

1 **TOWN OF SUNAPEE**

2 **ZONING BOARD**

3 **JUNE 6, 2019**

4 **PRESENT:** Daniel Schneider, Chair; James Lyons, Jr.; Clayton Platt; Jeffrey Claus, Alternate; Nicole Gage,
5 Zoning Administrator

6 **ABSENT:** Aaron Simpson, Vice Chair; George Neuwirt; William Larrow, Alternate

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

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

9 Mr. Lyons nominated Mr. Claus as a voting member for the meeting. Mr. Platt seconded the motion.
10 The motion passed unanimously.

11 **CASE #ZBA19-10: PARCEL ID: 0113-0021-0000: SEEKING A VARIANCE FROM ARTICLE III, SECTION 3.10**
12 **TO PERMIT REDUCTION OF WESTERN SIDE SETBACK FROM 15' TO 7' FROM PROPERTY LINE FOR A**
13 **GARAGE; ZONE RR W/SHORELINE OVERLAY; 60 RIDGEWOOD DR; TIMOTHY & BETTE NOWACK.**

14 Chairman Schneider explained that there are only four Board members at the meeting and three
15 positive votes are required in order for a case to pass. Chairman Schneider asked and the applicants
16 decided to proceed with the case with the four members.

17 Timothy and Bette Nowack presented the merits of their case.

18 Mrs. Nowack explained that at their last hearing, they had applied to reduce the front setback, to
19 increase the impervious surface, and to decrease the side setback. The first case was approved, the case
20 to decrease the side setback was denied, and the case to increase the impervious surface was
21 determined to not be necessary. Chairman Schneider said that the Nowacks withdrew the case
22 regarding the impervious surface. Ms. Gage said that she has spoken with the Nowacks and a hearing
23 for the impervious surface is not necessary. Mrs. Nowack said that the reasons the case for the side
24 setback was denied were: a one car garage could fit without a reduction of the side setback; having
25 something so close to the property line creates a reduction of the quality of the abutter's property and
26 possibly a reduction of property values; and it does not meet the criteria of 3(c) that the Variance would
27 not injure the public or private rights of others because it injures the rights of the abutters.

28 Mrs. Nowack said that the Variance application form has been changed since they applied for the other
29 cases and the updated form is now in alignment with the RSA. She wanted to make sure that they were
30 understanding the new language so she has done some research and there was a lot of information
31 from the NH Office of Strategic Initiative (OSI), including The Board of Adjustment in NH Handbook for
32 Local Officials (the Handbook), and the Simplex vs. the Town of Newington case. What she has learned
33 is that one of the main differences that was decided by the Supreme Court in the Simplex case had to do
34 with the definition of unnecessary hardship and the Simplex case then got incorporated into the new

35 RSA. The Handbook stated that prior to the Simplex case, for hardship to exist, the deprivation resulting
36 from application of the Ordinance had to be so great as to effectively prevent the owner from making
37 any reasonable use of land. The Supreme Court stated that their “decision of unnecessary hardship has
38 become too restrictive in light of the constitutional protections by which it must be tempered. In
39 consideration of these protections, therefore, we depart today from the restrictive approach that has
40 defined unnecessary hardship and adopt an approach more considerate of the constitutional right to
41 enjoy property. Henceforth, applicants for a variance may establish unnecessary hardship by proof that:
42 (1) a zoning restriction as applied to their property interferes with their reasonable use of the property,
43 considering the unique setting of the property in its environment; (2) no fair and substantial relationship
44 exists between the general purposes of the zoning ordinance and the specific restriction on the
45 property; and (3) the variance would not injure the public or private rights of others.” Mrs. Nowack
46 continued that there is a document titled *Court Establishes New Definition for Variance Hardship* that
47 says that with the addition of the phrase “fair and substantial”, it is no longer necessary for unnecessary
48 hardship to prevent the owner from making any reasonable use of the land, instead, the Board
49 members need to consider the character of the neighborhood surrounding the parcel for which the
50 Variance is sought and ask “does the regulation interfere with the owner’s right to use the property as
51 he /she sees fit, as long as that use does not injure the public or private rights of others”. She believes
52 that under the old regulations unnecessary hardship was for something like a lot that could not be built
53 upon without a Variance. However, this is a little less strict and with the wording “fair and substantial”
54 the owner has a right to reasonable use to their property providing it does not hurt the public or private
55 rights of others.

56 Mrs. Nowack said that page 4 of their application has the requirements for a Variance under the new
57 RSA and she has some questions regarding the language. It seems that in order to meet the criteria
58 under Section E, which pertains to unnecessary hardship, you need to meet the criteria under Section A
59 and B and then Section E is, therefore, met.

60 Mr. Platt said that, procedurally, he thought that the Board only heard a new Variance case when
61 another case has been denied if, per the Handbook, the “circumstances have changed sufficiently
62 enough to warrant acceptance of a reapplication. If there has not been a significant change in the
63 circumstances, then the Board should reject the application and end further consideration”. He thinks
64 that this is something that the Board needs to consider before they continue the hearing. Mr. Lyons
65 agreed with Mr. Platt. Mr. Platt said that the main difference is that the application is for 7 ft from the
66 property line, not 5 ft as was previously requested. Chairman Schneider asked and Mrs. Nowack
67 confirmed that the garage is the same size as previously requested, they are just moving it over 2 ft.
68 Chairman Schneider said that he thinks that the Zoning Administrator needs to determine if the change
69 of 2 ft is enough of a significant change. Mr. Platt said that is not what is said in the Handbook.

