

1 **TOWN OF SUNAPEE**

2 **ZONING BOARD**

3 **JANUARY 3, 2019**

4
5 **PRESENT:** Daniel Schneider, Chair; Aaron Simpson, Vice Chair; James Lyons, Jr.; William Larrow; Jeffrey
6 Claus, Alternate; Clayton Platt, Alternate; Nicole Gage, Zoning Administrator

7 **ABSENT:** George Neuwirt

8 **ALSO PRESENT:** See Sign-in Sheet

9 Chairman Schneider called the meeting to order at 7:00 pm.

10 Vice Chair Simpson made a motion to approve Mr. Claus to sit in for the meeting. Mr. Larrow seconded
11 the motion. The motion passed unanimously.

12 **CASE #ZBA19-01: SUSAN KENT: PARCEL ID: 0104-0006-0000: 1008 MAIN ST, GM; VR W/SHORELINES**
13 **OVERLAY; VARIANCE TO ALLOW A 29 FT SETBACK TO THE STREAM FOR A 9 X 10 FT ROOF STRUCTURE,**
14 **WHERE NORMALLY A 50 FT SETBACK IS REQUIRED, PER ARTICLE III, SECTION 3.40 (C) OF THE SUNAPEE**
15 **ZONING ORDINANCE.**

16 Mr. Platt recused himself from the case.

17 Susan Kent, Carl Hanson, attorney, and Ray Wentzell, builder, presented the merits of the case.

18 Attorney Hanson explained that Ms. Kent's property is a pre-existing non-conforming lot which is 0.27
19 acres. There is a setback of 50 ft required from Muzzey Brook which encroaches 15 ft on the existing
20 building. The setback from Main St encroaches on the entire front of the building, and the setback from
21 the side setback encroaches on 5 ft or 6 ft of the garage.

22 Attorney Hanson continued that the building is also a non-conforming use as there are two residential
23 units that are allowed on this property. There is a 500 – 600 sq ft apartment in the basement that is
24 accessed from the west side of the property. It is at that access point that Ms. Kent would like to have
25 permission to install a low 9 x 10 "shed" roof over the entryway. The purpose of this is to help make
26 sure there is not ice or snow falling from the back part of the roof of the house into this area.

27 Attorney Hanson said that he thinks that this is a reasonable request for a Variance. It is a unique
28 property because of the setbacks and the small lot so Ms. Kent does not have many options. It is also
29 not possible to put another access to the basement on the other end of the property due to the
30 contours of the land. Vice Chair Simpson asked if there was prior access to the basement more towards
31 the center of the building. Attorney Hanson said that there is not access in the middle of the building.
32 Vice Chair Simpson said that he knows there was previously access in the middle as he knew someone
33 who rented the space prior to Ms. Kent owning the property. Attorney Hanson said that the middle

34 section on the back of the house was not an access to the apartment; the original access was where the
35 roof is going to be installed. There were windows on the wall facing Route 11 and a door on the wall
36 facing Muzzey Brook. Mr. Larrow asked if there is a picture of the property before the construction was
37 completed. Mr. Platt said that the door used to go under the porch. Vice Chair Simpson asked and
38 Attorney Hanson said that there was a structure under the screen porch; all of the construction for the
39 porch was permitted after they were constructed; the only thing outstanding is the 9 x 10 roof.

40 Chairman Schneider asked why it was necessary to get the Town's attorney involved in order for Ms.
41 Kent to comply with the Zoning Ordinance. Attorney Hanson said that he is not sure he can answer that;
42 he thinks that Ms. Kent has tried to move forward with her project and has been in regular contact with
43 the Town in doing this. If Ms. Kent has mis-interpreted what the requirements are, she has made good
44 on them, which is why they are requesting the Variance. Mr. Larrow asked if Ms. Kent's builder did not
45 know that a permit was required. Mr. Wentzell said that he was hired by Ms. Kent to close in the porch
46 and put some windows in it. He always leave the permitting to the homeowner as a lot of towns do not
47 require permits; when he is hired he does what he is hired to do. Chairman Schneider asked and Mr.
48 Wentzell said that he lives in Goshen, NH. Chairman Schneider asked and Mr. Wentzell said that he is
49 not aware if Goshen requires permits.

