Town of Milford
Zoning Board of Adjustment
July 21, 2016
Case #2016-15
Nathan and Brooke Langlais
Special Exception

Present: Kevin Johnson Chairman
Michael Thornton
Joan Dargie
Len Harten
Rob Constantino

Absent: Jason Plourde
Kathy Bauer, Board of Selectmen Representative

Secretary: Peg Ouellette

Nathan and Brooke Langlais for the property located at 9 Willow St, Milford NH, Map 29, Lot 164, in the Residence A District, are seeking a Special Exception per the Milford Zoning Ordinance Article V, Section 5.02.5.A to allow a deck to be constructed four (4) feet +/- from the side setback line where fifteen (15) feet is required per Section 5.02.5C.

MINUTES APPROVED ON 11/3/16

K. Johnson, Chair, opened the meeting by stating that the hearings are held in accordance with the Town of Milford Zoning Ordinance and the applicable New Hampshire Statutes. He then introduced the Board. He informed all of the procedures of the Board. This case was tabled from the July 7, 2016 meeting. K. Johnson read the notice of hearing into the record. The list of abutters was read. Applicants Nathan Langlais and Brooke Langlais, and abutter Aaron Kaplan were present.
K. Johnson asked applicants to present their case.
N. Langlais came forward. He said they are too close to the setback and trying to keep the deck.
R. Constantino asked if the deck was already there. Did they make it bigger?
N. Langlais said it was there, not making it bigger.
R. Constantino asked if they were replacing it.
N. Langlais said no. They built it before and were trying to keep it.
K. Johnson said they didn't pull a permit, built it, and found out it was nonconforming use and were required to apply for exemption.
J. Dargie asked if the stairs on the side were gone.
N. Langlais said the Zoning Board asked for them to be removed the last time he was there and they pulled them immediately.
N. Langlais read the application into the record:

A Special Exception, as specified in Article V Section 5.02.5A of the Zoning Ordinance, is requested to permit:
A deck within side setbacks on an existing non-conforming structure.

A. The proposed use shall be similar to those permitted in the district:
The proposed use is similar to those permitted in the district because the subject lot is located in the Residence "A" District. The purpose of the deck is to create a space for the families to use and enjoy, similar to many of their neighbors.

B. The specific site is an appropriate location for the proposed use because:
Most homes in the neighborhood have decks and the deck does not exceed the footprint of the house.

C. The use as developed will not adversely affect the adjacent area because:
The neighborhood consists mostly of residential structures with similar decks and porches.

D. There will be no nuisance or serious hazard to vehicles or pedestrians:
Deck is in the back of the house away from vehicle and pedestrian traffic.

E. Adequate appropriate facilities will be provided for the proper operation of the proposed use because:
N/A

K. Johnson said Item E, applicant would make a statement the deck either will be or has been built to the appropriate code.
N. Langlais said right.
R. Constantino asked if the driveway was on that side of the building was the neighbor's.
N. Langlais said yes.
R. Constantino asked if it was shared.
N. Langlais said the property line runs down the side of the driveway so a portion is technically on his land, but it is not shared by him.
R. Constantino asked if he had no driveway.
N. Langlais said it was on the opposite side.
R. Constantino asked that was shared with those neighbors.
N. Langlais said yes, it was.
K. Johnson passed out a revised plan showing location of the driveway as "edge of gravel surface driveway."
The dotted line was property boundary. The applicant's actual drive is pavement on the other side of the house. As applicant testified, the stairs that were on the west side have been removed – the steps nearest the property line.
K. Johnson then asked for questions from the Board. There were none. He opened the meeting for public comment.
Aaron Kaplan, Trustee of RDM Trust, owner of immediately abutting property, 7 Willow St., came forward. He said he had extensive paperwork.
K. Johnson stated that any exhibits they wanted to describe should have been given to the Office of Community Development three days prior to the hearing for the Board to review. Otherwise, Mr. Kaplan would have to read through everything.
A. Kaplan thought that everything could be submitted prior to or the day of.
K. Johnson said they were not going to assume anything. Mr. Kaplan would have to read everything he wanted them to understand into the record.
A. Kaplan said fine. This project was previously heard as an equitable waiver. He had pictures, diagrams, etc. They had been here previously.
K. Johnson said this is a rehearing, starting from the beginning. Nothing before was of concern to the Board this night. Anything Mr. Kaplan wants to present must present tonight.

