

TESTIMONY OF RICHARD GALLAGHER - JULY 14, 2004

Varian: We will start in with our agenda. The first application is Richard Gallagher, 29 Wallace Circle in West Point, Map 27, Lot 58. This is a non-conforming lot and a non-conforming structure. He would like to construct a deck on the west side of his building using the 30% expansion rule. This application first came to us in 2003. It went up to September or October and was tabled for the winter. It came up last month and we are addressing it again tonight. The original application is in two parts. One part for a dormer and one part for a deck. The dormer was approved last year with no problem. I want to double check with you, Mr. Gallagher. This diagram shows a proposed deck going from the corner of your enclosed porch to the southwesterly corner of the main part of your house.

Gallagher: Yes. The triangle that you show there is more than 104 feet which would probably come in more like that, but it would be within that line

Varian: All right. When we were down there for the site inspection and, I guess, Bruce had probably mentioned a kitty-cornered deck like that, we were looking around the cellar door. Is that where you are thinking of now?

Gallagher: Yes. Right around in there.

Varian: Are you thinking of starting at that further corner?

Gallagher: Yes. Probably cutting in. That is my intention.

Varian: The paperwork that you have sent to us doesn't show the exact footage does it for that site?

Gallagher: No, it doesn't because I wasn't really sure what it would look like. But, it will be no more than 104 square feet. It will not be outside that diagonal line that goes from corner to corner.

Varian: There were questions last year about property lines and in your packet you had given us copies of deeds from prior owners and you had given us copies of surveyed plans that others had had. Unless there are any changes in any of your paperwork, we will assume that this is all part of the present packet. Comments now? Questions now?

Kaake: Are we going to need the square footage for the deck to continue on?

Rainey: You have got all my numbers.

Kaake: With it going kitty-cornered like that? Will it be cut like that?

Gallagher: I will come up with a thing to show you how 104 feet will work on that.

Varian: Your original application asked for a rectangular deck probably using 250 square feet and you were allowed 485.6499 square feet and you feel that your proposal tonight would not be over 104.

Gallagher: That's correct and I will go the geometry on that and give you a picture or design of what it would look like.

Varian: Any questions from the audience this minute? The next phase of this has been brought up that there is a stipulation in the code that prohibited over 20% of the lot size to be used for parking lots, buildings, etc. This is a picture of the lawn. We were discussing last Fall a parking area, or a parking lot, and we were discussing whether the fact that grass growing on the lawn and the parking on top of it constituted a driveway or a parking area. This picture shows us that grass is growing on the area where somebody would normally drive off Wallace Circle and park.

Gallagher: That was taken in May, so it's a lot greener now.

Newell: It looks vegetated to me.

Varian: So, we would have two sections to talk about. Section 12.C.1.a of the Shoreland Zoning Ordinance would be the section that would address a 30% expansion. The footage, at this point we are saying would not exceed 104 is well within the limits that would be allowed for an expansion. The question is, can it be allowed where this is non-conforming. The house is too close to the property line and the house is too close to the road, but that is not the section that we are worried about. A kitty-cornered deck does not go closer, on the paper, does not go closer to the property line and does not go closer to the water. It may aggravate a situation, but when we were checking with DEP last year, a parallel expansion was allowable in their eyes. There was a lot of controversy over where the lot line is and Mr. Gallagher presented several survey copies and the outline of the house as shown on this diagram and on this drawing shows where the deck would be built and it does not go beyond any one of the measurements of the present layout of the house. The question we have to wrestle with is, is this allowable under the Ordinance. The second question is the parking area and how much of the lot is covered by non-vegetated structure.

Kaake: On the driveway. I understand the deck part. What was the issue on the driveway? Is it in terms of the lot size and how much can be covered and how much can't be?

Varian: Yes. That is Section 15.B.4 which says, "The total area of all structures, parking lots and other non-vegetated surfaces within the Shoreland Zone shall not exceed 20% of

the lot or a portion thereof located within the Shoreland Zone including land area previously developed except in the general development district", which this is not.

