

SUNAPEE SELECTBOARD
MEETING AGENDA
6:30PM TOWN OFFICE MEETING ROOM
Tuesday, September 5th, 2023

Join us on Zoom: <https://us06web.zoom.us/j/86066395397>

1. REVIEW OF ITEMS FOR SIGNATURE:

CZC's

- Parcel ID: 0215-0035-0000, 55 Sunny Lane, John Brown
- Parcel ID: 0136-0007-0000, 179 Burkehaven Road, Patrick Clapp, JPC Investments LLC
- Parcel ID: 0211-0020-0000, 23 High Ridge Road, Anne Spencer & Paul Lembo
- Parcel ID: 0123-0021-0000, 706 Route 11, Town of Sunapee, Dewey Field
- Parcel ID: 0231-0040-0000, 127 Pine Ridge Rd, Daryl Heino

DEMO

- Parcel ID: 0101-0002-0000, 99 Springfield Road, Jeff Granville (*After the Fact)
- Parcel ID: 0215-0035-0000, 55 Sunny Lane, John Brown

2. APPOINTMENTS:

- Chief Cobb: Staffing Request
-

3. PUBLIC COMMENT

4. SELECTBOARD ACTION:

- Review MS-434
- Old Business:
 - i. Short-Term Rental Penalty Policy
 - ii. Selectboard Rules of Procedure
 - iii. Investment Policy

5. TOWN MANAGER REPORTS:

- Baypoint Broadband Update
- Right to Know Staff
- Miscellaneous Legal Updates
- Cybersecurity Concerns and Recommendations
- Georges Mills Bridge Closing Notifications Out
 - i. Bridge Closes 11 September 2023

6. CHAIRWOMAN'S REPORT:

7. UPCOMING MEETINGS:

September 6th – Conservation Commission – 7:00pm

September 7th – Zoning Board Meeting – 6:30pm

September 12th – Recreation Committee – 7:00pm

September 14th – Planning Board Meeting – 7:00pm

September 15th – Community Conversation – 10:00am

September 18th – Selectboard Meeting – 6:30pm

NONPUBLIC: The Board of Selectmen may enter a nonpublic session, if so voted, to discuss items listed under RSA 91-A:3, II



Revised Estimated Revenues

Sunapee

(RSA 21-J:34)

For the period beginning January 1, 2023 and ending December 31, 2023

PREPARER'S CERTIFICATION

Under penalties of perjury, I declare that I have examined the information contained in this form and to the best of my belief it is true, correct and complete.

Name	Position	Signature

This form must be signed, scanned, and uploaded to the Municipal Tax Rate Setting Portal:
<https://www.proptax.org/>

For assistance please contact:
NH DRA Municipal and Property Division
(603) 230-5090
<http://www.revenue.nh.gov/mun-prop/>



Revised Estimated Revenues

Account	Source	Article	Estimated Revenue
Taxes			
3120	Land Use Change Tax - General Fund	16	\$6,500
3180	Resident Tax		\$0
3185	Yield Tax	16	\$1,000
3186	Payment in Lieu of Taxes		\$0
3187	Excavation Tax		\$0
3189	Other Taxes		\$0
3190	Interest and Penalties on Delinquent Taxes	16	\$30,000
9991	Inventory Penalties		\$0
Taxes Subtotal			\$37,500
Licenses, Permits, and Fees			
3210	Business Licenses and Permits	16	\$1,280
3220	Motor Vehicle Permit Fees	16	\$1,020,000
3230	Building Permits	16	\$60,000
3290	Other Licenses, Permits, and Fees	16	\$20,800
3311-3319	From Federal Government		\$232,000
Licenses, Permits, and Fees Subtotal			\$1,334,080
State Sources			
3351	Municipal Aid/Shared Revenues		\$0
3352	Meals and Rooms Tax Distribution	16	\$176,553
3353	Highway Block Grant	16	\$200,000
3354	Water Pollution Grant	16	\$12,000
3355	Housing and Community Development		\$0
3356	State and Federal Forest Land Reimbursement		\$0
3357	Flood Control Reimbursement		\$0
3359	Other (Including Railroad Tax)		\$0
3379	From Other Governments	16	\$120,000
State Sources Subtotal			\$508,553
Charges for Services			
3401-3406	Income from Departments	16	\$57,000
3409	Other Charges	16	\$6,200
Charges for Services Subtotal			\$63,200
Miscellaneous Revenues			
3501	Sale of Municipal Property		\$11,000
3502	Interest on Investments	16	\$35,000
3503-3509	Other	16	\$9,000
Miscellaneous Revenues Subtotal			\$55,000



Revised Estimated Revenues

Account	Source	Article	Estimated Revenue
Interfund Operating Transfers In			
3912	From Special Revenue Funds		\$0
3913	From Capital Projects Funds		\$0
3914A	From Enterprise Funds: Airport (Offset)		\$0
3914E	From Enterprise Funds: Electric (Offset)	16	\$227,683
3914O	From Enterprise Funds: Other (Offset)		\$0
3914S	From Enterprise Funds: Sewer (Offset)	16	\$1,344,887
3914W	From Enterprise Funds: Water (Offset)	16	\$627,439
3915	From Capital Reserve Funds	,33,32,31	\$335,000
3916	From Trust and Fiduciary Funds		\$0
3917	From Conservation Funds		\$0
Interfund Operating Transfers In Subtotal			\$2,535,009
Other Financing Sources			
3934	Proceeds from Long Term Bonds and Notes	,02	\$0
Other Financing Sources Subtotal			\$0
Total Revised Estimated Revenues and Credits			\$4,533,342



