

**TOWN OF SUNAPEE
ZONING BOARD OF ADJUSTMENT**

**A PUBLIC HEARING WILL BE HELD AT THE TOWN
MEETING ROOM LOCATED AT 23 EDGEMONT ROAD
ROOM ON THURSDAY, April 18, 2019 AT 7:00 PM ON THE
FOLLOWING CASES:**

CONTINUED FROM 4/4/19:

Case #19-02

Parcel ID:

0106-0005-0000

Seeking a variance

per Article IV, Section 4.10

To permit dog sitting business.

1002 Main St. Georges Mills

George & Susan Neuwirt

Case #19-06

Parcel ID:

0129-0081-0000

Seeking a Special Exception

per Article III, Section 3.50(i),

**to allow a pre-existing, non-
conforming structure to be replaced
on existing footprint with a higher
envelope.**

25 Main St.

William Wightman

Case #19-07

Parcel ID

0113-0021-000

Variance

**from Article III, Section 3.10 of the
Zoning Ordinance to permit a**

**reduction of front setback from 50'
from centerline of road to 30' from
centerline of road for construction of
a garage.**

60 Ridgewood Dr.

Timothy & Bette Nowack

NOTE:

In the event the meeting is cancelled, the Agenda will be continued to the next scheduled Zoning Board meeting.

**Case #19-08
Parcel ID
0113-0021-000**

**Variance
from Article III, Section 3.10 of the
Zoning Ordinance to permit a
reduction of the western side setback
from 15' to 5' for construction of a
garage.
60 Ridgewood Dr.
Timothy & Bette Nowack**

**Case #19-09
Parcel ID
0113-0021-000**

**Variance
from Article III, Section 3.20 of the
Zoning Ordinance to permit a
reduction of impervious lot coverage
from 27.2% to 26.2% (whereas 25%
is the maximum allowed) for
construction of a garage.
60 Ridgewood Dr.
Timothy & Bette Nowack**

**NOTE: ZBA CASES 2019-03, -04 & -05 FOR 22 BURMA ROAD
HAVE BEEN SCHEDULED TO CONTINUE ON MAY 2, 2019**

MISC.

**Review Minutes from Previous
Meeting, Adoption of new Variance
application**

NOTE: In the event the meeting is cancelled, the Agenda will be continued to the next scheduled Zoning Board meeting.

2 BA #

19-02



TOWN OF SUNAPEE
23 Edgemont Road
Sunapee, New Hampshire 03782-0717
www.town.sunapee.nh.us

DATE: February 14, 2019
TO: ZBA
FROM: Nicole Gage, Zoning Administrator
RE: Case #ZBA19-02 / Variance / NEUWIRT

Comments:

1. Zoned VR Village Residential w/ partial Shorelines Overlay District
2. See Page 18 (Sect. 4.10) for the types of Uses allowed in the VR District.
3. After we received the Variance application, I responded to multiple emails from the applicant. See attached Email Correspondence (7 pages).
4. Once the Variance is granted, or deemed unnecessary by the ZBA, the next step would be to go to the Planning Board for Site Plan Review and to apply for a Sign Permit.

Zoning

From: Zoning
Sent: Friday, February 8, 2019 3:22 PM
To: 'gmnconstruction@comcast.net'
Cc: Barbara Vaughn; Michael Marquise
Subject: RE: Variance
Attachments: 20190208140038.pdf

Dear George & Susan:

RE: 1002 Main St GM, Village Residential (VR) District

Instead of going right for a Variance, do you want to start by appealing my interpretation of the ordinance to the ZBA? The ZBA has the authority to over-turn or uphold any or all of my interpretation. Attached is the application to use. These e-mails would serve as the interpretation. Please let Barb know asap. She is getting ready to mail the abutters next week for your variance application.

If you wish to appeal my determination for review by the Zoning Board of Adjustment pursuant to RSA 676:5, you must do so within 30 days of the date of this e-mail.

Here are additional reasons why I believe that "Day Care" does not cover a home-based pet-sitting business that allows overnight and extended stays, or a "doggy day care".

1. **DAY NOT OVERNIGHT:** A "Day Care" connotes daily use, daytime use, or a use having a beginning and an end within the same day, not overnight or extended days. You mentioned in the summary of your Variance application that you intend to keep dogs for multiple days and sometimes a few weeks at a time. Overnight boarding of dogs seems to best fit into the term "Kennel", and "Kennels" are allowed by Special Exception in the RR district.
2. **DAY CARE V. KENNEL:** I reviewed the Planning Board Public Hearing Minutes from December 1, 2005. At that time, the Planning Board was proposing an amendment to add "Day Care" to the Mixed Use District, because a "Day Care" was allowed in all districts except Mixed Use and they wanted to correct that oversight.
 - a. If "Day Care" is the same as allowing overnight & extended care of pets, then why does the town have a separate use called "Kennel" which is only permitted in the RR district by Special Exception?
3. **DAY CARE MEANING CARE OF HUMANS, NOT PETS:** In 2007 the ZBA approved a Special Exception for a Day Care Case 07-09 for a Child Care Business. See snippet of minutes here:
 - a. *6/14/2007 ZBA MINUTES: Page 2. 6 | 10 | 01. Case# 07-9. Sandra H. Bailey. Map# 107. Lot# 8. Seeking a Special Exception. Art. IV. 4:10. to run a DayCare in a Residential Zoned District as required under Sunapee Zoning Ordinance. 17 John Avery Lane. George's Mills. N.H. Dwight Erickson presented the case. The Board went over the five requirements for this type of business in a residential neighborhood. The property is on Town Water and Sewer. The applicant has the necessary State Health requirements covered. She has contacted the Fire Department. The State has regulations concerning the ages of the children. There is also a requirement concerning the amount of space and the number of children. She has been in the Child Care business for considerable time and is highly regarded. There was a question concerning the high voltage power lines. She has ample room for the business. The Public part of the hearing closed at 7:45P.M. The State limits the number of children to 12. There is also a condition of x number of square footage per child. James Lyons made a motion to approve the request of Sandra H. Bailey. Case# 07-9. Map# 107. Lot# 2. for a Special Exception from Art. IV. 4:10 to run a DayCare in a Residential Zoned District at 17 Avery Lane, George's Mills, N.H. Harry Gazelle seconded the motion. There were five yes votes.*

4. **KENNEL BUSINESS MEANS DOGS STAYING FOR A FEW DAYS OR OVERNIGHT.** In 2004, the ZBA approved a Special Exception for a Kennel business in the RR District. Ironically, the applicant mentioned wanting to run the business from home so his daughter does not have to go to day care. See snippet of minutes here:
- a. *7/8/2004 ZBA MINUTES: 7:55 P.M. Case #04-29. Matthew and Kathleen Driscoll. Map #225. Lot #3. Special Exception. Art. IV. 4:10. To operate a kennel / grooming business in existing garage. 206 State Rt. 11. Sunapee. This property is in the Rural Residential district and the request is allowed in this district. Mr. Driscoll presented the case. The case will have to go to the Planning Board and Site Plan Review after the Zoning Board approves the Special Exception. Peter White read the conditions of the ordinance concerning a home business. Mr. Driscoll said that his wife has been in the business for twenty years and he wants her to have the business at home and cut down on her travel time and so their daughter does not have to go to day care. The business would be by appointment only. They do have dogs of their own. At times, a dog might be kept overnight or for a few days. The Board was concerned that the house was not numbered. Mr. Driscoll said that it had been marked on a stone post and he had broken it when he was plowing. He said he would get a marker back up. The Board asked about the existing septic system. There is a State approved system on file in the Town Office that was done in 1997. It was done for 4 bedrooms and they have three bedrooms. The highway access was also discussed. The public part of the hearing closed at 8:15 P.M. Dick Guyer's concerns were with the health issue and the highway access. Mr. Driscoll has talked with his neighbors and they do not have any objections. Peter Urbach made a motion to approve the request of Matthew and Kathleen Driscoll. Case #04-29. Map #225. Lot #3. Special Exception. Art. IV. 4:10. To operate a kennel / grooming business in existing garage. 206 State. Rt.11. Sunapee. The conditions are as follows: The Planning Board reviews the adequacy and safe highway access. Planning Board review the adequacy of sewerage disposal available at the site. A house number will be put in a visible place. Robert Mastin seconded the motion. There were five yes votes.*
5. **HOME BUSINESS?** Home Businesses is an allowed use, if the activity meets the definition of Home Business from the Sunapee Zoning Ordinance:
- a. *HOME BUSINESS – Any business that is conducted within the home by the inhabitants of the home and no more than three non-resident employees. The home business shall meet all the requirements of the Site Plan Review Regulations. If the home business is for retail purposes, it shall be limited to items, which are made on the premises or antiques. The home business shall be subordinate and incidental to the primary residential use of the property and shall not change the residential character of the dwelling or neighborhood. The home business shall not generate noise, odor, traffic, or any other negative influence on the community or neighboring properties. (Adopted 3/14/2000)*

CC: Barbara Vaughn, Administrative Assistant / Michael Marquise, Planner

Nicole Gage
Zoning Administrator
Town of Sunapee, NH
23 Edgemont Rd., Sunapee, NH 03782
Email zoning@town.sunapee.nh.us / Web www.town.sunapee.nh.us
Direct (603) 763-3194 / Town Office (603) 763-2212

CONFIDENTIALITY NOTICE: Privacy should not be assumed with emails associated with town business. Certain emails are public documents and may be subject to disclosure.

check 11096
\$ 150.00 Rev

RECEIVED

FEB 06 2019

TOWN OF
SUNAPEE

CASE# _____

Town of Sunapee
Zoning Board of Adjustment

Variance

1. Landowner(s) Name(s): George & Susan Neuwirt 2. Parcel ID# 0106/0005/0000
3. Zoning District: VR
4. Project Location (Street & #): 1002 Main Street Georges Mills
5. Mailing Address: PO Box 663 Sunapee, NH 03782
6. Phone Number 603-763-6005
7. Reason the Variance is necessary: Dog sitting is not specifically
addressed as being allowed in the VR section of the ordinance.

•All applications seeking relief from setback requirements on lakefront properties must be accompanied with a professional recorded survey of the property and building location(s).


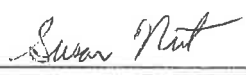
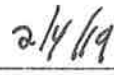
•Important-Your property has to be identified with your street number or name-without this identification your hearing may be continued to a later date.

•Please use the abutter list form, which is attached, for your abutters' mailing list.

•IMPORTANT: Review application deadline dates for a timely submission.

•Base Fee-See Zoning Administrator for Fee Schedule.

Please sign the following statement: I understand that the public hearing will be held at the scheduled date and time unless a request is made by me for a new hearing. Any rehearing will require a new public notice and notification to abutters, the cost of which will be borne by the applicant. Further, I hereby give permission to the ZBA members to visit the subject property prior to the public hearing. To the best of my knowledge, the above is true and correct.

Landowner(s) Signature(s) Date

A Variance is requested from Zoning Ordinance, Article IV Section 4.10 ~~2.3~~ to permit:

Dog sitting business within my home

Landowner(s): George & Susan Neuwirt Parcel ID#: 0106/0005/0000

Property Address: 1002 Main Street Georges Mills

FACTS SUPPORTING THIS REQUEST:

1. The proposed use would not diminish surrounding property values because:
This is a very low impact business. Nothing is being changed on the property and it is doubtful anyone would be aware that anything is different. The dogs are inside the home the majority of the time. There will be no signage.

2. Granting the variance would not be contrary to the public interest because:
The public will not be affected in any way.

3. Denial of the variance would result in unnecessary hardship per the following:

a. the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment because:

There are already several businesses on the street, all of which have significantly more impact on the neighborhood than this proposed use.

b. no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because:

The proposed use does not affect the health, safety or general welfare of the community in any way. It also does not threaten the natural resources or vitality of the town. It will not diminish surrounding property values because there will be no outward change of the property.

c. the variance would not injure the public or private rights of others because:

There will be no obvious indication that any business is going on at the property. There will be no signage. Traffic will be extremely limited because customers drop their dogs off for days or weeks at a time. Also, the home is located right on the corner at the end of the road. The dogs are inside the home the majority of the time and are never left unattended. I am home all day. When the dogs do go outside my yard is completely fenced in and they are not left out extended periods of time and are always attended.

4. Granting the variance would do substantial justice because:

There is a real need in our area for people to have a place to leave their dogs that they feel good about. Increasingly more and more people are treating their animals like children and no one feels good about their animals being in a cage the majority of the time.

Many people have dogs who are too scared or nervous to go to a regular kennel.

5. The use is not contrary to the spirit of the ordinance because:

The proposed use is actually far less of an impact on the surroundings than many of the uses allowed by right, such as a daycare or professional clinic. Inns and lodging are allowed by right; the only difference is I am lodging dogs instead of people.

CURRENT OWNER		UTILITIES		SIRT./ROAD		LOCATION		CURRENT ASSESSMENT	
NEUWIRT, GEORGE M & SUSAN J	4 Rolling	2 Public Water	1 Paved	3 Rural				Code	Assessed Value
PO BOX 663		3 Public Sewer						1010	105,700
SUNAPEE, NH 03782								1010	40,100
Additional Owners:								1010	1,000
SUPPLEMENTAL DATA		SALE PRICE V.C.		OTHER ASSESSMENTS		TOTAL		TOTAL	
Other ID: 0106-0005-0000		1972/995		1972/995		146,800		146,800	
SEPTIC APPR		1818/0602		1818/0602		146,800		146,800	
UTILITY		10/05/2011		10/05/2011		146,800		146,800	
DES PERMITS		09/10/2007		09/10/2007		146,800		146,800	
Routing # 0326		0/ 0		0/ 0		146,800		146,800	
SUBDIVISION						146,800		146,800	
GIS ID: 0106-0005-0000						146,800		146,800	

Year	Type	Description	Amount	Code	Description	Number	Amount	Comm. Int.
RECORD OF OWNERSHIP								
		NEUWIRT, GEORGE M & SUSAN J	1972/995	Q	V	75,000	00	
		BAILEY FAMILY TRUST, EDWARD A	1818/0602	U	I	0	1A	
		BAILEY FAMILY TRUST, EDWARD A.	1657/0865	U	I	0	1T	
		BAILEY SR, EDWARD A	0/ 0					
EXEMPTIONS								
Total: 146,800								

Year	Type	Description	Amount	Code	Description	Number	Amount	Comm. Int.
ASSESSING NEIGHBORHOOD								
		Street Index Name						
		NBHD Name						
		0001/A						
NOTES								
3/16- DEMO OLD STRUCTURES, REPLACE WITH								
2 STORY GARAGE WITH LA ABOVE								
EST INT 2017								

Permit ID	Issue Date	Type	Description	Amount	Insp. Date	% Comp.	Date Comp.	Comments
418D	12/17/2018	DW	DRIVEWAY	0		0		MAKING THE BACK & IMPACT 150 SQ FT OF CONSTRUCTION OF A 385 SQ FT TRAVEL TR. DEMO MAIN HOUSE
459LD	07/30/2018	LD	LAND DISTURBAN	500		0		
2018-01889	07/16/2018	DS	DES PERMITS	0		0		
3458	04/18/2016	AD	Addition	80,000	04/03/2017	100	04/01/2017	
3448	03/07/2016	OB	OUTBUILDING	0	04/04/2016	100	04/01/2016	
D89	03/07/2016	DE	Demolish	0	04/04/2016	100	04/01/2016	

Permit ID	Issue Date	Type	Description	Amount	Insp. Date	% Comp.	Date Comp.	Comments
BUILDING PERMIT RECORD								
ASSESSING NEIGHBORHOOD								
Total: 146,800								

Permit ID	Issue Date	Type	Description	Amount	Insp. Date	% Comp.	Date Comp.	Comments
BUILDING PERMIT RECORD								
ASSESSING NEIGHBORHOOD								
Total: 146,800								

B Use Code	Use Description	Zone	D	Front	Depth	Units	Unit Price	Factor	Acres	Disc	C	ST	Adj.	Notes- Adj	Special Pricing	S Adj Fact	Adj. Unit Price	Land Value
1	1010 Single Fam	MDL-01	VR			6,998	SF	7.31	0.9000	4	1.0000	1.00	0.00		Spec Use	1.00	6.58	40,100
LAND LINE VALUATION SECTION																		
Total Card Land Units: 0.14 AC Parcel Total Land Area: 0.14 AC Total Land Value: 40,100																		

APPROAISED VALUE SUMMARY

Appraised Bldg. Value (Card) 105,700

Appraised XF (B) Value (Bldg) 0

Appraised OB (L) Value (Bldg) 1,000

Appraised Land Value (Bldg) 40,100

Special Land Value 0

Total Appraised Parcel Value 146,800

Valuation Method: C

Adjustment: 0

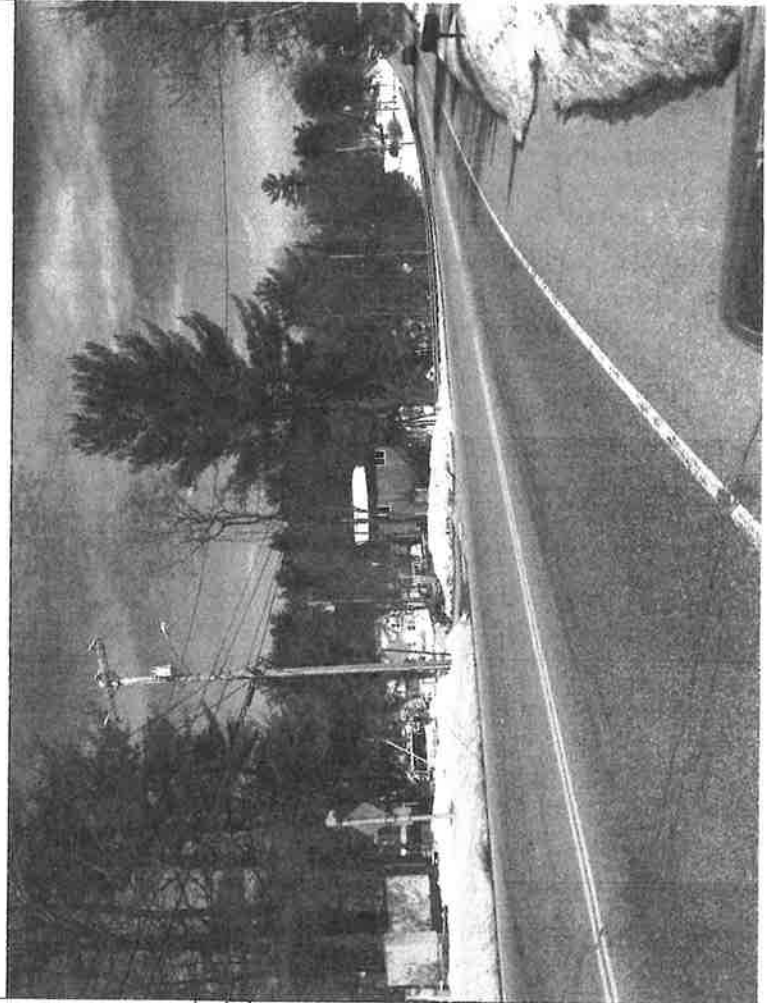
Net Total Appraised Parcel Value 146,800

CONSTRUCTION DETAIL (CONTINUED)

Element	Cd.	Ch.	Description
Style	06		Conventional
Model	01		Residential
DESIGN/APPEAL	05		Average +20
Stories	2		
Occupancy	1		
Exterior Wall 1	08		Wood on Sheath
Exterior Wall 2			
Roof Structure	03		Gable/Hip
Roof Cover	03		Asph/F Gls/Cmp
Interior Wall 1	05		Drywall/Sheet
Interior Wall 2			
Interior Flr 1	12		Hardwood
Interior Flr 2			
Heat Fuel	03		Gas
Heat Type	05		Hot Water
A/C	03		Central
Total Bedrooms	01		1 Bedroom
Total Bthrms	1		
Total Half Baths	1		
Total Xtra Fixtrs	4		
Total Rooms			
Bath Style	02		Average
Kitchen Style	02		Average

FUS		
FGR		
WDK	28	6

RTE 11



OB-OUTBUILDING & YARD ITEMS(L) / XF-BUILDING EXTRA FEATURES(B)

Code	Description	Sub	Sub Description	L/B	Units	Unit Price	Yr	Gde	Dp	Rt	Cnd	%Cnd	Apr Value
RPV1	RES PAV SMA			L	1	1,000.00	2005		0			100	1,000

BUILDING SUB-AREA SUMMARY SECTION

Code	Description	Living Area	Gross Area	Eff. Area	Unit Cost	Undeprac. Value
FGR	Garage, Framed	0	576	202		24,768
FUS	Upper Story, Finished	576	576	576		70,627
WDK	Deck, Wood	0	168	17		2,084
Ttl. Gross Liv./Lease Area:		576	1,320	795		106,744

Zoning

From: Zoning
Sent: Thursday, March 21, 2019 12:04 PM
To: Aaron H. Simpson; james.phelan.lyons@gmail.com; Dan Schneider; Bill Larrow; Clayton Platt; Jeff Claus
Cc: Zoning
Subject: ZBA Legal Response (CONFIDENTIAL - do not share with Neuwirt) re Dog Sitting Case

Dear ZBA.

Here is our Legal Counsel's response for the Dog Sitting Case (see below). Reminder: this is confidential and should not be shared with other people, and should not be shared with the applicant, George Neuwirt.

I am getting copies of the 2 court cases that Ms. Butterfield cites below. I will get those to you asap.

After reading this, if you want a conference call scheduled with legal counsel, you must email me directly and tell me. The plan is I schedule the Conference Call (if a ZBA member requests it) for April 4th at 6:30 PM in my office, before the meeting. Please note that Jeff & Bill cannot make it April 4th. I suspect the Dog Sitting case will have to be postponed to April 18th or maybe even May 2nd, depending on everyone's availability.

Nicole Gage
Zoning Administrator
Town of Sunapee, NH
23 Edgemont Rd., Sunapee, NH 03782
Email zoning@town.sunapee.nh.us / Web www.town.sunapee.nh.us
Direct (603) 763-3194 / Town Office (603) 763-2212

~~CONFIDENTIAL~~

CONFIDENTIALITY NOTICE: Privacy should not be assumed with emails associated with town business. Certain emails are public documents and may be subject to disclosure.

From: Naomi Butterfield <naomi@mitchellmunigroup.com>
Sent: Tuesday, March 19, 2019 3:10 PM
To: Zoning <zoning@town.sunapee.nh.us>
Cc: Donna Nashawaty <Donna@town.sunapee.nh.us>
Subject: Neuwirt Variance Request

~~CONFIDENTIAL~~

Good afternoon, Nicole,

You wrote seeking an answer to two questions related the Variance Request submitted by the Neuwirts with regard to their proposed pet sitting business. You noted that the ZBA continued the hearing until April 4, 2019 and provided a link to the original application, which I have reviewed together with the other materials and emails you sent.

My answers to your questions follow each question. The questions you asked were as follows:

- 1) "HARDSHIP FOR USE: Regarding Hardship for a "Use Variance" is there any case law the ZBA could read? " as qualified by your question that noted the ZBA was trying to determine if they should be looking at the unique conditions of the property vs. the unique type of use, and whether a use variance can run with the land versus the person and what would happen if it was abandoned.

CONFIDENTIAL

ANSWER: **The ZBA should consider the uniqueness of the property not the uniqueness of the use.** This is part of the Board's consideration of whether there are unique conditions of the property that would mean literal enforcement of an ordinance would create an unnecessary hardship. This consideration is one of five that the Board must consider in determining whether to grant the variance request.

In determining whether there is an **unnecessary hardship** the Board must find that an ordinance unduly restricts the use of the land. The following three elements are to be part of that determination: a) the zoning restriction, **as applied to the property**, interferes with the reasonable use of the property considering the unique setting of the property and its environment; b) no fair and substantial relationship exists between the general purposes of the ordinance and the specific restrictions of the property; AND c) the variance would not injure the public or private rights of others.

Two cases that I think discuss this test are 1) Simplex Technologies v. Town of Newington, 145 N.H. 727 (N.H. 2001) and Community Resources for Justice, Inc. v. City of Manchester, 154 N.H. 748 (N.H. 2007). Let me know if you would like copies of either and I can scan and send them to you.

The variance, if granted, runs with the property not the person and, as long as the variance is used within 2 years of final approval it continues even to a subsequent purchaser. Abandonment can occur with regard to a non-conforming use but not a variance. (Unlike a variance, a non-conforming use is one that existed prior to enactment of a zoning ordinance and so it is grandfathered in and can be abandoned with a showing of intent to discontinue that use. Let me know if you would like to discuss this further). **Once the variance is granted with regard to that property, as long as it is exercised within 2 years of the date of final approval, it will remain with the property going forward.**

- 2) "CONDITIONS: Can the ZBA put a condition that the variance is only good for 1 year? How about 2 years? I'm assuming that the clock would start ticking at some point within the 2 years they have to begin exercising the variance in RSA 674:33 I-a."

The short answer is "No." Conditions that are necessary to ensure observance of the spirit of a zoning order can be attached to a variance. Conditions that limit the variance to 1 or 2 years makes the variance essentially a "trial run" rather than ensuring that the variance is consistent with the spirit of the ordinance. Since the variance is granted based on the uniqueness of the property, as opposed to the use, the focus should be on whether the property meets the test set forth above or not.

Please feel free to call me if you would like further clarification. Someone from the firm can also be available on April 4, 2019 at 6:30 if the ZBA determines they would like a conference call on that date.

Best wishes,

Naomi

CONFIDENTIAL

~~CONFIDENTIAL~~

Zoning

From: Zoning
Sent: Thursday, March 21, 2019 12:15 PM
To: Aaron H. Simpson; james.phelan.lyons@gmail.com; Dan Schneider; Bill Larrow; Clayton Platt; Jeff Claus
Subject: Case Laws cited
Attachments: Cmty. Res. for Justice_ Inc. v. City of Manchester_ 154 (002).pdf; Simplex Techs._ Inc. v. Town of Newington_ 145 N.H. 727.pdf

Dear ZBA:

Here are the 2 cases the Ms. Butterfield cited in her written legal advice to you.
Reminder: this should not be shared with other people, and should not be shared with the applicant, George Neuwirt.

Nicole Gage
Zoning Administrator
Town of Sunapee, NH
23 Edgemont Rd., Sunapee, NH 03782
Email zoning@town.sunapee.nh.us / Web www.town.sunapee.nh.us
Direct (603) 763-3194 / Town Office (603) 763-2212

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~~CONFIDENTIAL~~

Caution
As of: March 21, 2019 4:08 PM Z

Simplex Techs., Inc. v. Town of Newington

Supreme Court of New Hampshire

January 29, 2001, Decided

No. 98-409

Reporter

145 N.H. 727 *; 766 A.2d 713 **; 2001 N.H. LEXIS 15 ***

SIMPLEX TECHNOLOGIES, INC. v. TOWN OF
NEWINGTON & a.

Prior History: [***1] Rockingham.

Disposition: Reversed and remanded.

