BCM Environmental & Land Law, PLLC
Solutions for Northern New England

March 27, 2024

Via Hand Delivery

Joe Halla, Chair
Town of Canterbury Zoning Board of Adjustment
10 Hackleboro Road
P.O. Box 500
Canterbury, N.H. 03224

RE: Variance Application; Case No. 2024-1; 31 South Harmony Lane (Tax Map 203, Lot 31)

Dear Chair Halla and Members of the Board:

I represent John and Jennifer Wiencek, owners of the seasonal camp property that abuts the subject property to the south at 29 South Harmony Lane Tax Map 203, Lot 52). The Wienceks bought their property in 2012 from the original owner of the camp. The Wienceks are opposed to the variances requested by the Applicant, Benchmark, LLC, on behalf of the landowner, Kristen Silveria.

I. The Applicant needs a Special Exception

The Applicant proposes to construct a single-family residence. Pursuant to Section 5.3.C (Table of Principal Uses) of the Canterbury Zoning Ordinance, a Special Exception is required to construct a single-family residence in the Natural Resource District. Although Section 4.1 provides some relief for a pre-existing, non-conforming lot, it would be a legal error to interpret Section 4.1 as exempting the Applicant from the Special Exception requirement of Section 5.3.C. Indeed, Town records show that landowners in the Natural Resource District have been required to apply for a Special Exception.

Section 4.1 provides that "[c]onstruction, for residential purposes only, on a non-conforming lot is permitted . . . ." This simply provides that being an undersized lot cannot be a reason for denial of all uses of that lot, but it does not open the door for all uses, even prohibited uses, to be allowed by right. Even non-conforming lots must obtain a Special Exception before a new, prohibited use can be made of the lot.

Note that Section 4.1 provides generally "for residential purposes" and does not provide for, specifically, a single-family home. The Applicant's property has been used for decades for residential purposes, there being now, and long having been, a residential trailer on the property. Other non-conforming properties along South Harmony Lane

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have been similarly used as residential, seasonal camps, with and without permanent structures.

If the Board were to erroneously interpret Section 4.1 to allow a single-family residence without the property owner seeking a special exception, that interpretation would lead to an absurd result. See Appeal of Local Gov't Ctr., 165 N.H. 790, 804 (2014) ("We construe all parts of a statute [which includes a zoning ordinance] together to effectuate its overall purpose and avoid an absurd or unjust result."). First, such an interpretation would mean that there is no limit to the type of "residential purposes" allowed under Section 4.1. To illustrate, this interpretation would result in there being nothing preventing an applicant from constructing *any* type of residential structure on the undersized lot, even residential uses that are not even allowed in the Natural Resource district by Special Exception, such as a multi-family dwelling. The purpose of Section 4.1 cannot be to allow any and all residential structures on an undersized lot in this zoning district under the guise of Section 4.1 generally allowing "residential purposes." Second, interpreting Section 4.1 to allow all types of residential uses would lead to the absurd result of the owner of a 0.41-acre lot being allowed, as of right, to construct a single-family or multi-family, year-round dwelling but require the owner of a conforming 10+ acre lot to obtain a Special Exception. Third, if Section 4.1 were intended to override all other zoning requirements, Section 4.1 would have language stating as much.

If the ZBA is inclined to determine that a special exception is not required, I respectfully request that the ZBA consult its legal counsel. Not requiring a Special Exception would not only be making an unforced legal error, it would create the proverbial slippery slope for all future applications in sensitive areas that are supposed to be protected by the Natural Resource district's well-considered requirements. The ZBA must be consistent in its interpretation and application of the Zoning Ordinance, and it must do so in a legally defensible manner.

The proper sequence of applications would be for the ZBA to first entertain an application for a Special Exception prior to entertaining an application for a variance from the setbacks. A Special Exception would logically come first to determine whether the proposed use is even allowed on the property before getting into subsidiary details of conformance with setback requirements. Also, hearing and granting a variance first would cause the ZBA to have essentially pre-judged the Special Exception case before it is even brought.

II. The application does not satisfy the requirements for submission

The ZBA may not consider the Applicant's application because it does not satisfy the Town's submission requirements and, by failing to do so, the Applicant has failed to provide information necessary for the ZBA and abutters to properly evaluate the application.

The Town's variance application form requires certain information. The form states, "[a]t a minimum, the plot plan must show the location and dimension of existing and proposed building footprints, setback distances to the property lines and road right of way; the location of well and septic systems . . . ." The Applicant's application fails to provide the following, in violation of the above-stated requirements: (1) the dimensions of the proposed building; (2) the 75-foot setback line from Rocky Pond; and (3) the distance from the proposed septic system to Rocky Pond.

