TOWN OF LONGBOAT KEY
ZONING BOARD OF ADJUSTMENT
MINUTES OF MARCH 17, 2011 MEETING

The meeting of the Zoning Board of Adjustment was called to order by Chairman Feole at 9:30 a.m. on Thursday, March 17, 2011.

Members Present:	Chairman Ben Feole, Vice Chairman Andrew Aitken, Secretary Charles Fuller, Members, Kenneth Schneier, Edward Zunz
Members Absent:	Members Sally Boynton, Gaele Barthold
Also Present:	David Persson, Town Attorney; Monica Simpson, Planning, Zoning & Building Director, Steve Schield, Planner; Donna Chipman, Office Manager

Ms. Chipman swore all those testifying at this hearing.

Approval of Minutes
Mr. Zunz made a MOTION TO APPROVE THE MINUTES OF THE FEBRUARY 10, 2011, ZONING BOARD OF ADJUSTMENT MEETING AS WRITTEN; seconded by Mr. Aitken and approved by a unanimous vote:

David Persson, Town Attorney, discussed his letter that was provided regarding what was a variance and explained what was considered a hardship under the law.

Agenda Item 1. Petition #1-11 by John F. Bass III Trust requesting a Variance from Section 158.150(D)(1) of the Town of Longboat Key Zoning Code to reduce the required gulf waterfront yard from the required 150 feet to 85 feet, 1 inch as measured from the Town's Erosion Control Line to allow for construction of a new single-family home, for property located at 3475 Gulf of Mexico Drive.

This petition was continued from the February 10, 2011, meeting. Chairman Feole reopened the public hearing.

Steve Schield, Planner, reviewed the staff report noting the existing home was constructed in 1956 and was located 85 feet, one inch from the Erosion Control Line (ECL). The setback from the gulf waterfront yard was measured from this point, and the applicant proposed a new structure that was 6,427 square feet of elevated living area. He discussed the history of the area pointing out that eight variances have been granted in the area over the last 10 years for the construction of new homes. He reviewed the parcel dimensions noting that the adjacent structure to the south (The Beach condominium) was located 74 feet, three inches from the ECL and 10 feet from the side property line; the public beach access was to the north. He commented that the lot located at 3515 Gulf of Mexico Drive was granted a variance to reduce the setback to 87 feet from the ECL. He continued with reviewing the Findings of Fact. He noted there was adequate room for a structure, and the Town's intent was to provide safety. He mentioned that if the board wished to grant a variance, there were recommended conditions in the staff report. He reviewed the proposed site plan and a PowerPoint presentation showing the existing conditions of the site. Attorney Persson asked if the existing structure on the property was non-conforming.

Mr. Schield responded it was non-conforming as to the gulf setback, but conformed to other required setbacks. The current structure was 800 square feet of living area and 1700 total area with the porch.

Mr. Zunz asked if the southern line was conforming. Mr. Schield noted that the existing structure was conforming. Mr. Zunz asked if the new structure would be moved further from the southern line. Mr. Schield replied yes. He continued with his PowerPoint presentation. Mr. Fuller asked if the variance request was to build a second story or a new structure. Mr. Schield explained the existing structure would be demolished and a new structure would be built.

Mr. Aitken referred to Item 4 limiting to a 5,000 square foot building pad, but pointed out that when he reviewed the plans provided, it indicated the residence was less than 5,000 square feet, which he believed was within staff's recommendation. Mr. Schield explained that was with a redesign. Mr. Aitken asked if the pool did not count if it was at grade. Mr. Schield replied correct. The depth of the house was currently 60 feet, and the applicant would have to expand the side property lines and narrow up in order to accommodate a greater distance from the gulf waterfront yard.

Mr. Zunz referred to page 4 of the application noting that it stated the proposed structure was 6,627 square feet of elevated living space. Mr. Schield responded the structure would be three stories above grade – two stories were habitable with a parking level underneath. Mr. Schneier asked if the proposal was smaller or larger than the 5,000 square feet. Mr. Schield explained the applicant would need to redesign the structure. Attorney Persson asked if staff's recommendation was that a variance be granted, but there was a question of how big. Mr. Schield replied that was correct. Staff recognized the need for a variance for the property, but they believed there would be greater safety by moving the structure further back and still have adequate room to construct a significant home on the property.