Core Terms

variance, zoning, unnecessary hardship, zoning ordinance, hardship, superior court, trial court, ordinance, rights

Case Summary

Procedural Posture

Plaintiff appealed the order of the superior court (New Hampshire), which affirmed a decision of the zoning board of adjustment denying plaintiff's request for a variance to develop a portion of its property.

Overview

Plaintiff requested a variance to develop a portion of its property, but it was denied. The court held the lower court properly denied plaintiff under its standard to receive a variance, however, that its definition of unnecessary hardship was too restrictive in light of the constitutional protections. In consideration of those protections, the court departed from the definition. The court remanded the case for the lower court to determine plaintiff's case under the new standard of unnecessary hardship.

Outcome

The court reversed and remanded. The court changed its definition of unnecessary hardship in relation to receiving a variance to make it less restrictive in light of constitutional protections.

LexisNexis® Headnotes

Civil Procedure > ... > Standards of Review > Substantial Evidence > General Overview

[HN1](#) [↓] Standards of Review, Substantial Evidence

The court's standard of review of the trial court's decision is whether the evidence reasonably supports the trial court findings, not whether it would find as the trial court did. Nevertheless, if the appellate court determines a trial court's decision is unsupported by the record or is erroneous as a matter of law, then it will overturn its judgment.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

Environmental Law > Land Use & Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Equitable & Statutory Limits

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

[HN2](#) [↓] Zoning, Constitutional Limits

To determine the validity of zoning laws, the police

power and the right to private property must be considered together as interdependent, the one qualifying and limiting the other.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

Governments > Local Governments > Administrative Boards

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Administrative Procedure

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

[HN3](#) [↓] Zoning, Ordinances

According to *N.H. Rev. Stat. Ann. § 674:33(b)*, a zoning board of adjustment may authorize a variance if the following conditions are met: (1) the variance will not be contrary to the public interest; (2) special conditions exist such that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; and (4) substantial justice is done. In addition, the board may not grant a variance if it diminishes the value of surrounding properties.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Constitutional Limits

[HN4](#) [↓] Zoning, Constitutional Limits

Zoning ordinances must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation.

Environmental Law > Land Use & Zoning > Constitutional Limits

Real Property Law > Ownership & Transfer > Public Entities

[HN5](#) [↓] Land Use & Zoning, Constitutional Limits

N.H. Const. pt. I, arts. 2, 12 guarantee to all persons the right to acquire, possess, and protect property. These guarantees limit all grants of power to the state that deprive individuals of the reasonable use of their land.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Environmental Law > Land Use & Zoning > Conditional Use Permits & Variances

Real Property Law > Zoning > General Overview

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

[HN6](#) [↓] Zoning, Constitutional Limits

Applicants for a variance may establish unnecessary hardship by proof that: (1) a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

Counsel: Gottesman and Hollis, P.A., of Nashua (Anna B. Hantz on the brief), and Stebbins, Lazos & Van Der Beken, of Manchester (Henry B. Stebbins on the brief and orally), for the plaintiff.

Peter J. Loughlin of Portsmouth, by brief and orally, for defendant Town of Newington.

Boynton, Waldron, Doleac, Woodman & Scott, P.A., of Portsmouth, for defendant the Equitable Life Assurance Society of the United States & The Fox Run Mall Joint Venture, filed no brief.

H. Bernard Waugh, Jr., of Concord, by brief for the New Hampshire Municipal Association, as amicus curiae.

Judges: NADEAU, J. THAYER, J., sat for oral argument but resigned prior to the final vote; BROCK, C.J., and BRODERICK and DALIANIS, JJ., concurred; HORTON, J., retired, specially assigned under RSA

490:3, concurred; NADEAU and DALIANIS, JJ., took part in the final vote by consent of the parties.

Opinion by: NADEAU

Opinion

[*728] [**714] NADEAU, J. The plaintiff, Simplex Technologies, Inc. (Simplex), appeals from an order of the Superior [***2] Court (Galway, J.), affirming a decision of the Town of Newington Zoning Board of Adjustment (ZBA) denying Simplex's request for a variance to develop a portion of its property that fronts Woodbury Avenue. The defendants are the Town of Newington and The Equitable Life Assurance Society of the United States and the Fox Run Mall Joint Venture. We reverse and remand.

Simplex owns ninety-two acres in Newington between the Piscataqua River and Woodbury Avenue. For more than thirty years Simplex has operated a manufacturing facility on this land. Woodbury Avenue forms a boundary line between industrial and commercial zoning districts in Newington. All the property west of Woodbury Avenue, including two shopping malls, was once in the industrial zone but now lies within the commercial zone, across the street from the Simplex property.

There are three other commercial businesses also located on the east side of Woodbury Avenue, within the commercial zone. North of the Simplex property along Woodbury Avenue is a mini-mall located on a ten-acre lot that was re-zoned for commercial use in 1983. A car dealership and an electronics retail store are located south of the Simplex property near [***3] the intersection of Woodbury Avenue and Gosling Road on thirteen acres of commercial property. The Bank of New Hampshire and the Great Bay School operate within the industrial zone, but not with industrial purposes; the bank operates as [**715] a nonpermitted use and the school operates as a nonconforming use.

Seeking to develop 6.2 acres of its property abutting Woodbury Avenue with a Barnes & Noble bookstore and a family restaurant, Simplex requested use and area variances for this property. The ZBA, determining that Simplex met none of the five criteria for a variance, denied its requests. Simplex appealed to the superior court, arguing that: (1) the ZBA's decision was unreasonable; (2) the Town was estopped from enforcing the zoning ordinance against [*729] Simplex

because it was acting in a discriminatory fashion; and (3) the zoning ordinance was unconstitutional on its face and as applied to Simplex. The superior court ruled that the ZBA's determination was not unreasonable or unlawful because Simplex did not meet the hardship criteria for a variance and rejected Simplex's municipal estoppel argument. The superior court also rejected Simplex's constitutional arguments. This appeal followed.

[***4] The trial court's review is governed by RSA 677:6, which places the burden of proof on the party seeking to set aside a ZBA decision to show that the decision is unlawful or unreasonable. According to this statute, the trial court must treat all findings of the ZBA as *prima facie* lawful and reasonable. See RSA 677:6 (1996). However, the trial court may set aside a ZBA decision if it finds by the balance of probabilities, based on the evidence before the court, that the ZBA's decision was unreasonable. See *id.*

"HN1[↑] Our standard of review of the trial court's decision is whether the evidence reasonably supports the trial court findings, not whether we would find as the trial court did." Rowe v. Town of North Hampton, 131 N.H. 424, 428, 553 A.2d 1331, 1334 (1989). Nevertheless, if we determine a trial court's decision is unsupported by the record or is erroneous as a matter of law, then we will overturn its judgment. See Olszak v. Town of New Hampton, 139 N.H. 723, 724, 661 A.2d 768, 770 (1995).

We begin by looking at the present state of land use variance law. HN2[↑] To determine the validity of zoning laws, the "police power and the right to private [***5] property must be considered together as interdependent, the one qualifying and limiting the other." Metzger v. Town of Brentwood, 117 N.H. 497, 502, 374 A.2d 954, 957 (1977) (quotation omitted). The purpose of a variance is to allow for "a waiver of the strict letter of the zoning ordinance without sacrifice to its spirit and purpose." Husnander v. Town of Barnstead, 139 N.H. 476, 478, 660 A.2d 477, 478 (1995). By allowing variances "litigation of constitutional questions may be avoided and a speedy and adequate remedy afforded in cases where special conditions" exist. Bouley v. Nashua, 106 N.H. 79, 84, 205 A.2d 38, 41 (1964) (quotations omitted).

HN3[↑] According to RSA 674:33, I(b), a zoning board of adjustment may authorize a variance if the following conditions are met: (1) the variance will not be contrary to the public interest; (2) special conditions exist such

145 N.H. 727, *729; 766 A.2d 713, **715; 2001 N.H. LEXIS 15, ***5

that literal enforcement of the ordinance results in unnecessary hardship; (3) the variance is consistent with the spirit of the ordinance; and (4) substantial justice is done. See RSA 674:33 (1996 & Supp. 2000). In addition, the board may not grant a variance if it diminishes [***6] the value of surrounding properties. [**730] See Ryan v. City of Manchester Zoning Board, 123 N.H. 170, 173, 459 A.2d 244, 245 (1983). The ZBA determined that Simplex failed to meet any of these conditions. The superior court affirmed the ZBA's decision, analyzing only the question of unnecessary hardship.

Our recent case law suggests that in seeking a variance, the hardship requirement is the most difficult to meet. To establish hardship, property owners must show that an ordinance unduly restricts the use of their land. See Governor's Island Club v. Gilford, 124 N.H. 126, 130, [**716] 467 A.2d 246, 248 (1983). In Governor's Island, we overturned the trial court's order affirming the ZBA's grant of a variance, stating: "For hardship to exist under our 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." *Id.*

In overturning the grant of a variance that allowed a landowner to expand his pre-existing nonconforming marina with a boat storage building, we stated: "The uncontroverted fact that the Marina had been operating as a viable commercial entity [***7] for several years prior to the variance application is conclusive evidence that a hardship does not exist." Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239, 243, 614 A.2d 1048, 1050 (1992). As in other cases, we emphasized that "the uniqueness of the land, not the plight of the owner, determines whether a hardship exists." *Id.* (quotation and citation omitted).

Dissenting in Grey Rocks, Justice Horton was critical of our restrictive definition of hardship. He discussed the similarity between our definition and a "substantial taking" approach. See *id.* at 247, 614 A.2d at 1052 (Horton, J., dissenting). Under this approach, variances are very difficult to obtain unless evidence establishes that the property owner cannot use his or her property in any way. See *id.* (Horton, J., dissenting). This approach "rejects any claim of right to use property as one sees fit, no matter how unobtrusive." *Id.* (Horton, J., dissenting).

Though variances have been granted, their numbers have been few, diminished undoubtedly by our

reiterated and restrictive definition of what constitutes an unnecessary hardship. See, e.g., Husnander, 139 N.H. at 478-79, 660 A.2d 477 at 478-79. [***8]

Our current restrictive approach is inconsistent with our earlier articulations of unnecessary hardship. In Fortuna v. Zoning Board of Adjustment of Manchester, a car dealership was granted a variance to expand its nonconforming use by adding a garage within an apartment zoning district. See Fortuna v. Zoning Board of Manchester, 95 N.H. 211, 212, 60 A.2d 133, 134 (1948). The record [**731] established that this addition would reduce traffic, but would not diminish the value of the surrounding properties. See Fortuna, 95 N.H. at 212-13, 60 A.2d at 135. We found unnecessary hardship existed because the ordinance interfered with the dealership's right to use its property as it saw fit and that its use did not injure the public or private rights of others. See Fortuna, 95 N.H. at 213-14, 60 A.2d at 135.

Also, our restrictive approach is inconsistent with the notion that zoning ordinances must be consistent with the character of the neighborhoods they regulate. In Belanger v. City of Nashua, the zoning board of adjustment denied a land owner a variance to expand a nonconforming commercial use from one room of her house to the whole house. See Belanger v. City of Nashua, 121 N.H. 389, 430 A.2d 166 (1981). [***9] The surrounding area had changed substantially since it was zoned for single family residential use. See *id.* at 393, 430 A.2d at 169. Emphasizing that municipalities must coordinate their zoning ordinances to reflect the current character of their neighborhoods, we upheld the trial court's order vacating the board's decision. See *id.*

Finally, our restrictive approach is inconsistent with our constitutional analysis concerning zoning laws. To safeguard the constitutional rights of landowners, we insist that HNA [↑] zoning ordinances "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the regulation." Town of Chesterfield v. Brooks, 126 N.H. 64, 69, 489 A.2d 600, 604 (1985) (quotation omitted).

Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right [**717] of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions. HNS [↑] The New Hampshire Constitution [***10] guarantees to all

persons the right to acquire, possess, and protect property. See N.H. CONST. pt. I, arts. 2, 12. These guarantees limit all grants of power to the State that deprive individuals of the reasonable use of their land.

NADEAU and DALIANIS, JJ., took part in the final vote by consent of the parties.

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We believe our definition of unnecessary hardship has become too restrictive in light of the constitutional protections by which it must be tempered. In consideration of these protections, therefore, we depart today from the restrictive approach that has defined unnecessary hardship and adopt an approach more considerate of the constitutional right to enjoy property. HN6 Henceforth, applicants for a variance may establish unnecessary hardship by proof that: (1) **[*732]** a zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

While the trial court properly applied settled law, because of our departure from the existing definition **[***11]** of hardship, we remand this case to the superior court to determine whether Simplex can establish unnecessary hardship under this new standard.

Simplex also argues that the trial court erred in rejecting its claim of municipal estoppel. Because Simplex did not raise this issue in its notice of appeal or obtain leave of this court to add the question, Simplex has waived the issue of estoppel and we will not consider it. See *Sup. Ct. R.* 16(3)(b); see also *State v. Peterson*, 135 N.H. 713, 714-15, 609 A.2d 749, 750-51 (1992).

Finally, Simplex argues that the enforcement of the zoning ordinance was unconstitutional because the restriction against commercial development was not equally applied to other Woodbury Avenue landowners. We decide cases on constitutional grounds only when necessary. See *Olson v. Fitzwilliam*, 142 N.H. 339, 345, 702 A.2d 318, 322 (1997). Because we reverse and remand on other grounds, we decline to address the merits of Simplex's constitutional claims. See *id.*

Reversed and remanded.

THAYER, J., sat for oral argument but resigned prior to the final vote; BROCK, C.J., and BRODERICK and DALIANIS, JJ., concurred; HORTON, **[***12]** J., retired, specially assigned under RSA 490:3, concurred;



Cmty. Res. for Justice, Inc. v. City of Manchester

Supreme Court of New Hampshire

November 14, 2006, Argued ; January 24, 2007, Opinion Issued

No. 2006-609

Reporter

154 N.H. 748 *; 917 A.2d 707 **; 2007 N.H. LEXIS 11 ***

COMMUNITY RESOURCES FOR JUSTICE, INC. v.
CITY OF MANCHESTER

Subsequent History: [***1] Released for Publication
January 24, 2007.

Prior History: Hillsborough-northern judicial district.

Disposition: Reversed and remanded.

Core Terms

ordinance, intermediate scrutiny, variance, classification, City's, zoning, trial court, halfway house, housing, prong, zoning ordinance, general welfare, rational basis, articulated, quotation, ban, correctional facility, unnecessary hardship, enabling, requires, tests, rational basis review, burden of proof, rationally, conceive, rights, legitimate governmental interest, correctional institution, constitutional review, municipality

Case Summary

Procedural Posture

Defendant city appealed the orders of the Superior Court (New Hampshire), which reversed the decision of the city's Zoning Board of Adjustment (ZBA) and remanded plaintiff applicant's case to the ZBA with instructions to grant a variance to the applicant. The applicant had applied for a building permit to operate a halfway house. The ZBA had denied the request upon concluding that the halfway house constituted a correctional facility.

Overview

A correctional facility was not a permitted use in any of the city's zoning districts. The court determined that the certified record did not reasonably support the trial court's determination that the applicant met its burden

with respect to establishing the first prong of the case law standard with regard to establishing unnecessary hardship when seeking a variance. The court found that there was no evidence that demonstrated how the size and layout of the specific building proposed made the property particularly appropriate for the proposed use, no evidence demonstrated that the proposed site was unique, nor did the evidence reasonably support the trial court's conclusion that the applicant's property was burdened by the restriction in a manner that was distinct from similarly situated property. The court clarified that the intermediate scrutiny level of review to challenge an ordinance's constitutionality required that the challenged legislation be substantially related to an important governmental objective, with the burden being on the government to demonstrate that the challenged legislation met that test.

Outcome

The court reversed the orders and remanded the case to the trial court for further proceedings, including the application of the intermediate scrutiny level of review test, which the court set forth in its opinion.

LexisNexis® Headnotes

Administrative Law > Judicial Review > Standards of Review > Clearly Erroneous Standard of Review

Real Property Law > Zoning > Judicial Review

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

HN1[↓] Standards of Review, Clearly Erroneous Standard of Review

An appellate court will uphold a trial court's decision on

a zoning appeal unless the evidence does not support it or it is legally erroneous. An appellate court's inquiry is not whether it would find as the trial court found, but rather whether the evidence before the court reasonably supports its findings.

Administrative Law > Judicial Review > Standards of Review > Substantial Evidence

Real Property Law > Zoning > Judicial Review

HN2 Standards of Review, Substantial Evidence

A trial court must treat all factual findings of a zoning board of adjustment (ZBA) as prima facie lawful and reasonable. *N.H. Rev. Stat. Ann. § 677:6* (1996). It may set aside a ZBA decision if it finds by the balance of probabilities, based on the evidence before it, that the ZBA's decision was unreasonable.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

Evidence > Burdens of Proof > Allocation

HN3 Zoning, Variances

To obtain a variance, an applicant must show that (1) granting the variance will not be contrary to the public interest; (2) special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; (3) granting the variance is consistent with the spirit of the ordinance; (4) by granting the variance substantial justice is done; and (5) granting the variance does not diminish the value of surrounding properties. To establish unnecessary hardship when seeking a use variance, an applicant must demonstrate that (1) a zoning restriction as applied to the applicant's property interferes with the applicant's reasonable use of the property, considering the unique setting of the property in its environment; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

Evidence > Burdens of Proof > Allocation

HN4 Zoning, Variances

The first prong of the case law standard to establish unnecessary hardship when seeking a use variance is the critical inquiry for determining whether unnecessary hardship has been established. To meet its burden of proof under that part of the case law test, the applicant must demonstrate, among other things, that the hardship is a result of the property's unique setting in its environment. That requires that the zoning restriction burden the property in a manner that is distinct from other similarly situated property. While the property need not be the only such burdened property, the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district. In addition, the burden must arise from the property and not from the individual plight of the landowner. The landowner must show that the hardship is a result of specific conditions of the property and not the area in general. Hardship exists when special conditions of the land render the use for which the variance is sought reasonable.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Variances

Real Property Law > Zoning > Judicial Review

HN5 Zoning, Variances

If any one of a zoning board of adjustment's reasons support its denial of a variance, an applicant's appeal of that decision fails.

Governments > Legislation > Interpretation

HN6 Legislation, Interpretation

The Supreme Court of New Hampshire is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. In interpreting a statute, a court first looks to the language of the statute itself and, if possible, construes that language according to its plain and ordinary meaning.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Local Planning

HN7 [↓] **Zoning, Local Planning**

See N.H. Rev. Stat. Ann. § 674:16(I) (Supp. 2006).

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Local Planning

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Ordinances

HN8 [↓] **Zoning, Local Planning**

N.H. Rev. Stat. Ann. § 674:16(I) (Supp. 2006) grants municipalities broad authority to pass zoning ordinances for the health, safety, morals, and general welfare of the community. Because a municipality's power to zone property to promote the health, safety, and general welfare of the community is delegated to it by the State of New Hampshire, the municipality must exercise that power in conformance with the enabling legislation. Where zoning is exercised for considerations or purposes not embodied in an enabling act, it will be held invalid as an ultra vires enactment beyond the scope of the zoning authority delegated.

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Local Planning

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Ordinances

HN9 [↓] **Zoning, Local Planning**

When an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire affected region must be considered in determining the ordinance's validity. The general welfare provision of the zoning enabling statute, N.H. Rev. Stat. Ann. § 674:16(I) (Supp. 2006), includes the welfare of the community in which a municipality is located and of which it forms a part. Municipalities are not isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State of New Hampshire, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries.

Business & Corporate Compliance > ... > Real

Property Law > Zoning > Constitutional Limits

Constitutional Law > Equal Protection > Judicial
Review > Standards of Review

Business & Corporate Compliance > ... > Real
Property Law > Zoning > Ordinances

HN10 [↓] **Zoning, Constitutional Limits**

In determining whether an ordinance is a proper exercise of a city's police power and thus able to withstand a substantive due process challenge under the State of New Hampshire Constitution, an appellate court applies the rational basis test. That test requires that legislation be only rationally related to a legitimate governmental interest and that it contains no inquiry into whether legislation unduly restricts individual rights. Under the rational basis test, a reviewing court presumes that the challenged ordinance is valid and require the challenger to prove otherwise. In an as-applied challenge, a reviewing court examines the relationship of the particular ordinance to particular property under particular conditions existing at the time of litigation. A reviewing court analyzes whether the ordinance is rationally related to a legitimate governmental interest under the facts of the case. In rational basis review of a city's ordinance on zoning, a reviewing court will not independently examine the factual basis for the ordinance. The reviewing court will inquire only as to whether the legislature could reasonably conceive to be true the facts upon which it is based.

Constitutional Law > Equal Protection > Judicial
Review > Standards of Review

HN11 [↓] **Judicial Review, Standards of Review**

In considering an equal protection challenge under the State of New Hampshire Constitution, a reviewing court must first determine the correct standard of review by examining the purpose and scope of the State-created classification and the individual rights affected. Classifications based upon suspect classes or affecting a fundamental right are subject to strict scrutiny. Classifications involving important substantive rights are subject to intermediate scrutiny. Absent some infringement of a fundamental right, an important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality.

Adjudication > Decisions > Stare Decisis

Governments > Courts > Judicial Precedent

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN12 [↓] **Zoning, Constitutional Limits**

As the right to use and enjoy property is an important substantive right, a reviewing court uses the intermediate scrutiny test to review equal protection challenges to zoning ordinances that infringe upon that right. Under that test, the challenged legislation must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN13 [↓] **Judicial Review, Standards of Review**

The State of New Hampshire's rational basis test requires that legislation be only rationally related to a legitimate governmental interest and that it contains no inquiry into whether legislation unduly restricts individual rights, and a least-restrictive-means analysis is not part of that test.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Constitutional Limits

Evidence > Burdens of Proof > Allocation

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

HN14 [↓] **Zoning, Constitutional Limits**

The challenging party bears the burden of proof with regard to challenging the constitutionality of an ordinance on zoning.

Administrative Law > Agency

HN15 [↓] **Decisions, Stare Decisis**

The doctrine of stare decisis demands respect in a society governed by the rule of law, given the status of a court's standards of constitutional review, in the judgment of the Supreme Court of New Hampshire, it is better to undergo the hardships that may result from correcting these tests and bringing them into conformity with each other than to suffer the errors to persist. Several factors inform the Court's judgment regarding whether to depart from precedent, including whether (1) the rule has proven to be intolerable simply by defying practical workability; (2) the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

HN16 [↓] **Judicial Review, Standards of Review**

The State of New Hampshire's tests for intermediate level scrutiny and rational basis review under the New Hampshire Constitution have remained substantially similar to one another. For both rational basis and intermediate scrutiny, the Supreme Court of New Hampshire has required that the government's objective merely be legitimate. For both rational basis and intermediate scrutiny, the Court has presumed that the challenged legislation was valid and places the burden of proving otherwise upon the challenger. Under both tests, the Court will not examine the factual basis relied upon by the legislature as justification for the statute. The Court's sole inquiry is whether the legislature could reasonably conceive to be true the facts on which the challenged legislative classifications are based.

Constitutional Law > Equal Protection > Judicial Review > Standards of Review

Evidence > Burdens of Proof > Allocation

HN17 [↕] **Judicial Review, Standards of Review**

To eliminate the confusion in the State of New Hampshire's intermediate level of review and to make the test more consistent with the federal test, the Supreme Court of New Hampshire holds that intermediate scrutiny under the New Hampshire Constitution requires that the challenged legislation be substantially related to an important governmental objective. The burden to demonstrate that the challenged legislation meets that test rests with the government. To meet that burden, the government may not rely upon justifications that are hypothesized or invented post hoc in response to litigation nor upon overbroad generalizations. Accordingly, the Court overrules *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980), to the extent that it does not employ that standard.

Counsel: Nixon Peabody LLP, of Manchester (David A. Vicinanza & a. on the brief, and Mr. Vicinanza orally), for the plaintiff.

Thomas I. Arnold, III, deputy city solicitor, of Manchester, on the brief and orally, for the defendant.

Judges: DALIANIS, J., DUGGAN, GALWAY and HICKS, JJ., concurred.

Opinion by: DALIANIS

Opinion

[*749] [**711] DALIANIS, J. The defendant, the City of Manchester (City), appeals the orders of the Superior Court (*Abramson*, J.) reversing the decision of the City's Zoning Board of Adjustment (ZBA) and remanding to the ZBA with instructions to grant a variance to the plaintiff, Community Resources for Justice, Inc. (CRJ). We reverse and remand for further proceedings.

[*750] I

The trial court recited the following facts: CRJ is an organization that operates residential transition centers or "halfway houses" under contracts with the Federal Bureau of Prisons. In the fall of 2004, CRJ purchased a building on Elm Street in Manchester, intending to use the building as [***2] a halfway house. The building is located in the central business district and currently houses both commercial and residential uses. The building has three floors; CRJ intended to renovate part

of the second floor and the entire third floor for the halfway house and leave the rest of the building undisturbed.

CRJ applied for a building permit to operate the halfway house. The City's building commissioner denied the permit application on the ground that CRJ's proposed use constituted a "correctional facility" as defined by the City's zoning ordinance. A "correctional facility" is not a permitted use in any of the city's zoning districts. CRJ appealed the building commissioner's decision to the ZBA and applied to the ZBA for a variance. The ZBA denied CRJ's appeal and its request for a variance. CRJ's rehearing requests were also denied.

CRJ appealed the ZBA's denials of its challenge to the building commissioner's decision and its variance request to the superior court. The trial court denied CRJ's appeal related to the building commissioner's decision. CRJ did not appeal that decision to this court. Accordingly, for the purposes of this appeal, CRJ's proposed halfway house constitutes [***3] a "correctional facility" within the meaning of the City's zoning ordinance.

As for the variance request, the trial court remanded the matter to the ZBA for further hearing and to make findings on unnecessary hardship. The court stated that it appeared that the ZBA may have [**712] applied a standard that was overly restrictive and inconsistent with our decision in *Simplex Technologies v. Town of Newington*, 145 N.H. 727, 766 A.2d 713 (2001).

The ZBA reviewed the matter at a non-public business meeting on February 2, 2006, and, finding that CRJ had failed to satisfy the *Simplex* requirements for unnecessary hardship, voted to deny CRJ's request for a variance. CRJ's request for a rehearing was denied.

On appeal to the superior court, CRJ asserted that the ZBA's decision was unreasonable because the ZBA misapplied *Simplex* upon remand and based its decision upon unsubstantiated fears. CRJ also argued that the zoning classification, which prohibits a "correctional facility" anywhere in the city, was unconstitutional.

Upon review of the certified record, the trial court found that "[t]o the extent that board members may have contemplated other more preferable uses for the property, [***4] rather than the reasonableness of just the proposed [*751] use, the ZBA may have, at least in part, applied the wrong standard." The court then examined each of the prongs of the *Simplex* unnecessary hardship test.

With respect to the first prong, the trial court ruled that the ZBA's determination was unreasonable and unlawful and that CRJ met its burden of showing that it meets the requirements under the first *Simplex* prong. The court also determined that the ZBA's findings with respect to the second and third prongs of the *Simplex* test were unreasonable, unlawful and unsupported by the evidence. The trial court therefore reversed the ZBA's decision and granted CRJ's request for a variance. Because it decided the case on other grounds, the trial court did not address or hold an evidentiary hearing upon CRJ's other arguments. In response to the City's motion for reconsideration, the court revised its decision by remanding the matter to the ZBA with instructions to grant CRJ a variance.

