



Town of Farmington
Planning and Community Development Department
356 Main Street
Farmington, NH 03835

FARMINGTON ZONING BOARD of ADJUSTMENT - AGENDA

Meeting Type: Regular Meeting
Meeting Location: Board of Selectmen's Chambers, Municipal Building, 356 Main Street, Farmington, NH
Meeting Date: Thursday – November 2, 2023
Meeting Time: 7:00PM

1. Pledge of Allegiance
2. Approval of the Prior Minutes
 - September 7, 2023 Meeting Minutes
3. Old Business
4. New Business
 - A. Public Hearing for a Variance by Tracy Hayes, Tax Map U12, Lot 9. A request has been made for a Variance under Table 2.04 (B) Space and Bulk Standards. The applicant is requesting a variance for relief from the maximum new residential density standards that require one unit per acre and be allowed to convert two existing offices into two apartments, where only one is permitted. The property is in the Urban Residential District.
5. Any Other Business Before the Board
6. Adjournment

John Scruton, Chairman
Farmington Zoning Board of Adjustment

Memo

To: Zoning Board of Adjustment
From: Kyle Pimental, Director of Planning and Community Development
Date: 10/30/2023
Re: November Zoning Board Meeting

Good evening,

Please note the following communication from the Town's Planning and Community Development Department.

1. Pledge of Allegiance
2. Review and Approval of September 7, 2023 Minutes
3. Old Business
4. New Business
 - A. Public Hearing for a Variance by Tracy Hayes, Tax Map U12, Lot 9. A request has been made for a Variance under Table 2.04 (B) Space and Bulk Standards. The applicant is requesting a variance for relief from the maximum new residential density standards that require one unit per acre and be allowed to convert two existing offices into two apartments, where only one is permitted. The property is in the Urban Residential District.
 - a. Noticing Requirements

All public hearing requirements, as set forth by RSA 676:7, have been met. This includes notifying all abutters that were listed in the application by certified mail, as defined by RSA 21:53, stating the time and place of the hearing not less than 5 days before the date fixed for the hearing. The abutters list was reviewed by the Planning Secretary for accuracy prior to the letters being mailed out. A copy of the abutter letter is included in the packets. A public notice of the hearing was also placed in the Seacoast Media Group newspaper (in both hard copy and digital formats) not less than 5 days before the date fixed for the hearing.
 - b. Variance Description

A variance is legal permission to violate a specific restriction in the Zoning Ordinance. It is designed to be the exception, not the rule, and the Zoning Board of Adjustment may only approve a variance if an applicant meets the 5-part test in State law. An applicant for a variance must answer all questions on the application plus any extra considerations required by the section of the Zoning Ordinance that is the object of the variance request.

The applicant must convince the ZBA that the application satisfies all five criteria, or the ZBA is not legally allowed to grant the variance.

If needed, see attached guidance from the Town's legal counsel.
 - c. Planning Department Comments

The applicant is seeking relief from the maximum residential density standards to allow two residential units on a property that is 1.61 acres where 2 acres is required. Unlike the Suburban Residential zone, which offers a 25% lot size reduction for each utility connection, the Urban

Residential zone requires that a property be connected to both water and sewer. The property is connected to municipal sewer, but not municipal water, therefore is not eligible for the 10,000 square feet per unit bonus that is allowed in the Urban Residential District. A prior site plan, which was approved by the Planning Board in 2020, is included in the ZBA's packets to show the layout of the property.

5. Any Other Business Before the Board
6. Adjournment

Upon receipt of this correspondence, if any ZBA member has additional questions or would like to follow up with staff, please contact Kyle Pimental at kpimental@strafford.org.

Respectfully,
-Kyle Pimental, Director of Planning and Community Development

Town of Farmington
Zoning Board of Adjustment Meeting Minutes
Thursday, September 7, 2023
Selectmen's Chambers
356 Main Street-Farmington, NH 03835

Board Members Present:

John Scruton, Chairman
Joe Pitre, Vice Chairman
Bill Fisher
Bob Morgan

Board Members Absent:

John Aylard, Clerk/Secretary

Others Present:

Kyle Pimental, Planning Director
Chris Wyskiel, Wyskiel, Boc, Tillinghast
& Bolduc, P. A.
Irene (Patty) & Mike Hodge

1). Call to Order:

Chairman Scruton called the meeting to order at 7 p.m.

2). Pledge of Allegiance:

All present stood for the Pledge of Allegiance.

3). Review of Minutes:

August 3, 2023- Public Session Minutes- No errors or omissions

Motion: (Pitre, second Morgan) to accept the minutes as written passed 3-0-1 (Scruton abstained).

4). Old Business: None

5). New Business:

Public Hearing for a Variance by Michael E. & Irene P. Rupp Hodge, Tax Map R06, Lot 174. A request has been made for a Variance under Table 2.01(B) Space and Bulk Standards. The applicant is requesting a Variance to allow for an encroachment into the fifteen (15) foot side setback for a proposed storage garage. The property is in the Agricultural Residential District.

Chairman Scruton said he believes this property is also in the Lancelot Shores Overlay (155 Camelot Shore Drive).

Attorney Chris Wyskiel told the board he was here representing Patty and Mike Hodge who are present this evening. He said he submitted a detailed letter with exhibits and supplementary application and asked if everyone had read it because he didn't want to read through the whole thing. He said he had some points he would like to discuss to emphasize what he wrote in his letter and some extra pictures to discuss with them.

Mr. Scruton said it would be safe for him to point out the points he wanted to make in addition

to the written text.

Att. Wyskiel began with the survey plan done by Norway Plains Assocs. depicting the property boundaries to the Hodge's property and the location of their present improvements. He said there is a proposed addition to the side of the house that is currently under construction to which a building permit was issued and it complies with all zoning.

He said if they look at the side yard building setback line it's shown as a dashed line the front corner of the proposed addition looks like it's going into the building but that's a part of the roof that's up in the air and your zoning ordinance allows that. He said they were here today because of the area in front of the addition which is the proposed garage and it's shaded in a dark color purposely because this is an existing conditions plan and that was pavement they always had a driveway right there and they've planned an addition to enclose that area.

He said presently because of the on-going construction some of that pavement has been ripped back maybe 3 or 4 ft. to allow for foundation forms and stuff for the structure to be built over. He said he had a picture he could submit that shows before any part of the driveway was disturbed the pavement came right up to as it's depicted on the plan and they can add that in the record.

Mr. Scruton said on the Great Northern this is 174.

Att. Wyskiel said yes and if they wanted to look at the tax map to orient the lot is #174 and lot 175 which immediately abuts the subject property is also owned by the Hodge's and it's a vacant lot and that's significant especially because of its change in topography. He said it's lower than 174 and there's quite a drop there. He asked if everyone has been to site or driven by and then said he had some photos that depict what he wanted to talk about if they haven't seen the site.

He said as this was originally planned the intent was to build a structure over the existing pavement but in fact it's going to be shifted over a little bit closer to the center of the house so his variance request was to allow an encroachment into the 15 ft. side yard setback not to exceed 4 ft. because they thought it would go as much as 4 ft. but in fact it's probably going to be more likely 3 maybe 2 ft. because it's going to be shifting closer to the center of house. He then gave some pictures of the site to the board.

Mr. Fisher looked at the photo and said he wasn't kidding about a drop off.

Mr. Scruton said the beach which is just around the corner from this house is straight down.

Att. Wyskiel said this is significant for a few reasons you can see the on-going addition...

Mr. Scruton asked what is going on this other part and if this is their lot beside their house.

Michael Hodges said yes.

Mr. Scruton asked if this has nothing to do with the variance request.

Mr. Hodges said no.

Att. Wyskiel said that lot is currently vacant and perhaps in the future they might build a new house there.

Mr. Hodge came forward and said that is a lot they purchased a couple of years ago and that's a totally separate lot but that 15 ft...

Att. Wyskiel said they could see a rope line in this picture and that is essentially the property line.

