

1 **TOWN OF SUNAPEE**

2 **ZONING BOARD**

3 **JUNE 1, 2023**

4 **Chairman Claus called the meeting to order at 6:35 PM.**

5 **MEMBERS PRESENT IN THE MEETING ROOM:** Ann Bordeianu, Jeff Claus, Cordell Johnston-Town  
6 Attorney, Jamie Silverstein, Michael Jewczyn, Pierre Lessard, Chris Murphy, Jim Lyons.

7 **MEMBERS PRESENT VIA ZOOM:** None.

8 **ALSO PRESENT IN THE MEETING ROOM:** Michael Marquise-Town Planner.

9 **PRESENT VIA ZOOM:** None.

10 Chairman Claus recused himself from the first case and appointed Vice-Chairman Ms. Silverstein to chair  
11 the meeting for the first case.

12 Ms. Silverstein appointed Mr. Lessard and Mr. Murphy as acting board members.

13 Ms. Silverstein continued with announcing the cases.

14 **NEW CASES**

15 **CASE # AP 23-02 PARCEL ID: 0115-0031-0000 MOTION FOR REHEARING: ZONING BOARD CASE #VA 23-**  
16 **02 ON MAY 4TH, 2023, WHICH GRANTED A VARIANCE FROM ARTICLE III, SECTION 3.40(L) TO PERMIT**  
17 **THE CONSTRUCTION OF A SINGLE-FAMILY DWELLING ON A SLOPE THAT EXCEEDS 25%.**

18 The Board had a brief discussion on the case and considered the advice provided by Town Counsel.

19 **MS. SILVERSTEIN MADE A MOTION TO DENY THE RE-HEARING REQUEST OF ZONING BOARD CASE #VA**  
20 **23-02 ON MAY 4TH, 2023, WHICH GRANTED A VARIANCE FROM ARTICLE III, SECTION 3.40(L) TO**  
21 **PERMIT THE CONSTRUCTION OF A SINGLE-FAMILY DWELLING ON A SLOPE THAT EXCEEDS 25%. ALL**  
22 **VOTED IN FAVOR.**

23 **CASE # SE 23-02 PARCEL ID: 0118-0051-0000 SEEKING APPROVAL OF A SPECIAL EXCEPTION FROM**  
24 **ARTICLE III, SECTION 3.50(L) FOR THE RELOCATION OF AN EXISTING DECK WITHIN THE 50-FOOT**  
25 **WATERFRONT BUFFER.**

26 Ms. Silverstein announced the voting members for this case as follows: Mr. Lyons, Mr. Murphy, Mr.  
27 Jewczyn, Ms. Silverstein, and Mr. Claus.

28 For this case, the two representatives, Mr. Brett Allard and Mr. Rage, legal counsels for the applicant  
29 owner of Dan Cave, did a short brief to the Board that after a series of meetings in April and May of last  
30 year, the applicants were granted two variances and a special exception to build a new resident's center  
31 family home as shown on the site plan. Those decisions were not appealed to and had to be final; but  
32 since then, in the last 12 months or more, the applicants have been doing due diligence to get the  
33 project started and to line up all the necessary people to start construction.

34 It was also briefly explained that the new deck will be partially within the lake front setback, 28 feet and  
35 9 inches from the reference line of the lake instead of 14 feet, 6 inches, and fully conforming relative to  
36 the side setback, which will offer more privacy to the homeowners and be 12 feet, 9 inches, less non-  
37 conforming relative to the proximity from the reference line of the current deck.

38 In the applicant presentation it was also added that the town amended its zoning ordinance in March to  
39 add a provision allowing for relocation of non-conforming structures by special exception, which is not a  
40 request to allow something that the zoning ordinance prohibits like a variance, but rather something  
41 that is allowed by right if the special exception criteria are satisfied. The applicant also mentioned that  
42 they are asking for special exceptions.

43 The criteria for granting special exceptions are straightforward and if the specific non-conforming  
44 structure is not made more non-conforming and the dimensional requirements in the criteria are  
45 satisfied, the Board should grant a special exception. The applicant went through the criteria as follows:

46 The new section 3.5(L) that they are asking a special exception from, states that the ZBA shall allow any  
47 legal structure, whether pre-existing non-conforming structure or a structure approved by prior variance  
48 of special exception, which is presently mounted forming to one or more dimensional setbacks to be  
49 relocated, reconstructed, modified, and replaced by a new structure having the same purpose and use  
50 provided that the criteria are satisfied.

51 The proposed structure must not be increased in size if it is non-conforming and closer to property  
52 boundaries or water body reference line, must not be higher than 25 feet from the finished grade at its  
53 highest point within the water body setback, and must have the same or less horizontal square footage  
54 as the existing structure within the setback. The relocated deck will be proposed at a height of 10 feet  
55 above grade and has a dimension of 150 square feet, which is the same as the existing structure fully  
56 situated on the water body setback.

57 In addition, the proposed structure was originally 14 feet from the water line but will now be moved to  
58 28 feet, 9 inches from the water line, which is more than the required 25 feet from the water line as per  
59 the non-conforming water body setback rule.

60 The Board has the authority to condition its approval of this special exception on receipt of a shoreland  
61 impact permit from DES since the project is within their 250-foot jurisdiction, but the applicant has  
62 already submitted all necessary permits and approvals that were reviewed and approved by the Board  
63 last year in connection with the two variances and special exceptions that were granted for this project.

64 According to the definition of minor structure, it is exempt from the terms of the ordinance and shall not  
65 require a CZC. This includes a 32 square foot open platform and associated stairs which are no more  
66 than four feet off the ground and used for access to a structure as mentioned before.

67 The applicant does not believe the provision is ambiguous enough to provide un-administrated losses, as  
68 it has been consistently interpreted in a certain way over a long period of time.

69 Ms. Silverstein expressed her concern that they are not seeing something in the plan and asked if it  
70 reflects the new deck but was told there is no material, and it won't change the plan.

71 Mr. Murphy expressed curiosity about the issue of stairs leading from the platform to the deck,  
72 hypothetically questioning what would happen if the stairway was not parallel to the deck.

73 The new structure that will replace the old house will cover the same area as the existing one, and the  
74 old house will be torn down as part of the process.

75 After a long discussion regarding the whole structure, Mr. Marquise expressed his opinion on the case  
76 that the comfort level of the Board must be enough that they feel the approvals and if it's relevant to  
77 the overall decision more information would be required. In addition to this, for the question of the  
78 stone platform versus the wood platform, it would be a design element that they may want to see. If the  
79 design element is relevant to the overall decision, more information should be asked for. This includes  
80 the question of stone platform versus wood platform.

81 It was also suggested that the Board could approve the project if the landing and steps are made of  
82 stone, which would make it a landscape feature and exempt as a minor structure, and they could revise  
83 the numbers and have the stormwater engineer change the footprint of the new deck.

84 Concern was expressed about going down a certain road in relation to the stormwater plan and  
85 suggested the Board could condition an amendment to show the new footprint as a condition of  
86 approval.

87 An audience member- Mr. Peter White - asked for clarification on whether a special exception is less  
88 erroneous than a variance, as a variance was granted on a steep slope without any erosion control plan  
89 and the only condition was to lose time setbacks. The Board acknowledges not being familiar with the  
90 case being discussed and emphasizes the need to evaluate each case independently, which can be  
91 challenging.

92 An abutting neighbor also commented that the proposed deck will be within the 50-foot water buffer,  
93 further out from the water line than the existing deck and will allow for better drainage for the pond.  
94 The existing deck is also within the 50-foot janitor front pocket. She also added that the deck doesn't  
95 look good, and it should be removed.

96 The Board discussed adding the new footprint to the erosion control plan and figures on the removal of  
97 old stairs versus new stairs to be provided.

98 **Ms. Silverstein made a motion for CASE # SE 23-02 PARCEL ID: 0118-0051-0000 SEEKING APPROVAL OF**  
99 **A SPECIAL EXCEPTION FROM ARTICLE III, SECTION 3.50(L) FOR THE RELOCATION OF AN EXISTING DECK**  
100 **WITHIN THE 50-FOOT WATERFRONT BUFFER to continue in the July 6<sup>th</sup>, 2023, session of the Board.**

101 A brief discussion on the requested documentation continued, where a new erosion plan which shows  
102 the new deck and measurements that the new deck is less non-conforming vs. the measurements of the  
103 old deck should be provided.

104 **Mr. Lyons seconded the motion.**

105 **The motion passed unanimously.**

106 **CASE # VA 23-04 PARCEL ID: 0136-0038-0000 SEEKING APPROVAL OF A VARIANCE FROM ARTICLE IV,**  
107 **SECTION 6.12 FOR THE REPLACEMENT OF AN EXISTING NONCONFORMING DECK WITH A NEW DECK,**  
108 **WITH A SMALL MODIFICATION TO THE FOOTPRINT.**

At the beginning of the discussion, it was requested that formal authorization from the representatives of the applicant should be provided. In addition, it was pointed out that no plan was included in the application.

After a brief discussion it was decided to continue with the presentation of the case, for which the representatives provided the Plan.

The session continued with the Applicant explaining briefly about the background of the case. The property is in the residential zoning district subject to the provisions of the shoreline overlay district. The required buildings have back to 50 feet from reference line along like some of the 10 feet from the sidelines and 50 feet from the road center. The proposal is to reconstruct the existing non-conforming deck with a small modification to the footprint. The next square foot remains the same as the existing deck, which is 718 square feet. The staircase is moved closer to the house by 10 feet, 3 inches further from the shoreline. The front face of the deck running parallel to the reference line is brought closer to the house by 4 inches.

The proposed modification to the deck's footprint includes moving the staircase closer to the house, bringing the front face of the deck closer to the house by 4 inches and extending it horizontally by 3 feet, 9 inches parallel to the shoreline. An infiltration drip edge will be installed underneath the deck and native planting beds will replace existing turf adjacent to the new deck. The elevation of the deck will remain the same. The modification allows for improved functional gathering space and accessibility for a family member with mobility issues. A variance is requested from the zoning ordinance, Article 6, Section 6.12, to replace an existing non-conforming deck that does not stay within the horizontal footprint for existing construction.

The project includes potential landscape improvements such as curvier surfaces to improve the overall function and aesthetics of the property, and the addition of native plantings to reduce stormwater runoff into the lake and improve the natural character of the shore, as mentioned in the transcript. These improvements are part of the project's effort to reduce nonconformity and increase accessibility without harming the general public, and to be more in line with the spirit of the ordinance. As part of this project, there is the potential for overall landscape improvements that would increase curvier surfaces and improve the overall function and aesthetics of the property as well and be able to do that with the outdated one.