A. Kaplan said this was heard as an equitable waiver. He didn't object to applicants' having a deck. However, did object very forcefully object to the large substantial deck, about 406 SF deck, substantially into the setback. As originally constructed, stairs that extended 1.8 ft from boundary line. In order to use those, applicants had to trespass on his property.
K. Johnson said that was moot. Stairs were gone.
A. Kaplan stated it came down to credibility. He started to mention the first hearing. K. Johnson reminded him this was an entirely new hearing. Only considering what is presented at this hearing. Do not refer to any prior hearing.
A. Kaplan asked if he could refer to the history of the deck.
K. Johnson said yes.
A. Kaplan said to clarify, when they went for the first one, it was his position that the applicant was not forthcoming and the Board took him at his word.
K. Johnson said as far as the Board was concerned this night, none of that occurred.
A. Kaplan said re history of the deck, deck came about because when applicant bought the property in 2008 or 2009 he pulled permits for kitchen, bath, and roofing work, etc. Applicant had a history of pulling permits. Original permit was in 2009, renewed in 2010. Mr. Kaplan handed out pictures of the deck to the Board. He said applicant didn't bring pictures because he didn't want to show the size.
His pictures show it is huge and on the side of the building on the right of deck on the picture with the writing on the bottom it stated that originally the closest point of Mr. Langlais' house was approx 27 ft from the bedroom and living room windows of Mr. Kaplan's house. It has reduced that to approx 17 ft. Applicant has focused on it was no closer to this line. In reading application it said that it approached no closer to the line and applicant wants Board to close their eyes to what lies beyond that line. Didn't say anything about objecting abutter. It was uncomfortably close to Mr. Kaplan's living room and bedroom windows. Someone on the deck can look into those windows. Applicant would also like to say it was in keeping with the neighborhood. Mr Kaplan gave summary of all decks in the neighborhood to the Board.
K. Johnson said he would have to read it.
A Kaplan said 5 of 9 have decks. Two of those are less than 50 SF. This is over double size of the next deck down in SF.
K. Johnson asked the sizes of those houses. Did Mr. Langlais have the largest house in the neighborhood?
A. Kaplan it was a two family property, a pre-existing nonconforming two-family. It increased footprint of house by 30 percent. He had documents from the assessment records. Other decks, 7 Willow St., 185 SF; 15 Oak, 144 SF; 48 SF at 56 Union St; and 32 SF at 16 Willow. In other words, applicants' deck was SF equal to SF of all the other decks combined. He said it was stated that all these properties were close together. That was relative. He gave GIS pictures to the Board. Relatively, it was accurate. 100 SF between couple of buildings. 90 SF between his and other side. In Mr. Langlais
deck he marked approx location closest to the bedroom and living room windows mentioned is about 15.5 ft. Then 22 ft and 19 ft to the next property. Felt that whole neighborhood was compressed wasn't the case. This did compress the property more. Affects property value. Showed picture which was theoretical. Applicant's position was it was no closer to the line. Top of picture showed pre-construction of unusual L-shape property. Bottom showed post-construction. Person had taken a property and built no closer to the line but had filled in the property; next door neighbor was saying he objected to this. This highlighted that the statement it was no closer to the line didn't hold water. It was closer to the structure.
K. Johnson stated the ordinance did not specify to the nearest structure; only specified distance to the property line. It did discuss impact on the neighborhood. But this was applicant's property and within the ordinance he was allowed to do what he would like. If in the exact theoretical example, instead of being 8 ft from the shared boundary, it was 15 ft from the shared boundary, the deck would still be there, the addition would still be there and Mr. Kaplan would still lose all of that and object because you were taking up all of the space.