Discussion ensued on the ECL:

- Adopted as beach line around 1991;
- That the Mean High Water Line (MHWL) was the prior setback line;
- That the beach nourishment began shortly after the adoption of the ECL;
- The State required, as part of the nourishment project, that the land seaward of the ECL was state of Florida land, and everything landward of the ECL was private; and
- The ECL established the boundary for the property, and when renourishment occurred there was more distance than prior to the renourishment; it was a fixed line.

Chairman Feole voiced concern with the ECL and the narrowness of the beach, and whether it was considered a 'hot spot.' He mentioned to construct a house that would be substantial in size could be questionable in terms of being able to use the lot, as opposed to making reasonable use of the lot. Mr. Schield responded that staff was trying to protect the Town and the owner to make it safe as possible while providing reasonable use. Chairman Feole questioned whether the existing home was demolished. Mr. Schield replied no. Mr. Aitken pointed out that the issue was not the size of the house, but the distance from the ECL. He commented regardless of the setback, the construction would remain the same. He asked if staff could quantify the value to the Town of the 20 foot differential. Mr. Schield explained that the closer the structure was to the 150 foot setback, the more it was in compliance with the code and provided added safety to the resident. Mr. Aitken did not understand the 'safety' argument by moving it back 20 feet.

Mr. Zunz discussed the eight variances that had been granted in the area and asked if each case involved new homes or remodeling. Mr. Schield mentioned they involved new homes. Mr. Zunz asked if in those situations where the existing home was demolished and a new one constructed, had it been the practice for the new house to be setback further that the previous structure. Mr. Schield explained they were at the same level or set back further. Mr. Zunz asked if staff recalled the gulf ever reaching the house on this site. Mr. Schield noted the applicant might be able to answer that question as they have owned the property for a long time; he knew that the beach north of the property had eroded back to Gulf of Mexico Drive in the past.

Mr. Zunz noted there was substantial reference to a variance that was granted to the lot north of the property in 2000. Attorney Persson pointed out the original variance was granted in 1986, and there was subsequent modifications to the variance since that time. Mr. Zunz asked if the variance had expired. Attorney Persson noted that the variance only expired if the Board stated it would expire; the variance would normally run with the land. Mr. Zunz asked if it would be the Board's power to limit and provide an expiration date. Attorney Persson explained if there was a rational basis to tie it to health, safety, and welfare in the granting of the variance, then yes; but if there was no rational basis, then no.

Mr. Zunz discussed that staff's recommendation was to move the building further back from the ECL by "stretching the building out horizontally;" and the applicant cited an authority that when building in an area like this, it was better to diminish the line of the building that was horizontal to the water. He asked if staff was concerned by making the building wider it was more susceptible to a storm. Mr. Schield explained the statute that was provided to the Board by the applicant indicated a lot of 'may' recommendations. He and Ms. Simpson had calculated, using a 60 percent shore parallel which would make the home 90 feet wide on the 100 foot lot, and taking the calculations of the existing porches, house, and the daylight plane, they would still be able to build a 4,000 square foot home.

David Levin, attorney representing the applicant, distributed several documents to the Board. He mentioned that he was sworn, because he would be providing statements that the board might consider. Attorney Persson asked if Mr. Levin was here as a lawyer or a witness, as he could not be both. Mr. Levin replied as an attorney. Mr. Levin continued with providing an overview of his background pointing out that his practice focused on environmental and waterfront property law. Mr. Zunz asked if there were rules about providing materials at the hearing and not submitting prior to the meeting. Attorney Persson responded that he believed Mr. Levin would be explaining the documents. Mr. Zunz commented that it would be helpful to have the documents in advance to review. Mr. Levin noted that the materials were provided to staff and the Town Attorney. Chairman Feole asked if staff had seen the documents. Monica Simpson, Planning, Zoning & Building Director, replied there was no request by the applicant to distribute the documents to the Board.

