

THE STATE OF NEW HAMPSHIRE HOUSING APPEALS BOARD



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Case Name: KTP Cottage, LLC v. Town of Sunapee
Case Number: ZBA-2023-21

ORDER

This appeal follows a decision by the Town of Sunapee (“Town”) Zoning Board of Adjustment (“ZBA”) denying several variance requests made by KTP Cottage, LLC (“Applicant”) to construct a new home partially within the footprint of an existing home on a lot with shore frontage on Lake Sunapee.

FACTS

This matter concerns certain property located at 106 Fernwood Point Road, also known as Map 121, Lot 42 on the Town of Sunapee tax maps (“Property”). The Property is located in the Rural-Residential zoning district. There is an existing single-story home on the Property that does not conform to current setback requirements on the side and on the waterfront.

On May 30, 2023, the Applicant filed an application requesting the following (CR 9):

1. A variance from Article III, Section 3.10 of the Sunapee Zoning Ordinance (the “Ordinance”) to allow a new home to be constructed within the 15-foot side setback.
2. A variance from Article III, Section 3.40(c) of the Ordinance to allow a new home to be constructed within the 50-foot waterfront setback.
3. A variance from Article III, Section 3.10 of the Ordinance to allow a new home to be constructed with a height exceeding 25 feet for the portion of the home within the side setback.

There is an existing home on the Property which encroaches on the 15-foot side setback on the westerly side of the Property. (CR 16). The Applicant has proposed to remove the old home and replace it with a new home that encroaches on the 15-foot setback by 55 square feet less than the existing home (the “Project”). (CR 9 and CR 18).

The existing home encroaches on the 50-foot waterfront setback. (CR 16). The Applicant proposed moving the new home away from the waterfront by two feet. (CR 9 and CR 18). The

Applicant's abutter to the east, Anne Waehner, wrote a letter of support for the Project on July 2, 2023. (CR 44).

On July 6, 2023, the ZBA held a hearing on the application. (CR 48). The ZBA suggested that an additional variance would be required to exceed the maximum allowable percentage of impervious area for rural residential properties on the shoreline of 25% since the Applicant is proposing 31.5%. (CR 50).

The abutters to the west, Kathryn and Brad Nichol, stated:

...concerns regarding the proposal...pointed out that although there is a 55-square-foot reduction in the square footage, the increase in building height, from 17 feet to 27-28 feet, would increase the cubic footage within the reduced side setback... 'We view that increased cubic footage in the setback as doing harm to our property.'

(CR 50).

Member Lyons "...expressed concern about the diminution in value of surrounding properties." (CR 51). Chairman Claus noted that "...the abutters had raised that concern as well." Member Silverstein stated that, "if the land does not have any special conditions, then we can't even get to the hardship discussion." (CR 50). The ZBA voted to deny the requested variances. (CR 51).

In its notice of decision, the ZBA cited the following reasons for denial:

1. The Applicant has failed to meet the requirements stated in (c) of Article X, Section 10.42 of the Ordinance. 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." (CR 53).

On August 1, 2023, the Applicant filed a Motion for Rehearing, (CR 54), including new exhibits. (CR 69-78). On August 17, 2023, the ZBA voted to deny the Motion. (CR 80-81). On August 29, 2023, the Applicant filed this appeal with the Housing Appeals Board ("HAB"). On

November 9, 2023, a prehearing conference was held. On November 21, 2023, a hearing on the merits was held. This decision follows.

LEGAL STANDARD OF REVIEW

The legal standards for review of a Zoning Board decision under RSA 677:15 are well established. “The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review when there is an error of law or when the court is persuaded by the balance of probabilities, on the evidence before it, that said decision is unreasonable.” See, RSA 677:15, V; Durant v. Town of Dunbarton, 121 N.H. 352, 357 (1981). The burden of establishing that a determination of a Planning Board was unlawful or unreasonable lies with the appealing party. K & P, Inc. v. Town of Plaistow, 133 N.H. 283, 292 (1990). See also, RSA 679:9.

The Housing Appeals Board review of any Zoning Board decision is limited. It will consider the Board of Adjustment’s factual findings prima facie lawful and reasonable. Those findings will not be set aside, unless, by a balance of probabilities upon the evidence before it, the Housing Appeals Board finds the Board of Adjustment’s decision was unlawful or unreasonable. See, RSA 679:9, II. See also, Lone Pine Hunter’s Club v. Town of Hollis, 149 N.H. 668 (2003).and Saturley v. Town of Hollis Zoning Board of Adjustment, 129 N.H. 757 (1987). The party seeking to set aside a Zoning Board decision bears the burden of proof to show that the order or decision was unlawful or unreasonable. RSA 676:6.

DISCUSSION

I. Public Interest and Spirit of the Ordinance

The requirement that the variance not be contrary to the public interest is related to the requirement that the variance be consistent with the spirit of the ordinance.” Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007). “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 v. Town of Chester, 152 N.H. 577 (2005). Two criteria for determining whether a variance will violate a zoning ordinance’s basic zoning objectives are to examine: (1) whether the variance would alter the essential character of the neighborhood; and (2) whether the variance would threaten the

public, health, safety or welfare. Harborside Associates, L.P. v Parade Residence Hotel, LLC, 162 N.H. 508 (2011).

The ZBA stated that the application violated the spirit of the Ordinance. (CR 218-220). The Town stated in its Pre-Hearing Memorandum to the HAB that the spirit of the setback provisions of the Ordinance is to prevent overcrowding of the Property. The Applicant has argued:

[The] Board appears to have been swayed by abutter comments about the cubic increase of building mass in the setback overwhelming the linear decrease in the encroachment ('The request states that less area is the side lot setback, and they're talking about 55 square feet. The height is increasing the cubic footage inside the setback,') (CR 207); however, the Ordinance beyond height restrictions, does not differentiate 'bulk' versus linear encroachments.