The current deck configuration provides limited accessibility and functional outdoor gathering space, especially for older family members with limited mobility. However, implementing additional patio space would be less accessible and have a greater impact on the lakefront character.

The proposal is for an addition with the same square footage as the existing one, which includes a deck that falls out from the existing stems and where the existing top ended, and the steps on the shoulder range per se.

The applicant was asked whether it got some guidance on the application for variance or special exception, on which the applicant explained that it got some feedback from the Town.

The members of the Board discussed the possibility of correcting a measurement to 3.5, which would require a special exception. The measurement in question is currently at 3.4 and is within the lake setback area.



Ms. Silverstein asked whether this falls under an approval for a variance from Article IV, section 6.12 to replace an existing non-conforming deck with a new deck that has a smaller footprint modification.

Ms. Silverstein addressed the hardship as part of the criteria for seeking a variance, which in this case is the existing deck that needs to be made more usable for someone with a disability.

During the meeting, it was mentioned that the expansion of the deck was discussed, but it was later realized that one component of the ordinance was missing, specifically 3.40 (C). This means that the request for expansion would remain the same despite the oversight.

**Ms. Silverstein made a motion for CASE # VA 23-04 PARCEL ID: 0136-0038-0000 SEEKING APPROVAL OF A VARIANCE FROM ARTICLE IV, SECTION 6.12 FOR THE REPLACEMENT OF AN EXISTING NONCONFORMING DECK WITH A NEW DECK, WITH A SMALL MODIFICATION TO THE FOOTPRINT to continue in the July 6<sup>th</sup>, 2023, session of the Board.**

**All voted in favor. The motion passed unanimously.**

MISCELLANEOUS: Review Minutes from Previous Meeting(s). The Minutes of previous meetings were discussed and given for a review to the members.

OTHER BUSINESS:

**Ms. Silverstein made a motion to adjourn the meeting at 8:55 PM.**

**Mr. Claus seconded the motion.**

**The motion was passed unanimously.**

Respectfully submitted.

Rajmonda Selimi

**TOWN OF SUNAPEE  
ZONING BOARD OF ADJUSTMENT  
A PUBLIC MEETING WILL BE HELD  
THURSDAY, June 1<sup>st</sup>, 2023, AT 6:30 PM,  
AT THE SUNAPEE TOWN MEETING ROOM  
ON THE FOLLOWING CASE(S):**

Join Zoom Meeting  
<https://us06web.zoom.us/j/83218752029>  
Meeting ID: 832 1875 2029

**NEW CASES**

Case # AP 23-02  
Parcel ID: 0115-0031-0000

Motion for Rehearing: Zoning Board Case #VA 23-02 on May 4th, 2023, which granted a Variance from Article III, Section 3.40(1) to permit the construction of a single-family dwelling on a slope that exceeds 25%.

*Tanner & April Royce  
35 North Shore Rd.  
Rural Residential Zone*

Case # SE 23-02  
Parcel ID: 0118-0051-0000

Seeking approval of a Special Exception from Article III, Section 3.50(1) for the relocation of an existing deck within the 50-foot waterfront buffer.

*Daniel D. Cave  
90 Burma Rd.  
Rural Residential Zone*

Case # VA 23-04  
Parcel ID: 0136-0038-0000

Seeking approval of a Variance from Article IV, Section 6.12 for the replacement of an existing nonconforming deck with a new deck, with a small modification to the footprint.

*Elizabeth & Stephen Foley  
84 Birch Point Rd.  
Residential Zone*

**MISCELLANEOUS:**

Review Minutes from Previous Meeting(s).

**NOTE:**

In the event the meeting is cancelled, the agenda will be continued to the next scheduled Zoning Board meeting.



**TOWN OF SUNAPEE**  
**Planning/Zoning Office**  
23 Edgemont Road  
Sunapee, New Hampshire 03782  
Phone: (603) 763-3194 Fax: (603) 763-4925



Case # VA 23-02

Date: May 4, 2023

**APRIL & TANNER:**  
**35 North Shore Road (115-031)**

Fee Paid: \$150+\$40.65

### APPLICATION FOR APPEAL

Name of Applicant Tanner and April Royce  
Mailing Address 23 Central St. Sunapee, NH 03782  
Owner(s) Vacation Homes, LLC  
Location of Property North Shore Rd. Sunapee, NH 03782  
Parcel ID 0115-0030-0000

#### SECTION I. APPEAL FROM AN ADMINISTRATIVE DECISION

Relating to the interpretation and enforcement of the provisions of the Zoning Ordinance.

Decision of the Zoning Board to be reviewed.  
See Attached Narrative

Number \_\_\_\_\_ Date 5/4/2023  
Article III Section 3.40(l) of the Zoning Ordinance in question.

Additional information may be supplied on separate sheet if the space provided is inadequate.

Please sign the following statement: I understand that the public hearing will be held at the scheduled date and time unless a request is made by me for a new hearing. Any rehearing will require a new public notice and notification to abutters, the cost of which will be borne by the applicant. Further, I hereby give permission to the ZBA members to visit the property prior to the public hearing. To the best of my knowledge, the above is true and correct.

April Royce  
Applicant

5/11/23  
Date

## **Zoning Board Motion for Rehearing**

April Royce and Tanner Royce, owners of 35 North Shore Rd. which abuts the property that received a Variance for construction on a slope of more than 25% on May 4, 2023, are formally making a Motion for a Rehearing. We have also appealed the decision of the Zoning Board as that is what is directed by the Sunapee Zoning Ordinance.

This motion for a rehearing is being filed based on Procedural Errors made by the Zoning Board and the Acting Chair of the Board during this meeting, as well as a Merit Based disagreement with the granting of the variance. This request is based on the failure of the Zoning Board to properly review, evaluate, understand, and clearly state the 5 Criteria that need to be met.

### **Procedural Errors:**

There are at least two categories of Procedural Errors that should invalidate the hearing, any vote, and should immediately call for vacating action taken by the Zoning Board. Sunapee has adopted and posted the Sunapee ZBA Rules of Procedure (2/20/2020) and RSA guidelines (specifically RSA 91-A:3) that govern the action of any board in the State of NH. Copies of each are included with this submittal.

1. Legal Counsel Attended the meeting, sat at the table with the board, and conversed with the committee chair on multiple occasions. According to the Rules of Procedure only the Zoning Administrator (XI.) may request legal advice. The town attorney is not part of the board, and any advice given in public would remove any attorney/client privilege.

The Sunapee ZBA Rules of Procedure (2/20/2020) were violated as the board does not have the right to directly seek legal counsel. All Communications with Legal Counsel are to be completed through the Zoning Administrator and not through direct contact with the board, involvement in the board meeting, or through illegal nonpublic sessions. This action by the Acting Chair violates the rights of Sunapee Citizens and would invalidate the meeting and any vote taken after this violation. The Chair should have continued the case, sought legal opinion through the

Administrator, and then reconvened after they had reviewed this information in the proper venue.

2. The acting Chair made a motion to put an alternate into place. The chair according to the Zoning Board Rules of Procedure, may request motions on the case but it does not allow the Chair to make a motion (IX, D, 10.)
3. The motion to appoint an Alternate was seconded but it was not voted upon by the board. No vote was taken to affirm the motion. Alternate was not properly put in place and their vote is invalid.
4. Zoning Administrator did not present a summary of the case. (IX, D, 2.)
5. The Board illegally entered a nonpublic session without following the guidelines of RSA 91-A:3, II as mandated by the RSA itself as well as the ZBA Rules of Procedure (IX., A.)

### **Violations of RSA 91-A:3 (language provided as part of this submittal)**

1. At 7:51 pm, Acting Chair called to adjourn the meeting to deliberative. She was corrected verbally by the town attorney to call this a “recess” to meet with Legal Counsel.
  - a. There was no motion properly made and seconded. (93-A:3, 1. (a))
  - b. The lack of a motion also violated (93-A:3, 1. (b)) which states that a motion must state the specific exemption under paragraph II. Any vote on such a motion is required to be by roll call, and shall require the affirmative votes of the majority of members present.
  - c. All discussions and decisions made during a nonpublic session shall be confined to the matters set out in the motion. Without a proper motion or vote; the board does not have the ability to have any nonpublic discussions and they violated this portion of the RSA as well.
2. An improper nonpublic session was entered into and should not have taken place. Any discussions are now part of the public record and minutes and a description of what took place in that session are owed to the citizens of Sunapee.
3. Even if the nonpublic session was entered into correctly, the board failed to vote with 2/3 of the board upon returning to keep the minutes sealed. Anything discussed in that nonpublic session needed to be publicly

disclosed within 72 hours of the session in the absence of this 2/3 vote to keep them sealed. No Vote was taken.

We do not find any public disclosure of that session being provided by the Town of Sunapee or the Zoning board, let alone any release of that to the public within the 72 hours that are mandated in the RSA.

### **Merit Based Request for a Rehearing**

Variances can be requested under 10.42 in the Zoning ordinance. The language in this section is also clear in that “each and every one of the following conditions are met:”

- (a) No diminution of value of surrounding properties would be suffered by granting this variance.
- (b) The granting of the permit would be a benefit to the public interest
- (c) Denial of the permit would result in unnecessary hardship to the owner;
- (d) By granting the permit, substantial justice will be done;
- (e) The use will not be contrary to the spirit of the ordinance.

The Board did not clearly state the (5) criteria and discuss each one properly during the meeting.

- Criteria (b) was mischaracterized by the attorney presenting the case and then the board deliberated on an incorrect reading of this criteria. The attorney stated that the granting of the variance would be contrary to public interest and the board used this reading during their deliberations. The Language says granting of the variance would be a benefit to Public Interest which would be a higher standard than saying that granting the variance would be contrary to public interest. No benefit to public interest was discussed, deliberated, or clearly stated during the meeting.
- Criteria (c) was also not accurately discussed and deliberated. The presenting attorney clearly discussed a “self-created hardship” (7:45:30 pm) and advised the board that this was not allowable.

Please review the exact quote from the presenting attorney when he referenced Metzger v Town of Brentwood:

“the finding that plaintiffs had notice that they might be prohibited from building when they purchased their land does not bar them from challenging the constitutionality of the ordinance as applied to their land. The self-created hardship principle applicable to variances does not fully apply when validity of the ordinance is questioned and the property owner is not barred from challenging the validity of an ordinance as applied to his property even though he acquired the property after the ordinance was enacted.”

