

**CITY OF WESTBROOK
ZONING BOARD OF APPEALS
September 10, 2019
MINUTES**

Present: Aaron Burns (Chair), Michael Lemay, Nancy Milton Heath, Philip Brown (Vice-Chair), Sherri Quint, Karen Axelsen (Alternate)

Absent:

Staff: David Finocchietti, Code Enforcement Officer

Aaron Burns David Morse resigned as he has been appointed to the City Council.

Administrative Agenda

1. Approval of July 9, 2019 minutes

Minutes approved as amended

New Business

2. Variance Request – William & Stacey Lamson, is requesting a nine-foot side yard variance and seven-foot rear yard variance to allow the replacement of a twelve-foot by twenty-two-foot garage on 14 Edna Joy Lane. Tax Map: 028, Lot 039, Zone: Residential Growth Area 1.

MEMO

DATE: August 28, 2019

TO: Zoning Board of Appeals

FROM: David Finocchietti, City Code Enforcement Officer

Cc: File

RE: September 10, 2019 Zoning Board Meeting

Items in this memo:

3. Variance Request – Contractor-Jeffrey R. Verrill

Property owner- William & Stacey Lamson

4. **Agenda Item #1 – Variance Request** –William & Stacey Lamson are requesting a nine (9') foot side yard variance and a seven (7') foot rear yard variance to allow the replacement of a twelve (12') foot by twenty-two (22') foot garage. Property located at 14 Edna Joy Lane, Westbrook, Maine, Tax Map: 028, Lot 039, Zone: Residential Growth Area 1.

5. Project Description:

This is a variance request from William & Stacey Lamson – To replace an existing 12-foot by 22-foot garage with a similar 12-foot by 22-foot garage in the same location which would require a 9-foot side yard variance and a 7-foot rear yard variance.

For the Board's reference:

Our Land Use Ordinances defines **Practical Difficulty Variance**.

*The Zoning Board of Appeals may grant a variance from the dimensional standards of the zoning ordinance when strict application of the ordinance to the petitioner and the petitioner's property would cause a practical difficulty **and when the following conditions exist:***

- A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood.
- B. 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.
- C. The practical difficulty is not the result of action taken by the petitioner or a prior owner.
- D. No other feasible alternative to a variance is available to the petitioner.
- E. The granting of a variance will not unreasonably adversely affect the natural environment; and
- F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.

Staff Comments:

The applicant's request is to replace an existing dilapidated garage with a new same size garage. Staff is providing comment on each of the tests of the ordinance for the ZBA's consideration in this matter.

- A. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood.
 - a. Staff finds no issues on this point
- B. 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.
 - a. Staff sees no issues on this point.
- C. The practical difficulty is not the result of action taken *by the petitioner* or a prior owner.
 - a. Staff finds this test is met for the following reason:
 - i. The house and garage were created in 1951 prior to zoning.
- D. No other feasible alternative to a variance is available to the petitioner.
 - a. Staff finds no reasonable alternative for vehicle storage.

- E. The granting of a variance will not unreasonably adversely affect the natural environment;
and
 - a. Staff has no issues on this point.

- F. The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.
 - a. Staff sees no issues on this point.

In closing, Staff does support this variance request to build a replacement garage. To date there have been no abutter concerns received by the Code Department from the neighborhood.

Jeffrey Verrill Contracting Services on behalf of William and Stacey Lamson 14 Edna Joy Lane Tax Map: 028, Lot: 039, Zone RGA1 presented the nine (9') foot side yard variance and a seven (7') foot rear yard variance request to replace a 12' X 22' foot dilapidated garage on the same footprint.

The wood structure is falling on the ground and the roof is falling in. All the equipment needed to be stored is outside and we are asking to replace the garage in the same size and likeness.

**Showed picture of the garage from Edna Joy Lane on screen

I will answer any questions or comments.

Aaron Burns why does this item need a variance?

Jeffrey Verrill last year we spoke to Rick Gouzie about getting a building permit and nothing was mentioned about a variance. Now the Lamson's are ready to rebuild and we spoke with the Code Department who said we need a variance and here we are tonight asking for one.

Aaron Burns Questions from the Board?

No questions

Aaron Burns David why is this item before us as a variance?

David Finocchietti there is no foundation, if there had been a foundation they could build on the same footprint. The only item that is mentioned in the Ordinance is if the structure is destroyed by fire, they have one year to replace it.

The Planning Department is working on amending the ordinance to change the language to allow updating a damaged structure within the same footprint unless willfully damaged by the owner. That amendment is now scheduled to go through Planning, then to get approved by the City Council.

Aaron Burns look at **Section 203 Nonconforming Use Provisions**, then **203.1 Continuance**. **The legally existing nonconforming use of land, building or structure existing on the effective date of this ordinance may be continued, although such use does not conform to this ordinance. Section 203.2 Discontinuance of a nonconforming use. 1. If a nonconforming nonresidential use is discontinued for 12 consecutive months, as determined by the Code Enforcement Officer, it shall thereafter be utilized as a permitted**

use or conditional use, in accordance with the performance standards in the zoning district in which it is located.

