

**Town of Buxton
Board of Appeals**

Minutes

Tuesday, September 4, 2018 at 7:00 p.m.

Recorded by Kandice Talbot

Members in Attendance: Stephen Heroux, Scott Warchol, Patrick Hanna, Charlene Libby

Members not in Attendance: Peter Leavitt

Others in attendance: Tyler & Heather Forgea

Stephen Heroux called the meeting to order at 7:00 p.m.

Chair Heroux discussed that they are a Board of 5 and they have 4 members tonight so they have a quorum. We sit up here and listen to an appeal and they make their decisions based on State Statues and Town Ordinance. We'll ask the applicant to come up, have him explain what he is asking for a variance. We'll ask questions. We'll ask people in the audience if they would like to come up and comment on it. At some point we will close the public hearing and have discussion among the Board and render a decision.

Chair Heroux made a motion to open the public hearing for a side setback variance to construct a garage for Tyler and Heather Forgea, Ms. Libby seconded. Voted 4-0 (Leavitt absent) in favor.

Tyler & Heather Forgea, applicants, discussed what they were requesting. They are looking at getting a side setback reduction to 17 ft. The garage they would like constructed is a 28 ft. x 36 ft. footprint attached to the right side of the house. The left side of house is where the leach field is located and the well is located right behind where the garage is proposed. We are also looking at constructing some additional living space above the garage for their family to grow.

Mr. & Mrs. Forgea realize that the side setback is currently 30 ft., however if they constructed a smaller garage they would lose the living space that they are trying to acquire.

Chair Heroux asked if this house was their primary home.

Mr. & Mrs. Forgea said that it was and then discussed that since the only option was to construct the garage on this side of the home, they would lose a bedroom. They also mentioned they only have one bathroom and they would like to add another bathroom. It would help them as well as increase the property value.

Mr. Warchol asked the applicants if they had given any thought to adding the living space to the back of the house and just going with a one car garage to stay within the setbacks required.

Mr. Forgea said the well is at the back of our house so trying to add onto the back would not work. Also the land in the back of the house pitches down and there would be a lot of fill required.

Mr. Warchol asked the applicants when they purchased the property.

Mr. Forgea said in 2014.

Chair Heroux made a motion to close the public hearing, Ms. Libby seconded. Voted 4-0 (Leavitt absent) in favor.

Ms. Libby wanted to discuss the neighborhood and how there are very small lots in an old development. She had done a drive by of the neighborhood and a lot of the houses had garages. She was wondering how the other houses had garages without getting an appeal. She had asked Ms. Talbot to put together a list of homes in the area that may have been granted a variance on their property.

Chair Heroux said that non-conforming buildings can exist for two reasons. One, they are legal non-conforming and they got a variance for it or it was grandfathered prior to. Or they are illegal non-conforming and they exist.

Ms. Libby then asked Ms. Talbot how one of the lots on the list that was done had gotten a variance.

Ms. Talbot said that she had put the list together based on approvals throughout the year and she did not go through each file to see what was entailed.

Ms. Libby asked before they go back and discuss 4.2.b.2 she had taken a look at dimensional requirements and the lot and yard requirements, side yards may be reduced to 20% of the frontage but no less than 20 ft. for non-conforming lots. Does this pertain here?

Chair Heroux said that this is an approved subdivision with legal non-conforming lots. State Statute, regarding of what our ordinance states, doesn't give anyone but the Board of Appeals to make a property setback reduction.

Ms. Libby then asked if it was in the Board of Appeal's jurisdiction to go down to 17 ft. Does that statement limit us to go to 20 ft.?

Mr. Heroux stated our ordinance limits us in two places so we can only go to a 20 ft. minimum.

Ms. Libby said we have an older subdivision with very small lots. We have lots, where if you did a drive by, is very consistent with what they are asking for. It seems fair to give them the same opportunity that we have given many others.

Chair Heroux said 6.2.b.2 would limit the Board of Appeals to 24 ft. and in theory if we use the dimensional requirements down to 20 ft., we could do that under an Administrative Appeal.

Ms. Libby said that they still could not get to the 17 ft. that they are asking for so their application might require a modification.