Mr. Levin continued his presentation discussing the document from the state noting that the state did have concerns with shore parallel width of structures. The state did have a goal, similar to the Town, to bring the structures as far landward as possible; however, the state would allow them to "line up" with the structure immediately to the south, assuming that structure had not been historically impacted by erosion. He reviewed a plan that was originally presented to staff, which was consistent with a variance that was granted for a structure across the street, and the design feature that they liked was having a side entry garage, as opposed to front entry, due to the proximity of the structure to Gulf of Mexico Drive.

This would be 74 feet, 10 inches from the ECL, which was consistent with preliminary discussions with Mr. Schield, where based on the history of variances in the 2000-3000 block of Gulf of Mexico Drive, 70 feet was the current target for new variances seaward of that. He reviewed a chart which identified the variances that had been granted in that area and their measurements. Mr. Levin noted that they had originally submitted an application at 74 feet, but the Town felt they had not maximized the property to the extent that they could to minimize the variance. As a result, they made a substantial modification to the project, which resulted in the plan being reviewed at this meeting; the distance was increased to 85 feet, one inch.

Mr. Levin noted that he was involved in the variance granted for 3515 Gulf of Mexico Drive, and at that time, they reviewed the 30 year state erosion projection line, and this area was not considered a 'hot spot.' It was subject to erosion, but the 30 year erosion projection line would not prohibit construction in this area. Concerning the proposed project, the minimum use of the property would be a 1,600 square foot structure, which was the minimum allowable under the Zoning Code; but, the Board had to determine the minimum reasonable use of the property. He cited the Ohio case, because it was difficult to find a case in Florida to define 'minimum reasonable use.' He reviewed the chart again noting the reason there was no criteria for reasonable use was because it was up to the Board to decide based on the circumstances. He pointed out the average distance that the Board had approved since 2000 was 70 feet; their proposal was 15 feet more landward. They did not wish to be narrower and wider, because the state had determined it was not in the best interest of those properties; they would prefer to be in the shore perpendicular direction, which made their structure more safe and in line with the state's objectives.
Chairman Feole pointed out that in the state guidelines it indicated that generally a coverage that did not exceed 60 percent was sufficient, in terms of the width parallel to the water. He questioned the percentage of the proposed structure. Mr. Levin replied 61 percent. Mr. Schneier asked if there were any written comments received from the adjacent neighbors. Mr. Levin replied no.

Mr. Zunz reviewed the drawing and noted that under the front entrance there was a semi-circle that seemed to run through the building. Mark Sultana, architect representing the applicant, explained it was a decorative feature of the staircase coming up; it ran to the structural wall of the house. Mr. Zunz pointed out that in the back of the building there was a double dark line on the plans and asked if that was the roof line. Mr. Sultana replied the line seaward was the line of the roof overhang, which was two feet and was required to be within the setback. Mr. Zunz discussed the porch area asking if it was possible to construct the building so the first actual wall would be at the back of the veranda, as opposed to the front. Mr. Sultana replied not necessarily, because the pilings would withstand a storm surge Mr. Fuller commented that he was not particularly persuaded by the argument that if it was wider it would be less safe. Mr. Sultana explained that if the home was wider than designed, it increased the structure that had to be designed into the building. The lateral forces caused by storm surge increased, because there was a wider portion of the home that would be hit by the storm surge; the pilings and columns that held up the second floor and roof of the home had to be stronger, which would make it more costly.

Ms. Simpson wished to make it clear to the Board that staff's recommendation was based on the criteria within the code. They did not recommend denial, as a variance had to be granted to rebuild the structure, but one of the criteria was whether the variance requested was the minimum necessary to provide reasonable use of the land. She noted that Mr. Levin discussed the use of the 20 foot front yard setback, but under-utilization of the setback areas, in staff's position, was not achieving the minimum variance necessary.