The property owner is not challenging the validity of the ordinance or the constitutionality of the ordinance. If they want to challenge the ordinance itself that cannot be done at the Zoning Board and must be addressed in a legal venue. Absent that specific challenge, the property owner does not have the right to a self-created hardship.

Without the ability to have this self-created hardship the property owner does not have any grounds for a hardship and the Zoning Board erred in their evaluation of the Hardship rule.

This land does have a reasonable use without allowing construction on the slope of 33% against the clearly written zoning ordinance. The previous owner had Pond Access, installed a dock, and had a tent, chairs, and an area for a fire pit near the water. They were able to access the water, dock a motorboat, a row boat, fish from the dock and land and enjoy the use of the property for many years without the need to have a home built on this property.

There is no hardship on this property with the exception of the self-created hardship which does not qualify for a variance. The presenting attorney stated that “it was town Code enforcement staff’s opinion that this property did not need further variances at the time of the 2021 Setback variances. This statement is untrue and was set to confuse the board. The Town of Sunapee did not have a code enforcement agent in place during 2021. This position was created in 2022 and is just now operating.

The Lawyer did not identify any staff that was involved in this discussion and the board never followed up on this statement. It would have been an error on the part of any town employee to state that the slope variance was not needed and we do not believe that any opinion was sought from the Planning or Zoning department that did exist at that time.

It is our belief that the property owner sought the opinion of Jeff Claus in making this determination. Mr. Claus cannot act as an agent of the town and also a land use consultant at the same time. He correctly recused himself from the previous cases as well as this case, since his role would be serving the applicant and not the town. They did not document any such conversation and the Prohibition on construction on this slope has been clearly in place since 2004.

Further, during the October 14, 2021 meeting reviewing the proposed Zoning Amendment Jeff Claus stated that the lot “my opinion was non-buildable” when discussing how he submitted this project for front and side set back variances. This was stated at the 2:26:50 mark of that meeting. Further he stated “it shouldn’t have” when asked about the granting of a variance (2:27:19).

This lot was known to have this restriction, no town employee or enforcement agent provided the guidance as stated by the presenting attorney, and the self-created hardship discussion only applies to challenging the validity or constitutionality of the ordinance. The applicant has not and did not challenge the ordinance itself and has a self-created hardship which does not qualify for a hardship variance. They also retain a reasonable use of the property as the previous property owner had enjoyed.

- Criteria (d) was not correctly discussed, deliberated, and the criteria was not met during the meeting. Substantial Justice is defined as “justice of a sufficient degree especially to satisfy a standard of fairness.”

The standard of fairness is a basic principle lending to the equal treatment of property owners and application of laws or Ordinances. This ordinance applies to all undeveloped properties in Sunapee and Substantial Justice is



done when every property owner is subject to the same laws and ordinances.

There was speculation by the board about how many variances had been granted to build on steep slopes. They referenced properties around Lake Sunapee and the buildings that may have been built on similar slopes. Those buildings were built and had existing footprints prior to the adoption of this probation in 2004.

In the October 14, 2021 Planning Board Meeting this issue was discussed directly. At the 2:36:00 point of that meeting, Town Planner Michael Marquise is quoted as saying that “I don’t know of 1 in 17 years of it in being effect” when discussing variances granted for building on a slope of this nature. Any construction prior to 2004 does not fall under these guidelines and the Voters of Sunapee clearly voted to prohibit construction on slopes of over 25%.

During that same meeting, it was referenced that both Newbury and New London have a prohibition on building on slopes of over 25% as well.

On November 11, 2021 the planning board again was discussing the proposed amendment. They stated clearly that the language change was being set forth so they could clarify “How to determine steep slopes” and the warrant article itself stated this clearly that the change was about determining the slope itself. They stated that the intent of this ordinance was to “discourage anyone from building on a steep slope.” (1:43:00).

During the December 9, 2021 Planning board meeting that moved the warrant article to the ballot, it was stated clearly at 41:30 that they were “trying not to change the intent” or the ordinance. That was followed by a motion made by Jeff Claus to move the warrant article to the ballot.

- Finally, criteria (e) was not properly discussed, deliberated, or met during the discussion. In fact, one board member stated clearly that this variance

was contrary to the spirit of the ordinance but wanted to see “if the engineer was as good as he thinks he is.” He clearly violated his duties as a zoning board member. If his opinion was that the variance was contrary to the spirit of the ordinance, then he has a duty to vote against the variance. The rules are very clear and he violated them by voting against his own opinion of meeting these criteria.

All (5) criteria have to be met. This is an “and” situation where there is no exception for not meeting one of the criteria. This member violated his duties, when he clearly stated that this was against the spirit of the ordinance. With this vote changed, and the alternates vote vacated due to improper actions taken by the board chair to include the alternate, the vote is 2-2 which would not allow the variance. The variance should fail based on a number of reasons but these are very alarming.

Further, the member who wants my neighborhood to be an area to check to see how good the engineer’s plan would work is appalling. Would he feel the same way in his neighborhood? He should be censured for this statement as he clearly violated his duties and wanted to see how it would work out. We understand that he may own property on Lake Sunapee. Would he feel the same way about a project taking place next to his home? This is the typical “Not in My Back yard” position that should not be allowable on a Zoning Board or any board.

This member also stated that he doesn’t see a benefit to public interest and stated that the Hardship in his opinion would be the cost to work with DES, Legal Costs incurred, and out of pocket funds for this project. Again, this is a self-created hardship which does not qualify under the Hardship language.

This same member also stated that if the public found this that egregious there would be a lot of people out the door with burning torches and pitchforks. This member fails to recognize that only abutters are noticed for the meeting and most of the public would not be aware of this case

being heard. The number of abutters of a property should have no bearing on the validity of meeting the required 5 criteria.

This again is about being a benefit to public interest and not contrary to the public interest as the board discussed. During this discussion, the Acting chair attempted to coerce analysis of the variance criteria and she indicated her opinion of the spirit of the ordinance as a fact at 8:10pm. She was incorrect in the forceful nature in which she attempted to sway the votes and her opinion of the spirit is not fact, and should not have been treated as fact. The members have the right to agree or disagree with her opinion as to the spirit of the ordinance.

Another member discusses the criteria for the variance and his lack of support. Acting Chair attempted to influence this member and “bully” him into changing his opinion. She stated to him that his opinion was subjective and tried to force her opinion regarding the spirit of the Ordinance. This uncomfortable back and forth lead to the Town Attorney to interject and try to clarify what the member was saying so that the Chair would not continue her verbal assault on the members opinion. This again is violation of Public Meeting guidelines and would invalidate any attorney-client privilege as the attorney involved himself in the public discussion of the case. We are now requesting minutes from the Illegal nonpublic session, as well as any correspondence between the town and the board regarding this case. Please provide that information prior to the hearing and make it public as part of the appeal process.

There are several other inaccuracies in the presentation of this case. The presenting attorney stated on at least two occasions that this property has the ability to hook up to Municipal sewer and water and would not be subject to further setbacks or other DES requirements. That is untrue. This property can and must be connected to the Town Sewer, however there is no town water available on this road. They are subject to installing a well and complying with all necessary setbacks and other considerations for a well to be installed.

The presenting attorney stated that other homes in the area were of similar size to the 2000 square foot building that is being proposed. That is untrue. All

surrounding buildings are substantially less than 2000 SF with most being under 1000 SF on this road specifically. This project would stand out in the neighborhood and does not conform with the current homes on this road.

The engineer stated that he could “improve” the Natural Watershed. While they may be able to reduce the run-off from the property, it cannot improve the Natural Watershed which is to be protected. That Natural Watershed is natural by name and nature has made this area. The Pond is best protected by not altering the Natural Watershed. In fact, in the October 14, 2021 Planning board meeting, it was stated that “Mother Nature has stabilized the ground and once it has been disturbed,” it is no longer a Natural Watershed.

In Summary, the board erred in its decision to grant this variance. They made significant procedural errors that should invalidate the granting of this variance immediately. While we are more than happy to make a motion for a rehearing and present an appeal at a designated meeting, the action taken by the Zoning Board should be vacated based on these significant errors and failure to follow the law.

The Merit based motion for rehearing and appeal will be successful because the board failed to follow their duties, properly evaluate the variance criteria, and allowed themselves to be swayed by the presenting attorney’s effective presentation and interpretation of court cases. Most of that information was not accurate, was falsely interpreted, and swayed the board’s decision. At a minimum, the board should have continued the meeting, sought legal guidance correctly by following the clearly written Sunapee ZBA procedures that were adopted in 2020, and then had the continued hearing after proper evaluation and discussion. The Acting Chair of the board clearly did not follow the proper guidelines, conversed with the Town Attorney both in public and private during the meeting, and attempted to bully the other members to vote the way that she was going to vote before the meeting commenced.

It is believed that there is some protection of the Zoning Board Chair, who correctly recused himself from this case as he presented the previous variance requests and tree cutting plan. We believe that an analysis of the legal advice provided by Town Counsel may provide some insight as to the potential protection of this board member by the Acting Chair. Detailed documentation of

that legal advice has been requested and needs to be provided based on the errors made on this case which would remove any attorney/client privilege.

We ask that the variance be vacated and the motion for rehearing and appeal meeting be scheduled to review all of the issues that occurred during the hearing and the subsequent granting of this variance.

Please contact us with any questions or concerns.

April and Tanner Royce

23 Central St.

35 North Shore Rd.

Sunapee, NH 03782

April - (603) 477-9366 [april@lucaspa.com](mailto:april@lucaspa.com)

Tanner - (603) 781-5000 [tanner@lucaspa.com](mailto:tanner@lucaspa.com)

## **Reference Material:**

### **91-A:3 Nonpublic Sessions. –**

I. (a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.

(b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.

(c) All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion.

II. Only the following matters shall be considered or acted upon in nonpublic session:

(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.

(d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph.

(f) Consideration of applications by the adult parole board under RSA 651-A.

(g) Consideration of security-related issues bearing on the immediate safety of security personnel or inmates at the county or state correctional facilities by county correctional superintendents or the commissioner of the department of corrections, or their designees.

(h) Consideration of applications by the business finance authority under RSA 162-A:7-10 and 162-A:13, where consideration of an application in public session would cause harm to the applicant or would inhibit full discussion of the application.

(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

(j) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A.

(k) Consideration by a school board of entering into a student or pupil tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations. A contract negotiated by a school board shall be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, shall be made public. Approval of a contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate.

(l) Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.

III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply.