The land where the garage is located is legally non-conforming and the owner wants to replace it prior to the twelve consecutive month regulation so I do not know why we need a variance.

David Finocchietti if someone took down a nonconforming sign and it was removed; they are not able to replace it.

Aaron Burns very specific sign ordinance Dairy Queen – The Ordinance at the time said you cannot replace a sign. Council said we do not want signs where they are not supposed to be. We do not want a grandfathered sign. They went back to the Boards and decided that was not a great idea so, amended the Ordinance to let them put a smaller sign in. It took a while, but everyone was generally happy. This is different, this is a specialized issue, this is not a sign, this is a non-conforming use of land which continues. The distinction of not having a foundation on the structure is sort of there. To me that is a distinction, not a difference. It is not being voluntary discontinued for twelve months.

You could get around that interpretation by doing one side and then doing the other side, as long as you leave a piece of it up you can build around it. It is not like a Shoreland thing where you have so much percentage of its existing. We do not have that Ordinance provision.

That is the way I see it. It does not make sense to me why someone would need to come to ZBA to replace a rotten building. I understand that there is an amendment to the Ordinance, but I do not even think the amendment is necessary in this case.

Mike Lemay when I reviewed this that was my conclusion as well. Before when someone came to us to replace an existing structure in the same exact spot and we had the same conclusion that a variance was not needed. That was a few years ago on Bridge Street near Severinos. They had a garage and wanted to replace it and we did not require a variance on that either.

Where do we go from here?

Aaron Burns the way I look at this a variance is not necessary because it is a legally existing non-conforming use which can be continued. Now that is two peoples view on the Board. I do not know what the rest of the Board thinks. We have not asked that yet, but we are also in a kind of a weird procedural position where it before us for a Variance and not an Administrative Appeal. That is also an issue as well.

David Finocchietti I can tell you that it may change some things that we have been working on.

Aaron Burns don't get me wrong; I think clarity is great to have an Ordinance provision that particularly points you to say under what conditions someone can reconstruct a building. Anything to make it easier to understand is good.

I think this is simple provision. I think it could be explained a little clearer in the Ordinance.

This is a non-conforming use of land that is not being voluntary being discontinued for more than 12 months.

Nancy Milton Heath as it stands the garage is just on gravel and the only thing is you are lifting it and putting in a slab?

Jeffery Verrill we are proposing to replace the entire structure sitting on a concrete slab.

Nancy Milton Heath that is the only difference on the exact same spot?

Jeffery Verrill on the same exact spot, the exact same size, it will just be on a permanent foundation.

Nancy Milton Heath okay, thank you.

Philip Brown I am not sure how I stand on the question you raised. I do raise the concern about record keeping. We know what results are when a variance is granted and it gets registered with the Registry of Deeds, so it is available for reference in the future when the owner sells the property or whatever.

Absent of the variance then my question is what sort of record would exist to officially document how the new structure got there?

Aaron Burns a Building Permit and a Certificate of Occupancy.

David Finocchietti I understand what you are saying, what is to stop someone to have a structure appear on their property up against the property line and say it has always been there?

Philip Brown I was not coming from the standpoint that someone is getting away with something. The question is into the future, we are all gone and do not remember anyway, what went on here?

Aaron Burns I think Phil's concern would be addressed in the Code file because once you have issued the C/O.

David Finocchietti there would be a building permit with a plot plan, shows its location and a C/O for the building.

I have another example on a property that I looked at today. Back in 1971 a variance was given for the construction of a garage that was approximately five (5) feet from the property line. Over the years the owner took it upon himself to add on to that garage. Eventually it ended up on the neighbor's property. He kept adding on. Looking at the documents that we had, fortunately I had documents that showed the Variance and the permit for the garage and the size of the garage. Obviously the add on was done without a permit and into the setback and onto someone else's property. It can get challenging depending on what we have for documents, especially on some of the older stuff.

Philip Brown can we talk about if we were to proceed without dealing without the Variance. What would the path going forward look like for the applicant?

Aaron Burns that is a good question because it is up to the Code Office. I presume if we determine that a Variance is not needed because it is a legal non-conforming use, the Code

Office would implement that decision. It would not be required to because this is not an Administrative Appeal. I think it is up to Administration on how they want to deal with it.

While I am firmly of the opinion this is not appropriate for a Variance, I am also aware that I do not want to inconvenience people picking legal issues that is not their fault. This is a no harm no foul category. It would be fair to rule on the Variance to move the process along.

My strong view is that this should not be necessary. That is two people's point of view.

Nancy Milton Heath I agree with that.

Aaron Burns now three people's point of view.

Michael Lemay do you want to take a straw vote on that.

Aaron Burns I do not think it is necessary. If this were an Administrative Appeal I would support a straw vote. That is not what we have before us.

David Finocchietti I will honor the Board's decision.

Jeffrey Verrill so that I am clear, if you decide the variance is not needed, then our next step is?

David Finocchietti a building permit.