Revised Estimated Revenues Summary

Subtotal of Revenues		\$4,533,342
Unassigned Fund Balance (Unreserved)	\$3,235,866	
(Less) Emergency Appropriations (RSA 32:11)	\$0	
(Less) Voted from Fund Balance	\$3,800	
(Less) Fund Balance to Reduce Taxes	\$850,000	
Fund Balance Retained	\$2,382,066	
Total Revenues and Credits		\$5,387,142
<hr/>		
Requested Overlay	\$0	

NOTICE: This opinion is subject to motions for rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Reporter, Supreme Court of New Hampshire, One Charles Doe Drive, Concord, New Hampshire 03301, of any editorial errors in order that corrections may be made before the opinion goes to press. Errors may be reported by email at the following address: reporter@courts.state.nh.us. Opinions are available on the Internet by 9:00 a.m. on the morning of their release. The direct address of the court's home page is: <https://www.courts.nh.gov/our-courts/supreme-court>

THE SUPREME COURT OF NEW HAMPSHIRE

Sullivan
No. 2022-0309

BRADLEY M. WEISS & a.

v.

TOWN OF SUNAPEE

Argued: February 23, 2023
Opinion Issued: August 23, 2023

Schuster, Buttrey & Wing, P.A., of Lebanon (Barry C. Schuster on the brief and orally), for the plaintiffs.

Mitchell Municipal Group, P.A., of Laconia (Laura Spector-Morgan on the brief and orally), for the defendant.

MACDONALD, C.J. The plaintiffs, Bradley M. Weiss and Cathleen A. Shea, appeal an order of the Superior Court (Tucker, J.) granting the motion to dismiss filed by the defendant, Town of Sunapee (Town). The trial court determined that, because the plaintiffs failed to request a second rehearing from the Town's Zoning Board of Adjustment (ZBA), the court did not have subject matter jurisdiction over their appeal. We reverse and remand.

The following facts are supported by the record. The plaintiffs sought a variance for an “east side setback” for their residence in Sunapee. On April 1, 2021, the ZBA held a hearing on the application. The hearing was held remotely, consistent with then-existing COVID-19 pandemic-related protocols. The ZBA voted 3-2 to deny the application. Members who voted against granting the variance cited insufficient evidence of unnecessary hardship and found the variance would not be in keeping with the spirit of the ordinance. They also expressed concern about health and safety issues if the variance were to be granted. The ZBA did not issue a written decision confirming the action taken at the April 1, 2021 hearing until August 3, 2021, which the Town concedes was “not . . . timely.” It is undisputed that the ZBA approved the minutes of the April 1 meeting on May 25, 2021.

On April 27, 2021, the plaintiffs filed a timely motion for rehearing, seeking review of the April 1 decision, which the ZBA granted. In the motion, the plaintiffs asserted that their evidence “demonstrated that granting the variance would do substantial justice, improve property values and be in the public interest.” They argued that the ZBA’s decision “made passing reference to the ‘spirit of the ordinance’ but primarily focused on the ‘hardship’ criterion” and that its decision was “in error because the application does observe the spirit of the ordinance and satisfies the hardship criterion.”

On June 17, 2021, the ZBA conducted a rehearing and again voted to deny the variance. The ZBA members found there was a lack of proof that the variance was not contrary to the public interest and reiterated their previous rationale that the variance would not be in keeping with the spirit of the ordinance and that there was insufficient evidence of unnecessary hardship. The ZBA issued its written decision from the June 17, 2021 rehearing on June 25, 2021.

The plaintiffs appealed to the superior court. In their complaint, the plaintiffs asserted that, during deliberation at the April 1 meeting, “some board members explained that the basis for the ruling was that the application failed to satisfy the criteria for ‘hardship,’ ‘spirit of the ordinance’ and ‘public interest,’” and that, at the June rehearing, “the board again denied the variance relying on the same criteria, namely ‘hardship,’ ‘spirit of the ordinance’ and ‘public interest.’” Thus, the plaintiffs asserted, the ZBA’s decision “denied the variance application on the same grounds as it had previously and no further motion for rehearing was required,” but, “[t]o the extent that the board may claim that any new issues arose,” they sought “for good cause to have such issues consolidated” in the appeal.

The Town moved to dismiss, arguing that because “new issues were raised by the board in its second denial,” and “a second motion for rehearing is

a jurisdictional prerequisite to filing an appeal with the superior court,” the court lacked jurisdiction over the appeal and could not “grant any request to add additional grounds to the appeal.” The trial court agreed with the Town, concluding that “a second motion for rehearing was required” and, in its absence, the court “[did] not have subject matter jurisdiction over the appeal.” The plaintiffs moved for reconsideration, which the trial court denied. This appeal followed.

II

Whether the plaintiffs were required to file a second motion for rehearing to perfect their appeal to superior court is controlled by statute. McDonald v. Town of Effingham Zoning Bd. of Adjustment, 152 N.H. 171, 174 (2005). We review the superior court’s interpretation of the applicable statute *de novo*. *Id.* We look first to the language of the statute itself and, if possible, construe that language according to its plain and ordinary meaning. Anderson v. Robitaille, 172 N.H. 20, 22 (2019). We give effect to every word of a statute whenever possible and will not consider what the legislature might have said or add language that the legislature did not see fit to include. In re J.P., 173 N.H. 453, 460 (2020).

RSA 677:3 provides:

No appeal from any order or decision of the zoning board of adjustment, a board of appeals, or the local legislative body shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2; and, when such application shall have been made, no ground not set forth in the application shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.