II

On appeal, the City argues that the trial court erred by: (1) improperly substituting its judgment for that of the ZBA; (2) finding that CRJ met the first prong of the *Simplex* unnecessary hardship test; and (3) finding that no evidence supported the ZBA's determination that CRJ failed to demonstrate unnecessary hardship.

HN1 We will uphold the trial court's decision on appeal unless the evidence does not support it or it is legally erroneous. *Bacon v. Town of Enfield*, 150 N.H. 468, 471, 840 A.2d 788 (2004). Our inquiry is not whether we would find as the trial court found, but rather whether the evidence before the court reasonably supports its findings. *Vigeant v. Town of Hudson*, 151 N.H. 747, 750, 867 A.2d 459 (2005).

For its part, **HN2** the trial court must treat all factual findings of the ZBA as *prima facie* lawful and reasonable. *RSA 677:6* (1996). "It may set aside a ZBA decision if it finds by the balance of probabilities, based on the evidence before it, that the ZBA's decision was unreasonable." *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580, 883 A.2d 1034 (2005) (quotation and brackets omitted).

HN3 To obtain a variance, an applicant must show that: (1) granting the variance will not be contrary to the public interest; (2) special conditions exist such that a literal enforcement of the provisions of the ordinance will result in unnecessary hardship; (3) granting the variance is consistent with the spirit of the ordinance; (4) by granting the variance substantial justice is done; and (5) ****713** granting ***752** the variance does

not diminish the value of surrounding properties.

Id.; see also *RSA 674:33, I(b)* (1996).

To establish "unnecessary hardship" when seeking a use variance, an applicant must demonstrate that: (1) a zoning restriction as applied to the applicant's property interferes with the applicant's "reasonable use of the property, considering the unique setting of the property in its environment"; (2) no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and (3) the variance would not injure the public or private rights of others. *Simplex*, 145 N.H. at 731-32.

"As our cases since *Simplex* have emphasized, **HN4** the first prong of the *Simplex* standard is the critical inquiry for determining whether unnecessary hardship has been established." *Harrington v. Town of Warner*, 152 N.H. 74, 80, 872 A.2d 990 (2005). *****7** To meet its burden of proof under this part of the *Simplex* test, the applicant must demonstrate, among other things, that the hardship is a result of the property's unique setting in its environment. *Id.* at 81. This requires that the zoning restriction burden the property "in a manner that is distinct from other similarly situated property." *Id.* While the property need not be the only such burdened property, "the burden cannot arise as a result of the zoning ordinance's equal burden on all property in the district." *Id.* In addition, the burden must arise from the property and not from the individual plight of the landowner. *Id.* Thus, the landowner must show that the hardship is a result of specific conditions of the property and not the area in general. *Id.* As we explained in *Rancourt v. City of Manchester*, 149 N.H. 51, 54, 816 A.2d 1011 (2003), "hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.'"

Based upon our review of the certified record, we conclude that it does not reasonably support the trial court's determination that CRJ met its burden with respect to the *****8** first prong of the *Simplex* test. The evidence does not reasonably support the trial court's conclusion that CRJ's property was burdened by the restriction in a manner that was distinct from similarly situated property. See *Harrington*, 152 N.H. at 81. Nor does the evidence reasonably support the trial court's conclusion that the hardship resulted from special conditions of the land, rather than the area in general. See *id.*; see also *Rancourt*, 149 N.H. at 54.

The evidence CRJ presented did not demonstrate that

its proposed site was unique, as compared to the surrounding lots. Garrison v. Town of Henniker, 154 N.H. 26, 907 A.2d 948, 953-54 (2006). While there was evidence that CRJ's [*753] property was located near public transportation and treatment facilities, as well as other city services that halfway house residents might need, there was no evidence that CRJ's property was unique in this respect. Presumably, all of the buildings in this location share these characteristics. These characteristics, alone, "do not distinguish [CRJ]'s proposed site from any other [site] in the [***9] area." Id. at 907 A.2d at 953.

Moreover, contrary to the trial court's finding, there was no evidence in the certified record that demonstrated "how the size and layout of this specific building made the property particularly appropriate for the proposed use." While the certified record contained a map of the building's layout, there is no evidence that this layout made this building uniquely suited as a halfway house. See Rancourt, 149 [**714] N.H. at 54. By contrast, in Rancourt, where the proposed use was the stabling of two horses, there was evidence that the lot at issue was "uniquely configured" in that the rear portion of it was considerably larger than the front and that there was a thick wooded buffer around the proposed paddock area. Id.

Absent evidence that CRJ's proposed use of the property was reasonable, considering the property's unique setting in its environment, we hold that the trial court erred when it concluded that CRJ met its burden of proof with respect to the first prong of the Simplex test. In light of this conclusion, we need not address whether the evidence reasonably supported the trial court's determinations [***10] with respect to the other prongs of the test. HN5 [↑] If any one of the ZBA's reasons supported its denial of a variance, CRJ's appeal of that decision fails. See Jensen's, Inc. v. City of Dover, 130 N.H. 761, 765, 547 A.2d 277 (1988). Accordingly, we reverse the trial court's reversal of the decision of the ZBA to deny CRJ a variance.

III

CRJ argues that even if the trial court erred when it ruled that the ZBA's denial of the variance was unreasonable, we may affirm on other grounds. CRJ contends that the City's ban on correctional facilities is: (1) ultra vires because it exceeds the authority granted the City by the state enabling act, see RSA 674:16:23 (1996 & Supp. 2006); and (2) unconstitutional because it either deprived CRJ of its state right to substantive

due process or violated its state and federal rights to equal protection. While the trial court did not address these arguments, we may do so in the first instance to the extent that they involve questions of law. See Shannon v. Foster, 115 N.H. 405, 407, 342 A.2d 632 (1975).

[*754] A

CRJ first argues that the City's ban on correctional facilities is ultra vires [***11] because it exceeds the powers delegated to it by the zoning enabling legislation. See Weare Land Use Assoc. v. Town of Weare, 153 N.H. 510, 511, 899 A.2d 255 (2006). CRJ asserts, "By specifically targeting, and then categorically banning, this essential community service from within the City's borders, this part of the Ordinance contravenes the general welfare provision of [RSA] 674:16." See Britton v. Town of Chester, 134 N.H. 434, 441, 595 A.2d 492 (1991).

HN6 [↑] This court is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole. DeLucca v. DeLucca, 152 N.H. 100, 103, 871 A.2d 72 (2005). In interpreting a statute, we first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Id.

The zoning enabling act, RSA 674:16, I (Supp. 2006) provides:

HN7 [↑] For the purpose of promoting the health, safety, or the general welfare of the community, the local legislative body of any city, town, or county in which there are located unincorporated towns or unorganized [***12] places is authorized to adopt or amend a zoning ordinance under the ordinance enactment procedures of RSA 675:2-5.

This act "HN8 [↑] grants municipalities broad authority to pass zoning ordinances for the health, safety, morals, and general welfare of the community." Asselin v. Town of Conway, 137 N.H. 368, 371, 628 A.2d 247 (1993). "Because a municipality's power to zone property to promote the health, safety and general welfare of the community is delegated to it by the State, the municipality [**715] must exercise this power in conformance with the enabling legislation." Marchand v. Town of Hudson, 147 N.H. 380, 384, 788 A.2d 250 (2001). "[W]here zoning is exercised for considerations or purposes not embodied in an enabling act, it will be held invalid . . . as an ultra vires enactment beyond the

scope of the zoning authority delegated." 1 A.H. Rathkopf & D.A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* § 1:11, at 1-35 (2005).

In *Britton*, 134 N.H. at 440, we held that "[HN9] w]hen an ordinance will have an impact beyond the boundaries of the municipality, the welfare of the entire affected region must [***13] be considered in determining the ordinance's validity." We interpreted "the general welfare provision of the zoning enabling statute to include the welfare of the 'community' . . . in which a municipality is located and of which it forms a part." *Britton*, 134 N.H. at 441 (citation omitted). As we explained: "Municipalities are not [*755] isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries." *Id.*

In *Britton*, the plaintiffs, low- and moderate-income people who had been unable to find affordable housing in the town of Chester, challenged the validity of a zoning ordinance that "provided for a single-family home on a two- acre lot or a duplex on a three-acre lot, and . . . excluded multi-family housing from all five zoning districts in the town." *Id.* at 437-38. After the plaintiffs petitioned for declaratory and injunctive relief, the town amended its ordinance to permit "multi-family housing as part of a 'planned residential development'." [***14] . . . , a form of multi-family housing required to include a variety of housing types, such as single-family homes, duplexes, and multi-family structures." *Id.* at 438. The master found that the ordinance, even as amended, "placed an unreasonable barrier to the development of affordable housing for low- and moderate-income families." *Id.*

We held that the ordinance was ultra vires because it failed to provide for the lawful needs of the community, broadly defined, and therefore conflicted with the enabling act. *Id.* at 441. We based our holding upon the master's finding that "'there are no substantial and compelling reasons that would warrant the Town of Chester, through its land use ordinances, from fulfilling its obligation to provide low[-] and moderate[-]income families within the community and a proportionate share of [the] same within its region from a realistic opportunity to obtain affordable housing.'" *Id.*

CRJ asks that we extend *Britton* to the facts of this case. The City counters that "[p]rivately run correctional institutions, including halfway houses, as separate from

publicly administered correctional institutions, including [***15] halfway houses[,] do not implicate the general welfare within the meaning of the zoning ordinance." The City concedes that its ban on correctional institutions does not apply to State-run institutions and asserts that such institutions "adequately provide for the general welfare." Neither party addresses whether the City's ban applies to correctional institutions run by the federal government. See 4 A.H. Rathkopf & D.A. Rathkopf, *Rathkopf's The Law of Zoning and Planning* § 76.23, at 76-79 (2005) (land owned or leased by the United States or a federal agency for purposes authorized by Congress "is immune from and supersedes state and local laws in contravention thereof"). [**716] Both parties appear to assume that the City's ban applies to correctional institutions run by private parties under contract with the federal government. Cf. *Northern N.H. Mental Health Housing, Inc. v. Town of Conway*, 121 N.H. 811, 812, 814, 435 A.2d 136 [*756] (1981) (holding private corporation that sought to establish residence for mentally ill individuals under contract with state was not bound by local zoning ordinances, absent statutory authority to contrary). Accordingly, we proceed [***16] under the same assumption.

We disagree with the City that correctional institutions run by private entities under contract with the Federal Bureau of Prisons do not implicate the general welfare within the meaning of the enabling legislation. To the contrary, as a federal judge noted in her letter to the ZBA regarding CRJ's application for a variance: "It is difficult to imagine a job more important in the criminal justice system than working to ease an offender's transition back into society. This is important, of course, for the offender. More significantly, it is important for the community to which these individuals will inevitably return." Moreover, like the ordinance at issue in *Britton*, the ordinance in this case has an impact beyond the City's borders. As CRJ observes:

Were this Court to endorse the Ordinance and its application to the proposed use, the communities surrounding Manchester will be free to[] follow Manchester's lead and ban halfway houses. . . . The effects of such a result would not end at the New Hampshire border. If the New Hampshire communities were to act as Manchester has, it could effectively push all new halfway houses out of New Hampshire. [***17]

We limit our holding on this issue to this question of law and remand for further proceedings. Because this

appeal originated as an appeal of the ZBA's denial of a variance to CRJ and the trial court did not address CRJ's alternative arguments or hold an evidentiary hearing on them, neither party has yet had an opportunity to present evidence related to CRJ's argument that the ordinance is ultra vires.

B

CRJ next asserts that the ban on correctional facilities violates its substantive due process rights under the New Hampshire Constitution. HN10 In determining whether an ordinance is a proper exercise of the City's police power, and thus able to withstand a substantive due process challenge under the State Constitution, we apply the rational basis test. Boulders at Strafford v. Town of Strafford, 153 N.H. 633, 636, 903 A.2d 1021 (2006). In Boulders, we clarified that this test "requires that legislation be only rationally related to a legitimate governmental interest" and that it "contains no inquiry into whether legislation unduly restricts individual rights." Id. at 641. Under our rational basis test, we presume that the challenged ordinance is valid [*757] and [***18] require the challenger to prove otherwise. See Verizon New England v. City of Rochester, 151 N.H. 263, 270, 855 A.2d 497 (2004).

In an as-applied challenge, such as CRJ's, we examine "the relationship of the particular ordinance to particular property under particular conditions existing at the time of litigation." Dow v. Town of Effingham, 148 N.H. 121, 124, 803 A.2d 1059 (2002). Thus, we analyze whether the ordinance is rationally related to a legitimate governmental interest under the facts of this case.

The City articulates several legitimate governmental interests that the ordinance conceivably could serve such as: [*717] "[c]oncerns that the prisoners to be housed at a residential transition facility would either pose some threat to the surrounding community, engage in recidivism, exacerbate the City's perceived burden in accommodating a disproportionate share of social services or affect surrounding property values." These interests need not be the City's actual interests in adopting the ordinance nor need they be based upon facts. In rational basis review, we will not independently examine the factual basis for the ordinance. See Appeal of Salem Regional Med. Ctr., 134 N.H. 207, 215, 590 A.2d 602 (1991). [***19] Rather, we will inquire only as to "whether the legislature could reasonably conceive to be true the facts" upon which it is based. Winnisquam Reg. Sch. Dist. v. Levine, 152 N.H. 537, 539-40, 880 A.2d 369 (2005) (quotation omitted). Here, we conclude

that the City could reasonably conceive these facts to be true, and thus that the ordinance serves or could conceivably serve legitimate governmental interests.

We next examine whether the ordinance, as applied to CRJ's property, bears a rational relationship to these interests. As CRJ proposes to construct a halfway house for federal prisoners still serving out their sentences, we conclude that applying this ordinance to CRJ's property is rationally related to the conceivable purposes for that ordinance. Accordingly, we hold that the ordinance does not violate CRJ's state constitutional right to substantive due process.

C

Finally, CRJ contends that the City's ban of correctional facilities, as applied to CRJ, violates its federal and state constitutional rights to equal protection. See U.S. CONST. amend. XIV; N.H. CONST. pt. I, art. 12. Although in its initial brief, CRJ appeared to argue that the ordinance was [***20] unconstitutional on its face, in its reply brief, CRJ clarified that it "challenged the ordinance 'as applied' to it rather than as facially invalid." As CRJ has apparently abandoned any argument it may have made that [*758] the ordinance was facially unconstitutional, we confine our analysis to whether the ordinance is unconstitutional as applied.

We first address CRJ's claim under the State Constitution, State v. Ball, 124 N.H. 226, 231, 471 A.2d 347 (1983), and cite federal opinions for guidance only, id. at 232-33. HN11 In considering an equal protection challenge under our State Constitution, we must first determine the [correct] standard of review by examining the purpose and scope of the State-created classification and the individual rights affected." In re Sandra H., 150 N.H. 634, 637, 846 A.2d 513 (2004) (quotation omitted). Classifications based upon suspect classes or affecting a fundamental right are subject to strict scrutiny. Id. Classifications involving "important substantive rights" are subject to intermediate scrutiny. Id. at 638 (quotation omitted). "Finally, absent some infringement of a fundamental [***21] right, an important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality." Id.

HN12 As the right to use and enjoy property is an important substantive right, we use our intermediate scrutiny test to review equal protection challenges to zoning ordinances that infringe upon this right. LeClair v. LeClair, 137 N.H. 213, 222, 624 A.2d 1350 (1993). We first adopted an intermediate scrutiny approach to

154 N.H. 748, *758; 917 A.2d 707, **717; 2007 N.H. LEXIS 11, ***21

constitutional review in *Carson v. Maurer*, 120 N.H. 925, 424 A.2d 825 (1980). *Gonya v. Comm'r, N.H. Ins. Dep't*, 153 N.H. 521, 535, 899 A.2d 278 (2006) (Broderick, C.J., concurring specially). Under **[**718]** this test, the challenged legislation must be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Carson*, 120 N.H. at 932 (quotation omitted).

In his concurrence in *Gonya*, Chief Justice Broderick observed that our test for intermediate-level scrutiny may be overly deferential to challenged legislation by requiring that it be substantially related only **[***22]** to a legitimate legislative objective, rather than an important one. See *Gonya*, 153 N.H. at 536, 538-39 (Broderick, C.J., concurring specially); see also *City of Dover v. Imperial Cas. & Indemn. Co.*, 133 N.H. 109, 122-23, 575 A.2d 1280 (1990) (Souter, J., dissenting). He also observed that although our test for intermediate-level scrutiny was intended to be less deferential to legislation than our test for rational basis, there was significant overlap between the two tests. See *Gonya*, 153 N.H. at 538 (Broderick, C.J., concurring specially). For instance, until we clarified our rational basis test in *Boulders*, both our rational basis and intermediate scrutiny tests "employ[ed] the terms 'reasonable,' 'arbitrary,' and 'unduly restrictive.'" *Boulders*, 153 N.H. at 640. Chief Justice Broderick encouraged future litigants to ask the court to address:

[*759] (1) whether the terms "reasonable" and "arbitrary" should continue to be part of our intermediate test; and (2) whether the governmental objective required by the test should be merely "legitimate" as in rational basis review, or whether we should **[***23]** require an "important" objective due to the "fair and substantial" prong of the intermediate scrutiny test.

Gonya, 153 N.H. at 538 (Broderick, C.J., concurring specially) (citations omitted). He explained:

A new articulation of this test is necessary to bring it into conformity with our other levels of constitutional review. An intermediate scrutiny standard should require more scrutiny than the rational basis test -- namely, that legislation merely be rationally related to a legitimate governmental interest -- but a less exacting examination than our strict scrutiny test -- namely, that legislation be necessary to achieve a compelling governmental interest and narrowly tailored to meet that end. As currently articulated, it is not clear whether our intermediate scrutiny test

does so.

Id. at 538-39 (Broderick, C.J., concurring specially).

To eliminate confusion in our tests for constitutional review, we held in *Boulders* that **HN13**^(↑) our rational basis test "requires that legislation be only rationally related to a legitimate governmental interest" and that it "contains no inquiry into whether legislation unduly restricts individual **[***24]** rights, and that a least-restrictive-means analysis is not part of this test." *Boulders*, 153 N.H. at 641. Although "[w]e recognize[d] that our holding . . . affect[ed] the other standards of constitutional review," we did not "make any changes to our intermediate and strict scrutiny tests," but we "encourage[d] future litigants to consider these issues . . . to aid our continued examination of these standards of constitutional review." *Id.*

CRJ has asked us to clarify our intermediate scrutiny test. It asserts, "Although this Court should find the Ordinance unconstitutional as applied to CRJ under any articulation of middle tier scrutiny, there appears to be some confusion as to which party bears the burden of proof under middle tier review under the New Hampshire Constitution." CRJ observes that we have previously held that **HN14**^(↑) the challenging party bears the burden of proof, see **[**719]** *Buskey v. Town of Hanover*, 133 N.H. 318, 322, 577 A.2d 406 (1990), while the United States Supreme Court has ruled that the government has the burden of proof for middle tier review under the Federal Constitution, see *United States v. Virginia*, 518 U.S. 515, 533, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996). **[***25]** Thus, CRJ states: "To the extent this Court's articulation of [the middle tier] standard is **[*760]** inconsistent or unclear, it may be prudent to clarify in these proceedings that the burden falls upon the [City] under middle tier scrutiny."

In light of this request, we now take the opportunity to clarify our middle tier scrutiny test. While we recognize that **HN15**^(↑) the doctrine of stare decisis "demands respect in a society governed by the rule of law," *Brannigan v. Usitalo*, 134 N.H. 50, 53, 587 A.2d 1232 (1991) (quotation omitted), "given the status of our standards of constitutional review, in our judgment it is better to undergo the hardships that may result from correcting these tests and bringing them into conformity with each other than to suffer the errors to persist," *Boulders*, 153 N.H. at 641.

Several factors inform our judgment regarding whether to depart from precedent, including whether: (1) the rule

has proven to be intolerable simply by defying practical workability; (2) the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) related principles of law have so far developed as to have [***26] left the old rule no more than a remnant of abandoned doctrine; and (4) facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. *Jacobs v. Director, N.H. Div. of Motor Vehicles*, 149 N.H. 502, 505, 823 A.2d 752 (2003); *Planned Parenthood of Southeastern PA. v. Casey*, 505 U.S. 833, 854-55, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). As the discussion below demonstrates, we believe that we must abandon the intermediate scrutiny test we developed in *Carson* because related principles of law have so far developed as to have left this test "no more than a remnant of abandoned doctrine." *Jacobs*, 149 N.H. at 505 (quotation omitted).

Although we apply an intermediate level of scrutiny to a broader category of rights than do the federal courts, we have intended our analysis under this level of scrutiny to be the same as that applied by the federal courts. *In re Sandra H.*, 150 N.H. at 638. While the federal test for intermediate scrutiny has evolved, ours has remained the same. As a result, the federal test for intermediate scrutiny and our test now differ in [***27] a number of respects.

We derived our test for intermediate scrutiny, in part, from *Reed v. Reed*, 404 U.S. 71, 76-77, 92 S. Ct. 251, 30 L. Ed. 2d 225, (1971), in which the United States Supreme Court applied it to invalidate classifications based upon gender. See *Carson*, 120 N.H. at 932. The test itself was first articulated in *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415, 40 S. Ct. 560, 64 L. Ed. 989 (1920). Under this test, "[a] classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" *Reed*, 404 U.S. at 76; *Carson*, 120 N.H. at 932. In *Reed*, the Court referred to this test as part of rational basis review. *Reed*, 404 U.S. at 76. [*761] The Court used it, however, to give heightened scrutiny to gender-based classifications for the first time. N. Redlich & a., *Understanding [**720] Constitutional Law* § 10.01, at 404 (3d ed. 2005).

In *Reed*, the Court "struck down a statute that preferred males to serve as estate administrators [***28] over equally qualified females." *Id.* Rather than merely accept the state's generalized assumptions that justified this

preference, the Court "required the state to conduct hearings to ascertain the qualifications of men and women on an individualized basis." *Id.* In this way, the Court scrutinized the classifications under a test that was different from rational basis but not as exacting as strict scrutiny.

Since deciding *Reed*, the Court has explicitly devised a heightened scrutiny test by which to review gender-based classifications. *Id.* at 405. This test, first articulated in *Craig v. Boren*, 429 U.S. 190, 197, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), requires that such classifications serve important governmental objectives and be substantially related to achieving those objectives. This new standard of review is the standard the Court now identifies as intermediate scrutiny. *Clark v. Jeter*, 486 U.S. 456, 461, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988). Under this standard of review, the defender of the classification has the burden of demonstrating that its proffered justification is "exceedingly persuasive." *Virginia*, 518 U.S. at 533. To meet this [***29] "demanding" burden, the government must demonstrate that its justification is "genuine, not hypothesized or invented *post hoc* in response to litigation." *Id.* Further, the government "must not rely on overbroad generalizations." *Id.* Federal courts apply this test for intermediate scrutiny to "discriminatory classifications based on sex or illegitimacy." *Clark*, 486 U.S. at 461. Following its decision in *Craig*, the United States Supreme Court has questioned whether the *Royster* standard of review remains good law. See *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294, 102 S. Ct. 1070, 71 L. Ed. 2d 152 (1982).

As currently articulated by the United States Supreme Court, the federal tests for intermediate scrutiny and rational basis review differ in a number of respects. For instance, under intermediate scrutiny, the burden of justifying the classification rests with the government, see *Virginia*, 518 U.S. at 533, while under rational basis review, the defender of the classification "has no obligation to produce evidence to sustain the . . . classification"; rather, "the burden is on the one attacking the [legislation] [***30] to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Heller v. Doe*, 509 U.S. 312, 320-21, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (quotation and brackets omitted). Additionally, under intermediate scrutiny, the governmental interest must be "important," while rational basis requires that the interest be "legitimate." Compare *Virginia*, 518 U.S. at 533, with *Heller*, 509 U.S. at 320. Moreover, the fit between the means employed and the

154 N.H. 748, *761; 917 A.2d 707, **720; 2007 N.H. LEXIS 11, ***30

ends served is different; under [*762] intermediate scrutiny, the means must be "substantially related" to the governmental interest, while under rational basis, they need only be "rationally related." *Compare Virginia, 518 U.S. at 533, with Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985).* Further, under intermediate scrutiny, "the availability of . . . alternatives to a . . . classification is often highly probative of the validity of the classification," while under rational basis review, "[t]he fact that other means are better suited to the achievement of governmental ends [***31] therefore is of no moment." *Tuan Anh Nguyen v. INS, 533 U.S. 53, 77-78, 121 S. Ct. 2053, [**721] 150 L. Ed. 2d 115 (2001)* (O'Connor, J., dissenting).

By contrast, HN16 [↑] our tests for intermediate level scrutiny and rational basis review under our State Constitution have remained substantially similar to one another. For both rational basis and intermediate scrutiny, we have required that the government's objective merely be "legitimate." *Compare Verizon New England, 151 N.H. at 270* (rational basis), *with Carson, 120 N.H. at 933* (intermediate scrutiny). For both rational basis and intermediate scrutiny, we have presumed that the challenged legislation was valid and placed the burden of proving otherwise upon the challenger. *Compare Verizon New England, 151 N.H. at 270* (rational basis), *with Quirk v. Town of New Boston, 140 N.H. 124, 132, 663 A.2d 1328 (1995)* (burden of proof on challenger under intermediate scrutiny), *and Jensen's, Inc., 130 N.H. at 768* (presume legislation valid under intermediate scrutiny). Under both tests, "we will not examine the factual basis relied upon by the legislature [***32] as justification for the statute. . . . Our sole inquiry is whether the legislature could reasonably conceive to be true the facts on which the challenged legislative classifications are based." *Winnisquam Reg. Sch. Dist. v. Levine, 152 N.H. at 539-40* (quotation omitted).

HN17 [↑] To eliminate the confusion in our intermediate level of review and to make our test more consistent with the federal test, we now hold that intermediate scrutiny under the State Constitution requires that the challenged legislation be substantially related to an important governmental objective. *Virginia, 518 U.S. at 533.* The burden to demonstrate that the challenged legislation meets this test rests with the government (in this case, the City). *Id.* To meet this burden, the government may not rely upon justifications that are hypothesized or "invented *post hoc* in response to litigation," nor upon "overbroad generalizations." *Id.*

Accordingly, we overrule *Carson v. Maurer, 120 N.H. 925, 424 A.2d 825 (1980)*, to the extent that it did not employ this standard. Having [*763] articulated this new standard, we remand for further proceedings consistent with this [***33] opinion.

Reversed and remanded.

DUGGAN, GALWAY and HICKS, JJ., concurred.

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TOWN OF SUNAPEE
Water and Sewer Commission
P.O. Box 347, Sunapee, NH 03782-0347
(603) 763-2115

6 March 2019

George & Susan Neuwirt
P.O. Box 663
Sunapee, NH 03782

Dear George and Susan:

I have spoken with NH DES Representatives about the Powerloo for dog waste that you would like to install on your property.

