patio can really be compared to lawn or a vegetated area. I know this is a hard surface but it's designed to accept water at a rate that is better than lawn area. This patio that's permeable will accept water at faster rates if not equal rates as the lawn right next to it.

**Susan Patz:** Where is the data for that?

**John Stephens:** The State has endless amounts of data on permeable stones and water management.

**Susan Patz:** I would like to see the data for that kind of surface. It's a broad impervious surface with joints, the run off can't be the same as natural vegetative area but I haven't seen the data to compare.

**John Stephens:** There are design pavers that accept water, asphalt that can accept water.

**Susan Patz:** But we are talking about this design though.

**John Stephens:** Yes and the State has accepted the natural stone patio with pea stone joints and the underlayment of the crushed stone base to be like the permeable pavers and the permeable asphalt.

**Attorney Spector-Morgan:** Is there documentation about that?

**John Stephens:** Yes there is.

**Attorney Spector-Morgan:** Maybe you might want to submit that.

**Attorney Springer:** We will do that.

**George Lamprey:** Contextually so I have the correct understanding, the Shore Land Protection Act has minimum standards and a community or town can adopt stricter standards. The stricter standards will apply correct?

**Attorney Springer:** I agree with part of what you said, I would not term any State standards for setbacks from bodies of water minimal. They can be very difficult to meet, however, the second part of your statement is true. The Town can adopt stricter regulations.

**Jean Meloney:** Correct me if I'm wrong but doesn't the Town overrule the State?

**Attorney Springer:** Well you have to meet both. You don't over rule the State but it's in addition to.

**Chairman:** Ken a question I have for you, the definition did not include anything about pervious or impervious surfaces for the patio (inaudible Ken states gravel is pervious, multiple responses from public no it's not) listen it doesn't matter, I just want to find out was this consideration for having the patio of a 150 sf what went into that size determination?

**Ken Ballance:** Unobtrusive, small area which was a compromise giving a reference point as a maximum. A lot of forethought was put into it by speaking to people that were building at the time, asking what they would like to have there. A table and a few chairs was the consensus so roughly a 10 x 15 area.

**Chairman:** No discussion based on the size and impervious surface?

**Ken Ballance:** No there was no discussion about that, it was a compromise because some individuals didn't want to allow anything in that zone and after all these years of looking at that and being a builder myself we thought there should be a compromise somewhere. The run off portion of it was not an issue because normal ground in that area will pick up that little bit of water that is hitting the hard surface. Obviously grass or nature's way is the best to handle run off.

**George Lamprey:** I think I heard a reaction to the word gravel and whether that was pervious or impervious and I think what I heard was that it's definitely impervious is that correct?

**John Stephens:** That is correct.

**George Lamprey:** So since that is within our definition that would indicate there is not a distinction between pervious and impervious. When you are articulating the definition of a patio, you are indicating that the patio was relative to impervious surface.

**Attorney Springer:** Right

**George Lamprey:** Ok thank you I just needed to have it straight.

**Ken Ballance:** Only when it deals with percolation.

**John Stephens:** Which defines permeability.

Chairman asks if anyone would like to speak in favor of the variance. Hearing none, Chairman asks if anyone would like to speak in opposition.

**Ben Bare:** 249 Whittier Highway. This pervious and impervious issue, I really question whether what they are proposing is really any better than grass. In my experience I think grass handles water runoff and filtration the best. I don't think you can meet that percolation requirement with pea stone or rocks. The second issue is I don't think the intent of the ordinance is being met. I think if you grant the variance everyone else is going to want the same thing. It's in violation of the ordinance now with this size patio.

**Chairman:** Thank you. Anyone else that would like to speak in opposition?

**Chairman:** Hearing none, would anyone like to rebut?

**Attorney Springer:** Just a suggestion, if the Board believes that Mr. Stephens is not sufficient as an expert we would be happy to submit a report for next month on every point I just said regarding the drainage, permeability etc. If the Board has any questions on whether or not this will improve drainage etc. We would be happy to supply something and the Board can accept and redeliberate next month.

**Attorney Spector-Morgan:** I think the question for the Board is does it make it better compared to nothing versus this proposal. Not compared to what's there versus this proposal.

**Jean Meloney:** You spoke to the slope of the land being greater to surrounding properties. How much greater because you are stating that in the application.

**Attorney Springer:** We can check that as well, I believe there is a sufficient slope down Dew Point Lane.

**Chairman:** We are not really concerned with the issues uphill on the road we are really only concerned with the area in question.

