

ZONING BOARD OF ADJUSTMENT	August 25, 2022 7:00 PM
TOWN OF HAMPTON FALLS	TOWN HALL

FINAL

A. CALL TO ORDER

J. DeLeire, Chairman, called the meeting to order at 7:00 PM.

B. ROLL CALL- ZONING BOARD OF ADJUSTMENT

3 MEMBERS and 2 ALTERNATES PRESENT: John DeLeire, Chairman; Mark Call, Member; Alex Dittami, Member; James Hasenfus, Alternate; Weezie Vance, Alternate.

4 ABSENT: Steve Bryant, Vice-Chairman; Patricia Young, Alternate; Jim Manna, Alternate; Jude Augusta, Alternate

STAFF: Mark Sikorski, Building Inspector; Rachel D. Webb, Planning/Zoning/Town Secretary.

GUEST: Charles Fusco (applicant)

C. PUBLIC HEARING

Continuation of Case # 22-03: Application from **Charles and Darlene Fusco** for an Equitable Waiver to the terms of Zoning Ordinance Article III, section 7.7.1 and asks that said terms be waived to permit a pool and deck as constructed within the side setback, located in Zone A/R: Agricultural / Residential zone, at property located at **10 Alexis Lane, Map 2, Lot 4-21.**

Chairman DeLeire reviewed the fact that Case #22-03 was a Continuation of the case heard for an Equitable Waiver request at the July 28, 2022, Zoning Board of Adjustment (ZBA) meeting, where the ZBA members had some questions that were subsequently referred to the Town's Land Use Attorney (Mr. Cordell Johnston) for clarification. Attorney Johnston communicated that there did not appear to be any case law regarding denying an Equitable Waiver and then hearing the same application as a Variance. Attorney Johnston recommended that it was in the ZBA's best interest to reach a decision on the Equitable Waiver application, and then (if negative) proceed with the Variance application request. Chairman DeLeire explained that it would not have been possible to have done both at the July meeting, all at once, because the public needs to be noticed for the Variance application separately from the Equitable Waiver application. There was time to post the Legal Ad and Abutter Notices to comply with the legal notification requirements in time for this meeting tonight, so with the applicant's permission, staff went ahead and added the Variance application to the agenda for tonight after addressing the public notice requirements.

Chairman DeLeire said that the ZBA learned that there was not any latitude with an Equitable Waiver, but that there was a way forward with a Variance. A. Dittami agreed with Chairman DeLeire that an Equitable Waiver is strict. He further discussed the powers and authority of the ZBA, including penalties that would be through the Building Inspector. He referenced page 83 of the Zoning Ordinance, Article VIII, section 1 regarding Penalties of \$275.00 per day for each day of violation, upon conviction after going to court. A. Dittami continued discussing the powers of granting a Variance and reflected on the approval of the Heronfield Academy case as an example.

A. Dittami asked the applicant, C. Fusco, if his wife had discussed with the Building Inspector adding another housing unit on the lot, and he said that she had, but that when they learned that there was a minimum lot area requirement of two-acres the conversation ended. A. Dittami asked

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C. Fusco if he had a HVAC business, that he must be familiar with obtaining electrical and plumbing permits for HVAC projects, so why didn't he think that he needed any permits to install his pool and deck? C. Fusco responded that he was under stress and did not think that he needed it. He said that he tried to hire a pool installer but that eventually he just decided to do it himself and did not think about needing permits.

A.Dittami asked Chairman DeLeire if the ZBA needed to make Findings of Fact in every case, or just for the Variance, and Chairman DeLeire responded that Findings of Fact should be discussed for every application.

MOTION: To close the public comment part of the meeting and to move onto deliberations.

MOTION: A. DITTAMI

SECOND: J. DELEIRE

UNANIMOUS

MOTION: To deny the request for the Equitable Waiver for Case # 22-03: Application from Charles and Darlene Fusco for an Equitable Waiver to the terms of Zoning Ordinance Article III, section 7.7.1 and asks that said terms be waived to permit a pool and deck as constructed within the side setback, located in Zone A/R: Agricultural / Residential zone, at property located at 10 Alexis Lane, Map 2, Lot 4-21.