70 Mrs. Nowack said that during the last hearing there was a conversation about putting a condition on an
71 approval to move the garage 2 ft to make it 7 ft and was told that it would need to be done with a new
72 application to be considered and this is what they have based their new submission on.

Mr. Platt read the section of the Handbook regarding previous applications, which states “when an application is submitted, the files should be reviewed to determine if a previous application was denied for the same situation. If so, the board should determine if circumstances have changed sufficiently to warrant acceptance of a reapplication. If there has not been a significant change in circumstances, then the board should reject the application and end further consideration. This determination must, of course, be made at a meeting of the board following submission of the application.” Mrs. Nowack asked if the section talks about additional information as well. Mr. Platt said that it says, “a significant change in circumstances”. Mrs. Nowack said that she considers it to be a significant change and she went through a lot of effort to put the application and proposal together and she has a lot of new information and additional information. She feels as though certain aspects at the last meeting did not give them a fair opportunity to respond but they now have more of a basis to present their case. Also, based on last month’s meeting, she finds the Board inconsistent regarding their decisions, especially considering the garage that was approved for 22 Burma Rd. Mrs. Nowack continued to discuss her thoughts regarding the approval for 22 Burma Rd.

Ms. Gage said that she met with the Nowacks after their last hearing and they explained that they would not appeal the Board’s decision but would move the garage because she thought that was what the Board was asking them. Given that they are moving the garage 2 ft, she did not think that the Fisher Doctrine (the previous application doctrine) would come into play because the Board approved the front setback Variance. She would feel terrible if this application is not heard because she felt as though the applicants were going above and beyond what they needed to do by redoing their whole plan rather than appealing the Board’s decision. Mrs. Nowack said that they did consider appealing the Board’s decision and did speak to an attorney. However, they felt as though this was a friendlier way to go about it rather than appealing the Board’s decision.

Mrs. Nowack said that she also has an issue with the denial that says a one car garage could fit without a reduction of the side setback and she would like to go through that and talk about why she does not think it is a valid reason.

Chairman Schneider closed the meeting to public comments to discuss Mr. Platt’s concerns regarding the previous application. Chairman Schneider asked if anyone wants to make a motion that the Board should not hear the case because there has not been a significant change. Mr. Platt asked and Chairman Schneider said that he thinks that voting on this would be the only way to do it.

Mr. Platt made a motion that the Board accept the application has significant changes and continue with the hearing. Mr. Lyons seconded the motion. The motion passed unanimously.

Chairman Schneider reopened the meeting to public comments.

Mrs. Nowack said that page 7 of their application has a listing of the purposes of the Ordinance, which is what the RSA directs what the Zoning Ordinances should be based on. She bolded the parts of the Ordinance that she feels are important to her case (see application in case file). She believes that if their application meets all of these purposes then they meet the Spirit of the Ordinance.

Mrs. Nowack said that Section E of the requirements for awarding a Variance says, “literal enforcement of the provisions of the Ordinance would result in unnecessary hardship”. For the purposes of unnecessary hardship, it means that owing to special conditions of the property that distinguish it from other properties in the area, which she thinks is the road frontage in their case. Mrs. Nowack continued that she thinks that “no fair and substantial relationship exists between the general purposes of the Ordinance provision and the specific application of that provision to the property” does not mean that they cannot use their property if they do not get a Variance because that is not true, it means that there is no fair and substantial relationship between the Town denying their Variance and them not being able to use their property as the Constitution of New Hampshire guarantees them. Mrs. Nowack said that she has a copy of the Simplex decision that describes this if the Board would like to see it. She hopes that the Board looks at their application under the new RSA and not the old RSA which denies their request as long as they have reasonable use of the property. Mr. Platt asked and Mrs. Nowack said that the Simplex decision was from 2001 and the new language was created out of this decision. Mrs. Nowack said that there is no fair and substantial relationship between denying the Variance and their constitutional right to use the property.

Mrs. Nowack said that they are proposing a 20 ft x 20 ft garage with a 10 ft x 4 ft bump out to accommodate stairs that need to be inside and are required to bridge the elevation difference. They also need to change page 7 of the application that says that it will be a maximum height of 15 ft over the slab to 17 ft because LaValley’s told them that they need the extra room to fit a standard size garage door. The proposed garage is 7 ft from the Fitzgerald’s property line, the previous application asked for 5 ft from the property line. Mrs. Nowack continued that moving the garage towards the other side of the property would require another Variance for that setback and would also block access to that side of the property to do maintenance for their well, grinder pump, roof, etc. There is also an 8 ft right of way over their property that cannot be blocked. This is the best location on the property and they cannot move it over more. Their lot is very similar in size to the other properties in their neighborhood, as well as to 22 Burma Rd, but the difference with their lot is that their property is pie shaped with very narrow frontage.

Mrs. Nowack said that they currently park on the road and they will be moving the parking area away from the road into the garage which will allow for more access and turn around space for any Town vehicles that need to use the area as well as for safety vehicles. They are also adding a drainage system to take storm water from the road and infiltrate it. It will be a well-constructed wood framed building and will be able to house some of the things they currently have outside. Therefore, this proposal is not contrary to the public interest.

