

TOWN OF SEABROOK ISLAND

Board of Zoning Appeals Meeting

November 8, 2018 – 2:30 PM

Town Hall, Council Chambers
2001 Seabrook Island Road



MINUTES

Present: Walter Sewell (Chairman), Bob Leggett (Vice Chairman), Ava Kleinman, John Fox, Joe Cronin (Zoning Administrator), Lynda Stearns (Acting Secretary)

Absent: Robert Quagliato

Guests: Jean Jones (Property Owner), Tommy Berl (Surfside Construction)

Chairman Sewell called the Board of Zoning Appeals meeting to order at 2:30 PM. Acting Secretary Lynda Stearns Cronin confirmed that the requirements of the Freedom of Information Act were fulfilled, and the meeting was properly posted.

APPROVAL OF MINUTES

1. **Board of Zoning Appeals Meeting: August 29, 2018:** Ms. Kleinman noted that an incorrect date was listed at the top of the draft minutes. She stated that the date should be corrected to October 29, 2018. Ms. Kleinman made a motion to approve the minutes from the October 29, 2018, meeting of the Board of Zoning Appeals, as amended. Mr. Fox seconded the motion. The motion was **APPROVED** by a vote of 4-0.

NEW BUSINESS ITEMS

1. **Appeal #38: 2633 Jenkins Point Road (Tax Map # 149-00-00-046 – Lot 34, Block 52):** Chairman Sewell explained that the owners of 2633 Jenkins Point Road have submitted an appeal to the Board of Zoning Appeals for review of a zoning denial which was issued by the Zoning Administrator. Specifically, the applicants were appealing the Zoning Administrator's determination that the installation of a pervious pergola system over an existing deck would result in the deck being reclassified from an "open deck" to a "covered porch," thereby becoming subject to a 25-foot marsh setback requirement rather than a 15-foot setback for open decks.

Prior to opening the hearing, Chairman Sewell asked if notice of the hearing had been properly posted as required by state and local law. Acting Secretary Stearns responded in the affirmative.

Chairman Sewell stated for the record that the Board had conducted a site visit to the property on October 29, 2018. The site visit was attended by Board members Sewell, Fox, Kleinman and Quagliato, Zoning Administrator Cronin, and Tommy Berl of Surfside Construction (on behalf of the applicant). Chairman Sewell stated that the site visit was for observational purposes only and no testimony was received.

Chairman Sewell then called on Zoning Administrator Cronin to provide testimony regarding the reason for denial of the request. Chairman Sewell administered an oath to Zoning Administrator Cronin prior to receiving his testimony.

Zoning Administrator Cronin stated that On October 9, 2018, he denied a zoning permit application to construct a pergola at the rear of an existing residence located on the property. The reasons cited in his written notice of denial were as follows:

- The rear of the Property abuts a marsh critical area which has been delineated on a survey by SCDHEC-OCRM. Pursuant to the town's Development Standards Ordinance (DSO), all structures which abut a marsh (exclusive of "open decks") shall be set back at least 25 feet from the OCRM critical line. "Open decks" are permitted to encroach into the 25-foot marsh setback; provided, however, no part of the deck may be closer than 15 feet from the critical line.
- Though the proposed pergola system was designed to allow water to pass through to the deck and to the ground below, the DSO defines a deck having a "**roof or other covering of any kind**" as a "porch" rather than a "deck." [*Emphasis added*]
- Therefore, in the Zoning Administrator's opinion, the installation of a pergola system would require the covered portions of the existing deck to be reclassified as a "porch" rather than an "open deck," and the 25-foot marsh setback would apply. Because the pergola system would encroach into the 25-foot marsh setback, the zoning permit application was denied.

Zoning Administrator Cronin noted that a portion of the existing deck, which contains an outdoor kitchen area, is already covered by an impervious roof. While this section of the deck was conforming at the time of its construction, changes to the critical line location over time have resulted in the covered portion of the deck now encroaching into the 25-foot setback. While maintenance of the non-conforming section would be permitted, in his opinion, the non-conforming roof could not be modified or expanded unless it was brought into conformity with the setback requirements.

Zoning Administrator Cronin stated that prior to acting on this request, he looked for similar cases in which another pervious structure was installed over a deck, and whether such a structure was determined to convert the classification of the deck below into a covered porch. He found one such example from 2014. At that time, the owners of 2923 Deer Point Drive were seeking to install a two-level deck within a 25-foot marsh setback area. The town's previous Zoning Administrator determined that the second level, although pervious,

constituted a covering over the lower level. The owners submitted a variance request to the Board of Zoning Appeals; however, the request was denied by the Board. In Zoning Administrator Cronin's opinion, this could be considered as precedent regarding whether a pervious covering would convert an "open deck" to a "covered porch." He noted, however, that unlike the proposed pergola system, the two-level deck proposed in 2014 did include additional outdoor living space on the second level.