Chair Heroux made a motion to reopen the public hearing, Mr. Warchol seconded. Voted 4-0 (Leavitt absent) in favor.

Mr. Forgea said that he had come in and talked to Mr. Gordon, Code Enforcement Officer, and he had said that he could go down to the 20 ft. so he was wondering if Mr. Gordon could approve that then why are they there.

Chair Heroux said that no matter how our ordinance reads, State Statue is the defining body in what can and can't happen in certain property line, dimensional requirements. State Statue only allows the Board of Appeals to make any setback or boundary change no matter what this said. We had received a letter from the Attorney saying we needed to change our ordinance. So you being here is actually the appropriate place to be. There are two places in our ordinance that says we should not go less than 20 ft. The reason behind that is Fire Protection because that is what is required for an emergency vehicle to get between a building and a fence. Section 6.2.b.2 allows us to reduce by 20% your setback and the hardest part about getting a variance is that you have to meet the four cases of hardship. The first and fourth hardships are very difficult to meet. The piece we are talking about now is an asterisk in our Land Use Table would allow us to address that in an Administrative Appeal. You would not even have to demonstrate that you meet any of the hardships. Typically, on an Administrative Appeal I am going to look at how it affects the abutter, how it affects the neighborhood, and how it affects the town. If we decided to go that route, then I would ask you to amend your application to an Administrative Appeal and not a variance and move forward that way. But we could only go down to 20 ft.

Mr. Hanna asked if they could try to go through the variance and if it doesn't work, could they go to the Administrative Appeal.

Chair Heroux said you can only request an appeal once from this Board. If you are denied, then you would have to go to Superior Court. He said he thought they would be going down a road they shouldn't by doing it that way.

Mr. Forgea asked if they went either way, the minimum number would be 20 ft.

Chair Heroux said as our ordinance reads that is the minimum number.

Mr. Forgea asked if there was a way we could find out about a 15 ft. setback that was granted by the Board of Appeals in the past.

Chair Heroux said we could research that and come up with an answer. I don't know what the relevance of the answer would be. It would definitely shed some light, but I'm not sure of the complete relevance of it. So we can do this. We can table this, which would mean we would meet one month from now. This will have to be decided one month from now. The other possibility is you can withdraw your application and you can come back at any time. But again, we're not going to meet for another month.

Mr. Forgea said they were pushing the envelope on the weather and they are looking for a garage for this winter. The other part is that I have to go down to a 24 ft. garage and you put a set of stairs inside the garage to get to the second floor and now I'm down to 22 ft. or 21 ft. and that is really tight for two vehicles side by side.

Chair Heroux said he would like to close the public hearing and see how the Board would plan on proceeding tonight then I will reopen the public hearing again and we can decide which way you want to go. Either 6.2.b.2 or Administrative Appeal, tabling or withdrawing.

Chair Heroux made a motion to close the public hearing, Ms. Libby seconded. Voted 4-0 (Leavitt absent) in favor.

Mr. Warchol asked how we got to administrative appeal.

Chair Heroux said it's a sharp turn to go this route, but it is within our ability. If our ordinance book was written to what the state allows to happen then it would automatically be an administrative appeal. The only way the applicant can use this sub note 3 would be for an administrative appeal, because the Code Officer would have to deny the request because he does not have jurisdiction to make that reduction. Then it would come to us. We would review this under 6.2.a, because they would not have to meet hardship to get Administrative Appeal.

Ms. Libby mentioned that Chair Heroux had referenced two sections in the ordinance that talk about 20 ft. Where is the second one?

Mr. Warchol said it's referenced in 6.2.b.2.

The other Board members pointed out that this is the 20%, which gets you 24 ft. not 20 ft.

Ms. Libby said what also is a little confusing is the ordinance clearly states that Mr. Gordon can reduce the setback down to 20 ft.

Mr. Hanna said that hypothetically the Code Enforcement Officer can go down to 20 ft. and then we can go to 6.2.b and that gives us the opportunity to go less.

Ms. Libby said she also was reading it that way and she thinks that was Fred's interpretation. That he could go to 20 ft. and if it was more than 20 ft. than we had flexibility beyond that. She then asked Mr. Heroux if he thought the Board of Appeals had anyway to grant them a 17 ft. variance.