Mr. Hodge said it's not straight perpendicular through the property it goes at a slight angle.

Att. Wyskiel said there used to be a structure on that lot but it was torn down and some of the soil disturbance they see is not related to new construction. He said he is showing them the slope on the side yard for 2 reasons-one it also is a reason why the proposed storage garage is shifting a little bit closer to the center of house because the guy doing the excavating they're going to have to put some footings in to support the new building and he wanted to keep as far away from that as he can.

He said another existing condition that's relevant to the unique characteristics of this lot that's pertinent to the hardship requirement is in the front of the house as that's where their septic system is located. He asked why they don't just shift the garage over in front of the house so they can comply with the setback requirement and answered because the guy would dig up chunks of the septic system and you can't do that so they tried to encroach into the setback as little as possible not to exceed 4 ft. because that's how its written in fact it's going to be a little closer that way but it can't be further into the center of the house of the septic being there.

He said the other thing that was significant about this slope condition is it's also a condition of the land that's relevant to the hardship thing and then turned to Mr. Pimental's memo and noted it was a nice checklist to consider some of the points he has to address. He said if he jumps to the hardship criteria on page 2 it talks about there needs to be some special condition attributable to the property itself. He said size is certainly one of them because they are in Camelot (Lancelot) Shore Overlay District and the lots are small. He said the 15 ft. setback is a building standard for all of the Agricultural Residential zone throughout the town where the lots are a lot bigger in other places and down around Baxter Lake they're all tiny little lots. He said the zoning ordinance has a declaration of intent that relief is intended to be given in spots especially the ordinance is specifically for a front setback here we don't need a front setback we're going to comply with it but we think the side yard setback is reasonable.

Att. Wyskiel said one of the reasons for a setback requirement is just a space thing so neighbors are not crowding with each other and if we are in 2 dimensions on a flat surface another 15 ft. and 15 ft. between houses there's a nice 30 ft. split that makes some sense. He said whoever builds on lot 175 which is lower it's going to be on vector that's a longer line too. So the spacing isn't as critical to do the 15 ft. and I think that makes the request reasonable he said.

He said there are these conditions of the land which then lead you to the portion of that test that says is there a fair and substantial relationship between the purpose of the 15 foot requirement in the ordinance and its application to this property. He said its application to this property is unnecessary the encroachment is a reasonable thing, the proposed use is

reasonable they're just going to store a lot of equipment. He said they park themselves and their guests in this parking area that's paved in front of the house so they aren't going to squeeze a car into the garage but it makes sense to put all this stuff away instead of another plastic or metal storage shed someplace else on the property that tries to comply with this and it's a matter of convenience.

Att. Wyskiel said the other one he points out is the side yard boundary lines aren't parallel there's a skew here and whoever laid out the house initially to comply with the setback you're creating a triangular wedge. He asked if it is reasonable to allow this parallel line for the garage to protrude out to be parallel with the structure but it's not parallel to the boundary line but the boundary line is unique. I think that meets the hardship conditions that are required by the statute and case law he said.

He said the public interest he submitted with the application a series of photos that Mr. Hodge took around the neighborhood and they are aware of Camelot Shores. He said there are a lot of structures and these photos are not submitted to say there are some people that have conditions that are invalid under zoning it's just to show them that they are not the only ones that are going to have something close to a property line-there are garages, sheds, other types of things and they showed them on a tax map where those pictures were. He said Mr. Hodge estimated the distances using a program called Onyx where you can put a dot on the computer and they give you an approx. measure and it's not exact but they show encroachments at the side yard setbacks so they are not going to be the only ones who do that.

He said it wouldn't be in the public interest to grant this if it essentially changed the character of the neighborhood or threatened the health, safety or general welfare of the public. He said the public is not going to be harmed by this at all and it's not going to have a detrimental impact on the community because it's sort of in keeping with what a lot of other people have done garages, improvements, the house itself some houses are closer to the side yard setback that is shown by the pictures.

He said the Hodges have spoken with a few of their neighbors and some said they would be willing to come to speak in favor but they didn't come they didn't write against it but they've said they didn't have any problem with it.

Att. Wyskiel said for spirit of the ordinance-the proposed use this addition is not in conflict with the purposes of the ordinance that is a criteria that goes hand in hand with the public interest and just denying the variance doesn't serve the purpose of your zoning. He said he quoted the specific language in his letter but there is a declaration of the intent of the overlay district is that it understands that relief is going to be needed in instances where people try to make reasonable improvements to their property and that declaration is the spirit of the ordinance for that overlay district so coming here for a variance request is consistent with that declaration that he thinks fits that element of proving their variance should be granted.

He said for substantial justice they're all informed of that in the state guidebook and if you put

the competing interest of the public harm that may occur if you grant the variance to the harm that the Hodges' would experience if the variance is denied you put that on a scale and in whose favor does it tip. He said he couldn't imagine what harm comes to the Town of Farmington if the variance is granted here. He said the Hodges' harm you can see it they want to make a nice improvement to their house the neighbors are in favor with it and he thinks the scale tips in their favor.

He said the surrounding property values will not be diminished and he didn't have any specific proof to that effect but the law allows the board to take their personal knowledge in hand. He said this is one heck of a real estate market with property values screaming high and the neighbors would prefer to see this type of a nice integrated storage shed built into the house as an improvement and store all their stuff than in some type of a plastic storage bin or a garage that they may put someplace else. He said they could take notice of the fact that the properties would not be devalued by this improvement.

Att. Wyskiel said he thought all 5 criteria were satisfied with that and he would be happy to answer any questions.

Mr. Scruton said before they go there he had a question for them. He said they only have 4 out of the 5 board members here and asked if they were okay to proceed with 4 board members.

Att. Wyskiel said he explained to the Hodge's that they need 3 votes and they have the right to say we'll wait. He said they have a contractor that's champing at the bit and wanted him to get this application in maybe 2 months ago. He then turned to the Hodges and asked them if they were comfortable going forward tonight getting 3 votes out of 4.

Mr. and Mrs. Hodge said yes and it's not going to change anything.

Att. Wyskiel said we're here we're ready let's do it.

Mr. Scruton said they have their presentation here, their information they have our attorney's summary of the 5 variance criteria and asked the board members if they had any questions.

Mr. Morgan said the only weight he puts on most applications is the objection from the neighbors. I don't see any so I have no questions he said.

Mr. Fisher and Mr. Pitre did not have any questions or comments.

Mr. Scruton said he thought they covered it from his standpoint and he didn't have any additional questions. He then asked Mr. Pimental if he had any questions or comments.

Mr. Pimental said the applicant has essentially covered it and the only thing he wanted to clarify was something someone said earlier even though the property owner owns the next property over it's not encroaching into the other it's just encroaching into the side setback of their own property. So it's not encroaching onto that property just to make sure that that's clear and we really wouldn't put too much weight in that just because the property could always be sold to somebody else. I just wanted to make that clear that it's just the side setback not actually onto the abutting property.

Att. Wyskiel said the plan shows that clearly is that future development on this if the lot next

door does not exist and there's not an encroachment into an existing structure and whoever builds something there is going to want it tasteful they're going to say if they don't want to be this close to the thing on the hill they will design accordingly. He said that makes it a different condition than a property where you have 2 existing structures and someone is trying to add something. That is the only point I was trying to make about it being also owned by them and being vacant he said.

Mr. Scruton said he had a question and maybe he could mark on this is where is the garage going to be now instead of where it is on that plan.

Att. Wyskiel said there is no garage on this plan now all there is pavement and he circled the area where there was existing pavement on the plan and this picture shows that. He said the garage is going to be right on top of where the pavement is except where this setback line this little corner that he is filling in and also circled is going to be less.

Mr. Scruton said so it's going to move north a few feet.

Att. Wyskiel said yes generally north so it's going to encroach less and the garage will be on top of that area.

Mr. Scruton asked if there was anything else he wanted to say.

