

Addendum to Application for Variance

SUPPLEMENTAL MEMORANDUM ON HARDSHIP. SPECIAL CONDITIONS

Owner: David Caldwell, Jr. and Christina Caldwell

Tax Lot: Map 10, Lot 33-A

At the first meeting on this Variance request, the Board voted in favor of the variance on all criteria, except could not determine that whether the property had “special conditions ... that distinguish it from other properties in the area” that make it such that no fair and substantial relationship exists between the general application of the zoning ordinance and application to the subject property. The Board invited the Applicant to return with additional information on the subject, and this memorandum is the Applicant’s further submission.

The assessment of “special conditions” has recently changed in New Hampshire – “before Simplex, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned ... after Simplex, hardship exists when special conditions of the land render the use for which the variance is sought "reasonable."” Rancourt v. City of Manchester, 149 N.H. 51, 54 (2003). “Special conditions” requires that the applicant demonstrate that its property is unique in its surroundings or environment. Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 107 (2007), citing Garrison v. Town of Henniker, 154 N.H. 26, 35 (2006). In addition, “the proposed project is presumed to be reasonable if it is a permitted use under the Town's applicable zoning ordinance. . . . If the use is allowed, an area variance may not be denied because the ZBA disagrees with the proposed use of the property.” Id., citing Vigeant v. Town of Hudson, 151 N.H. 747, 752-53, (2005).

“Special conditions” does **not** require some physical uniqueness, but simply that “the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property.” Harrington v. Town of Warner, 152 N.H. 74, 81 (2005). Moreover, “special conditions”:

“does **not** ... require that the property be the only such burdened property. Rather, the burden cannot arise as a result of the zoning ordinance’s equal burden on all property in the district.”

Id., at 81.

Within that framework, the “special conditions” on the Subject Property that make the variance reasonable are as follows:

- 1) This is a substandard unbuilt (but grandfathered as buildable) lot of 0.36 acres; which is burdened differently than other properties in the district, and likely the majority of unbuilt properties in the district.
- 2) The building envelope is only approximately 25’ by 75’; on a significant slope on the shorter angle.

- 3) The azimuth angle of the sun requires the proposed configuration of the house and porch for the solar shingles to work, and to allow a home that approaches net-zero.
- 4) While there are other sub-standard lots with the same slope and configuration, this is not the entirety of lots in the District (see Harrington), and moreover, the majority of the lots (including the two abutters), were built out before zoning, and were built out in the front setback as proposed by this variance request (including the abutter having a similar porch on the front to handle the slope of these lots, allowing for street level access with a drop for the foundation).
- 5) The Subject Property is additionally unique in that it is one of these substandard lots (and upon information and belief the only one on this section of street) which was not built prior to the adoption of this front setback.
- 6) The Subject Property has a different configuration from the actual road versus the right of way from either abutter or property on this Road. Namely, while the front setback measures from the right of way, as shown on the submitted map, the travelled Road does not run the center of the right of way, and varies significantly among lots. Therefore, the Subject Property is treated differently from other lots vis a vis the Road, which affords other lots a different treatment relative to the general purpose of the Ordinance, which in keeping rural character presumably relates more to setback from actual travelled ways, not rights of way. In any case, the Subject Lot is treated differently from its neighbors based upon the variation of road setback versus right of way setback.
- 7) Certain of the plans showing this lot (including the original plat and/or older Jackson tax maps) show that a significant portion of this lot, and the building envelope on this lot, was within wetlands. This is the now unbuilt portion of the building envelope. While there are currently no discernible wetlands now, the fact of significant prior wetlands certainly would have impacted whether the lot was built prior to zoning (i.e. when the wetlands existed), and creates an additional special condition of the lot.
- 8) The combination of all of the above are an additional special condition.