

STATE OF VERMONT
ENVIRONMENTAL COURT

In re: Snelgrove Permit Amendment (Appeal of LeBlanc, <u>et al.</u>)	} } } }	Docket No. 25-1-07 Vtec
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Decision and Order

Appellants Jacques LeBlanc, David LeBlanc, Christine Fortin, James LeBlanc and Herman LeBlanc (Appellants) appealed from a decision of the Zoning Board of Adjustment (ZBA) of the Town of Newport granting a zoning permit amendment to Appellee-Applicant Robert Snelgrove for a boathouse. Appellants are represented by Duncan Frey Kilmartin, Esq.; Appellee-Applicant is represented by Christopher D. Roy, Esq., and the Town of Newport is represented by William Boyd Davies, Esq.

Appellee-Applicant and Appellants have each moved¹ for summary judgment regarding whether the as-built boathouse conforms to the Zoning Bylaws. They have provided the zoning bylaws last amended in February of 2006. The following facts are undisputed unless otherwise noted.

¹ The result in this decision is not dependent on whether or when Appellants filed their response to Appellee-Applicant's motion. As most recently discussed in In re Legrove and Paznokaitis Variance Application, Docket No. 19-1-08 Vtec slip op. at 1-2 (Vt. Env'tl. Ct., July 15, 2008), even in a case in which no other parties have entered an appearance, it is not appropriate for the Environmental Court simply to grant the relief requested by an appellant as if by default. In re: Free Heel, Inc., d/b/a Base Camp Outfitters, Docket No. 217-9-06 Vtec, slip op. at 1, n. 1 (Vt. Env'tl. Ct. Mar. 21, 2007). Rather, the Court must independently examine the material facts, and may only grant the motion if the moving party is entitled to judgment under the applicable substantive law, because the Court is obligated to apply the substantive standards that were applicable before the tribunal appealed from. 10 V.S.A. § 8504(h); V.R.E.C.P. 5(g).

Applicant's property is located at 5706 Lake Road on the westerly shore of Lake Memphremagog in the Town of Newport. The 2006 Zoning Bylaws² define the entire town as a single zoning district, § 201, and establish dimensional requirements for lots and structures according to the particular use category rather than according to the zoning district. § 206. For residential uses, the side yard setback and rear yard setbacks are 25 feet, and the building height maximum is 35 feet. The Zoning Bylaws do not appear to establish a setback requirement from the lakeshore of Lake Memphremagog.

When Applicant acquired the property in 1976 it included an existing single-family house and a boathouse (the former boathouse). Under the 2006 Zoning Bylaws these uses are categorized as a permitted single-family dwelling use and a permitted accessory use. The former boathouse was located at the lakeshore at (or near³) the southerly boundary of Appellee-Applicant's property, so it was entirely within the side yard setback area adjoining the northerly boundary of Appellants' property.

Under the 2006 Zoning Bylaws the former boathouse was a nonconforming structure because it was located entirely within the twenty-five-foot side yard setback. A small stream entered the back of the former boathouse, dropping four to five feet in elevation by its outlet at the lake level at the front of the former boathouse.

² The parties have not provided any earlier zoning ordinance from which the Court could determine when the boathouse became nonconforming; for the purposes of this decision the Court will assume that the regulations in effect in October of 2005, when the first application was filed, also contained a 25-foot side setback requirement.

³ Paragraph 6 of the affidavit of Herman LeBlanc, together with the deed excerpt attached as Appendix A.1 to Appellants' Notice of Appeal and Statement of Questions, suggests that the LeBlanc-Snelgrove property line ran from the lake around the south side and the back (west side) of the former boathouse, before proceeding from there towards the west, so that any expansion of the boathouse towards the west could arguably be on Appellants' property. Any dispute over the location of the property line or the parties' respective property rights must be resolved in superior court.

The former boathouse had a low concrete foundation or concrete footings, on which was built a single-story structure that opened onto the lake and provided access and storage for a single boat. The structure had a peaked roof with the gable ends facing east and west (towards the lake).

The parties dispute the dimensions of the former boathouse. Appellee-Applicant states that the width was 21' 2" and that the length was 32' 11", inclusive of an approximately one-foot overhang and including the lateral extent of the footings at ground level. Appellee-Applicant states that the height of the former boathouse was 19 feet, but does not clarify whether this dimension is taken from the lake level, the ground level at some location, or the top of the concrete foundation. Appellants state that the width was 18' 6", plus two additional feet of roof overhang, for a total width of 20' 6"; and that the length was 30' 3", plus additional two feet of roof overhang, for a total length of 32' 3". Appellants argue that the height cannot be determined without an agreed measurement method, but that the elevation of the peak of the roof of the former boathouse was approximately 11 to 12 feet lower than that of the current boathouse.