MOTION: J. DELEIRE

Findings of Fact: The Equitable Waiver criteria for approval are very strict. The applicant must be able to satisfy all the provisions of the Equitable Waiver. As discussed, ignorance of the law is no excuse, failure to inquire, misrepresentation or bad faith is no excuse.

SECOND: A. DITTAMI

UNANIMOUS

Case # 22-04: Application from Charles and Darlene Fusco for a Variance to the terms of Zoning Ordinance Article III, section 7.7.1 and asks that said terms be waived to permit a pool and deck as constructed within the side setback, located in Zone A/R: Agricultural / Residential zone, at property located at 10 Alexis Lane, Map 2, Lot 4-21.

The applicant, C. Fusco, presented his Variance application in terms of the following five (5) criteria:

- 1) The Variance will not be contrary to the public interest. The deck and pool are located in the backyard of a private residence and unnoticeable and/or unseen by most abutters.
- 2) The spirit of the Ordinance is observed. The deck and pool are very sturdy structures that are well gated and will not threaten the safety or welfare of the abutters, neighbors, or general public.
- 3) Substantial justice is done. The addition of this pool and deck have added value to the property at 10 Alexis Lane, therefore adding value to those properties surrounding it.
- 4) Granting a variance would not diminish the values of surrounding properties. Granting this variance would not diminish the value of surrounding properties because it has added value to 10 Alexis Lane, which in turn would add value to the neighborhood,

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- 5) Describe the special conditions that exist, such that literal enforcement of the provision of the ordinance results in unnecessary hardship. (a) 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: The deck and pool are located in the most logical area of the yard, as the land has a dramatic slope and moving the structures to the right would have put them on that slope, possibly compromising it. It would also interfere with the access to the well. (b)if the criteria above are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it. If the variance is not granted, then, due to the location of the well and the dramatic slope in the yard, the pool would need to be completely eliminated and the deck would need to be redesigned and restructured. All surrounding landscaping would also need to be relocated.

Chairman DeLeire asked the Building Inspector if the construction complies with the Building Codes, or is there anything that would need to be changed? M. Sikorski responded that the only thing he did not have the opportunity to examine was the electrical work inside the house, for the pool, and that he would verify it, if the variance is approved. The applicant said that the electrical work is on its own GFI circuit breaker with a timer. M. Sikorski said that he would verify that electrical work upon inspection. Additionally, M. Sikorski said that the deck and pool are well-built.

Chairman DeLeire began by saying, to the applicant, that he took a great risk by building first and then coming to the ZBA afterwards to ask for forgiveness/relief. He continued that he is looking at the application in terms of whether or not he would have granted the Variance request if the applicant had come to the ZBA prior to building. Would the ZBA have taken into account the aspects of the slope, the setback and the well location, and that there may not have been any other alternatives.

Chairman DeLeire asked M. Sikorski, do the facts seem consistent with what you have witnessed on the site, with his particular expertise? M. Sikorski responded that the sensibility of the location is without question. The slope is more drastic on the opposite side of the house, and the wellhead interrupts potential relocation on the right side. There is a case to be made to not site a pool next to a wellhead. There is also the safety factor of a pool that you want to be able to keep an eye on it. There are a lot of factors that give weight to the location of the pool where it is.

M. Call recalled five years ago when he installed a pool in his yard, speaking with M. Sikorski about the location of the pool, to locate it not in the setback because it would be difficult to get a Variance, in his particular circumstances. He said that this is why it is important to have those discussions before construction, and this is why permits are required. M. Call asked M. Sikorski how far into the setback is the deck located? M. Sikorski responded that the only way to determine that precisely is to strike a line with a surveyor. M. Sikorski clarified that the plan

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submitted was based on a Septic Design, which is not the same thing as a survey. The applicant responded that the deck was approximately twelve-feet (12') into the setback.