Kaake: So the issue is that the driveway is not being used because of the vegetation that's covering it? Is that the point that he's trying to make?

Gallagher: It's not a driveway. It's just a lawn.

Thayer: But, it will be used for parking?

Gallagher: No. I'm not using it now for parking.

Kaake: Do you park across the street?

Gallagher: I park on the street which everybody does down there.

Varian: It would be your intention not to park.....?

Gallagher: I might unload some things or something.

Varian: But it is not your intention to use it as a driveway day in and day out?

Gallagher: No.

Thayer: Even if you have a lot of guests? An overflow?

Gallagher: Just on the weekend. Sometimes the kids come up, sometimes they don't. But, there is on street parking there and Scott has volunteered his parking spaces, so there is a good amount.

Thayer: Is that allowable?

Varian: Do you mean to park somewhere else?

Thayer: No. To park on the lawn if he has an overflow.

Varian: Well, I would not like to sit here personally as a Planning Board member and say that nobody can ever drive a car on their lawn. I think that is a little too much Big Brother. It (the Ordinance) doesn't say that you can't do it. They are talking about parking lots and other non-vegetated surfaces. It doesn't say anything about now and again or once in awhile or once a week or anything like that.

Kaake: Would this get recorded with the deed? Will this get filed?

Varian: The 30% section would. And, if it's all in the same permit, any restrictions would show.

Kaake: It would be noted. OK.

Gallagher: Well, I can't even expand a full 30%.

Kaake: No. I was just thinking down the road, if somebody says "I am going to make this into a driveway", there will be some kind of control there.

Newell: The regulation reads to vegetation whether it's a driveway or not. The pictures clearly show to me that it is a vegetated area. If somebody wanted to go in there and pave it, I think we would have every right to turn them down on that.

Varian: Any questions?

Roger Therriault: We have some comments to make, but no questions at this point.

Varian: We would entertain your comments at this point.

Therriault: There are several things, Madam Chairman and members of the Board. My name is Roger Therriault. I represent the abutting owner, Don Wallace. He abuts the property to the west and the south. I think there's been some misconception with respect to the 30% rule. I think that the Ordinance states that the 30% rule applies where the structure is within the setback from the water. This building is not in violation of that. What it is in violation of, is all the other setback requirements that apply to all the other properties in Phippsburg. Therefore, the 30% isn't a major concern. However, what that means is that the first section that you have in your code that deals with expansion of non-conforming structures says that you can expand them, but you cannot increase the non-conformance regardless of the 30%. The 30% has nothing to do with it. This is a separate issue. I appreciate you being concerned enough to deal with DEP. There is, however, a case called Lewis vs. the City of Rockland which was decided about six years ago. I have copies of that for you along with an article from the Maine Townsman that comments on it. What that says in a situation that was almost exactly the same as this one is that you cannot increase the lineal square footage in a circumstance such as this. What we mean by that is that you cannot take the nearest point to the setback if it is within the setback requirement and extend it. That's not permitted. It's pretty clear in that case that that's exactly what they are saying. I have got copies for all of you for you to take a look at. Again, that's a fairly recent development. I think that in and of itself precludes the expansion because what you have here is, you have essentially the whole front of that building within a (unintelligible) foot setback. And, what you would have after he did his deck would be an additional 104 feet within that setback. And that, according to the Lewis case, is an expansion of the non-conforming use. It is

exacerbating it and making it worse. And we believe, for that reason, that he meets that situation. I guess the only comment we have with respect to the lot size issue and the surveys and all that is that I know of at least four or five surveys of the surrounding properties, not his property, and none of them agree as to where the property lines are.

