

Town of Newington, NH  
ZONING BOARD OF ADJUSTMENT

Meeting Minutes – September 29, 2015

- Call to Order:** Chair Matt Morton called the September 29, 2015 meeting at 6:30 PM.
- Present:** Matt Morton, Chair; Ted Connors; Ralph Estes; John Frink; Jim Weiner; Town Planner, Tom Morgan; and Jane Kendall, Recorder
- Public Guests:** Attorney Charles Griffin; Richard Pickford with WSCA; Mr. Pratt with the City of Portsmouth Public Works; Attorney Jack McGee; Dave Emery; Jerry Smith with JS Design; Bill Peterson, Great Bay Wildlife Refuge Manager

**Public Hearings:**

- A) Request by **Portsmouth Community Radio (WSCA)** for a variance from the Zoning Ordinance in regards to a proposal to erect an 80-foot high antenna tower atop Beane Hill. The property is situated between **Arboretum Drive and the Spaulding Turnpike, Tax Map 19, Lot 22.**

Attorney Charles Griffin appeared before the Board and read through the five criteria for granting WSCA's request for a variance to erect an antenna on top of the City of Portsmouth's water tank.

Attorney Griffin said it would not diminish surrounding property values of the water tank owned by the City of Portsmouth or the abutting Wal-Mart. He provided a photo and said it would look no different than the communications antenna behind the Newington Police Station and would not alter the essential character of the surrounding community.

Attorney Griffin said it would not be contrary to the public interest and would actually benefit to the town and public because it would enable the Town to add their own emergency communications antenna, which would enhance safety for the residents.

Attorney Griffin said it would not conflict with the spirit of the Ordinance, which defines the Commercial District as mixed use that allowed non-retail use. He added that the bulk of the commercial district was on the other side of the turnpike and this would not require parking or in anyway increase traffic that would adversely affect the community or threaten the public health, safety or welfare.

Attorney Griffin said the State of NH and the IRS approved the project and denying the application would not outweigh reasonable use of the property.

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Attorney Griffin said it was a non-profit use and asked that the filing fee be waived.

Board member, Ralph Estes asked if the property was in Pease Development on the Newington side and if they paid taxes. Town Planner, Tom Morgan said they were on a portion of property that stuck into Pease that the City of Portsmouth owned. He said the 1952 land acquisition dated back to when the Air Force arrived and then the Town made an agreement with Portsmouth in 1965 for the water line that ran under Great Bay to Fox Point and to the tank.

Board member, Jim Weiner said the Planning Board discussed previous applications for cell towers in that district that were turned down and referred to the Waterfront/Industrial District. He said there were two electrical engineers with the Planning Board that talked about shielding the interference at the Music Hall, which should cost less than erecting a tower. Attorney Griffin said he was misinformed when he presented to the Planning Board and he later learned that the antenna was no longer at the Music Hall and it was only temporarily placed on top of a building on Arboretum Drive.

Mr. Weiner said the water tower was not attractive, but there was vacant land nearby that could be developed in the future and the tower could detract from view and impact the value of the land. Mr. Rick Pickford, board member of WSCA said the tower would only be visible briefly when driving down the Spaulding Turnpike and it would not be as high as a 125' high cell phone tower and would not stick out among the surrounding electric and telephone poles. Mr. Morgan said Eversource would be upgrading their transmission lines with taller poles that would be bigger and uglier. Mr. Weiner said he thought the radio tower would still add to the ugliness and although it would be wonderful to add fire and police telecommunications to the tower, it was not zoned for towers. Attorney Griffin said there were vegetative buffer in the regulations that had been applied to Sig Sauer and 100 Arboretum Drive so anyone purchasing that had to adhere to the regulation and would not be deterred by sight of a tower. He said their 6' antenna mounted to a 60' water tower was not as massive as cell towers either.

Mr. Pickford said there was only a sliver of area where their frequency would work because of interference from a radio station in Amesbury. He said they looked at area at the Waterfront/Industrial District and the elevation was not high enough on Newington Station for the transmission and Sprague said their building was not available for an antenna. Mr. Morgan confirmed that he advised the applicant to place their tower in the Industrial District and he called Sprague to confirm that they were turned down and heard Sprague did not own the tower there.

Mr. Weiner said he was still concerned with setting a precedent after the Planning Board turned cell tower applications down for the Commercial District and so it was what it was if they weren't able to find a location in the Industrial District. Mr. Pickford said a cell tower could turn up their amplifier if they didn't get good reception, but their radio station could not do that and needed to be 180' above sea level.