Chairman DeLeire extrapolated from the documents submitted that to the left there is a stone wall, and the stone wall looks like it would be the property line, but in actuality the property line starts to the left of the stone wall then cuts through it at an angle as it heads toward the deck and the pool. There is a measurement on the plan of fifty-three-feet (53') from the stone wall to the corner of the house, so he estimated that the corner of the deck is approximately twenty-five-feet (25') from the stone wall. The applicant had previously represented that the actual property line was indicated by a wooden stake in the woods located approximately thirteen-feet (13') beyond the stone wall into the wooded area, so the deck encroachment into the setback would be less than twenty-five-feet (25'), and would be more like twelve-feet (12'). M. Call agreed that Chairman DeLeire's description of the plan was a fair assessment looking at the materials presented. Chairman DeLeire continued by asking the question, would the ZBA grant a variance for a pool and deck into twenty-five-feet (25') of the setback? The applicant reiterated that the measurement from the corner of the house to the far corner of the deck is thirteen-feet (13'), and the measurement from the corner of the deck to the stone wall is thirty-seven-feet (37').

W. Vance asked the applicant if any of his neighbors had discussed his application with him, and C. Fusco responded that his neighbor located behind him is in support, and that she loves the pool. W. Vance asked if the applicant's neighbor on the side next to the pool had commented, and he responded no, none of the other neighbors had commented. He added that since he moved into the house that they have had nothing but compliments on how nice the house looks, because his wife and he take such meticulous care of the exterior of the property.

J. DeLeire asked, while looking at the photos submitted with the application, if it is possible to see any of the neighbors' houses from the pool/deck, and the response was no, he can not see any of his neighbors' houses right now, with the foliage. J. DeLeire followed up asking about the neighbor to the left, on the side of the pool, is it possible to see that house from the pool? C. Fusco responded that the neighbors' house to the left is located further up to the left of the pool, and not immediately adjacent, so that when you look next to the pool all that is seen is woods.

A.Dittami asked M. Sikorski if there are any special conditions of the property that distinguish it from any other properties in the area in that neighborhood, such as different shape, size, topography? M. Sikorski responded that the right side of the property suffers from the wetland setback, and that is one of the reasons why the house ended up located on the left side of the lot. He continued that an uneducated person would assume that the house was located in the center of the lot, but that is not true in this scenario because the wetland setback forced the house to be located outside of the wetland buffer area and to the left.

A.Dittami asked M. Sikorski if there is any interference with the things that the ordinance is designed to protect, within the setback, such as noise, safety, and access, with the pool location where it is. M. Sikorski stated that there were limitations on the build of the house on the lot with

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the topography and the wet area. The usable, flat area of the property was the front yard for the leach field, and the left side for the house.

A.Dittami asked M. Sikorski if the location of the pool and deck would location interfere with any public purposes of the zoning ordinance, such as adequate access for fire trucks, and located far enough away so that noise will not be a factor, etc., and M. Sikorski responded no.

M. Call asked what is the size of the pool, and C. Fusco responded that it is a twenty-four-foot (24') round pool.

Chairman DeLeire closed the public comment portion of the hearing, and moved onto deliberations. He said that in his fourteen-years (14 yrs) on the ZBA that it was unusual for this to happen. Chairman DeLeire stated that if this variance application were to have come before the ZBA before being constructed, that he would probably be inclined to vote in favor of it. It doesn't hurt anything, it is not contrary to any public interest, to the spirit of the ordinance, substantial justice, and it will not diminish the value of the surrounding properties. There are some special conditions for the lot in terms of the slope and it being wet. Having someone take down the pool and deck may not be a public purpose that the ZBA can support. Chairman DeLeire said that he is inclined to move in a positive direction on the Variance application.

A.Dittami asked if M. Sikorski was comfortable with what has been submitted for the Variance application in terms of permitting? M. Sikorski said that what has been submitted is a plan that is a septic plan, it is not a survey, and there are some photographs, so what would be preferred is for an "As-Built" plan to be submitted for the record as a condition of approval of the Variance. Chairman DeLeire said that the ZBA could require whatever the Building Inspector requires for permits to be submitted to satisfy the file. A. Dittami agreed with M. Sikorski's assessment.

