

Department of Permitting & Inspections

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MEMORANDUM

To: Development Review Board
From: Ryan Morrison
Date: July 7, 2020
RE: ZP20-0792CA (AP); 291 Appletree Point Road

Note: These are staff comments only. Decisions on projects are made by the Development Review Board, which may approve, deny, table or modify any project. THE APPLICANT OR REPRESENTATIVE MUST ATTEND THE MEETING.

File: ZP20-0792CA Appeal
Location: 291 Appletree Point Road
Zone: RL-W **Ward:** 4W
Date appeal accepted: April 20, 2020
Date of administrative decision: April 15, 2020
Date of application: March 17, 2020
Appellant / Owner: Gordon Maher
Request: Appeal of Administrative Denial of a request to permit an after-the-fact deck.

Background:

- **Zoning Permit 20-0792CA;** after-the-fact patio removal and replacement with a deck on a different footprint. Denied April 15, 2020. (Subject of this appeal.)
- **Non-Applicability of Zoning Permit 16-0459NA;** new vent for dryer and boiler from existing basement window. Approved October 7, 2015.

Overview:

Zoning Permit 20-0792CA, to permit an after-the-fact patio removal and replacement deck on a different footprint, at 291 Appletree Point Rd, was denied on April 15, 2020 for reasons outlined below. On April 20, 2020, the appellant filed a timely appeal within the 15-day appeal period.

Recommendation: Uphold zoning permit denial based on the following findings.

I. Findings

Timeline:

- **March 17, 2020** – Application ZP20-0792CA submitted.
- **March 24, 2020** – Application ZP20-0792CA deemed complete.
- **April 15, 2020** – Decision of Denial for ZP20-0792CA.
- **April 20, 2020** – Appeal of administrative denial submitted.

Reason for Denial:

Application ZP20-0792CA (subject of this appeal) was **denied April 15, 2020 for the following reasons:**

The applicant proposes replacing a lakeside patio with a deck that has a different footprint and encroaches closer to the waterfront. Table 4.4.5-3 sets a minimum waterfront setback of 75 ft from the ordinary high water mark of Lake Champlain in the RL-W zone. Section 4.4.5 (d) (1) (B) (ii) allows for the averaging of waterfront setbacks based on neighboring principal structures within 150 ft of either side of a property. Averaging the waterfront setbacks of homes within 150 ft of the subject property (both sides) does not aid in a setback reduction for the new deck. According to the applicant, the pre-existing patio (per historic imagery) was removed in two portions in 2017 and 2018. The patio was within the 75 ft waterfront setback. The patio is considered a nonconforming structure.

The applicant proposes replacing the patio with a deck that not only changes the footprint, but also encroaches closer to the ordinary high water mark of Lake Champlain – with a new setback of 28.5 ft from an existing lake wall. Sec. 5.3.5 (b) allows for nonconforming structures to ‘be replaced by a new structure retaining the same degree of nonconformity as the original structure.’ The section continues: ‘Zoning permit application for the replacement structure shall be completed within 1 year of demolition of the nonconforming structure; failure to do so shall result in the loss of the ability to retain the nonconformity.’

The applicant states that the replacement decking and patio removal was conducted in two phases – in 2017 and 2018. More than 1 year has passed since the removal of the nonconforming patio, thus rendering the possibility of obtaining a zoning permit for its replacement void. Additionally, the replacement deck encroaches closer to the ordinary high water mark of Lake Champlain than the previous patio, thus increasing the nonconformity.

The new deck is in violation of Table 4.4.5-3 and Sec. 5.3.5 (b) of the Burlington Comprehensive Development Ordinance.

The appellant has not provided an argument as to why the denial was issued in error and should be overturned. Conversation with the appellant simply revolved around his request for a variance to the waterfront setback requirement to accommodate the new deck. No variance has actually been sought or obtained.

Property History and the Replacement Deck:

According to the Assessor’s Office database, and from conversation with the appellant, the following information is known:

- The existing home was built in 1925, and is located within the 75 ft waterfront setback.
- The appellant stated that the previous lakeside patio was there for 50 years ago. Aerial photos from 2000, 2004 and 2013 show the previous patio. Earlier aerials are too unclear to see the patio.
- The 2019 aerial photo shows the new deck in a different footprint than the previous patio.
- The appellant stated that he removed the patio in two phases – in 2017 and 2018 and concurrently built the deck – a 12’x12’ portion in 2017, and a 12’x15’ portion in 2018. It is important to note that no zoning permits were obtained for the removal of the patio and for the construction of the deck.

- The previous patio would have been considered an existing nonconformity, and its replacement with a deck would have likely been permitted if: 1) the deck maintained the same degree (or less) of setback nonconformity; and 2) if the applicable zoning permit(s) for the patio replacement was obtained within one year from the date of patio removal.
- The new deck is setback from the waterfront a distance of 28.5 ft. The previous patio had a setback of approximately 30 ft. The new deck is not only in a different footprint, but it also increases the waterfront setback nonconformity.
- In accordance with Sec. 5.3.5 (B), because the previous patio was removed in 2017 and 2018, it lost its standing as an existing nonconforming use that could be replaced since a permit was not sought for its replacement within a year of the patio removal. Essentially, the zoning ordinance would consider there to be no existing patio at the time of the submittal of ZP20-0792CA, and would view the ‘replacement’ deck as an entirely new structure.
- Sec. 4.4.5 (d) (1) (B)(ii) states *“If the waterfront setback of existing principal structures within a distance of one hundred fifty (150) feet on either or both sides of a lot is less than the required setback, the setback may be reduced to the average alignment of such structures.”* The average setback of the adjoining homes/structures to the 100’ lake elevation is 48’ (based off aerial photos). The new deck (and previous patio) is well within the average 48’ waterfront setback – with a setback of 28.5 ft.
- Removal of the patio in 2017/2018 precludes any claim to grandfathered nonconformity or to the 15-year statute of limitations.

Summary

The previous patio was removed in two phases – in 2017 and 2018. An after-the-fact permit application (ZP20-0792CA) was submitted on March 17, 2020 – more than a year after the patio was removed. Section 5.3.5 (B) considers the previous nonconforming patio as having lost its ability to be replaced since a zoning permit was not sought within a year of its removal. As a result, the replacement deck is considered an entirely new structure. The new deck has a smaller waterfront setback (28.5 ft) compared to the average setbacks established on the adjoining lots – 48 ft, and is thus in violation of Sec. 4.4.5 (d) (1) (B)(ii) CDO.

II. Recommended Motion:

Uphold the denial of zoning application 20-0792CA