



April 8th, 2024

To: Mayor Kudron and The Board of Trustees
From: Kim White, Community Development Director

RE: **PUBLIC HEARING- (QUASI-JUDICIAL)** Continued from January 22nd, 2024, and continued from March 25th, 2024, Consideration to Adopt Resolution 21-2024; Considering a Variance to the Stream and Lake Setback Requirements for Property Located at 210 Rapids Lane, with Conditions

Purpose

The Town has received a shoreline variance request for a newly constructed deck partially in the five foot (5') non-disturbance zone and fully within the thirty (30') shoreline setback area (Fig 1). Neither a variance to stream setbacks nor a building permit was obtained prior to construction of the deck.

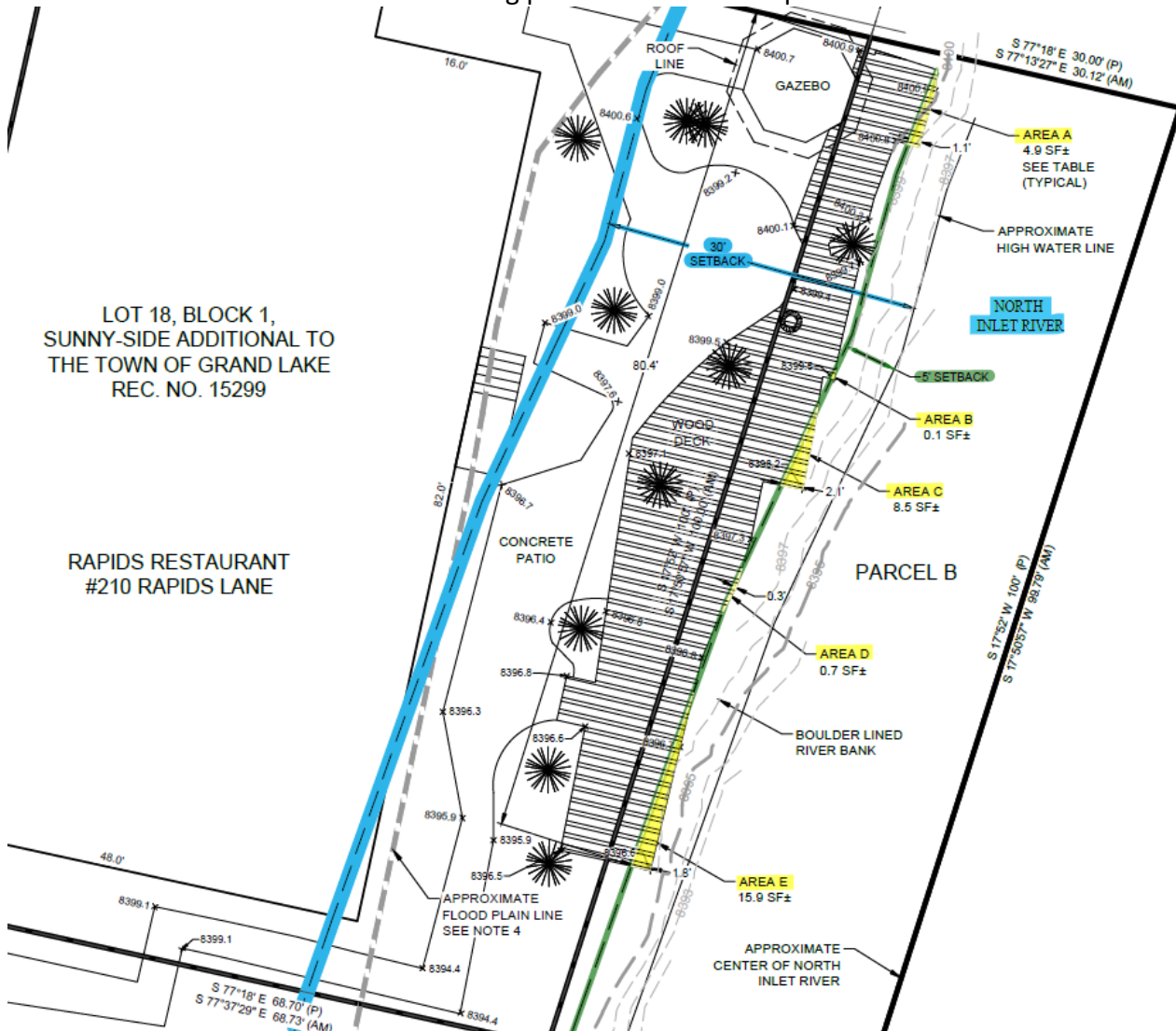


Figure 1- yellow highlighted area within the 5' non-disturbance zone



Background:

- The item was brought before the Planning Commission at a noticed Public Hearing on January 17th, 2024 where the commissioners voted unanimously to continue the hearing until February 21st, 2024, at which time they voted 6:0 in favor of the resolution with conditions (exhibit 5).
- The Board of Trustees motioned to continue the hearing from January 22nd, 2024 until March 25th, 2024 to accommodate the Planning Commission continuation.
- The item was reviewed by the Board at the Public Hearing on March 25th, 2024, and further continued until April 8th, 2024.

As a recap from the March 25th Hearing:

- An image of the newly built deck was seen on social media and reported to staff, who sent a letter to the owners (exhibit 1).
- The existing deck is a use by right in this Commercial Transitional zone as 12-2-10 (item 13) accessory use, but there is no evidence it complies with building code regulations pertaining to decks, as no construction documents have been submitted.
- Notices were mailed to the neighbors. Town received 2 written responses from these, 1 for and 1 against. (exhibit 2 and 3)
- The applicants initially indicated that the deck has been in place for decades.
- The County Building official stated that according to the International Building Code, commercial property open to the public, must have a building permit issued, and should be ADA compliant.