Mrs. Nowack said that regarding the Spirit of the Ordinance, she interprets it to be equal to the purposes that are in the RSA. They are putting a garage where they normally park and there will be an increase in access for safety and maintenance vehicles. In terms of adequate air and light for neighboring buildings, they will be 70 ft away from the Fitzgerald’s house and 50 ft from the Hack’s house and 30 ft from their garage. The garage will be low profile and not block anyone’s views or sunlight and it will take up roughly the same space that they currently use for two parked cars. There is an existing long driveway that goes down to the house that they are willing to remove and not use it for

cars but still allow them to have space if they need it to get equipment in and out of there. It will also be a better use of natural resources because they are putting in a storm water infiltration system. Mrs. Nowack continued that she does not see how there should be any negative effects on the public interests. Additionally, the Handbook says that due to *Malachy Glen Associates, Inc. vs. the Town of Chichester*, “to be contrary to the public interest, the Variance must unduly, and in a marked degree, conflict with the Ordinance such that it violates the Ordinance’s basic Zoning objectives. One way to ascertain whether granting the Variance would violate basic Zoning objectives is to examine whether it would alter the essential character of the locality. Another approach to determine whether granting the Variance would violate basic Zoning objectives is to examine whether granting the Variance would threaten the public health, safety or welfare”. Mrs. Nowack said that she does not think that they will be building a garage that would be contrary to the public interest.

Mrs. Nowack said that construction of the garage and stairs will bring the property up to what is basically modern standards for a year-round retirement home. It will increase safety and convenience, particularly in the harsh winters, without negatively effecting the quality or use of abutting properties. Two car garages are typical, even for starter homes. There are also positive gains to the property regarding access, maintenance, and storm water management. Referring to the Handbook again, it says “perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice”. Mrs. Nowack continued that there is no loss to the public, there is only benefits to them and to the public.

Mrs. Nowack said that regarding if the values of the surrounding properties will not be diminished, at the last hearing the Board decided that having a garage so close to the property line creates a reduction of the quality of the abutter’s property and possibly a reduction in property values. A possible reduction in property values does not seem to be what the Handbook says which is: “while objections to the variance by abutters may be taken as some indication that property values might be decreased, such objections do not require the Zoning Board of Adjustment to find that values would decrease. Very often, there will be conflicting evidence and dueling experts on this point, and on many others in a controversial application. It is the job of the ZBA to sift through the conflicting testimony and other evidence and to make a finding as to whether a decrease in property value will occur”. Mrs. Nowack continued that the Handbook further states “opposition of neighbors or the fact that no abutters appear at the hearing should not sway boards. The Board must review each of the five variance criteria and grant the variance, only if they are all met. The Board does not have the discretion to grant the variance because they like the applicant or because they believe the project is a good idea”.

Mrs. Nowack said that Exhibit N in the submitted application is an email from John Calderwood of Four Seasons Sotheby’s International Realty to Jeffrey Fitzgerald. Mrs. Nowack read the email to the Board (see application in file). She thinks that it is clear that the realtor did not see the plans and did not know the location of the proposed garage or how high or how big it would be; this does not seem like a letter that should have held a lot of weight, however, it did seem to be what guided the Board’s decision at their last hearing.

188 Mrs. Nowack said that Exhibit M is a letter from Kristen McAllister, one of the Assessors for Sunapee.
189 They have never met her but called to talk to her about the proposed project and asked her opinion and
190 she wrote them the letter. Mrs. Nowack read the letter (see application in file). Mrs. Nowack said that
191 they do have an approved NH DES Shoreland Permit and a storm water management plan.

192 Mr. Lyons asked about the storm water management plan and Mrs. Nowack said she can show it to the
193 Board. Mr. Claus asked and Mrs. Nowack said that the Shoreland Permit has been approved by the
194 State. Mr. Claus asked and Mrs. Nowack said that they received a Permit by Notification last year to
195 build the garage. Mr. Claus said that the plan would not fall under a Permit by Notification because they
196 are disturbing more than 1,500 sq ft. Mrs. Nowack said that the garage and parking area construction is
197 less than 1,000 sq ft. Mr. Platt said that they are excavating and removing the driveway. Mr. Claus said
198 that he calculated approximately 1,486 sq ft of disturbance and that was only looking at the proposed
199 impervious and removing the existing pervious and does not equate for any excavation. Mrs. Nowack
200 said that a Zoning approval can be made conditional upon a Shoreland Permit. Ms. Gage said that a
201 Certificate of Zoning Compliance would not be issued without all the required State permits.

202 Mrs. Gage gave a copy of the storm water management plan to the Board. There was a discussion
203 regarding the drainage plan and the elevation of the lot.

204 Chairman Schneider asked and Mrs. Nowack explained that the approved DES permit did include the
205 garage but the older version of their proposal. They have not updated the DES permit with a new plan
206 because they do not have Zoning approval. Chairman Schneider asked and Mrs. Nowack confirmed that
207 they will need to do a new permit for the new plan.

208 Mrs. Nowack read a letter from William and Emily Hack (see letter in file). Mrs. Nowack also read
209 Exhibit L of the application, a letter from Dave Smith of Harbor Light Realty (see application in file). Mrs.
210 Nowack said that they also spoke to another real estate agent who told them that the only time that
211 they have seen property values depreciated was when a view to the lake has been blocked, access to an
212 abutter's property has been blocked, or drainage issues have been exacerbated; they are not doing any
213 of these things.

214 Mrs. Nowack said that even though the proposed garage will be 7 ft from the property line, it will be 70
215 ft from the Fitzgerald's house, and it will not block any air movement or sunlight. The Fitzgerald's
216 property slopes down steeply and Exhibit G and H of their application show where the Fitzgerald's house
217 is located. The Tax Map does not show the Hacks' house very accurately, however, the arrow on Exhibit
218 G shows approximately where their front door is located. Exhibit H is an aerial photo from google and
219 she has put in where the garage would be and it shows how far it would be from the Fitzgerald's house.
220 Exhibit I also shows the steep slope to the Fitzgerald's house. They might see the top of the garage and
221 they will pass it on the way to their house, but it should not negatively impact their property value.
222 Additionally, they had a temporary garage on their property that they have removed but it was located
223 up by the road and they probably built it there because they did not have to look at it. She questions if
224 the view of their garage will have an impact on the quality or use of the Fitzgerald's property. Mrs.
225 Nowack continued that the proposed garage will be 7 ft from the property line but asked what their

constitutional rights are for them to use their own property. They only have 42 ft of frontage; therefore, the side setback Variance is required for them to have the garage.