Aaron Burns for clarity sake I do not have an issue granting a variance here. It is not really needed. It does not hurt or benefit anything from my point of view except you will have a piece of paper in the file that says you have a variance that cannot be questioned.

Since you went through the trouble putting the packets together, paid for the advertising, you might as well get what you came for. You are looking for a garage, you do not care whether we put it in the Appeal box or the Variance box. You are looking for a replaced structure so, I do not want to hang you up on that.

With that in mind we can go through the criteria.

Workshop Item

- 1. The strict application of the Ordinance of the property precludes the ability of the applicant to pursue a use permitted in the Zone in which the property is located.**

As I said before, I do not think that number one is met, it does not preclude the use.

The Board Members agreed.

- 2. The strict application of the Ordinance results in a significant economic injury to the applicant.**

Assuming that the Ordinance prohibits it, the need for the garage is very typical for a single-family house. It is something expected, and the house came with the garage and has been there for quite a while.

- 3. The need for a variance is due to the unique circumstances of the property and not to the general condition of the neighborhood.**

It is a garage that needs to be replaced and is at the end of its useful life

4. **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.**

No indication would change the neighborhood or effect any properties, we have letters of support from abutters

5. **The practical difficulty is not the result of action taken by the petitioner or a prior owner.**

Predates the Ordinance

6. **No other feasible alternative to a variance is available to the petitioner.**

Assuming the Ordinance prohibits it, then yes this would be the only feasible alternative

7. **The granting of a variance will not unreasonably adversely affect the natural environment.**

No indication

8. **The property is not located in whole or in part within shoreland areas as described in Title 38, section 435.**

Not located in the Shoreland Zone

Aaron Burns the way I have stated it at least two or three of the findings of fact required for a Variance are not satisfied.

Michael Lemay I agree

Aaron Burns any members of the Public that wish to comment on the application?

No comments

Public comment closed

Aaron Burns does anyone have a contrary point of view to this? Does anyone think that the Ordinance says something other than what I think it says? Does anyone have a different reading of it?

I do not want to hold this up but I have a problem fundamentally granting something that is not appropriate to be granted because we cannot meet the criteria that are necessary to find it, so maybe the way to do this would be I would accept the Code Officer to grant the building permit and the reconsideration or interpretation of the Ordinance. If not, I would be willing to keep this on the agenda for a follow-up meeting as it probably will get withdrawn if the Code Officer grants the building permit.

Nancy Milton Heath vote on it tonight or not vote on it.

Aaron Burns not vote on it tonight and hold it. That way it gives the applicant some recourse. I trust Dave is going to do what he said.

David Finocchietti I would like to do it that way.

Aaron Burns I do not like setting a precedent of granting a variance with at least three of the criteria are not satisfied.

David Finocchietti what I will need guidance on is that when a structure is removed to replace it; it has to meet current zoning.

Aaron Burns the use it is not being voluntarily discontinued. The use of that square footage where that structure is, that is the vested right for legal existing non-conforming.

You have a structure on that piece of Real Estate that is within the setback and was there before the setback was drawn and allowed to stay there as long as it is not being voluntarily discontinued. Your interpretation is rational in that because you have a provision that specifically says if the structure is destroyed by fire it can be replaced within one year. The provision that talks about fire does not preclude; it is permissive, not restrictive. It does not say the structure only be rebuilt if it is destroyed by fire. It does not restrict it, it grants permission. It is not inconsistent with what I am talking about it is additional the way I read it. It is still the nonconforming use of the land. Which is allowed as legally existing nonconforming.

Mike Lemay is there electricity to the garage now and will that change? I am assuming you will have a new garage door and you will want a garage door opener.

Jeffrey Verrill there is an underground line that has been discontinued due the state of the structure.

Mike Lemay I was just thinking that something might change with the new structure.

Aaron Burns it will be modern materials and a foundation for the structure. You are still talking about the square footage that was there before. The use is not being discontinued.

It is good to have specific ordinance and you can rebuild it under these types of circumstances. Those types of provisions tend to be restrictive and not permissive from a general statement. Every Ordinance that I have come across has the statement of the continued use as long as it is not discontinued over twelve months.

So, if everyone agrees I would entertain a motion to continue this to the next meeting date with the understanding that the Variance Application will likely be withdrawn when the building permit is issued.

Is the applicant okay with that?

**The applicant agreed

Aaron Burns David said he is going to issue the building permit according to the Board's interpretation of the Ordinance. I see no reason to delay as once the building permit is issued the Variance Application will be withdrawn.

**Applicant and Code Officer agree.

Aaron Burns the Board is okay with that?

**The Board agreed.

All in favor of scheduling this for further hearing at the next Board meeting.

The vote is 5-0 in favor of postponing this item to the next meeting if something unforeseen happens.

Aaron Burns as there is not further business to come before the Board, I would entertain a motion to adjourn.

Sherri Quint so moved

2nd by Philip Brown

Adjourn

THANK YOU, respectfully submitted by Linda Gain lgain@westbrook.me.us