Att. Wyskiel said no.

Mr. Scruton asked the Hodges if they had anything they wanted to say.

Mr. and Mrs. Hodge said no and Mr. Hodge said he thought he covered it very well.

Mr. Scruton then asked if any of the abutters wanted to speak and seeing no abutters present he closed the public hearing at 7:20 p.m.

He asked the board to begin the review of the criteria and asked for a motion for each of the criteria as they go down through the 5 points to see if they meet the test of a variance.

1). The variance will not be contrary to the public interest: Mr. Scruton asked if there was a motion on public interest and would granting the variance have a detrimental impact on the community.

Motion: (Pitre, second Morgan) granting the variance is not contrary to the public interest;

Discussion: Mr. Scruton said he thought they needed to have a reason for that and asked Mr. Pitre if he wanted to give his reason for making the motion.

Mr. Pitre said it is a very minor adjustment to our zoning and they are not encroaching-they said up to 3 ft. and that pretty much covers it and that's immaterial and if you look at the slope that's 3 ft. on a horizontal plain and that's quite a slope there so they could be in compliance probably not at the line but it's very steep there and that's going to be very difficult. He said there would have to be a lot of adjustment to the next lot to even and it's not crowding out everyone on the next lot even if somebody else where to build.

Mr. Scruton said the way he would state it to be to put in minutes and his reasoning to vote yes on this motion would be: 1). That it does not have a detrimental impact because it's not going to affect neighboring properties, community facilities, public safety and welfare and 2). It's not

going to alter the character of the neighborhood. He said the rest of the neighborhood is not that different than what this is going to be. He asked if there were any other comments on criteria #1.

Mr. Fisher and Mr. Morgan said they agreed with Mr. Scruton's reasoning.

Vote: the motion passed 4-0.

2). The spirit of the ordinance is observed: Mr. Scruton asked if the spirit of the ordinance is observed in granting the requested setback variance.

Motion: (Pitre, second Fisher) that the spirit of the ordinance is observed by granting the requested setback areas;

Discussion: Mr. Pitre said the spirit of the ordinance is to not overcrowd the neighborhood which we know that is a tough area in Lancelot Shores everybody has very small lots and for the landowner and others to enjoy their property he didn't believe its infringing on anybody else's rights in that neighborhood.

Mr. Scruton said he would concur with the statement that the attorney made that the intent of the overlay district is to allow modest and reasonable remodeling and that he thought this is modest and reasonable remodeling.

Vote: the motion passed 4-0.

3). Substantial justice is done: Mr. Scruton asked if there was a motion on the substantial justice question and if granting the setback variance would do substantial justice.

Motion: So moved by Mr. Pitre and seconded by Mr. Morgan.

Discussion: Mr. Pitre said people should what they want with their land as much as it doesn't infringe on somebody else's rights and this basically does substantial justice.

Mr. Scruton said the way he would state it is that there would be little public gain from denying this variance as opposed to what happens with building the garage where it's asked for. I see no real public gain by denying the variance he said.

Mr. Fisher said he agreed and just looking at the surrounding areas-the work they want to do and are proposing and that this is only encroaching a few feet to deny this variance would grant any public gain at all.

Mr. Scruton said he thought it would be unjust and Mr. Fisher agreed.

Mr. Scruton asked if there were any other comments on criteria #3 and hearing none called for the vote.

Vote: the motion passed 4-0.

4). The value of surrounding properties are not diminished: Mr. Scruton said there was nothing presented but knowing what they know about real estate values in the area he asked if there was going to be any impact on property values that any of them could see. He asked for a motion on surrounding property values will not be diminished.

Motion: So moved by Mr. Pitre and seconded by Mr. Fisher.

Discussion: Mr. Scruton said there's a hot real estate market but even if it wasn't a hot real

estate market it's so much like everything else down there that he didn't see how it would affect anything else.

Mr. Fisher said any improvements to anything on the property will increase the value of all surrounding properties in all of Camelot Shores in general.

Mr. Scruton said he could remember going back to the '60's what was built down there and he could tell you that there is tremendous improvement in the quality of the housing that exists in there so they want to encourage continued improvement that goes on.

Vote: the motion passed 4-0.

5). Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship:

Mr. Scruton said normally this is the hardest one to prove and the argument that was presented was literal enforcement of the setback from which relief is requested would result in unnecessary hardship because of the special condition of the property. He said it doesn't distinguish it necessarily from the rest of the properties within Baxter Lake but it certainly distinguishes it from the rest of the properties in Map 7-6 and in that area. He said the topography on those frontage lots is a lot different than the ones behind it.

Motion: (Pitre, second Morgan) that literal enforcement of the relief requested would result in an unnecessary hardship;

Discussion: Mr. Pitre said it's a very minor encroachment into the setback.

Mr. Scruton said what he would add to the minutes is that the topography of the lots down there and the shape of the lots creates a hardship for doing just about anything with the slanted side lines and all of those factors enter into it so he would say that it meets the test of unnecessary hardship. He said this is the one that he frequently gets hung up on and doesn't go along with but this one here certainly meets that case.

Vote: the motion passed 4-0.

Mr. Scruton said having gone over the 5 criteria and feel that it meets all 5 criteria if there was a motion to approve the variance request.

Motion: (Morgan, second Fisher) to approve the variance application for the property at Map 06, Lot 174 for the side setback as requested passed 4-0.

Mr. Scruton asked Att. Wyskiel if they had any questions for the board.

Att. Wyskiel said they had no questions and were just going to sign in before they leave.

6). Any Other Business before the Board: None

7). Adjournment:

Motion: (Morgan, second Fisher) to adjourn the meeting passed 4-0 at 7:31 p.m.

Kathleen Magoon Recording Secretary

John Scruton, Chairman

TOWN OF FARMINGTON
ZONING BOARD OF ADJUSTMENT
356 Main Street, Farmington, NH 03835
603-755-2774

RECEIVED 1071-23
(For Office Use Only)
Date Rec'd: _____ By: _____ Tax Map/Lot: _____
FEES:
Application: \$ 150.00 Public Notice: Actual cost of listing
Abutters: actual cost of postage per letter = \$ 8.53/letter
Total Received: \$ _____ Cash _____ Check # _____

tracy.l.hayes@outlook.com

VARIANCE

Tax Map: U-12 Lot: 9 Zoning: UR

Name of Applicant: Tracy Hayes Phone: 603-651-9284

Address: 240 Silver St. Middleton, NH 03887

Owner of Property Concerned: Same
(If same as above, write "same")

Address: Same
(if same as above, write "same")

Location of Property: 83 Charles St.

Description of Property: 2 offices and 2 bay garage
(list length of frontage, sides and rear)

Proposed use or existing use affected: Propose to convert the 2 offices to 2 - 1 bedroom apartments and keeping the garage as commercial space.

A variance is requested from article 204B section _____ of the Zoning Ordinance to permit relief from the max residential density where one unit per acre is allowed

Facts supporting this request:

1. The Variance will not be contrary to the public interest: The neighborhood is largely residential and we are seeking to only add one extra unit in a nicely built fairly new building to allow more rental properties in Farmington.

2. The spirit of the ordinance is observed: The proposed use is only increasing the residential max by one unit. (1 bedroom) so the spirit of the Ordinance is still observed.

3. Substantial justice is done: This proposal will increase the very limited rental market in Farmington in a newly, well built building.

4. The value of surrounding properties are not diminished: The neighborhood is

mainly residential, and we are converting a commercial property to mixed use to allow for residential use. As the area is residential, there would be no diminished value in neighboring properties with only an additional one bedroom apartment.

5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship:

The property is currently commercially zoned with 1.61 acres. ~~The property needs an additional 0.39 acres to increase the residential units by one additional one bedroom unit. (No additional acreage is available.)~~ The general public purpose of the ordinance provision is to prevent a large number of residences in a small physical location. We are only looking to increase it by one -1 bedroom apartment and therefore, is no fair and substantial relationship. As we are simply increasing it by 1 small apartment, the proposed use is reasonable.