(Applicant's Memorandum of Law, ¶ 39).

The Applicant continued its argument, "In...using a 'bulk' restriction not present in the Ordinance, the Board acted unreasonably and unlawfully in determining the Proposal was inconsistent with this variance criterion." (Applicant's Memorandum of Law, ¶ 42).

At the November 21, 2023, HAB hearing on the merits, Applicant's counsel stated that setbacks should only be looked at as being two dimensional. However, by inference, the presence of a height restriction in the Ordinance, and in this instance, as applied to a non-conforming lot, implies that bulk will be an issue. If the spirit of the Ordinance is to prevent overcrowding of the Property, the ZBA was not acting unreasonably in determining that the Project did not meet the spirit of the Ordinance. See, for example, Nine A, LLC v. Town of Chesterfield, 157 N.H. 361 (2008) where the New Hampshire Supreme Court upheld the denial of a variance that would replace a nonconforming building in a lake district with a nonconforming cluster development. Specifically, the Court found that the ZBA acted reasonably when it found that the proposed development was contrary to the public interest and inconsistent with the spirit of the Ordinance which required compliance with dimensional requirements to prevent congestion and over-development.

II. Value

Section 10.42 of the Ordinance and RSA 674:33 I.(a)(2)(D) requires that, *inter alia*, a zoning board may grant a variance if the Applicant demonstrates that the values of surrounding properties are not diminished (by a grant of the variance). The burden of establishing that it

meets all variance criteria is on the Applicant (see, for example, Perrault v. Town of New Hampton, 171 N.H. 183 (2018)). The Applicant offered no evidence regarding valuation at the ZBA hearing. In contrast, an abutter testified that the increased building size would [do] “harm to our property,” (CR 208), which can reasonably be inferred as having an adverse impact on value. The ZBA may also rely on its members’ knowledge in reaching its decision. See Nestor v. Meredith Zoning Board of Adjustment, 138 N.H. 632 (1994). The Applicant simply failed to meet its burden as to this criterion.

The Applicant tried to introduce evidence of value in its motion for rehearing. However, this evidence was not presented in a timely fashion. The purpose of rehearing is to review alleged errors in a Zoning Board’s decision – it is not to allow new evidence that could have been presented at the original hearing. It would not have been difficult for the Applicant to present valuation evidence at the ZBA hearing.

III. Hardship

A. Notice of Decision.

In its Notice of Decision, the Sunapee ZBA found that “the strict enforcement of the ordinance does not result in an unnecessary hardship for the Applicant. The circumstances presented do not warrant the granting of a variance based on the criteria defined in the ordinance.” The New Hampshire Legislature codified the hardship test in 2009. The criteria, which is also found in the Ordinance at Section 10.42, is outlined in RSA 674:33. RSA 674:33, I. (a)(2)(E) provides: “Literal enforcement of the provisions of the ordinance would result in unnecessary hardship.” The first prong of the test provides: “(b)(1) For purposes of subparagraph I(a)(2)(E), ‘unnecessary hardship’ means that, owing to special conditions of the property that distinguishes 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.”

B. Whether Special Conditions Exist.

The ZBA concluded that the property did not contain any special conditions that distinguished it from other properties in the area. The Applicant asserted that the property had

several special conditions due to its small size, its wedge shape, location next to a larger property, deteriorating condition of the house, and slope of the property. (CR 13) The deteriorating condition of the house and proximity to a larger lot do not rise to the level of a special condition.

At the June 6, 2023 ZBA meeting, Chairman Claus inquired about special conditions that distinguished the Property from other properties in the area and added that there were several properties of similar or smaller size in the area. Applicant's counsel replied that there were several special conditions about the Property. He stated that uniqueness does not mean that the Property is the only one in the zoning district with these special conditions. Applicant's counsel stated that there may be half a dozen small, wedge-shaped lots in the area, but this condition is not shared by all lots in the Rural-Residential Zoning District. Applicant's counsel reiterated that (1) the size and wedge shape of the Property, and the fact that it is next to a larger lot that has a building that is significantly set back; and (2) that there is ample space between the proposed structure on the Property and its proximity to the abutting structure are both special conditions. (CR 49).

Based on the foregoing, and as spelled out in the Applicant's original application, (CR 12-13), we find that the Applicant did demonstrate that the Property has special conditions. In particular, the wedge shape of the property is a condition that is shared by some, but not all of the properties in the neighborhood, and this condition has a significant impact on the property's building envelope as was clearly demonstrated by the Applicant's plans. (CR 16, 18, 20). The HAB also notes that the proposed use could be considered reasonable in general but recognizes that the proposed configuration as presented to the ZBA may adversely impact the value of surrounding properties.

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CONCLUSION

Based on the foregoing, upon a balancing of the probabilities, the Housing Appeals Board
ORDERS as follows:

1. The Decision of the Town of Sunapee's Zoning Board of Adjustment denying the Applicant's variance to reconstruct a residence within setbacks and in excess of the maximum height allowed in the Sunapee Rural Residential District is UPHELD, consistent with this Order.
2. The Town's requests for findings of fact and rulings of law which are consistent with this Order are APPROVED; the balance are DENIED.

**HOUSING APPEALS BOARD
ALL MEMBERS CONCURRED
SO ORDERED:**

Elizabeth Menard

Elizabeth M. Menard, Clerk

Date: February 20, 2024