She mentioned that Mr. Levin had discussed variances that were granted since the year 2000; however, there was a lot of history since that time. Staff, and the Town, had recognized, even through the development of the 2007 Comprehensive Plan that the Town had safely endured the hurricane seasons of 2004 and 2005. The Board's reliance on past variances that have been granted was not necessarily what the Board needed to review; they were based on a case-by-case basis. There was a 150 foot setback within the Zoning Code, and any variance granted should recognize that was the setback standard, and the Board should come as close as possible to that standard. Concerning the Florida Department of Environmental Protection (FDEP) documents distributed by Mr. Levin, she pointed out the title of those documents were guidelines, and noted that one of the statements stated, "*In addition, structures should be sited landward of the construction established by existing similar structures along the shoreline*." She pointed out that the structure to the south was a condominium structure, and not a similar structure to the proposal. She continued reviewing several other guidelines noting they were not mandated by the state.

Susan Davidson, representing the owners at Buttonwood Cove Condominium, questioned the status of the property noting there was a 'For Sale' sign posted on the property. She asked if it was going to be turned over once it was built, or were the current owners going to remain as residents. Mr. Levin responded that it would depend upon the board's decision. He commented if they were only allowed to modify the existing structure, then the owners might leave it to someone else to determine what they wished to do with the property. They were unable to use the existing property without a variance, and the existing home was not reasonable. Attorney Persson pointed out that ownership of the property was irrelevant.

No one else wished to be heard, and the hearing was closed.

Mr. Zunz agreed that a variance was needed; however, he was concerned with the variance being requested. He believed 20 feet made a difference and discussed 'minimum reasonable use.' He commented that it was the function of the board and staff to minimize deviations from the code. He would like to see the property set back another 10-15 feet, because it should be their goal to get closer to compliance with the Zoning Code. He would like to see a variance granted, but would also like to see a serious attempt to reduce the size of the house and move back to at least 100 feet. He would not increase the width as much as recommended by staff.

Mr. Schneier commented that he had a favorable view toward the application. He believed it was clear that a building larger than what existed could be built on the property. He referred to the chart presented by Mr. Levin and noted the existing structure was the furthest from the beach. He mentioned that an issue that had not been discussed was aesthetics from Gulf of Mexico Drive, and he believed having a larger home closer to the street would not be attractive. He understood the footprint size proposed was within the size parameters that the Town would receive as favorable.

Mr. Fuller asked if the Board could make a motion, or take a vote, to grant the variance for so many feet from the ECL and not address the size of the house or location, but leave it up to the applicant. Attorney Persson replied correct; the Board could establish the variance from the ECL, which created a building pad and allow the applicant to utilize the building pad under the code.

Mr. Fuller made a MOTION TO GRANT A VARIANCE FOR 100 FEET FROM THE EROSION CONTROL LINE, AS RECOMMENDED BY STAFF, AND ADOPT THE FINDINGS OF FACT. Motion died for lack of second.

Mr. Aitken made a MOTION TO GRANT PETITION 1-11 AS REQUESTED WITH A PROVISION THAT CONSTRUCTION TAKE PLACE IN A REASONABLE AMOUNT OF TIME.

Attorney Persson requested that a date certain be established for the variance. Mr. Aitken assumed that whatever date was established that the applicant would be able to apply for an extension if needed. Attorney Persson responded the applicant could come back and seek a modification to the variance. He asked Mr. Levin if five years would be reasonable. Mr. Levin replied yes. Attorney Persson suggested the motion reflect that construction should commence within five years.

Mr. Aitken revised his MOTION TO GRANT PETITION 1-11 AS REQUESTED WITH A PROVISION THAT CONSTRUCTION BEGIN WITHIN FIVE YEARS OF THE DATE OF APPROVAL AND THAT THE BOARD FOUND THE SEVEN CRITERIA HAVE BEEN MET; seconded by Mr. Schneier.

Mr. Feole voiced his concern that the Planning, Zoning & Building Department was working to improve the safety and the ability to fit within the standards for our community, and that from time to time the Town was deviating from that. As a result, the properties were encroaching closer and closer. He also voiced concern with reasonable use of property as the Board was seeing minimum lots being used for maximum dwellings. Mr. Zunz commented the reason he did not second the motion was because he would like to see it reduced to 100 feet or 95 feet from the ECL.