(A) For purposes of the Variance application, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
- (ii) The proposed use is a reasonable one.

(B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Applicant Lacey Hayes Date 10/10/23
 (Signature)

Property Owner Lacey Hayes Date 10/10/23
 (Signature)

RSA 674:33

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

TOWN OF FARMINGTON - VALUATION AND FEE SCHEDULE

BUILDING DEPARTMENT

Calculation of Value:

| | |
|-----------------------------------|--|
| Residential Building Permit | \$70.00 per square foot |
| Non-livable structures | \$35.00 per square foot |
| Porches & Decks & Sheds | \$20.00 per square foot |
| Manufactured Housing/Mobile Homes | Bill of Sale Required |
| Commercial Structures /Buildings | Based on construction contract (copy required) |
| Roofs and Siding | Based on costs only not square feet |
| Swimming Pool (In ground) | Based on costs |

Example: 1200 square feet x \$70 = \$84,000 divided by 1000 = 84 times \$7.50 = \$630.00 plus \$100.00** = \$730.00

** May be more or less than \$100.00 and includes inspections, flat fees and other costs.

Fees:

| | |
|------------------------------|--|
| Building Permit | \$25.00 flat fee plus \$7.50 per \$1000.00 value |
| Electrical Permit | \$25.00 flat fee |
| Plumbing Permit | \$25.00 flat fee |
| Inspections / Re-inspections | \$25.00 each occurrence |
| Occupancy Permit | \$25.00 flat fee |
| Swimming Pool Permit | \$25.00 flat fee Above Ground Only |
| Demolition/Wrecking Permit | \$25.00 flat fee |

All fees (value, flat fees, associated permits, etc.) must be paid for when the building permit is issued.

PLANNING BOARD

Applications for Amendments to previously approved plans will be treated as a new application.

Application Fees:

| | |
|------------------------------|--|
| Minor Site Review | \$100.00 |
| Major Site Review | \$200.00 base fee, plus \$50.00 per new dwelling unit, or \$100.00 per 1,000 sq. ft. of new non-residential construction |
| Minor Subdivision Review | \$175.00 base fee plus \$100.00 per newly created lot |
| Major Subdivision Review | \$225.00 base fee plus \$100.00 per newly created lot |
| Lot Line Revision | \$150.00 base fee |
| Special Use Permit | \$150.00 base fee |
| Earth Removal Permit | \$150.00 base fee |
| Scenic Tree Cutting/Trimming | \$150.00 base fee |
| Voluntary Lot Merger | \$12.00 |
| Legal Notice Advertising | Actual cost of listing |
| Abutter Fees | Actual cost of postage per abutter plus applicant and professionals |
| Planner Fee | \$75.00/hour after two (2) hours |
| Recording Fees | As determined |

NOTE: All plats and/or plans to be recorded at the Registry of Deeds will require the applicant to pay \$29 per page plus the mandatory LCHIP charge of \$25.00. The Town of Farmington will file all plats/plans at the Registry on behalf of the applicant.

Planning Board requirements continued on next page.

Additionally, all other fees for third party review or legal review by the Town Attorney must be paid by the applicant prior to filing of the decision for the application.

In the event that a Compliance Hearing is deemed necessary by the Planning Board, any and all fees resulting from said compliance hearing will be born by the APPLICANT/DEVELOPER, including any third-party review and all legal fees.

Additional Requirements:

- 2 sets of Mailing Labels for Abutter Notices on all public hearings
- 1 certified Abutters List
- 16 complete copies of Application with supporting documentation plus original
- 16 copies of 11" x 17" Plan Sets
- 5 complete full-size Plan Sets
- 1 colored full-size Plan Set
- 1 signed copy of this Fee Schedule

ZONING BOARD OF ADJUSTMENT

Application Fees:

| | |
|--|---|
| Variance Request | \$150.00 |
| Special Exception | \$150.00 |
| Appeal from an Administrative Decision | \$150.00 |
| Legal notice advertising | Actual cost of listing |
| Abutter Fees | Actual cost of postage per abutter plus applicant and professionals |
| Planner Fee | \$75.00/hour after two (2) hours |

Additional Requirements:

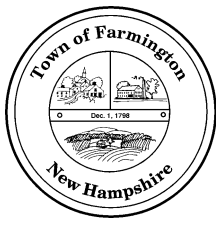
- 3 sets of Mailing Labels for Abutter Notices for all public hearings
- 1 certified Abutters List
- 6 complete copies of Application with supporting documentation plus original
- 1 signed copy of this Fee Schedule

NOTE: All additional copies of plans and application materials currently before the Planning Board or ZBA requested by Town staff and Boards shall be provided at the applicant's expense.

All additional copies of plans or file materials requested by the public shall cost \$1.00 per page. Plan sets that cannot be copied at the Municipal Offices will cost \$5.00 per sheet.



Applicant's Signature



A Bicentennial Community
1798 - 1998

Town of Farmington
356 Main Street
Farmington, NH 03835
Phone: (603) 755-2208 • Fax: (603) 755-9934

October 16, 2023

Dear Abutter:

Notice is hereby given that the Farmington Zoning Board of Adjustment will meet on Thursday, November 2, 2023, at 7:00PM in the Municipal Offices Building, 356 Main Street to hold a:

Public Hearing for a Variance by Tracy Hayes, Tax Map U12, Lot 9. A request has been made for a Variance under Table 2.04 (B) Space and Bulk Standards. The applicant is requesting a variance for relief from the maximum new residential density standards that require one unit per acre and be allowed to convert two existing offices into two apartments, where only one is permitted. The property is in the Urban Residential District.

To make a request for more information on this proposal, please visit or reach out to the Planning and Community Development Department at the Municipal Offices Building at 356 Main Street.

Sincerely:

John Scruton, Chairman
Farmington Zoning Board of Adjustment

From: [Tabby Scott](#)
To: [Kyle Pimental](#); [Kelly Heon](#)
Subject: Fwd: Thank you for placing your order with us.
Date: Monday, October 16, 2023 1:17:35 PM
Attachments: [noname](#)

Receipt for ZBA liabilities - Hayes Variance


----- Forwarded message -----

From: **Seacoast Legals** <seacoastlegals@gannett.com>
Date: Mon, Oct 16, 2023 at 1:00 PM
Subject: Thank you for placing your order with us.
To: <tscott@farmington.nh.us>

THANK YOU for your ad submission!

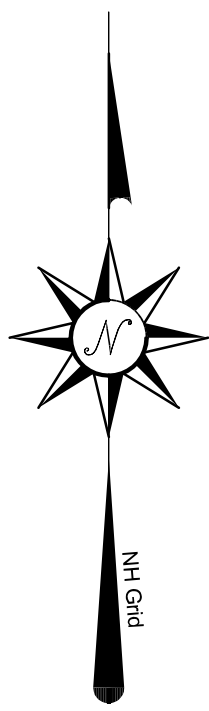
This is your confirmation that your order has been submitted. Below are the details of your transaction. Please save this confirmation for your records.