Despite the proposed structure including a single-family dwelling, garage, and deck, the only dimension of the building provided on the plan is the 12-foot width of the deck. This failure does not permit the ZBA to properly evaluate the proposed dwelling.

Inexplicably, the plan does not show the 75-foot setback from Rocky Pond. The Applicant is seeking a variance from this setback, but this setback is not even shown on the plan. This makes it impossible for the ZBA or abutters to understand how much of the proposed building is within the Rocky Pond setback.

The Applicant's failure to show the distance between the proposed septic system and Rocky Pond does not allow the ZBA or abutters to understand the impact of the system and whether it satisfies State requirements. Additionally, pursuant to Section 5.2.C.1, septic systems must be located at least 125 feet from Rocky Pond, but it is unclear whether such requirements are met because the distance is not shown on the submitted plan. It is also not shown whether the well and septic system are at least 75-feet apart, as required by the New Hampshire Department of Environmental Services.

The ZBA cannot reasonably or lawfully consider or approve a variance application that does not meet the requirements stated in the application form. The satisfaction of these requirements is essential for a evaluation of the Applicant's proposal.

III. Natural Resource District

Pursuant to Section 5.3.A.7, the purpose of the Natural Resource District is "[t]o acknowledge those areas of high natural resources value as community assets which must be conserved by special consideration of the impact of uses in these areas." Rocky Pond and its shoreline were intentionally included in the Natural Resource District. The reason for this is that the marine biology of Rocky Pond and its shoreline is delicate and, as the Ordinance requires, "must be conserved." (Emphasis added.) This is a mandate. Nowhere in the application does the Applicant even allege that the proposed development would not adversely affect this delicate marine environment or the onsite wetlands.[1] This

[1] Note that the Applicant's deed requires that the owner "*will do nothing to obstruct the natural flow of surface water from the westerly side of said road or passway through said culvert.*" (Deed attached.) The

is especially concerning when the variance is for the installation of a home within the protected shoreline that will be there forever.

IV. The Applicant has not addressed all the applicable variance criteria

The five applicable criteria for any variance in any New Hampshire municipality is set forth in RSA 674:33, I(a) and (b). Those criteria are as follows:

> (A) The variance will not be contrary to the public interest;
> (B) The spirit of the ordinance is observed;
> (C) Substantial justice is done;
> (D) The values of surrounding properties are not diminished; and
> (E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
>
> > (b)(1) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area:
> > (A) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and
> > (B) The proposed use is a reasonable one.

In her application, the Applicant does not address all these criteria. For example, the Applicant's application does not address the Substantial Justice criterion. The Applicant also does not explain why "[n]o 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 does not explain why the construction of a single-family dwelling that does not meet the setbacks is a reasonable use for this undersized lot and in this neighborhood. It would be a legal error for the ZBA to grant a variance to an Applicant whose application does not even address the applicable variance criteria.

V. The Applicant does not satisfy the variance criteria

Even if the Applicant had addressed all the variance criteria in its application, the Applicant does not satisfy the criteria, and so the ZBA cannot grant the variance.

1. Public Interest and Spirit of the Ordinance

The first two criteria under RSA 674:33, I(a)(2) are whether "[t]he variance will not be contrary to the public interest" and observe the spirit of the Ordinance. These two

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Applicant has not submitted any evidence to show that covering this property with 19% impervious coverage will not obstruct the natural flow of the surface water that flows through the property to Rocky Pond.

criteria are related and considered together. See Harborside Assocs. v. Parade Residence Hotel, 162 N.H. 508, 514 (2011). "The first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is to examine the applicable zoning ordinance." Chester Rod & Gun Club, Inc. v. Town of Chester, 152 N.H. 577, 581 (2005). For a variance to be contrary to public interest, it "must unduly and in a marked degree conflict with the ordinance such that it violates the ordinances basic zoning objectives." Nine A LLC v. Town of Chesterfield, 157 N.H. 361, 366 (2008). To determine whether "a variance violates an ordinance's basic zoning objectives, [the court considers], among other things, whether it would alter the essential character of the locality or threaten public health, safety, or welfare." Id.; Harborside Assocs., 162 N.H. at 514. Here, granting the variances would alter the essential character of the South Harmony Lane neighborhood and threaten public health, safety, and welfare by allowing the construction of a large, single-family home so close to Rocky Pond.