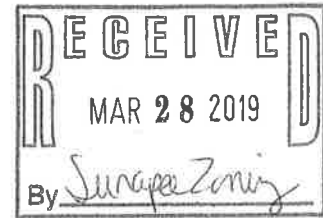
There is no problem with the flushing of pet waste into the Sunapee Sewer System that we can foresee and as such we think that this is a very good option for pet waste disposal that effectively addresses environmental impacts to water quality that can be caused by these wastes.

Sincerely

David Bailey
Superintendent

Zoning

From: gmnconstruction@comcast.net
Sent: Thursday, March 28, 2019 10:02 AM
To: Zoning; Barbara Vaughn; georgem.neuwirtconstruction@comcast.net
Subject: Georges Mills property



ZBA
23 Edgemont RD
Sunapee NH

Hi Nicole

I would like to ask the ZBA to move the case pending at our house in Georges Mills from April 4 to the April 18th meeting so that we can have a full board.

Respectfully submitted

George and Sue Neuwirt

George M. Neuwirt
Owner
George M. Neuwirt Construction, LLC
PO Box 663
Sunapee, NH 03782
603-763-6005
www.georgeneuwirtconstruction.com



George M. Neuwirt
Owner
Trusted Rentals, LLC
PO Box 663
Sunapee, NH 03782
603-763-1319
www.trustedrentalsnh.com



From: georgem.neuwirtconstruction@comcast.net [mailto:georgem.neuwirtconstruction@comcast.net]

Sent: Friday, March 08, 2019 2:52 PM

To: Heisler, Cindy

Subject: Pet Sitting

Hi Cindy,

Thank you so much for speaking with me on the phone today. I just would like to verify in writing that for me to pet sit dogs in my home in NH that I do not need a license or inspection from the state of NH. The only way I would need this is if I was transferring (selling) dogs to the public. This is true regardless of the number of dogs I would be sitting in my home.

Also, the phrasing of five or more dogs needing a group license refers to the normal town licensing of a pet owner's dog. The group license is a discounted rate from the town for owning five or more dogs. This also is nothing that would apply to me as a dog sitter in my home.

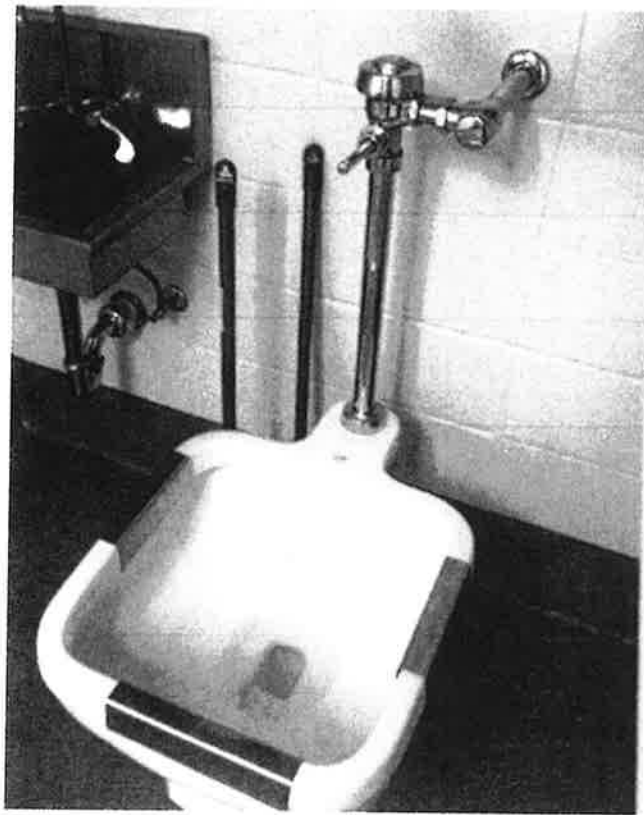
Thank you helping me to understand this issue.

Sincerely,

Susan Neuwirt
Sunapee, Nh



Materials
received at
the 3/7 hearing



Zoning

Additional
materials
for Case
19-02

From: georgem.neuwirtconstruction@comcast.net
Sent: Friday, March 8, 2019 3:26 PM
To: Zoning
Cc: gmnconstruction@comcast.net
Subject: FW: Pet Sitting

Hi Nicole,

I had a nice conversation with the state today to help clarify some of last night's issues. Could you please forward this to the board members?

Thanks so much for your help,
Susan Neuwirt

From: Heisler, Cindy <Cindy.Heisler@agr.nh.gov>
Sent: Friday, March 8, 2019 3:20 PM
To: 'georgem.neuwirtconstruction@comcast.net' <georgem.neuwirtconstruction@comcast.net>
Subject: RE: Pet Sitting

Hi Susan,

There is no requirement at the state level to be licensed or inspected to have a doggy daycare, boarding kennel or to do pet sitting. None of these activities transfers live animals to the public, they are caring for dogs belonging to other people.

The license requirement under RSA 437 is for animal shelters, pet vendors or commercial kennels – all businesses that are transferring live animals customarily used as household pets to the public with or without a fee. The definitions of each can be found under RSA 437:1 Definitions; at the following link:

<http://www.gencourt.state.nh.us/rsa/html/XL/437/437-mrg.htm>

A group license is for an owner or keeper of 5 or more dogs who needs to annual register them with the

town. <http://www.gencourt.state.nh.us/rsa/html/XLV/466/466-6.htm>

<http://www.gencourt.state.nh.us/rsa/html/XLV/466/466-4.htm>

Thank you,

Cindy
Cynthia M. Heisler
NH Dept. of Agriculture, Markets & Food
Division of Animal Industry
PO Box 2042
25 Capitol St., 2nd Fl.
Concord, NH 03302-2042
603-271-2404
Fax 603-271-1109

800-813-5280

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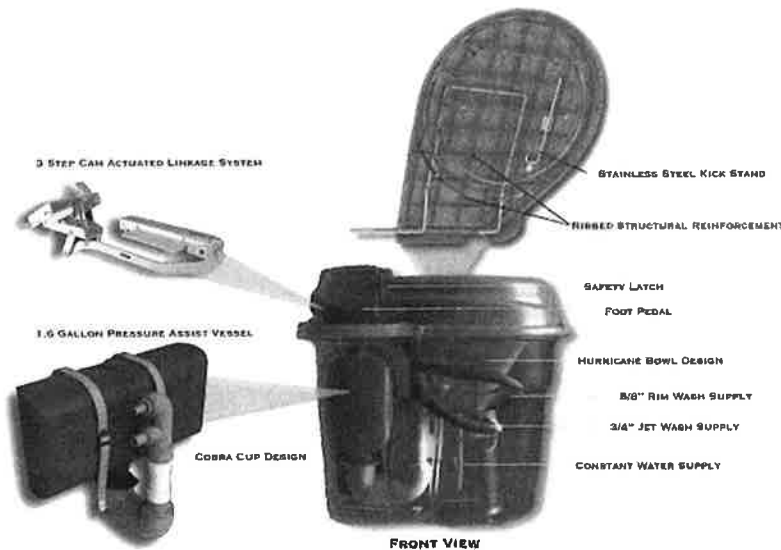
Request a FREE
Info Kit and
BONUS \$100
Rebate Certificate



Request a Kit

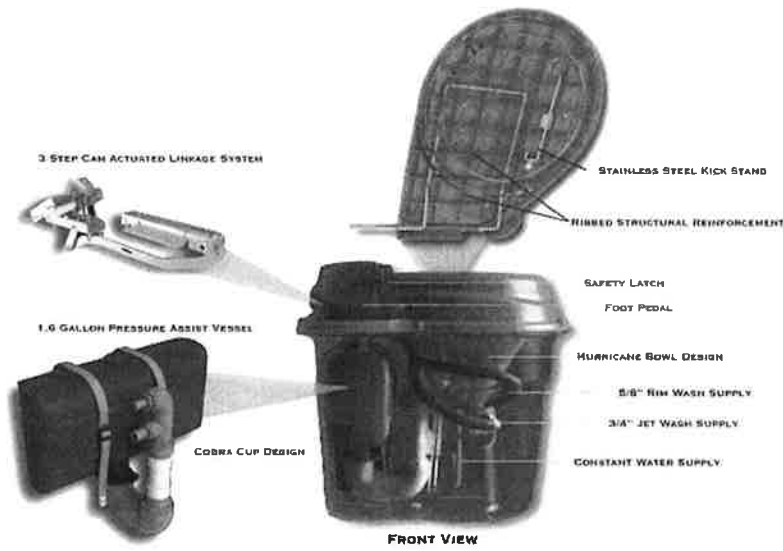


Featured on Animal Planet's
"Your Pet Wants This Too!"
Aired on November 27, 2010



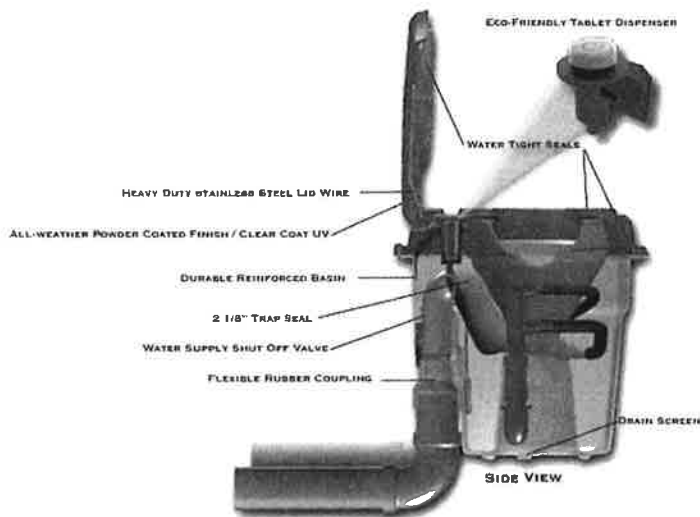
Home Environment About Us
Specs Easy Order Blog
Contact

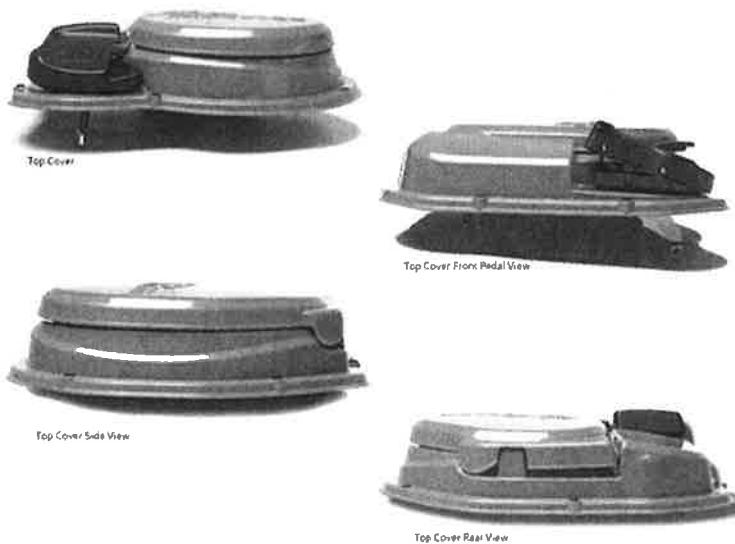
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QUALITY BUILT FROM THE INSIDE OUT

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- › STAINLESS STEEL LINKAGE
- › DURABLE POWDER COATED FINISH





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- ▶ ERGONOMIC FOOT PEDAL DESIGNED FOR HANDS-FREE OPERATION.
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- ▶ SELF-CLOSING LID MECHANISM FOR SAFETY.
- ▶ CONSTRUCTED OF ADVANCED MATERIALS TO WITHSTAND ANY CLIMATE.
- ▶ POWERED BY A DUAL ACTION JET WASH THROUGH A 'COBRA CUP' DESIGN. [A PRESSURE ASSIST VESSEL DISCHARGES WATER AT THE BOTTOM
- ▶ OF THE BOWL AND PUSHES THE WASTE IMMEDIATELY INTO THE DRAIN, FOLLOWED BY A JET RIM WASH AT THE TOP OF THE BOWL THAT
- ▶ CLEANS AND PROVIDES SIPHONIC ACTION TO COMPLETELY PROPEL WASTE INTO THE DRAIN].
- ▶ 1.6 GALLON OR 6L FLUSH (OR LESS) WATER USAGE.
- ▶ MULTIPLE BACK FLOW PREVENTION DEVICES PREVENT CONTAMINATION OF POTABLE WATER SUPPLY.
 - ▶ ANTI-SIPHON W/CHECK BALL VALVE FOR BACK-FLOW PREVENTION WITHIN THE PRESSURE ASSIST UNIT
 - ▶ CHECK VALVE ON ENGINEERED COBRA CUP FOR ADDITIONAL BACK-FLOW PREVENTION
- ▶ TRAP SEAL DESIGNED TO PREVENT ESCAPE OF SEWER GASES.
- ▶ BUILT-IN TABLET RESERVOIR FOR DISPENSING ECO-FRIENDLY DEODORIZING TABLETS.
- ▶ OPTIONAL FREEZE PROTECTION FOR COLDER CLIMATES EMPLOYING SELF-REGULATING HEATING CABLE TECHNOLOGY.
- ▶ OPTIONAL POWERLOO ACCESSORY COVERS AND DEODORIZING TABLETS.



Published on *petMD* (<https://www.petmd.com>)

The Scoop on Poop: Facts on How to Dispose of Dog Poop



by Bryant, Carol

Subscribe Now!

Keep your pets healthy, happy & safe with the latest news from petMD.

Every dog poops. And every day, pet parents go through the task of cleaning up and disposing of feces. But do you know how to dispose of dog poop properly? Whether you scoop it with a shovel or pick it up with a poop bag, there are a few things that pet parents need to know about the daily ritual.

Let's separate the fact from the fiction about disposing of pet poop.

Fact

Flushing dog poop down the toilet – without a bag, only the waste – is perhaps the best disposal method, says the U.S. Environmental Protection Agency and the National Resources Defense Council. Leaving pet waste on the ground increases public health risks by allowing harmful bacteria and nutrients to wash into storm drains, and eventually into local waterbodies.

But cat feces should never be flushed, as it may contain *Toxoplasma gondii*, a parasite that can infect people and animals. Municipal water treatment systems do not always kill this parasite.

Fiction

Leaving dog poop behind is good for the soil. Reality: In order for feces from a carnivorous animal to be used as an effective fertilizer, it has to be fully composted with other materials such as egg shells and grass clippings and allowed to break down over time.

Fact

America's 78.2 million dogs collectively deposit 10 million tons of waste per year, according to waste clean-up service, Doody Calls. That's enough to fill some 268,000 tractor trailers.

Fiction

Subscribe Now!

Keep your pets healthy, happy & safe with the latest news from petMD.

Dog waste cannot harm your health. Reality: Dog feces can carry a host of disease and worms -- including heartworms, whipworms, hookworms, *roundworms*, tapeworms, parvovirus, giardia, salmonella, and even E. coli. This is why it's imperative to clean it up after Fido does his duty.

Fact

If not flushing (again only bagless dog poop, never cat waste), it's best to use a biodegradable bag and place in the garbage.

Fiction

Bagged poop can be flushed. Reality: It can clog home plumbing and stress sewer systems.

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Source URL: <https://www.petmd.com/dog/care/scoop-poop-facts-and-fiction-about-disposing-it>

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Wikipedia

Boarding kennels

This is a place where dogs or cats are housed temporarily for a fee, an alternative to using a pet sitter. Although many people worry about the stress placed on the animal by being put in an unfamiliar and most likely crowded environment, the majority of boarding kennels work to reduce stress.^[] Many kennels offer one-on-one "play times" in order to get the animal out of the kennel environment. Familiar objects, such as blankets and toys from home, are also permitted at many kennels. Similarly, many kennels offer grooming and training services in addition to boarding, with the idea being that the kennel can be the owner's "one-stop shop" for all three services.^[*citation needed*]



A dog sits in front of a typical kennel panel

3/5/19

To whom it may concern,

My name is Kinam Johnson
and I live at , Prospect Hill Rd,
George Mills, NH.

My husband and I strongly support
Susan Neulist's business of
caring for dogs in her home.

It's convenient to have in
our neighborhood.

Knowing her character as a
caring, sensitive and responsible
person that loves dogs, I'm sure
that she'll never leave them
outside unattended or to cause
disturbances.

Sincerely

David & Kinam Johnson.

2/19/19

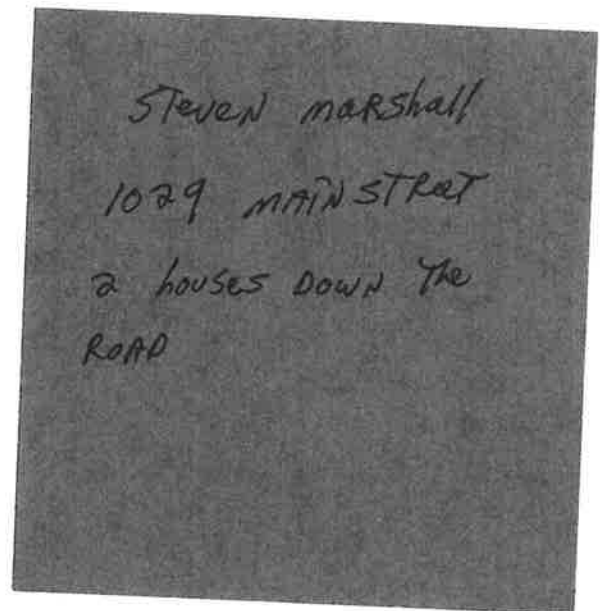
Dear Zoning Officials,

We live on Main Street in Georges Mills and would like to voice our support of Susan Neuwirt pet sitting dogs at her Georges Mills Property. We do not have an issue with this happening.

Respectfully,



Steven I & Karen Marshall



STEVEN MARSHALL
1029 MAIN STREET
2 HOUSES DOWN THE
ROAD

Dear Neighbor,

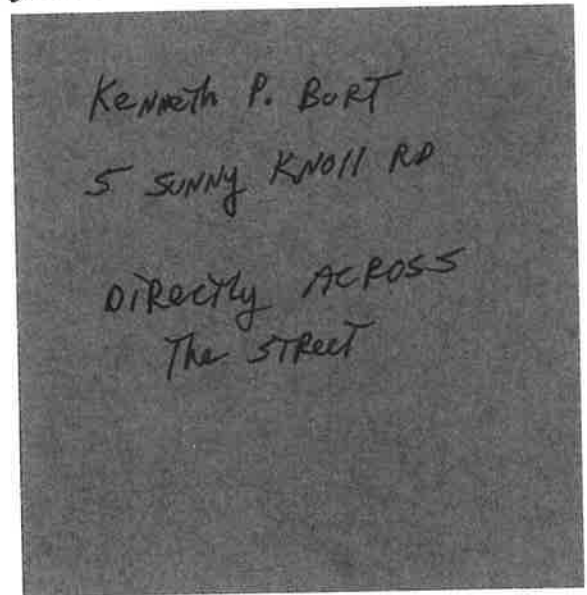
My name is Susan Neuwirt and I live at 1002 Main Street in Georges Mills, NH. I am requesting a variance from the Town of Sunapee to allow me to pet sit dogs within my home. The dogs will be inside my home the majority of the time, occasionally going outside in my fenced in yard. At no time will they be left outside unattended to bark. I will be at home with them all day. There will be no changes made to the property. I would like to ask for your support in this endeavor. If you have no objections, I would greatly appreciate it if you would write a brief letter of support and return in the enclosed envelope. If you do object, I appreciate your time.

Sincerely,



Susan Neuwirt

OK Kenneth A. Burt



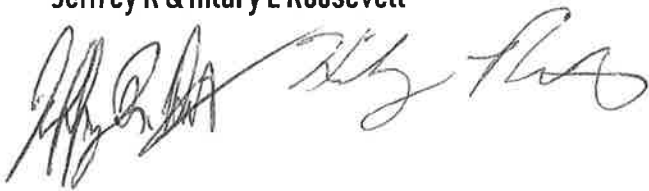
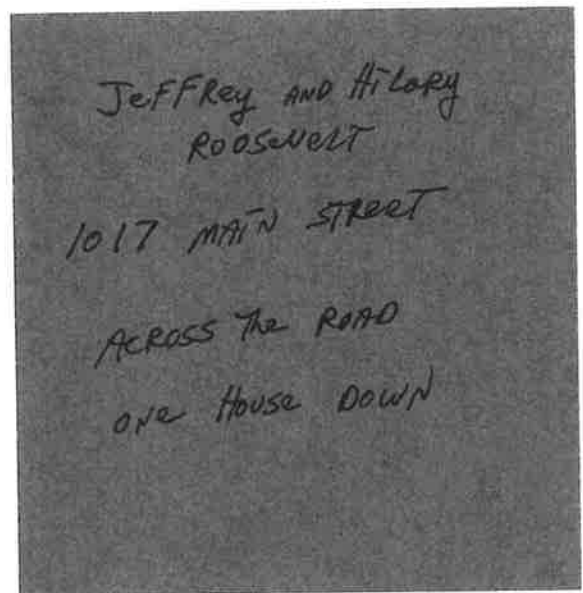
Kenneth P. Burt
5 Sunny Knoll Rd
Directly Across
The Street

Dear Sirs,

We reside in Georges Mills one house down from the Neuwirts on the opposite side of the road. We are writing this letter in support of allowing the variance for pet sitting in their home. We feel that this new venture would have little to no impact compared to the businesses which are already located in this neighborhood.

With Regards,

Jeffrey R & Hilary L Roosevelt

Handwritten signatures of Jeffrey R. and Hilary L. Roosevelt in black ink.A dark rectangular area containing handwritten text in white ink. The text reads: "JEFFREY AND HILARY ROOSEVELT", "1017 MAIN STREET", "ACROSS THE ROAD", "ONE HOUSE DOWN".

JEFFREY AND HILARY
ROOSEVELT
1017 MAIN STREET
ACROSS THE ROAD
ONE HOUSE DOWN

2/19/19

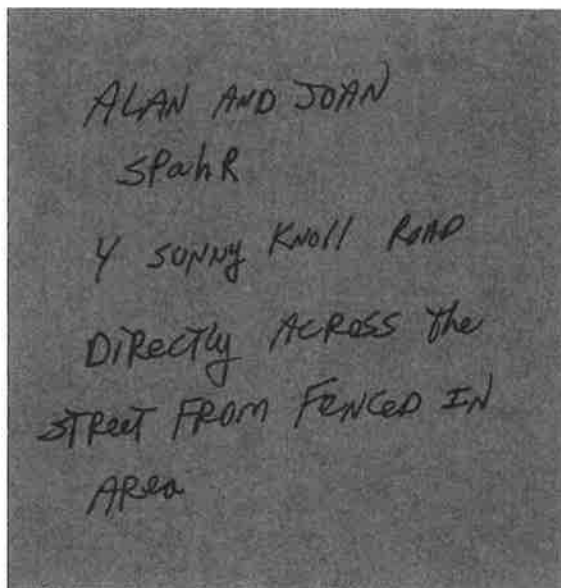
Dear Zoning Board of Adjustment,

We are in support of my neighbor, Susan Neuwirt, pet sitting dogs at her Georges Mills Property. We do not feel that this will adversely affect ourselves or the neighborhood.

Respectfully,

A handwritten signature in cursive script, appearing to read "Alan & Joan Spahr", with a long horizontal line extending to the right.

Alan & Joan Spahr

A rectangular area with a dark, textured background containing handwritten text in white ink. The text reads: "ALAN AND JOAN SPahr", "4 SUNNY KNOLL ROAD", "DIRECTLY ACROSS THE", "STREET FROM FENCED IN", "AREA".

ALAN AND JOAN
SPahr
4 SUNNY KNOLL ROAD
DIRECTLY ACROSS THE
STREET FROM FENCED IN
AREA

 **HANSON LAW OFFICES**
CARL HANSON, Licensed in NH & VT

Suite 204, The Gallery • 276 Newport Rd.
New London, NH 03257
603.877.0210 phone • 603.877.0235 fax
carl@hansonoffices.com

March 1, 2019

Town of Sunapee
Zoning Board of Adjustment
23 Edgemont Road
Sunapee, NH 03782

RECEIVED

MAR 04 2019

**TOWN OF
SUNAPEE**

Re: George and Susan Neuwirt
CASE #19-02: PARCEL ID: 0106-0005-0000

To whom it may concern:

I represent Susan Kent, owner of property abutting the Neuwirt property referenced above. The Kent property is located on Main Street, immediately to the northeast of the Neuwirt property.

Because Ms. Kent is currently travelling, and will be unable to attend the March 7, 2019 Zoning Board meeting, she has asked me to write to you to express her objections to the requested variance.

Background:

The applicants propose to use the property, a 0.14 acre parcel in the Village Residential District, to conduct a “dog sitting” business. Although the subject property abuts the right-of-way for Route 11, the other neighbors, on Main Street, are small residential buildings, a cemetery and a small pumping station.

Application

The details of the operation of the proposed business are less than clear. Based upon the application, the following appears to be the case:

1. there is no stated limit on the number of dogs who might be accommodated at a particular time;
2. the dogs will be inside the home for the majority of the time, but when they are outside they will be in the fenced area behind the house; and,
3. the dogs will not be left unattended.

There are several issues, not addressed by the Application, that ought to be addressed:

1. What are the plans for disposal of fecal matter from the dogs;
2. Will the dogs be walked in the neighborhood? If so, how many at a time, and on what roads?
3. How will the applicants minimize barking?

Objections:

A “dog sitting” business is not a permitted use in the Village Residential district. Therefore, the applicants are seeking a variance. In support of their application, they have alleged that the denial of a variance in this case would result in “unnecessary hardship.” To support their allegation of unnecessary hardship, they have stated that (1) there are already several businesses on the street which have more impact on the neighborhood than the proposed dog sitting business would; (2) that the proposed use has no effect on the health, safety or welfare of the community; and, (3) there would be no obvious indication that any business was going on at the property.

First, the “other businesses on the street,” apparently refers to businesses located on Route 11. There are no nearby businesses on Main Street, which is largely residential. In addition, the fact that other businesses might have “more impact” on the neighborhood is not a reason to permit an additional business to locate in the Village Residential district, contrary to the use restrictions in the district.

Second, the applicants speculate that the proposed business would have “no effect” on the health, safety, or welfare of the community. There is no description in the application regarding the treatment and disposal of the additional fecal matter generated by the business. There is no description of the number(s) of dogs that might be accommodated. There is no description of the dog walking, which seems likely to be required. There is no description of the possible noise generated by the presence of the additional dogs. It seems impossible that the addition of the business would have “no effect” on the neighborhood.

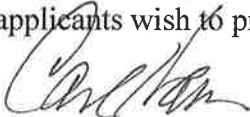
Third, it seems clear that, contrary to the applicants’ statement, it would be apparent that a business was going on due to the increase in the number of dogs at the property. This would be apparent also in the comings and goings of the dogs and their owners.