We appreciate you using our online self-service ads portal, available 24/7. Please continue to visit Portsmouth Herald/Foster's Daily Democrat/Seacoast Sunday's online Classifieds [HERE](#) to place your legal notices in the future.

| | |
|---|--|
| Job Details Order Number: LPRT0027880 Classification: Govt Public Notices Package: General Package Order Cost: \$116.38 | Schedule for ad number LPRT0027880 Fri Oct 20, 2023 Portsmouth <i>All Zones</i> Herald/Foster's Daily Democrat/Seacoast Sunday  |
| Account Details Farmington, Town Of TOWN HALL Farmington, NH 03835 603-755-2774 tscott@farmington.nh.us Farmington, Town Of | |

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Tabitha Scott
Planning Secretary
Town of Farmington NH
356 Main Street
Farmington NH 03835
603-755-2774
603-755-2774

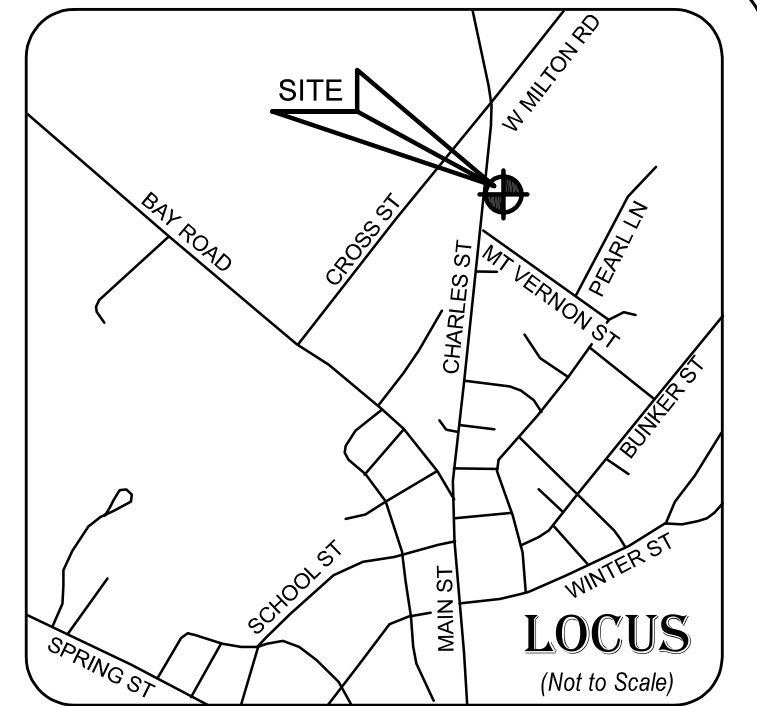
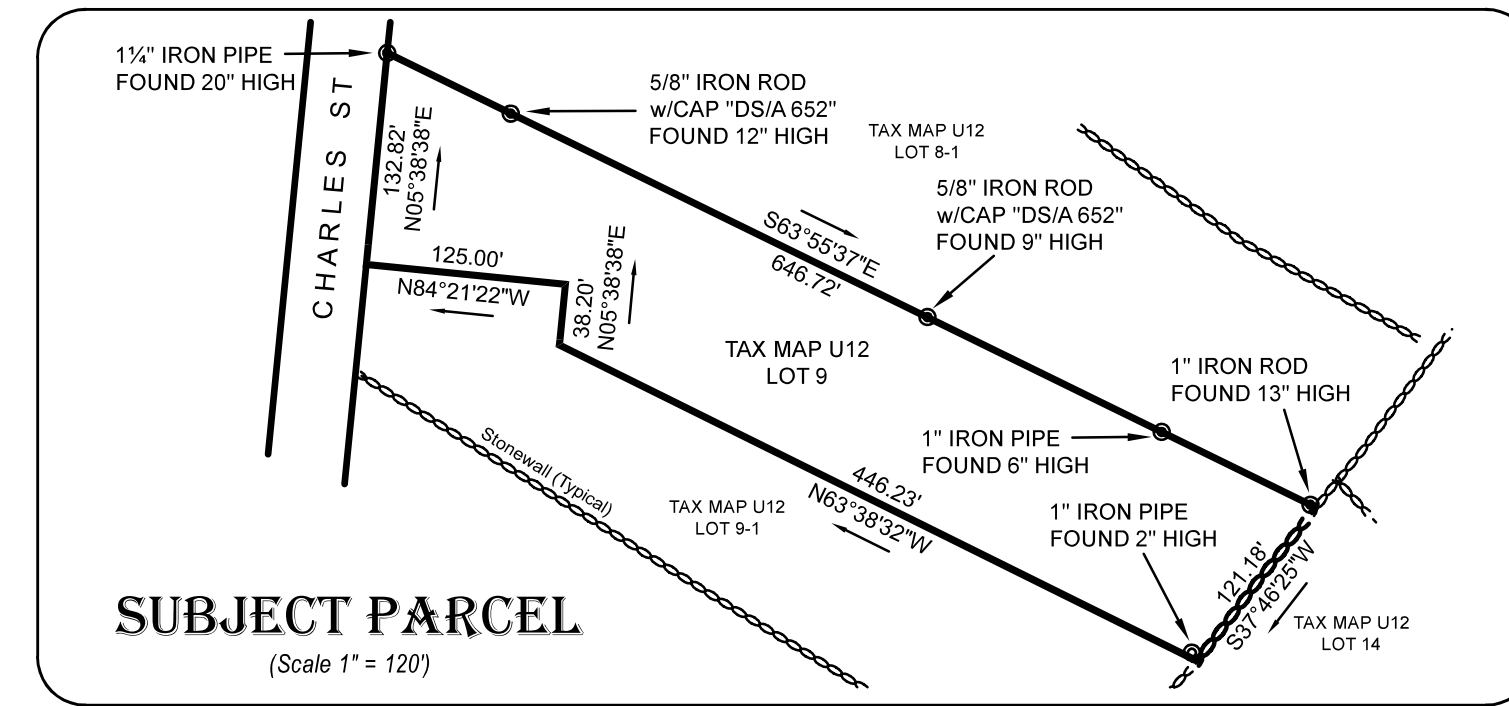
This email has been scanned for spam and viruses by Proofpoint Essentials. Click [here](#) to report this email as spam.



N/F
MARCO D. & MORAL VARNNEY
TAX MAP U12 LOT 4
67 CROSS STREET
FARMINGTON, NH 03835
S.C.R.D. BOOK 3908 PAGE 527

CHARLES STREET

- LEGEND:**
 MONUMENTS (AS NOTED) ⊙
 WELL ⊕
 UTILITY POLE ○
 STONEWALL ---
 PROPERTY LINE ———
 SETBACK LINE - - - - -
 EDGE OF PAVEMENT - - - - -
 EDGE OF GRAVEL - - - - -
 EDGE OF WETLAND - - - - -
 CONTOUR LINE - - - - -



N/F
FRANK K. & PAMELA B. LORD
IRREVOCABLE TRUST
TAX MAP U12 LOT 8-1
89 CHARLES STREET
FARMINGTON, NH 03835
S.C.R.D. BOOK 3786 PAGE 514

PARKING:

- OFFICE: PROPOSED 660 Sq. Ft.
1 SPACE PER 325 Sq. Ft.
- WHAREHOUSE: PROPOSED 1080 Sq. Ft.
1 SPACE PER EMPLOYEE (5 Employees)
1 SPACE PER COMPANY VEHICLE (3 Vehicles)
1 SPACE PER 10,000 Sq. Ft.
- REQUIRED: 11 REQUIRED
PROVIDED: 11 Regular, 2 in Garage
1 Handicap

ZONING DATA:

- ZONE: URBAN RESIDENTIAL (UR)
- REQUIREMENTS:
 MINIMUM LOT SIZE: 1/2 ACRE (21,780 Sq. Ft.)
 MINIMUM STREET FRONTAGE: 75 Feet
 MINIMUM FRONT SETBACK: 25 Feet
 MINIMUM SIDE SETBACK: 15 Feet
 MINIMUM REAR SETBACK: 15 Feet
- WETLAND OVERLAY DISTRICT:
 CLASS 1: 100 FOOT BUFFER ZONE
 CLASS 2: 50 FOOT BUFFER ZONE
 CLASS 3: NO BUFFER ZONE

COVERAGE:

- MAX COVERAGE: 35%
 Existing Coverage: 11,680 Sq. Ft. / 16.6%
 Proposed Coverage: 11,820 Sq. Ft. / 16.8%

WETLAND NOTES:

Wetland Delineation Methods
 The wetland boundaries as depicted were delineated/flagged by Joseph W. Noel, NH Certified Soil Scientist #017 and NH Certified Wetland Scientist #086, on April 15, 2020. The delineation was conducted in accordance with the U.S. Army Corps of Engineers document *Corps of Engineers Wetlands Delineation Manual*, (1987) along with the required *Regional Supplement to the Corps of Engineers Wetland Delineation Manual: Northcentral and Northeast Region*, (Version 2, January 2012).