50 Chairman Schneider said that the Zoning Administrator sent a cease and desist letter to Ms. Kent, which
51 was apparently ignored. Mr. Wentzell said that when the letter arrived he stopped doing any
52 construction on the property. Ms. Gage said that she thinks that she clearly documented the dates and
53 the steps that were required to get the proper permitting on the project. The letter was sent September
54 20th and on September 28th the Town had still not received an application for a permit and construction
55 was still noted on site. Chairman Schneider said that bothers him. Ms. Gage said that as soon as the
56 Town's attorney letter was sent Mr. Wentzell applied for the permits. Chairman Schneider asked how
57 much it cost the town to get a letter sent from the Town's attorney. Ms. Gage said that she does not
58 know; she would have to look at the billing for that month. Chairman Schneider asked why the Town
59 should go through all the trouble and expense. Ms. Gage said that the language in the letter from the
60 Town's attorney explains the time period allotted before fines are imposed per RSA 676:17 and they did
61 not cross that threshold. Chairman Schneider asked who pays for the Town's attorney fees and Vice
62 Chair Simpson said that is the cost of doing business unless they go to court. Chairman Schneider said
63 that Ms. Gage sent a notice that said the work needed to stop and that notice was ignored. The Town's
64 attorney then sent another letter and at that point the permits were requested. Attorney Hanson asked
65 to confer with Ms. Kent as he knows that she was traveling.

66 Chairman Schneider said that in the course of construction, an Ordinance was violated; this was
67 discovered when the permit was finally requested. Attorney Hanson said that is why they are
68 requesting a Variance from the strict application of the Zoning Ordinance. Chairman Schneider asked
69 and Attorney Hanson confirmed that they are requesting the Variance after the fact. Mr. Larrow asked
70 that if it was noted during the permit time that a Variance was required for the roof, why it was built
71 without the Variance. Attorney Hanson said that he believes that it had already been built. Ms. Gage
72 said that when the after-the-fact permit application was received by the Town, she noted that the roof

73 did not meet the setback and told Ms. Kent it would need to be removed within 20 days or she could
74 apply for a Variance.

75 Vice Chair Simpson said that he was looking at the pictures of the property and does not see where the
76 entrance was to the basement before the construction was done. Ms. Kent said that she would like to
77 beg the Board's forgiveness. She is a new resident to Sunapee and is not familiar with the permitting
78 process. The entrance to the basement was always under the screen porch and was not a secure
79 entrance so a secure door was placed on the end of the building. Vice Chair Simpson asked if the door
80 to the apartment was where it is currently located or if it was underneath the deck. Ms. Kent said that it
81 was under the deck. She had underneath the deck closed in and there is now a secure door. Mr. Claus
82 asked and Ms. Kent explained that under the deck is not living space, it is enclosed but it is cold. Mr.
83 Platt said there used to be a tarp that you had to go through to go in but it was not living space. Mr.
84 Larrow said that when the Board had a previous case he took a picture of the back of the house but he
85 does not have it with him. Mr. Platt said that it was enclosed space that was not heated; the door to the
86 heated space was underneath the porch. Attorney Hanson said that outside the foundation there was
87 an unheated space that was walled in with lattice and a tarp. Mr. Platt said that now it is walled in with
88 more than lattice. Ms. Kent said that she is expecting to retire at the end of this year and wants to move
89 in to the apartment. The house is rented and there has been an apartment in the basement for many
90 years and she wants to move into it. She did not realize she needed a Variance to put the roof over the
91 entrance. Chairman Schneider said that if Ms. Kent had applied for a permit before she started she
92 would have found out it was needed. Ms. Kent said that she understands that and it was not her
93 intention to not abide by the Zoning regulations.

94 Attorney Hanson began to explain the details for the five criteria required for the Variance application.

95 Attorney Hanson said that he does not think that the roof would impact surrounding property values as
96 it is so minimal. The roof is clearly not contrary to the public interest as Ms. Kent has already gotten a
97 DES permit and he cannot imagine any other public interests. Chairman Schneider said that he does not
98 think it is in the public's interest to ask forgiveness rather than permission; he does not think that the
99 Board should encourage this. Attorney Hanson said that he would agree with Chairman Schneider but it
100 is more a philosophical question rather than a question that pertains to the application of the Zoning
101 Ordinance. He does not think that the Zoning Board can decline to apply the law on a particular
102 application on the basis of prior misbehavior of an applicant. Chairman Schneider said that an after-the-
103 fact request is different than a before-the-fact request.