**Reference Material:**

**91-A:3 Nonpublic Sessions. –**

I. (a) Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II. No session at which evidence, information, or testimony in any form is received shall be closed to the public, except as provided in paragraph II. No public body may enter nonpublic session, except pursuant to a motion properly made and seconded.

(b) Any motion to enter nonpublic session shall state on its face the specific exemption under paragraph II which is relied upon as foundation for the nonpublic session. The vote on any such motion shall be by roll call, and shall require the affirmative vote of the majority of members present.

(c) All discussions held and decisions made during nonpublic session shall be confined to the matters set out in the motion.

II. Only the following matters shall be considered or acted upon in nonpublic session:

(a) The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.

(b) The hiring of any person as a public employee.

(c) Matters which, if discussed in public, would likely affect adversely the reputation of any person, other than a member of the public body itself, unless such person requests an open meeting. This exemption shall extend to any application for assistance or tax abatement or waiver of a fee, fine, or other levy, if based on inability to pay or poverty of the applicant.

(d) Consideration of the acquisition, sale, or lease of real or personal property which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general community.

(e) Consideration or negotiation of pending claims or litigation which has been threatened in writing or filed by or against the public body or any subdivision thereof, or by or against any member thereof because of his or her membership in such public body, until the claim or litigation has been fully adjudicated or otherwise settled. Any application filed for tax abatement, pursuant to law, with any body or board shall not constitute a threatened or filed litigation against any public body for the purposes of this subparagraph.

(f) Consideration of applications by the adult parole board under RSA 651-A.

(g) Consideration of security-related issues bearing on the immediate safety of security personnel or inmates at the county or state correctional facilities by county correctional superintendents or the commissioner of the department of corrections, or their designees.

(h) Consideration of applications by the business finance authority under RSA 162-A:7-10 and 162-A:13, where consideration of an application in public session would cause harm



to the applicant or would inhibit full discussion of the application.

(i) Consideration of matters relating to the preparation for and the carrying out of emergency functions, including training to carry out such functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life.

(j) Consideration of confidential, commercial, or financial information that is exempt from public disclosure under RSA 91-A:5, IV in an adjudicative proceeding pursuant to RSA 541 or RSA 541-A.

(k) Consideration by a school board of entering into a student or pupil tuition contract authorized by RSA 194 or RSA 195-A, which, if discussed in public, would likely benefit a party or parties whose interests are adverse to those of the general public or the school district that is considering a contract, including any meeting between the school boards, or committees thereof, involved in the negotiations. A contract negotiated by a school board shall be made public prior to its consideration for approval by a school district, together with minutes of all meetings held in nonpublic session, any proposals or records related to the contract, and any proposal or records involving a school district that did not become a party to the contract, shall be made public. Approval of a contract by a school district shall occur only at a meeting open to the public at which, or after which, the public has had an opportunity to participate.

(l) Consideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body, even where legal counsel is not present.

III. Minutes of meetings in nonpublic session shall be kept and the record of all actions shall be promptly made available for public inspection, except as provided in this section. Minutes of such sessions shall record all actions in such a manner that the vote of each member is ascertained and recorded. Minutes and decisions reached in nonpublic session shall be publicly disclosed within 72 hours of the meeting, unless, by recorded vote of 2/3 of the members present taken in public session, it is determined that divulgence of the information likely would affect adversely the reputation of any person other than a member of the public body itself, or render the proposed action ineffective, or pertain to terrorism, more specifically, to matters relating to the preparation for and the carrying out of all emergency functions, developed by local or state safety officials that are directly intended to thwart a deliberate act that is intended to result in widespread or severe damage to property or widespread injury or loss of life. This shall include training to carry out such functions. In the event of such circumstances, information may be withheld until, in the opinion of a majority of members, the aforesaid circumstances no longer apply.

**Zoning Board of Adjustment  
Sunapee, New Hampshire  
Rules of Procedure**

**I. Zoning Ordinance:** The Zoning Ordinance ("the Ordinance") is incorporated by reference into these Rules of Procedure ("the Rules"). In the case of a discrepancy between the Ordinance and the Rules, the Ordinance shall take precedence.

**II. Zoning Administrator:** The Zoning Administrator shall:

- A. Act as the agent to the Board of Selectmen in the administration of the Ordinance as per Article VIII of the Ordinance.
- B. Receive applications for a Certificate of Zoning Compliance and determine which applications require action by the Zoning Board of Adjustment ("the Board").
- C. Receive applications for action by the Board.
- D. Prepare and distribute to Board members information on cases to be heard by the Board.
- E. Act as the liaison between the Board and town administration.
- F. Be responsible for compliance with New Hampshire statutes relating to the Board, including scheduling of meetings, public notice of meetings, minutes of meetings, and notice of decisions.

**III. Applications**

- A. Applications for Board action must be made by the owner of record of the applicable property, except that the holder of a valid purchase and sale agreement or valid option to purchase may make such application with the written approval of the owner of record. If the applicant wishes to designate an agent to present the case to the Board, such agent must be designated to the Board either in person or through signed written communication.
- B. Adequate plans and exhibits must accompany all applications. It is the obligation of the applicant to supply all relevant information to the Board. Such information includes, but is not limited to, lot dimensions, dimensions of proposed and existing structures, identification of abutting properties and roads, locations of water bodies, wetlands, septic systems, etc.
- C. A recent survey is strongly recommended for applications that concern setbacks, and may be required by the Zoning Administrator and/or the Board.
- D. The Zoning Administrator is authorized to delay submission of an application to the Board until such time as adequate plans and exhibits are supplied.
- E. The Board may vote to continue a case to a future specified meeting date pending receipt of additional relevant information.
- F. Completed applications with accompanying plans and exhibits shall be made available to Board members not less than five days prior to a scheduled meeting.
- G. An application for an action by the Board regarding a property for which a previous application was denied, may be submitted only if the application materially differs from the previous application that was denied.

**IV. Appeals of an Administrative Decision:** Appeals from an administrative decision related to the Zoning Ordinance, taken under RSA 676:5, must be filed within thirty (30) days of the decision. Appeals of an Administrative Decision shall be governed as per Section 10.20 of the Zoning Ordinance.

- V. Officers:** A Chairperson and a Vice-Chairperson shall each be an elected member of the Board and shall be elected annually by elected members at the first Board meeting following the town voting day in March. An affirmative vote of at least three elected members of the Board shall be required for election. In the event that there are not at least three elected Board members voting affirmatively, the full Board present (members and alternative members) shall elect an acting Chairperson and Vice-Chairperson to serve until such time as the required number of elected members voting affirmatively is obtained. The Vice-Chairperson shall act as Chair in the absence of the Chairperson. If the Chairperson and Vice-Chairperson are both absent, the longest serving elected Board member shall be the acting Chair.
- VI. Alternate Members:** Alternate members will have all the rights, privileges and responsibilities of regular members except for voting at a public hearing and serving as an officer of the Board. Alternate members may participate and deliberate at a public hearing, but they may not vote unless they are replacing a regular Board member.
- VII. Attendance:** Board members are expected to diligently discharge their responsibilities, including attending meetings of the Board. Members unable to attend a Board meeting should give prior notice to the Zoning Administrator and the Chair as much in advance as possible. Members who fail to diligently discharge their responsibilities may be removed as per Section 10.12 of the Ordinance.
- VIII. Board of Fewer than Five Members:** If the Board has a Quorum (as defined by Section 10.14 of the Ordinance) but fewer than five total voting members (elected and alternate) are present at a meeting, prior to the hearing of each case the Chair shall ask the applicant whether the applicant wishes the case to be heard with fewer than 5 voting members, or to be deferred until the next subsequent meeting. The applicant's decision shall be binding and may not be changed once the case has commenced to be heard.

**IX. Public Hearings:**

- A. All public proceedings shall be open to the public, except that the Board may call a non-public session pursuant to RSA 91-A:3, II.
- B. The Chair has the authority to order the removal of any person who acts in a manner that disrupts the orderly proceedings of the Board.
- C. Any person shall be permitted to use recording devices. However, the Chair has the jurisdiction to determine that the recording devices do not impair the proceedings for the applicant, the Board, and others present.
- D. The order of public hearings shall be as follows:
1. The Chair shall call the hearing in session and call the first case.
  2. The Zoning Administrator should present a summary of the case.
  3. The applicant or agent shall present the merits of the case.
  4. Members of the Board may ask questions of the applicant.



5. The Chair shall ask for any comments or questions from others present. Those wishing to speak must identify themselves by name and address.
6. The Chair will allow the applicant to make a further statement regarding the merits of the case.
7. The Chair will ask the Board members if they have further questions for the applicant.
8. Following all questions from the Board, the Chair will close the meeting to further testimony. At the request of a Board member, the Chair may subsequently re-open the meeting for outside questions or comments.
9. The Board members shall deliberate the case among themselves.
10. Following the Board member discussion, the Chair will request motions on the case. Each motion shall have a seconder. Motions may be amended by a like motion and second.
11. Following discussions among Board members, the Chair will call for a vote on the most recent motion on the table. All votes must be public by a show of hands, and each member's vote will be announced by the Chair.
12. The Chair may place reasonable time limits on all proceedings.
13. Following the last case on the agenda, the Board shall review, amend, and approve the minutes of the prior meeting,
14. The Chair will request any further items to be brought to the attention of the Board.
15. The Board may vote to adjourn the meeting prior to the conclusion of the agenda. In this case, remaining items on the agenda will be continued to a specific date determined and announced by the Board.

**X. Continued Cases:** If a case is continued to a subsequent meeting, the voting (elected and alternate) members originally present for that case shall continue to be voting members for the continuation. If not all of the original voting members for that case are present at the continuation, the Chair shall appoint other Board members as voting members to constitute a full Board to hear the case.

**XI. Communications with Legal Counsel:** The Board may vote to instruct the Zoning Administrator to request legal advice from Town Counsel, either in the form of a written opinion or a "non-meeting" conference call. The Board may either pose specific questions or indicate areas of concern. Without prior approval by the Board, the Chairperson may also request the Zoning Administrator to obtain legal advice on matters such as governance, legal risks, or to provide information to the Board when expediency is necessary. In addition, the Zoning Administrator may request legal advice on matters involving the Board. The Zoning Administrator shall provide Board members with all relevant information as soon as is practicable. In accordance with Town policy, the Zoning Administrator shall direct all communications to counsel through the Town Manager.