Local Classification and Wetland Setbacks
 Per Town of Farmington Zoning Ordinance Section 4.02(F) Wetland Conservation Overlay District Initial Designations.

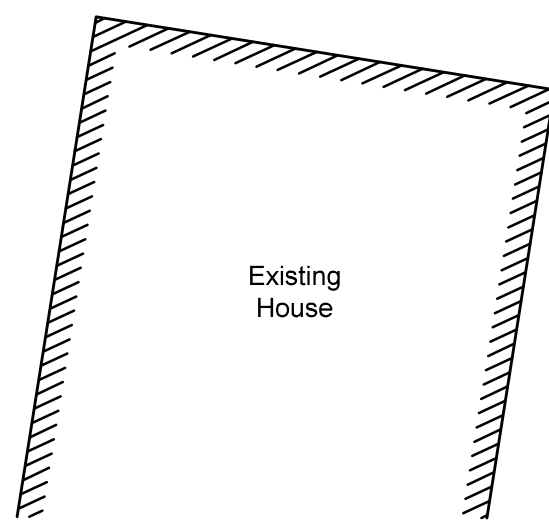
Wetland area A (i.e., A series flag numbers) appears to be a Class Three Wetland. No buffers are required for Class Three Wetlands.

Wetland area B (i.e., B series flag numbers) appears to be a Class Two Wetland by being connected to wetlands that are shown on the National Wetlands Inventory Maps (NWI). The system on the NWI map is designated as (PFO1E). Class Two Wetland buffers are 50 feet from the wetland boundary. Wetland area B also contains a stream channel that begins at the outlet of a culvert that drains beneath a filled area behind the existing building. The culvert carries water from wetland area A. The stream does not appear to meet the Town of Farmington definition of a waterbody (i.e., stream does not appear to flow for 12 months in an average year).

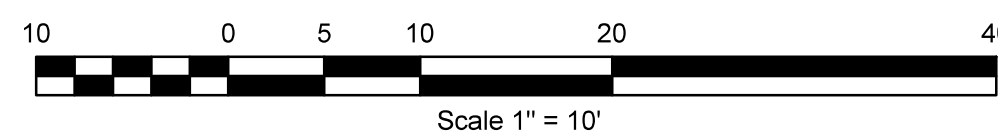
Wetland class designations and buffers should be verified by town officials. Confirm current zoning requirements with the Town of Farmington prior to any planning/design or construction.

NOTES:

- OWNER OF RECORD:
RAINONE PROPERTIES, LLC
S.C.R.D. BOOK 4747 PAGE 134
DATED APRIL 1, 2020
- TOTAL PARCEL AREA:
70,171 Square Feet OR 1.61 Acres
- BASIS OF BEARING IS PER NH GRID NORTH AND ELEVATIONS ARE BASED UPON NGVD 1988 AS ACQUIRED BY GPS ON APRIL 6, 2020.
- PLAN REFERENCE: "LOT LINE REVISION, FARMINGTON, N.H. FOR WILLIAM & KATHY ANN TSIROS" PREPARED BY JOHN W. DURGIN ASSOCIATES DATED NOVEMBER 13, 1985 AND RECORDED AT THE S.C.R.D. AS PLAN 33-26.
- THE PERIMETER BOUNDARY IS PER THE ABOVE REFERENCED PLAN AND HAS NOT BEEN VERIFIED BY THIS FIRM.



N/F
DAVID B. SPRAGUE
PATRICIA A. SPRAGUE
TAX MAP U12 LOT 9-1
79 CHARLES STREET
FARMINGTON, NH 03835
S.C.R.D. BOOK 1859 PAGE 415



| REV | DATE | STATUS |
|-----|------|--------|
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| | | |
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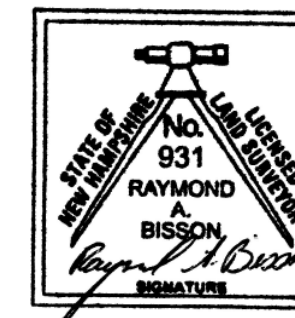
PROPOSED SITE PLAN

Located at:
83 Charles Street, Farmington
Strafford County, New Hampshire
For:
Rainone Properties, LLC
c/o Augustus Rainone
14 Gary Road, Middleton, NH 03887



Licensed in New Hampshire & Maine
 PO Box 458, Barrington, NH 03825
 t: (603) 664-3900 www.StonewallSurveying.com

| | |
|--|-------------------------------|
| TAX MAP & LOT NO: Tax Map U12 Lot 9 | DRAWING NO: 20017 Pro-Site |
| SCALE: 1" = 10' | SHEET: 1 of 1 |
| PROJECT NO: 20017 | DATE: 6/25/2020 |



TO: Lebanon Zoning Board of Adjustment

FROM: C. Christine Fillmore

DATE: April 5, 2022

RE: Applying the Five Criteria of a Variance under RSA 674:33

The purpose of variances is to act as a constitutional “safety valve” to prevent land use ordinances from restricting property use too much. Land use regulation is a balance between the private rights of property owners to use their property and the need for society to control how property is used to prevent harm to others and to promote community goals. Zoning ordinances and regulations restrict what people can do with their property. If those restrictions go too far, however, they may eat into the property owner’s constitutional rights to own and enjoy property. Variances exist to bend the rules *just enough* to prevent an unconstitutional “taking” of property rights and to restore the balance between private and public rights.

The variance criteria in RSA 674:33 are designed to identify situations in which a variance is needed to avoid an unconstitutional taking. The ZBA can only grant a variance when the applicant demonstrates that all five are satisfied:

- (A) The variance will not be contrary to the public interest;
- (B) The spirit of the ordinance is observed;
- (C) Substantial justice is done;
- (D) The values of surrounding properties are not diminished; and
- (E) Literal enforcement of the ordinance provision would result in an unnecessary hardship.

I. The variance will not be contrary to the public interest

In essence, this factor requires the Board to find that there will be no harm to the public interest if the variance is granted. The applicant doesn’t have to show that the variance would create some public benefit. *Gray v. Seidel*, 143 N.H. 327, 329 (1999).

To be contrary to the public interest, the variance must “unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance’s basic zoning objectives.” *Chester Rod & Gun Club, Inc. v. Town of Chester*, 152 N.H. 577 (2005). “Mere conflict with the terms of the ordinance is insufficient.” *Harborside Assocs., L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508 (2011). Obviously, every variance is going to conflict with the ordinance in some way, because a variance is, essentially, permission to violate a provision of the ordinance. This factor is looking for some more significant conflict with the basic zoning objectives that apply to that situation.

To determine whether a variance is contrary to the public interest in this way, the ZBA can look at whether the variance alters the essential character of the neighborhood. For example, would the proposed structure or addition be “in keeping with others” in that neighborhood? Or would it be out of place? See *id.* The Board can also look at whether the variance would threaten the health,

safety, or general welfare of the public. If what the applicant has asked for does not create some particular hazard, it is unlikely to threaten the public safety, health or welfare.

II. The spirit of the ordinance is observed

This factor requires the ZBA to consider the underlying purpose of the zoning ordinance (or the particular section at issue) and see whether granting the variance would be in conflict with that purpose. This might mean looking at the general purpose section of the zoning ordinance, the stated purposes for the particular zoning district where the property is located, the Town's master plan, or any other statements of purpose that might be relevant.

This factor is related to, and often analyzed hand in hand with, the first factor, usually using the same test: would the variance alter the essential character of the neighborhood or otherwise threaten the public health, safety, or welfare?