104 Attorney Hanson said that regarding the hardship, the existing building is already within the 50 ft
105 setback. The addition of the roof will not make the building any appreciatively closer to Muzzey Brook
106 than it is now. Because of the unnecessary hardship presented by this particular lot with the non-
107 conforming structure, it is a reasonable use of the property for Ms. Kent to put the roof on so she can
108 have safe access to the lower level of her property. He does not believe that it impairs the purposes of
109 the Zoning Ordinance in Sunapee. Chairman Schneider asked if there is a reason that the entrance has
110 to be on that side of the building rather than the middle. Attorney Hanson said that the land slopes and
111 it would not be possible to install a standard height door in the wall facing Mr. Neuwirt's property.

112 Mr. Lyons asked and Attorney Hanson confirmed that there was a ground level entrance to the
113 basement apartment before all the construction was done. Mr. Lyons asked if the Board is being asked
114 to take an existing ground level entrance and swing it around. Mr. Platt said that there was already a
115 door there. Mr. Lyons said that the porch would have provided safety from falling snow and ice.
116 Attorney Hanson said that there was no safety from the ice or snow until you got under the porch. Mr.
117 Platt said that the physical access has not changed. Mr. Larrow said that, assuming this door is not a
118 new access point, the porch was there and the snow and ice would have still hit that area without the
119 roof. There was further discussion regarding the location of the doors and if there were doors that were
120 added or changed.

121 Attorney Hanson said that in terms of whether there is no fair and substantial relationship between the
122 general purposes of the Zoning Ordinances and the specific restriction on the property, the addition of
123 the 9 x 10 roof will not get the property closer to Muzzey Brook than it is already. Chairman Schneider
124 asked and Attorney Hanson confirmed that it does increase the footprint of the building within the
125 setback. Attorney Hanson continued that they are only asking for a roof, not for a floor, walls, etc.; it is
126 only to protect the entryway.

127 Mr. Platt asked if the sliding door will be used for ingress and egress. Ms. Kent said that the sliding door
128 will be used. Mr. Platt asked and Ms. Kent confirmed that she will not be building a deck there.

129 Attorney Hanson said that he does not believe that there will be any private or public rights of others
130 that are affected because of the roof. It is almost invisible from the road and is invisible from one of the
131 neighboring properties. The neighbor across Muzzey Brook is a cemetery and he does not think that
132 they will be affected by the roof. Mr. Lyons asked and Attorney Hanson confirmed that if the roof is
133 taken down it will expose bare earth. Mr. Lyons said that one of the purposes for a waterbody setback
134 is to allow water to spread out and percolate slowly and filter into the brook, which flows into Lake
135 Sunapee. It seems to him that with the addition of the roof, the process would be truncated. Attorney
136 Hanson said that is possible, however, DES has already issued a permit for the roof. Mr. Lyons asked if
137 there are drainage proposals to slow the water down and allow it to infiltrate into the ground; he has
138 not seen the DES permit. Attorney Hanson said that the DES permit notes that there will be 190 sq ft of
139 impervious area. Vice Chair Simpson said that the DES permit is a Permit by Notification so what was
140 put on the permit was what was approved. Attorney Hanson said that the slope of the ground is
141 relatively flat but he understands Mr. Lyon's concerns.

142 Chairman Schneider said that the DES permit mentions a deck and asked where the deck is located.
143 Attorney Hanson explained that the deck is the new deck that was constructed and showed where it is
144 located on the structure. The deck did not require a Variance because it is further than 50 ft from
145 Muzzey Brook. Mr. Claus asked and Attorney Hanson said that the deck and porch are both permitted
146 with after the fact permits. Mr. Claus asked and Attorney Hanson said that there was one after the fact
147 permit application and when Ms. Gage reviewed the application it was determined that one of the
148 things they were asking for a permit for required a Variance because it expanded the footprint of the
149 building within the 50 ft setback from Muzzey Brook.

150 Vice Chair Simpson said that he'd like Attorney Hanson to address the Variance criteria relating to how
151 granting the Variance will not be contrary to the public interest as it is written on the application that it
152 is because it is private property, which does not support the argument. Attorney Hanson said that it is
153 not contrary to the public interest because the project will largely not be visible from the road or public
154 view points. Chairman Schneider said that it is very visible from the road. Attorney Hanson said that it
155 is not visible from Main St, it is visible from Route 11. It is a relatively minor addition to the property
156 and esthetically it is pleasing to have that "L" filled in rather than have it the two story drop. Vice Chair
157 Simpson said that esthetics do not apply. Attorney Hanson said that he agrees with Vice Chair Simpson
158 but it matters to his client. Vice Chair Simpson said that safety is more persuasive. Attorney Hanson
159 said that his client would like to get in and out of the downstairs apartment and this is the only access to
160 the apartment. She would like to get in and out without worrying about snow and ice falling on her.
161 Vice Chair Simpson asked and Attorney Hanson confirmed that Ms. Kent will still need to walk around
162 the building to get to the road.