## **XII. Joint Meetings with the Planning Board**

- A. The Board may request the Planning Board to hold a joint meeting regarding an application. A joint meeting may facilitate the decision on an application and eliminate possible misunderstanding of the application. Each land use board may decide whether or not to hold such a joint meeting. The Planning Board Chairperson shall act as the Chair for such a joint meeting. When a joint meeting is held, each Board is responsible for keeping its own minutes and rendering a decision on matters within the respective jurisdictions.
- B. The Board shall meet at least annually with the Planning Board to propose and discuss changes to the Ordinance.

## **XIII. Amendments:** These Rules may be amended by majority vote of the Board in a meeting at which there is a quorum. Proposed changes to the Rules must be submitted to the Zoning Administrator in writing and distributed to the Board at least five days prior to the meeting at which a vote will be taken.



May 26, 2023

*Via Email & First-Class Mail*

Town of Sunapee ZBA  
23 Edgemont Road  
Sunapee, NH 03782

**RE:   Objection to Appeal of Tanner & April Royce  
      Parcel ID: 0115-0030-0000; North Shore Road**

Dear Chair and Members of the ZBA:

As you know, this office represents Vacation Homes, LLC (the “Applicant”), which acts by and through its member, Andrew Mason. The Applicant owns the vacant property located on North Shore Road known as Tax Parcel 0115-0030-0000 (the “Property”). The Property is situated in the Rural Residential District and Shoreline Overlay District. At its May 4, 2023 meeting, the ZBA granted a variance to the Applicant to permit construction of a single-family dwelling on a slope exceeding 25%. On May 11, 2023, Tanner and April Royce (collectively, the “Abutter”), owners of abutting property situated at 35 North Shore Road, purported to file an appeal document challenging the ZBA’s decision and requesting that the ZBA vacate same. The Applicant first learned that the appeal was filed on May 23, 2023 when the Town released the agenda for its June 2023 ZBA meeting with the appeal document appended thereto. For the reasons set forth below, the Abutter’s appeal is without merit and should be denied.

As a threshold matter, the Abutter has not properly appealed the ZBA’s decision granting the variance as a matter of procedure. The sole avenue for an aggrieved party to appeal the decision of the ZBA granting a variance is by filing a Motion for Rehearing pursuant to RSA 677:2 and RSA 677:3. RSA 677:2 provides, in relevant part, that “[w]ithin 30 days after any order or decision of the zoning board of adjustment . . . any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding, or covered or included in the order, specifying in the motion for rehearing the ground therefor; and the board of adjustment . . . may grant such rehearing if in its opinion good reason therefor is stated in the motion.” RSA 677:3 provides, in relevant part, that a “motion for rehearing made under RSA 677:2 shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable” and that “[n]o appeal from any order or decision of the zoning board of adjustment . . . shall be taken unless the appellant shall have made application for rehearing as provided in RSA 677:2.”

However, the Abutter has not filed a Motion for Rehearing pursuant to RSA 677:2 and RSA 677:3. Rather, the Abutter has filed an appeal from an administrative decision pursuant to RSA 674:33 and RSA

676:5. RSA 676:5 provides, in relevant part, that “[a]ppeals to the board of adjustment concerning any matter within the board’s powers as set forth in RSA 674:33 may be taken by any person aggrieved . . . by any decision of the administrative officer.” RSA 674:33(I)(a)(1) authorizes the ZBA to “[h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance . . .”

Accordingly, the ZBA only has jurisdiction and authority to hear administrative appeals under RSA 674:33 and RSA 676:5 when they are taken from a decision of an administrative official.<sup>1</sup> The ZBA does not have jurisdiction and authority to hear “administrative appeals” of its own decision to grant a variance. The ZBA only has jurisdiction and authority to reconsider its decision to grant a variance when an aggrieved party with standing files a timely Motion for Rehearing under RSA 677:2 and RSA 677:3. Since the Abutter has not filed a Motion for Rehearing pursuant to RSA 677:2 and RSA 677:3, the arguments contained in the appeal document should not be considered and the ZBA should either decline to act on the appeal or deny same for that reason.

To the extent the arguments contained in the Abutter’s appeal are considered, they are without merit. Contrary to the allegations contained therein, there was nothing improper about Town Counsel attending the ZBA meeting, sitting at the ZBA table, and communicating directly with the members. Section XI of the ZBA’s Rules of Procedure provide that the “Board may vote to instruct the Zoning Administrator to request legal advice from Town Counsel . . .” The balance of Section XI sets forth other things that the ZBA may do with respect to communicating with Town Counsel through the Zoning Administrator. However, nothing contained therein prohibits the ZBA from communicating directly with Town Counsel. These procedures that the ZBA may choose to follow appear to be related to communication with Town Counsel outside public meetings, since it is typically more efficient for such correspondence to flow through a single entity (the Zoning Administrator) rather than through five or more ZBA members. Indeed, this is most likely the case because Section XI entitled “Communications with Legal Counsel” is distinct from Section IX entitled “Public Hearings.” In the State of New Hampshire, it is routine for Town Counsel to attend ZBA meetings and advise the Board directly throughout, and neither the ZBA’s Rules of Procedure nor applicable law prohibit that.

The ZBA’s Rules of Procedure do not prohibit the Chair from making motions and do not require a passed motion for the designation of an alternate ZBA member to sit as a voting member. Nor could they, because it would be contrary to State law. RSA 673:11 provides that “[w]henever a regular member of a local land use board is absent or whenever a regular member disqualifies himself or herself, the chairperson shall designate an alternate, if one is present, to act in the absent member’s place.” Therefore, the Chair’s designation of an alternate without a passed motion was proper under RSA 673:11.

All of the Abutter’s arguments alleging violations of RSA 91-A should be disregarded. The ZBA is permitted to enter nonpublic session to obtain legal advice from Town Counsel. See RSA 91-A:3(II)(1) (allowing nonpublic session for “[c]onsideration of legal advice provided by legal counsel, either in writing or orally, to one or more members of the public body.”). Moreover, the ZBA lacks the ability to vacate its decision granting a variance based upon allegations of RSA 91-A violations because, even if they have merit (which these do not), the aggrieved party’s remedy is to “petition the superior court for injunctive relief” as

---

<sup>1</sup> Or, in limited circumstances, from a decision of the Planning Board when “in the exercise of subdivision or site plan review, the planning board makes any decision or determination which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer . . .” RSA 676:5(III).

provided in RSA 91-A:7. An “aggrieved party” cannot weaponize RSA 91-A as a means to persuade the ZBA to vacate its decision granting a variance.

The “Merit Based” portion of the Abutter’s appeal does not suggest any basis for the ZBA to vacate its decision granting the variance. Regardless of the language contained in the zoning ordinance, the Applicant, through counsel, properly characterized the “public interest” prong of the variance analysis when demonstrating that granting the variance would not be contrary to the public interest. See RSA 674:33(I)(a)(2)(A) (authorizing the ZBA to grant a variance when the “variance will not be contrary to the public interest.”). The “benefit to the public interest” language contained in the zoning ordinance appears to be carried over from prior law that was rendered obsolete when the legislature codified the “not contrary to the public interest” language into the above-referenced statute in 2009. However, the language in the zoning ordinance is an immaterial oversight because it is superseded by the “not contrary to the public interest” language contained in RSA 674:33(I)(a)(2)(A).

Contrary to the Abutter’s assertions, the Applicant did challenge the validity and constitutionality of the zoning ordinance as applied to its property in the context of the hardship analysis. See Applicant’s Narrative to its Variance Application (“denying the variance would amount to an unconstitutional taking without just compensation because the ZBA would have effectively determined that this lot must remain vacant forever, contrary to the Applicant’s constitutional right to reasonably use and enjoy property.”). And to the extent the Abutter suggests that opinions expressed by one member of the ZBA relative to one variance criteria require the ZBA to vacate its decision granting the variance entirely, that assertion is incorrect. Opinions expressed by one member are not equivalent to the greater will of the Board. The ZBA, as a whole, clearly articulated proper basis and reasoning for granting the variance when it passed its affirmative motion to do so, and that reasoning is abundantly clear in the minutes and video recording of the meeting. Further, even if that particular member’s vote is discounted, the motion to grant the slope variance still would have been approved by a vote of three in favor and one opposed.

Finally, the Abutter’s continued suggestion that the Applicant can only demonstrate a self-created hardship because the Applicant knew about the slope restriction when it purchased the property is without merit. As discussed at the meeting, had the Applicant been aware of the slope restriction when it purchased the property, it would have requested the slope variance at the same time as the July 2021 front yard setback variance when the Applicant was doing its due diligence before purchasing the property. However, the slope variance was not requested because Town staff’s opinion at that time was that only the setback variance was required. Moreover, even assuming for the sake of argument that the Applicant was aware of the slope restriction when it purchased the property and that a variance would be required for construction of a single-family dwelling, that knowledge would not constitute a self-created hardship justifying denial of the variance. As the Applicant, through counsel, stated at the last meeting, the New Hampshire Supreme Court has, in a number of cases, expressly rejected the notion that a purchase of property with knowledge of a zoning restriction constitutes a self-created hardship justifying denial of a variance. See Metzger v. Town of Brentwood, 117 N.H. 497 (1977); Hill v. Town of Chester, 146 N.H. 291 (2001); Harrington v. Town of Warner, 152 N.H. 74 (2005). This is at least in part because “a purchaser of property acquires no greater right to a variance than his predecessor”, so “he should not be held to acquire less.” 15 New Hampshire Practice: Land Use, Planning & Zoning 24.25.

For the foregoing reason, the Abutter’s request for the ZBA to vacate its decision granting the variance should be denied. The ZBA’s decision granting the variance was both lawful and reasonable and should be affirmed.



Sincerely,

*/s/ Brett W. Allard*

Brett W. Allard, Esq.

Cordell A.  
Johnston

Attorney at Law

P.O. Box 252  
Henniker, NH 03242  
603-748-4019  
cordell@cajohnston.com

May 31, 2023

Jamie Silverstein, Vice Chair  
Sunapee Zoning Board of Adjustment  
23 Edgemont Road  
Sunapee, NH 03782

Re: Vacation Homes, LLC

Dear Jamie:

This letter addresses claims of "procedural errors" in connection with the ZBA's May 4, 2023, approval of a variance requested by Vacation Homes, LLC. The claims were made in a motion for rehearing filed by abutters April and Tanner Royce.

To be clear, the board committed no procedural errors in its hearing on May 4. I address each of the claimed errors below.

1. Legal counsel attendance and advice to ZBA. There is nothing unusual or improper about legal counsel's attending the meeting and providing advice to the chair or the board. This is common practice throughout New Hampshire. The claims that "only the Zoning Administrator may request legal advice" and that "the board does not have the right to directly seek legal counsel" are not true, and such a rule would make no sense.