Mrs. Nowack said that another reason she does not think that their garage will impact property values is because their garage is consistent with other garages in the neighborhood. Mr. Nowack gave pictures showing other garages along Ridgewood Rd that are similar to what they are proposing. Mrs. Nowack said that one of the garages belongs to the Hacks, which is right next door to their property; the other belongs to the Rose family and is two houses down from them. She does not know how adding another garage, which would be lower in height, smaller in dimension, and not have a second story, would have a negative impact on property values in the neighborhood.

Mrs. Nowack said that she would also like to compare their proposal to the recent approval that the Board made at 22 Burma Rd. Chairman Schneider said that 22 Burma Rd has no bearing on this case so they will not discuss it. Chairman Schneider continued that the Board has another case to hear and requested that the Nowacks wrap up their presentation.

Mrs. Nowack said that she wanted to talk about the Board's suggestion that they could build a one car garage without any side setback Variances as she has included sketches showing what a one car garage would look like and how much room it would take up. They have two cars and they would still need a parking area for the second car so a 12 ft garage that would fit between the two side setbacks and would be 78 ft from the Fitzgerald's house as opposed to 70 ft. She does not think that the normal person could tell the difference between 70 ft and 78 ft away and she does not think that there is a significant value to a one car garage over a two-car garage from that perspective. Mrs. Nowack continued that if they built a one car garage, she thinks that the Ordinance would allow the garage to be up to 40 ft tall, without any restrictions. If they were only allowed to build a one car garage, they would want to have some additional storage space and would make it two stories and probably 24 ft high. There would also not be any changes to the impervious surface area because they would still need to have the driveway for the second car. Mrs. Nowack continued that she would postulate that a two car garage with a low profile would be more attractive and have a better appearance than a one car garage that is two stories, which is why she included a photo of a one car garage in their neighborhood that is two stories with living space. She would like to know if the Board thinks that if they built something like that instead of what they are proposing if it would be beneficial to the values in the neighborhood.

Mrs. Nowack said that another advantage to their neighborhood would be that the Board could put limits on an approval including a limit on the height, that it be only a two car garage, that it does not have living space above the garage, and that they require the storm water management plan to be installed. If they build a garage without the side setback Variance, there is no requirement for them to do any of these things. Mr. Platt said that the State of NH will require a storm water management plan. He also does not think that the Board should get involved with drainage designs.

Mrs. Nowack said that she thinks that a two car garage would be a benefit to everyone. Their proposed two car garage is not, in any way, inconsistent with the purposes of the Ordinance. Conversely, it presents many advantages towards achieving the goals of the Ordinance and a two car garage is a part

of most modern rural residential construction projects in this climate. There will be a net gain to the general public so there are no tradeoffs to consider.

Mrs. Nowack said that the proposed use is a reasonable one because their proposed garage is similar to others on the street within 500 ft of their property in their application. Table 3 on page 10 and Exhibit F show the properties with garages in their neighborhood and the sizes of the lots. Their lot size is consistent with the lot sizes in their neighborhood, however, the road frontage for their property makes the side setback Variance to be reasonable to consider.

Mrs. Nowack said that in the Supreme Court Case *Malachy Glen Associates, Inc. vs. the Town of Chichester*, the Supreme Court reversed a decision made by the Town of Chichester because the Zoning Board denied an applicant's request for a Variance because a proposed storage facility could be constructed without a Variance if the number of storage units was reduced. Mrs. Nowack said that she found this information in *The Five Variance Criteria in the 21st Century* on the NH OSI website. It also says that "the Court also rejected the ZBA's argument that there were other reasonably feasible methods available to the applicant via the elimination of a number of the desired storage units. The Court clearly stated that "the ZBA must look at the project as proposed by the applicant and may not weigh the utility of alternate uses in its consideration of the variance application". They had a proposal for storage units and if they reduced the number they would not have required a Variance; the Court determined that the Zoning Board could not tell an applicant that they need to change a project so that a Variance was not needed. The Court said that the ZBA cannot change an application and reversed the Town's decision and the Variance was awarded. Mrs. Nowack continued that she believes that this is an analogist to denying their application for a two car garage because a one car garage could be built without requiring a Variance. Chairman Schneider said that was not the only reason that the application was denied. Mr. Nowack asked and Mrs. Nowack confirmed that the Malachy Glen case involved a wetland and the Zoning Board said that they could build the facility and not intrude on the wetland if they reduced the number of units. Mrs. Nowack gave further explanation regarding this case.

Mrs. Nowack said that the property values was another reason that the Board denied their Variance application. They did consider appealing the decision, however, they felt that this new application was a better way of going about it.

Chairman Schneider asked if Mrs. Nowack has anything further to add. Mrs. Nowack said that she wants to conclude her presentation.