Chair Heroux discussed how in the past anything has been done. Hardships have been met. He said hardship 1 is hard to meet and hardship 4 is very hard to meet. Mr. Heroux did not feel they could meet hardship 1. He also felt, in his personal opinion, that the Board of Appeals could not grant them a 17 ft. variance.

Ms. Libby asked if the applicants would have the chance to change their application to an Administrative Appeal if they would like to do that this same night.

Chair Heroux said that they would be able to do that. So I think we discuss, decide which avenue we would like to go then open it back up to the applicant to let them decide what they would like to do. Chair Heroux asked if the Board thought Administrative was the way to go.

Mr. Warchol asked if going to Administrative was basically what we feel and there are no guidelines.

Chair Heroux said that is why it is a limited process.

The Board then discussed whether an administrative appeal or a variance would be the route to go. They felt that an Administrative Appeal would be best way to go with the most option for the applicants.

Chair Heroux made a motion to open the public hearing, Ms. Libby seconded. Voted 4-0 (Leavitt absent) in favor.

Chair Heroux then discussed with the applicants a couple of options that they would have. One would be to change your application to an administrative appeal, we'll decide by not looking at hardship as a criteria, and that would allow us to get you down to 20 ft. You can withdraw your application, in lieu of collecting more data. You could ask us to table it and we would be back and one month and a decision would be made that night.

Mr. Forgea asked if they tabled it if that would help them possibly get down to the 17 ft. that we are requesting.

Chair Heroux said, Kandice, like us, want to make things work and she will do her best to find the document as to how a previous neighbor received a variance of 15 ft. He is not going to guarantee that will happen. He is not sure how that would have relevance in an administrative appeal, however it might have relevance in a hardship case.

Mr. Warchol suggested that maybe the applicant might want to take the time to check with an attorney and see if the Board of Appeals could reduce the setback less than 20 ft.

Mr. Hanna said that what he is struggling with is the language that says the CEO can reduce the setback down to 20 ft. He feels that gives the Board of Appeals the option to reduce less than 20 ft. But I understand meeting the hardships.

Chair Heroux said we are now back to the same three options. Two of them will lead you back in a month and one of them will give you a decision tonight.

Mr. Hanna asked if there has ever been a case where an applicant has proven all 4 cases of hardship.

Mr. Heroux said there has but in his recollection the biggest driver was it was an older subdivision, other side of town with smaller lots. The builder put houses, not even where they were shown on the plans, and some houses weren't even on the lots. When a home owner went to sell it was determined they were too close to property line and they ended up getting a variance because it wasn't done by the applicant, it was done by the original builder. It was for an existing structure, not something that they were proposing.

Mr. Forgea asked again why it was that when he met with Mr. Gordon, at that time Mr. Gordon could reduce the side setback down to 20 ft. and to go to the Board of Appeals could get him a reduction less than the 20 ft. If he had known he couldn't get less, he wouldn't have spent this time.

Chair Heroux said Mr. Gordon was right. If you meet all four cases of hardship we can do something different. The question is can you demonstrate you meet all four cases of hardship.

Ms. Forgea asked if they still had to go through the Administrative Appeal if Mr. Gordon could just go ahead and grant the permit with a 20 ft. side reduction.

Chair Heroux said that based on State Statue this is the best way to go. If Mr. Gordon reduced the side setback to 20 ft. then a town resident came in and said it is not right that a reduction was granted by the Code Enforcement Officer, then it would come back to the Board of Appeals. But it could also end up in Superior Court as a challenge.

Mr. Forgea asked if they got held up on building the garage and they found more information could they come back and present this again or no.

Chair Heroux said if you asked for an administrative appeal and then came back for a variance, it may be possible but I am not actually sure. He said he couldn't give him an option on that one way or another, but if the applicant wanted to go that way, he should have an attorney look at it.

Mr. Forgea then withdrew his application for a variance and requested an Administrative Appeal for a side setback reduction to 20 ft.

Chair Heroux made a motion to close the public hearing, Ms. Libby seconded. Voted 4-0 (Leavitt absent) in favor.