A. Kaplan said NH Supreme Court found in cases that when it affects the abutting property value when it is a substantial change beyond what was there before. This was an expansion of a nonconforming use.
K. Johnson said that was for the Board to decide. The ordinance has, as Supreme Court has supported, that "*Alterations, expansion or change of a non-conforming use or structure shall only be permitted by Special Exception by the Zoning Board of Adjustment if it finds that: 1. The proposed alteration, expansion or change shall not change the nature of the original use or structure and the proposed alteration, expansion, or change shall involve no substantially different effect on the neighborhood,"* and that was for the Board to determine.
A. Kaplan said there were a multitude of Supreme Court cases showing that this should not be allowed, which he could get into. Re history of the property, one thing K. Johnson said was it could not change substantially.
K. Johnson reread the wording. He said they could all agree it was not changing the original use.
A. Kaplan disagreed.
K. Johnson said it was residential use and a deck on a residential use was not a change in use. "And the proposed alteration, expansion or change shall involve no substantially different effect on the neighborhood." That was the controlling clause.
A. Kaplan said nature of use or nature of the structure. Deck didn't exist before.
K. Johnson said a deck was a legitimate expansion of nonconforming use.
A. Kaplan said K. Johnson was missing the point. Mr. Langlais should present his case. Burden is on Mr. Langlais who has said nothing.
K. Johnson said applicant presented evidence that other homes had decks and that his current deck was no more nonconforming than rest of the house. It didn't come closer to the boundary than the rest of the house. Deck was 4. 3 ft from the property line and one corner of house was 3.8 ft. from the property line. He has not made it more nonconforming.
A. Kaplan said Chair was closing his eyes to what lay beyond.
K. Johnson said no, he was simply stating facts as presented. When it came to whether this alteration, expansion or change - they agreed this was an expansion because he wasn't changing an existing deck. he was expanding the residential structure. Whether it would have a substantial effect on the neighborhood. That was what the Board needed to determine.
A. Kaplan said that was the second part; however, first part was that it didn't change nature of use. It did. He could show Supreme Court has found that specifically a deck changes nature of the use. There was a memo from zoning administrator submitted with comments.
K. Johnson said those were removed.
A. Kaplan asked if Board members read them.
K. Johnson repeated they were removed.
J. Dargie said she hadn't seen them.
A. Kaplan asked if no one read them.
K. Johnson said no.
A., Kaplan said in a second section the administrator threw in support of the application and attempted to argue case for applicant. Mr. Langlais was responsible to answer all questions. He answered four, but completely neglected to mention anything about expansion of use clause. Special exception instructions state if anything applies – and expansion of use did apply in this case– you must answer that question.
K. Johnson asked the Board if they thought this was a change of use. Board members responded no.
K. Johnson stated the Board did not feel adding a deck to a residential house constituted a change in use.
A. Kaplan said if he or Mr. Langlais had written that memo – burden was with Mr. Langlais and not with zoning, not with anyone else. Mr. Langlais had not answered that question.
K. Johnson said applicant must present sufficient evidence for them to make their decision. If Mr. Kaplan wasn't there, they would accept Mr. Langlais' evidence, use their personal knowledge, look at the documents submitted with the permit, and make a determination based on that. Now that Mr. Kaplan

was there to raise other points, they would consider those and balance that against the information that they have been provided.
J. Dargie said applicant needs to fill out application for special exception.
A. Kaplan said he didn't answer that question on the application for special exception.
K. Johnson quoted "The use is similar to those permitted in the district because." That was from the Court's requirements for criteria for special exception and straight from the zoning ordinance.
A. Kaplan cited Sec. 3, Attachments, C. Additional explanations, justification, abutters' statements.
J. Dargie said it wasn't on that. What he was referring to had never been on special exception.
A Kaplan said it was on the application.
K. Johnson said it was on page 2, basically saying to "explain how the proposal meets the special exception criteria as specified in Art. X, Sec. 10.02.1 of the zoning ordinance" and read Item B and applicant's response. His was a deck and others have decks. It was similar and therefore sufficient to answer whether the use was similar to those in the neighborhood.
A. Kaplan said he had presented information that this was nowhere close to what the neighborhood was like. Would a 20,000 SF mansion be similar to a 1200 SF ranch? His argument is with Chair.
J. Dargie said she saw where he was going . Owner's opinion it was similar and presented paperwork that way. Once that presented, and as Bd. going along and Mr. Kaplan presents his other information, if they felt it wasn't they would ask questions.
A. Kaplan said applicant showed no substantiation. He had presented information from records. Burden didn't lie with him as abutter to prove that it hurts him; it lay with applicant.
K. Johnson said it wasn't; it was not applicant's burden to prove it wouldn't hurt Mr. Kaplan.
J. Dargie said it was up to Mr. Kaplan to present his information, and if the Bd. agreed with that. They would ask more questions.
A. Kaplan asked if burden was with Mr. Langlais to prove that all special criteria were met.
K. Johnson said burden lay to present sufficient information to make a decision. He has presented that he wants to put a deck on his house. Other houses in the neighborhood have decks. He showed a plan of his deck and how it fits with his house. They have picture of neighborhood showing other houses with decks and pools and other structures in that area. It was up to the Zoning Bd in their deliberations to make determination whether it was similar or not. He understands what Mr. Kaplan was saying. Felt Mr. Kaplan was missing what he was saying. Mr. Kaplan was hung up on, he thought this was a change in use; the Board didn't. Mr. Kaplan feels this is something that will impact the neighborhood. That is something the Bd needed to determine and were open to.
A. Kaplan said they were arguing and taking up time. Don't take Mr. Langlais' word. Take the word of the Supreme Court and town attorney. A line seemed to be missing. Was that pulled out?
J. Dargie said it was additional information and was never been in that special exception application.
K. Johnson asked if he was looking at ordinance or special exception application.
A. Kaplan said he was looking at application. Then said this was the ordinance "*In addition, several types of Special Exceptions have their own criteria that must be met. These include but are not limited to"* only one of these apply and that is nonconforming use and structure, alteration, expansion, etc.
K. Johnson said that was governed by Sec. II which they went over.
A. Kaplan continued *"if your project is covered by one or more of the above situations, include your answers to the required criteria specified in the referenced section of the Milford Zoning Ordinance as an attachment under Section III C."* You would have to answer that question. Was this structure a substantial change in use of the structure and does it substantially affect the neighborhood.
M. Langlais asked what the difference was if it was a picnic table or a deck.
K. Johnson said Mr. Kaplan asked a legitimate question. Ordinance says if covered under Sec. 2.03.1C you need to address those two criteria either as attachments in Sec C, and he didn't see them in the file. Applicant could request they table the application to give applicant time to respond to those criteria and provide information or ask ZBA to proceed without it.