RSA 677:3, I (2016). Thus, in order to perfect an appeal to the superior court, the statute requires that the appellant first move for rehearing with the ZBA within 30 days after the ZBA’s decision. See RSA 677:2 (2016). That requirement, once met, vests the superior court with subject matter jurisdiction over the appeal. However, in such an appeal, “no ground not set forth in the application” for rehearing “shall be urged, relied on, or given any consideration by a court unless the court for good cause shown shall allow the appellant to specify additional grounds.” RSA 677:3, I. By this plain language, the appellant is thereby limited in its appeal to the grounds set forth in the motion for rehearing unless good cause is shown why the court should allow additional grounds.

As we explained in Dziana v. City of Portsmouth, when the bases for aggrievement change following a ZBA’s decision on rehearing, a new motion for

rehearing raising such new issues is required before an appeal to the superior court challenging those new bases may be made. Dziama v. City of Portsmouth, 140 N.H. 542, 545 (1995). Otherwise, the court is limited to consideration of the errors alleged in the first rehearing motion. Id. Thus, in the absence of a second motion for rehearing allowing the ZBA the first opportunity to pass upon any alleged errors in its decision, the plaintiff has not preserved the new issues for appellate review. Id.

As applicable here, following the ZBA's April 1 decision, the plaintiffs timely moved for rehearing based on two grounds set forth in the decision — the ZBA's findings that there was insufficient evidence of unnecessary hardship and that the variance would not be in keeping with the spirit of the ordinance. Accordingly, the superior court has jurisdiction over the appeal and may review those issues on appeal. See id. The court's review is limited, however, to the grounds set forth in the first motion for rehearing, see id., unless for good cause shown the court allows the plaintiffs to specify additional grounds. See RSA 677:3, I.

The plaintiffs argue that they demonstrated good cause, alleging, inter alia, that when the ZBA denied their variance request on rehearing on June 17, 2021, they “were faced with a dilemma.” They contend that there was no written decision from the ZBA's April 1 meeting available to them, and that they were “relying on their notes and recollections from” the April meeting. The plaintiffs state that they “knew that the zoning board engaged in a discussion of hardship and how health and safety might be affected by granting the variance.” They also allege that “[a]s of early July 2021” the ZBA “had still not issued a written decision for its April 1st vote,” and the written decision from the June 17 hearing “was never provided to the plaintiffs until they received the Certified Record.” Because the trial court dismissed their appeal for lack of subject matter jurisdiction, however, it did not consider whether the plaintiffs had shown good cause to specify additional grounds.

We hold that, pursuant to RSA 677:3, the plaintiffs perfected their appeal to the superior court from the ZBA's April 1 denial by timely moving for rehearing. Accordingly, we reverse the trial court's ruling that it lacked subject matter jurisdiction over the plaintiffs' appeal and remand for further proceedings consistent with this decision, including whether for good cause shown the plaintiffs should be allowed to specify additional grounds. See RSA 677:3, I.

Reversed and remanded.

HICKS, BASSETT, and DONOVAN, JJ., concurred; HANTZ MARCONI, J., concurred in part and dissented in part.

HANTZ MARCONI, J., concurring in part and dissenting in part. I agree with the majority that, because the plaintiffs timely moved for rehearing, the superior court has jurisdiction over the appeal. However, under the circumstances presented here where, due to the untimeliness of the ZBA's written decision from the April 1, 2021 hearing, there was no opportunity for the plaintiffs to verify or compare the official written decisions of the ZBA, I would hold that no second motion for rehearing was necessary and I would find good cause as a matter of law.



CLEVELAND, WATERS AND BASS
ATTORNEYS AT LAW

JEFFREY C. CHRISTENSEN, ESQUIRE

CHRISTENSENJ@CWBPA.COM

August 29, 2023

BY WAY OF HAND-DELIVERY

State of NH Housing Appeals Board
Governor Gallen State Office Park
Johnson Hall, 107 Pleasant Street
Concord, NH 03301

**RE: KTP Cottage, LLC v. The Town of Sunapee, New Hampshire and
the Town of Sunapee Zoning Board of Adjustment**

Dear Clerk:

On behalf of KTP Cottage, LLC, enclosed is an original and one copy of an Appeal Application form with the Petition for Appeal and Decisions being appealed thereon, along with our firm check in the amount of \$250.00 to cover the cost of this filing in connection with the above-captioned matter.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in blue ink that reads "Alexander M. Brewer for".

Jeffrey C. Christensen

JCC/sm
Enclosures
cc: KTP Cottage, LLC

4874-3258-1500, v. 1

CLEVELAND, WATERS AND BASS, P.A.

50926

VENDOR: TREASURER, STATE OF NH		08/29/2023		CHECK NO: 50926 LCTRNH	
OUR REF. NO.	YOUR INVOICE NUMBER	INVOICE DATE	INVOICE AMOUNT	AMOUNT PAID	DISCOUNT TAKEN
123032	30126-001	08/29/2023	250.00	250.00	0.00
30126-001 FILING FEE					

Check Total: 250.00

THE FACE OF THIS DOCUMENT HAS A COLORED BACKGROUND ON WHITE PAPER

CLEVELAND, WATERS AND BASS, P.A.
TWO CAPITAL PLAZA, 5TH FLOOR
CONCORD, NH 03301

TO BANK, N.A. 54-7/114 50926

CHECK NO. CHECK DATE VENDOR NO.
50926 08/29/2023 LCTRNH

PAY Two hundred fifty and NO/100 Dollars

CHECK AMOUNT
\$250.00

TREASURER, STATE OF NH
TO THE ORDER OF

CLEVELAND, WATERS AND BASS, P.A.