Chair Heroux then said that he does not feel that this administrative appeal is going to affect the neighborhood, the abutters, or the town in a negative way.

Ms. Libby said she felt it was clearly a positive enhancement and fits into the character of the neighborhood.

Chair Heroux then asked all those in favor of the administrative appeal for a side yard reduction to 20 ft. The vote was 4-0 (Leavitt absent) in favor.

Chair Heroux then made a motion for the Board of Appeals to grant the Administrative Appeal for a 20 ft. side yard setback to build a garage that was drawn on the application that was changed from a variance to an administrative appeal. Ms. Libby seconded the motion. The vote was 4-0 (Leavitt absent) in favor.

CEO Report:

No Report

Bills:

There were no bills

Communications:

Maine Town & City

Minutes:

Mr. Warchol said he had a comment on the minutes on page 2, third paragraph up from the bottom, second sentence where it says "and mostly Mr. Chamberland came in because of the overhand and he wanted to avoid". That should've been overhang.

Chair. Heroux made a motion to approve the minutes of June 5, 2018 with the change. Seconded by Mr. Warchol. The Board voted 4-0 (Leavitt absent) in favor.

Other Business:

Chair Heroux said on at least two occasions I've made presentations at the Planning Board in regards to accessory buildings and it might have gotten cleaned up in one place.

Ms. Libby asked if the Planning Board writes it or recommends it.

Chair Heroux said that if the Selectmen would like to see a change, they make a presentation to the Planning Board. Same thing with the Business Design Standards. All of the processing goes through the Planning Board. The Planning Board holds the public hearing, and mediates that and then gets moved forward from there. The Selectmen do have the ability if the Planning Board decides to not go forward with a change, the Selectmen can go forward with it. Hopefully it would go through a regular process, which would be a presentation to the Planning Board, the Planning Board would then set a public hearing. The Selectmen then gets it on the warrant.

Ms. Libby then discussed about the variance hardship, especially the reasonable return one, we need to have some criteria that is objective, instead of being so subjective, how can we decide what's a reasonable return without having some information.

Ms. Talbot and Mr. Warchol discussed bringing in information from their seminars for members to review.

Chair Heroux said you are going to have these State Statutes that say these things, but you can say you think because they can't sell the house, there is not reasonable return and that is the way I am going to interpret it. You can definitely say that. The only piece is if it gets challenged, there is statute already set on what the bench is.

Ms. Libby said that her concern was consistency. The Board could decide in one case it's reasonable and the next it isn't, without really having any benchmark to compare it to.

Chair Heroux said on the fourth hardship we message that the best we can to make 6.2.b.2 work and with this garage who the one is causing the infraction.

Ms. Libby said in this case, it's an older subdivision, the lot sizes were very much smaller, and the code changed after the fact, so I think giving them some leeway because of that and looking at the other conditions, I would feel comfortable with that.

Chair Heroux held up a copy of the letter from the Attorney saying things needed to be changed. The Selectmen have a copy and the Planning Board have a copy. This just needs to happen.

Mr. Warchol then asked about bullet three under dimensional requirements where it says side yards may be reduced to 20% of the frontage but not less. Are you thinking that it is the front frontage or the front side?

Chair Heroux said at one point the previous Code Enforcement Officer would say the property has 151 ft. of road frontage and would take 20% of that. In Chair Heroux's opinion it is not supposed to happen that way. He feels that the frontage means the front setback. This needs to be cleaned up. He has gone in front of the Planning Board and explained his interpretation of this language, but he believes the Planning Board had to decide how they want to go with accessory buildings and make those numbers for that. Moving forward he would like the members to look at it and the next time the Board meets bring forward what you think ought to happen and then we'll schedule something with the Planning Board and present it and move forward.

The Board then discussed when the next meeting would be held. In order for this to get on the town meeting in June for an ordinance change this has to be almost completed by February. The decision was to hold the meeting in December.

Motion by Chairman Heroux to adjourn at 8:50. Mr. Warchol seconded. The Board voted 4-0 (Leavitt absent) in favor.

Date approved _____

Stephen Heroux, Chairman

Date