So, I guess the best we have to work with is his sketch plan that was done. If you do the map on that sketch plan, and I tried to do it this afternoon, I came up with significantly less than 6,000 square feet that is on the tax records. If there is a lot coverage issue, I think that you need to be very precise in exactly how much square footage is on that lot. Perhaps there ought to be some (unintelligible) indicating what that calculation is, because once you let that go and it turns out that it is wrong and you don't have the square footage and coverage, (unintelligible) it has already been breached and you have allowed something that should not have been allowed. We are dealing with very, very small differences here. The difference in the parking lot, about 190 odd square feet, makes a difference as to whether this is over or under. That particular requirement needs to be investigated more and I think there needs to be some evidence. (unintelligible) I think that's still the question. As I said, I tried to do the math, squaring things off and trying to do it that way and it's probably not exactly accurate, but it's probably reasonably accurate and I got something less than 5,000 square feet on that lot. I think that's all we have and will be happy to answer questions that you might have.

Varian: The Lewis case did come up last summer and fall and we contacted Maine Municipal and we also contacted DEP as you know, and we contacted the Town's Attorney as well. Maine Municipal did say per the Lewis case the same as you just said. It was determined that something should not be made more non-conforming and the interpretation that would left up to us is, is that type of a diagram more or not. Also, we were advised to the Town Attorney that Mr. Gallagher had certainly presented enough information to show that he had right, title and interest in the property and enough information for us to make some kind of a decision yea or nay so that it didn't get held up any longer. The Maine Municipal and the Town Attorney both cautioned us that whatever we did, that we should make sure that every section that we are addressing would be mentioned here and every move that we made would be mentioned here. Also, if it is the Board's opinion that we don't have the expertise to interpret the laws, then we would say that also.

Therriault: We are not asking the Board to solve the problem. We know that that is not your job. There are other higher powers to take care of these things. The comments we made tonight have been based on the mortgage (unintelligible) and is based on the assumption that that is what we are dealing with in a court of law. If there are other property line issues, then those would be determined in another forum.

Varian: Regardless of all of the surveys and everything else, we felt that there certainly was one valid pin there that may be, even though it was done for someone else, may be OK. But, that wasn't really our question after awhile.

Therriault: This lot was created, I think, in 1938. Read the description of the lot and descriptions that are carried forth into subsequent deeds, there are no monuments with respect to any of the corners. There may be a pin in there, but who knows how it got there or why it's there. It certainly is not called for in the deeds.

Varian: It was done for somebody else, but it is over there somewhere.

Therriault: One of them is reported to be somebody's mailbox post.

Varian: OK. Now, you have brought up the Lewis case which we did discuss last Fall and I'm trying to refresh everyone's memory here. If you want to take a minute and scan down through that (the Lewis case).

Therriault: The key language in the Lewis case is the first paragraph on the back page.

Gallagher: That's an issue of the way the Planning Board in Rockport interpreted their own Shoreland Ordinance and their ruling was appealed to the State and the State said, "Yes, you did misinterpret it. It has no application to the Town of Phippsburg (unintelligible)."

Varian: I will say that as a result of this case, that MMA advises people to amend their Ordinances to include some kind of a sentence there and not rely on DEP in the Shoreland Zoning. We haven't done it and may or may not. I don't know. Any other comments at this point on either section? We don't have, do we Lee, in these figures the 20%? We didn't figure the lot coverage, did we?

Rainey: (unintelligible) 0.4 acres which is 6098.44 square feet. The house eats up 1219.68. He's allowed 1116.00 under the 20%. I'm pretty sure there's a concrete walkway down there that I figured in along the edge of the house. That leaves 103.68 if you're not considering the driveway thing.

Kaake: What's the proposed deck?

Rainey: 104 (square feet). Isn't there a concrete walkway that runs right along beside the house?

Gallagher: Yes, but it's underneath the eaves.

Rainey: The lot size is 6098.4 and you multiply that by 30% (unintelligible). (unintelligible) 1219.68 square feet. The footprint of the house is 1116 which leaves 103.68 and I'm just going by the assessment records.

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Varian: Roger, did you say that you have reason to believe that the square footage of the house isn't correct?