**Jean Meloney:** It's stated the shape of the property and the slope is what makes the property unique.

**John Stephens:** I would like to make a point about the permeable patio not being as good just lawn. Lawn needs upkeep to take care it, if you cut your lawn everyone knows you leave the clippings there that provides extra nitrogen, phosphorous not to mention there's sediment that can move amongst the lawn. The patio you have a hard stone the rain hits it the water goes into the joints and into the ground there is no nitrogen or phosphorous so taking that patio out and putting more lawn there versus the added buffers we added along the shoreline there is more movement for these things to go into the lake. With this proposal, the water hits the patio and filters down into the ground, it's not carrying sediment it's not carrying any nitrogen or phosphorous with it.

**Attorney Spector-Morgan:** May I make a suggestion Mr. Chairman, the first time the Board went to view the property it was during the winter, if we are going to continue the hearing to the next meeting anyway, does it make sense to have the Board do another site visit so you can see what they are talking about here without the snow? Board Members agree with this suggestion.

**Ken Ballance:** I just want to ask a question, how this became a segway from discussing what we allow, which is 150 sf, to them proposing 949 sf and how it's going to help the drainage? That's not the issue, the issue is not the drainage, the issue is you are allowed 150 sf and now you want 949 sf when you had 1400 sf. I don't understand.

**Chairman:** The only argument would be that if these changes would improve something. You know it's hard to understand what was exactly there before.

**Ken Ballance:** I can show you what was there before I have pictures.

**Chairman:** Before 2014?

**Ken Ballance:** Yes, there were rocks that were laid around which they were calling a patio and the only patio that was actually there was down by the lake. Within 20' of the lakefront then around a tree there were some stepping stones. There were natural stones and grass. Again, that's not my point, the point is the fact that you are discussing if this will help drainage and so forth is because you are thinking of allowing such a large amount. I don't get it, I'm not finding the reasonable logic for this discussion for why it's so important to have proper drainage because if we didn't have the patio we wouldn't be discussing it.

**Chairman:** Again the only question is did the run off issues previously versus now is that a special condition of the property that doing this would help. We have to look at the conditions of the property and see if this would apply.

**Attorney Spector-Morgan:** Also, one of the criteria in-fact several of the criteria, relate to the spirit of the ordinance and whether or not this would violate the spirit of the ordinance. I think what the Board and the applicant are trying to get at is if the spirit of the ordinance is as they say to prevent an impermeable surface in that area then if there is a permeable surface there, does that then fulfill the intent of the spirit of the ordinance. I think it's very relevant to what the Board needs to discuss. Though I hear what you're saying that if it wasn't so big then we wouldn't need to have this discussion.

**Ken Ballance:** Well I have to disagree with you on that but that's ok.

**Attorney Spector-Morgan:** If there is any other information the Board wants to evaluate I would encourage you to ask for it now so they can get it all to you before the next meeting.

**Chairman:** Yes, we will keep the hearing open and just discuss what other information we may want to have.

**Susan Patz:** I guess I just need clarification, I'm on the lake quite a bit and have seen what development has done to it. When I see that much grass and it is a sloped lot even with some type of barriers there is still a lot of run off into the lake. The maintenance to keep that grass so green concerns me. I'm not an expert on this so I would like to know what the data says about this. Anytime we add more nutrients to an environment we are going to have excessive growth and it's going to be in the lake.

**Chairman:** Section 11:8:2 under prohibited uses outlines what cannot be used with 100' of a water body.

**Ken Ballance:** It has to be applied by a licensed individual.

**Mark Stephens:** We are not licensed so we contract that out to someone who is.

**Attorney Springer:** But we will be happy to address that point.

**George Lamprey:** We've talked a lot the spirit of the ordinance, a lot of speculation as performance being an issue and what it is you wish to achieve by protection of a water body. Any regulation usually has to have a standard from which that becomes articulated, which in this case is 150 sf. So you are at the issue of, is the spirit of the ordinance met through performance despite the talk of something so large versus 150 sf and I'm not going to answer that right now I'm just putting that out there as one of the questions we have to deal with.

**Attorney Spector-Morgan:** You absolutely have to deal with that but I think you should focus on right now is what information they can give you to help you answer that question.

**Stephany Marchut-LaVallee:** One of the things for me is that you are calling this pervious and the piece you are showing me is not pervious.

**John Stephens:** It is pervious. Cru-Con parking lot is pervious, it doesn't look like it but it is.

**George Lamprey:** I think the general consensus is that we would like more information on how this slope varies from other properties in the general area. I don't know how you grasp the permeability question from the starting point of the lot without the existing conditions. I'm not sure how you will capture that. Does the applicant have any issues relative to the uniqueness of the lot that we have not hit upon that makes this different in the neighborhood?

**Attorney Springer:** I think we stand on what is written in the application.

**Ken Ballance:** To clarify, I went back to where we had the discussion in my notes when we talked about where the 150 sf size came from, the presumption was that if someone wanted to build it with pervious stone it wasn't going to need to be listed. The idea was to keep it from being a deck. What is listed under that definition is what is commonly used.