163 Chairman Schneider asked and there were no additional questions for Attorney Hanson or Ms. Kent
164 from the Board so he closed the meeting to public input.

165 Vice Chair Simpson said that the roof makes the apartment more accessible but it is for an entrance that
166 he does not believe previously existed; the slider is obviously new as well. Mr. Platt said that he met
167 Ms. Kent in that entranceway when he was doing the survey of the property. There was a tarp there
168 that he walked through; the access was under the porch with cold storage and you then went into the
169 living space through another door. Mr. Larrow said that there was not a door there, it was only a
170 storage area. Mr. Platt agreed that there was no door, just a tarp, but if you were going to go into the
171 apartment you would go through that area to get in. Chairman Schneider said that the door does not
172 have to be where it is located, it could have been put in the rear rather than the side. Mr. Platt said that
173 there is a 5 ft slope behind the porch. Mr. Claus said that the travel path is through this area, which falls
174 under the roof where the snow and ice will fall. Mr. Larrow said that on that side of the building, by the
175 brook, there is a slope which you have to go down regardless of where the door is located. Mr. Claus
176 said that the shortest path would be closer to the house, which is the area that the roof covers. Vice
177 Chair Simpson said that Ms. Kent could have put a door in the side of the house, which would have been
178 away from snow fall and closer to the front of the house.

179 Chairman Schneider said that he thinks that any motion the Board makes should include that the porch
180 will not be further improved without seeking an additional Variance. Mr. Larrow agreed that the area
181 under the roof should not be enclosed. Mr. Larrow said that he thinks that the most disconcerting thing
182 about the whole situation is that if you read through the packet Ms. Gage put together, on the surface it
183 looks like Ms. Kent just did what she wanted to do because this is what she wanted to do. Chairman
184 Schneider said that he is most concerned with how it was done. Mr. Larrow said that is what makes it
185 difficult to get at the facts because you want the person who has spent the money to get what they
186 want based on the regulations of the Town. It is nice to have a roof over an entryway as it makes sense
187 for safety; he just does not like the way that this came about. Chairman Schneider said that he does not
188 think that it would have been necessary to put the door where it could have been put on the rear of the
189 porch rather than the side of the porch; he does not think that would have been a hardship. Mr. Platt

said that it would have taken some excavation and land disturbance to do that. Mr. Larrow said that if you look at the drawing it does not seem like it would have been difficult to do. Mr. Platt asked and Mr. Larrow confirmed that he is talking about putting a door off the lower side. Attorney Hanson said that if the door is moved around the corner there is still snow and ice coming down from the eave of the porch roof and would require a roof. Vice Chair Simpson said that roof could have been placed outside the setback. Attorney Hanson said that the setback goes right to the middle of the porch so any roof covering would have also required a Variance. There was further discussion regarding this matter.

Chairman Schneider asked if anyone had any further questions for Attorney Hanson or Ms. Kent and there were none.

Vice Chair Simpson made a motion to approve Case #ZBA19-01: Susan Kent: 0104-0006-0000: 1008 Main St, Georges Mills; Village Residential w/shorelines overlay; Variance to allow a 29 ft setback to the stream for a 9 x 10 ft roof structure, where normally a 50 ft setback is required, per Article III, Section 3.40 (c) of the Sunapee Zoning Ordinance; subject to the condition that the area under the roof not be enclosed and that no impermeable surface be installed underneath the roof. Mr. Larrow seconded the motion. Mr. Platt said that he does not think that impermeable surface makes a lot of difference as the area is pretty hard packed. Chairman Schneider said that he is not sure the Board wants to encourage seeking forgiveness rather than permission. He is concerned by the disregard of the Ordinance and disregard of the communications sent by the Zoning Administrator. He is not sure that it is in the public interest to approve this application and he does not think that just because the roof is desirable that it constitutes a hardship. Vice Chair Simpson said that he is concerned about creep; if the porch and roof get enclosed then there is another 200 sq ft of living space. He wonders if the motion should be amended so that the porch does not get turned into a four-season living space. Chairman Schneider said that the porch is already enclosed. Vice Chair Simpson said that he is talking about underneath the porch. Chairman Schneider said that it is permitted by right to enclose that area under Section 3.40 (k) which says "if a pre-existing structure contains enclosed living space, which projects over a non-conforming open area, the open area may be enclosed provided an application for a Certificate of Zoning Compliance has been approved". Vice Chair Simpson asked if a porch is living space, even if it has been converted to living space now it was previously a screened porch. Ms. Gage said that it was more than just a screened porch before it was finished. Vice Chair Simpson said that according to the tax card it was a screened porch. Mr. Lyons said that he does not think that this meets the criteria for hardship. The motion failed unanimously because the proposal does not meet the definition of hardship and in Chairman Schneider's opinion does not meet the public interest.