Therriault: No. The land.

Varian: The land is incorrect?

Therriault: I looked at the map. If you square off both of those pieces and average out the lines in order to find the square footage it's off about 5000 feet

Kaake: Is this the document right here that you are referencing?

Therriault: Yes. What we did was, we just took the averages. There's two pieces there. There's a straight piece and a triangular piece and you could square both of those off and do the multiplication and come up with a pretty good view of what the square footage of that is. And, that is what I did with those numbers. As I said, it's a good deal less than 6000. It's probably less than 5000.

Gallagher: For over fifty years, probably closer to sixty, Mrs. Thompson was paying taxes on 6098 square feet. I bought 6098 square feet. She sold me 6098 square feet and to have it questioned at this point over 100 square feet....

Kaake: Well, to clarify the issue is that with the calculations that we have, I didn't realize that it was so close. If we had calculated and said, which we have many, many times that you have 400 square feet and you want to add a 100 foot square deck, then probably this individual's calculations and his questioning, I would tend to think about it. We are dealing with 1-1/2 or 2 square feet. That's the issue.

Gallagher: And you have been doing that for over six months now.

Kaake: And what did I say at the last meeting? I strongly suggested to you that if I owned this piece of property and I had five or six various deeds and pieces of paper that aren't certified either, and I think that was my other point, that none of them were legal documents. I think the last time that we met, I strongly recommended that you should have it surveyed.

Gallagher: And I brought it up the last time when you weren't here, that even if I had it done and spent whatever it costs in (unintelligible), which would probably be more than the cost of the deck that I want to do, even if I had done that then it could still be contested. People could stand up and say "It has happened to my neighbors. It has happened to my neighbors." So, spending that money to reconfirm what five surveys pointed out, if I thought that that would be the end all, you're right. But, that can still be contested and say, "Well that really wasn't the pin. The surveyor had it wrong." I'm very

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confident of the pins on the sides of the lot. The Town has always considered that based on the deed and everything else for over fifty years. The six thousand and (unintelligible) square feet.

Kaake: But, according to your mortgage survey here, it's showing 5000 square feet.

Gallagher: This was a rough mental calculation done by somebody who took that and accused that of not being a legal document to begin with, who has stood up in front of the Board and questioned the lines, questioned the setbacks, brought in Lewis vs. so forth, and it's almost getting to the point where, you know. If every month that I come up here is something else going to be thrown at me and say "Well, we have no proof, we haven't measured it out, we haven't done this, it may be small?" Well, the Town hasn't said that it is small for sixty years. And I think that it's really wrong that at this meeting that question should be raised and now brought into the question. This is what I bought, this is what was sold to me, this is what we pay taxes on.

Kaake: Unfortunately, on the coast of Maine and the ages of some of these pieces of property, I myself being one of the individuals, have bought property thinking that I owned something and, after having it surveyed, found out that I didn't own it. Unfortunately, I had to lose a quarter of an acre. But, that was the way it was surveyed and.....

Gallagher: I have brought five surveys into this Planning Board.

Kaake: But, you haven't had one that would tie all of them together.

Gallagher: They have all tied together. Excuse me, they all tied together. And, the people who question this have never brought one deed, one survey, one anything. I have copies of them in the car if you would like me to bring them out and I will go over them pin by pin how every single one of them agrees on the lines of my property. The abuttor who is objecting to this hasn't brought one scintilla of evidence other than to throw out questions about Rockland or mailbox posts. Nothing. There is nothing that says the pins are not the way they are on five different surveys.

Kaake: Is this document here, the reflection of the five pieces that you have?

Gallagher: Generally, yes. Shall I get the documents?

Kaake: No. I am just trying to remember from what our last meeting was and for some reason I think the five pieces of paper that you brought in actually were not reflective of this configuration.

Gallagher: They are reflective of the pin in the southeast corner, fifty feet down, (unintelligible) and then going down across.