More importantly, however, the applicants’ allegations do not support a conclusion that there is “unnecessary hardship.” In order to show “unnecessary hardship,” the applicants must show 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.” RSA 674:33, I(b)(5)(A). *See, Rochester City Council v. Rochester Zoning Board of Adjustment*, 194 A.3d 472, (2018).

The subject property is very small (0.14 acres), and the other homes on Main Street are also generally on small lots. It is otherwise unique in the location abutting Route 11 and Main Street, and within a relatively short distance from the shore of Lake Sunapee.

The general public purposes of the permitted uses in the Village Residential district is to protect the residential nature of the neighborhood, while also allowing certain uses which are compatible with the residential neighborhood. Specifically, uses are allowed to accommodate tourists, which has no doubt been historically important for the neighborhood. The Sunapee Zoning Ordinance specifically provides that, “[a]ny use not specifically permitted is prohibited.” Section 4.20.

Ms. Kent objects to the request for a variance. Her property is a very short distance from the Neuwirt property. The addition of an unknown number of dogs in connection with a business next door to her property will unavoidably create noise, odor, and traffic. The presence of a “dog sitting” business on the 0.14 acre lot in the neighborhood is not a reasonable use of the property. The Zoning ordinance is clear in describing the uses which are permitted and which are not. The application itself is lacking in information which would be relevant to making the determinations which would be required to issue a variance. Ms. Kent respectfully requests the opportunity to respond in a reasonable time to any additional information that the applicants wish to present.



Sincerely,

Carl Hanson

c: Susan Kent

March 6, 2019

Attention Town of Sunapee Zoning Board of Adjustment:

Tony Bergeron and I, Muriel have received notification of George and Susan Neuwirt seeking a variance to permit a dog sitting business at 1002 Main St. Georges Mills which is just across our residence at 1007 Main Street. After having viewed the variance on line which states that once a variance is approved then the variance stays with the property we are strongly against the acceptance of this variance. Our concerns are the barking noise from a dog or many dogs which will be a change to this quite residential village. Any over night sitting that then becomes kenneling dogs and which brings us to the question about the dogs waste and smells and how many dogs will be permitted at any time.

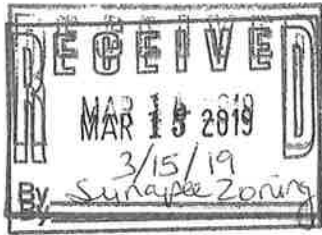
This is a residential area not a commercial/ business area which we would hope that the Board would consider our concerns and the fact we have resided here for more than 50 years.

**Thank you
Respectfully,**

**Tony and Muriel Bergeron
1007 Main Street
Georges Mills, N.H. 03751**

ZBA#

19-06



CASE# ZBA 19-06

Town of Sunapee
Zoning Board of Adjustment

Special Exception

- 1. Landowner(s) Name(s): William Wightman 2. Parcel ID# map # 26; Lot # 29
- 3. Zoning District: Village - Commercial
- 4. Project Location (Street & #): 25 Main St.
- 5. Mailing Address: PO Box 304, Sunapee, NH 03782
- 6. Phone Number 603-381-1662
- 7. Reason the Special Exception is necessary: Expansion of a pre-existing, non-conforming structure on existing footprint but with a slightly higher envelope.

•All applications seeking relief from setback requirements on lakefront properties must be accompanied with a professional recorded survey of the property and building location(s).

•Important-Your property has to be identified with your street number or name-without this identification your hearing may be continued to a later date.

•Please use the abutter list form, which is attached, for your abutters' mailing list.

•IMPORTANT: Review application deadline dates for a timely submission.

•Base Fee-See Zoning Administrator for Fee Schedule.

Please sign the following statement: I understand that the public hearing will be held at the scheduled date and time unless a request is made by me for a new hearing. Any rehearing will require a new public notice and notification to abutters, the cost of which will be borne by the applicant. Further, I hereby give permission to the ZBA members to visit the subject property prior to the public hearing. To the best of my knowledge, the above is true and correct.

William Wightman 3/15/19
 Landowner(s) Signature(s) Date

TOWN OF SUNAPEE
ZONING BOARD OF ADJUSTMENT

Description of proposed use, showing justification for a Special exception as specified in the Zoning Ordinance, Article III Section 3.50i

It is requested that the portion of the pre-existing, non-conforming structure, located at 25 Main St., located along the 'gateway' to Sunapee Harbor, be approved for an improvement renovation as described below. Having purchased this property from former Selectperson, Charles Weinstein in 1997, I have slowly been upgrading its appearance and this renovation represents a final phase of those efforts that will provide a number of solutions a numerous issues:

1. The structure is in need of work from both an aesthetic and a functional perspective. This renovation will address both of these.
2. When purchased, Mr. Weinstein described the property as having 3 to 4, town approved parking spaces along the Main St. side of the building. While this allows for parking throughout most of the year, it does not allow for parking during winter months when I'm required to park off the street in a lot where I have arranged permission from John Wiggins to do so. These proposed renovations will re-activate the garage function with two 8' bays located directly adjacent to the main part building and remedy the winter parking issue.
3. The structure is currently used in a commercial sense by Wightsteeple Productions as a shop for any off-site construction activities. It would continue to be used as such but in a far more efficient way and with a far more attractive exterior.
4. Plans for the renovation are being designed at LaValleys Building Supply to assure compliance with structural integrity and building codes. New plans show an increase of six (6) feet in total height to allow for use of a 2nd story for additional shop space and storage. Discussions with the designers included a flat roof that could allow for a roof-top garden in alignment with current environmental and ecological building uses.
5. The new structure would remain within the existing footprint but the envelope would increase in height by 6 feet. In reference to the noted Article and Section, it appears this renovation would be in compliance with each of the Section's noted requirements.

TOWN OF SUNAPEE
ZONING BOARD OF ADJUSTMENT

Description of proposed use, showing justification for a Special exception as specified in the Zoning Ordinance, Article III Section 3.50i

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victorian flat roof co...

Types of Roof Construction

Roof Construction Basics

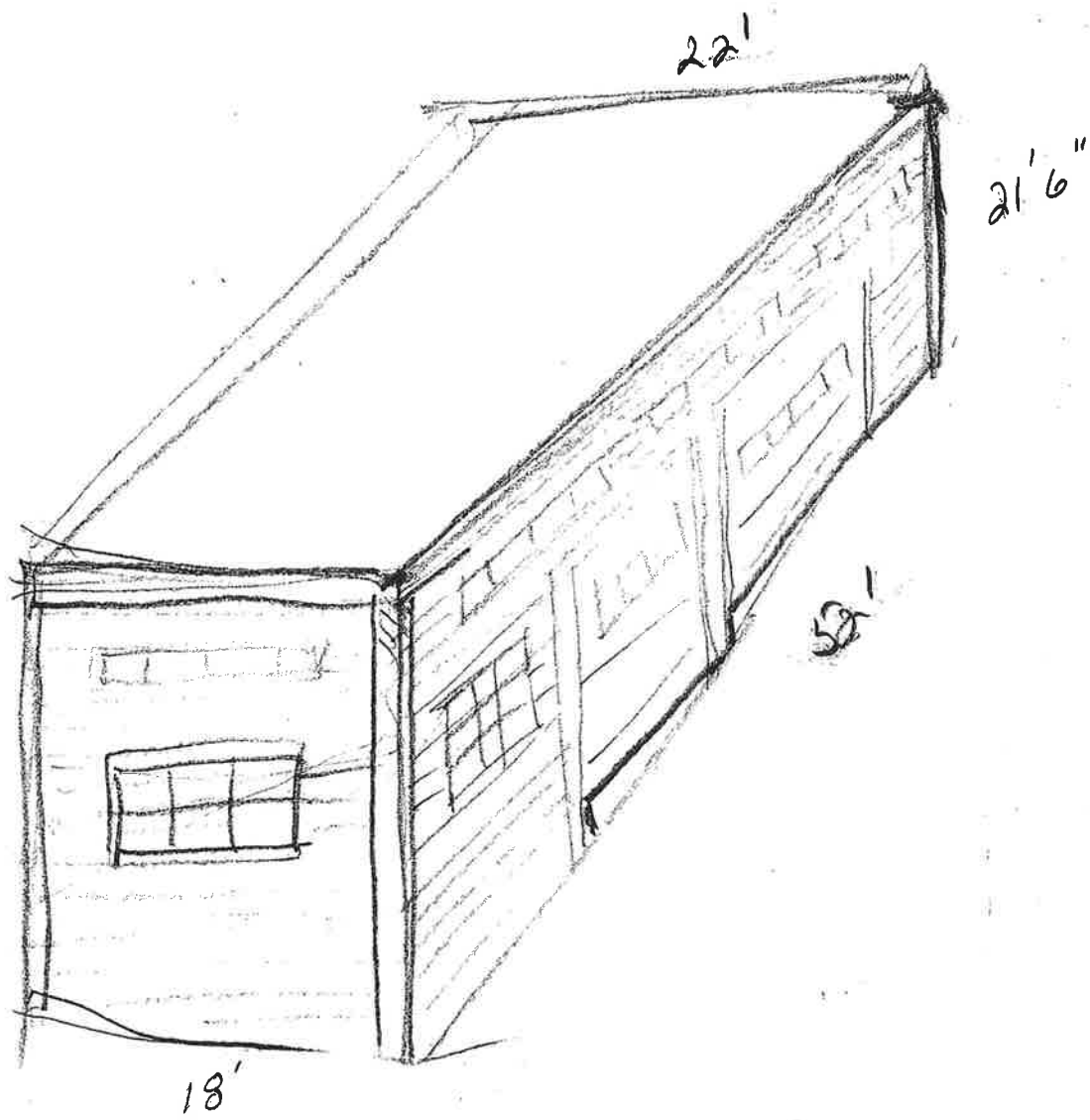
Flat Roof Construction

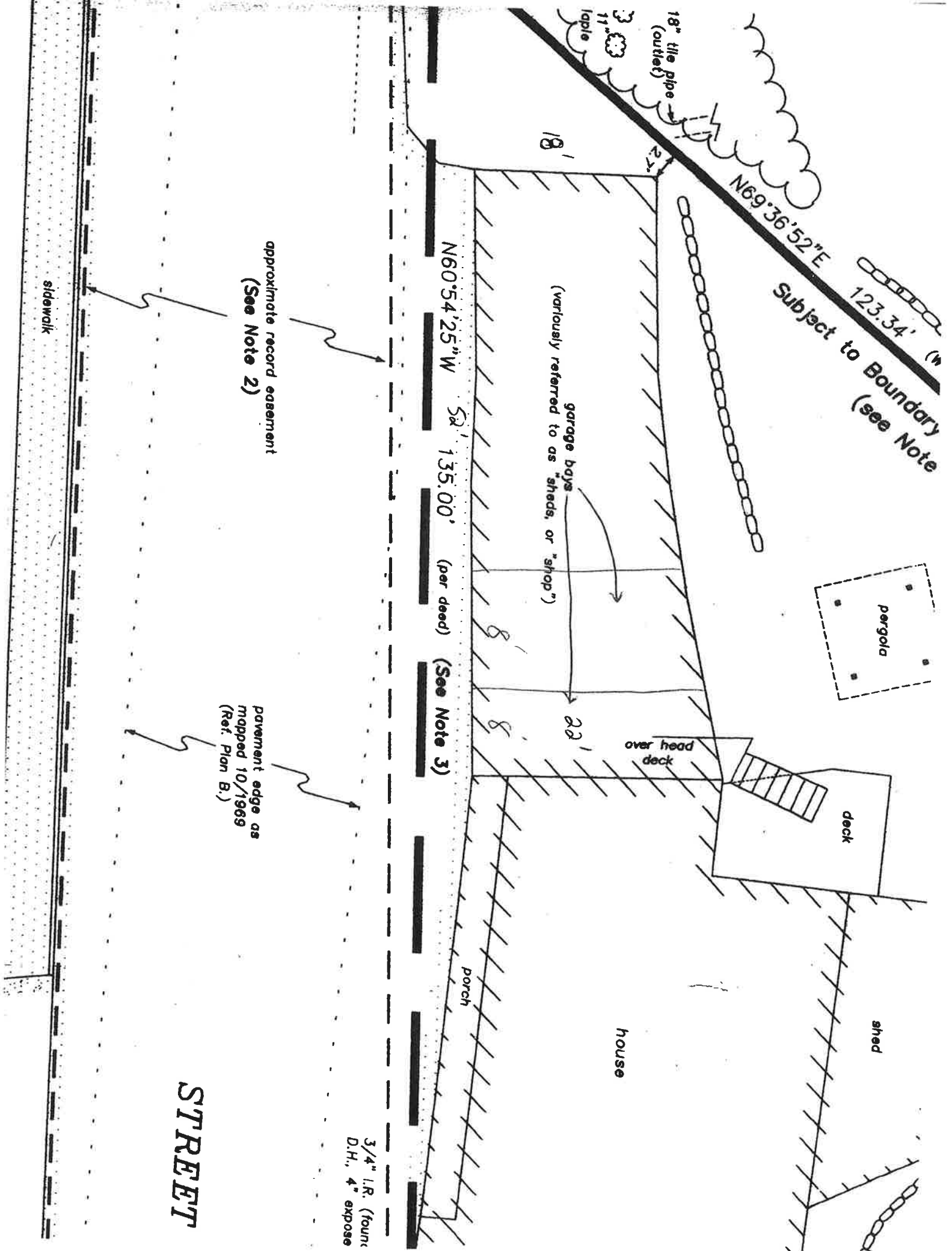
Small Roof Construction



more @ www.keralahousedesigns.com







approximately record easement
(See Note 2)

pavement edge as
mapped 10/1969
(Ref. Plan B.)

STREET

3/4" I.R. (four
D.H., 4" expose)

Subject to Boundary
(see Note)

$N60^{\circ}54'25"W$ $52'$ $135.00'$ (per deed) (See Note 3)

$N69^{\circ}36'52"E$
 $123.34'$

$18'$

garage bays
(variously referred to as "sheds, or "shop")

$22'$

house

deck

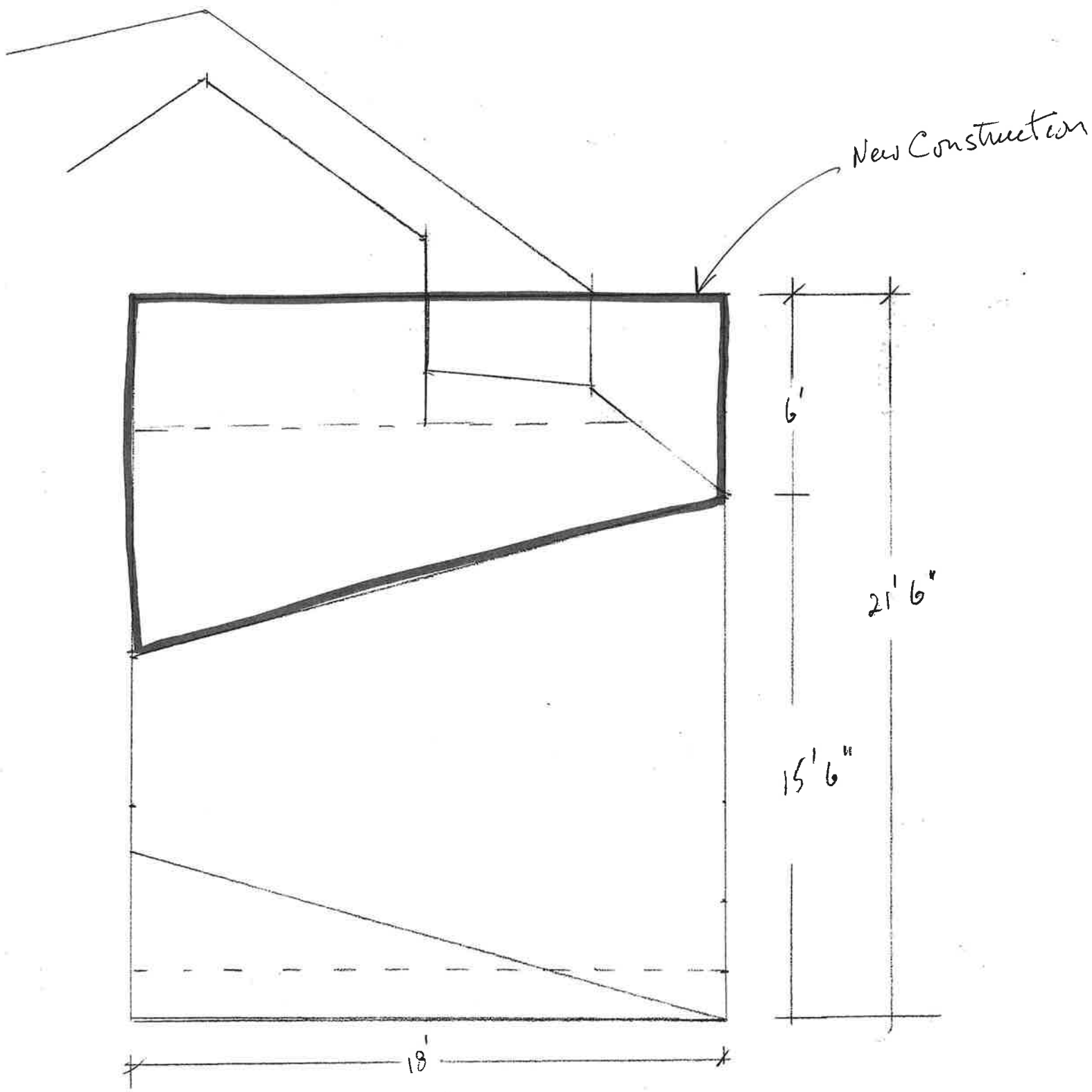
shed

pergola

over head
deck

porch

sidewalk



CURRENT OWNER	TOPO	UTILITIES	STRT./ROAD	LOCATION	DESCRIPTION	CURRENT ASSESSMENT	2413
WIGHTMAN, WILLIAM	4 Rolling	2 Public Water	1 Paved	3 Rural	COMMERC. COM LAND	Code 3400 Appraised Value 3400	74,500 106,100 4,600
PO BOX 304		3 Public Sewer			COMMERC.	Code 3400 Appraised Value 3400	74,500 106,100 4,600
SUNAPEE, NH 03782-0304							SUNAPEE, NH
Additional Owners:							

RECORD OF OWNERSHIP	BK-VOL/PAGE	SALE DATE	q/u	w/i	SALE PRICE	V.C.	PREVIOUS ASSESSMENTS (HISTORY)
WIGHTMAN, WILLIAM	1119/ 620	05/28/1997					Yr. Code Assessed Value Yr. Code Assessed Value Yr. Code Assessed Value
							2018 3400 74,500 2018 3400 106,100 2018 3400 4,600
							Total: 185,200

EXEMPTIONS	Amount	Code	Description	Number	Amount	Comm. Inv.
1. WIGHT STEEPLE PRODUCTIONS						
2. 1 BD RM APT FUNC=PARKING						
PARKING AN ISSUE UST TO LEFT						
4/08 DORMERS ADDED, INT OF TOS OPEN STUDD						
NO SIDING CHK 09 4/11-EST 100 % COMPLETE						
Total:						185,200

OTHER ASSESSMENTS	Number	Amount	Comm. Inv.
ASSESSING NEIGHBORHOOD			
Street Index Name			
Batch			
Tracing			
Total:			185,200

APPRAISED VALUE SUMMARY	Value
Appraised Bldg. Value (Card)	74,500
Appraised XF (B) Value (Bldg)	0
Appraised OB (L) Value (Bldg)	4,600
Appraised Land Value (Bldg)	106,100
Special Land Value	0
Total Appraised Parcel Value	185,200
Valuation Method:	C
Adjustment:	0
Net Total Appraised Parcel Value	185,200

BUILDING PERMIT RECORD	Permit ID	Issue Date	Type	Description	Amount	Insp. Date	% Comp.	Date Comp.	Comments	Date	Type	IS	ID	CD	Purpose/Result
	2408	06/18/2007	AD	Addition	0	09/01/2011	100	04/01/2011	9.5 X 27 2ND STORY DC	09/02/2015			NB	FR	IN FIELD REVIEW
										09/20/2011			MP	ZC	ZONING CHANGE
										09/01/2011			NB	BP	BUILDING PERMIT
										04/20/2010			MC	BP	BUILDING PERMIT
										09/10/2009			NB	AC	ADMIN DATA ENTRY

VISIT/ CHANGE HISTORY	Date	Type	IS	ID	CD	Purpose/Result
	09/02/2015				FR	IN FIELD REVIEW
	09/20/2011				ZC	ZONING CHANGE
	09/01/2011				NB	BUILDING PERMIT
	04/20/2010				MC	BUILDING PERMIT
	09/10/2009				NB	ADMIN DATA ENTRY

LAND LINE VALUATION SECTION	B Use Code	Use Description	Zone	D Front	Depth	Units	Unit Price	I. Factor	S.A. Disc	Acre	C. Factor	ST. Idx	Adj.	Notes- Adj	S Adj Fact	Adj. Unit Price	Land Value
	1	OFFICE BLD MDL-94	VC			8,712	SF	5.41	1.5000	6	1.0000	1.50	0.00	LOCATION	1.00	12.18	106,100

Total Card Land Units:	0.20	AC	Parcel Total Land Area:	0.2	AC	Total Land Value:	106,100
------------------------	------	----	-------------------------	-----	----	-------------------	---------



CONSTRUCTION DETAIL (CONTINUED)

Element	Description	Element	Description
Style	Office/Apt		
Model	Commercial		
Grade	Below Average		
Stories	1		
Occupancy	2		
Exterior Wall 1	Chapboard		
Exterior Wall 2			
Roof Structure	Gable/Hip		
Roof Cover	Asph/F Gls/Cmp		
Interior Wall 1	Plastered		
Interior Wall 2	K PINE/A WD		
Interior Floor 1	Pine/Soft Wood		
Interior Floor 2	Carpet		
Heating Fuel	Oil		
Heating Type	Forced Air-Duc		
AC Type	None		
Bldg Use	OFFICE BLD MDL-94		
Total Rooms			
Total Bedrooms			
Total Baths			
Heat/AC	NONE		
Frame Type	WOOD FRAME		
Baths/Plumbing	LIGHT		
Ceiling/Wall	CEIL & WALLS		
Rooms/Ptnts	AVERAGE		
Wall Height			
% Conn Wall			

MIXED USE

Code	Description	Percentage
3400	OFFICE BLD MDL-94	100

COST/MARKET VALUATION

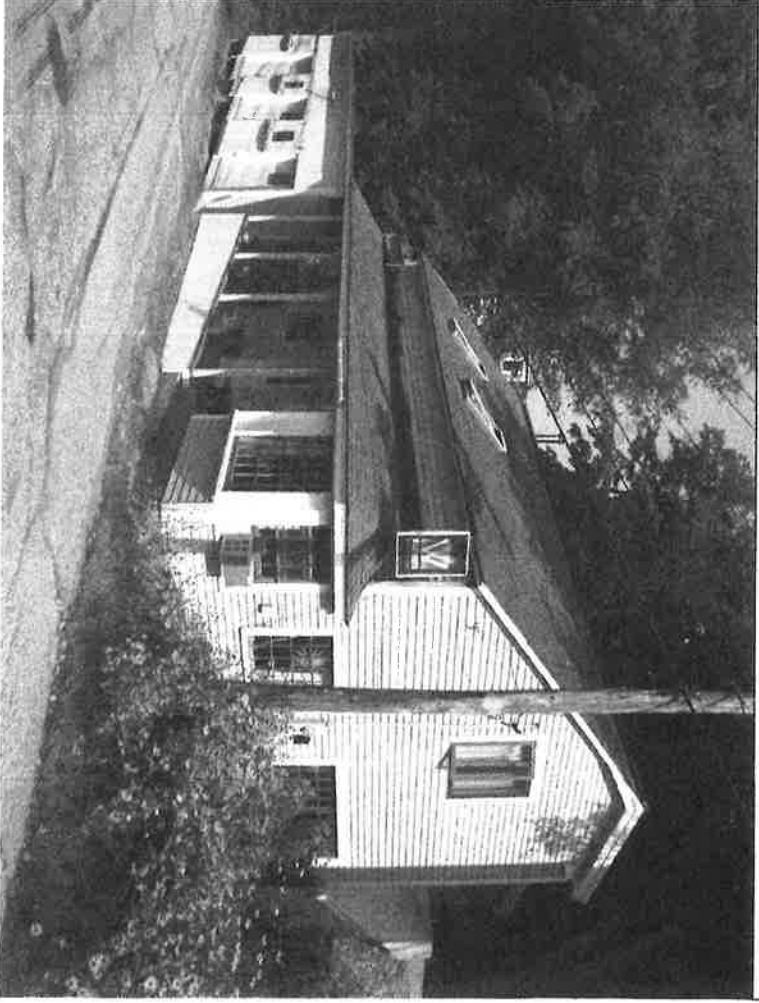
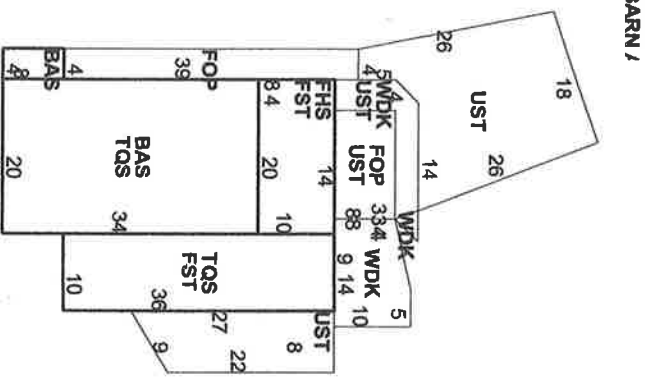
Adj. Base Rate:	68.83
Net Other Adj:	148,952
Replace Cost	0.00
AYB	148,952
EYB	1,900
Dep Code	1,990
Remodel Rating	A
Year Remodeled	
Dep %	50
Functional Obshc	
External Obshc	
Cost Trend Factor	1
Condition	
% Complete	
Overall % Cond	50
Apprais Val	74,500
Dep % Ovr	0
Dep Ovr Comment	
Misc Imp Ovr	0
Misc Imp Ovr Comment	
Cost to Cure Ovr	0
Cost to Cure Ovr Comment	