In October of 2005, Appellee-Applicant submitted an application for a zoning permit for the boathouse, proposing to reconstruct it northerly of the stream, about five feet northerly of its pre-existing location. The application stated both the "existing use and occupancy" and the "proposed use and occupancy" as "BOATHOUSE." The application stated the building length as "35" [feet], the width as "15" [feet], and the number of stories as "1." The application noted that it was for the "DEMOLITION & REBUILDING OF SAME SIZE BOATHOUSE 5 FT NORTH OF EXISTING," that is, still within the side setback; however, it stated the side setback as "N/A [not applicable]." Despite proposing construction within the side setback area, the 2005 application was acted on by the Zoning Administrative Officer rather than being referred to the ZBA under § 404 of the Zoning Bylaws. It was approved on November 17, 2005 and became final without appeal.

The project also received a letter dated September 27, 2005 from the state Agency of Natural Resources (ANR) regarding the requirements of state law for the project. That letter, based on a site visit taken on August 8, 2005 by an ANR employee, described the former boathouse as having been “located landward of” the lake, stated that the reconstructed boathouse was also proposed to be located landward of the lake, and stated that the existing alignment of the stream would be retained, with the reconstructed boathouse being placed northerly of the stream. Condition 2 of the ANR letter required that “[t]he reconstructed boathouse shall be landward of the existing shoreline.” The ANR letter stated that “[t]he streambed will be stabilized with existing stone and stone from an existing stone jetty, located north of the boathouse, which will be removed from the lake;” and that “[t]he removal of the existing jetty will provide access between the lake and the reconstructed boathouse.” No issues relating to the compliance of the current construction with the ANR letter or with any ANR regulations are before the Court in the present appeal.

Appellee-Applicant demolished the former boathouse and, in 2006, constructed the boathouse in its current location (the current boathouse). Appellants claim that the stream was relocated southerly of its original location, so as to run to the south of the current boathouse.

The current boathouse is a two-story structure, with concrete foundation walls that are much higher than the foundation or footings of the former boathouse, so that they form the full ground- or lake-level story. It has a second story with a peaked roof, with the gable ends facing east and west. It has three dormers with windows in the north-facing slope of the roof, and has a door on the east end of the building for direct access to the second story. The second story is a finished open room that is served by electricity, but has no plumbing, heating or other utilities.

The parties dispute the dimensions of the current boathouse. Appellee-Applicant

states that, exclusive of the eave overhang, the width is 18' 4"; the length is 34' 4"; and the height is 26'. Appellee-Applicant states that the eave overhang past the exterior walls is 1' 6" on the south and north sides, and 2' on the east and west ends, so that the width including the eave overhang would be 21' 4" and the length including the eave overhang would be 38' 4". Appellants state that the width is 18' 8½"; the length is 34' 6"; and that the height cannot be determined without an agreed measurement method, but that it is 29' to 31' depending on the measurement method.

In addition to completing work on the current boathouse, Applicant constructed a concrete retaining wall at the property boundary in approximately the same location as the southerly wall of the former boathouse, but much taller than the foundation or footings of the former boathouse, so that the stream runs between that retaining wall and the southerly wall of the current boathouse.

In 2007, Applicant sought to amend the 2005 zoning permit to obtain a so-called "as-built" permit for the current boathouse. Material facts are in dispute, or at least have not been provided to the Court, regarding how or whether the January 2, 2007 meeting of the ZBA was noticed for this application. There appears to be no dispute that the application was filled out at that hearing, and then was ruled on at the same hearing. The parties have provided a copy of undated, unsigned minutes for this hearing; material facts are in dispute, or at least have not been provided to the Court, as to whether the minutes were subsequently approved by vote of the ZBA.

The 2007 application stated the "existing use and occupancy" as "BOATHOUSE-AMENDMENT OF EXISTING PERMIT" and stated the "proposed use and occupancy" as "BOATHOUSE & SLEEPING QUARTERS." The 2007 application stated the building length as "34" [feet], the width as "16" [feet], and the number of stories as "2." Although the 2007 application stated the building footprint as 34' x 16', it also stated the square footage as 600 square feet, rather than the 544 square feet that would be produced by

multiplying the length by the width.