M. Langlais asked for criteria to be repeated. K. Johnson read them.
Mr. Langlais said he felt that Sec II of the application – he would go with that.
A. Kaplan asked what the answer was.
K. Johnson said Mr. Langlais felt it will involve no substantial difference in the neighborhood because others have decks and pools.
A. Kaplan said the stricken comments were gone. However the zoning administrator attempted to answer this question. If he were to make those statements and zoning member were to listen and not direct him away, that would be considered an ex parte communications.
K. Johnson said advice from their office was not considered ex parte.
A. Kaplan said this was no complaint about Bd. members. When the town administration takes something, especially when there was already a lawsuit that cost taxpayers.
K. Johnson said they could not consider that. It did not happen as far as this Bd was concerned.
A. Kaplan said every Bd member had responsibility to abide by the standard. He would have been equally objecting if it was in favor of him. Would not want favorable decision and then have it overturned later because of allegations of bias. He asked in reading the comment, had they formed an opinion? Hoped the answer was no, but if yes, he would like to counter them. Was anyone swayed by them?
J. Dargie asked which statements.
A. Kaplan asked the Chair to read them.
K. Johnson held up a page; A. Kaplan said that was whited out.
A. Kaplan said there were two staff memos.
K. Johnson and J. Dargie said they were just passed out; they hadn't seen them. They had not seen one and had not read the other.
R. Constantino said he read it; it gave no information.
A. Kaplan's concern was administration. He quoted "It is my interpretation that the pre-existing nonconforming side yard encroachment is not being increased. It is also my interpretation the deck does not change the original use or substantially affect the neighborhood." He asked if anyone had read that.
Bd. member said they've heard it now. Did anyone feel there was a bias?
K. Johnson said no.
J. Dargie said they get things like this all the time, from Conservation, for example. It has always been her feeling that she was looking for them to make a comment and not looking for them approve or disapprove. She was totally that way. No one would sway her.
A. Kaplan said that didn't appear to be the case with all members. He continued by presenting the permit originally pulled by applicant after having been served a violation. Mr. Langlais is a framer by trade. This permit showed a deck and shed. It was renewed in 2010 and 2011.
J. Dargie said, to help on this, that permit was more pertinent in the last hearing. They were discussing a special exception here, so it didn't have anything to do with that. Nothing in reading the questions to determine whether he should have pulled a permit or not.
A. Kaplan said in the previous case evidence was shown he knew the permit process.
K. Johnson said this was a whole different case.
J. Dargie said they are looking at it as if that never happened.
K. Johnson said these issues had come before them previously. They look at it as if the deck were not there, would we say yes or no. That is how they review cases such as this where a structure has been placed where special exception is required but the special exception was not requested prior to construction. They address the issue as though if it had not been built, would they grant it. Sometimes they say yes, sometimes no. People have been required to tear down decks. They review on the facts in the application.
J. Dargie said she is looking at it as though, if it didn't exist, how would they decide.