RUB RED IMAGE
FADES WITH HEAT



MP

⑈050926⑈ ⑆011400071⑆ 110199602⑈

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD

Governor Gallen State Office Park
Johnson Hall, 107 Pleasant Street
Concord, New Hampshire 03301
Telephone: (603) 271-1198
TTY/TDD Relay: (800) 735-2964
Visit us at <https://hab.nh.gov>



APPEAL APPLICATION

Date of Municipal Decision being appealed: 07/06/2023 and 08/17/2023

Defendant Town/City: Town of Sunapee, NH and the Town of Sunapee ZBA

Applicant Information

Name(s): KTP Cottage, LLC

Mailing Address: 106 Fernwood Point Road, Sunapee, NH 03782

E-mail Address: _____

Telephone (Direct Line): _____

Signature: _____ **Date:** _____

Representative(s), if other than person appealing:

Name(s): Jeffrey C. Christensen, Esquire

Company/Firm: Cleveland, Waters and Bass, P.A.

Mailing Address: Two Capital Plaza, 5th Floor, Concord, NH 03301

E-mail Address: christensenj@cwbp.com

Telephone (Direct Line): (603) 229-1070

Signature: Alexandra N. Brewer for Jeffrey C. Christensen, Esquire **Date:** 08/29/2023

APPLICANT, YOU MUST ATTACH:

- 1) A copy of the Municipal Decision being appealed.
 - 2) The substance of your appeal in writing, consistent with Administrative Rule Hab 202.02.
 - 3) A check in the amount of \$250.00 made payable to: Treasurer, State of New Hampshire.
- NOTE:** Within five (5) days of filing your appeal, you must submit a certification that the municipal board, committee, or commission has been notified. See RSA 679:6, I; Administrative Rule Hab 201.04(b).



Town of Sunapee
Zoning Board
NOTICE OF DECISION

CASE # VA 23-07

You are hereby notified that the Zoning Board application of:

PARCEL ID: 0121-0042-0000 106 FERNWOOD POINT ROAD

RURAL RESIDENTIAL ZONE

SEEKING APPROVAL FOR A REHEARING OF ZBA CASE #VA 23-07 ON JULY 6, 2023, WHICH DENIED VARIANCES FROM (A) ARTICLE III, SECTION 3.10 TO PERMIT RECONSTRUCTION OF A RESIDENCE WITHIN THE SIDE AND REAR SETBACKS; (B) ARTICLE III, SECTION 3.10 TO PERMIT ~28.25 SQ. FT. OF THE PROJECTED ROOF AREA WITHIN THE REDUCED SETBACK TO EXCEED A HEIGHT OF 25 FEET; AND (C) SECTION 3.40(C) TO PERMIT THE RECONSTRUCTION OF THE RESIDENCE WITHIN THE 50-FOOT WATERFRONT SETBACK

Has been DENIED by the affirmative vote of at least three members of the Zoning Board for the following reasons:

1. The Motion for Rehearing presented no new facts not available at the original hearing.
2. After reviewing the record of the original hearing, the Board found that the Motion for Rehearing does not fully or accurately address the reasons discussed by the Board for finding that granting the requested variance would not be in the public interest, would not result in substantial justice being done, and would not result in unnecessary hardship for the applicant.

FINDINGS OF FACT:

1. The applicant has failed to meet the requirements stated in (c) of Article X, Section 10.42. The hardship presented by the applicant does not meet the threshold necessary for the approval of the variance.
2. The proposed project does not adhere to the spirit of the ordinance. It deviates from the intended objectives and principles outlined in the zoning regulations.
3. The evidence presented demonstrates that the implementation of the proposed project would negatively impact the values of the surrounding properties. The potential decrease in property values is a concern.
4. The strict enforcement of the ordinance does not result in unnecessary hardship for the applicant. The circumstances presented do not warrant the granting of a variance based on the criteria defined in the ordinance. Viable alternatives exist for the reconstruction of the project without necessitating the listed variances. Reasonable alternatives are available that comply with the existing zoning regulations.

The decision was made at the 8/17/2023 Zoning Board meeting.



Zoning Board Chair

08/23/2023

Date

Notes: 1) Any person affected has a right to appeal this decision. If you wish to appeal, you must act within thirty 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.

2) 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).



Town of Sunapee
Zoning Board
NOTICE OF DECISION

CASE # VA 23-07

You are hereby notified that the Zoning Board application of:


PARCEL ID: 0121-0042-0000 106 FERNWOOD POINT ROAD ; RURAL RESIDENTIAL ZONE

SEEKING APPROVAL FOR VARIANCES FROM (A) ARTICLE III, SECTION 3.10 TO PERMIT RECONSTRUCTION OF A RESIDENCE WITHIN THE SIDE AND REAR SETBACKS; (B) ARTICLE III, SECTION 3.10 TO PERMIT ~28.25 SQ. FT. OF THE PROJECTED ROOF AREA WITHIN THE REDUCED SETBACK TO EXCEED A HEIGHT OF 25 FEET; AND (C) SECTION 3.40 (C) TO PERMIT THE RECONSTRUCTION OF THE RESIDENCE WITHIN THE 50 FOOT WATERFRONT SETBACK

Has been **DENIED** by the affirmative vote of at least three members of the Zoning Board:

1. The applicant has failed to meet the requirements stated in (c) of Article X, Section 10.42. The hardship presented by the applicant does not meet the threshold necessary for the approval of the variance.
2. The proposed project does not adhere to the spirit of the ordinance. It deviates from the intended objectives and principles outlined in the zoning regulations.
3. The evidence presented demonstrates that the implementation of the proposed project would negatively impact the values of the surrounding properties. The potential decrease in property values is a concern.
4. The strict enforcement of the ordinance does not result in unnecessary hardship for the applicant. The circumstances presented do not warrant the granting of a variance based on the criteria defined in the ordinance. Viable alternatives exist for the reconstruction of the project without necessitating the listed variances. Reasonable alternatives are available that comply with the existing zoning regulations.

The decision was made at the 7/6/2023 Zoning Board meeting.