- Since the deck is not in the stream and is not dug into the shoreline, neither the Army Corp nor the CDPHE approval were required.
- Colorado Flood Plain rules require any development in the floodplain to have proper documentation filed with the Town or else risk the National Flood Plain Insurance program for the entire Town.
- The flood plain application was submitted and after review by a state official, stated that an encroachment analysis is required as well as documentation on how the structure is anchored to prevent it causing issues downstream in the event of flooding.
- The Owners have submitted the documents for the shoreline variance and the flood plain application but have not submitted:
 - o building permit application
 - o evidence of the deck as a pre-existing, non-conforming condition
 - o documentation showing anchoring to prevent floatation.
 - o documentation that it will not cause a rise of less than ½' from the Base Flood Elevation (BFE) usually done through an encroachment analysis by a CO licensed engineer.

Municipal Code

Municipal Code 12-2-29 Shoreline and Surface Water Regulations:

(A) STREAM AND LAKE SETBACKS

- 1. In order to help preserve the environmental quality of the water in the Grand Lake, a thirty (30) foot **stream and lake setback** from the mean identifiable high-water mark **shall be maintained for buildings, parking, snow storage areas and other improvements to a site.** ...*
- 2. **When activities are proposed within the 30' setback, a variance may be requested by an Applicant.** ...*
- 4. The first five (5) feet of this setback shall be a non-disturbance zone, except in the cases of bridges, irrigation structures, flood control devices, boathouses, commercial marinas, boat rentals, boat repair and maintenance facilities and walkways and stairways less than four (4) feet in width leading directly from the shoreline to the principal structure.*



Municipal Code Chapter 12 ARTICLE 5. - FLOOD DAMAGE PREVENTION

12-5-2 Development. Any man-made change in improved and unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.