The board's rules of procedure say the board may instruct the zoning administrator to request legal advice, but nowhere do they say that only the zoning administrator may request legal advice. The rule simply authorizes the board to designate the administrator as an intermediary. Obviously the board has authority on its own to seek legal advice. Otherwise, when the board needs legal advice in an appeal from a decision of the zoning administrator, it would need to ask the administrator to obtain a legal opinion about his own decision and relay that opinion to the board. That is nonsensical.

As for the statement that "any advice given in public would remove any attorney/client privilege," that is true but irrelevant. It waives the privilege only with respect to the advice that was actually given in public. The abutters suggest later in the document that because I spoke during the public meeting, every communication between me and the town is now subject to public disclosure. That is simply incorrect.

2 & 3. Designation of alternate. A motion to designate an alternate is not necessary, so it does not matter who made the motion or that there was no vote on the motion. Under state law, when a regular member of the board is absent, "the chairperson shall designate an alternate . . . to act in the absent member's place." No motion is required—the chair simply designates an alternate, which you did.

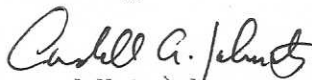
4. Zoning administrator summary. The rules of procedure say the zoning administrator "should present a summary of the case." This is a suggested procedure, not a requirement. Even if it were, no one can seriously claim that the absence of a summary by the zoning administrator affected the outcome. Between the applicant's presentation and the abutters' arguments, the board heard everything that could possibly be relevant to the case.

5. Improper nonpublic session. There was no improper nonpublic session. Nonpublic sessions are governed by RSA 91-A:3 and are subject to strict procedural requirements, which the abutters have summarized accurately. However, the discussion with me was not a nonpublic session.

The board took a brief recess during the meeting to consult with me. A consultation with legal counsel is not a nonpublic session and is not governed by RSA 91-A:3. It is addressed, instead, by RSA 91-A:2, which states that a "consultation with legal counsel" is not a "meeting"; it therefore is not subject to the Right-to-Know Law at all. There is no requirement for a motion or a vote, and no minutes are kept. The requirements of RSA 91-A:3 are not relevant.

I hope this addresses any concerns the board may have about the alleged procedural errors. We can discuss any questions about the merits of the case separately. Please let me know if you have any questions.

Sincerely,

  
Cordell A. Johnston

## **Zoning Board Variance Appeal**

April Royce and Tanner Royce, owners of 35 North Shore Rd. which abuts the property that received a Variance for construction on a slope of more than 25% on May 4, 2023, are formally appealing the decision to grant a variance for construction on this slope that was stated to be around 33% during their variance application hearing.

This appeal is being filed based on Procedural Errors made by the Zoning Board and the Acting Chair of the Board during this meeting, as well as a Merit Based appeal based on the failure of the Zoning Board to properly review, evaluate, understand, and clearly state the 5 Criteria that need to be met.

### **Procedural Errors:**

There are at least two categories of Procedural Errors that should invalidate the hearing, any vote, and should immediately call for vacating action taken by the Zoning Board. Sunapee has adopted and posted the Sunapee ZBA Rules of Procedure (2/20/2020) and RSA guidelines (specifically RSA 91-A:3) that govern the action of any board in the State of NH. Copies of each are included with this submittal.

1. Legal Counsel Attended the meeting, sat at the table with the board, and conversed with the committee chair on multiple occasions. According to the Rules of Procedure only the Zoning Administrator (XI.) may request legal advice. The town attorney is not part of the board, and any advice given in public would remove any attorney/client privilege.

The Sunapee ZBA Rules of Procedure (2/20/2020) were violated as the board does not have the right to directly seek legal counsel. All Communications with Legal Counsel are to be completed through the Zoning Administrator and not through direct contact with the board, involvement in the board meeting, or through illegal nonpublic sessions. This action by the Acting Chair violates the rights of Sunapee Citizens and would invalidate the meeting and any vote taken after this violation. The Chair should have continued the case, sought legal opinion through the Administrator, and then reconvened after they had reviewed this information in the proper venue.

2. The acting Chair made a motion to put an alternate into place. The chair according to the Zoning Board Rules of Procedure, may request motions on the case but it does not allow the Chair to make a motion (IX, D, 10.)
3. The motion to appoint an Alternate was seconded but it was not voted upon by the board. No vote was taken to affirm the motion. Alternate was not properly put in place and their vote is invalid.
4. Zoning Administrator did not present a summary of the case. (IX, D, 2.)
5. The Board illegally entered a nonpublic session without following the guidelines of RSA 91-A:3, II as mandated by the RSA itself as well as the ZBA Rules of Procedure (IX., A.)

### **Violations of RSA 91-A:3 (language provided as part of this submittal)**

1. At 7:51 pm, Acting Chair called to adjourn the meeting to deliberative. She was corrected verbally by the town attorney to call this a “recess” to meet with Legal Counsel.
  - a. There was no motion properly made and seconded. (93-A:3, 1. (a))
  - b. The lack of a motion also violated (93-A:3, 1. (b)) which states that a motion must state the specific exemption under paragraph II. Any vote on such a motion is required to be by roll call, and shall require the affirmative votes of the majority of members present.
  - c. All discussions and decisions made during a nonpublic session shall be confined to the matters set out in the motion. Without a proper motion or vote; the board does not have the ability to have any nonpublic discussions and they violated this portion of the RSA as well.
2. An improper nonpublic session was entered into and should not have taken place. Any discussions are now part of the public record and minutes and a description of what took place in that session are owed to the citizens of Sunapee.
3. Even if the nonpublic session was entered into correctly, the board failed to vote with 2/3 of the board upon returning to keep the minutes sealed. Anything discussed in that nonpublic session needed to be publicly disclosed within 72 hours of the session in the absence of this 2/3 vote to keep them sealed. No Vote was taken.

We do not find any public disclosure of that session being provided by the Town of Sunapee or the Zoning board, let alone any release of that to the public within the 72 hours that are mandated in the RSA.

## **Merit Based Appeal**

Variances can be requested under 10.42 in the Zoning ordinance. The language in this section is also clear in that “each and every one of the following conditions are met:”

- (a) No diminution of value of surrounding properties would be suffered by granting this variance.
- (b) The granting of the permit would be a benefit to the public interest
- (c) Denial of the permit would result in unnecessary hardship to the owner;
- (d) By granting the permit, substantial justice will be done;
- (e) The use will not be contrary to the spirit of the ordinance.

The Board did not clearly state the (5) criteria and discuss each one properly during the meeting.

- Criteria (b) was mischaracterized by the attorney presenting the case and then the board deliberated on an incorrect reading of this criteria. The attorney stated that the granting of the variance would be **contrary** to public interest and the board used this reading during their deliberations. The Language says granting of the variance would be a **benefit** to Public Interest which would be a higher standard than saying that granting the variance would be contrary to public interest. No benefit to public interest was discussed, deliberated, or clearly stated during the meeting.
- Criteria (c) was also not accurately discussed and deliberated. The presenting attorney clearly discussed a “self-created hardship” (7:45:30 pm) and advised the board that this was not allowable.

Please review the exact quote from the presenting attorney when he referenced Metzer v Town of Brentwood:

“the finding that plaintiffs had notice that they might be prohibited from building when they purchased their land does not bar them from challenging the constitutionality of the ordinance as applied to their land. The self-created hardship principle applicable to variances does not fully apply when validity of the ordinance is questioned and the property owner is not barred from challenging the validity of an ordinance as applied to his property even though he acquired the property after the ordinance was enacted.”

The property owner is not challenging the validity of the ordinance or the constitutionality of the ordinance. If they want to challenge the ordinance itself that cannot be done at the Zoning Board and must be addressed in a legal venue. Absent that specific challenge, the property owner does not have the right to a self-created hardship.

Without the ability to have this self-created hardship the property owner does not have any grounds for a hardship and the Zoning Board erred in their evaluation of the Hardship rule.

This land does have a reasonable use without allowing construction on the slope of 33% against the clearly written zoning ordinance. The previous owner had Pond Access, installed a dock, and had a tent, chairs, and an area for a fire pit near the water. They were able to access the water, dock a motorboat, a row boat, fish from the dock and land and enjoy the use of the property for many years without the need to have a home built on this property.

There is no hardship on this property with the exception of the self-created hardship which does not qualify for a variance. The presenting attorney stated that “it was town Code enforcement staff’s opinion that this property did not need further variances at the time of the 2021 Setback variances. This statement is untrue and was set to confuse the board. The Town of Sunapee did not have a code enforcement agent in place during 2021. This position was created in 2022 and is just now operating.

The Lawyer did not identify any staff that was involved in this discussion and the board never followed up on this statement. It would have been an error on the part of any town employee to state that the slope variance

was not needed and we do not believe that any opinion was sought from the Planning or Zoning department that did exist at that time.

It is our belief that the property owner sought the opinion of Jeff Claus in making this determination. Mr. Claus cannot act as an agent of the town and also a land use consultant at the same time. He correctly recused himself from the previous cases as well as this case, since his role would be serving the applicant and not the town. They did not document any such conversation and the Prohibition on construction on this slope has been clearly in place since 2004.

Further, during the October 14, 2021 meeting reviewing the proposed Zoning Amendment Jeff Claus stated that the lot "my opinion was non-buildable" when discussing how he submitted this project for front and side set back variances. This was stated at the 2:26:50 mark of that meeting. Further he stated "it shouldn't have" when asked about the granting of a variance (2:27:19).

This lot was known to have this restriction, no town employee or enforcement agent provided the guidance as stated by the presenting attorney, and the self-created hardship discussion only applies to challenging the validity or constitutionality of the ordinance. The applicant has not and did not challenge the ordinance itself and has a self-created hardship which does not qualify for a hardship variance. They also retain a reasonable use of the property as the previous property owner had enjoyed.

- Criteria (d) was not correctly discussed, deliberated, and the criteria was not met during the meeting. Substantial Justice is defined as "justice of a sufficient degree especially to satisfy a standard of fairness."

The standard of fairness is a basic principle lending to the equal treatment of property owners and application of laws or Ordinances. This ordinance applies to all undeveloped properties in Sunapee and Substantial Justice is done when every property owner is subject to the same laws and ordinances.



There was speculation by the board about how many variances had been granted to build on steep slopes. They referenced properties around Lake Sunapee and the buildings that may have been built on similar slopes. Those buildings were built and had existing footprints prior to the adoption of this probation in 2004.