Kaake: My concern here is, if this is calculated out, and I might spend a few minutes, but 1,000 feet is quite a substantial amount of square footage and your deck that we are trying to pass is plus or minus one or two square feet, then I seriously think you have an issue here and we have an issue that I have a hard time passing something with a

thousand foot variance or discrepancy or however you want to call it.

Gallagher: Is there any evidence that that thousand foot variance actually exists? Or, is it somebody saying "There may be a thousand foot variance"?

Kaake: Well, like we said at the last meeting, is have the property surveyed and then we can make an accurate legal judgment. From what this document right here.....

Gallagher: I will get the surveys right out there to show every boundary that goes around my property. And to say that I have to have it surveyed again to prove that point and spend \$2,000, the Board wants me to spend \$2,000 when there is a lot of evidence that the pins in my property lines are exactly as they are represented on that and on four other documents supported by deeds. To say that I should have to go and spend the money on another survey, I just don't think that that's right.

Kaake: I don't think you had a survey done, if I remember right.

Gallagher; I didn't have a survey done because Betty Reed had a survey done, because Scott Michaels and Danny Wallace, the abutters son, had it done. Because Danny and Connie had another one done. Because Mrs. Thompson's Attorney had one done and they are all saying the same thing. They are showing the same pins. I have had the surveyor, not Shirley but his son, Ron Beal down there and he attests that the pins, when the Board was down there, the claim was made that the pin was somewhere out in the road. Ron Beal was prepared to come into this Board, and I have mentioned this to you folks before, and say that he has gone all up and down that street looking for pins and has found absolutely nothing there. There is nothing to suggest that my boundary lines are any different from what was on that survey and what was on all the others. The Town has always treated that as over 6,000 some odd square feet. That is the way they have taxed it, that's the way it has been on the Town records, that's the way it is.

Kaake: That's not the way it is. That may be the way the tax, in my case for example, same situation, they have been taxing the property for seventy-five years and when I finally got a survey in there, rather than the stone wall and seven rods to a big oak tree and had it legally surveyed for my own protection from my abuttor, I found out that I had less property than I thought I did, and I didn't go back to the Town and say that for the

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last seventy-five years you have been charging me for X number of acres. I just had to bite the bullet because I, unfortunately, got the land without a survey.

Gallagher: I think that's a totally different situation.

Kaake: Well, I don't know where we can leave this without a survey.

Therriault: I'm sorry that Mr. Gallagher doesn't understand the burden of proof and it is

up to him as (unintelligible). This mortgage survey has exactly the same dimensions on it as his deed does.

Varian: As his deed does?

Therriault: Exactly, the same footages. So this is as close as we are going to get tonight or, probably, any other time as to what his lot looks like and how big it is. I'm simply indicating to you that if you do the math on his mortgage survey that it doesn't come out to what the Town has got. That is the simple point we are making and we are simply suggesting to the Board that that is a situation that deserves at least some further investigation. You can do the math on this as well as I can. I have subtracted out the driveway and by putting the driveway back in, I got 5067 square feet. These are the dimensions off his deed. This isn't something we cooked up over the winter. This is something from the evidence that he presented to you in order to carry this burden of proof and, folks, it isn't there. You may not like that, but those are the facts. It simply isn't there.

Newell: Lee, what do you come up with for square footage on that document that he has?

Unintelligible conversation.

Gallagher: Well I would request that, if the Board tonight is going to deny my petition because they want to change it, then I would request that, if they are going to change it, I would request that the Town come down and survey it and give me tax readings on what it is. The Town has carried that for fifty years plus and now they are changing it. But, I'm not saying "Oh, gee whiz I give up because the Town and the Planning Board has decided it's not really 6,000, it's now something else." Well, I think the Town has to prove that and I would like to have them come down and survey my property and give me an accurate square footage. Otherwise, I think that what we have now on the record should stay.