Vice-Chair, Ted Connors said he wasn't on the Board when cell towers were turned down, but they were profit motivated and this application was not. He said the

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applicant was the only non-commercial community radio for the Seacoast area and it could be a benefit to Newington if they could put their local information on the radio station. He added that the Fire Department had included a letter that they also wanted to put a repeater on the tower and he hoped the Police Department and Department of Public Works could do the same if needed.

Vice-Chair Connors said he didn't see the proposal as intrusive considering there was already a water tower, telephone poles and transmission lines going in that would double in size.

*Ted Connors moved to grant the request by Portsmouth Community Radio (WSCA) for a variances from the Zoning Ordinance in regards to a proposal to erect an 80-foot high antenna tower atop Beane Hill. The property is situated between Arboretum Drive and the Spaulding Turnpike, Tax Map 19, Lot 22, and John Frink seconded the motion.*

Chair Morton continued with the discussion and asked if there would be any support cables. Mr. Pickford explained that the tower would have three legs bolted to a concrete block on the ground. He said the frequency was the same as that used by ham radio operators. Chair Morton asked if there would be a fence and Mr. Pickford replied that the tank was a municipal facility that was protected by homeland security.

Mr. Weiner said the Planning Board was concerned with precedent settings for other cell tower applicants. Vice-Chair Connors clarified that most companies were redirected.

Mr. Morgan said most cell tower applicants were directed to the Industrial zone and never went to the Planning Board except for two applicants, but they also got what they wanted, so this proposal was not a good comparison,

Mr. Estes asked what the life expectancy of the antenna would be and Mr. Pickford replied that he expected it to be good for 30-40 years and then it would be turned back to the City of Portsmouth.

Mr. Pickford said they were a volunteer run, non-profit and had to go to NH Charitable Foundation. Mr. Estes asked how much the City of Portsmouth contributed and Mr. Weiner said Portsmouth was charging them \$ 600 a year. Mr. Pickford said they didn't own any property and the tank was their only option because there were no cell phone towers in Newington.

Chair Morton asked Mr. Morgan why the applicant was before Newington if the City of Portsmouth owned the property and Mr. Morgan said State law guided municipalities in RSA 674:54 regarding property owned by a government entity, and Town counsel, Attorney John Ratigan advised but WSCA that they would need a variance because zoning didn't list radio towers, and if they were not listed, then the use was deemed as prohibited.

Mr. Estes asked what the Planning Board decided and Mr. Weiner said they took no vote, but there was confusion on why they didn't use shielding at the Music Hall, but it turned out they weren't even there. Vice-Chair Connors said the Planning Board's concerns with shielding had nothing to do with the Zoning Board's decisions. Mr. Weiner

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replied that there were two electrical engineers on the Planning Board. Mr. Frink said he had served on the Planning Board and had experienced Planning Board members trying to redesign applicants' proposals and that was not their task.

Mr. Frink asked what kind of tower they were proposing and Mr. Pickford replied that it was a VHF tower. Chair Morton said it would be much like household antennas. Mr. Frink said it didn't sound as if it would be any uglier than the Spaulding Turnpike itself and it wasn't as if the turnpike was going to look like the White Mountain Highway.

*The motion passed 4-1 Matt Morton, Ted Connors, Ralph Estes, and John Frink voting in favor and Jim Weiner opposing.*

A) **John Emery** requests variances from Articles VI, X & XII of the Zoning Ordinance for property at **170 Fabyan Point Road, Tax Map 50, Lot 2.**

Attorney Jack McGee appeared before the Board to represent the applicant, John Emery who resided out of state in Hawaii. Attorney McGee said Mr. Emery purchased the lot a couple of years earlier. He said it was a unique lot on Fabyan point that was split on the other side by the U.S. Fish and Wildlife property. He said there was a small, two-bedroom house in middle that appeared to be built in the 1940's. He said the interior was scrunched and Mr. Emery wanted to convert the entry porch to enlarge the kitchen and bedroom.

Attorney McGee pointed out that it was a non-conforming lot and nothing could be done to bring the home into contemporary living proportions that would not require a variance. He said the first variance was for the non-conforming lot, the second was to allow the 8' setback for the front yard, and the third was to allow a 55' setback from the low water mark for the deck where 100' was required by the town.

Mr. Jerry Smith, the designer and builder commented that the Conservation Commission was concerned with the size of the deck, suggesting that it only go half way across the building, but pointed out that it was not that large considering a reasonable size for an outdoor dining area that any homeowner would want. He said the deck would be up high, wouldn't affect drainage, no trees would be cut, and it wouldn't hurt the wetlands.

Attorney McGee said the Board was supposed to look at the individual application, and therefore, granting the application would not set precedence because this was an extremely small lot.