Ms. Kleinman asked if the applicants were replacing the nonconforming portion of the existing roof within its current footprint, or if it was being expanded. Zoning Administrator Cronin noted that the existing roof was circular, whereas the applicants were now seeking to square it off, which would further extend the covering into the 25-foot setback. With the exception of one small corner, the remainder of the new pergola system over the rest of the deck would meet the 25-foot setback requirement.

Mr. Fox stated that if there was not a section of deck located under the portions which would be squared-off, then he felt that those sections could not be classified as a "covered deck" under the definition. Zoning Administrator Cronin stated that he agreed with this interpretation but noted that there was one small corner of the deck which is currently uncovered that the applicants were proposing to cover, which would result in an additional encroachment into the 25-foot setback. Therefore, the non-conformity would indeed be expanding.

Mr. Fox also stated that the applicants were seeking to replace an existing hard roof with a pervious covering, which in fact would be aiding the flow of water through the existing structure. Zoning Administrator Cronin agreed with this interpretation as well, but again noted the definition from the DSO which defines a covered porch as having "a roof or covering of any kind," without differentiating between pervious and impervious coverings.

Ms. Kleinman asked if the denial was based on the fact that the corners of the existing non-conforming roof would be expanded within the setback area. Zoning Administrator Cronin responded that if the only issue was squaring off the corners (which would not have decking beneath them) then he would have approved the zoning permit. However, the request also included a small portion of existing decking which would be newly covered within the 25-foot setback area. The extent of this new encroachment was approximately 2-3 feet.

Ms. Kleinman asked Zoning Administrator Cronin if he had come across any other examples in which an applicant was seeking to expand or modify an existing non-conforming use or structure. Zoning Administrator Cronin noted two recent examples in which a homeowner was seeking to replace the screens on a non-conforming porch with glass windows. In these examples, there was no change to the non-conforming use (ie. they were permitted to remain as unheated living space), the building's roofline or to the overall building footprint. He added that if the applicants were seeking to reconstruct or expand the non-conforming porches in these cases, then he would not have approved them. Ms. Kleinman asked if he saw the current request as similar to those two. Zoning Administrator Cronin responded that in this case, the non-conforming roof was being completely removed and replaced with a different type of covering, and that the footprint of the existing non-conformity would also be

expanded. While he felt that the type of the proposed pergola would be *more* conforming than what was there currently, it was his opinion that the new covering should comply with the town's current setback requirements. She asked if the owners would be allowed to repair the existing non-conforming roof. He responded that he would in fact sign off on ordinary maintenance and repair to a non-conforming structure, as that would be allowed by the DSO.

There being no further questions of the Zoning Administrator, Chairman Sewell then called upon the property owner, Ms. Jean Jones, to step forward to the podium. Chairman Sewell administered an oath to Ms. Jones prior to receiving her testimony.

Ms. Jones began her testimony by stating that she and her husband had recently purchased the property and were seeking to install a pergola system for the purpose of providing shade over the existing deck, which was subject to intense heat and sun in the afternoon. She also stated that the existing roof over the outdoor kitchen obstructs the marsh view from the residence. She added that the proposed pergola was the most cost effective and eco friendly option for addressing their issues on the deck. She stated that the pergola would not create any additional outdoor living space, but was intended solely to provide protection from the sun. She added that her husband has medical conditions that do not allow him to spend time in the sun, so this request would effectively allow him to use the outdoor living space. She added that the majority of the pergola system was outside the 25-foot setback, and that we were really only talking about no more than 3 feet.

Mr. Leggett questioned whether a pergola system would truly address the issues of excessive heat and sun on the rear deck, adding that he has a covered porch on his home and that the heat remains excessive at times. Ms. Jones responded that the pergola would not filter out all of the sun, but that they hoped to install some fans for additional circulation.

Ms. Kleinman stated that if the Board denied the request, the owner could still build the pergola out to the 25-foot setback line, which would cover most of the deck. Ms. Jones responded that the problem with this option is that half of the kitchen area would be uncovered.

There being no further questions of the property owner, Chairman Sewell called upon the applicant, Mr. Tommy Burl of Surfside Construction, who was under contract to complete the work on the property owners' behalf. Chairman Sewell then administered an oath to Mr. Burl prior to receiving his testimony.