A. Karan said he would skip to whether it was a change in nature of use of structure or substantially affecting him as abutter. Everyone except Mr. Langlais agreed. Building Dept. called it a large deck. Will submit that.
K. Johnson said he had to go over it.
A. Kaplan said it stated a large deck was built on the back of the house. There were also other structures. Somehow those other structures were allowed to go by the wayside. This was not the only one. If there were ongoing willing violations of the zoning ordinance, that was relevant information for the Bd. Going back to 2013 decking had been replaced by a front porch.
M. Langlais disputed that.
A. Kaplan said he would go by building inspector's notes. He continued, roof covering was built on the left side of the house and asked of applicant vinyl seal must be formalized on the former bathroom and kitchen. Because 2010 and 2011 he allowed them to expire. He ignored it and built deck and overhang and reconstructed porch. Now a shed built within 6 ft of that setback.
K. Johnson said the shed was moved and no longer in the setback.
A. Kaplan said end result; rewarding bad behavior, you get more bad behavior.
K. Johnson repeated they could only consider case before them. Case for special exception for deck built in the setback.
A. Kaplan said forget about the history of the property.
K. Johnson said got the feeling that Mr. Kaplan wanted to present information why he felt it would have affect on his property.
A. Kaplan said which was supported by the evidence, the Supreme Court, and the town attorney.
He handed out a transcript from Supreme Court because equitable waiver went to court. Court, building inspector and he said it was a large deck. Mr. Langlais said it was an unobtrusive structure. A barely noticeable 400 SF deck doesn't make sense. In the equitable waiver there was a question
K. Johnson asked who was presenting that testimony.
A. Kaplan said it was a transcript. Attorney Drescher transcript for Superior Court.
K. Johnson said May 12.
A. Kaplan said he put only relevant pages. He started to read Atty. Drescher's testimony.
K. Johnson said it was Atty. Drescher's testimony and that was all they needed to know.
A. Kaplan said from cost of hours spent putting in the deck and materials, "this is a significant structure. I don't say, nor do I agree with the characterization that it looms but I will say that it is substantial. Because it is substantial it will be no small task to remove it. Turning it ninety degrees, you can also see that it's a monstrous job." It only takes a monstrous job to remove a monstrous deck. Ordinance says it cannot have a substantial impact on the neighborhood.
K. Johnson said it states 'substantially different" impact.
A. Kaplan said previous closest exterior wall of applicant's house was 28 ft away. Problem is twofold.
Move it and it is closer to those widows and changes closest portion of his house from an exterior wall to a large unenclosed deck.
K. Johnson said from enclosed living space to unenclosed living space.
A. Kaplan said consider use. People have parties, they play games, they smoke. Smoke going into his windows. Nuisance not allowed in any district. Nuisance resulting from smells, sounds, etc. How can it be when town attorney says it is substantial deck and monstrous to remove it? If this goes to court, town attorney will have to go back and say disregard what he said – it is a change is structure, not just use.
J. Dargie said, interpreting that he said turning it 90 degrees could be a monstrous thing. All he has to do is take that deck and turn it 90 degrees and be within the setback. All of those things he mentioned, smells, noise, music, etc. if he turned it 90 degrees it would still be the same thing.
A. Kaplan said it would be substantially further away.
K. Johnson said 18 ft.
A. Kaplan said he would have to move it.

K. Johnson said 18 ft. If he goes 15 ft. from the lot line, that is 28 ft. from the corner of Mr. Kaplan's house.
J. Dargie said it would be closer to the windows because it would be further into the back yard.
A. Kaplan believed if Mr. Langlais had asked for special exception before, Bd. could have questioned need for a 400 SF deck. Could build a 200 SF deck if you wish to building to the back you could have. Didn't care if it was 800 SF if it was conforming. It is right outside their windows. There is a reason for the setback. You can't say what is 5 ft. or 10 ft.
J. Dargie said only reason they were there was because it was a nonconforming building.
K. Johnson said they'd be there regardless. If the rest of the structure wasn't but the deck was nonconforming. He asked the attorney. The additional nonconformist is an additional layer. If the house were oriented differently and made it necessary to building a deck that encroached they would still be there.
A. Kaplan mentioned another case for a special exception.
J. Dargie said even without the deck, you could still stand outside.
A. Kaplan said that point was made before. However, the deck runs with the land. People standing there don't. People standing there, putting chairs there, putting a picnic table there doesn't run with the land. It is not permanent. There is an authority that says when you consider a special exception you assume applicant is a scofflaw. Not saying he is. He may be greatest neighbor in the world but then rents to people and they are outside every night drinking.
K. Johnson said they could be on the grass doing that.
A. Kaplan that is for zoning to make that case. Use of that deck is the problem. It is common thing to go out on a deck to smoke. Is it common to go right over to the boundary to smoke?
K. Johnson said that is entirely speculative
A. Kaplan disagreed. That is purpose of zoning. They want to bring it into conformity sooner or later, not expand. Nuisance, sounds, smells, privacy are legitimate concerns. Deck greatly expands footprint. There is multitude of case law on special exception, all point to advising not to grant this.
J. Dargie asked if he had specific case law.
A. Kaplan said he did.
J. Dargie asked him to submit those. Very difficult to read through all that case law. When attorneys come in and quote case law, you feel you don't know anything about it. Would suggest the Bd to let him submit and review it at another meeting.
A. Kaplan said it may be necessary or not.
K. Johnson said he will lay odds that for every case Mr. Kaplan came up with, he could come up with others where the court differed. Court has been a pendulum. Recommended that Mr. Kaplan submit evidence, they will discuss it and they table the discussion. That will allow Bd members to review the cases and see where they fit in this case. Gives Mr, Kaplan and applicant fair representation and allows the Bd. time to fully review all information presented by applicant, Office of Community Development, and Mr. Kaplan. Procedurally he needs to present it now so the Bd. can take it with them.
A. Kaplan said only have to look at Milford Zoning Ordinance to see this shouldn't be allowed. He quoted "provisions of this ordinance shall be activated by 'shall' when required." When ordinance says "shall" it cannot be waived.
K. Johnson said he was the one that insisted that "shall" "should" "may be" added to the ordinance. Makes their job easier when the ordinance is clear. However, the ordinance is full of "weasely" like "reasonable." What is reasonable?
A. Kaplan read from the ordinance section on Nonconforming Uses and Structures.
K. Johnson said there is one of those words. What is "reasonable"?
A. Kaplan said however it was pretty clear-cut in ordinance expansion change is only allowed by special exception by the ZBA and "shall, if it finds that the proposed alteration or change shall not change the nature of the original use or the structure." It cannot change either. It shall not change the nature of the