Note that the Applicant does not justify how these variances would NOT be contrary to public interest or observe the spirit of the ordinance, and it is not the ZBA's role to fill in gaps in the application. In paragraphs 3 and 4 of the application, which are the paragraphs where the Applicant must state why it satisfies these criteria, the Applicant simply states that there are other residential homes with similar setbacks and that the proposal satisfies the *side* setbacks. These hardly justify why allowing a new, single-family home within fifty feet of Rocky Pond is NOT contrary to public interest or observes the spirit of the Ordinance. That the side setbacks are satisfied is not remarkable and says nothing about why the Pond and road setbacks should be relaxed. The Applicant's statements also ignore the fact that the vast majority of existing residential uses are seasonal camps that were constructed prior to the setback requirement rather than year-round, single-family residences.

As for the character of the neighborhood, the essential character of a neighborhood can be ascertained by (1) looking at the existing uses and (2) looking at what uses are allowed in the zoning district. As for existing uses, there are 25 lots along the shore of Rocky Pond in the Natural Resource District. Five of the lots are undeveloped. Of the 20 developed lots, 16 of them were developed between 1940 and 1963. Ten of these lots are assessed as camps. Only four lots have been developed since 1963, but one of them is not on the portion of the parcel adjacent to Rocky Pond. In sum, these figures (which are shown on the attached map) show that it is not customary to allow new, year-round homes to violate the 75-foot setback.

The turn-off from Route 106 onto narrow, unpaved South Harmony Lane marks the entry into a special, different world. The essential character of this neighborhood is a "camp" neighborhood, which is consistent with the purpose of the Natural Resources district.

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This essential character of the neighborhood is bolstered by looking at the uses allowed in this zoning district. The only uses allowed by right in the Natural Resource district are agriculture, forestry, accessory uses, and horses for personal use. See Section 5.3.C (Table of Principal Uses). The fact that single-family homes, as well as many other uses, are only allowed by Special Exception further shows that the essential character of this neighborhood does not include year-round, single-family homes.

2. Substantial Justice

The Applicant did not address this criterion at all in its application despite being required by RSA 674:33, I(a)(2)(C). As stated above, the Applicant must address every variance criteria and has the burden of proving that each is satisfied. See Grey Rocks Land Trust v. Town of Hebron, 136 N.H. 239, 243 (1992) ("The party seeking a variance . . . bears the burden of establishing each of the requirements for a variance.") (overruled on other grounds by Simplex Techs., Inc. v. Town of Newington, 145 N.H. 727, 731–32 (2001)).

"Perhaps the only guiding rule [on this standard] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007). Here, denial of the variance would not be a loss to the landowner. The landowner bought the property knowing of the restrictions in the Natural Resource district. Even if the landowner did not have actual knowledge, she had constructive knowledge, which is treated the same as actual notice under New Hampshire law. See Page v. Page, 8 N.H. 187, 198 (1836) (stating that "constructive notice . . . is in law tantamount to actual notice").

Also, the landowner can develop this property in accordance with the Zoning Ordinance's setbacks by building a smaller home that meets the setbacks and is in keeping with the character of the neighborhood. Attached is a mark-up of the Applicant's plan that shows the buildable area that is available on the Applicant's property while still conforming with all setbacks. This completely belies the Applicant's suggestion that violating the setbacks is necessary to build a home on this property; the home just may not be as large as the Applicant would like. Thus, there is no loss to the Applicant if the variances to construct this proposed home are denied.

Any perceived loss to the landowner is greatly outweighed by the gain to the general public that denial of the variance would result in. The purpose of the Natural Resource district is "[t]o acknowledge those areas of high natural resources value as community assets which must be conserved by special consideration of the impact of uses in these areas." This purpose of protecting Rocky Pond as a "community asset" is accomplished by (1) restricting the uses that are allowed in the district; (2) requiring a minimum 10-acre lot size; and (3) the 75-foot setback from Rocky Pond, which is more protective than the State Shoreland Water Quality Protection Act that requires a

minimum 50-foot setback for primary structures. The Town of Canterbury specifically chose to increase that setback to 75 feet to protect Rocky Pond. Allowing a single-family home less than 75 feet from the shore would undermine this purpose, thereby resulting in a loss to the general public. Once the rural, camp character of South Harmony Lane and Rocky is lost, it is lost forever. Any perceived loss to the landowner is not outweighed by this loss to the public and, therefore, denying this variance is the only way to achieve substantial justice. In short, the Applicant does not satisfy the substantial-justice criterion.

3. Property Values

Under RSA 674:33, I(a)(2)(d), a zoning board of adjustment may only grant a variance if "[t]he values of surrounding properties are not diminished." The burden is on an applicant to demonstrate that this requirement is met. See Grey Rocks Land Trust v. Town of Hebron, 136 N.H. at 243. The Applicant has not submitted any evidence that granting the variance will not diminish the value of surrounding properties. The only justification offered by the Applicant is the following: "This will be a new home of similar size and quality to other homes in the area. These improvements will only add value to the property." See Application at ¶ 5. In reality, the home will be much larger than all or most of the homes and camps in the neighborhood. The Applicant also seems to be saying that the home will add value to *her* property, which is not the standard that must be proven.

