

Shutesbury ZBA Meeting Minutes
January 13, 2021 Virtual Meeting Platform

Zoning Board members present: Chuck DiMare/Chair, Jeff Lacy, and Andy Berg

Zoning Board alternates present: Herb Gilmore

Staff present: Tessa Dowling/Land Use Clerk

Guests: Anna Mancebo, Meaghen and Steve Mikolajczuk, David Holmes, James Martin, Donna MacNicol (Town Counsel), Toni Humphriss, Joseph Salvador, May Emery

DiMare calls the meeting to order at 7:03pm.

Statement relative to conducting virtual meetings following the Governor's restrictions on public meetings is read into the record by Dowling.

At 7:03pm, Berg moves and Lacy seconds a motion to table the 12.21.20 meeting minutes to be reviewed at the next meeting. Roll call vote: Lacy: aye, Berg: aye, DiMare: aye; the motion carries.

Public Hearing Continuation for a Special Permit/Variance (Case 20-002): Application of Steven & Meaghen Mikolajczuk for Reconstruction of a house at 32 Lake Drive

At 7:04pm, DiMare opened the continuation of the public hearing for Case 20-002.

DiMare listed the materials presented as evidence in the Case including meeting minutes, photos, legal cases, the ruling in the Special Permit case for 67 Lake Dr., the Town Counsel analysis, and the memorandum submitted by the applicants' lawyer, James Martin.

DiMare reads the 67 Shore Dr. Special Permit ruling.

Lacy submits new photos as evidence that show the spacing between the houses around 32 Lake Dr.

DiMare restates the error that was in the original public notice: the porch does not further encroach on the side setbacks. The porch is less nonconforming than the house.

Lacy confirms with the applicants that although the house is going up and dormers will be added that the width of the house will not be extended.

Per DiMare, the primary reason to continue the review of the case law related to the Case and the Town Counsel analysis and Martin's memorandum.

Lacy used the time between this meeting and the previous one to read case laws regarding whether single family house extension or alteration within the existing nonconforming footprint can be granted by right. Lacy refers to Goldhirsh v NcNear Court Case and explains that, according to his reading, nonconformity can be increased within the existing footprint if there is an increase in height.

Two questions need to be answered for the Board to make a decision on the application: 1) whether the nonconformity of the structure would be increasing due to the applicants' plans and 2) whether the increase would be substantially more detrimental to the neighborhood.

The Board discussed the definition of neighborhood. The possible extent of the neighborhood discussed included the Lake District, the lake community, the west side of the lake, and Lake Dr. DiMare asked for a neighborhood definition from Town Counsel and the applicant's attorney James Martin.

Per Town Counsel, the definition matters and whether a similar project had been approved before. She refers to the Lombard v Board of Appeals of Wellesley Court Case. In the vicinity of 32 Lake Dr. other houses have added a second story. The neighborhood would be more than the immediate Lake District but not full zoning district. Look for historic, geographic, and demographic similarities. The Lake Wyola Association holds 4 interconnected beaches, takes care of the roads around the lake, and organizes lake social gatherings. More than the immediate houses around Lake Dr. The west side of the lake.

Martin supports Town Counsel's neighborhood definition. The lake is a community.

Per Gilmore, the damming of the lake created a new shore and the lots around the lake were created at the same time.

Berg sees the neighborhood as the lake.

Lacy sees the neighborhood as a smaller area.

Salvador, a resident of the lake and someone who helps clear the roads as part of the Lake Wyola Association, says the lake works as a family.

The applicant, Meaghen Mikolajczuk, grew up on the lake, had friends across the lake and saw the lake as a community.

Per Holmes, the great impact is to the houses in the second or third rows. The larger you make the neighborhood the more diluted the impact. The increase in the number of lake houses with second stories that block the view of the lake is a detriment to the entire neighborhood.

At 8:17pm, DiMare moved and Berg seconds a motion to define neighborhood as Lake Wyola District. Roll call vote: Berg: aye, Lacy: nay, DiMare: aye; the motion carries.

Per Town Counsel, Shutesbury Town Zoning Bylaw 6.1-3 indicates that a special permit is required for this project, but Board needs to decide if the case law and the second except clause for single family homes of MA G.L. Ch. 40A Section 6 show that the Board has to approve the project. The Board may have less discretion to approve or disapprove the project.

Lacy refers to Zoning Bylaw section 6.1-3 D2 the 9th example on page 23 "An alteration that increases the overall height of the structure... Since the height of the proposed addition within the setback (*Proposed*) is greater than the height of the existing structure (*Existing*), this alteration requires a special permit.

Per Mikolajczuk, referring to other examples in Zoning Bylaw section 6.1-3 D2 and proposes to avoid the need for a special permit by first increasing the height of part of the house that is conforming and then increasing the rest of the house to match the new height.

Town Counsel does not recommend they withdraw from this process at this point because she is not sure that the building inspector would support the project done in two steps.

DiMare and Berg would rather approve the project with conditions.

The Board discusses the extent of the nonconformity of the structure.