structure. It has changed. Cannot see how it could be said a 30 percent increase in the footprint of the house - it was not there before. That is a change not only in the house – he knows they disagree - but it is a change in the structure. Believed that was added by Kevin in 2012.
K. Johnson said if he wanted to put 20 ft. deck right out back door. Might or might not have asked for a special exception. Would not have been a problem. Even if it extended to the edge of the house, or even not fully to the edge of the house, but say the door was just on the other side of the 15 ft. setback and he's putting a 10 ft deck to come out that back door to go down into the yard. Bd. would have said yes because that is reasonable.
A. Kaplan asked, putting it into the setback or not?
K. Johnson said if he was one foot into the setback and wanted to put in a deck so he could have an area before the steps to go down into the yard from the back door. Versus whatever is there. Comes nowhere near the corner of the house. Nowhere the nonconformity of it. This Bd. would have granted that special exception with no argument. That would have been reasonable. Now they are arguing the reasonableness of the size which is determination for the Bd. There are many things that could have been done. Now they have to review this specific deck in this situation.
A. Kaplan said it sounded like he was trying to convince him over to the applicant's side.
K. Johnson said no, he was trying to get him to see that any deck is not unreasonable.
A. Kaplan said one of the Bd. members at last meeting said there would have been no issue if he pulled permit or put it in back or built smaller deck there would have been no problem.
K. Johnson said instead they asked forgiveness and permission.
A. Kaplan said, exactly. That sort of concept. He went on to say that the plan presented by applicant, done by Mr. Todd could not be relied on.
K. Johnson said it was certified by Robert Todd, a certified land surveyor. Nothing on there that said he certified it. It is not guaranteeing anything. He said the footprint shown as 7 Willow St. was not his house. That was raised at previous meeting.
Applicant said he answered that at the first meeting.
K. Johnson said that meeting doesn't exist.
Applicant asked why it was being talked about
K. Johnson said Mr. Kaplan was presenting evidence that the plan was not correct.
A. Kaplan wanted to play a recording.
J. Dargie asked if he had an actual transcript
A Kaplan wanted to play recording. K. Johnson said if it was from prior meeting it was irrelevant.
A. Kaplan said they must let him play it because it spoke to the accuracy of the plan.
K. Johnson said they couldn't question whoever that was.
A. Kaplan said the plan was signed off by Robert Todd without even being there.
K. Johnson said he was accepting that. He can't use a recording. If he wanted to bring in whoever made that statement to testify so the Bd could question them, then he could submit it.
A. Kaplan said he didn't understand the bias.
K. Johnson said he was trying to convince him that anything that went on at the prior meeting.
A Kaplan said it spoke directly to the accuracy.
K. Johnson said then bring Mr. Todd in to testify to the accuracy or have his own surveyor testify to the inaccuracy.
A Kaplan said he brought mountains of evidence and Mr. Langlais brought unsubstantiated claims.
K. Johnson said he would accept the plan until it was refuted by evidence.
A. Kaplan said that was what he was trying to do.
K Johnson said not a recording.
A. Kaplan said 7 Willow St. is how which is not even close to Mr .Langlais. Mr.Todd has put Mr. Langlais' footprint on Mr. Kaplan's lot. If you measure with a ruler and look at GIS photo it looks nothing like that. He modified it slightly. It pushes over half of his house 20 ft away from that deck. Plan