A.Dittami wanted to limit the property owner from further expansions on the site, and both Chairman DeLeire and M. Sikorski said that that would not be appropriate because there are other locations on the property where the applicant could build onto that would be conforming, for example if the owner wanted to put a shed down on the driveway, he has buildable space to do that.

M. Call wanted to be sure to include as a Condition of Approval the Electrical Inspection that the Building Inspector said has not yet been done. M. Sikorski explained that if the Variance is approved, that he will take the two (2) denied permit applications in the file (one for the deck and one for the pool) and process them, and go through the normal sequence of events to perform necessary inspections, to make sure that there are the proper gates to keep access away from the pool, and to look at the electrical work. He summarized saying that everything will be done as part of the process, but it will just be done out of order. Additionally, he requested the requirement of an accurate drawing of the pool and deck as part of the Variance approval. M. Call said that he liked that idea to put it into the record, because the approval is coming after it was built.

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The applicant, C. Fusco, asked for clarification saying that the drawing he submitted is not acceptable, and that he needs to provide an engineered drawing. M. Sikorski clarified saying that the survey needs to start at the pin near the wall to shoot some distances on that side of the house to show the lot line, the setback, the structure, and the encroachment; does not need to survey the driveway side, or the front yard. The drawing to be submitted to the Building Inspector within three-months (3-months) timeframe from approval.

MOTION: To grant Case # 22-04: Application from Charles and Darlene Fusco for a Variance to the terms of Zoning Ordinance Article III, section 7.7.1 and asks that said terms be waived to permit a pool and deck as constructed within the side setback, located in Zone A/R: Agricultural / Residential zone, at property located at 10 Alexis Lane, Map 2, Lot 4-21.

MOTION: M. CALL

AMENDED MOTION: By J. DELEIRE: (a) To incorporate the five (5) criteria, as presented by the petitioner, and (b) to include an engineered drawing commensurate with the Building Inspector's direction as part of the requirements for building and electrical permits, on or before three-(3)-months from date of approval. M. CALL accepted those two amendments to his motion.

Discussion: A. Dittami said that he thought the ZBA should indicate that there be no further encroachment of the setback. Chairman DeLeire said that there was no need to do that because it is against the ordinance anyway, and a Variance would be needed, so the ZBA does not need to restrict the applicant. A. Dittami said that the ZBA does not have to, but given the way that the process unfolded, should the ZBA? Chairman DeLeire said that he did not think that the ZBA should because he did not think that you can limit any property owner because that sounds like a punishment. The applicant could come in next week and ask for something else and if the ZBA had restricted them then the ZBA would be doing a disservice. A. Dittami reminded the ZBA about the Heronfield Academy approval where the ZBA did not include restrictions and what resulted from the ZBA not being specific in limiting a Variance approval.

SECOND: J. DELEIRE

UNANIMOUS

D. REVIEW AND APPROVAL OF PREVIOUS MEETING MINUTES: 07/28/2022

MOTION: To approve the meeting minutes from 07/28/2022, as written.

MOTION: M. CALL

SECOND: J. DELEIRE

UNANIMOUS

E. OTHER BUSINESS

1) 2023 Budget – Zoning Board of Adjustment. Chairman DeLeire said that he would address this agenda item at the ZBA meeting in September.

F. COMMUNICATIONS TO BOARD MEMBERS There were no communications to Board Members.

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G. ADJOURN

MOTION: To adjourn the Zoning Board of Adjustment at 8:00 PM.

MOTION: M. CALL

SECOND: J. DELEIRE

UNANIMOUS

The next meeting of the Hampton Falls Zoning Board of Adjustment is scheduled for Thursday, September 22, 2022, at 7:00 PM at Hampton Falls Town Hall.

Zoning Board of Adjustment Minutes prepared by Rachel D. Webb, Planning/Zoning/Town Secretary.