Lacy shares photos of the spacing between the houses around 32 Lake Dr. He sees this area as distinct from the other areas of the lake because there is less space between houses and more development across the street that would be affected by the loss of view. He is concerned about a wall of houses going up and blocking the view. The nonconformity is more intensified by the increase in height. Reminds the Board that there has been negative as well as positive testimony.

Per Martin, Lucy's reasons for disagreeing with the project are not based on the statute or case law. The applicant is staying within the nonconforming setbacks that were grandfathered in. He says it is disingenuous that Lacy can tell the applicant that is he ok with the project without the dormers and now be concerned about the height. Martin does not think the photos showing the distance between houses is relevant. He refers to Bellalta v Brookline Board of Appeals Court Case and says the reasons for a negative determination need to be very specific.

Martin and DiMare are concerned that case law and state statutes would not support the town bylaw 6.1-3. They do not agree with Lacy that an increase in height increases the nonconformity of the structure.

Per Berg, the Board has discussed changing the bylaw so there is more of a height limit here. We recognize we need to change the law. We cannot substitute preferences for what should be a bylaw. Berg would help bring a new bylaw for future projects to town meeting; the change is not on the applicants.

DiMare is concerned that Lacy is reading the statutes and case law selectively.

Per Lacy, suggestion to applicants that they could remove the bulk of project and go up in height or not go as high but add dormers to the structure. The Board has modified plans during the hearing process before.

Berg brings up the option of closing the hearing and then refraining from issuing a decision for 90 days and then the permit is constructively granted.

Martin would not recommend that option until the applicants have the chance to talk to the building inspector. Martin supports closing the public hearing.

Holmes does not support constructively granting the permit.

At 9:19pm, Berg moves and DiMare seconds a motion to close the Special Permit Case 20-002 public hearing. Roll call vote: Lacy: aye, Berg: aye, DiMare: aye; the motion carries.

At 9:22pm, Berg moves and Lacy seconds a motion to discuss the decision for Case 20-002 for 32 Lake Dr. at the February 18, 2021 virtual meeting. Roll call vote: Lacy: aye, Berg: aye, DiMare: aye; the motion carries.

Shutesbury All Boards Meeting January 19, 2021

DiMare announces the All Boards Meeting, which is scheduled for 6:30-8:00pm.

Berg could make the meeting from 6:30- 7:00pm.

DiMare asks Dowling to find out who is running the meeting so that Berg could have an early slot to summarize ZBA business before he had to leave.
Lacy has a conflict the night of the meeting.

At the meeting the issue of an increase in density and development around Lake Wyola can be raised.

Per DiMare, the ZBA and the Planning Board can jointly walk around the Lake in May or June to see if the district should be divided into further zones.

Berg supports the idea of a walk and was willing to work on the summary for the meeting.

DiMare suggests Lacy take a leadership role on the project.

Per Berg, the town would likely pass new zoning bylaws if both the ZBA and the Planning Board support them.

Both DiMare and Berg emphasize the need to create clear rules for people who are purchasing a property in Shutesbury.

Education/Guidance

No one came forward for education or guidance.

New Business

- DiMare raises concerns about the high cost of the Special Permit newspaper notices. Per Berg, the fees may need to be raised again. The Special Permit fee was raised to \$400 from \$300, but the last newspaper notice cost over \$600. Statute requires that the newspaper notice run for two weeks.
- At the January 25th meeting the Board will review the drafted decision for the Cloutier Special Permit (80 Shore Dr.) and open the hearing for the Boroweic Special Permit (16 Wyola Dr.). DiMare will stop by the town hall on January 19, 2021 between 10am and noon to pick up the hard copy of the Boroweic Special Permit.
- Lacy has asked Bob Richie and Town Counsel when the ZBA can use associate members. The ZBA wants to clarify whether the associate member can replace a voting member in hearing if they have attended the previous meetings on the project and the voting member's absence is unexpected or if the associate member must be appointed the replacement of a specific member when a hearing begins. Town Counsel will discuss the concern with the Attorney General.
- The ZBA will consider using their budget to purchase a copy of MA Continuing Legal Education: Zoning Manual and the Handbook of Massachusetts Land Use and Planning Law by Mark Borrowski.

Old Business

Reminder that Application Fees for Special Permits/Variations increased to \$400, Appeals of Building Inspector Decision fee increased to \$400, and Application Fees for Site Plan Review Fees increased to \$200 effective as of January 1, 2021 (Voted in favor at the October 14, 2020 and December 21, 2020 ZBA Meetings)

Schedule next ZBA Meeting/Site Inspections

The Special Permit hearing for a house rebuild project at 16 Wyola Dr. (Case 20-004), submitted by applicant Mathew Borowiec, is scheduled for January 25, 2021. The meeting will start at 7pm.

At 9:52pm, Berg moves and Lacy seconds a motion to adjourn the meeting. Roll call vote: Lacy: aye, Berg: aye, DiMare: aye; the motion carries.

Respectfully submitted,
Tessa Dowling
Land Use Clerk