

Effingham Zoning Board of Adjustment Meeting Minutes May 1, 2013

- 5 Present: Tim White, Jim Pittman, Mike Cahalane, Jory Augenti, Fran Marchand
Minutes prepared by Barbara Thompson

The meeting was called to order at 7:02 pm.

- 10 Minutes: Fran moved and Jory seconded to accept the minutes from April with corrections. The motion passed.

1. Under correspondence: OEP delete "Aril"
2. First paragraph in the public hearing change "alternated" to "alternate".
3. Second full paragraph on page two, line one change "stature" to "statute"
- 15 4. Change the third full paragraph to read: Jory suggested the hearing be continued so the Board could contact the Town attorney to determine if there is a statute of limitation regarding building permit denials. Mike moved and Tim seconded to continue the hearing until the May 1st meeting so he could do further research on hardship requirements. The motion passed and the hearing was continued until
- 20 May 1st.

Public Comment: none

Correspondence: none

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Old business: none

New Business:

7:15 PM

- 30 **Public Hearing Case #070 (Continued)**
Shaine and Isabelle Cheney
Tax Map 411 Lot 51

Jim appointed Fran to sit as a voting member of the Board.

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Discussion

Jim reported on the correspondence for Town counsel regarding a statute of limitations for a building permit denial. The result is there is no time limit as it would deny due process to the applicant. Jory moved and Fran seconded to accept Attorney Sanderson's email for the record.

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The motion passed.

Mike presented the results of his research on the question of hardship.

Effingham Zoning Ordinance Section 1104.1, items 1-4.

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NH Planning and Land Use Regulations: RSA 674:33.

- Page 503 Powers of Zoning Board of Adjustment: 5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. A: 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.

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- i: No fair and substantial relationship exists between the general public purposes (intended or desired results)
- ii: The proposed use is a reasonable (logical, rational, sensible, equitable, fair) one. Only one of these criteria must be met.

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- Page 504 of the Land Use Regulations: Statement of Intent referencing an amended section 307:5 to eliminate the separate “unnecessary hardship” standard for “area” variances as established by the NH Supreme Court in *Boccia v. City of Portsmouth*.
 - Page 505, Section 12 the first two paragraphs granting variances concerning signage, dimensions and driveways and building sizes.
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- Page 507: To establish an unnecessary hardship, applicants for variances must prove: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property.
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- Page 507: The Supreme Court of NH held that the court’s definition of undue hardship had become too restrictive in light of the constitutional protections by which it must be tempered. . . . and decided to depart from the restrictive approach that had defined unnecessary hardship and adopted an approach more considerate of the constitutional right to enjoy property. Henceforth, applicants for a variance could establish unnecessary
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- hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.
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Effingham Zoning Ordinance

- Section 1103.1, C To authorize upon appeal in specific cases such Variances from the terms of the Ordinance as will not be contrary to public interest, where owing to special conditions a literal enforcement of the provision of the Ordinance will result in
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- unnecessary hardship and so that the spirit of the Ordinance will be observed and substantial justice done.
 - Section 708 concerning lot density and the 10% rule.

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- Municipal Law Lecture series: Page 32, paragraph C which in part relates to the size of the building contributing as a deciding factor in a variance.

Jory explained the 10% does not apply here, only on new construction on lots of an acre or less.

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- Mike felt the main question was the interpretation of what is reasonable. His opinion was that granting the construction of the deck served the public interest by increasing the value of the property which increases the tax base. Granting the variance was in the public interest and would help the neighborhood.

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- Mike felt the size of the house could constitute a special condition.

Deliberation

Jim suggested taking a poll on the criteria so far. All agreed they were in concurrence with a favorable vote on criteria 1-4. The criteria on hardship needed more discussion.

100 Mike reiterated his argument that this is a reasonable use of the property and would stand up in court based on previous case decisions.

Tim expressed a leaning towards reasonable use as well.

105 Fran had a problem with the 30% rule and whether the deck is an excessive increase. However, in this case the inequity between a house with a very small footprint compared to a house with a large footprint is unduly restrictive and he was concerned that by observing the letter of the zoning ordinance the Board would be denying a reasonable use of the property.

110 Tim cited NH Planning and Land Use Regulations pg 508, A hardship resulted if a restriction upon use, when applied to a particular property, became arbitrary, confiscatory, or unduly oppressive because of conditions of the property distinguishing it from other properties similarly restricted. He felt that the house location being within the front setback is an arbitrary and oppressive condition. If the house was located anywhere else on the property, a variance would
115 not be required. He also felt that the previous owner of the home had created the hardship by building the house within the setback (prior to zoning) and that Mr. Cheney's application should not be denied because he did not create the hardship. His question is how sacred is the 30% setback versus the ability of a property owner to do something reasonable like put on a deck.

120 Mike felt the 30% rule is a guideline and any expansion beyond the 30% is a case by case situation.

Jory still felt that hardship was not being met.

125 Jim concurred with Tim. The nonconformity was there as zoning came into existence and he felt this was relevant. Fairness is significant in this particular case, because the 30% rule does not address this kind of situation. Pulling from presentation by others, he felt the setback was the hardship and was an arbitrary and punitive reason to deny relief. He felt it was appropriate to define the setback as an unreasonable burden (hardship).

130 Jory moved to take a straw poll to either continue the hearing or to vote on the variance. Tim seconded. The motion passed. All members agreed to vote on the variance.

Jim closed deliberations at 8:58pm

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The Vote

The members all agreed favorably on criteria 1-4. Concerning the 5th criteria (hardship) Fran said he would agree to grant relief from hardship with the condition that the deck could never be enclosed and made into living space and that this condition would pass on with the ownership of
140 the home. He made a motion to that effect and Jory seconded. The motion passed with Mike voting no. Four members were in favor of granting relief from hardship with Jory voting no. The variance was granted with said condition.

Jim closed the hearing at 9:17pm.

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Jory moved and Fran seconded to adjourn the meeting. The motion passed and the meeting adjourned at 9:17 pm

150 *These minutes are considered draft until approved at a future regular meeting of the ZBA. Any changes or corrections will be noted in the next meeting minutes.*