Zoning Board Chair
07.14.2023

Date

Notes: 1) Any person affected has a right to appeal this decision. If you wish to appeal, you must act within thirty 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.

2) 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).

THE STATE OF NEW HAMPSHIRE

HOUSING APPEALS BOARD
DOCKET NO. _____

KTP Cottage, LLC

v.

The Town of Sunapee, New Hampshire and the
Town of Sunapee Zoning Board of Adjustment

PETITION FOR APPEAL

NOW COMES the Petitioner, KTP Cottage, LLC (the “Applicant”, by and through its attorneys, Cleveland, Waters and Bass, P.A., and complains against the Town of Sunapee, New Hampshire, and the Town of Sunapee Zoning Board of Adjustment (collectively, the “Town”, the “Board”, or the “ZBA”) as follows:

INTRODUCTION

1. This is an appeal pursuant to RSA 677:4 and RSA 679:7 of the ZBA’s August 17, 2023 denial of the Petitioner’s request for a rehearing of the ZBA’s July 6, 2023 decision denying a variance application to replace an existing, outdated and deteriorating structure with a new residence.

PARTIES AND JURISDICTION

2. The Petitioner, KTP Cottage, LLC, is an individual who owns the certain real property at 106 Fernwood Point Road in Sunapee, New Hampshire (the “Property”).

3. The Respondent, the Town of Sunapee, New Hampshire is, on information and belief, a New Hampshire municipality with a principal place of business at 23 Edgemont Road in Sunapee, New Hampshire.

4. The Respondent, the Town of Sunapee Zoning Board of Adjustment, is, on information and belief, a lawfully-constituted land use board within the Town of Sunapee with a principal place of business at 23 Edgemont Road in Sunapee, New Hampshire.

5. The Housing Appeal Board has jurisdiction to hear this appeal pursuant to RSA 677:4 and RSA 679:7.

FACTS

6. The Property, owned by The Applicant, is a residential property containing a single-family dwelling in a residential neighborhood on the shores of Lake Sunapee (the “Lake”).

7. The Property is a pre-existing non-conforming lot; it is only 0.33 acres.

8. The Property contains a pre-existing, non-conforming residence (the “Existing Residence”) which is in violation of multiple provisions of the Zoning Ordinance including, but not limited to, the side setback and the waterfront setback. The Existing Residence is outdated and deteriorating.

9. The Applicant intends to improve the Property by replacing the Existing Residence with an updated, modern residence, that expands the footprint (in an area that does not encroach on the setbacks) and adds a second floor, as well as related stormwater management and erosion control improvements (the “Proposal”). The Proposal would be the Applicant’s primary residence.

10. The Proposal, despite expanding the footprint of the Existing Residence, nevertheless *reduces* the overall nonconformity of the Property. The Proposal will reduce the encroachment in the side and rear setback by 55 square feet, and will be farther from the Lake than the Existing Residence by at least 2 feet, and as much as 8 feet in some locations.

11. Nevertheless, because the Proposal is not entirely within the footprint of the Existing Residence, the Proposal required a variance from the side setback and waterfront setback.

12. Additionally, while Sunapee's zoning ordinance normally allows buildings to be 40 feet tall, the zoning ordinance imposes stricter requirements on nonconforming lots where the building encroaches into the setback of 25 feet in height in the setback. Approximately 28.25 square feet of the roofline of the Proposal, such as the peak of a dormer, that exceed 25 feet within the setback, reaching a height of roughly 27 or 28 feet, depending on the location. Accordingly, another variance was required to address these portions of the Proposal.

13. In sum, the Proposal requires a variance from (a) Section 3.10 of the Zoning Ordinance to permit reconstruction of the residence within the side and rear setbacks as described on the attached plans; (b) Section 3.10 of the Zoning Ordinance to permit approximately 28.25 square feet of the projected roof area within the reduced setback area to exceed a height of 25 feet; and (c) Section 3.40(c) of the Zoning Ordinance to permit the reconstruction of the residence within the 50-foot waterfront setback.

14. These variances are required for several reasons.

15. The small size of the Property (0.33 acres as opposed to the 1.5 acre minimum in the district) significantly limits its buildable area.

16. The Property is wedge-shaped, widening as it approaches the Lake. As a result, any attempt to relocate a residence farther back from the Lake to reduce the environmental impact will result in greater encroachment into the side setbacks.

17. The slope of the Property also impacts the design possibilities. For example, a portion of the roofline that exceeds the 25 foot maximum height is over the garage. Applicable

codes and practical necessity set minimum heights for both the garage and the living space above it. Accordingly, the height of the Proposal could not be reduced without lowering the building below grade which, for a garage, would result in flooding.

18. On or about May 30, 2023, the Applicant filed a variance application (the “Application”) which was heard by the ZBA on July 6, 2023.

19. At the July 6, 2023 hearing, the ZBA denied the Application. The ZBA found that there was no unnecessary hardship because the Property lacked special characteristics and that it was not necessary to replace the Existing Structure with the Proposal. The ZBA also found that the Application was not consistent with the spirit of the ordinance because of the potential cumulative impact of similar proposals. Finally, the ZBA opined that the Proposal, overall, would reduce the value of surrounding properties, particularly the adjacent lot to the west.

20. On or about August 1, 2023, the Applicant requested a rehearing, which was denied on August 17, 2023.

21. As summarized below, however, the Board’s decision was legally erroneous and/or unreasonable.

ASSIGNMENTS OF ERROR

22. The Board’s decision made several errors of law and fact including, but not limited to, those discussed below. Instead, the Board should have granted the Application.