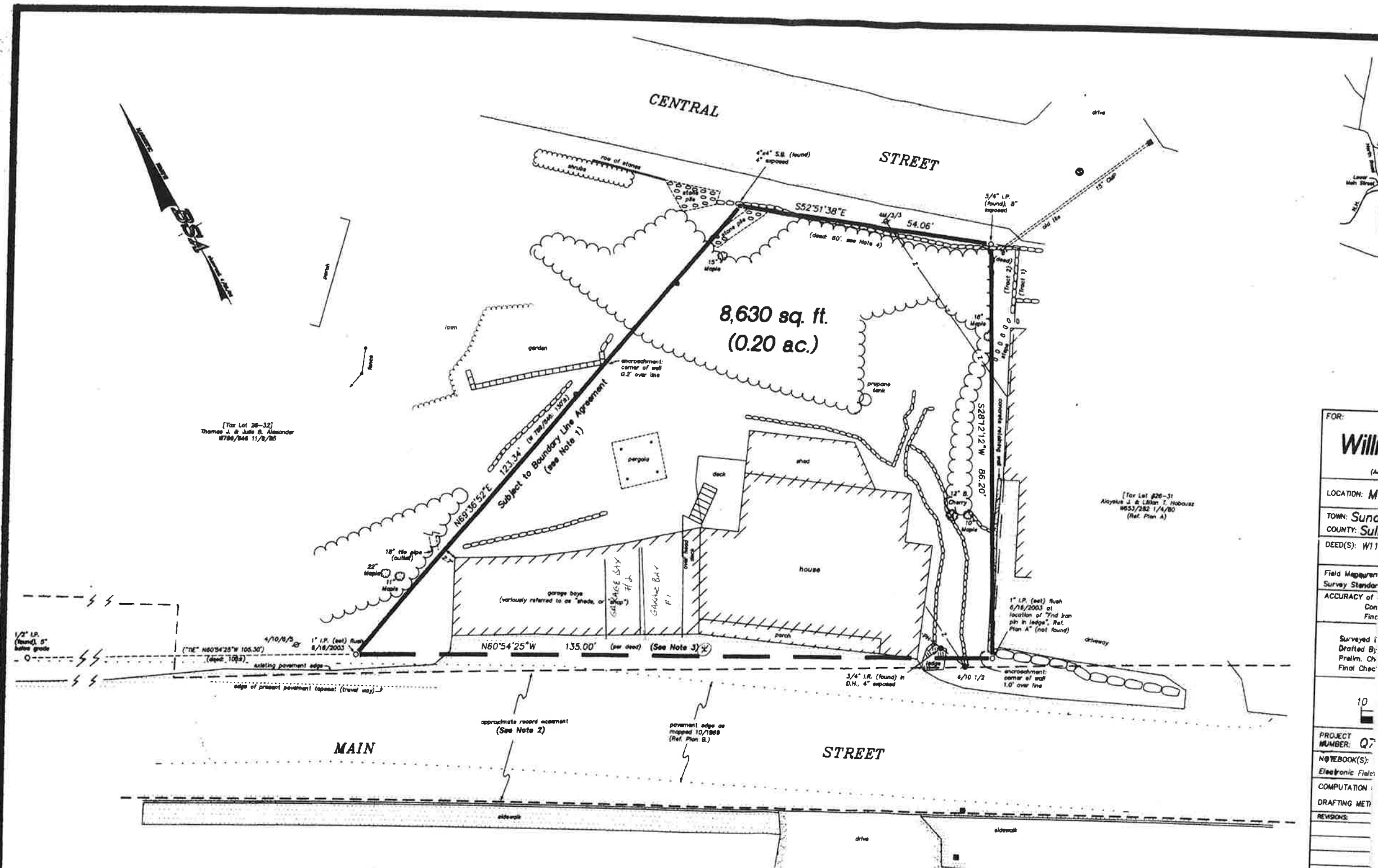
OB-OUTBUILDING & YARD ITEMS(L) / XF-BUILDING EXTRA FEATURES(B)

Code	Description	Sub	Sub Descript	L/B Units	Unit Price	Yr	Gde	Dp Rt	Cnd	%Cnd	Apr Value
BRN1	BARN - 1 STOR			L	455	20,000	1900	0		50	4,600

BUILDING SUB-AREA SUMMARY SECTION

Code	Description	Living Area	Gross Area	Eff. Area	Unit Cost	Underec. Value
BAS	First Floor	712	712	712		49,008
FHS	Half Story, Finished	200	200	100		6,883
FOP	Porch, Open, Finished	0	268	67		4,612
FST	Utility, Finished	0	560	224		15,418
TQS	Three Quarter Story	1,040	1,040	780		53,689
UST	Utility, Storage, Unfinished	0	864	259		17,827
WDK	Deck, Wood	0	217	22		1,514
7th Gross Liv/Pass Area:		1,952	3,861	2,164		148,952





[Tax Lot 26-32]
Thomas J. & Julie B. Alexander
4786/846 11/9/85

[Tax Lot 26-31]
Moyet J. & Lillian T. Hoboush
8631/282 1/4/80
(Ref. Plan A)

- SYMBOLS**
- Stone Bound, S.B.
 - Concrete Bound, C.B.
 - Iron Pipe, I.P.
 - Iron Rod, I.R.
 - ⊙ Drill Hole, D.H.
 - ⊙ Survey Markers
 - ⊙ Brass Stake (Found)
 - ⊙ Stone Retaining Walls
 - ⊙ Utility Pole
 - ⊙ Catch Basin
 - ⊙ Tree Line
- "N" lines are not properly shown

- REFERENCE PLANS**
- A. Plan entitled "Boundary Line Survey, A. Hoboush Land", Central Street, Sunapee, NH, dated 7/3/86, by Clifford P. Richer.
 - B. Plan entitled "Water Main, River Road, Main Street, Water System Improvements for Town of Sunapee", dated Oct. 1988, by Anderson-Hatchel & Company, Inc.

NOTES

1. Despite diligent efforts, this office has been unable to determine the precise location of this boundary. The stone bound of Central Street is believed to be original and undisturbed; the uncertainly is at Main Street. The record origin of this line is a call for "an iron pin set in the ground at the Eastern side of said Main Street" (8471/281 1/8/1868). The description includes a dimension to locate the corner along Main Street, but no information with which to determine how far off the road the "pin" was located. The existing (older) description and the record easement place the corner within the paved road surface, both as it exists now and as it was in 1868 according to the record easement. No maps, sketches or other information showing the location of the monument were found.
2. In a telephone conversation with this office, one of the original grantees of the subject property recalled an iron pin "close to the road", and that the line was 2 to 3 feet off the closest building corner. A more recent predecessor in title indicated he had never seen the pin, but thought the line was 2 to 2-1/2 feet off the building corner. No pin was recovered during an extensive search of the vicinity.
3. Other found monuments, and the locations of others as reconstructed from record information vary widely with respect to the distance off the road. Placing the corner at the between adjacent monuments result in a line consistent with the parcel evidence obtained, and is suggested as the basis for agreement.

- NOTES (cont'd)**
2. The Main Street easement shown is based on a layout in the Sunapee Town Records, vol. 1800-1915, pages 401-402 (typed transcription provided by the Sunapee Road Agent). The easement cannot be precisely located because the record point of beginning is located by reference to a building believed to have burned or been razed prior to 1825, with no trace remaining.
 3. This line is for the purpose of lot description only, and is not intended to imply the limit of the interest in the property.
 4. The discrepancy in the deed dimension along Central Street is believed to be attributable to the erroneous inclusion of the 8 feet of road frontage associated with tract 2 of the Hoboush property.

FOR: **Willi** (A.A.)

LOCATION: **Mc**

TOWN: **Sunapee**
COUNTY: **Sullivan**

DEED(S): **W11**

Field Measurement
Survey Standard
ACCURACY of
Con
Finc

Surveyed &
Drafted By:
Pratt, Ch
Final Check:

10

PROJECT NUMBER: **Q7**

NOTEBOOK(S):
Electronic Field

COMPUTATION:
DRAFTING METHOD:
REVISIONS:

E
& A
LU

NOR!

Memo

Date: March 28, 2019
To: Michael Marquise, Planner
From: Nicole Gage, Zoning Administrator
CC: Zoning Board of Adjustment
William Wightman, Property Owner
Re: Statement of Property Usage & ZBA Application #19-06

Here is the Statement of Property Usage for the Planning Board to review and sign. I have enclosed copies of the correspondence, ZBA materials, and what history I could find on this property. The ZBA and Planning Board may find this information useful.

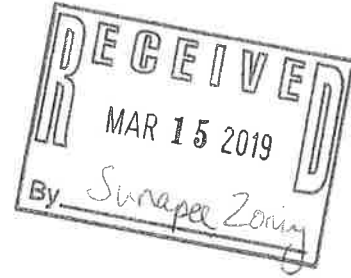
This is coming before the ZBA on April 18th for a Special Exception to rebuild the storage/workshop area, which is nonconforming due to being too close to the side and front setback. The proposal is to build a 2-story structure with rooftop garden-type area.

TOWN OF SUNAPEE
STATEMENT OF PROPERTY USAGE

1. Owner's Name: William Wightman
Address (Mail): PO Box 304
Sunapee, NH 03782

2. Phone: 603-763-8732 hm
603-381-1662 cell

3. Property Location: 25 Main St. By: _____
Parcel ID: ~~Map #26 / Lot #29~~ 0129-0081-0000



4. CURRENT USE OF PROPERTY:

a. Describe in detail the current use of Property:
Currently Commercial Space consists of the lower level of the dwelling that can be viewed as two main sections:

1. An area directly below an upper living area (23' x 35').
This area is used as a office/music studio for production and teaching services.
2. An area within the structure to be renovated (22' x 52').
This area is used for construction and storage services.

b. # of Employees (none)

c. Square Feet of Commercial Space:

1. 23' x 35' = 805 sq. ft. – office/service
 2. 22' x 52' = 1,144 sq. ft. - service
- Total: 1,949 sq. ft.

d. Hours of Operation: (varied)

5. PROPOSED USE OF PROPERTY:

a. Describe in detail the proposed use of Property:
The use of the property would essentially remain the same with the same described activities. The advantage of the renovation is to allow for garage areas and an upper storage/work area above the existing "garage bays" area as indicated on the provided survey.

b. # of Employees (none)

c. Square Feet of Commercial Space:

1. 23' x 35' = 805 sq. ft. – office/service
 2. 22' x 52' = 1,144 sq. ft. – storage/service
- Total: 1,949 sq. ft.

d. Hours of Operation: (varied)

6. Certification/Permission for Inspection: To the best of my knowledge the above is true and accurate. I hereby grant permission for site inspection to Planning or Zoning Officials.


Signature of Landowners

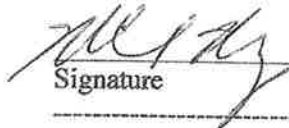
3/15/19

Property Changes Noted

- 1. Increase in Employees? Yes No
- 2. Increase in Business Area? Yes No
- 3. Increase in Use Intensity? Yes No
- 4. Increase in Days/Hours Operation Yes No

Town Planner's Comments

IT SEEMS FROM THE NARRATIVE THAT
 ADDITIONAL AREA WILL BE EFFECTIVELY
 CREATED WHICH MAY INCREASE USE CAPACITY.
 RECOMMEND A CONSULT WITH AB TO MAKE DETERMINATION.

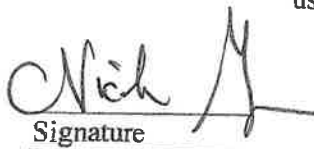

 Signature

3-20-19
 Date

Zoning Administrator's Determinations

Based on the above data, findings, and comments, it is recommended that

- (1) the applicant should apply for a Site Plan Review Hearing
- (2) the applicant should consult with the Planning Board to determine if a Site Plan Review Hearing is required.
- (3) the applicant may move forward with the conversion without applying to the Planning Board for Site Plan Review as no use increase or other impacts have been identified.


 Signature

3/22/2019
 Date

Planning Board Decision (As Per #2 Above)

Based on the information provided by the applicant, the recommendations above, and as a result of review and discussion by the Planning Board, it is the opinion of the Board that this project will/will not require a Site Plan Review Hearing for the proposed conversion.

Signature

Date

CORRESPONDENCE

Zoning

From: Zoning
Sent: Thursday, March 28, 2019 11:30 AM
To: 'Bill Wightman'; Michael Marquise
Subject: RE: April 11th Planning Board meeting?

Thank you Bill. I am going to share this information with the Planning Board and Zoning Board of Adjustment to assist them with their upcoming meetings. Talk to you soon.

CC: Michael Marquise, Town Planner

Nicole Gage
Zoning Administrator
Town of Sunapee, NH
23 Edgemont Rd., Sunapee, NH 03782
Email zoning@town.sunapee.nh.us / Web www.town.sunapee.nh.us
Direct (603) 763-3194 / Town Office (603) 763-2212

CONFIDENTIALITY NOTICE: Privacy should not be assumed with emails associated with town business. Certain emails are public documents and may be subject to disclosure.

From: Bill Wightman <bill.wightman@comcast.net>
Sent: Friday, March 22, 2019 5:49 PM
To: Zoning <zoning@town.sunapee.nh.us>; Michael Marquise <Michael@town.sunapee.nh.us>
Subject: Re: April 11th Planning Board meeting?

Hi Nicole,

Thanks for your timely work on this project and your questions.
I've provided some answers below:

1. What is a "construction and storage service"? Can you provide more description? What type of items would be stored? What type of service would be offered? Etc.

Wightsteeples Productions has provided and continues to provide a number of different services. These have and will continue to include construction services as well as musical and theatrical educational productions and programs. These services are most always conducted off-site, i.e., at businesses or homes, or in schools. I have also conducted on-site services including construction shop work and music production work (i.e., recordings and lessons).

The structure to be renovated has been used predominantly as a shop for these services and for storage of theatrical and musical equipment. With the provision of the garage area, it is intended that the upper area will provide for the space that the new garage area will displace. Essentially, there will not be an increase in the space used commercially. It would only be transferred.

2. Is this a new business?

No, this is not a new business – the services will remain the same.

3. Can you please provide a layout and a list of current and proposed square footage for each use (apartment, office, and construction/storage services).

The square footage of commercial use below the living area will remain the same and continue to be 805 square feet (23' x 35').

The square footage of the commercial use of the structure to be renovated will also remain the same. The current area is approx. 1,144 square feet (22' x 52'). Of that, approx. one half will be converted into garage space and that area will be transferred to the upper level. The additional space above (over the garages) will be unable to be used as it will lack sufficient headroom due to the garage doors below.

4. Is the storage area that you want to convert, is that heated? Or is there livable space there now?

The current shop space has heat and it is planned that these new spaces will have heat of some kind. None of the renovated space is considered as living space.

5. Do you propose to use the new rooftop design for activities related to the businesses?

It is not intended that the rooftop design be for business related activities.

Thanks,
Bill
Bill Wightman, Owner / Director
Wightsteeple Productions
PO Box 304, 25 Main St.
Sunapee, NH 03782
603-381-1662 Cell
603-763-8732 Home Office
bill.wightman@comcast.net
www.josajazz.com

Zoning

From: Zoning
Sent: Friday, April 6, 2018 2:02 PM
To: bill.wightman@comcast.net
Subject: 25 Main St

Hi Bill.

To expand beyond the building envelope (the exact box that's there), and to change the use from a storage/utility area to garage bays and shop, I recommend the following:

- 1) Complete a Statement of Property Usage, to be reviewed by the Planning Board, to see if a Site Plan Review will be required.. Here is a link to the online form:
http://www.town.sunapee.nh.us/Pages/SunapeeNH_Planning/Property%20Usage%20Form.pdf
- 2) Contact Scott Hazelton, Highway Department, to discuss the requirements for a Driveway Permit to enter the proposed garage bays
- 3) Request a Special Exception from the Zoning Board, Part Article VI, 6.12, to allow you to expand a Pre-Existing, Non-Conforming structure beyond the existing building envelope (ie, go up a little higher, and possibly fill in the crawl space below) when you replace or reconstruct the structure. 6.12 allows you to do expand beyond the envelope by either Variance or Special Exception. A special Exception is much more straightforward, and the Zoning Board can refer to 3.50 (f) and 3.55, 1-2 for the criteria to grant a special exception.
- 4) Apply for a permit to construct (Certificate of Zoning Compliance) once you get your Special Exception.

Nicole Gage
Zoning Administrator
Town of Sunapee, NH
Email zoning@town.sunapee.nh.us / Web www.town.sunapee.nh.us
Direct (603) 763-3194 / Town Office (603) 763-2212

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PROPERTY CARD

CURRENT OWNER
 WIGHTMAN, WILLIAM
 PO BOX 304
 SUNAPEE, NH 03782-0304
 Additional Owners:

TOPO.
 4 Rolling
 2 Public Water
 3 Public Sewer

UTILITIES
 1 Paved
 3 Rural

STRT./ROAD
 LOCATION

ASSESSMENT
 Code Appraised Value Assessed Value
 3400 74,500 74,500
 3400 106,100 106,100
 3400 4,600 4,600

SUPPLEMENTAL DATA
 Other ID: 0129-0081-0000
 SEPTIC APPR
 UTILITY
 DES PERMITS
 Routing # 1634
 SUBDIVISION
 GIS ID: 0129-0081-0000

RECORD OF OWNERSHIP
 WIGHTMAN, WILLIAM
 BK-VOL/PAGE 1119/620
 SALE DATE 05/28/1997
 SALE PRICE V.C.

PREVIOUS ASSESSMENTS (HISTORY)

Yr.	Code	Assessed Value	Yr.	Code	Assessed Value
2018	3400	74,500	2017	3400	74,500
2018	3400	106,100	2017	3400	106,100
2018	3400	4,600	2017	3400	4,600
Total:		185,200	Total:		185,200

EXEMPTIONS

Year	Type	Description	Amount	Code	Description	Number	Amount	Comm. Int.
OTHER ASSESSMENTS								
ASSESSING NEIGHBORHOOD								
NOTES								

ASSESSING NEIGHBORHOOD

Street Index Name Tracing Batch

NOTES

1. WIGHT STEEPLE PRODUCTIONS
 2. 1 BD RM APT FUNC=PARKING
 PARKING AN ISSUE UST TO LEFT
 4/08 DORMERS ADDED, INT OF TQS OPEN STUD
 NO SIDING CHK 09 4/11-EST 100 % COMPLETE

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 Appraised Land Value (Bldg) 106,100
 Special Land Value 0
 Total Appraised Parcel Value 185,200
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Net Total Appraised Parcel Value 185,200

BUILDING PERMIT RECORD

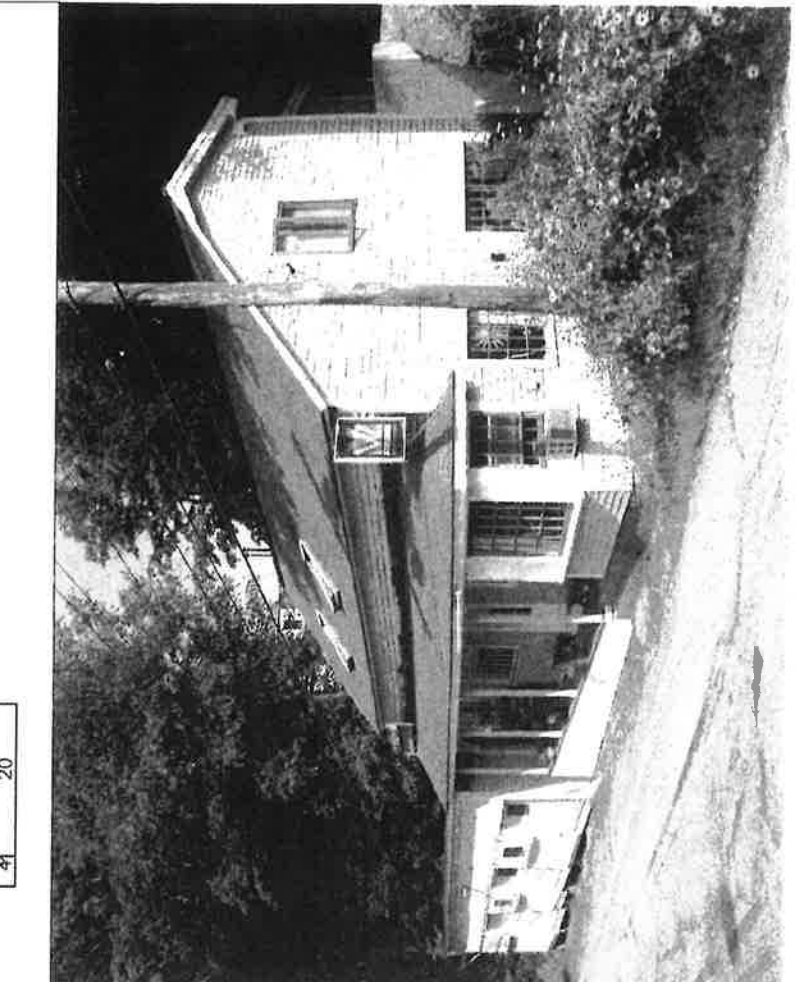
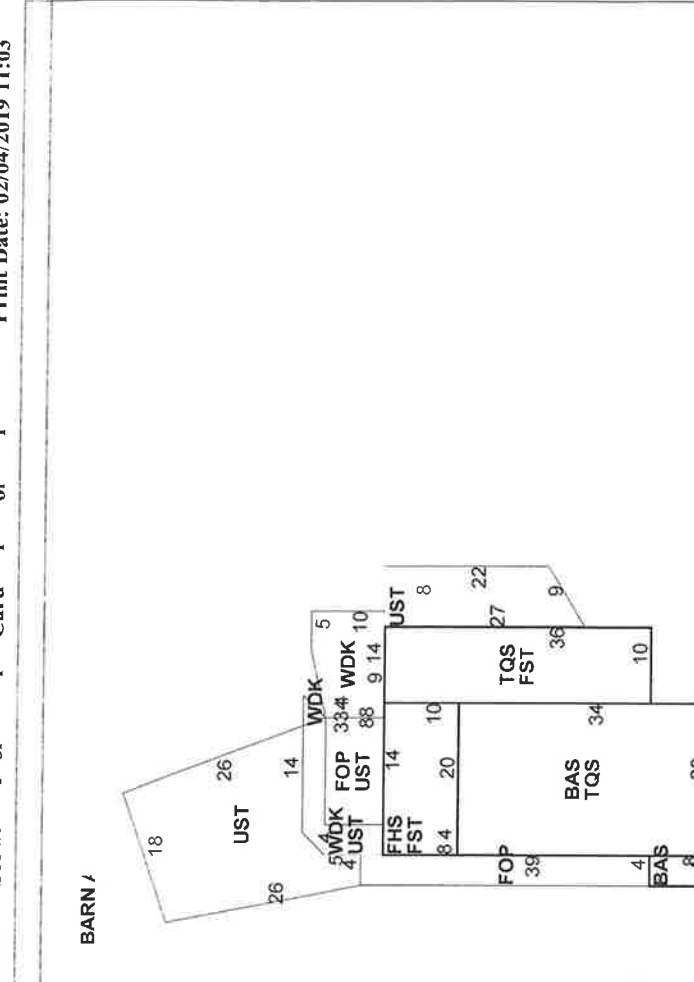
Permit ID	Issue Date	Type	Description	Amount	Insp. Date	% Comp.	Date Comp.	Comments
2408	06/18/2007	AD	Addition	0	09/01/2011	100	04/01/2011	9.5 X 27 2ND STORY DC

LAND LINE VALUATION SECTION

B #	Use Description	Zone	D	Front Depth	Units	Unit Price	I. Factor	S.A. Disc	Acre	C. Factor	ST. Idx	Notes-Adj	S.Adj Fact	Adj. Unit Price	Land Value
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Total Card Land Units: 0.20 AC														Parcel Total Land Area: 0.2 AC	Total Land Value: 106,100

VISION

CONSTRUCTION DETAIL		CONSTRUCTION DETAIL (CONTINUED)										
Element	Cd. / Ch.	Description	Description									
81		Office/Apt										
94		Commercial										
02		Below Average										
1		Stories										
2		Occupancy										
11		Exterior Wall 1										
11		Exterior Wall 2										
03		Roof Structure										
03		Roof Cover										
03		Interior Wall 1										
07		Interior Wall 2										
09		Interior Floor 1										
14		Interior Floor 2										
02		Heating Fuel										
04		Heating Type										
01		AC Type										
3400		Bldg Use										
		Total Rooms										
		Total Bedrms										
		Total Baths										
00		Heat/AC										
02		Frame Type										
01		Baths/Plumbing										
06		Ceiling/Wall										
02		Rooms/Prtns										
8		Wall Height										
		% Conn Wall										
OB-OUTBUILDING & YARD ITEMS(L) / XF-BUILDING EXTRA FEATURES(B)												
Code	Description	Sub	Sub Description	L/B	Units	Unit Price	Yr	Gde	Dp Rv	Chd	%Cnd	Apr Value
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BUILDING SUB-AREA SUMMARY SECTION												
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FST	Utility, Finished	0	560	224		15,418						
TQS	Three Quarter Story	1,040	1,040	780		53,689						
UST	Utility, Storage, Unfinished	0	864	259		17,827						
WDK	Deck, Wood	0	217	22		1,514						
Ttl. Gross Liv/Lease Area:					1,952	3,861	2,164					148,952



HISTORY

NO. 500

TOWN OF SUNAPEE, N.H.

CERTIFICATE OF ZONING COMPLIANCE

BASED ON THE ZONING ORDINANCE AND ADOPTED ADMINISTRATIVE PROCEDURES THE APPLICANT:

CHARLES W. WEINSTEIN
NAME

P.O. BOX 22, Sunapee, NH 03782
ADDRESS

HAS BEEN GRANTED / ~~DENIED~~ THIS CERTIFICATE FOR THE PROPOSED DEVELOPMENT OF Leveling the shed roof to serve as exit and flat deck.

ON LAND DESCRIBED AS Map 26 Lot 29
Main Street

IN THE TOWN OF SUNAPEE TAX RECORDS.

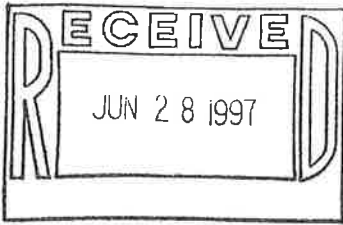
REASON FOR DENIAL _____

[Signature]

[Signature]

[Signature]
BOARD OF SELECTMEN

October 1, 1990
DATE



TOWN OF SUNAPEE

SIGN PERMIT APPLICATION

Please Print Clearly or Type

No. 235

Name Bill Wightman

Street Location 25 Main St.

Address PO Box 300

New London, NH 03257

Map # 26 Lot # 29

Phone 763-8732

Number of Signs Proposed 2

Area of Sign #1 9 sq ft (18" x 22")

Area of Sign #2 6 sq ft (32" x 24")

Total Area of Proposed Signs 15 sq ft

Total Area of Existing Signs on Property 0

General Description of Proposed Signs (inc. Lighting, Location, Dimensions, etc.)

one sign on bracket (#2)

one sign on bld. (#1)

To the Best of my Knowledge the above is True and Correct

William Wightman Owner's Name

6/27/97 Date

For Office Use Only

I do recommend this application for approval pursuant to Article V of the Zoning Ordinance.

[Signature] Zoning Administrator

7-3-97 Date

The Applicant is Granted/ a Permit for the Placement of a Sign subject to the following Conditions or Reasons for Denial.

