ATKINSON ZONING BOARD OF ADJUSTMENT
21 Academy Avenue
Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall
Wednesday September 14, 2011

Present: Hank Riehl; Glenn Saba; Sam Zannini; John Recesso; Cathy Blash

Mr. Riehl called the meeting to order at 7:30 p.m.

Correspondence:
Incoming:

Outgoing:

Approval of Minutes of August 10, 2011 – The following corrections and additions were made:

Page 2, criterion, i, after agreed, add "this" and after met, delete "and' and insert "when".

Mr. Zannini made a motion to accept the minutes as amended. Mr. Saba seconded and they were approved. Mr. Riehl and Ms. Blash abstained.

Public Hearings - Continued from June 8 and July 13, 2011- 7:30 P.M.
Richard Deangelis, Application for a Variance from Article IV Section 410 to allow a deck attached to an existing dwelling 15 ft 2 inches from the water (84 feet and 10 inch variance) at 15 Chase Island Road, Map 22, Lot 15, RR3 Zone.

Abutters List was read with the following present:
Mr. DeAngelis

Mr. DeAngelis explained that he built the deck inside the wetland setback and without the benefit of a permit or a variance to do so. He has gone the State and they approved the deck going 12 feet out from the house, to within 18 feet of the water, which means removing 3 feet from the deck as built right now. Mr. DeAngelis has decided that instead of trying to deal with the State on this issue, he is going to take the three feet off of the deck making tonight's variance request to allow the deck to be 18 +/- feet from the water, which is an 82 foot +/- variance.

Mr. Riehl did not feel a need to review the State's side of the issue in great depth because the ZBA does not enforce State regulations. Mr. Riehl then read the letter from the Conservation Commission, which explained that under DES regulations an owner of a pre-existing lot is allowed under CSPA to build an open or three season deck/porch 12 feet towards the water from the existing footprint, but not past it. The Conservation Commission stated that as long as Mr. DeAngelis agrees and complies with reducing the deck to 12 feet toward the lake (removing three feet from the current as-built dimension), they would recommend granting the variance. Mr. Riehl re-stated that the DES's regulations have no bearing on Town regulations, as the town's are more restrictive, and it is town regulations that should guide ZBA proceedings.

Mr. Riehl believes this is fairly straight forward as far as the facts are concerned. The deck is newly constructed and not a replacement of any other pre-existing structure. Mr. DeAngelis claimed that he did find three footings when he was digging the new footings, but never found any evidence in Town records of a previously existing deck.

The Board reviewed the diagrams. Mr. Saba asked if the existing three season porch (from where the deck in question tonight was built) was preexisting and when it was built. Mr. DeAngelis said the porch was built at the time the cottage was built. It is on the tax card and is known to the Town. Mr. Recesso asked about the doors on the porch and Mr. DeAngelis explained the doors were changed by him. There were steps originally that led from a door outside. These were removed when Mr. DeAngelis added the deck. Mr. Riehl asked Mr. DeAngelis to reconfirm his intentions that the deck on the drawing was to be reduced to an even 12 feet, removing 3 feet, to comply with state requirements. Mr. DeAngelis confirmed.

Mr. Recesso asked where the Shoreline Protection Acts comes into play with this. Mr. Saba stated he had experience with this and said a property owner can extend from the front of the structure, facing the water, no matter where it is, an open deck 12 feet towards the water, even if it goes directly to the water. Mr. Riehl does not believe this is applicable at all because the Town does not enforce State laws anyway. They are only concerned with the Town's regulations. Mr.Riehl said the Town usually looks for the applicant to satisfy DES regulations before they come to the ZBA as a procedural approach, but state approval is no assurance of town approval.