The surrounding properties exist in a rural, camp neighborhood. Allowing a new home on the shore of Rocky Pond will forever alter the neighborhood, and especially the setting enjoyed by abutters John and Jennifer Wiencek, who bought their seasonal camp from the original owners and maintain the camp in its traditional state. The ZBA cannot grant these variances without the Applicant satisfying its burden that it satisfies this criterion, especially without *any* evidence from the Applicant. This criterion is to protect surrounding properties, and these variances will not do so. Thus, it is clear that this new home will alter the camp character of the neighborhood that the Wienceks, the Crawfords, and other seasonal residents of South Harmony Lane have long enjoyed.

4. Unnecessary Hardship

An unnecessary hardship is established only when "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). Alternatively, if those requirements are not met, "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." RSA 674:33.

The first requirement of the unnecessary hardship test is that the property has special conditions that distinguish it from other properties in the area. This is a threshold question. If the property is not different from the other properties in the area, the variance must be denied. Here, the Applicant's property is no different than the other properties on South Harmony Lane that front on Rocky Pond, all of which are non-conforming in size (and all are similar in size). This is plainly shown on Tax Map 203 attached to the application. This property is no different than the other properties along Rocky Pond that are seasonally used for residential purposes, with or without permanent structures. For this reason alone, the ZBA must deny the variance. No variance can be granted if the subject property does not have special conditions "that distinguish it from other properties in the area."

The Applicant also fails the second part of the unnecessary hardship test, *i.e.*, that "[n]o fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property." RSA 674:33, I(b)(1)(A). Stated differently, this requirement is satisfied if declining to enforce the provision at hand will not undermine the purposes of that provision. Here, the provisions at issue are the setbacks from South Harmony Lane and Rocky Pond. With regard to the 75-foot Rocky Pond setback, the purposes are to protect the water quality of Rocky Pond and the character of the waterfront community. See Section 5.3.A.7.

There is no doubt that disregarding the 75-foot setback from Rocky Pond will have an adverse effect on the Pond and the neighboring properties. The 75-foot setback is specifically intended to prevent new homes close to the Pond, thereby limiting adverse effects to the Pond and its shoreline. There is clearly a fair and substantial relationship between the 75-foot setback and the application of that setback to this property. A home of such a size that it is closer than 75 feet from the Pond is not necessary to allow residential use of this property, as shown on the attached marked-up plan. The buildable area shown on the marked-up plan confirms that denying this variance and requiring the Applicant to build a structure that complies with the setbacks will not cause an unnecessary hardship. While the Applicant may consider this a hardship, RSA 674:33 only allows a variance to avoid an *unnecessary* hardship, not just any argued hardship.[2]

The Applicant's desire to build a home in violation of the setbacks is only the Applicant's desire, but the Applicant's desired home directly conflicts with the purposes of the 75-foot setback. Therefore, the ZBA cannot find that there is not a fair and

[2] The Board should keep in mind that variances are not designed to be easy to get and, generally throughout New Hampshire, variance applications are denied more often than they are granted.

substantial relationship between the general public purposes of the 75-foot setback and the application of that setback to this property without committing a legal error.

Although the Applicant does not even attempt to make the case that the proposed use within the 75-foot setback is a reasonable one, the proposed use in this location is not reasonable. The Applicant can construct a residential structure on this property that is 75 feet from Rocky Pond, and that would be a reasonable use of the property and in keeping with the character of the neighborhood.

Finally, the Applicant cannot satisfy the alternative unnecessary hardship test of RSA 674:33, I(b)(2) because the property *can* be reasonably be used in strict conformance with the applicable setbacks, as discussed above and proven by the attached marked-up plan.

For all these reasons, the Applicant has not satisfied any of the three parts of the unnecessary hardship test or the alternative unnecessary hardship test. Therefore, the ZBA cannot find that an unnecessary hardship would result from a denial of the variance.

VI. Conclusion

Other abutters, the Crawfords, have also submitted a letter in opposition to granting these variances. The Wienceks have had similar experiences with the long-time owners of the Applicant's property and concur with the Crawfords' understanding about the buildability of this lot and their concerns about the variances.

The ZBA cannot lawfully grant a variance when the Applicant (1) needs, but has not applied for, a Special Exception; (2) has not provided required, critical information on its plans; (3) has not addressed all applicable variance criteria; and (4) does not satisfy the variance criteria. For these reasons, the variance must be denied.

Sincerely,

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Enclosures