**Jean Meloney:** As I look at the definition of patio I myself don't see it as the intent being impervious or pervious. I think the intent was the size for outdoor recreational use. To allow a place to gather that is not in excess or damaging to the surrounding areas to the lake.

**Attorney Springer:** Following up on that, why would you ban pervious surface if you can build a patio with sod. Based on what the CO said is in his notes, why would you have a prohibition against pervious.

**Chairman:** I don't think there is a prohibition.

**Attorney Springer:** That is exactly my point, there is no prohibition against a pervious surfaces being used as a patio. You can have a lawn and put chairs out and call it a patio and you would have to come in and get a variance. I know that's an extreme example but a pervious surface means that the water goes down it doesn't go into the lake. So if you're saying the prohibition includes pervious surfaces, you are saying in effect you need a variance from something that isn't causing a problem.

**Ken Ballance:** That has nothing to do with it.

**Attorney Springer:** That has everything to do with it. If I may, this is why I read it the way I did because in my opinion it makes zero sense and I thought he just said it wasn't designed for pervious surfaces we didn't want a deck. I get that you cannot define every single surface that someone will choose for a deck. They can use wood they can use plastic they can use whatever they want but the one thing they all share is that they are impervious. We are not going to solve it tonight but that is why I read it as I did.

**Ken Ballance:** It was only done so a large natural area wouldn't be disturbed that was the whole idea. We are allowing you to do something other than put your lawn chairs on pine needles or grass because most places we are dealing with don't have grass they have natural cover to them so we allowed this little area in order for them to do that. That was its pure intent.

**Attorney Springer:** That may very well be true, I was not there the only thing I can say is how I read it and pine needles are pervious.

**Ken Ballance:** And they are also natural, they belong there.

**George Lamprey:** I need a clarification as to what you stated in the beginning of your presentation and that was this is a permitted use that we are presenting. Is that because of your interpretation of patio and do you recall making that statement?

**Attorney Springer:** I did say that. My comment and I should clarify, a patio of a certain size is a permitted use. It is not as if the ordinance says you cannot have a patio period. We are not putting in a commercial use we are requesting something that is a permitted use in your ordinance.

**George Lamprey:** Thank you I just wanted to clarify that statement.

Chairman states the Board is looking for information on the slope and the pervious/impervious surfaces and whether to maybe involve an independent party to look at this. Again, it's just a side question because impervious versus pervious really isn't that critical. A soil scientist may be what we need. Ken states a hydrologist may be what you want they deal with the movement of water.

After some discussion between the Board and the applicant's attorney the decision was made to contact Nicol Rosebury of Ames Associates. The Board and applicant's attorney decide on a date for the site walk and a date to continue the hearing. Attorney Springer states what he has for their to-do list is to get a report from Nicol Rosebury to verify if the proposed plan makes it better compared to nothing regarding drainage. John Stephens asks what the definition of nothing is in this case. Chairman states as best as they can back to what was there when the house was built but no patio. Attorney Springer states he will also get information on the grade of the land and what is currently being applied to maintain the lawn.

Bill Ricciardi of 217 Whittier Highway asks if it would be beneficial to provide a plan that shows what 150 sf patio would look like on the property. I would be curious to see what could be done within the ordinance.

Attorney Spector-Morgan states if the applicant would like to do that it would be up to them.

Jill Weed of 217 Whittier Highway, how big is the area they are proposing to take away? Attorney Springer responds the reduction would be 410 sf from the kitchen area.

Anthony Avrutine states Mr. Bare had expressed some displeasure regarding the run off situation and asks if Mr. Bare would like to provide any information as to why that was and if he has any experience in that area. Mr. Bare states that he holds a Master's Degree in Environmental Health with many years of studying natural vegetation. Mr. Bare understands the technology has evolved since then but still believes that the natural state of the land is preferred.

**MOTION: Chairman motions to continue the hearing. The Board will reconvene with a site walk at 24 Dew Point Lane on October 11<sup>th</sup> at 9 a.m. Hearing will be tentatively continued to October 15<sup>th</sup> at 7 p.m.**

**IV. OTHER**

Chairman discusses the "Right to Know" communication for new members.

ZBA handbooks are provided to new members per the request of the Chairman.

Date change for November if an application comes in. Regularly scheduled meeting would fall on Veteran's Day the Board agreed to move the meeting date to November 5<sup>th</sup>. Clerk will update the ZBA calendar with the adjusted application deadline along with the tentative meeting date.

**ADJOURNMENT**

Jean Meloney motioned to adjourn the meeting at 8:23 p.m. Seconded by Anthony Avrutine all were in favor. Respectfully submitted by Aimee Manfredi-Sanschagrin.