It may also be possible to find that a variance will violate the spirit of the ordinance if the cumulative impact of similar development is something the ordinance was intended to prevent. While this theory has not explicitly been adopted by the NH Supreme Court, there is some support for it in at least two reported opinions. In the first case, *Maureen Bacon v. Town of Enfield*, 150 N.H. 468 (2004), a landowner sought to attach a shed to the outside of a lakefront house. The ZBA denied a variance in part because it would violate the spirit of the ordinance. Though this single shed would not greatly contribute to shorefront congestion, the cumulative impact of many such additions to many such homes could have a significant impact on the lakefront and the value of the lake itself as a natural resource. Because the ordinance was crafted to prevent shorefront congestion and over development, the Supreme Court agreed that allowing such variances would violate the spirit of the ordinance. See also *Perreault v. New Hampton*, 171 N.H. 183 (2018) (prevention of overcrowding is a legitimate zoning purpose).

III. Substantial justice is done

The only real guidance we have on this factor is that any loss to the individual which is not outweighed by a gain to the general public is an injustice. For example, in *Malachy Glen Assocs., Inc. v. Town of Chichester*, 155 N.H. 102 (2007), an applicant sought a variance to build storage units within a wetlands buffer. Evidence on the record supported the finding that the project, which would be built within a commercial area, posed no threat to the wetlands, was appropriate for the area, and did not harm abutters, and thus the denial of such a variance would not provide any appreciable gain to the public. Since this project was an otherwise permitted use in the district, granting the variance would satisfy this criteria. See also *Harrington v. Town of Warner*, 152 N.H. 74, 85 (2005) (expanding a mobile home park did substantial justice "because it would improve a dilapidated area of town and provide affordable housing in the area"). In addition, if a proposed use is going to be different from the present uses in the area, then the effect of the variance on the area (and thus the gain to the public from preventing it) may be greater. See *Labrecque v. Town of Salem*, 128 N.H. 455 (1986).

IV. The values of surrounding properties are not diminished

The burden is on the applicant to demonstrate that it is more likely than not that the project will not decrease surrounding property values. It is not up to the abutters or the ZBA to establish that there would be some decrease in value. There will frequently be conflicting testimony and evidence presented on this point. Often, this will take the form of one or more letters from realtors offering their opinion. On occasion, there may be a more formal expert opinion or study from an appraiser. This is also an area in which courts have found that ZBA members may draw upon their own knowledge of the area involved and their personal experiences. The ZBA's job is to weigh the evidence and the credibility of the witnesses to determine whether it believes a decrease in property values would occur with the granting of a variance. The ZBA is not automatically required to accept the conclusions of an expert on this point, even if it is not contradicted by other expert evidence. *Daniels v. Town of Londonderry*, 157 N.H. 519 (2008). The ZBA may discount an expert opinion if the expert lacks credibility or if their qualifications or methodology are somehow faulty, and of course if there are competing experts, it is the ZBA's job to decide which is more credible. However, ZBA may not ignore expert evidence if it is not contradicted and there is no basis for questioning its credibility or reliability. When there is credible, uncontradicted expert evidence, the ZBA must have a very solid reason for disregarding it.

V. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship

To establish that denial of a variance would result in an unnecessary hardship, the applicant must satisfy one of two statutory tests set forth in RSA 674:33 I(b)(1) and (b)(2) as follows:

“...“unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:

- (A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; **and**
- (B) The proposed use is a reasonable one.”

If this first test is not met, RSA 674:33 I(b)(2) requires a second analysis:

“(2) If the criteria in subparagraph (1) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.”

Special Conditions of the Property: Critically, both of these tests require the property to have some kind of “special condition” that distinguishes it from other properties in the area such that this particular property is burdened by the zoning restriction in a different way than other, similarly-situated properties. *Garrison v. Town of Henniker*, 154 N.H. 26 (2006). By its very nature, a zoning ordinance restricts the use of properties in certain ways. A restriction that burdens similar properties in similar ways does not by itself create a hardship. Only when a property has some characteristic that makes it different from others can an applicant claim that the property

suffers an unnecessary hardship. It is not enough to demonstrate that the property would be difficult to use for other purposes, or that it is particularly suitable for the applicant's desired use; even if those things are true, the applicant must still demonstrate that something about *this* property means it is burdened by the zoning restriction in a way that is distinct from other similarly situated property. *Id*

The Supreme Court in *Harrington v. Town of Warner*, 152 N.H. 74 (2005) clarified that the zoning ordinance's burden on a property must arise from some physical characteristic of the property itself and its suitability for use in accordance with the ordinance, and not from the individual plight of the landowner. *A "special condition" can be the property's size, location, configuration, elevation, soil type, wetlands, water bodies, or other physical distinction. However, whatever it is, the special condition of the property must be related to the specific zoning restriction at issue.* For instance, in *Garrison v. Town of Henniker*, 154 N.H. 26 (2006) the landowner failed to show that the property at issue was sufficiently different from any other property within the zone to be considered unique. The property, zoned rural residential, was larger than other residential lots, but that size difference did not make it unique for zoning purposes in a way that was related to the zoning restriction at issue.

Question: Can the "special condition" of the property be the fact that the variance involves the expansion of a pre-existing nonconforming use that was permitted when it was established, but subsequently prohibited by the adoption or amendment of a zoning provision? Existing court opinions do not specifically say this. "Special conditions" tend to be some kind of physical characteristic of the property itself. There are, however, variance opinions that happen to involve the expansion of a nonconforming use or the establishment of a use that was once permitted but which zoning now prohibits in that location.

One such case is *Rochester City Council v. Rochester ZBA*, 171 N.H. 271 (2018). The City's zoning ordinance was amended in 2014 to prohibit manufactured housing parks completely. The applicant owned a manufactured housing park which lawfully existed before the 2014 amendment and was therefore a pre-existing nonconforming use. In 2015, the applicant acquired an abutting property and sought a variance to expand the park onto the new lot. In affirming the grant of the variance, the Court found that the special conditions of the property could include the shape of the new lot, the existence of wetlands and other topographical features of the lot, as well as the fact that it was located adjacent to other existing manufactured housing parks. The Court did not cite the recent change in zoning as a "special condition of the property."

It has been suggested that the *Simplex* opinion stands for the proposition that a "special condition of the property" can be the fact that the proposed use was at one time a permitted use but is now prohibited as a result of a zoning change. This is not my understanding of that opinion. The opinion in *Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001) was a turning point in variance law in New Hampshire. The Court in this opinion held that the then-existing test for unnecessary hardship had become too restrictive and difficult to satisfy, and they announced that the test going forward would be slightly different (and slightly less restrictive). The property at issue in that case was in the industrial district and the applicant asked for a variance to use it for commercial purposes. Much of the nearby area had previously been zoned industrial, but had been changed to commercial. Although two nearby properties had pre-existing nonconforming

commercial uses on them in the industrial district, this seems to have been significant only because they were two of the several commercial uses surrounding the subject property. Notably, the Court did not analyze or clarify what the “special condition” of this property may have been. Instead, the Court simply set forth the new unnecessary hardship test and remanded the case back to the superior court for further proceedings under that new test. As a result, I do not believe this case supports the argument that a property has a “special condition” if the applicant is seeking to expand a pre-existing nonconforming use which has become nonconforming through a change in the zoning ordinance.

If there is no special condition of the property, then there can be no unnecessary hardship. If the applicant does identify one or more special conditions of the property that make it unique in some way relevant to the variance, the Board must then determine whether either of the two tests are satisfied.