Mrs. Nowack said that she has gone through the Variance criteria and demonstrated that their proposal meets each of the criteria. They have demonstrated that the Variance would not be contrary to public interest and would, in fact, enhance public safety and alleviate environmental concerns. They have demonstrated that the project is consistent with the spirit of the Ordinance and that substantial justice would be done by allowing this year-round full-time residence to be brought up to a modern living standard. Considering the price that they paid for this property and the taxes they pay, building a modest two-car garage is not an unusual or unreasonable request and it is consistent with a lot of other properties in the neighborhood and does not change the neighborhood character. Mrs. Nowack

continued that both the public and them as property owners will gain from this Variance; there is no trade-off and is a win/win situation. They have provided a strong case as to why their project will not negatively impact abutter's property values, reinforced by the knowledgeable and objective opinion of the Town Assessor. One abutter has objected to the Variance saying that their property value may be negatively impacted, which is based on a real estate agent's opinion regarding the imagined appearance of the proposed garage but that opinion was not really backed up with any evidence. They have demonstrated unnecessary hardship by demonstrating that there is no fair and substantial relationship between the public purpose of the Ordinance and the specific application to their property and this Variance will only provide benefits to the public. They have demonstrated that the proposed use is a reasonable one as it is a garage, and everyone should understand that it is reasonable. Additionally, they have shown that adding a garage to their property will not make their property overbuilt. Mrs. Nowack continued that the Board did not let her talk about 22 Burma Rd but if they compare it, their property is much less developed and more conforming than that property and many of the other homes in their community. Table 1 of their application shows side setbacks that have been approved by the Zoning Board, ranging from 2 ft side setbacks to 10 ft and some being quite recent. Mr. Lyons said that they all represent individual cases. Mrs. Nowack said that they do but that there should be some kind of consistent basis for making decisions. Mr. Lyons said that all the decisions were individually rendered.

Chairman Schneider asked and Mrs. Nowack said that she is not done with her presentation.

Mrs. Nowack said that their impervious surface for this proposal is 26.4%, which is almost within the current guideline of 25%. They have listed various reasons why a two-car garage is more appropriate for this location and blends in better with the neighborhood character and has multiple benefits over construction of a two-story one car garage which would not require a side setback Variance and, theoretically, could be constructed to a height of 40 ft. If the Board looks at the essence of this application, they are talking about putting a structure over two cars where they already park. The Board's decision can limit them to having a structure over just one of those cars, however, she questions what it would accomplish and what benefit it would provide to the Town, the public, and the abutters.

Chairman Schneider said that he will ask the Board members to ask any questions they may have and then would like any abutters present to comment.

Mr. Lyons asked if this case involves the issues regarding turning the snowplows around and asked how that was resolved. Mrs. Nowack said that they moved the proposed garage back. Mr. Platt said that the Board approved the Variance for the front setback. Mr. Claus asked and Chairman Schneider said that the Board did not put a condition on that approval that they would not be allowed to park in front of the garage.

Mr. Lyons said that there is a lot of concern in the application regarding an elderly individual having to deal with snow and ice, which he can appreciate. However, he wonders why the protection does not extend from the back of the garage to the front of the house. Mrs. Nowack said that the plan is to put in a concrete walkway with an electric snow melt in it.

339 Stuart Caswell, 57 Ridgewood Rd, asked who is in charge of managing the logistics of the actual
340 construction because he has lived on the road for 23 years and the last garage that was built, which is
341 the Hack's garage, needed him to call the police because the concrete trucks were in the middle of the
342 road and then were rinsing the trucks onto a neighbor's yard. When this garage is being built, the
343 Nowacks will not have any parking spaces for their own cars, so he questions where they and the
344 contractors will park. Chairman Schneider said that he thinks that this would be handled by the Highway
345 Department, it is not a Zoning issue. Mr. Caswell said that the Highway Department has already brought
346 the Board information the Board did not listen to and asked how he goes further with that. Ms. Gage
347 said that there is no building inspector in Sunapee. Mr. Caswell said that he knows this, but the
348 concrete pumper truck was parked in the middle of the public road and he could not access his driveway
349 for five hours throughout the day; there was no road control or flagman. Ms. Gage said that they have
350 made some updates at the request of the Police Chief and Highway Director to address this issue, so
351 that when people apply for permits, they are asked to make a plan for alternative parking arrangements
352 with both the Police Chief and Highway Director. Mr. Caswell asked if this has been done with this case.
353 Ms. Gage said that would be done when they receive a permit for construction.

354 Jeff Fitzgerald, 62 Ridgewood Rd, said that he is the abutter that would be impacted by this proposed
355 garage. He is prepared to discuss the new RSA that was quoted, however, other than listening to the
356 comments that were made, many of the things that were discussed with Scott Hazelton with respect to
357 emergency access, plowing access and the continued lack of drainage on this non-Sunapee maintained
358 road, other than plowing, is not relevant to that RSA. This is a different case because, as he reads his
359 deed, this is not a Town road. He is going to get a lawyer and discuss this issue with them because it
360 appears that this precedent is completely inappropriate. The road during mud season is completely
361 mud and there is no drainage; what is plowed is done to a point of convenience and the snow goes
362 wherever it can be put. The Nowacks are fortunate that they have virtually no snow plowed onto their
363 property. Chairman Schneider asked and Mr. Fitzgerald confirmed that the road is plowed by the Town.

364 Mr. Fitzgerald said that the drainage is an issue on the road. When the Hacks built their garage, it
365 created an ongoing feud because the drainage changed; historically, the drainage used to go down the
366 Hack's driveway and now goes down their neighbor's driveway. This is not a simple case and he doubts
367 that it applies to the Ordinances that are being quoted but he does not know because he would have to
368 consult an attorney.