Staff Analysis

-Staff presented the item to the Board on 3/25/24 and stated that dirt compaction in 2011 from machinery used (fig 2) to reinforce the bank may have killed some of the trees, however the applicant stated that the trees were already dead and that compaction isn't an issue with tree death. Thus, staff's previous analysis that the new deck covering may offer protection from foot traffic compaction is inaccurate for this case.

-The applicant stated that the previous owner did not have dining on the shoreline and it was only recently added.

-The applicant stated that if the current decking, from around 2022, is removed or relocated, it will cause the restaurant to shut down.

-Town Staff has not received any construction documents, so it is unclear whether it is a floating deck, how the deck will stay in place if there is a sudden increase in water level, and if the deck was built to building code standards.

-When the Board asked the applicant if they could return to dining on the waterfront without the deck, the response was that it would not be insured.

-At the February 21st, Planning Commission hearing the applicant agreed to obtain the encroachment analysis. -

-At the March 25th Board meeting the applicant stated that the price for such an analysis was prohibitive.



Fig 2



Fig. 3 - 2020 shoreline condition



More about Floodplain:

Town Staff met with the Colorado Department of Natural Resources NFIP Community Assistance Program Coordinator and discussed the development on the property. The NFIP (National Flood Insurance Program), which is managed by FEMA, provides flood insurance to property owners, renters and businesses, and having this coverage helps them recover faster when floodwaters recede. The NFIP works with communities required to adopt and enforce floodplain management regulations that help mitigate flooding effects.

The Flood Plain Administrator reviewed the FEMA National Flood Hazard Layer (figure 4) and noted that the decking is on the shoreline and the shoreline is in Zone A. As a point of visual reference in Figure 4, 5, &6, the brown circle below the red arrow is the gazebo, which is half inside Zone A, but is pre-existing and not part of this hearing.

Any development in zone A (figure 4, 5) requires documentation to be filed with the Town in order for the Town to remain eligible for National Flood Plain Insurance Program. Part of the documentation for this development is the encroachment analysis. Per Colorado floodplain rules, specifically 2 CCR 408, and dually adopted in the Town municipal code 12-5-2, the definition of development is any man-made change in improved and unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials. • Per state rule 12.G, developments in zone A must demonstrate no more than a one-half foot (1/2') rise in BFE between existing and post-construction. Developments in floodways must show no-rise. This is a floodplain in Zone A.