Attorney McGee said people should not be required to live in past conditions when others were living in contemporary conditions and this application was not contrary to the public interest or the spirit of the Ordinance, which was to encourage greater conformance. He said the changes were for a reasonable use and would not alter or harm the character of the surrounding property, which was U.S. Fish and Wildlife who were notified and had not complained. He said justice would be served by allowing a reasonable use of the property by the owner. He said the lot was so small that it created a hardship, which affected reasonable use of the property. He said the applicant currently lived in Hawaii, but his father grew up on Great Bay in Greenland

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and he owned other properties in the area. He said the applicant returned periodically for visits and he was considering making this his home for the long term.

Mr. Smith said the applicant bought the property when he had the chance so he could stay there when he visited 3-4 times a year and close it up when he was not there. He said his father might also want to stay there. He said the applicant considered adding a second story, but he advised him to keep the changes simple with minimal additions and variances.

The applicant's father, Dave Emery stated that he grew up and currently lived on Sunset Farm in Greenland, but he used to own the Carroll's house behind the Baird's house on Newington Road, where his children grew up in town. He said Sunset Farm couldn't stay in the family after his father died so the family made arrangements with The Nature Conservancy (TNC) to purchase the property. He said his sister was allowed to live on ten acres, and then the property would go to New Hampshire Fish and Game after she died and then he would not be able to live on the Sunset Farm any longer. He said the applicant, his son, John Emery intended to keep the Fabyan Point house in the family, but at this point it was only rumor that he would live there.

Mr. Weiner said the Conservation Commission the applicant had initially a sketch of a smaller deck during an initial consultation and then returned with a larger deck proposal. He said Commission took the non-conformity of the lot into account and had no issue with the addition, but they did not approve the house length deck encroaching on the 100' setback and he recommended a grass patio instead of a deck. Mr. Jerry Smith said the State would not allow an impervious surface patio and would only allow a grass surface.

Mr. Estes said he walked out to the Bay and looked back to the house, which was very small and he thought it made sense to build a deck across the back. Mr. Smith said it took the applicant a year to finalize his plans and he never intended the preliminary sketch without dimensions to go before the Commission for a decision. Attorney McGee said there was no attempt to trick the Commission with the previous sketch and they had not requested a full width deck so they would not need to request another variance.

Mr. Frink said the Shoreline Protection Act prevented impervious surface close to the setback so and the slotted deck would never be covered. Mr. Smith agreed that the State would only allow an open deck and would not allow a terrace. He said David Price with the Department of Environmental Services (DES) had no objections to the 12'x24' deck. He added that the State allowed a 12' deep deck within a 50' setback, but the Town had wetlands plus shoreline restrictions that required a 100' foot setback.

Mr. Frink asked if the Town could be assured that the applicant and future owners would not extend the footprint of the building. Mr. Morgan said another owner could not expand anything without going back for another variance. Mr. Smith added that the new septic system was only approved for two bedrooms.

Bill Peterson, manager of Great Bay Wildlife Refuge said they had no objections so long as no environmental laws were violated.

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*Ted Connors moved to accept John Emery's requests for variances from Articles VI, X & XII of the Zoning Ordinance for property at 170 Fabyan Point Road, Tax Map 50, Lot 2. Ralph Estes seconded the motion.*

Mr. Estes asked the applicant how long before construction began and when they expected completion. Mr. Smith replied that they would probably begin in the spring and would be done in a year. He said they had already went to the building inspector and there was a slab foundation in place so they could build at any time.

Mr. Frink read through the five criteria, stating that the request would not be contrary to the public interest and was in the spirit of the Ordinance, which was to allow a reasonable use of the property. He said DES took the special conditions of the property into consideration and the applicant was meeting their 50' setback requirements for shoreline protection. He added that it had always been a summer camp and granting the variance would not alter the general appearance of the surrounding area considering it was a difficult lot to access and the structure would remain the same instead of a multi-story mini mansion.

Mr. Frink said the health and safety of the community or the water quality of the estuary would not be impacted because the open deck would allow water to drain the same as it had and the Bay would not be impacted by the small change. He said substantial justice would be served and there would be no gain to the public in denying the variances considering it was a non-conforming, tiny lot.

In conclusion, Mr. Frink said there was a hardship as a result of the location and size of the property and the request should be granted.

*The motion passed with all in favor.*

**Minutes:** Ted Connors motioned to accept the Zoning Board Minutes of August 17, 2015. Jim Weiner seconded the motion, and all members voted in favor.

**Adjournment:** Ted Connors motioned to adjourn. Jim Weiner seconded, and all were in favor and meeting adjourned at 8 p.m.

**Next Meeting:** TBD as needed

**Respectfully  
Submitted by:** Jane K. Kendall, Recording Secretary