369 Mr. Fitzgerald said that when he purchased his property and the Nowacks purchased their property,
370 they both had the same covenants, which was a 15 ft setback. Unlike the case study that they quoted,
371 nothing has changed; that was understood by him and them and he is asking that it be maintained.
372 There is no hardship here, he is their age and has a steeper driveway than they do, and he manages his
373 driveway. Mr. Fitzgerald continued that this is not a hardship, this is convenience and at his expense,
374 which is the problem that he has with the proposal. The reason that there is Zoning is because it is not
375 reasonable to put houses 12 ft apart. If this proposal is granted, even though the building will be 7 ft
376 from the property line, it is only 6 ft from the overhang. This proposal would change their rural
377 residential neighborhood forever and he thinks that it would be a mistake. The Nowacks could restore

378 their driveway, especially as the one where they are currently parking is not permitted. They could plow
379 their driveway and it would allow them to park right in front of their door, just like he does.

380 Mike Jewczyn, 27 Burkehaven Ln, said that he is a citizen of Sunapee and does not know any of the
381 parties involved. However, what is significant to him is that the Nowacks are presenting themselves as
382 being injured by regulations of the Town because the setbacks injure them in some fashion. The fact
383 that they are bringing up their constitutional rights being abridged would seem to him that the Board
384 could not make a decision without the Town attorney's opinion. Additionally, bringing in a lot of
385 subjective comparisons of other areas of Town is just that, subjective; each one was a Variance in its
386 own particular manner and you cannot cross reference them. Although the presentation was good and
387 had a lot of stuff and took a lot of time, there is still a setback and reason that the Planning Board and
388 Zoning Board exist in the Town of Sunapee is because the needs of the many outweigh the needs of the
389 few. Mr. Jewczyn continued that they bought the lot with 42 ft of frontage and the remarks that Mr.
390 Fitzgerald made are significant. At the time they purchased the properties, they both made a promises
391 and covenant amongst themselves and those should be considered. He thinks that if the Board makes a
392 decision without the advice of the Town's attorney it would make a mistake.

393 Mr. Platt said that he thinks that Mr. Jewczyn is wrong on two accounts. Every decision that the Board
394 renders is based on the constitutional rights of people to enjoy their property. Also, the purpose of the
395 Zoning Board is to give relief because the Zoning Ordinance does not always treat all people fairly; it is to
396 allow the individual to make a case to get relief from Zoning when the will of the many renders
397 constitutional problems for people to enjoy their property.

398 Mrs. Nowack said that she does not understand what Mr. Fitzgerald is talking about as their deed does
399 not talk about covenants. The current side setbacks were not in effect when they purchased the
400 property; at the time it was actually a 25 ft setback and they received a Special Exception to reduce it.
401 She does not know Mr. Fitzgerald's expense as they currently park on that spot and it was approved
402 when the built the house. Mr. Fitzgerald said that there was never a driveway permit issued for that
403 spot. Mrs. Nowack said that it was on their proposal when they submitted their plans to build their
404 house and it was something discussed and is in the minutes of the meeting; the space on the street was
405 requested at that time and it is where they have been parking for as long as they have had the house
406 built. Putting the garage in that space, farther back from the road, will not change any of the things that
407 Mr. Fitzgerald has talked about.

408 Mrs. Nowack asked Mr. Fitzgerald what expense he will experience if the garage is built 7 ft from the
409 property line. Mr. Fitzgerald said that, first and foremost, they do not have hardship so there is no need
410 for them to request this. Chairman Schneider said that he thinks that this has already been discussed.
411 Mrs. Nowack again asked Mr. Fitzgerald what the disadvantage is to him. Mrs. Nowack said that she
412 thinks that what they have been proposed will improve the situation and they have not seen anything
413 that contradicts that.

414 Chairman Schneider closed the meeting to public comment and asked the Board for comments.

415 Mr. Platt said that he supported the previous Variance application and he feels that the Board has
416 established a tradition of understanding that a garage is a reasonable use in Sunapee's neighborhoods
417 and climate, and he thinks that it is consistent with this neighborhood. He also thinks that this seems to
418 be the best place on the property to build a garage.

419 Chairman Schneider said that he would agree with Mr. Platt, but the Board is not approving something
420 in the front setback, they are talking about a side setback, which does impinge upon an abutter's
421 property. According to the abutter, it does reduce his enjoyment of his property and it might possibly
422 have some effect on the value of the property. Chairman Schneider continued that he does not know
423 that it is proper for a Town Assessor to write a letter regarding an opinion of a value. He has never seen
424 an Assessor do this before and asked if anyone else has seen an Assessor write a similar letter as he
425 questions if it is appropriate. Mr. Platt said that the Board has never had a case that is this indecisive.
426 Chairman Schneider said that for something so speculative he does not know if it is a proper use of the
427 Assessor's purview. Mr. Lyons asked and Chairman Schneider confirmed that he is talking about the
428 letter from the Town's tax assessor.

429 Chairman Schneider said that he does not find the disconnect between the purpose of the Ordinance
430 and this property. He does not think that there is hardship though there may be inconvenience. The
431 hardship criteria is that the property cannot be reasonably used. Mr. Platt said that he thinks that
432 Chairman Schneider is mistaken because the hardship is that the proposed use is reasonable, not that
433 they do not have reasonable use of the property. He thinks that this is the crux of the change that was
434 made to the RSA. Chairman Schneider said that is not the criteria; the criteria is "owing to special
435 conditions of the property that distinguish it from other properties in the area, denial of the Variance
436 would result in unnecessary hardship because: no fair and substantial relationship exists between the
437 general public purposes of the Ordinance provision and the specific application of that provision to the
438 property because". He does not think that there is a reason that the Ordinance cannot be applied to the
439 property. Mr. Lyons asked if the Simplex decision was made in 2001 and it was confirmed that it was.
440 Mr. Platt said that Section II of the hardship criteria says, "the proposed use is as reasonable one
441 because". It does not say "someone does not have reasonable use of their property so they need to get
442 a Variance", the RSA says that "the proposed use is reasonable", which is different.