First Test: RSA 674:33 I(b)(1) (A) and (B) set forth a two-step test. To satisfy the first step, the applicant must demonstrate that, because of the special conditions of the property, no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the applicant’s property. Obviously, the Board will need to consider what the “general public purposes” of the particular ordinance provision are. These might be things like reducing traffic, preserving natural features, avoiding noise, reducing or encouraging density of development, protecting aesthetics, grouping compatible uses, and many others. Then, the Board should see whether applying that provision to this property advances those purposes in any “fair and substantial” way, in light of the special conditions of the property. *Farrar v. City of Keene*, 158 N.H. 684, 690-91 (2009). For example, a zoning ordinance might prohibit commercial uses in a residential district for the purpose of limiting commercial traffic on residential streets. One lot in the district might be larger than all the others and also have frontage on a residential street on one side, and a busy commercial street on the opposite side. If that property owner could place a retail business on the property with access only from the busy commercial street, there might be no fair and substantial relationship between the purpose of the ordinance (prohibiting retail uses to reduce traffic) and its application to this particular property.

The second step in this test is for the applicant to establish that, because of the special conditions of the property, the proposed use is reasonable. For example, in *Rancourt v. City of Manchester*, 149 N.H. 51 (2003), the applicant sought a variance to stable horses on a 3-acre lot in a district where horses were not allowed. Given the special conditions of the property (the country setting of the lot, the larger size than other lots, the configuration of the lot with extra size at the rear, the existing wooded buffer, etc.), the court found it was logical to conclude that these conditions made stabling two horses reasonable in that location. This criterion cannot be analyzed in isolation from the rest of the factors; it should include an analysis of how the proposed use would affect neighboring properties, how it would impact the town’s zoning goals, and whether it would alter the essential character of the neighborhood. *Farrar v. City of Keene*, 158 N.H. 684, 690-91 (2009), *Harrington v. Town of Warner*, 152 N.H. 74, 83 (2005).

Second Test: If an applicant cannot meet the first test, they may still be able to secure a variance if the property satisfies the second test in RSA 674:33 I(b)(2): “an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from

other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.”

This standard is a difficult one to meet. In order to satisfy this test, “the deprivation resulting from application of the ordinance must be so great as to effectively prevent the owner from making any reasonable use of the land. If the land is reasonably suitable for a permitted use, then there is no hardship and no ground for a variance, even if the other four parts of the five-part test have been met.” *Governor’s Island Club, Inc. v. Town of Gilford*, 124 N.H. 126 (1983).

In that case, a lakefront property owner wished to subdivide his shorefront parcel into two lots. Each lot would have the minimum required frontage of 150 feet. However, each parcel fell just shy of the area requirement of 30,000 square feet. He proposed subdividing the lots, and as a condition of the variance, preserving a third lot, an interior parcel of 70,000 square feet, as open space that could only be conveyed to an owner or abutter of the shorefront lots. The Court vacated the ZBA’s grant of a variance, stating that the property could be used as a residential lot, as it had been, and thus a hardship did not exist.

This standard does not require that the landowner show that they have been deprived of all beneficial use of the land. It does, however, require more than a “mere inconvenience.” It also requires consideration of the owner’s ability to receive a reasonable return on their investment, but “mere conclusory and lay opinion concerning the lack of reasonable return is not sufficient; there must be actual proof, often in the form of dollars and cents evidence.” *Harrington v. Town of Warner*, 152 N.H. 74 (2005); *see also Malachy Glen Assocs., Inc. v. Town of Chichester*, 155 N.H. 102 (2007) (when project can be built without a variance, it is the applicant’s burden to show such an alternative is cost prohibitive).

Self-Created Hardships: Sometimes, an applicant has created the hardship they claim entitles them to a variance. While the fact that a hardship is self-created does not automatically prevent a finding of unnecessary hardship, it is a relevant factor that the Zoning Board should consider. *Hill v. Town of Chester*, 146 N.H. 291 (2001). These situations frequently involve an applicant who purchased the property for a particular purpose that local zoning prohibits. Landowners are deemed to know the zoning restrictions that apply to their property, but they might still be able to obtain a variance if they demonstrate acting in good faith. *Harrington v. Town of Warner*, 152 N.H. 74 (2005) (good faith could include compliance with ordinance procedures, trying alternatives before seeking variance, or reasonable reliance on misrepresentations of others regarding the property).

GUIDANCE FOR THE FIVE VARIANCE CRITERIA

A variance is legal permission to violate a specific restriction in the Zoning Ordinance. It is designed to be the exception, not the rule, and the Zoning Board of Adjustment (ZBA) may only approve a variance if an applicant meets the 5-part test in State law. An applicant for a variance must answer all questions on the application plus any extra considerations required by the section of the Zoning Ordinance that is the object of the variance request. It is important to include supporting information (e.g. plans, maps, photos, expert opinions, etc.). You may also wish to seek legal advice before applying.

PLEASE NOTE: The applicant must convince the ZBA that the application satisfies all five criteria, or the ZBA is not legally allowed to grant the variance.

Criterion 1: Public Interest

Would granting the variance have a detrimental impact on the community, including neighboring properties, community facilities, public safety, and welfare? If so, then it is not in the public interest to grant it.

- Is the proposal contrary to the intent of the Zoning Ordinance or of the specific provision involved?
- Does the variance alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public?

Criterion 2: Spirit of the Ordinance

Would the spirit of the Ordinance be observed if the variance was granted?

- Is the proposed use appropriate for this zoning district, or does it conflict with the purposes the Ordinance was intended to achieve?
- Are there specific statements or provisions of the Zoning Ordinance that prevent these proposed uses or the scale of these uses such that granting the variance would undermine one or more goals of the Ordinance?

Criterion 3: Substantial Justice

Would granting the variance do “substantial justice”?

- Would any loss to the individual (applicant) caused by a denial of the variance be outweighed or offset by some gain to the general public?
- Would denying the variance prevent some particular harm to the public? If not, then granting the variance could do substantial justice.

Criterion 4: Surrounding Property Values will not be diminished

The applicant must demonstrate it is more likely than not that surrounding property values will *not* be diminished if the variance is granted. This may be established by testimony of property owners (applicant and abutters), and ZBA members may rely on personal experience and knowledge, although expert testimony may be more persuasive.

Criterion 5: Unnecessary Hardship

There are two tests for this criterion that may be addressed. Most commonly an applicant addresses 5(A). Criterion 5(B) is included in state law to address the rare occurrence when enforcement of the Zoning Ordinance and denial of the variance would deprive the owner of **any** reasonable use of the land - an unconstitutional taking.

Criterion 5(A): Owing to special conditions of the property that distinguish it from others in the area, (i) no fair and substantial relationship exists between the general public

purposes of the ordinance provision and its application to this property, and (ii) the proposed use is reasonable.

- “Special condition” is some attribute of the property itself (size, topography, soils, ledge, shape, frontage, elevation, wetlands, water bodies, existing buildings, etc.); it is not something about the property owner. The special condition must be something that causes this property to be burdened by the zoning restriction in a way that is different from other properties in the area. If you cannot identify any special conditions of the property, the ZBA cannot grant the variance.
- (i) no fair and substantial relationship between purpose of the ordinance and application to this property: look at the purposes of the specific restriction involved (what are you asking the ZBA to vary, and why does the Ordinance include that restriction?). This might be something like reducing traffic, preserving natural features, retaining neighborhood character, etc. Given the special conditions of this property, explain why allowing the proposed use would *not* lead to the harm(s) that this restriction was intended to prevent.
- (ii) the proposed use is reasonable in light of those special conditions of the property.

Criterion 5(B): Owing to special conditions of the property that distinguish it from others in the area, the property cannot be reasonably used in strict conformance with the Ordinance, and a variance is necessary to enable a reasonable use of it.

- “Special condition” is the same as above – some attribute of the property itself that means this property is affected by the zoning restriction in a way that is different from other properties in the area.
- The applicant must demonstrate that the special conditions of this property cause the particular zoning restriction at issue to affect this property so severely that no reasonable use can be made of the property *at all*.
- If the property could reasonably be used for some other purpose or in some other way, this test cannot be met.

For more information, see the NH OPD handbook “*The Board of Adjustment in New Hampshire; A Handbook for Local Officials*,” available free online at <https://www.nh.gov/osi/planning/resources/documents/zoning-board-handbook.pdf>