MINUTES

Changes to the minutes from December 6, 2018: Change Line 98 to read "...the Board for a Variance to the criteria..." Change Line 113 to read "...Special Exception concurrently with granting..." Change Line 188 to read "...allowed by right if the criteria are met." Change Line 229 to read "...they need to comply with that criteria."

227 Vice Chair Simpson made a motion to approve the minutes of December 6, 2018 as amended. Mr.
228 Larrow seconded the motion. The motion passed with four in favor and one abstention.

229 **MISCELLANEOUS**

230 Vice Chair Simpson asked if the Bonnanno's have filed a motion for reconsidering. Ms. Gage said that
231 they have not; they have 30 days from the day after the decision was made.

232 Ms. Gage reminded the Board members that Mr. Larrow and Vice Chair Simpson's terms are up in 2019.
233 She checked the municipal calendar and they can sign up to run again at the Town Clerk's office
234 between January 23rd and February 1st. Mr. Larrow said that he probably not run again. The Board said
235 that they hope that Mr. Larrow decides to run again. Ms. Gage said that the Planning Board is going
236 digital in 2019 so the packets will be available online. That might be something that the Zoning Board
237 could do so that the packets are easier to read. The Board said that he thinks that it would be good to
238 have plans submitted digitally and to have their packets available in digital format. There was further
239 discussion regarding this matter.

240 There was a discussion regarding updating the Rules and Procedures for the Zoning Board.

241 Ms. Gage gave the Board a packet regarding the Variance application as well as a worksheet to use for
242 Variance cases. Ms. Gage said that she has included confidential correspondence from the Town's
243 attorney regarding questions that she had about her concerns about the five questions on the
244 application as they refer to old RSA information. Additionally, Mr. Neuwirt had recommended a
245 summary page from the Town of Bradford's application to be added to the Variance application. Ms.
246 Gage continued that she thinks that the Board needs to look at the language that is being used on the
247 applications. She would like to work with one of the Board members to look at the documents and audit
248 the application to see if it can be approved. Chairman Schneider asked and Ms. Gage confirmed that the
249 page from the Town of Bradford is a supplement to the Variance application. There was further
250 discussion regarding the Variance application and Chairman Schneider said he would work on the
251 application with Ms. Gage.

252 Mr. Platt said that one of the criteria for a Variance is that the proposed use is a reasonable one. The
253 Board should be looking at if the proposal is reasonable, not if there is an alternative. Talking about
254 putting a door on the other side of the building and cutting a foundation should not be part of the
255 discussion; the Board should be looking at what is before them.

256 Chairman Schneider said that he thought that the Board did not want to define unnecessary hardship
257 because the courts seem to change the definition. Ms. Gage said that Mr. Neuwirt wanted to include
258 the definition that Bradford is using, which she believes relates directly to a recent court decision. Vice
259 Chair Simpson said that it talks about how some of the criteria are closely related and should be
260 considered together. Chairman Schneider said that he would recommend keeping the application as it is
261 and giving the supplemental information to applicants as a guide. Ms. Gage asked if they should include
262 the edits that the Town's attorney suggested. Chairman Schneider said that he has not had a chance to
263 look at the suggestions. Ms. Gage said that the State has a sample Variance application as well.

264 There was a discussion regarding hardship and how it is difficult because the legislators keep trying to
265 change the language to keep up with court decisions but it changes too often.

266 Ms. Gage said that she will update the Variance application and have the Town's attorney review it and
267 then give it to the Board as a draft.

268 Ms. Gage said that she is sitting in on a webinar from NHMA that the Board is welcome to sit in on
269 regarding proposed changes to land use legislation.

270 There was a discussion regarding the spring conference for Zoning and Planning Board members.

271 Chairman Schneider adjourned the meeting at 8:22 pm.

272 Respectfully submitted,

273 Melissa Pollari

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277

278 Zoning Board of Adjustment

279 _____

280 Daniel Schneider, Chair

Aaron Simpson, Vice Chair

281 _____

282 James Lyons, Jr.

William Larrow

283 _____

284 George Neuwirt

Clayton Platt, Alternate

285 _____

286 Jeffery Claus, Alternate