23. The Board’s decision on whether there would be an unnecessary hardship focused whether the Proposal “was a need or a want” as Board members characterized it. The Board found there was not a hardship because the Applicant did not “need” to replace the Existing Residence or, alternatively, could replace the Existing Residence with a structure of a different design that did not require variances. This reasoning is inconsistent with the standard under

applicable law. See Malachy Glen Assocs., Inc. v. Town of Chichester, 155 N.H. 102, 108 (2007); Harrington v. Town of Warner, 152 N.H. 74, 80-81 (2005); Rancourt v. City of Manchester, 149 N.H. 51, 54 (2003); Simplex Techs., Inc. v. Town of Newington, 145 N.H. 727, 731 (2001). Whether the Proposal is necessary is not relevant and is not grounds for denial of a variance. Because the Proposal is reasonable, the ZBA should not have based its decision on whether it was “necessary”.

24. The Board also applied the incorrect legal standard when determining whether the Property had special conditions. The Board found that, because several nearby lots to the east were also small and wedge shaped, the Property had no special conditions. The Board ignored the fact that, nearby lots to the west were much larger, some as much as five or seven times as large as the Property, and that most of the smaller lots in the area are not wedge shaped and do not narrow as one recedes from the Lake. In other words, the Board found that the Property did not have special conditions when compared *solely* to other lots that shared those conditions. This is inconsistent with New Hampshire law. See Cnty. Res. for Just., Inc. v. City of Manchester, 154 N.H. 748, 752 (2007) (“the property *need not be the only such burdened property*” as long as the burden does not “arise as a result of the zoning ordinance’s equal burden on *all property in the district.*”) (emphasis added; internal quotations omitted).

25. Moreover, even when solely compared to the other small, wedge-shaped lots, the Property has special conditions not shared by those lots in that it is adjacent to a much larger lot, the residence on which is well away from the location of the Proposal. The other small, wedge shaped lots are all clustered together and have residences that are constructed close to each other. The Proposal on the Property will not impact overcrowding the way it could on any of the other

small, wedge shaped lots; the Property is more suited to the Proposal than other small wedge shaped lots would be.

26. The Board's finding that the Proposal was not consistent with the spirit of the ordinance was primarily based on the argument as to the cumulative impact, with Board members opining that there would be a negative impact if other lots in the area were similarly redeveloped. As mentioned above, however, the Proposal *reduces* the overall nonconformity on the Property. Bringing the Property closer to compliance with the ordinance is intrinsically consistent with the spirit of the ordinance. Likewise, the cumulative impact of every lot in the area being more conforming with the zoning ordinance must also be consistent with the spirit of the ordinance.

27. Finally, the Board applied the incorrect analysis to the issue of diminution of the surrounding property values. The Board appeared to consider whether the *Proposal* would diminish surrounding property values, rather than whether the *variance* would diminish property values, as required by New Hampshire law. See Malachy Glen, 155 N.H. at 105 (A variance may be granted if "the *variance* will not diminish the value of surrounding properties") (emphasis added). In other words, the question the Board should have asked is not whether replacing the Existing Residence would reduce the value of the surrounding properties, but whether the difference in height of 27 or 28 feet instead of 25 feet, or whether the change in the footprint within the setbacks would result in diminished property values. As shown by letters from multiple realtors with over 60 years of experience in selling waterfront property between them, neither the variance nor the Proposal as a whole would reduce surrounding property values.

28. The Board did not find that the Application was inconsistent with the public interest or substantial justice. For the reasons set forth in the Application and discussed with the Board at the hearing, these two elements were met as well.

29. As discussed in the Application and the Motion for Rehearing, the Application satisfies all necessary elements and the Board should have granted the requested variances.

COUNT I

30. The Applicant repeats and incorporates by reference all of the facts set forth in the above paragraphs as if fully set forth herein.

31. The ZBA's decision to deny the Application was unlawful and/or unreasonable as set forth above.

32. The ZBA's decision should therefore be overturned and the Housing Appeals Board should order that the variances be granted pursuant to RSA 679:5, II.

RESERVATION OF RIGHTS

33. The Applicant hereby reserves the right to amend this Petition as further developments or discovery may warrant.

Respectfully submitted,

KTP COTTAGE, LLC

By its attorneys,
CLEVELAND, WATERS AND BASS, P.A.

Dated: August 29, 2023

By: Alexandria N. Brewer for
Jeffrey C. Christensen, Esq. (NH Bar #265308)
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**STATE OF NEW HAMPSHIRE
OFFICE OF PROFESSIONAL
LICENSURE AND CERTIFICATION**

BOARD OF REAL ESTATE APPRAISERS

**In Re: Brian Underwood
Rab. License #NHCR-394**

**RESCHEDULED AND AMENDED
NOTICE OF DISCIPLINARY
ADJUDICATIVE HEARING -
10/20/2023 @ 10:00 AM**

Docket No.: 22-REA-003

I. CASE SUMMARY/PROCEDURAL HISTORY:

On or about 02/16/22, the Board of Real Estate Appraisers ("Board") received a complaint from Kristen McAllister, CNHA and Assessor for the Towns of New London, Newbury and Sunapee, alleging that Brian Underwood ("Licensee") had submitted an appraisal to be used in a Superior Court tax appeal that was "extremely flawed". After investigation and discussion, the Board voted on 09/16/22 to commence an adjudicative proceeding to determine whether the Licensee committed professional misconduct. This matter has been rescheduled twice since November of 2022. This Amended and Rescheduled Notice of Disciplinary Adjudicative Hearing follows.

II. ORDERS:

(a) Pursuant to RSA 310:10, X and N.H. Code Admin. R. Plc 206.06(a) ("Rules"), the Board hereby notifies the parties that the Board has scheduled an **adjudicative/disciplinary hearing** for:

Date: 10/20/23

Time: 10:00 am

Place: OPLC, 7 Eagle Square, Concord, NH 03301. If you require reasonable accommodations, a translator, or wish to participate remotely (Rule 206.08(f)), you may file a motion with the Board.