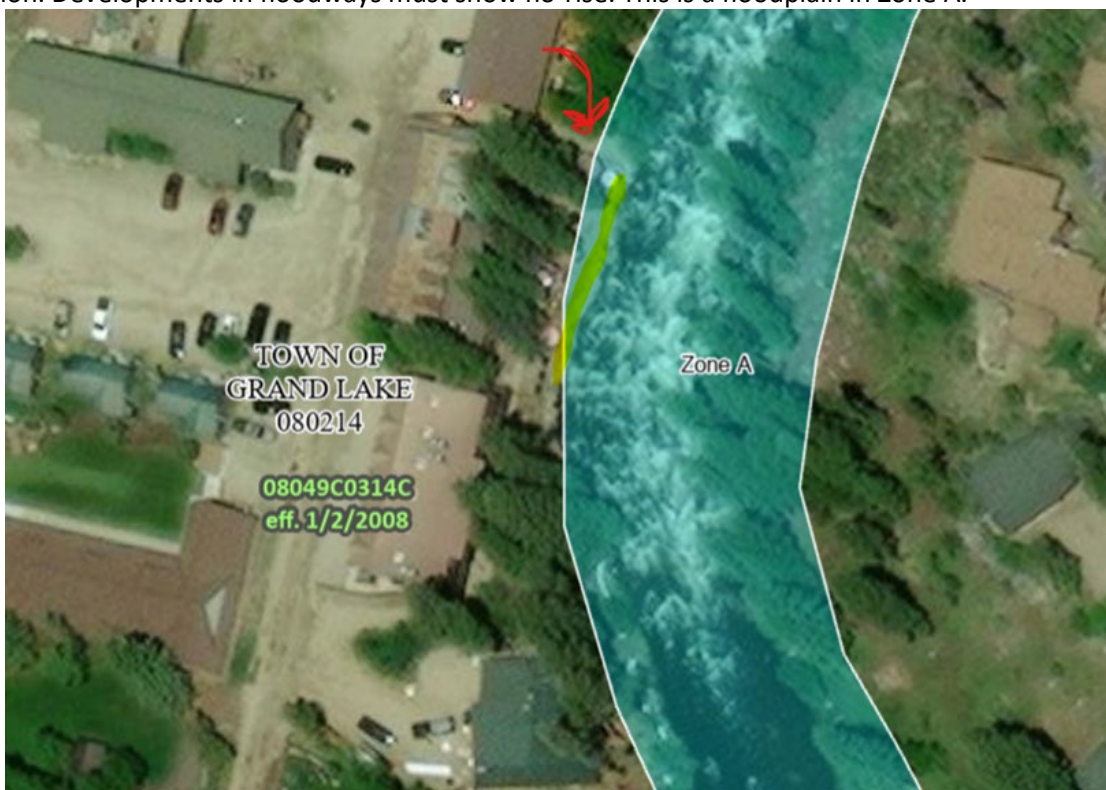


Figure 4: Location map: red arrow pointing to gazebo (brown circle) yellow line indicating shoreline area of deck
<https://msc.fema.gov/portal/search?AddressQuery=210%20rapids%20lane%20grand%20lake%2C%20co>



Figure 5: Zoomed FEMA National Flood Hazard Layer- yellow line indicating decking location, red arrow indicating brown roof of gazebo

Staff reached out to the State NFIP coordinator to request if there were other options for the applicant to demonstrate that the decking will not cause a more than ½ foot (1/2') rise in the base flood elevation between existing and post-construction conditions, as the applicant has stated it is cost prohibitive. The State NFIP coordinator said that the Town can accept a report from a CO state licensed Engineer (not an architect) that states the deck does not impact the floodplain in any way, nor does it impact other adjacent, insurable structures. Also, there must be evidence, in the form of construction documents, that show the deck is anchored to prevent floatation. The current condition of having it built around boulders and trees, which can be uprooted and rolled, is not acceptable by the Town to prove it is not going float in the event of a flood. It cannot become part of the debris flow in the event of a flood.

If the applicant does not provide the required documentation, the Town can lose the ability to apply for any grant assistance or federal funds and can lose the NFIP. The time frame for compliance follows the municipal code of Grand Lake. If this is insufficient the state will send a letter to the community with a deadline for compliance.



At the March 25th, 2024 meeting the location of the deck in relation to Zone A was questioned by the applicant. According to the NFIP coordinator, if the flood plain manager determines an object to be in the floodplain (zone A), it is the owner's responsibility to refute the Town's claim. This is normally done with a survey.

The NFIP coordinator said the least expensive route for permitting the deck (floodplain permit), would be to accept that it is in the floodplain (to avoid a survey cost), then get an engineer to review the site and create a report as outlined above, provide construction drawings of how the deck was built and how it is anchored to prevent floatation, and obtain a building permit. Or apply for a building permit to construct a deck outside of the floodplain which could be on the back of the indoor dining area to continue to provide an outside dining experience.



Figure 6- 2022 plan view



Board Discussion

The Board should conduct the Public Hearing as follows:

1. Reopen the Continued Public Hearing
2. Allow Staff to present and update of the matter
3. Allow the Applicant to address the Board regarding the remaining issues
4. Open the meeting for public comment
5. Close the Public Hearing
6. Have a discussion among the Board, including any clarifying questions of staff or the applicant.
7. Adopt a resolution

Shoreline setback discussion:

Section 12-2-29(A)(4):

(4) The first five (5) feet of this setback shall be a non-disturbance zone, except in the cases of bridges, irrigation structures, flood control devices, boathouses, commercial marinas, boat rentals, boat repair and maintenance facilities and walkways and stairways less than four (4) feet in width leading directly from the shoreline to the principal structure. **(Figure 1- highlights areas that are within the 5' zone)**

It is required to have the Board find that the item meets the shoreline variance request based on the items (MC 12-2-29(A)(2)(b)).