Mr. Fuller commented that the variance addressed the distance from the ECL, and he was suggesting adoption of what staff was recommending, because that would be the least intrusion into the waterfront. The applicant would still have a large home, which would satisfy the minimum requirement. The Board should do what they could to reduce the non-conformities.

Mr. Schneier pointed out that in terms of distance from the ECL, when reviewing the history of the area, there were 17 properties that were more than 10 feet closer to the ECL than this proposal. Mr. Fuller responded that he was not aware of the facts for those properties, and the Board was not controlled by precedent; each case was based on its own merits.

Motion carried on roll call vote:

AITKEN:	**AYE**	**FEOLE:**	**AYE**
FULLER:	**NO**	**SCHNEIER:**	**AYE**
ZUNZ:	**NO**		

Attorney Persson discussed the vote, noting that in order to grant a variance they had to have four votes, and if they count the number of people absent, and add to the people who voted yes, and if it equals four or more, then it would automatically continue until the next meeting. He reviewed the code section with the Board.

Mr. Levin provided a stipulation for consideration. He commented that while they believed at 85 feet they were substantially landward of other variances granted, if the Board considered granting the variance at 90 feet, so it was further landward than requested, then they would agree to the additional five feet. Mr. Feole asked if staff wished to comment. Ms. Simpson responded that staff was unable to make a recommendation on the stipulation at this time.

The Board recessed from 11:30 am – 11:37 am.

Mr. Levin commented that Patrick DiPinto would address their concerns, but they were comfortable with stipulating to the five feet. The shrinking of the structure in depth, as recommended by staff, would require them to expand the structure in a shore parallel direction, and in addition to the fact they were concerned that it would extend their coverage beyond the 61 percent currently proposed and the difficulty it might present with their application to the state.

Chairman Feole reopened the hearing.

Patrick DiPinto, owner's consultant, pointed out they were proposing a structure at 60 feet in depth, because they thought it was consistent with the other homes on the key. Staff noted they had to include the front stairs and front porch in that square footage, and in negotiation with staff, and shrinking the home to 60 feet in depth, they included the front stairs, the front landing, and the back porch. They presented a plan for 60 feet, but they could agree to go another five feet to 55 feet, including the front stairs, landing, and back porch.

Mr. Zunz reviewed the drawing, and not including the stairs or porch, it seemed to be 42 feet. He asked how it was shrunk to 10 feet. Mr. DiPinto commented that they were trying to construct the proposed home they submitted, but staff was requesting a home 20 feet smaller. Mr. Zunz pointed out that if the home was moved 10 feet further from the ECL, then it would reduce the 42 feet to 32 feet. Mr. DiPinto responded the stairs were not drawn to scale, because during their last revisions they did not have a definitive sketch of how those stairs would be; the stairs depicted would have to be increased. They did not continue working on their design, because they did not know if it would be approved; they were told to focus on the distance from the ECL. Discussion ensued on the size of the stairs and encroachment into the setback.

Ms. Simpson commented that it was always difficult when an applicant came in with a home that was already designed. There was nothing in the code that required that level of detail be submitted, and there was nothing in the building code that required a back porch or veranda on a structure. The last variance granted was for a beachfront home without a rear porch. At this point, staff would recommend granting a variance for the property for a distance from the ECL that the Board believed was appropriate based on the distance from the ECL and not the structure. The existing structure had not been subject to repetitive loss through FEMA, but the two properties to the south have had that loss. The distance was an important issue to consider.