Please advise if this hearing is anticipated to last longer than 4 hours by filing a motion explaining with particularity the necessity for the additional time. **INFORMATION REGARDING A PREHEARING CONFERENCE CAN BE FOUND IN SECTION II, r OF THIS NOTICE.**

(b) STATUTORY AUTHORITY: This adjudicative/disciplinary hearing shall be conducted pursuant to RSA 310:10 and Rule 206.06 et seq. To the extent that the Plc rules do not address an issue of policy or procedures, the Board shall rely upon RSA 310-B, RSA 541-A, RSA 310, and N.H. Admin. R. Ann., Title Jus, Part 800.

(c) ISSUES PRESENTED: Pursuant to Rule 206.06(b)(3), the issues to be considered at the hearing in this matter are as follows:

- (1) Whether Licensee violated RSA 310-B:18(II)(g) by allegedly failing, without good cause, to exercise diligence in developing, preparing and/or communicating the appraisal report for 2 Fernwood South in Sunapee, New Hampshire with a date of valuation of 04/01/20.
- (2) Whether Licensee violated RSA 310-B:18(II)(h) by allegedly acting with negligence and/or incompetence in developing, preparing and/or the appraisal report for 2 Fernwood South in Sunapee, New Hampshire with a date of valuation of 04/01/20.
- (3) Whether Licensee violated RSA 310-B:18(II)(f) and/or (i) by disregarding or violating any of the provisions of RSA 310-B or the rules adopted by the Board by allegedly failing to comply with any or all Uniform Standards of Professional Appraisals Practices (“USPAP”) in the appraisal report for 2 Fernwood South in Sunapee, New Hampshire with a date of valuation of 04/01/20, as more particularly set forth in an Appraisal Review Report authored by George LeMay, dated 02/15/22, including but not limited to:
 - a. The Appraisal does not generally report analysis of agreements of sale, options or listings of the subject as of the effective date as required by Standard Rule (“SR”) 2-2 (a&b)(viii), and/or SR 1-5(a).
 - b. The Appraisal does not generally provide an analysis of agreements of sale, options or listing of the subject that occurred within the three (3) years prior to the effective date as required by SR 2-2(a&b) and/or SR 1-5(a).
 - c. The Appraisal does not generally provide support for the opinion of reasonable exposure time as required by SR 2-2 (a&b) (vi & viii).
 - d. The Appraisal’s scope of work determination does not state identity of the client and any intended users as required by SR 2-2 (a&b)(i).
 - e. The Appraisal’s scope of work determination does not fully report the date and effective date of appraisal as required by SR 2-2 (a&b)(xi).
 - f. The Appraisal’s scope of work determination and work performed is insufficient to produce credible assignment results as required by the Scope of Work Rule.
 - g. The Appraisal’s Neighborhood does not fully discuss factors that affect marketability as required by SR 2-1(b), SR 2-2(a&b)(iii), SR 1-2(e)(1), SR 1-3(a) and/or SR 1-4(f).

- h. The Appraisal's Neighborhood does not have factors affecting marketability and market trends properly incorporated in the highest and best use analysis and value analysis as required by SR 2-2(a&b)(x) and/or SR 1-3(b).
 - i. The Appraisal's Highest and Best Use does not have an opinion as to the highest and best use of the land as required by SR 2-2(a&b)(x) and/or SR 1-3(b).
 - j. The Appraisal's Highest and Best Use does not provide support and rationale for HBU opinion of the land as required by SR 2-2(a&b)(x) and/or SR 1-3(b).
 - k. The Appraisal does not provide the appraiser's license or certificate number adjacent to or immediately below the appraiser's signature whenever the appraiser's signature is used in an appraisal report as required by RSA 310-B:16, II.
- (4) If a finding of misconduct is made pursuant to RSA 310-B:18(II), whether and to what extent Licensee should be subjected to one or more of the disciplinary sanctions authorized by RSA 310-B:18(III) and/or RSA 310:12.
- (d) **PRESIDING OFFICER:** Pursuant to RSA 310:10, IV, V, and VI and Rule 206.03 et seq., an individual employed as Hearings Examiner with the New Hampshire Office of Professional Licensure & Certification shall act as the presiding officer in this proceeding with the authority to do, among other things, the following: preside, regulate and control the course of a hearing; issue oaths or affirmations to witnesses; rule on questions of law and other procedural matters; issue final orders based on factual findings of the Board; issue subpoenas; hold prehearing conferences; render legal opinions; and make conclusions of law.
- (e) **HEARING COUNSEL/ADMINISTRATIVE PROSECUTOR:** Pursuant to RSA 310:10, III, the Chief Prosecutor (currently John Garrigan, Esq.), OPLC Division of Enforcement, 7 Eagle Square, Concord, N.H., 03301 (or his designee) shall serve as Hearing Counsel to represent the public interest.
- (f) **ATTORNEYS:** Pursuant to RSA 310:10, XI and Rule 206.06(b)(10), each party has the right to have an attorney represent them at the party's own expense.
- (g) **VOLUNTARY EXCHANGE OF DOCUMENTS:** Pursuant to Rule 206.18, the parties shall attempt to agree among themselves concerning the mutual exchange of relevant information. If these efforts prove unsuccessful, upon motion, discovery shall be further ordered when the parties cannot adequately address said issues voluntarily.
- (h) **MOTIONS:** Pursuant to Rule 206.12, parties shall file any motions or other requested relief in this matter with the Presiding Officer's Office, and provide a copy to the other parties. Unless good cause exists, all motions shall be filed at least ten (10) days before the date of any hearing, conference, event or deadline which would be affected by the requested relief. **SEE PREHEARING CONFERENCE ORDER OF 08/22/23.**