The Board shall consider the following 7 factors:

Section 12-2-29(A)(2)(b): The following factors will be considered in determining whether to issue a variance from the 30' shoreline regulations:

1. The shape, size, topography, slope, soils, vegetation, and other physical characteristics of the property.
2. The locations of all bodies of water on the property, including along property boundaries.
3. The location and extent of the proposed setback intrusion.
4. Whether alternative designs are possible which require less intrusion or no intrusion.
5. Sensitivity of the body of water and affected critical habitats.
6. Intensity of land use adjacent to the body of water proposed to intrusion.
7. Impact on floodplains and stream functions (a variance shall not be approved when the reduction would result in the setback being narrower than the floodplain)

Then, using the above 7 items, determine if one of the items below (a-e) apply:

Section 12-2-29(A)(2):



...During the public hearing the burden on the Applicant shall include but not be limited to, establishing the activity conforms to one (1) or more of the exceptions set forth in Section 12-3-5(A)(4)(a) through (e) (**Applicant submitted exhibit 4 as proof of conformity to exceptions a-e**)

The exceptions in Section 12-3-5(A)(4)(a) through (e) are:

- (a) By reason of exceptional shape, size or topography of lot, or other exceptional situation or condition of the building or land, practical difficulty or unnecessary hardship would result to the owners of said property from a strict enforcement of these Regulations;
- (b) Literal interpretation of the provisions of these Regulations would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of these Regulations.
- (c) The special conditions and circumstances do not result from the actions of the applicant;
- (d) Granting the variance request will not confer on the applicant any special privilege that is denied by this ordinance to other lands, structures, or buildings in the same district;
- (e) That the granting of the variance does not pose a detriment to the public good and does not substantially impair the intent and purpose of the Zone Plan and these Regulations.

If the Board grants a variance to allow the deck, staff recommends that such approval be conditioned on

- (1) removing those portions of the deck in Areas A, C, and E that encroach into the 5-foot non-disturbance zone, as there is no avenue for a variance to this code provision,
- (2) submitting a building permit application including the building construction plans for review by the Town zoning and County building department and pay all applicable fees, (3) complying with all other provisions of the Grand Lake Municipal Code that relate to the deck, including but not limited to Section 12-2-29(A)(5),
- (3) refraining from further use of the deck until construction under the permit has been completed and approved by the building inspector, and
- (4) complete the floodplain application by obtaining an encroachment analysis (from an engineer or other professional) to demonstrate no more than a one-half foot (1/2') rise in base flood elevation between existing and post-construction conditions

Or

- (4) a report from a CO state licensed Engineer (not an architect) that states the deck does not impact the floodplain in any way, nor does it impact other adjacent, insurable structure, and
- (5) providing documentation on how the deck is anchored to demonstrate that in the event of a flood it will not pose a detriment to public good.
- (6) It is also suggested that a condition be added that the shoreline vegetation be maintained at current level (fig 7) and that riparian vegetation is allowed to become denser to limit shoreline erosion. The planning commission's intent is that the Owner does not actively remove or otherwise intentionally harm healthy, native, riparian vegetation.



Figure 7 - shoreline vegetation -images from 2023 online real estate marketing

Board Suggested Motion

1. I Move to Adopt Resolution 21-2024; Approval of the Variance to Shoreline and Surface Water Regulations with conditions, as presented.

Or

2. I Move to Adopt Resolution 21-2024; Approval of the Variance to Shoreline and Surface Water Regulations with the following additional conditions

_____.

Or

3. I Move deny the variance for the following reasons: _____