Date July 7, 1997

Board of Selectmen

[Signatures: E. C. Kelly, Jean W. Peterson, William H. Chalmer]

2408

Permit Number

Town of Sunapee
Decision Sheet

434

Census Code

Landowner(s) Name: WILLIAM WIGHTMAN

Map/Lot: 129/81

Findings:

Street Location: 25 MAIN ST

Lot Coverage: N/C Percent: —

Recommended Action:

Soil Type: — Class: —

Not Applicable (No permit required)

Septic Approval: TOWN SEWER No. of Beds: —

Approval X Denial —

Non-conforming Lot or Structure? —

Reasons for Denial:

Energy Permit Approved? —

1.) —

Flood Zone? No

2.) —

Ry J [Signature]
Signature of Zoning Administrator

6/17/07
Date

~~Zoning Board Appeal~~

~~Date of Hearing: _____~~

~~Case No. _____~~

~~Action of Board: _____~~

~~Signature of ZBA Chair _____~~

~~Date _____~~

~~Zoning Administrator Concurrence _____~~

Certificate of Zoning Compliance

Based on the Zoning Ordinance and adopted administrative procedures, the applicant WILLIAM WIGHTMAN

is hereby GRANTED ~~AS APPLIED~~ a Certificate of Compliance for property at Map 129 Lot 81

of the Sunapee Tax Records for a 9 1/2 x 27' 2ND STORY DORMER

HEATED LIVING SPACE FOR BR. BATH

Certificate of Compliance expires: 6/18/08

Not Applicable (No permit required): —

[Signature]
[Signature]
[Signature]

William Paquet
Richard C Jensen
6/18/07

ZBA #

19-07,

19-08,

19-09

Town of Sunapee
Zoning Board of Adjustment

Variance

1. Landowner(s) Name(s): Bette & Tim Nowack 2. Parcel ID# Map 113, Lot 21
3. Zoning District: Rural Residential
4. Project Location (Street & #): 60 Ridgewood Rd
5. Mailing Address: 60 Ridgewood Rd, Sunapee, NH 03782
6. Phone Number 603.491.9817
7. Reason the Variance is necessary: The lot is non-conforming and there is no location on the property where a garage can be constructed without requiring a variance for front and side setbacks.

•All applications seeking relief from setback requirements on lakefront properties must be accompanied with a professional recorded survey of the property and building location(s).

•Important-Your property has to be identified with your street number or name-without this identification your hearing may be continued to a later date.

•Please use the abutter list form, which is attached, for your abutters' mailing list.

•IMPORTANT: Review application deadline dates for a timely submission.

•Base Fee-See Zoning Administrator for Fee Schedule.

Please sign the following statement: I understand that the public hearing will be held at the scheduled date and time unless a request is made by me for a new hearing. Any rehearing will require a new public notice and notification to abutters, the cost of which will be borne by the applicant. Further, I hereby give permission to the ZBA members to visit the subject property prior to the public hearing. To the best of my knowledge, the above is true and correct.

Bette L Nowack

Feb 25, 2019

Timothy Nowack

2/25/2019

Landowner(s) Signature(s)

Date

A Variance is requested from Zoning Ordinance, Article III Section 3.10 ^{§3.20} to permit:

1. Reduction of front setback from 50' from centerline of road to 30' from centerline

2. Reduction of western side setback from 15' to 5'

3. Reduction of impervious lot coverage from 27.2% to 26.2% to 5' from property line

↳ Whereas 25% is the max. allowed -CRH

Landowner(s): Bette & Timothy Nowack Parcel ID#: Map 113, Lot 21

Property Address: 60 Ridgewood Rd, Sunapee, NH 03782

FACTS SUPPORTING THIS REQUEST:

1. The proposed use would not diminish surrounding property values because:

Two-car garages facing Ridgewood Rd are typical. Garage will be constructed with same siding, trim and paint color as house, which has traditional cottage look.

2. Granting the variance would not be contrary to the public interest because:

Garage setback from road will be greater than current setback of parking area, thereby increasing access for town safety and maintenance vehicles at the end of road.

3. Denial of the variance would result in unnecessary hardship per the following:

a. the zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment because:

Unique setting - smallest lot with shortest frontage of any other lots on road, also has 8' ROW, severely restricting location for parking/garage. Lot is very steep, making traversing from house to parking area treacherous in icy winter conditions. Garage with internal stairs will greatly improve safety concerns.

b. no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because:

The purpose of the ordinance to provide for public safety and maintenance by maintaining a front setback would be enhanced from the current condition.

c. the variance would not injure the public or private rights of others because:

Although the garage would be visible to our abutters it would be consistent with other properties on the road and would be designed to be attractive. It will be located in the approximate location of our current parking area so there would be no change in traffic or privacy. The presence of a garage structure may even enhance privacy of the western abutter (62 Ridgewood Rd).

4. Granting the variance would do substantial justice because:

When property was purchased, deed indicated a garage could be constructed on property. Before deciding to move here full time, zoning Administrator at the time believed it would be reasonable to get variances to construct a garage. As aging retirees a garage would provide safer access for us in years to come.

5. The use is not contrary to the spirit of the ordinance because:

The ordinance allows for ^{variances for} reduced setbacks. Our lot is a grandfathered non-conforming lot with access issues that can be resolved by the proposed project and increase safety and stormwater management for residences at the end of Ridgewood Rd.

Timothy & Bette Nowack Lot Plan /60 Ridgewood Road Sunapee, NH 03782 Sheet 1 of 2



Survey Plan Notes:

"Ridgewood"
Property of Dane, Chapman & Shaw
Sunapee, NH
Lot 20 / Sunapee Lot # 21
Surveyed by: Herman Chase
Akeley, N.H.
Date: 1951
Recorded Sullivan County Registry of Deeds
Date: September 12, 2006
Plan: # P3 F1 M7 PF1

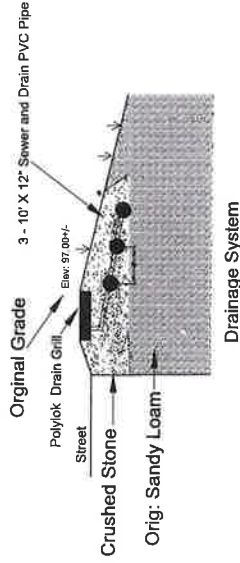
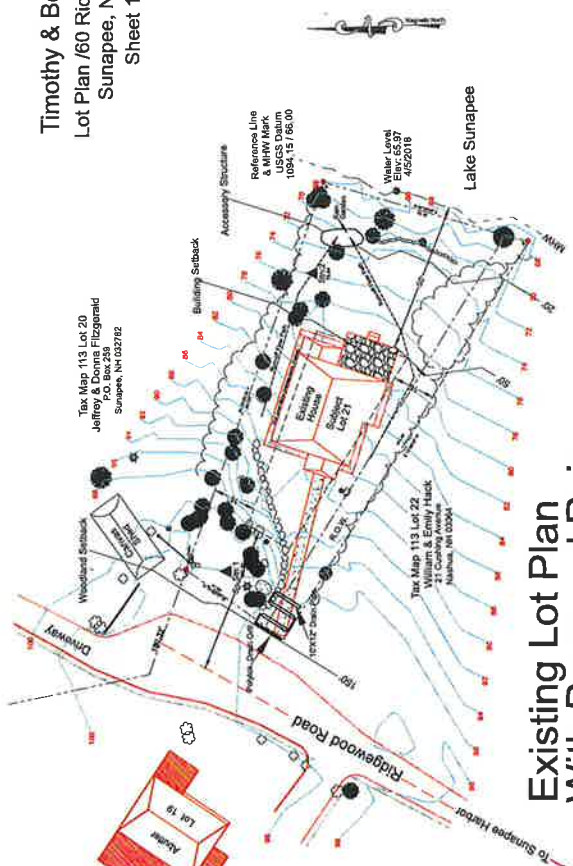
Property of Bette L. & Timothy L. Nowack
C/O Ridgewood Sunapee, NH
Lot 20 / Sunapee Lot # 21
Succeeded by: Thomas C. Dombrowski L.L.S. #557
19 Myrtle St. Claremont, NH 03743
Date: July 18, 2000
Appears Not to have been Registered.

Zone: RR

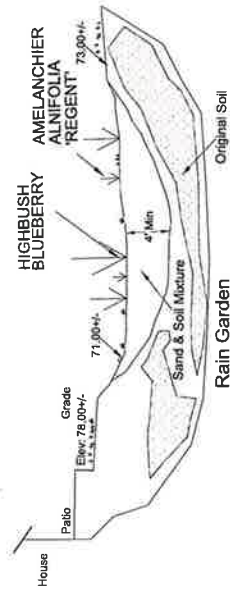
Legend:

- Station Points
- Existing Elevation Points
- Tree & Bush Line
- Property Markers IR / IP / GB
- Shoreline / Wetland
- Trees: Elm, Maple, Spruce, Fir, Pine, Birch, Oak, Poplar, Fruit
- Bushes: Juniper, Yew, Holly, Boxwood, Privet, Honeysuckle, Hydrangea, Lilac, Rose, Spirea, Viburnum, Red Twig Dogwood
- Swamp
- Seaback Line
- Property Line
- Utility Pole
- Stone Wall
- Boulders
- Lamp Post

Existing Lot Plan With Proposed Rain Garden and Drainage



Rain Garden Plantings



60 Ridgewood Road Sunapee, NH 03782
LOCUS
(Not to Scale)
Lake Sunapee NHDES HWMark: = 1094.15
USGS Datum: = 1093.0
Riverside: = 66.0

FEMA FLOOD MAP:
Map Number 33019C0215E
Effective Date: May 23, 2006
Panel 135 of 705
Lake Sunapee Classified: Zone AE
Elevation: 1095.0

SOIL REFERENCE:
Sullivan County Soil Survey
NCSS
1. M6D / Marlow Fine Sandy Loam
Very Stony

PLAN NOTES:

- The purpose of this plan is to construct a Garage 20'x20', Covered Deck 5'x5', Stone Steps, Porch, Stairway 12'x4', and Structural Drainage System.
- Refer to the Rain Garden and Drainage System.
- NH Shop and Appliance Permit # 2016-01585 for Garage, Deck, Stairway.
- Additional Pending Shoreland Permit for Rain Garden and Run-off Drainage.
- The percentage of impervious to pervious is 21%.
- There will be NO impact to the Shoreline Area as a result of the proposed project.
- This Plan is NOT a Survey. Total Station, Field Note, Town Records, Deeds, and Registered Plans have been used to compile this Topographic Site Plan.

Revisions	
1.	6/1/2018
2.	
3.	



Total Station / Wetlands Delineated / Plan Drawn by:
Riverside
Surveyors
90 Main St., Suite 402
10 Bridge St. Road
Sunapee, NH 03782
Tel: (603) 837-4028
Fax: (603) 837-4049
Email: riverside@riverside.nh

Nowack – 60 Ridgewood Road

Justification for Front and Side Setback Variances for Garage Construction

Accompanying Documents:

1. Variance Application.
2. Site Plan showing existing conditions. Surveyed by licensed surveyor in August 2018.
3. Site Plan showing proposed garage and associated modifications.
4. Conceptual renderings of garage from 8 viewpoints.
5. June 15, 2018 letter from NHDES indicating approval of Shoreland Permit for garage, drainage system and rain garden.
6. Riverside plan showing locations and construction details for drainage system and rain garden.
7. Warranty Deed

Requirements for awarding a variance under the new RSA 674.33, I(b)(5):

- (A) For the purposes of this subparagraph, "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.

Special conditions of the property that distinguish it from other properties in the area:

The lot at 60 Ridgewood Rd is smaller in area and has less road frontage than any other property on Ridgewood Rd. (See Table 1). In addition, there is an 8 ft ROW along the eastern side of the lot further restricting use of the lot. Because of the dimensions of, and restrictions on, the property, there is no location on the property where a 2-car garage could be constructed without requiring at least one variance. Furthermore, the steepness of the lot (a drop in elevation of 10 ft from the road to the house) makes the current driveway inaccessible in the winter. Stormwater drainage from the road causes the driveway to ice over in the winter, making traversing from the house to the road and upper parking area treacherous.

Table 1

Address	Owner	Area (acres)	Road Frontage (ft)
58 Ridgewood	Fitzgerald	0.71	NA
60 Ridgewood	Nowack	0.20	42
58 Ridgewood	Hack	0.23	56.32
56 Ridgewood	Howland	0.38	91.38
50 Ridgewood	Mulliken	0.42	92
48 Ridgewood	Rose	0.24	67
46 Ridgewood	Dunlap	0.22	71

42 Ridgewood	Patrick	0.23	72
30 Ridgewood	Libsch	0.44	95
24 Ridgewood	Holmes	0.34	65
22 Ridgewood	Bushueff	0.55	92
20 Ridgewood	Bushueff	0.53	86
6 Ridgewood	Kaufman	2.28	423

Relationship between general public purposes of ordinance and application of provision:

Our understanding of the general public purpose of the ordinance requiring a 50 ft setback from the road center line is to provide for maintenance of the road (plowing and regrading) and access for emergency vehicles. Our current 2-car parking area backs up to the southern property line at Ridgewood Rd with no setback. By constructing a garage that is set back from the road by 8 ft at its closest point, emergency and maintenance vehicles will have better access and space for maneuverability at the end of Ridgewood Rd.

The proposed use is a reasonable one:

A 2-car garage is a reasonable use for a year-round home. Few modern households in the Town of Sunapee own fewer than 2 vehicles. If we constructed a one-car garage, we would still require an additional parking space adjacent to the garage, resulting in essentially the same area of impervious surface.

When we purchased the property in 1998, based on the wording of the warranty deed (attached), we were under the assumption that we would be able to build a garage on the property. Before deciding to move up to Sunapee as full-time residents we spoke to Roger Landry, Zoning Administrator at the time (circa 2013). We went over the zoning requirements with respect to our site plan and Roger indicated that it was not unreasonable for us to assume that we could obtain a variance enabling us to construct a garage on our property. We became full time residents in Sunapee in April of 2017.

A variance is required to enable reasonable use:

As a year-round property occupied by an aging retired couple in the winter, reasonable use includes having a safe and secure area for parking cars and safe access to the house from the parking area. Our experience during the past two winters has demonstrated that icing of the parking area and the driveway makes for treacherous access to our cars. In fact, this winter, when we had a contractor working on repairing our deck, one of the workers slipped on the ice in the driveway, was injured, and went on workers comp.

Rationale for design of garage and selection of garage location:

A lot of thought and engineering was put into the design and selection of the location for the garage building because of the unusual constraints of the property.

Setback from centerline of road: The garage will be located with as great a setback from the road as possible while still allowing sufficient space for steps to descend from the 1125 ft elevation garage slab to the 1114 ft elevation ground surface at the house entry. (See attached cross-section elevation drawing.) The 4 ft by 10 ft bump-out on the garage allows us to add interior stairs to descend to and elevation of 1120 ft. Additional exterior steps will be needed to descend from 1120 ft to the ground elevation of 1114 ft at the house entry. Interior stairs will have an 8 in rise/11 in run. Exterior stairs will have an 8 in rise and 18 in run and will just barely fit in the space between the garage and the house.

Attaching the garage to the house was evaluated, but the slope of the lot would require the slab of the garage to be elevated 11 ft above the slab of the house, requiring construction of a massive raised foundation and major redesign of the house, including removal of all windows on the south side of the house, and a longer driveway with more impervious surface. In addition, side variances would still be required.

Side setback: A 20-ft wide garage is a minimum functional size to contain 2 standard size vehicles (example: Honda Accord 16.5' long by 6.5' wide). With road frontage of slightly less than 42 ft, there is no location for a garage that would not require at least one variance for a side setback. We chose to place the garage 5 ft from the western property line for the following reasons:

1. Only one side variance would be needed. Due to the ROW, the lot is not wide enough to meet the 15-ft setback on the west side, even if the garage bordered the ROW.
2. Less alteration of the natural grade of the land would be needed to construct the garage on the western side of the lot. Less off-site fill and retaining wall construction will be needed. Drainage of stormwater runoff from the road can be better handled.
3. Although we plan to remove the impervious surface from the current driveway, we will occasionally need to bring vehicles down closer to the house to perform house maintenance (painting, roofing, etc.) and access our grinder pump, waste tank and well which are on the east side of the house. Placing the garage closer to the eastern property boundary would restrict access for maintenance.

The proposed use would not diminish surrounding property values:

Garages are a common feature of residences on Ridgewood Road. There are 8 houses on the same side of the street within 500 ft of 60 Ridgewood, 4 of these houses have garages facing the road. Three of the 4 garages do not meet the setback requirement of 50 ft from the centerline of the road (62, 58, and 50 Ridgewood Road). The garage will be a permanent structure on a concrete slab with frost walls. The wood frame structure will be an attractive building, consistent in style with our house, with similar siding, trim, and color and with a maximum height of 15 ft over the slab elevation. The garage will be within 5 ft from the western property line (shared with Fitzgerald's property), but will be approximately 65 to 70 ft away from the Fitzgerald's house at its closest point, or about the same distance that Fitzgerald's garage is from our house.

The variance would not injure the public or private rights of others:

The proposed garage would be set back farther from the road ROW than our current parking area, allowing additional space for Town vehicle access and maneuverability at the end of Ridgewood Road and sufficient width for a turnaround for vehicles. The project would not impact the use of any of the abutting properties. Improved stormwater management and infiltration features (as approved by NHDES Shoreland Protection Program) will improve stormwater management on the road and reduce stormwater flow into the lake.

Approved Shoreland Protection Permit will be modified:

We have an approved Shoreland Protection Permit for a 20 ft x 20 ft garage and associated stormwater management system. If the requested variances are approved by the ZBA, we will submit a request for a modification of the Shoreland Protection Permit to NHDES to increase the garage size by 40 sq ft and adjust the garage location. The proposed stormwater management system will be installed as previously approved by NHDES with no changes.



The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner



June 15, 2018

RIVERSIDE ECOLOGICAL DESIGNS LLC
PO BOX 497
S SUTTON NH 03273

RE: Wetlands Bureau File # 2018-01535
Timothy & Bette Nowack
60 Ridgewood Rd, Sunapee
Tax Map/Lot # 113 / 021; Block

Dear Mr. Rodewald:

The Department of Environmental Services (DES) has reviewed your request to add additional stormwater control in the form of a Drainage System and Rain Garden and determined the impacts will not require an additional permit. The information, including the revised plan dated June 1, 2018, will be added to the current Shoreland Permit by Notification.

If you have any questions, please contact me directly at craig.day@des.nh.gov or (603) 271-0649.

Sincerely,

Craig W. Day
Wetlands Inspector
NHDES Wetlands Bureau

cc: Sunapee Board of Selectmen
Timothy & Bette Nowack

WARRANTY DEED

004377

KNOW ALL MEN BY THESE PRESENTS, that we, JOHN K. HERPEL and STELLA HERPEL, husband and wife, both of Acworth, County of Sullivan and State of New Hampshire, for consideration paid, grant to BETTE L. NOWACK and TIMOTHY L. NOWACK, of Concord, County of Merrimack and State of New Hampshire, whose present mailing address is 6 Meadowlark Lane, Concord, NH 03301, with WARRANTY COVENANTS to the said BETTE L. NOWACK and TIMOTHY L. NOWACK, as joint tenants with rights of survivorship,

A certain tract or parcel of land, with any improvements thereon, situated in Sunapee, County of Sullivan and State of New Hampshire, being Lot No. 20 as shown on a plan of lots entitled "Ridgewood," which said plan is recorded in the Sullivan County Registry of Deeds at Planfile 1, Pocket 3, Folder 1, #7, bounded and described as follows:

Beginning at an iron pin set in the ground on the Northerly side of a new road of "the grantors" known as the Ridgewood Road at the Southeast corner of this lot and the Southwest corner of Lot No. 19; thence running North 72° West along the Northerly side of said new road forty-two feet, more or less, to an iron pin set in the ground; thence running North 2° East against the Easterly side of Lot No. 21 one hundred forty-one feet, more or less, to an iron pin set in the ground near the high water mark of Lake Sunapee; thence running North 86° East in a line roughly parallel to the shore of said lake seventy-five feet, more or less, to an iron pin set in the ground at the Northwest corner of Lot No. 19; thence running South 14° West against the Westerly side of Lot No. 19 one hundred sixty-one feet, more or less, to the point of beginning. Together with what area lies between the land described, the extensions of the side lines and the shore.

Also conveying to the grantees, their heirs and assigns, a right-of-way to be used in common with others from the main highway to the premises herein described, over the private road now or formerly owned by George Dane, Glendon C. Chapman, and Kenneth E. Shaw, as is now constituted, for the purpose of reaching the property herein conveyed.

Reserving, however, to George Dane, Glendon C. Chapman, and Kenneth E. Shaw, their heirs and assigns, the right and privilege of permitting the Town of Sunapee to lay and repair water pipes along the northerly side of said new road for the purpose of supplying the various cottage owners with water in the event that the Town of Sunapee ever sees fit to extend their water supply to said premises.

Excepting and reserving to George Dane, Glendon C. Chapman, and Kenneth E. Shaw, their heirs and assigns, the right and privilege of permitting the Public Service Company of New Hampshire, or their successors or assigns, the privilege of erecting and maintaining power lines on said premises for the purpose of supplying the various cottage owners with light and power.

Said premises are conveyed subject to the following restrictions which run with the land and shall be binding on the grantees and all persons claiming under them:

1. That no more than one cottage shall be erected, altered, placed, or permitted to remain on said described lot, except that a private garage for not more than two cars may be erected and a combination toolhouse and woodshed may be erected which is not detrimental to the neighborhood.

2. That said property shall not be used for a commercial seaplane base.

3. That no Quonset hut type buildings or metal buildings of any kind shall be erected on said premises, and that any building erected shall be of standard type substantial construction.


4. That said cottage must be erected with modern plumbing facilities, and that no outdoor toilets or chemical closets will be permitted.

Subject also to an eight (8) foot right-of-way located on the easterly line of the subject premises granted to Donald R. Blair and Maureen Blair for access to Lake Sunapee, and the right to have the electric power lines and water lines as they exist on said right-of-way, described in Book 519, Page 174, of the Sullivan County Registry of Deeds.

Meaning and intending to describe and convey all and the same premises as were conveyed to John K. Herpel and Stella Herpel by Arthur W. Wight and Eleanor S. Wight by warranty deed dated March 27, 1992, recorded in Volume 963, Page 798 of the Sullivan County Registry of Deeds.

And we, the said grantors, release to said grantees all rights of homestead and other interests therein.

Signed this 15 day of JUNE, 1998.



John K. Herpel



Stella Herpel

STATE OF NEW HAMPSHIRE
SULLIVAN, SS.

JUNE 15, 1998


Personally appeared John K. Herpel and Stella Herpel, known to me, or satisfactorily proven, to be the persons whose names are subscribed to the foregoing instrument and acknowledged that they executed the same for the purposes therein contained.

Before me,



Notary Public/Justice of the Peace
My commission expires: 

STATE OF NEW HAMPSHIRE

DEPARTMENT OF REVENUE ADMINISTRATION  REAL ESTATE TRANSFER TAX

THOUSAND 5 HUNDRED AND 28 DOLLARS

06/16/1998 295534 \$ 11578.00

VOID IF ALTERED

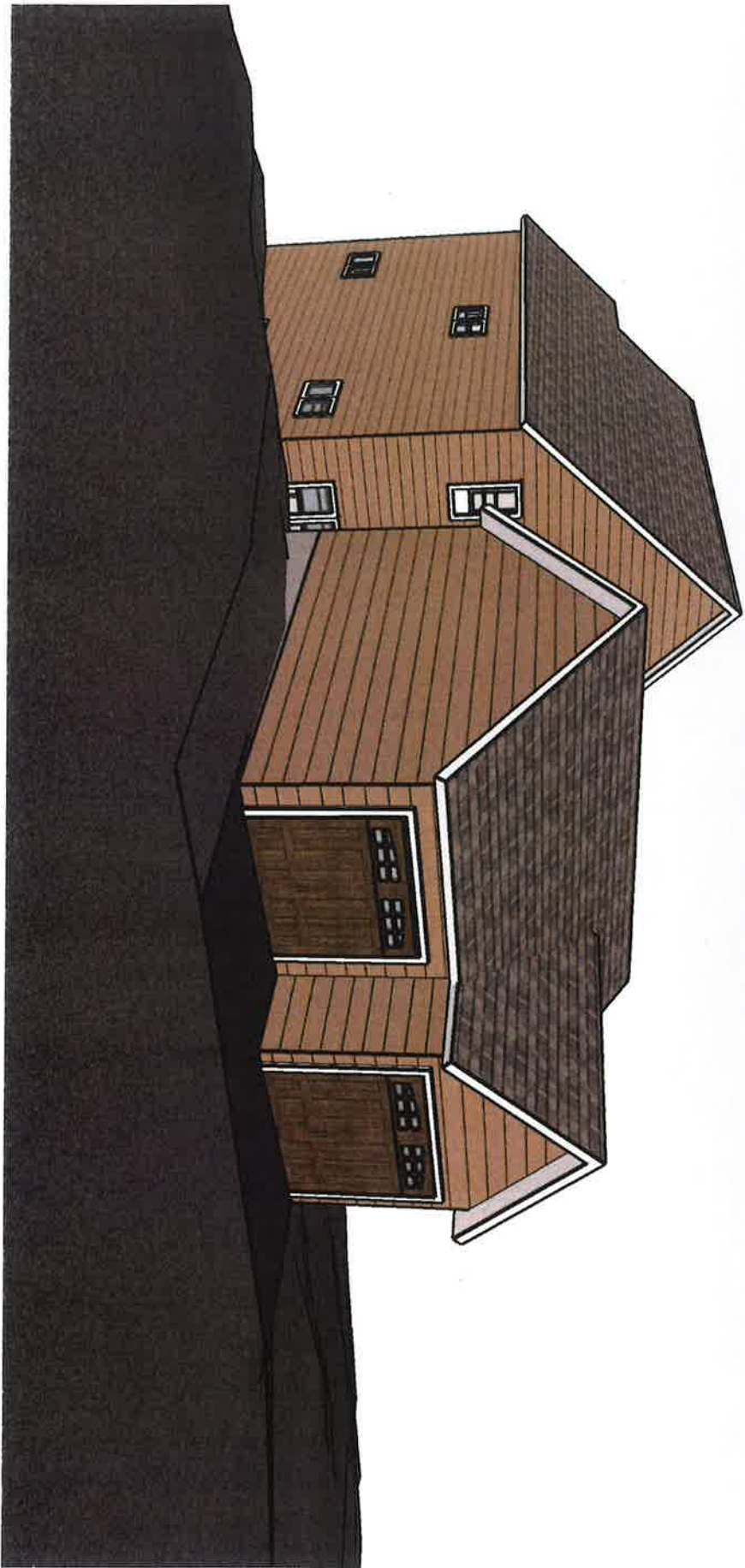
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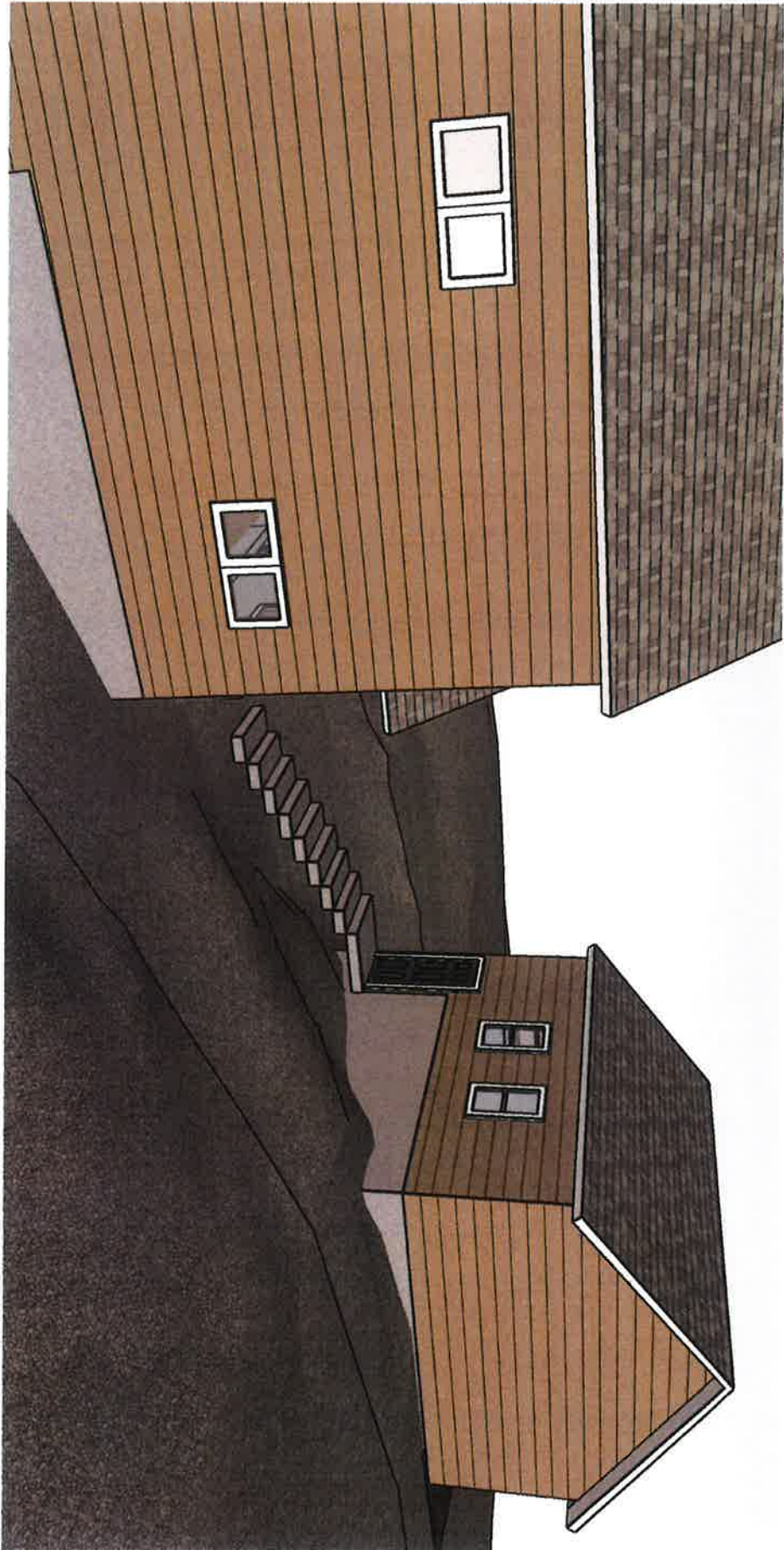
SULLIVAN COUNTY
REGISTRY OF DEEDS