Mr. Berl stated that the proposed pergola was an open, permeable system that would allow water to return to the surface. He stated that the addition of a pergola would not convert the deck into a porch, as the pergola was an architectural element rather than a roof or covering. Mr. Berl stated that the wording contained in the ordinance is ambiguous at best; however, it was his opinion that the proposed pergola was consistent with the intent of the ordinance, as the ordinance was meant to prevent a solid roof or closed horizontal structure from being constructed within a marsh setback area. He stated that the pergola is not designed to create a new separate and distinct living space; there is no access on top of it for one to walk or place furniture, and it is merely a system to help shade a portion of the current deck. He added that

the applicants' proposal meets the 15-foot setback requirement, as well as the intent of the and 25-foot setback requirements setback, because the pergola is an open system that allows water to pass through and return to the surface. He stated that the pergola system would be more compliant with the ordinance than the existing non-conforming roof, which was proposed to be removed.

Mr. Berl also questioned the Zoning Administrator as to why he would allow non-conforming screened porches to be enclosed with windows, as this would convert the porch into part of the principal structure and increase the amount of the dwelling's heated square footage. Zoning Administrator Cronin responded that the permit applications for each request did not include conditioning the living space within the porch, and if they did, then the zoning permits would not have been approved.

Several Board members asked Mr. Berl to explain the method in which the pergola would be installed, and specifically, how it would be attached to the existing residential structure. A discussion then took place regarding the details of the pergola design.

There being no further testimony, Chairman Sewell asked if anyone else wished to speak. There was no one else in the audience, and no additional comments were received. Chairman Sewell then opened the floor for discussion.

Mr. Leggett stated that he had no additional questions or comments.

Ms. Kleinman stated that while she felt for the homeowner, it was not the Board's role to change the plain wording of the ordinance. She added that to accept the appeal, the Board would need to determine that the Zoning Administrator had made an error in applying the ordinance. In her opinion, the term "roof or covering of any kind" was dispositive, and the addition of a covering would convert the open deck into a porch. She added that discussion of whether a covering must be pervious or not was more a question of interpretation; from a legal standpoint, the Board shouldn't address questions or intent if there is a plain meaning in the ordinance. She added that the Board's previous denial of a variance in 2014 also factored into her decision.

Mr. Fox stated that it appeared to him that this request should come in the form of a variance rather than an appeal. He stated that the Board was being asked to change the legislation. In this case, he found it hard to find a glaring error in the application of the zoning ordinance; however, he added that he would likely vote in favor of the request if it were submitted as a variance.

Ms. Jones asked what would be required to change the request from an appeal to a variance. Zoning Administrator Cronin responded that the applicant would simply need to fill out a variance application, and that a separate Board of Zoning Appeals meeting and public hearing would be conducted. The Board would then review the request against the four state-mandated criteria for issuing a variance and would either approve or deny the variance request. He added that while an appeal was a question of whether an administrative officer properly interpreted and applied the requirements of the ordinance, a variance was a

question of whether site constraints on a specific piece of property would create an unnecessary hardship by prohibiting or unreasonably restricting the use or property.

Mr. Berl stated that the denial of a variance in 2014 should not be viewed as precedent in this case, as the request at that time was for a two-story deck which would create outdoor living space on both levels. The proposed pergola would not create any additional outdoor living space.

Ms. Kleinman stated that if this was a recurring issue, then it should be addressed by council with a legislative solution in the DSO.

There being no further discussion, Chairman Sewell called for a motion. Following a thorough review of the application, including all supporting materials received in advance of the meeting, and all testimony received during the public hearing, the Board of Zoning Appeals determined that the language contained in the DSO regarding the definition of an "open deck" and "porch" were clear and unambiguous, and that the installation of a covering "of any kind" would convert the existing deck into a porch under the provisions of the DSO.

Based on these conclusions, Mr. Leggett made a motion, seconded by Ms. Kleinman, to accept the appeal as submitted by the Applicants. The motion to accept the appeal was **REJECTED** by a vote of 0-4. Therefore, the decision of the Zoning Administrator is hereby **AFFIRMED**.

ITEMS FOR INFORMATION / DISCUSSION

There were no items for Information / Discussion.

There being no further business, Mr. Fox made a motion to adjourn the meeting. Mr. Leggett seconded the motion. The motion was **APPROVED** by a vote of 4-0, and the meeting was adjourned at 3:52 PM.

Minutes Approved: January 18, 2019



Lynda Stearns
Acting Secretary