(i) **OBJECTIONS:** Pursuant to Rule 206.12(d), any responses or objections to motions or other requested relief shall be filed in similar fashion within ten (10) days of receipt of such motion or other requested relief. **SEE PREHEARING CONFERENCE ORDER OF 08/22/23.**

(j) **EXHIBITS:** Pursuant to Rule 206.18(d), parties shall provide a final witness list, including a brief summary of their testimony, a list of proposed exhibits, and a copy of any proposed exhibits to the Presiding Officer's Office and the other parties no later than fourteen (14) days prior to the hearing. Respondent's exhibits shall be pre-marked for identification with capital letters; Hearing Counsel's exhibits shall be pre-marked for identification with Arabic numerals. **SEE PREHEARING CONFERENCE ORDER OF 08/22/23.**

(k) **MAILING ADDRESS FOR THE PRESIDING OFFICER'S OFFICE:** Pursuant to Rule 206.10(a), any and all petitions, motions, pleadings, proposed exhibits, or other documents shall be filed with the Presiding Officer:

Thomas Pappas, Jr., Hearings Clerk
The Presiding Officer's Office
7 Eagle Square
Concord NH 03301
hearingsclerk@oplcnh.gov

(l) **COMMUNICATIONS WITH THE BOARD AND PRESIDING OFFICER:** Routine procedural inquiries may be made by contacting Thomas Pappas, Jr. Any other communications with the Board or Presiding Officer must be in writing and filed as provided above. *Ex parte* communications (meaning "without the other party present and/or included") with the Presiding Officer and/or Board are specifically forbidden by law. *See, i.e.*, Rule 206.10(b) and RSA 541-A:36.

(m) **EMAIL COMMUNICATIONS:** The parties and the Presiding Officer's Office have the option to agree to exchange e-mail addresses and the parties may agree that e-mail service of any and all documents going forward may be considered in compliance with Rule 206.11(a)(3) and 206.11(b)(3).

(n) **CONTINUANCES:** Pursuant to Rule 206.16, if you are unable to appear at any scheduled hearing, you must request a continuance from the Presiding Officer in writing and it shall be granted if the Presiding Officer determines that a continuance would assist in resolving the matter fairly under Rule 206.16(b). **SEE PREHEARING CONFERENCE ORDER OF 08/22/23.**

(o) **INTERVENTION: COMPLAINANT IS HEREBY NOTIFIED OF ITS RIGHT TO PETITION FOR INTERVENTION PURSUANT TO RULE 206.14. ANY FILED PETITION SHOULD STATE WITH PARTICULARITY: 1) THE PETITIONER'S INTEREST IN THE SUBJECT MATTER OF THE HEARING; 2) WHY THE INTERESTS OF THE EXISTING PARTICIPANTS AND THE ORDERLY AND PROMPT CONDUCT OF THE PROCEEDING WOULD NOT BE IMPAIRED BY ALLOWING THE PETITIONER TO INTERVENE; AND 3) ANY OTHER REASONS WHY THE**

PETITIONER SHOULD BE PERMITTED TO INTERVENE. THE INTERVENING PARTY SHALL CONTEMPORANEOUSLY COPY ALL PARTIES ON THE FILED PLEADING PURSUANT TO RULE 206.11. COMPLAINANT SHALL FILE ANY SUCH QUALIFYING PETITION TO INTERVENE NO LATER THAN 10/05/23.

(p) NON-ATTENDANCE AT HEARING: PURSUANT TO RULE 206.25, THE FAILURE OF A PARTY TO APPEAR AT THE TIME/PLACE SPECIFIED ABOVE MAY RESULT IN THE HEARING BEING HELD IN ABSENTIA (WITHOUT THAT PARTY PRESENT) AND THE BOARD MAY ISSUE A FINAL DECISION WITHOUT FURTHER NOTICE OR OPPORTUNITY TO BE HEARD.

(q) PREHEARING CONFERENCE: Pursuant to RSA 310:10, VI and Plc 206.06(b)(6), a non-public Prehearing Conference in this matter is hereby scheduled for **10/10/23 at 10:30 AM via Zoom**. The link is available at the Board's website at: [NH Real Estate Appraisers Board Meeting Information | NH Office of Professional Licensure and Certification](#). The specific issues to be addressed at the prehearing conference are as follows:

- (1) The distribution of exhibits and written testimony, if any, to the participants;
- (2) Opportunities and procedures for simplification of the issues;
- (3) Possible amendments to the pleadings;
- (4) Opportunities and procedures for settlement;
- (5) Possible admissions of fact and authentication of documents to avoid unnecessary proof;
- (6) Possible limitations on the number of witnesses and possible limitations on the scheduling of witnesses;
- (7) Possible changes to the standard procedures that would otherwise govern the proceeding; and
- (8) Other matters that might contribute to the prompt and orderly conduct of the proceeding.
SEE PREHEARING CONFERENCE ORDER OF 08/22/23.

(r) RECORDING: A recording of the hearings shall be taken and preserved.

(s) FINDINGS OF FACT: Pursuant to RSA 310:10, VII: Boards shall be the triers of fact in all disciplinary and non-disciplinary proceedings. If, based upon the Board's findings of fact, the Presiding Officer concludes the Licensee has committed professional misconduct, the Board shall determine what if any sanctions to impose. *See* RSA 310:12.

(t) All prior consistent orders remain in full force and effect.

DATED: 8/23/2023

_____/s/ Nikolas K. Frye, Esq._____
Nikolas K. Frye, Esq., Hearings Examiner
Presiding Officer
New Hampshire Office of
Professional Licensure & Certification
7 Eagle Square
Concord, NH 03301