The Board review the Criterion

1. Mr. Riehl thought the situation was difficult because the Town has put in requirement that there be a 100' setback to the wetlands. Sometimes the Board hears variance requests for low value/swampy areas or little seasonal creeks but this is about Big Island Pond. The Town has spoken and they want 100' setbacks and that is what they expect. Here the Board is being asked to grant something that is already well within the 100' setback and adding another 12' encroachment. He believes this does affect the public interest and is having a hard time with it. Mr. Saba said that based on the 5 criteria, law and the history they have had with the new criteria, the applicant must merely show that there is no harm and will not be contrary to the public interest. He contended that a primary wetland is a lot more important to the wetland than an open body of water such as this. There is no runoff to the lake and is not disturbing any wildlife or important vegetation and he did not believe it was contrary to the public interest. Mr. Saba stated this was backed by the letter from the Conservation Commission and would weigh heavy in the decision of the application. Mr. Zannini stated there was a Supreme Court case; Mallard v. Chichester where the Court ruled it would have to unduly and to a marked degree conflict. He did not believe that this application violated that. He would also rely heavily on the Conservation Commission. No one from Big Island Pond had raised any concerns. Even though DES is separate, they allow a 12 foot encroachment to be exempt from the Shoreline Protection. Mr. Riehl asked if there were a bigger public interest in that the Town has spoken by virtue of the regulation. Mr. Zannini said there is a regulation but that is why there are variances. There is no roof on the deck, there is spacing on the floorboards and will slow down runoff. There have been many other open decks within the 50' setback that have been approved by the Board. Mr. Saba said the ordinance is to protect ground water and wildlife in conservation areas. This deck is not harming the water in any way. Mr. Saba stated further that if the applicant satisfies the other four criteria a denial based solely on the public interest criterion is unlikely to be upheld in Court. The Board agreed 4-1 with Mr. Riehl dissenting that this was met as stated and discussed.
2. Mr. Saba stated that the spirit of the ordinance is to protect the general welfare. In his experience an open body of water does not fall under primary wetland. The spirit of the ordinance is to protect that and unless there were runoff falling into the lake or if some kind of vegetation was cleared for this, it would be different. This was a manicured lawn. He believed there would be many lawsuits if DES allowed open decks and a Town refused to allow them. He believed the ordinance and the intent were clear. Mr. Zannini said that when it came to the spirit of the ordinance the Courts have also taken into account overcrowding and public safety, which this has no affect on. Mr. Riehl asked what the response was to the fact that the Town's ordinance was crystal clear. Mr. Zannini's response was that if the Board held everybody to the strict zoning requirements they would never grant a variance. Mr. Riehl said that he saw a difference between some of the requests where somebody was going 5 feet closer to a seasonal brook with cattails as opposed to somebody getting within 15 or 18 feet to the lake. Ms. Killam told the Board they may want to review 410:1 while discussing this matter. Mr. Saba said this was exactly what he was trying to articulate. Ms. Blash asked how many of the surrounding homes had decks. Mr. DeAngelis stated

that most had decks including some that were over the water. She asked if these were grandfathered in. Mr. Riehl stated that some were grandfathered, some may have been built without permits, etc. This matter in front of the board is under today's regulations and the fact that it has already been built is of no consequence and should not be germane to the discussion. Mr. Zannini stated again that this is not overcrowding sidelines, not affecting public safety response and in his opinion he is going to rely on Conservation and Shoreline Protection because he believes they are qualified in these matters. The Board agreed 4-1 with Mr. Riehl dissenting that this was met as stated and discussed.

3. Mr. Saba believed that the Board needed to weigh the individual loss opposed to the gain to the general public. It is not unusual to have an open deck and the loss to the property owner to remove it would far outweigh any gain to the public. Mr. Recesso stated that there is no outdoor plumbing associated with this. Ms. Blash stated that being a realtor this deck does add value to the house and surrounding properties. The Board unanimously agreed this was met based on discussions.
4. The Board unanimously agreed this was met based on discussions.
5. The Board unanimously agreed this was met based on discussions.

Motion to approve the variance request, as amended during discussions for a deck extending 12 feet from the home's 3-season porch to a point approx 18+/- feet from the lake (an 82+/- foot variance) was made by Mr. Zannini, seconded by Mr. Recesso and approved 4-1, with Mr. Riehl voting against.

Public Hearings - Continued from July 13, 2011- 7:35 P.M.

Todd Wallace, Dube Plus Construction, for D.J Lowell Trust, Application for Special Exception Per Article IV Section 460 to allow Extended Family Accessory Living Unit at 15 Woodlawn Ave, Map 13 Lot 50 in the RR2 Zone.

The Applicants requested a continuance while they work with DES .

Mr. Zannini made a motion to continue the hearing based on the applicant's request. Mr. Recesso seconded and it was unanimously approved.

Motion was made and seconded to adjourn the hearing. Mr. Riehl adjourned the hearing at 8:30 p.m.

Respectfully Submitted _____

Minutes transcribed from tape ***Rebecca Russo***