in front of them (which he presented) was proper footprint of his house. Compare it to blown up picture of Todd diagram. He put property footprint in there. Look at windows to left. Mr. Todd is claiming that the jog – Mr Kaplan measured it to 7 ½ ft. – Mr Todd had that at 26 ft. away.
N. Langlais said Mr. Kaplan wouldn't allow anyone on his property.
A. Kaplan would present evidence. K. Johnson accepted. A. Kaplan said they cannot rely on what Mr. Todd said. It was not accurate. He presented letters to and from himself and Mr. Todd where he requested that they not survey on his property in the winter, per advice of his insurer, because of risk of someone falling on ice, snow. Mr Todd's testimony to the Bd. was the Mr. Kaplan said not to step foot on his land. Nothing in the letters he just presented said that. They eventually came to an agreement.
He made further comments re the inaccuracy of Mr. Todd's plan. He then mentioned a fence and bushes that Mr. Langlais has since ripped out.
N. Langlais said it was on his property.
There was discussion between applicant and A. Kaplan concerning whether they were removed before or after the survey.
K. Johnson asked where the stake was.
A. Kaplan pointed out back of property and the iron pin. Extends away from Langlais property on or about the line behind his property and with the neighbor behind him. It touches the pin with the shared boundary between Langlais property and his and approaches to delineate the line on or about the line between the Langlais property and his.
N. Langlais said a chicken wire fence was not a boundary.
A. Kaplan responded it was to delineate the line. It was not for a garden, to contain a pet or children. Fence not shown on Todd's plan. Shows fencing way off where it didn't matter. Didn't show all fencing delineated line because that would be a very bad fact for Mr. Langlais to face to say at that point he didn't know where the property line was. He had assessing records. This was not dispute between neighbors. He was strictly trying to protect his investment in his property.
K. Johnson said that was valid information to present to the board.
J. Dargie asked, re protecting the value, if he had a realtor to an assessment.
A. Kaplan said yes, he would present that.
N. Langlais asked if his tenants stopped paying rent. That would affect the value.
K. Johnson said value of his property was independent of whatever tenant pays or doesn't pay.
A Kaplan then cited and quoted from a court case Kidd v. Town of Alton granting of special exceptions.
K. Johnson said if A. Kaplan could present evidence that is sufficient to the Bd. to accept that the deck as it stands should decrease the value of his property, that would be sufficient to invalidate. As with a variance, you must meet all criteria. That would be a valuable piece of evidence.
A. Kaplan said he'd get back to that.
K. Johnson asked Map # of Mr. Kaplan's property. He wasn't sure, but it was mirror image of Mr. Langlais' property. But, he said on GIS it was completely different. He believed this was a fraudulent application. If Mr Langlais and Mr. Todd had been forthcoming they would not have ended up in court. Mr. Langlais is a framer. Could rebuild it in back of his property.
K. Johnson said NH Supreme Court found that equitable waiver was not the appropriate process.
A. Kaplan asked if he read the information.
K. Johnson said yes. He reads Supreme Court information all the time.
A. Kaplan thought he meant the Bd. comments. Mrs. Lunn said it was the wrong process.
K. Johnson said he didn't sit on the Bd.
A. Kaplan said Mrs. Lunn said - he objected to what the town did because it introduced bias. She said it was remanded back. It was not. It was reverted back. It was not process. Her interpretation was the Supreme Court found it was the wrong process, and here is the right process. That is a biased interpretation; putting words in Supreme Court's mouth because they found criteria for equitable waiver were not met. They also said without prejudice Mr. Langlais had right to pursue – not the right to obtain