In the October 14, 2021 Planning Board Meeting this issue was discussed directly. At the 2:36:00 point of that meeting, Town Planner Michael Marquise is quoted as saying that “I don’t know of 1 in 17 years of it in being effect” when discussing variances granted for building on a slope of this nature. Any construction prior to 2004 does not fall under these guidelines and the Voters of Sunapee clearly voted to prohibit construction on slopes of over 25%.

During that same meeting, it was referenced that both Newbury and New London have a prohibition on building on slopes of over 25% as well.

On November 11, 2021 the planning board again was discussing the proposed amendment. They stated clearly that the language change was being set forth so they could clarify “How to determine steep slopes” and the warrant article itself stated this clearly that the change was about determining the slope itself. They stated that the intent of this ordinance was to “discourage anyone from building on a steep slope.” (1:43:00).

During the December 9, 2021 Planning board meeting that moved the warrant article to the ballot, it was stated clearly at 41:30 that they were “trying not to change the intent” or the ordinance. That was followed by a motion made by Jeff Claus to move the warrant article to the ballot.

- Finally, criteria (e) was not properly discussed, deliberated, or met during the discussion. In fact, one board member stated clearly that this variance was contrary to the spirit of the ordinance but wanted to see “if the engineer was as good as he thinks he is.” He clearly violated his duties as a zoning board member. If his opinion was that the variance was contrary to

the spirit of the ordinance, then he has a duty to vote against the variance. The rules are very clear and he violated them by voting against his own opinion of meeting these criteria.

All (5) criteria have to be met. This is an "and" situation where there is no exception for not meeting one of the criteria. This member violated his duties, when he clearly stated that this was against the spirit of the ordinance. With this vote changed, and the alternates vote vacated due to improper actions taken by the board chair to include the alternate, the vote is 2-2 which would not allow the variance. The variance should fail based on a number of reasons but these are very alarming.

Further, the member who wants my neighborhood to be an area to check to see how good the engineer's plan would work is appalling. Would he feel the same way in his neighborhood? He should be censured for this statement as he clearly violated his duties and wanted to see how it would work out. We understand that he may own property on Lake Sunapee. Would he feel the same way about a project taking place next to his home? This is the typical "Not in My Back yard" position that should not be allowable on a Zoning Board or any board.

This member also stated that he doesn't see a benefit to public interest and stated that the Hardship in his opinion would be the cost to work with DES, Legal Costs incurred, and out of pocket funds for this project. Again, this is a self-created hardship which does not qualify under the Hardship language.

This same member also stated that if the public found this that egregious there would be a lot of people out the door with burning torches and pitchforks. This member fails to recognize that only abutters are noticed for the meeting and most of the public would not be aware of this case being heard. The number of abutters of a property should have no bearing on the validity of meeting the required 5 criteria.

This again is about being a benefit to public interest and not contrary to the public interest as the board discussed. During this discussion, the Acting chair attempted to coerce analysis of the variance criteria and she indicated her opinion of the spirit of the ordinance as a fact at 8:10pm. She was incorrect in the forceful nature in which she attempted to sway the votes and her opinion of the spirit is not fact, and should not have been treated as fact. The members have the right to agree or disagree with her opinion as to the spirit of the ordinance.

Another member discusses the criteria for the variance and his lack of support. Acting Chair attempted to influence this member and "bully" him into changing his opinion. She stated to him that his opinion was subjective and tried to force her opinion regarding the spirit of the Ordinance. This uncomfortable back and forth lead to the Town Attorney to interject and try to clarify what the member was saying so that the Chair would not continue her verbal assault on the members opinion. This again is violation of Public Meeting guidelines and would invalidate any attorney-client privilege as the attorney involved himself in the public discussion of the case. We are now requesting minutes from the Illegal nonpublic session, as well as any correspondence between the town and the board regarding this case. Please provide that information prior to the hearing and make it public as part of the appeal process.

There are several other inaccuracies in the presentation of this case. The presenting attorney stated on at least two occasions that this property has the ability to hook up to Municipal sewer and water and would not be subject to further setbacks or other DES requirements. That is untrue. This property can and must be connected to the Town Sewer, however there is no town water available on this road. They are subject to installing a well and complying with all necessary setbacks and other considerations for a well to be installed.

The presenting attorney stated that other homes in the area were of similar size to the 2000 square foot building that is being proposed. That is untrue. All surrounding buildings are substantially less than 2000 SF with most being under 1000 SF on this road specifically. This project would stand out in the neighborhood and does not conform with the current homes on this road.

The engineer stated that he could "improve" the Natural Watershed. While they may be able to reduce the run-off from the property, it cannot improve the Natural Watershed which is to be protected. That Natural Watershed is natural by name and nature has made this area. The Pond is best protected by not altering the Natural Watershed. In fact, in the October 14, 2021 Planning board meeting, it was stated that "Mother Nature has stabilized the ground and once it has been disturbed," it is no longer a Natural Watershed.

In Summary, the board erred in its decision to grant this variance. They made significant procedural errors that should invalidate the granting of this variance immediately. While we are more than happy to present this appeal at a designated meeting, the action taken by the Zoning Board should be vacated based on these significant errors and failure to follow the law.

The Merit based appeal will be successful because the board failed to follow their duties, properly evaluate the variance criteria, and allowed themselves to be swayed by the presenting attorney's effective presentation and interpretation of court cases. Most of that information was not accurate, was falsely interpreted, and swayed the board's decision. At a minimum, the board should have continued the meeting, sought legal guidance correctly by following the clearly written Sunapee ZBA procedures that were adopted in 2020, and then had the continued hearing after proper evaluation and discussion. The Acting Chair of the board clearly did not follow the proper guidelines, conversed with the Town Attorney both in public and private during the meeting, and attempted to bully the other members to vote the way that she was going to vote before the meeting commenced.

It is believed that there is some protection of the Zoning Board Chair, who correctly recused himself from this case as he presented the previous variance requests and tree cutting plan. We believe that an analysis of the legal advice provided by Town Counsel may provide some insight as to the potential protection of this board member by the Acting Chair. Detailed documentation of that legal advice has been requested and needs to be provided based on the errors made on this case which would remove any attorney/client privilege.

We ask that the variance be vacated and the appeal meeting be scheduled to review all of the issues that occurred during the hearing and the subsequent granting of this variance.

Please contact us with any questions or concerns.

April and Tanner Royce

23 Central St.

35 North Shore Rd.

Sunapee, NH 03782

April - (603) 477-9366 [april@lucaspa.com](mailto:april@lucaspa.com)

Tanner - (603) 781-5000 [tanner@lucaspa.com](mailto:tanner@lucaspa.com)

Town of Sunapee  
23 Edgemont Rd., Sunapee NH  
Phone (603) 763-3194 / Website [www.town.sunapee.nh.us](http://www.town.sunapee.nh.us)  
Email [zoning@town.sunapee.nh.us](mailto:zoning@town.sunapee.nh.us)

CASE# SE 23-02

**RECEIVED**

**MAY 14 2023**

**TOWN OF  
SUNAPEE**

**Zoning Board of Adjustment (ZBA)  
Special Exception**

Questions? Please contact the Land Use & Assessing Coordinator or the Planning & Zoning Director. All dates and deadlines are published on the ZBA calendar.

1. Landowner(s) Name(s): Daniel D. Cave
2. Parcel ID: 0118-0051-0000 3. Zoning District: RR
4. Project Location (Street & #): 90 Burma Road
5. Mailing Address: 11 Mockingbird Lane, Glastonbury, CT 06033
6. Phone Number: 1-860-657-8766
7. Email: cavedd@gmail.com

☒ **ABUTTERS LIST:** You must prepare a list of all abutting property owners and attach it to your application. If you have any difficulty, consult the Town Office, but the accuracy of the list is your responsibility. You can download an abutters list by using the Tax Maps/GIS on the Town's website (under Assessing Department).

☒ **FEES:** ☒ Application Fee: \$ 150 \* Make check payable to Town of Sunapee.  
☒ Abutter Notification Fee: \$ 8 \* per abutter. Make payable to US Post Office.

\* NOTE: Rates and fees are subject to change. For the most current rate, please check with the Town Office.

☐ **ATTACHMENTS:** To assist the Board, please attach sketches, photos, surveys, plot plans, pictures, construction plans, or whatever may help explain the proposed use. Include copies of any prior Zoning or Planning decisions concerning the property. If you have something in writing stating that your proposed project does not meet zoning, please attach that to this application; it may be a letter, email or denied permit. A professional survey by a licensed surveyor is strongly recommended for variances related to setback requirements. For properties located in the Shoreline Overlay District, a professional survey is required. Supplemental materials for the Board must be submitted no later than five (5) days before the scheduled hearing, however, adequate plans and exhibits must accompany the application. This includes, but is not limited to: lot dimensions, dimensions of proposed and existing structures, identification of abutting properties and roads, locations of water bodies, wetlands, septic systems, etc.

*Applications will not be considered complete unless all the questions are answered, the fees are paid, and an Abutters Mailing List is attached.*

**GENERAL DESCRIPTION:** This is a place to give a general summary of the proposed project as an introduction and overview for the public hearing. For example, where is the property located? Describe the property. Give area, frontage, side and rear lines, slopes, natural features, etc. What do you propose to do? Why does your proposal require a Special Exception from the Board of Adjustment?

Relocation of existing deck within 50-foot waterfront buffer

pursuant to Section 3.50(I) of the Zoning Ordinance

Attach additional sheets of paper as necessary.

**EXPLAIN HOW THE PROPOSAL MEETS THE SPECIAL EXCETION CRITERIA AS SPECIFIED IN ARTICLE 3, SECTION 3.50(l) OF THE ZONING ORDINANCE** (list all criteria from the Ordinance)

Criteria 1: See attached as to all criteria.

Criteria 2: \_\_\_\_\_

Criteria 3: \_\_\_\_\_

Criteria 4: \_\_\_\_\_

Criteria 5: \_\_\_\_\_

Criteria 6: \_\_\_\_\_

Criteria 7: \_\_\_\_\_

Criteria 8: \_\_\_\_\_

**SIGNATURE:** I understand that the public hearing will be held at the scheduled date and time unless a request is made by me for a new hearing. Any rehearing will require a new public notice and notification to abutters, the cost of which will be borne by the applicant. Further, I hereby give permission to the ZBA members and zoning officials to visit the subject property prior to the public hearing. To the best of my knowledge, the above is true and correct.