443 Mr. Lyons said that he attended a conference last week so he has not had a chance to assimilate and
444 look at everything. However, the applicants commented that the 2001 Simplex decision softened the
445 criteria and the State legislature in 2004 passed legislation to undo Simplex, however, he is sure that
446 things have changed since then. Mrs. Nowack said that the new RSA is dated 2009 and is based on
447 Simplex; she has all the information if the Board would like to review it. Chairman Schneider reminded
448 everyone that the meeting is closed to public comments.

449 Mr. Claus said that he struggles with this proposal for a few reasons. One reason is the argument that
450 the garage can only exist in this location with the 7 ft setback as he looks at the plan and sees a lot of
451 other solutions. The garage could be shifted over towards the other property to have a 10 ft side
452 setback on one side and a 12.5 ft side setback on the other side. Chairman Schneider said that the
453 Board cannot give other solutions. Mr. Claus said that there have been two other properties that he can

454 think of that are on the lake that have been in similar situations and have had to abut the garage to the
455 house. They have had the same elevation changes and came up with solutions to fit within their
456 setbacks or had minor Variances to the setbacks. Mr. Claus continued that he does not think that there
457 was a lot of effort put in to finding another solution; there is a small portion of the garage that is fit
458 between the setbacks and there is still 20 ft between the garage and the house. Mr. Platt said that
459 solution would increase the impervious surface quite a bit because of how far back they would have to
460 go. Mr. Claus said that he only did some quick calculations on the impervious surface. It just seems to
461 him that there are other solutions that would require less of an impact for the side setbacks. Ms. Gage
462 said that it would still require a Variance from the side setbacks. Mr. Platt said that it would also require
463 a Variance for the impervious surface and that there are a lot of steep slopes.

464 Chairman Schneider said that there is a case to be made for there being too many structures on too
465 small of a property, which is not a hardship. Mr. Lyons asked if the 26.4% impervious surface area
466 mandates that they have a drainage plan. Mr. Platt said that he thinks that one is required over 25%.
467 Mr. Claus said that a drainage plan is required for over 20% and over 30% requires an engineer.

468 Chairman Schneider reopened the meeting per Mr. Lyons' request.

469 Mr. Lyons asked and Mrs. Nowack said that she does not believe that the drainage plan was drawn by an
470 engineer.

471 Chairman Schneider closed the meeting to public comments and asked for a motion on the case.

472 Mr. Platt made a motion to approve Case #ZBA19-10: Parcel ID: 0113-0021-0000: seeking a Variance
473 from Article III, Section 3.10 to permit reduction of western side setback from 15' to 7' from property
474 line for a garage; 60 Ridgewood Dr; Timothy and Bette Nowack; subject to all proper Shoreland Permits
475 being approved and all construction complying with said permits. Mr. Lyons seconded the motion.

476 Mr. Lyons said that the applicant has indicated that they would be willing to limit the height. Mr. Lyons
477 asked and Mrs. Nowack said that the garage will be a maximum of 17 ft high above the slab. Chairman
478 Schneider opened the meeting to public comments. Mrs. Nowack said that the garage will be 17 ft high
479 from the slab and the slab will be at an elevation of 1125. Mr. Lyons said that he does not want the slab
480 to be 3 ft tall and wants to know the total height of the garage. Chairman Schneider closed the meeting
481 to public comments. Mr. Lyons said that he would like to limit the overall height to 18 ft and the
482 overhead space be devoted solely to storage and not living space. Additionally, that there will be a
483 storm water management plan designed, implemented, and maintained. Mr. Platt asked and Mr. Lyons
484 said that the storm water management plan requirement may be something that is done through the
485 Shoreland Permit process. However, as a community dependent on Lake Sunapee, he thinks that the
486 Board has an obligation to defend the quality of the water. Mr. Platt said that there are rules in the
487 building codes and such that cover that. He does not think that it is in the Board's purview to cover all
488 the drainage issues that might come up. Mr. Lyons said that many other lake communities have rules
489 like this and there is no reason that the Board cannot have that as a condition. Chairman Schneider
490 asked Mr. Lyons to amend the motion if he would like to do so.

Mr. Lyons made a motion to amend the motion to include that the height be limited to 17 ft; that the overhead space be solely used for storage, never a living space; and that a drainage plan be designed, implemented, and maintained. Ms. Gage asked and Mr. Lyons said that the height should be limited to 18 ft; he does not want something 40 ft high. Mr. Platt seconded the amendment to the motion. The amendment passed unanimously. The motion to approve the motion as amended failed with two in favor and two opposed due to lack of hardship.

CASE #ZBA19-11: PARCEL ID: 0128-0016-0000: SEEKING A SPECIAL EXCEPTION PER ARTICLE III, SECTION 3.50 (F) AND 3.55 TO REPLACE A DECK THAT FALLS BETWEEN THE CENTERLINE AND 50' ROAD SETBACK WITH A LARGER DECK; ZONE RS W/SHORELINE OVERLAY; 25 GARNET ST; MORGAN & LORETTA DEWEY.

Chairman Schneider said that there are only four members present and the case requires three positive votes to be approved; therefore, the applicant can determine to either proceed or continue the case to the next meeting. The applicant chose to proceed with hearing the case.