The additional concrete retaining wall at the southerly side of the stream was not mentioned in either the 2005 or the 2007 application. No zoning permit application appears to have been filed regarding that wall.

Questions 1 and 5 of the Statement of Questions

Material facts are in dispute, or at least have not been provided to the Court, regarding how or whether the January 2, 2007 meeting of the ZBA was noticed for this application. There appears to be no dispute that the application was filled out as well as ruled on at that hearing, which could not have allowed for the notice or warning required for conditional use review by 24 V.S.A. § 4464(a)(1). Unless Appellee-Applicant or the Town can show at trial that reasonable efforts were made to provide adequate posting and notice, § 4464(a)(5), the Court is required by that section to remand this action to the ZBA.

Material facts also have not been provided to the Court, regarding whether the January 2, 2007 meeting minutes were ever adopted by the ZBA sufficiently to constitute the written decision of the ZBA under 24 V.S.A. § 4464(b)(1).

Question 2 of the Statement of Questions

Nothing about the uses on Appellee-Applicant's property is nonconforming, as residential uses and their accessory uses are classified as permitted uses. Rather, the former boathouse was a noncomplying structure housing a permitted use. It was noncomplying due to its failure to meet the side setback dimensional requirements. Compare 24 V.S.A. § 4303(14) with § 4303(15); and both definitions in § 602 of the Zoning Bylaws. Therefore § 404(1) of the Zoning Bylaws does not apply.

In re Misericchi, 170 Vt. 320 (2000), decided under the prior statute, does not require a different result. It was decided at a time during which the state zoning enabling statute

language authorizing towns to regulate noncomplying structures had for a time been repealed, leaving only the language authorizing towns to regulate nonconforming uses, even though many zoning bylaws retained older provisions regulating noncomplying structures. That anomaly was cured by the extensive statutory amendments enacted in 2004.

Under the present statute, municipalities are required to define in their zoning bylaws how all nonconformities (nonconforming uses, structures, and lots) are to be addressed, including the extent to which a nonconformity may change or expand. 24 V.S.A. § 4412(7). Municipalities also may, but are not required to, provide in their zoning bylaws for waivers to reduce dimensional requirements in defined circumstances. 24 V.S.A. § 4414(8). The 2006 Zoning Bylaws, adopted after that statutory authority was enacted, allow the alteration or expansion of a nonconforming structure, but only “providing such action does not increase the degree of nonconformance.” The 2006 Zoning Bylaws do not provide for waivers of the side setback dimensional requirement.

Even using Appellee-Applicant’s measurements of the current and the former boathouse, the current boathouse increases the volume of noncomplying structure within the required setback area from that of the former boathouse, thereby increasing the degree of nonconformance. In re Appeal of Tucker, Docket No. 123-7-98 Vtec (Vt. Envtl. Ct. Aug. 2, 1999); aff’d Docket No. 1999-399 (Vt., Mar. 10, 2000) (unreported mem.) (three-justice panel) (permit allowing construction of one-story building extending into side setbacks does not authorize expansion to two stories within the setbacks, even though two-story building would not violate height limitations or extend laterally any farther into setbacks); see also Appeal of Barnes, Docket No. 154-8-04 Vtec, slip op. at 6–7 (Vt. Envtl. Ct. May 18, 2005) (additional height added to pre-existing noncomplying structure within setback area requires a variance); In re Appeal of Dunnett, 172 Vt. 196, 202–03 (2001) (affirming denial of enlargement of portion of building within side setback area under

nonconforming structure provisions of bylaw).

Moreover, as of receiving the 2005 Permit, all that Appellee-Applicant was authorized to construct was a new 15' x 35' single-story boathouse, located five feet farther north than the existing boathouse. The current boathouse represents an expansion within the setback area that is larger than that authorized by the 2005 Permit, as well as one that is larger than that of the former boathouse. As the 2006 Zoning Bylaws do not provide for conditional use approval for such an expansion, and do not provide for a waiver of the side setback dimensional requirement, the 2007 application would require a variance in order to be approved.

All that is before the Court in the present proceeding is what was before the ZBA as proposed by the 2007 application: a two-story, 34' x 16' boathouse, five feet northerly of the former boathouse. As Appellee-Applicant's own statement of facts asserts that the current boathouse is instead 34' 4" x 18' 4", plus an additional three feet of width and four feet of length due to the eave overhangs, it is not clear to the Court whether Appellee-Applicant wishes to amend the application or believes that he has done so. Moreover, the freestanding southerly retaining wall appears to require a permit, as it falls within the definition of a structure. § 602 of the Zoning Bylaws.