– but has to prove his case. He came back to how K. Johnson mirrored Mrs. Lunn's statement but didn't read it.
K. Johnson said he did read it. That was an oversimplification of the entire matter.
A. Kaplan was bringing up the bias.
K. Johnson said when he first saw this case, even though he didn't sit it, he saw it was an equitable waiver and thought that was a misinterpretation. But didn't say anything because he wasn't sitting the Bd In his opinion, equitable waiver was not appropriate relief. This is irrelevant. They should get back on track.
A Kaplan said Mrs. Lunn said case was taken to Supreme Court which determined wrong process was used. Before that the wrong process was used. He read further from Mrs. Lunn's comments. He said he interpreted it as saying that was the wrong process, here's the right process.
J. Dargie asked for the final by Supreme Court.
A. Kaplan read… "the deck conforms to the existing side yard nonconformity." He can't make sense of that. His concern was the Bd had read it. Believed some members did. He asked if any had been biased by what was said. Did anyone feel they had to recuse themselves?
K. Johnson said no. J. Dargie said no. K. Johnson asked L. Harten, explained what notes he was referring to.
Before L. Harten answered, A. Kaplan said he believed members had. He read letter from Masiello Real Estate for submission to the Bd. giving opinion that deck devalued his home. Also from Keller Willliams, Karl Zahn, from records of equitable waiver case. He also stated he and his father were experts in real estate. He read letter from himself and his father, Ronald Kaplan. He stated it was not a deck they objected to. It was a nonconforming deck built within the setback and so close to his house. Deck would result in significant reduction in their privacy and enjoyment of their home.
He went on to cite several Supreme Court cases, and to point out reasons why he thought this application didn't meet the criteria for a special exception. He also quoted Milford Zoning Ordinance and NH Office of State Planning. He said NH Office of State Planning said that enlargement or nonconforming use may not be substantial.
K. Johnson said that was one of those weasel words. What constitutes reasonable?
A. Kaplan said the town attorney said the deck was substantial. You would be asking him to go to court and argue against himself. He continued to cite court cases and how he felt they related to this case.
He ended by asking the Bd to make him whole again. Or side with the applicant and grant the special exception and go to court and go against case law he read and the entire ordinance for the sole convenience of someone who willingly violated the zoning ordinance. Do they want to do that with taxpayers' money and put them through this again?
J. Dargie asked if he went to court twice.
A Kaplan said he did do a motion for relief which was substantial. Once denied, went to Superior Court and got an attorney and spent thousands. Arguing over facts. Town denied it increased 30 percent. Approached town zoning administrator who didn't want to grant him assistance to have an independent third party give confirmation that it does. Was told to refer to the record. Same thing the town attorney told him.
K. Johnson said that was because the Superior Court is required to refer to the record.
A. Kaplan said the issue was the response was when they said 30 percent, the town attorney denied.
The court ruled against him. Could not spend more money. Feels he has such a strong case. He went to Superior Court on his own. Town responded. Superior Court unanimous decision that it was illegal. Not because it was the wrong process, but because it didn't meet the requirements. It cannot be made legal. It is wrong process no matter what. If every structure had a right process there wouldn't be need for zoning. Applicant can cut it back or build it entirely out back. He would not ask him to tear it down. Don't make him (Kaplan) and his family go through this again.
K. Johnson asked if he had anything else.
A. Kaplan said no.

K. Johnson asked for questions from the Board.
A. Kaplan submitted the entire packet of information to the Board.
J. Dargie asked if there were tenants in his house and if there had been complaints from tenants.
A. Kaplan said there were tenants. At Superior Court the town brought up the fact there were no complaints or letters from tenants. In the rental business, it would be foolish to put tenants between a rock and hard place. He didn't want to put tenants in that position. Wants them to get along with neighbors. He wouldn't answer on tenants' behalf.
J. Dargie asked if downstairs window was a living room and upstairs was a bedroom.
A. Kaplan said yes, and side entrance. If it was an unbuildable lot, that would be another thing. In this case it is a buildable lot that is already built on and what are built there are living room and bedroom windows and a side entrance. And applicants tried to misrepresent to the Bd.
J. Dargie asked about a motion to table.
A. Kaplan said, re tabling, with what applicant presented and the burden being on Mr. Langlais to prove all criteria being met and burden not being on him that they haven't been met..
K. Johnson said it was more for the Board's convenience. They are required to come up with certain amount of paperwork and would not have time tonight.
A. Kaplan said at the last meeting the Bd. started voting no and someone said they needed more information. He had papers in hand. Mr. Langlais came in with other misinformation and was given a second opportunity. At the next meeting will they just make a ruling, or will there be more testimony?
K. Johnson said they would finish testimony this evening. Assuming they will table to the next meeting, but the testimony and public comment will be closed. Bd. has right to ask additional questions for clarification of issues raised. Otherwise, it will be deliberation.
A. Kaplan asked, no further testimony or documents?
K. Johnson said none accepted after this point. A. Kaplan gave Chair all his documentation. Chair asked for further comment. There was none.
Before closing public comment, he gave the applicant a brief opportunity to rebut issues raised by Mr. Kaplan. At this point, he was fairly sure they would table their deliberation.
N. Langlais said he believed when he built the deck it was not that close to property line, from hearsay from neighbors. Noted that on the application. When stop work order was put on the door he tried to do everything asked for. Obviously it was a mistake to build the deck without a permit. Since that, he has done everything he was asked to do. Re use, didn't understand the difference between a picnic table and a deck.
K. Johnson said that was for the Bd to decide where they stand.
N. Langlais said there wasn't much more for him to say. Wants to keep his deck.
K. Johnson closed the public comment portion of the hearing. He asked for a motion to table the deliberation.
J. Dargie made motion to table deliberation on the case until the next regular meeting, August 4, for Case #2016-15.
K. Johnson seconded He noted that no additional notice will be given to applicants or abutters.
All voted in favor. Motion to table passed.