Mr. Fuller questioned what size lot would remain if the Board applied staff's setback. Ms. Simpson explained that staff recommended a building envelope that would be 40 x 125 feet parallel to Gulf of Mexico Drive and located 106 feet from the ECL. The 100 feet proposed by Mr. Zunz was close; the 10 foot reduction being discussed was better than what was being requested by the applicant. Mr. Aitken understood that his motion was to build 85 feet, one inch from the ECL. He did not believe they were voting on the plan that was submitted. Ms. Simpson noted that a major part of the condition staff was recommending was that the variance shall be restricted to the site plan and design as submitted. She voiced concern that the site plan presented was not what was going to be built. Mr. Zunz asked if the setback was approved at 95 feet, would that provide a 50 foot envelope. Ms. Simpson replied yes.

Mr. Levin pointed out their structure was not as far seaward (proposed or existing) as those to the south. There was a dune in front of the existing structure, and they were not intending to build up to those structures to the south, or place the structure in harm's way. The plan submitted was conceptual in nature, and did not show the interior division of rooms. They were not here to consider actual building plans. He believed Mr. DiPinto was stating the plans were not accurately showing the full extent of what the stairs would be on final design consideration. Mr. Aitken asked if the applicant was willing to accept the five feet additional setback from the ECL. Mr. Levin replied yes. Mr. Aitken commented that he would accept an amendment to his motion for the additional five feet. Mr. Zunz pointed out that part of the problem was the motion was tied to the site plan as proposed. Attorney Persson suggested the Board rescind the prior vote and recommend an alternative motion.

Ms. Simpson commented that with the proposed change, obviously the proposed footprint would not work. She would not wish to limit the design team, if they found another design would work better, as long as they adhered to the variance that was granted. She noted that if the Board was considering approving any variance different than what was requested, then they should delete the remainder of the recommendation dealing with the specific plan. Mr. Zunz suggested that the motion would be that the variance be granted to build up to 90 feet, one inch.

Mr. Feole made a MOTION TO RESCIND THE VOTE; seconded by Mr. Schneier and approved by a roll call vote.

AITKEN:	**AYE**	**FEOLE:**	**AYE**
FULLER:	**AYE**	**SCHNEIER:**	**AYE**
ZUNZ:	**AYE**		

Mr. Aitken made a MOTION TO GRANT PETITION 1-11 A VARIANCE THAT ALLOWED THEM TO BUILD UP TO 90 FEET, ONE INCH FROM THE EROSION CONTROL LINE, THAT THE CONSTRUCTION NEEDS TO BEGIN WITHIN FIVE YEARS OF APPROVAL OF THE VARIANCE, AND THAT THE BOARD FOUND THAT THE SEVEN CRITERIA WERE PRESENT; seconded by Mr. Schneier and approved by a roll call vote:

AITKEN:	**AYE**	**FEOLE:**	**AYE**
FULLER:	**NO**	**SCHNEIER:**	**AYE**
ZUNZ:	**AYE**		

Setting Future Meeting Date.
The next meeting was tentatively scheduled for Thursday, April 14, 2011.

Mr. Zunz asked if it was appropriate for the Board to adopt a procedural rule that applicants could not present new materials during a hearing, and that they must be submitted in advance to allow review time. Attorney Persson recommended that the Board direct staff to come back with a rule that if agenda materials were distributed, then nothing else could be submitted, but if they were, then the hearing would be automatically continued.

Mr. Zunz asked if there was intent to bring back the proposal addressing the gulf waterfront setbacks. Ms. Simpson explained that it would have been a zoning code amendment that would have provided clarity within that section of the code as to what could be done, and she did not believe the Town Commission vehemently opposed it, but they chose not to adopt. She mentioned that typically it would be an issue raised to the Town Commission by the Planning and Zoning Board, but at that time both P&Z and ZBA were in support of the proposal.

Mr. Schneier asked if Petition 1-11 had an issue with the coverage ratio. Ms. Simpson replied no; otherwise that would be another variance. Discussed ensued on coverage ratios. Mr. Aitken asked if the ECL ever changed. Ms. Simpson explained that it could; the state sets the line, and when reviewing the line, it did 'jog' in places. She has received requests from people asking if it could be moved, and they were instructed to make a request to the state.

Adjournment.
The meeting was adjourned at 12:18 PM.

Respectfully submitted,

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Charles Fuller, Secretary
Zoning Board of Adjustment