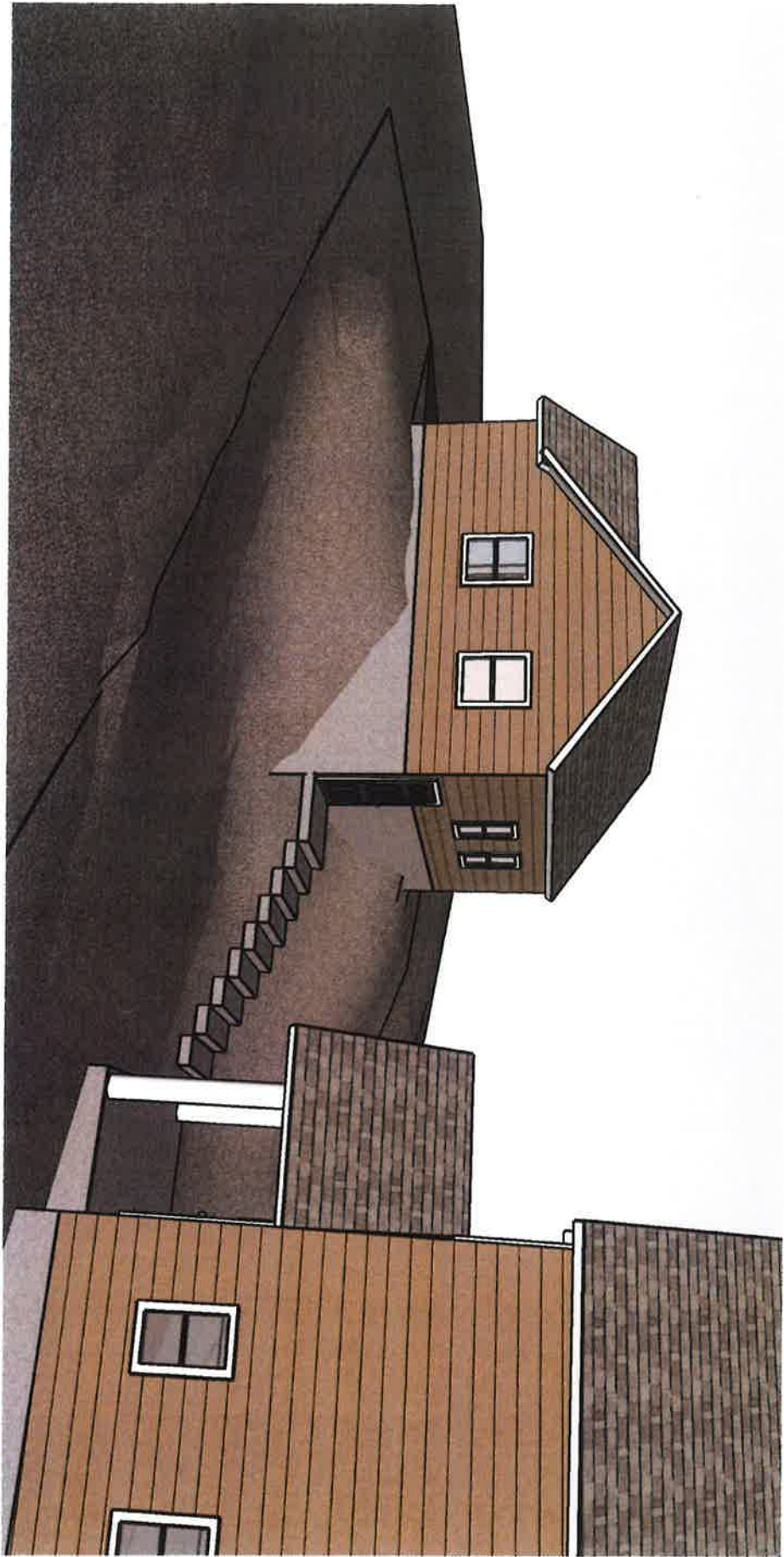
SULLIVAN COUNTY RECORDS
Sharon D. Big REGISTER

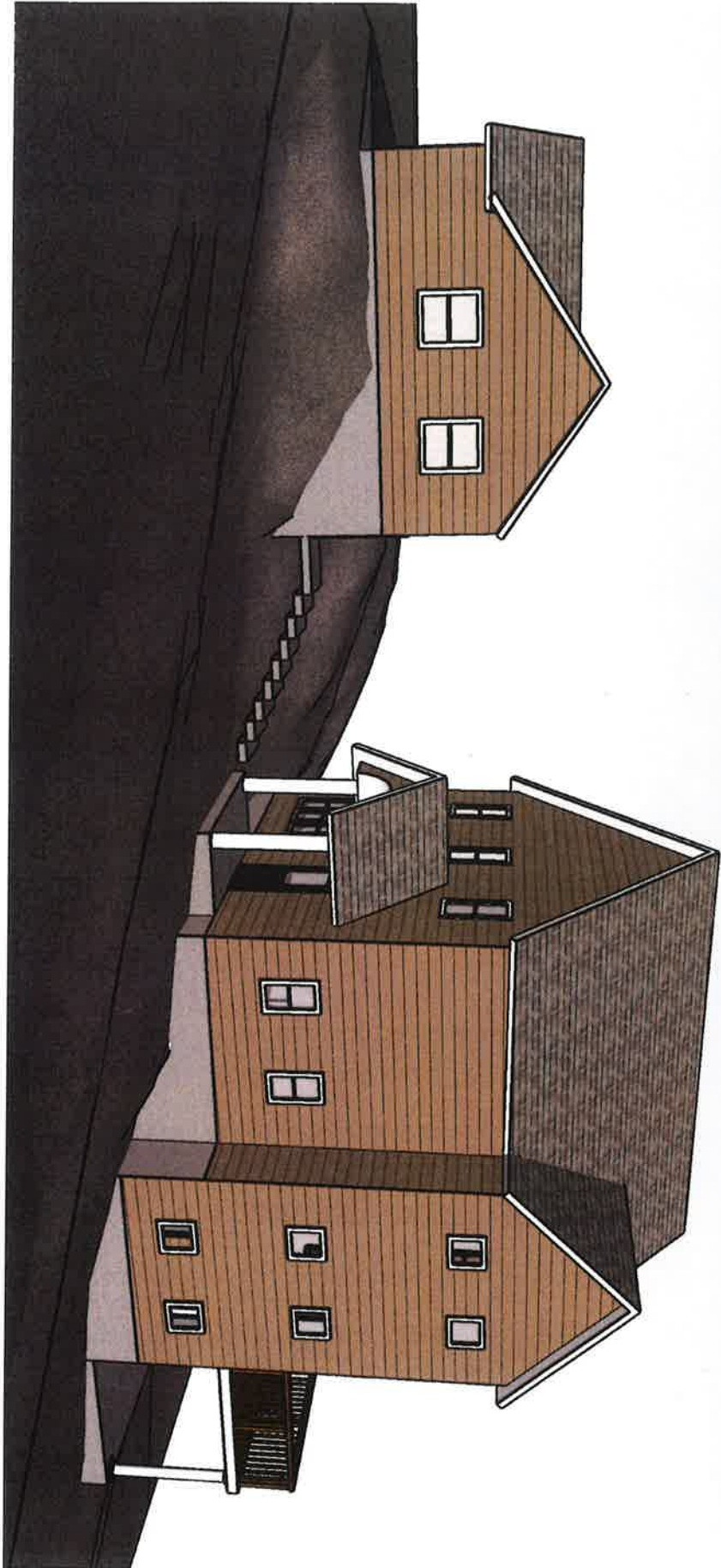


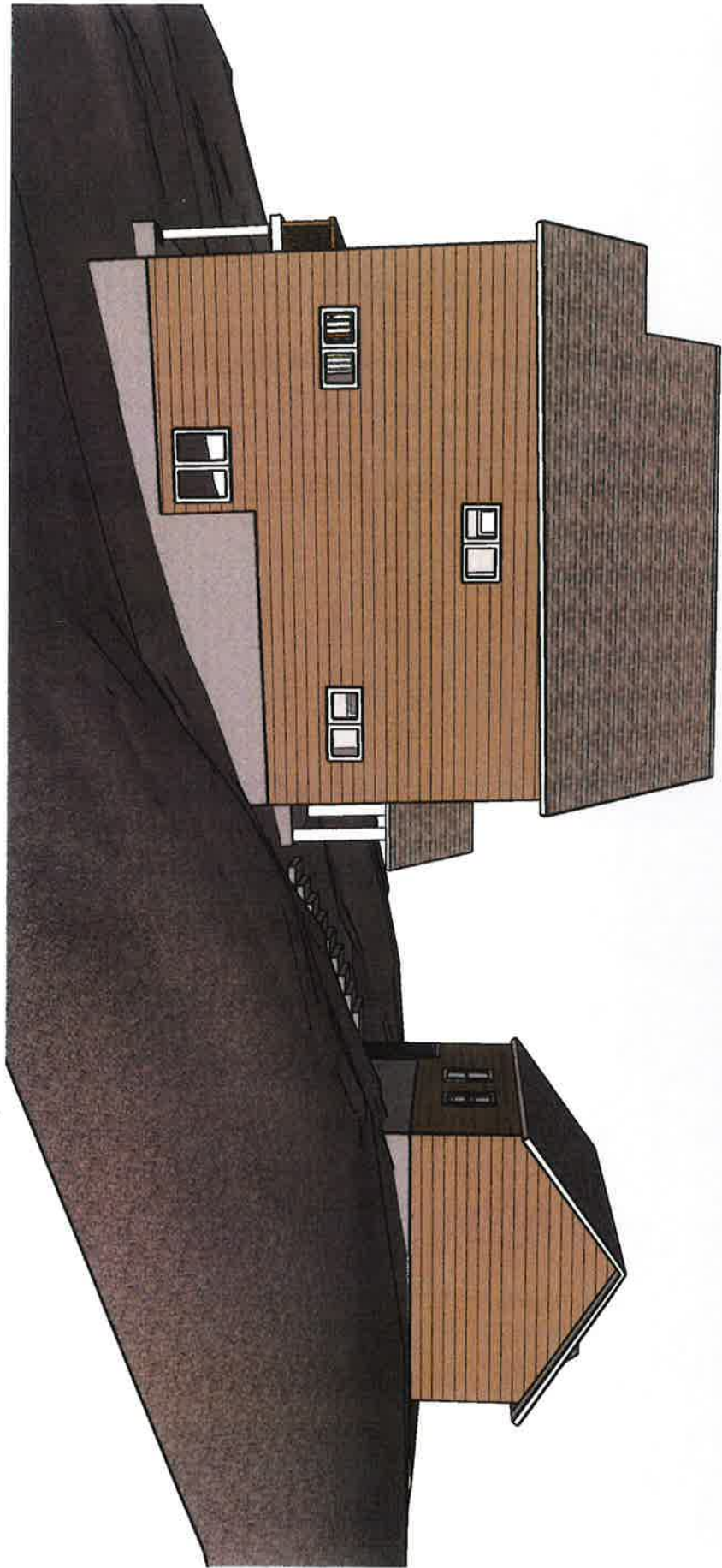


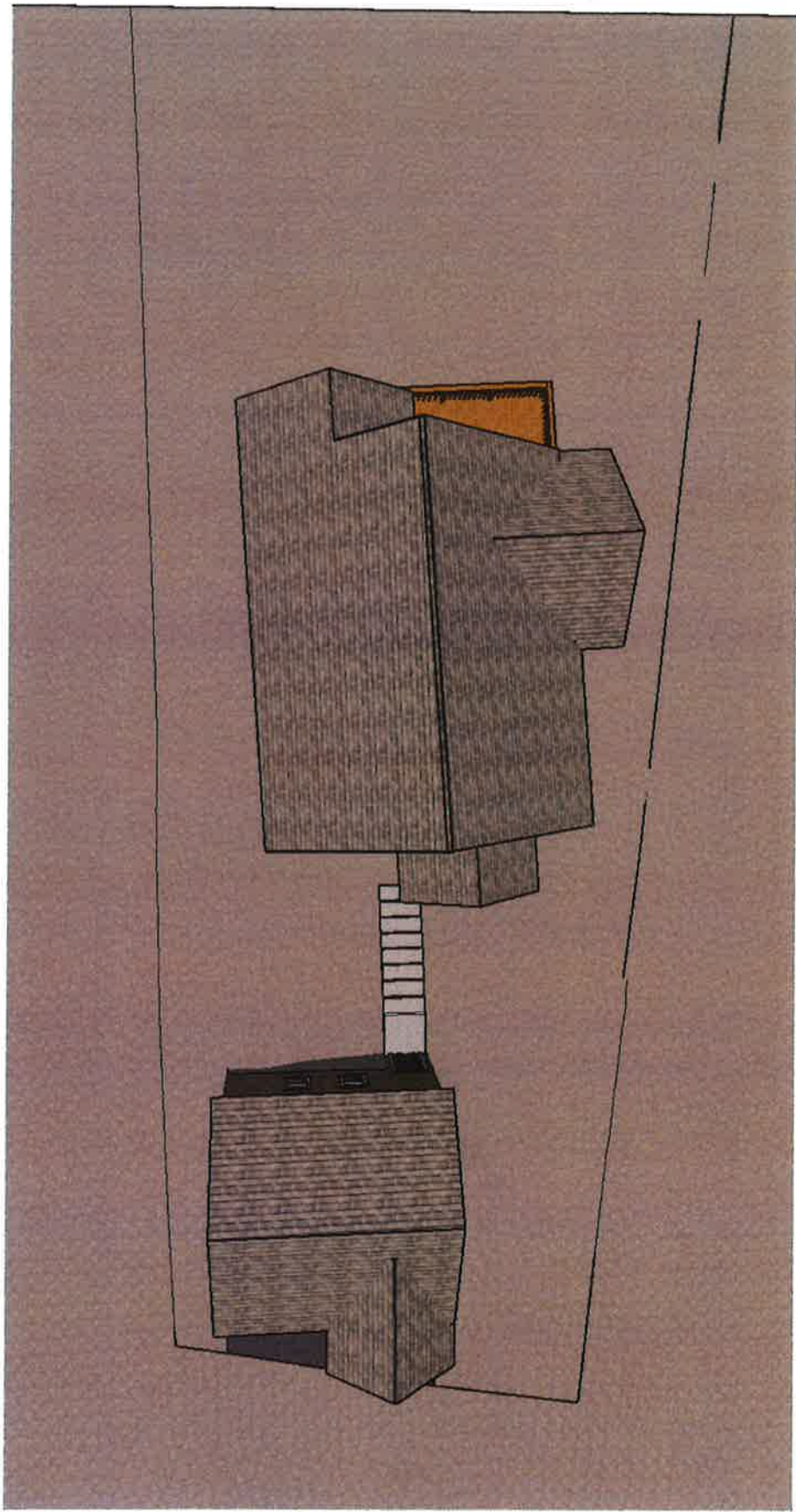












Misc.
Agenda
Items



TOWN OF SUNAPEE
23 Edgemont Road
Sunapee, New Hampshire 03782-0717
Phone: (603) 763-2212 Fax: (603) 763-4925

April 5, 2019

TO: Zoning Board of Adjustment

CC: Michael Marquise, Planner

FROM: Nicole Gage, Zoning Administrator

RE: Height Regulations in Zoning Ordinance
Sections 3.10, 3.40(i), and Article XI definition of "Maximum Structure Height"

Thank you for helping me out last night, so I can better interpret all our "height" rules. I want you to know that I listened to you last night, and that the ZBA feedback was very useful to me as the zoning administrator.

Thank you for clarifying the difference between "Maximum Structure Height" and "Maximum Height." It was helpful to hear the ZBA interpret the special 25-foot "Maximum Height" at the bottom of the chart in 3.10 for reduced Side or Rear setbacks. My understanding now is that the "25-foot Maximum Height" can mean 25-feet above the grade directly below it, just like the windowsill/eaves wording in 3.40(i). And that if the Planning Board meant for that 25-feet to refer to "Maximum Structure Height", they would have used those words.

I am going to update the CZC with some better language, so I don't misguide people in the future. I also made some notes to myself for a possible amendment suggestion to the Planning Board.

Town of Sunapee
23 Edgemont Rd., Sunapee NH
Phone (603) 763-3194 / Website www.town.sunapee.nh.us
Email zoning@town.sunapee.nh.us

CASE# _____

Draft
#2

Zoning Board of Adjustment (ZBA) Variance Application

Questions? Please contact the Zoning Administrator. All dates and deadlines are published on the ZBA calendar; see Page 6. For helpful guidelines on completing this application, see page 4-5.

Attach additional sheets of paper as necessary.

1. Landowner(s) Name(s): _____
2. Parcel ID: _____ 3. Zoning District: _____
1. Project Location (Street & #): _____
2. Mailing Address: _____
3. Phone Number: _____
4. Email: _____

ABUTTERS LIST: You must prepare a list of all abutting property owners and attach it to your application. If you have any difficulty, consult the town office, but the accuracy of the list is your responsibility. You can download an abutters list by using the Tax Maps/GIS on the town's website (under Assessing Department).

FEEES: Application Fee: \$150 Make check payable to Town of Sunapee.
 Abutter Notification Fee: ~~\$6.85~~* per abutter. Make payable to US Post Office.

Postmaster

* NOTE: Rates are subject to change based on current rates set by the US Post Office. ~~This is the rate effective February 2019. If the postage rate changes, or if the amount of the check is incorrect, you will be asked to submit a new check and the application may be held up until the correct amount is received.~~ For the most current rate, please check with the town office.

ATTACHMENTS: To assist the board, please attach sketches, photos, surveys, plot plans, pictures, construction plans, or whatever may help explain the proposed use. Include copies of any prior Zoning or Planning decisions concerning the property. If you have something in writing stating that your proposed project does not meet zoning, please attach that to this application. It may be a letter, email or denied permit. A professional survey by a licensed surveyor is strongly recommended for variances related to setback requirements. For properties located in the Shorelines Overlay District, a professional survey is required.

Applications will not be considered complete unless all the questions are answered, the fees are paid, and an Abutters Mailing List is attached.

Revised 2/22/2019

GENERAL DESCRIPTION: This is a place to give a general summary of the proposed project as an introduction and overview for the public hearing. For example, where is the property is located? Describe the property. Give area, frontage, side and rear lines, slopes, natural features, etc. What do you propose to do? Why does your proposal require an appeal to the board of adjustment?

Attach additional sheets of paper as necessary.

SPECIFIC REASON THE VARIANCE IS NECESSARY: A Variance is requested from Zoning

Ordinance, Article _____, Section _____ to permit _____

~~Landowner(s): _____ Parcel ID#: _____~~

~~Property Address: _____~~

Facts in support of granting the variance:

No bold in questions 1-5

1. Granting the variance would not be contrary to the public **interest** because: _____

2. If the variance were granted, the **spirit** of the ordinance would be observed because: _____

3. Granting the variance would do substantial **justice** because: _____

4. If the variance were granted, the values of the surrounding properties would not be diminished because: _____

5. **Unnecessary Hardship**

a. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

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 because: _____

- and -

ii. The proposed use is a reasonable one because: _____

b. Explain how, 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. _____

NOTE:

For person(s) with physical disabilities,
please see RSA 674:33 regarding alternative hardship criteria for a Variance.

SIGNATURE: I understand that the public hearing will be held at the scheduled date and time unless a request is made by me for a new hearing. Any rehearing will require a new public notice and notification to abutters, the cost of which will be borne by the applicant. Further, I hereby give permission to the ZBA members and zoning officials to visit the subject property prior to the public hearing. To the best of my knowledge, the above is true and correct.

Landowner(s) Signature(s)

Date

APPENDIX A

Helpful Guidelines for Completing the Variance Application, Part 1

This information shall not be construed as legal advice
or interpretation of the law in any way or form.

~~The Zoning Administrator is available to help you with this application. If you have any questions, please call, email or stop by the town office. The Zoning Administrator can be reached at (603) 763-3194 or zoning@town.sunapee.nh.us.~~

PURPOSE OF ZONING: For more information about the "Purpose of Zoning" see Sunapee Zoning Ordinance Article I, Section 1.20 "Purpose" and NH RSA 674:17 "Purposes of Zoning Ordinances" (as may be amended).

↳ Article II, Section 2.30 "District Purposes and Description";

ABOUT THE 5 VARIANCE QUESTIONS: (SEE APPENDIX B) A variance is an authorization which may be granted under special circumstances to use your property in a way that is not permitted under the strict terms of the zoning ordinance. The Zoning Board of Adjustment (ZBA) must determine that the variance request satisfies the following 5 criteria. Please note that all criteria must be satisfied in order for a variance to be granted. Please provide a written response along with any other supporting documentation for each of the following criteria. Attach additional pages if necessary. Failure to satisfactorily prove any single criteria will result in denial of the application. The Applicant has the burden of proof. Applicants should be prepared to present information pertinent to the variance being requested. To obtain a legally granted variance, you must demonstrate/prove that the proposal satisfies ALL FIVE of the variance criteria.

MORE INFORMATION: It is recommended that you become familiar with the Sunapee Zoning Ordinance, as well as the state statutes that cover planning and zoning (New Hampshire RSA Chapters 672- 678). You can purchase a copy of the Sunapee Zoning Ordinance at the town office, or download a copy from the town's website (www.town.sunapee.nh.us). The State's RSAs can be viewed online at <http://www.gencourt.state.nh.us/rsa/html/indexes/default.html>.

WHAT HAPPENS NEXT: The board will promptly schedule a public hearing upon receipt of your properly completed application. Public notice of the hearing will be posted and printed in a newspaper and notice will be mailed to you and to all abutters at least five days before the date of the hearing. You and all other parties are invited to appear in person (or by agent or counsel) to state reasons why the appeal should or should not be granted. After the public hearing, the board will reach a decision. An official Notice of Decision will be made available within 5 business days, along with the minutes of the hearing.

IF THE VARIANCE IS GRANTED, HOW LONG DO I HAVE TO BUILD IT? If after a period of twenty four (24) months from the date a Variance or Special Exception is granted by the Zoning Board of Adjustment, the applicant has neither applied for nor received a Certificate of Compliance from the Board of Selectmen, the Variance or Special Exception will become void. An extension may be granted by the Zoning Board of Adjustment. Reference Article X, Section 10.16 (e).

WHAT IF I DISAGREEE WITH THE BOARD'S DECISION? Any person affected has a right to appeal this decision. If you wish to appeal, you must act within thirty (30) days of the date of the hearing. The necessary first step before any appeal may be taken to the courts, is to apply to the Zoning Board for a rehearing. The motion for a rehearing must set forth all the grounds on which you will base your appeal. See New Hampshire Statutes, RSA Chapter 677 for details.

APPENDIX B

Helpful Guidelines for Completing the Variance Application – Part 2

**This information shall not be construed as legal advice
or interpretation of the law in any way or form.**

SOURCE: State of NH Office of Strategic Initiatives, 2018 Handbook for Local Officials
for The Board of Adjustment in New Hampshire.

<u>VARIANCE CRITERIA GUIDELINES</u>	
Statutory Requirements (RSA 674:33, I(b))	Explanation
<i>APPLICANT MUST SATISFY ALL OF THE FOLLOWING</i>	
1. The variance is not contrary to the public interest.	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure "public rights."
2. The spirit of the ordinance is observed.	As it is in the public's interest to uphold the spirit of the ordinance, these two criteria are related.
3. Substantial justice is done.	The benefit to the applicant should not be outweighed by harm to the general public.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship can be shown in either of two ways: First is to show that because of special condition of the property that distinguish it from other properties in the area: (a) There is no fair and substantial relationship 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. <i>Alternatively</i> , unnecessary hardship exists 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.	The applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other land in the area. (a) Determine the purpose of the zoning restriction in question. The applicant must establish that, because of the special conditions of the property, the restriction, as applied to the property, does not serve that purpose in a "fair and substantial" way. (b) The applicant must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood. <i>Alternatively</i> , the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.

ATTACH ZBA CALENDAR
HERE