Varian: If this drawing reflects the wording in your deed, I don't know how old your deed is, I don't know any of that past history deed to deed to deed, but if this the drawing that we would be expected to use to show square footage, then it should be figured out

and not quickly like we are doing. If the Town has been overassessing you, you have the right to go and ask for an abatement. We are not the know all and end all on paying your property tax. But, if something like this does show that there has been a mistake along the way, you can certainly can go to the Town and ask for an abatement with whatever proof you have. You can go to the Assessor. The Town isn't going to go down there and survey it, I can guarantee you that. But, you would be able to talk about less square footage if it isn't there. If this is what we are going to use as a basis and this was taken from a deed, this should be able to be printed out properly right down to the square footage rather than taking what the Town says which is the 6098. At this point, I think

that is a valid objection and I think it should be figured out to the closest decimal point but, in lieu of having that figure, I guess are we questioning this (tape ran out).

Gallagher: No, that's not we are basing it on. What we are basing it on is what the Town bases it's taxes on which has been my basis. So if the Town has said, for sixty years that it has been six thousand some odd square feet and now they choose to change it, it is up to the Town to determine what that is. It is not up to me to have to go and reprove what I have. I mean, the Town has (unintelligible)

Varian: Your deed markings would have footages and, if that is where this came from, if your drawing came from your deed, then somebody can take those figures and figure exactly how many square feet there are in the lot, regardless of what the Town says. We use the Town's figures the first time around just because it was on the property card. But, there is nothing in the law that says the Town's tax maps are accurate and they are not to be used as a basis for anything. Your actual deeds and their measurements will give you that accurate measurement. As I say, if there is a discrepancy between what the deed says and what the Town has recorded, then you would have to ask for a correction and an abatement, but we can't sit here and take what it says on the tax map as being totally correct because it may not be.

Gallagher: You certainly did when it came to the 20% and said I couldn't have it because it was this and that. It wasn't, well maybe it's fifty feet bigger or maybe it's.....

Varian: Well, I am going to say that this is why everybody has a chance to speak. We were probably remiss in not figuring it out for ourselves to see if it was actually there or not. But, somebody has brought that up and we have to consider it now and we were going along with the assumption that probably the tax figures were correct and they may not be. It sounds like we are throwing another barricade at you and that's not what we are trying to do.

Rainey: (unintelligible)

Gallagher: It was said that that could not be used as the source, so I got four other sources. Where do I go from here? What is the next step? Who determines square footage?

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Varian: I would say for starters that you would present it to us. You would present us with a figure that shows what you say the lot contains for square footage. Then that would bring us to the 20% portion of it. The idea of the deck being able to go on with its non-conformity would be a separate question. We couldn't answer that without the 20% at this point.

Kaake: So, you need to prove that you have the 6,098 because you are only off a square foot or so, right?

Varian: If you use the property cards....

Kaake: So, basically, you have got to prove that this is inaccurate because if it does calculate the 5200 square feet, you have got to come up with 6,000 square feet. So you really have to present us a document that shows that you have 6,000 square feet in order to meet the 20 (%).

Newell: And end up with 104 square feet.

Kaake: Right. End up with 104.

Newell: The bottom line, and believe me I have walked that property and that little deck that you want to build there, I don't believe is any more of a non-conformity than 99% of the structures in Phippsburg, especially in the village of West Point. That doesn't necessarily mean it's right, but that's just the way things have taken place in that part of Town forever. The fact is, we need a document that shows how, a certified document, that shows how many square feet of property we are dealing with. Without that, our hands are tied, in my opinion.

Gallagher: Another problem. I'll have to do that

Newell: We don't necessarily think the Town is right all the time on tax records and....

Varian: Any other comments? Should we vote on whether to table this until next month? If we should have any kind of an interim meeting, it's not expected, but if we did, we would put in on that meeting. There is none planned this minute.

Gallagher: When is the next meeting?

Varian: Second Wednesday in August. Always six o'clock. Any other comments? Just a show of hands, not a vote, that we feel this is the correct way to go. Table for the accurate figure?

Gallagher: Thank you.