Morgan Dewey presented the merits of the case. Mr. Dewey said that he is requesting Special Exceptions from Article III, Section 3.50(f) and 3.55 to replace a deck on a property at 25 Garnet St that falls between the centerline and the 50 ft road setback with a larger deck. He and his wife purchased the property in January 2018. The structure is a two-bay garage and utility room on the first floor and a one-bedroom apartment on the second floor; the lot size is 0.14 acres. They intend to use the garage for storage and the apartment when their grandchildren visit.

Mr. Dewey said that when they purchased the property it was divided into two lots. The front lot was where the structure was located and the other lot was behind the building, away from the road. Last year, they received approval from the Town to merge the two lots.

Mr. Dewey said that they plan to improve the building's exterior with siding and new windows and address the two main deficiencies; the first being to demolish the existing deck and staircase. According to the building inspector that they used when they purchased the property, the stairs are unsafe and not up to code and the deck is also not safe. They would, therefore, like to build a larger deck to replace the existing deck. The second deficiency that they need to handle is to remove a stonewall that is behind the building and structurally compromised. They will be replacing that wall with a sloped and graded retaining wall. Mr. Dewey continued that Garnet St has a steep embankment that is quite challenging. For the replacement of the wall, they are applying for a Land Disturbance Permit and NH Shoreland Permit later in the summer.

Mr. Dewey said that they have applied for a Certificate of Zoning Compliance in connection with the staircase and deck replacement.

Mr. Dewey said that the property is not conforming with the centerline setback as the current deck falls between the centerline and the 50 ft setback. The current deck is 7 ft from the right of way and their plan would be to extend the distance from the proposed deck to the right of way to 10 ft. The proposed deck will be conforming with the side setback.

Mr. Dewey explained the existing conditions plan to the Board. The entire structure sits within the 50 ft right of way. Chairman Schneider asked and Mr. Dewey showed the Board the location of the 50 ft setback line as well as the side setbacks. Mr. Dewey explained the proposed conditions plan to the Board. They are proposing moving the deck away from the road by 3 ft to get it from 7 ft to 10 ft; they would then like to extend the deck to wrap around the building. The apartment is small and they would like to have a slightly bigger deck to have some more space. Mr. Lyons asked and Mr. Dewey confirmed that it will be an open deck. Mr. Dewey said that the side setback will be 10 ft 7 inches at the closest point so it will be within the side setback.

Mr. Lyons said that, essentially, they are taking something that is non-conforming and making it less non-conforming. Chairman Schneider said that it depends on how they look at it; it will be less non-conforming from the centerline of the road but more non-conforming with regards to the area that is in the setback. Mr. Platt asked and Mr. Dewey confirmed that the deck is not higher than the predominant ridgeline of the garage.

Chairman Schneider went over the criteria for a Special Exception under 3.50(f). The addition does not further decrease the front setback; the addition is at least 10 ft from the right of way at all points; and, the addition is no higher than the predominant ridgeline of the existing building. The Board said that all of these criteria have been met. Chairman Schneider went over the additional criteria for dimensional Special Exceptions under Section 3.55. The granting of the Special Exception, in the judgement of the ZBA, is necessary to fairly utilize the lot; and, the granting of the Special Exception, in the judgement of the ZBA, is consistent with the intent of the Ordinance of the Master Plan. Chairman Schneider asked and none of the Board members had any concerns regarding these conditions.

Mr. Lyons asked about the drainage from the hillside as they will be replacing the stone wall with a retaining wall. Mr. Dewey said that they have Fuss & O'Neill Engineers working on a drainage plan for them.

Chairman Schneider asked and there were no additional questions from the Board regarding the case. There was also no one in the audience to comment on the case.

Mr. Platt said that he does not think that the Board should put drainage requirements on this case because the deck that the Board is approving is minor and has no impact on the drainage at all.

Chairman Schneider closed the meeting to public comments and asked for a motion from the Board.

Mr. Platt made a motion to approve Case #ZBA19-11: Parcel ID: 0128-0016-0000: seeking a Special Exception per Article III, Section 3.50 (f) and 3.55 to replace a deck that falls between the centerline and 50 ft road setback with a larger deck further back from the road; 25 Garnet St; Morgan and Loretta Dewey, owners. Mr. Claus seconded the motion. The motion passed unanimously.

MINUTES

Changes to the minutes from April 18, 2019: Change Line 434 to read "...the Town confuses their parking regulations with Zoning." Change Line 583 to read "...DES Permit but conditional on a future

564 DES Permit.” Change Line 614 to read “...mean that the Board would necessarily approve the
565 Variance...”

566 Mr. Lyons made a motion to approve the minutes as amended. Mr. Claus seconded the motion. The
567 motion passed unanimously.

568 Changes to the minutes from May 2, 2019: Change Line 311 to read “Vice Chair Simpson asked to
569 reopen...”

570 Mr. Lyons made a motion to accept the minutes as amended. Mr. Claus seconded the motion. The
571 motion passed with three in favor and one abstention.

572 Mr. Platt made a motion to adjourn the meeting at 9:03 pm. Mr. Claus seconded the motion. The
573 motion passed unanimously.

574 Respectfully submitted,

575 Melissa Pollari

576

577 Zoning Board of Adjustment

578 _____

579 Daniel Schneider, Chair Aaron Simpson, Vice Chair

580 _____

581 James Lyons, Jr. Clayton Platt

582 _____

583 George Neuwirt William Larrow, Alternate

584 _____

585 Jeffery Claus, Alternate