Accordingly Summary Judgment must be granted in favor of Appellants on Question 2 of the Statement of Questions. The enlargement of the existing boathouse within the side setback area is not eligible for conditional use approval under the terms of § 404(2) of the Zoning Bylaws, because the proposal would increase the degree of nonconformance. Any application for a variance must be presented to the ZBA before it could be appealed to this Court.

Question 3 of the Statement of Questions

Although Appellee-Applicant's designation of the side setback as not being

applicable could have supported the Zoning Administrative Officer's or the ZBA's rejection of the 2007 application as incomplete, they did not do so. As the application is de novo before the Court, and the information about the setbacks has been provided in this proceeding, this issue has become moot.

Question 4 of the Statement of Questions

No application for a variance was before the ZBA, and therefore the Court cannot consider an application for a variance in the present proceeding. In re Torres, 154 Vt. 233, 236 (1990). Question 4 of the Statement of Questions is therefore beyond the scope of this appeal.

Question 6 of the Statement of Questions

The present appeal was taken from the ZBA decision to approve the 2007 application. It is not an enforcement action, nor is it an appeal of a zoning administrator's refusal to issue a notice of violation or to take enforcement action. Question 6 of the Statement of Questions is therefore also beyond the scope of this appeal.

Question 7 of the Statement of Questions

The 2005 Permit became final without appeal, and cannot now be challenged, either directly or indirectly. 24 V.S.A. § 4472(d). Appellee-Applicant remains entitled to have what was applied for and approved in the 2005 Permit: a 15' x 35' single-story boathouse located five feet northerly of the former boathouse. See, e.g., In re Appeal of Adams, Docket No. 145-9-03 Vtec, slip op. at 3 (Vt. Env'tl. Ct. Mar. 21 2005), citing Town of Bennington v. Hanson-Walbridge Funeral Home, Inc., 139 Vt. 288, 292-93 (1981).

The construction allowed by the 2005 Permit continues to qualify as a nonconforming structure (as defined in 24 V.S.A. § 4303(14) and § 602 of the Zoning

Bylaws) as having been improperly authorized as a result of error of the Zoning Administrator, because the new construction was proposed to be located within the side setback and should have been referred to the ZBA under § 404(2) of the Zoning Bylaws.

Anything constructed beyond the scope of what was authorized by the 2005 Permit is before the Court in the present case involving the 2007 application, but does not require or allow the voiding of the 2005 Permit.

Accordingly, based on the foregoing, it is hereby ORDERED and ADJUDGED that:

1. Summary judgment is denied on Questions 1 and 5 of the Statement of Questions, as material facts are in dispute, or at least have not been provided to the Court, as discussed above.

2. Summary Judgment is entered in favor of Appellants on Question 2 of the Statement of Questions in that, even using Appellee-Applicant's measurements of the current boathouse, the current boathouse increases the volume of noncomplying structure occupying the required setback area beyond that of the former boathouse, and therefore does not qualify to apply for conditional use approval under § 404(2) of the Zoning Bylaws. Moreover, under the unappealed 2005 Permit, all that Appellee-Applicant was authorized to construct was a replacement 15' x 35' single-story boathouse, located five feet farther north than the existing boathouse. The current boathouse represents an expansion within the setback area that is far larger than that authorized by the 2005 Permit as well.

3. Question 3 of the Statement of Questions is hereby DISMISSED as MOOT.

4. Summary Judgment is entered in favor of Appellee-Applicant on Question 4 of the Statement of Questions that the issue of a variance was not before the ZBA and therefore is not before the Court in the present proceeding; Question 4 of the Statement of Questions is therefore DISMISSED.

5. Summary Judgment is entered in favor of Appellee-Applicant on Question 6 of the Statement of Questions that the issue of whether a notice of violation or other enforcement action is warranted was not before the ZBA and therefore is not before the Court in the present proceeding; Question 6 of the Statement of Questions is therefore DISMISSED.

6. Summary Judgment is entered in favor of Appellee-Applicant on Question 7, as the 2005 Permit became final without appeal and cannot now be challenged.

While certain facts remain in dispute as discussed in this decision, it is not clear that the disputed facts require resolution in the present appeal. Because this matter is already set for trial on August 20, 2008, we have scheduled a telephone conference (see enclosed notice) to discuss whether the trial is necessary in light of the present decision, and how the parties wish to proceed.

Done at Berlin, Vermont, this 18th day of July, 2008.

Merideth Wright
Environmental Judge