David Case 5-3-2023  
Landowner(s) Signature(s) Date



# 50 foot Abutters List Report

Tri Town, NH

May 01, 2023

## Subject Property:

Parcel Number: Sun-0118-0051-0000  
CAMA Number: Sun-0118-0051-0000  
Property Address: 90 BURMA RD

Mailing Address: CAVE, DANIEL D  
11 MOCKINGBIRD LANE  
GLASTONBURY, CT 06033

---

## Abutters:

Parcel Number: Sun-0118-0045-0000  
CAMA Number: Sun-0118-0045-0000  
Property Address: BURMA RD

Mailing Address: BINZEL, MAUREEN A  
88 BURMA RD  
SUNAPEE, NH 03782

Parcel Number: Sun-0118-0047-0000  
CAMA Number: Sun-0118-0047-0000  
Property Address: BURMA RD

Mailing Address: LOVELY FAMILY TRUST OF 2016 PETER  
R & MARTHA E LOVELY, TRU  
4 KILLARNEY LN  
NEWPORT, NH 03773

Parcel Number: Sun-0118-0050-0000  
CAMA Number: Sun-0118-0050-0000  
Property Address: 98 BURMA RD

Mailing Address: KIERNAN, BRIAN & LAURA  
91 DAWSON DR  
NEEDHAM, MA 02492

Parcel Number: Sun-0118-0052-0000  
CAMA Number: Sun-0118-0052-0000  
Property Address: 88 BURMA RD

Mailing Address: BINZEL, MAUREEN A  
88 BURMA RD  
SUNAPEE, NH 03782



[www.cai-tech.com](http://www.cai-tech.com)

5/1/2023

Data shown on this report is provided for planning and informational purposes only. The municipality and CAI Technologies are not responsible for any use for other purposes or misuse or misrepresentation of this report.

Page 1 of 1



## Introduction

Daniel D. Cave (the "Applicant") is the owner of the approximately half-acre property situated at 90 Burma Road (Tax Parcel 118-51) along Perkins Pond. The lot is situated in the Rural Residential District. The gently-sloping property has about 207 feet of frontage along Burma Road and approximately 142 feet of frontage along Perkins Pond. The existing cottage is located on the northeast side of the parcel - entirely in the waterbody setback and partially in the side setback. However, the existing cottage was constructed in the 1920's and therefore predates the Town's adoption of the Zoning Ordinance. As such, the existing cottage is a legal preexisting nonconforming structure.

In April and May of 2022, this Zoning Board approved a replacement and vertical expansion of the existing cottage envelope, and a horizontal expansion away from the water body to connect it to the buildable area of the lot as part of a broader project to construct a new single-family home on the property (reference Case #ZBA22-03, ZBA Case #22-05 and ZBA Case #22-06). For reference, the plan approved by this Board dated June 30, 2021 and the Notices of Decision pertaining thereto are enclosed herewith. Commencement of the project was delayed and is expected to begin this summer; the existing cottage remains in its historic footprint on the property and has yet to be demolished.

As shown on the enclosed Exhibit plan entitled the "Cave Residence Proposed Site Plan", the Applicant proposes to relocate the existing structure, namely the deck which is presently located entirely in the waterbody setback and partially in the side setback, to a less non-conforming location within the 50-ft waterbody setback pursuant to Section 3.50(l) of the Zoning Ordinance. The relocated deck is proposed to be the same size as the existing deck: 150 +/- square feet. For the reasons set forth below, the Applicant submits that he has satisfied the subject criteria and requests that the Board grant the special exception.

**(1) The proposed structure's non-conformity shall be lessened as determined by its location further from one or more property boundaries, or the water body, from which the dimensional setback the structure is non-conforming to is established;**

The current 150 +/- square foot deck structure is located entirely within the 50-ft water body setback, is approximately 14-18 ft. from the Perkins Pond reference line along its waterbody side, and is approximately 8-10 ft. from the side boundary along its northerly side where a 15 ft. setback is required. The proposed structure will be entirely removed from the side setback, and will be moved back to 28' 9" from the water body at its closest point. As such, the non-conformities associated with legal preexisting nonconforming deck will be eliminated relative to the side setback and lessened relative to the water body setback.

**(2) The proposed structure's non-conformity shall not be increased as determined by its location closer to one or more property boundaries, or the water body reference line, from which the dimensional setback the structure is non-conforming to is established;**

As discussed above, the proposed structure will be no closer to a dimensional setback to which it is non-conforming. In other words, the proposed deck will not encroach further into the waterbody and side setbacks than the existing deck because it will become less nonconforming relative to both setbacks.

**(3) The proposed structure is no higher than the greater of 25' from the finished grade at its highest point within any setback or the maximum structure height applicable to the existing structure that may**

**have been permitted by a prior Special Exception or Variance approved by the Zoning Board of Adjustment;**

The relocated deck is proposed at a height of approximately 10 ft. above grade. As such, the proposed structure will be no higher than 25 ft. from the finished grade at its highest point in the water body setback.

**(4) The proposed structure is of the same or less horizontal square footage as the existing structure;**

The proposed structure is of the same horizontal square footage as the existing structure: 150 +/- square feet.

**(5) If the proposed structure is (a) in a water body setback and (b) widened relative to the existing structure on the side most closely parallel to the shoreline, the area directly behind and between it and the buildable area of the property is of no greater square footage than the comparable area associated with the existing structure; and**

This criteria is not applicable inasmuch as the proposed structure will directly connect to the buildable area of the property, thereby leaving no undeveloped area directly behind and between it and the buildable area of the property.

**(6) If the proposed structure is non-conforming to a water body setback, it is at least 25' from the water body at all points where the structure is proposed; and**

At 28' 9" from the reference line of the Pond, the proposed structure will be more than 25 ft. from the water body at its closest point.

**(7) A drainage and erosion control plan is prepared by a licensed professional engineer as part of the application; and**

A drainage and erosion control plan has been prepared for the entire new residence project by the below-referenced, licensed professional engineer (please reference the aforementioned Cases #22-03, #22-05 and #22-06 for details) as reviewed by the Board and approved in April and May 2022. A copy of the drainage and erosion control plan is enclosed herewith. This and any and all other final incidental adjustments to the plan will be reflected in the final drainage and erosion plan to support all state and local permits.

Daniel Monette, PE

Project Manager

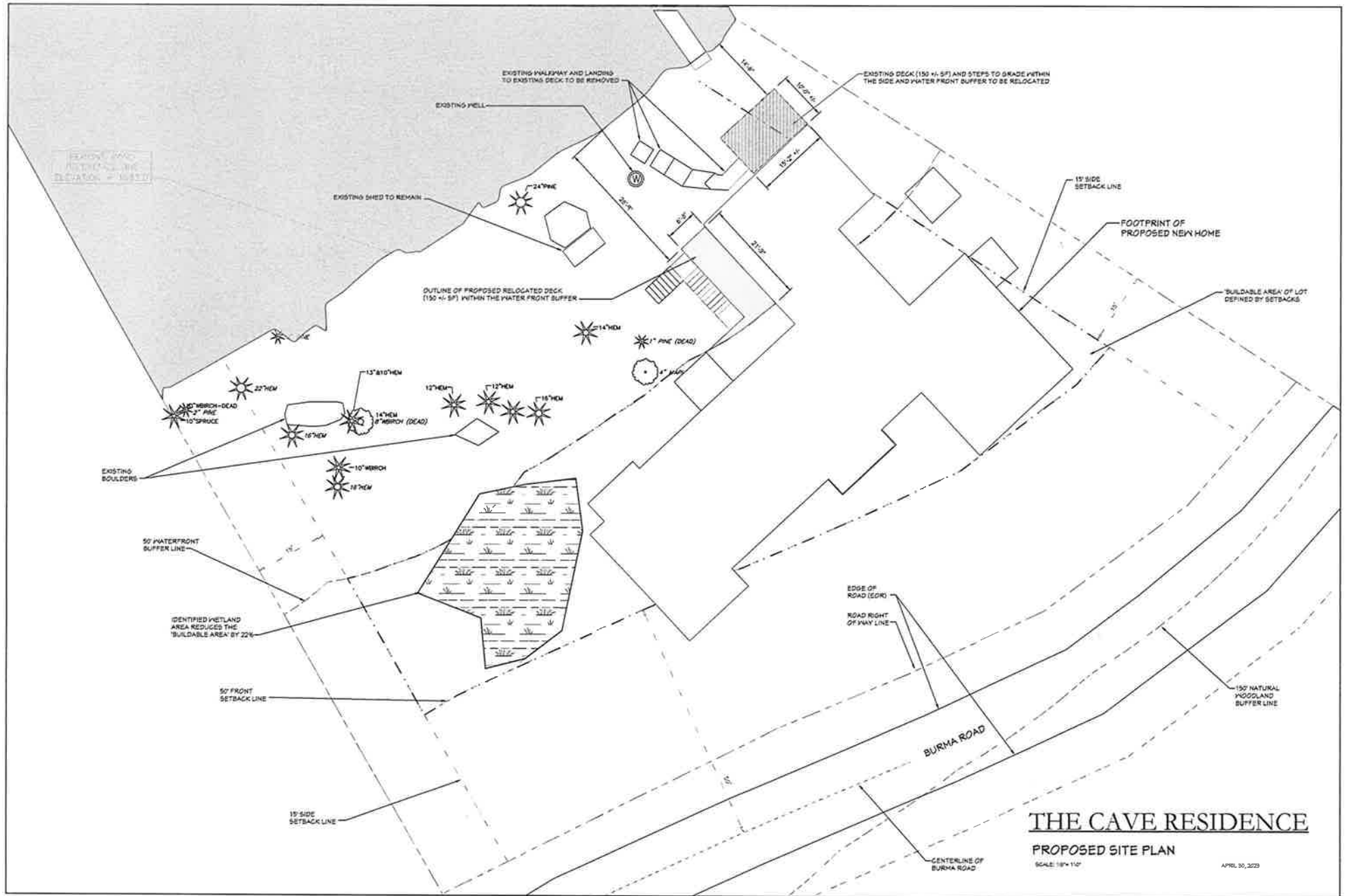
Fuss & O'Neill, Inc. | 205 Billings Farm Rd - Suite 6B | White River Junction, VT 05001  
802.698.0370 x2215 | [dmonette@fando.com](mailto:dmonette@fando.com) | cell: 802.356.9156

**(8) Approval of a special exception under this provision is contingent upon receipt of an approved Shoreland Water Quality Protection Act (SWQPA) permit, and**

The Applicant acknowledges this approval contingency requirement; Mr. Monette will be completing and submitting an application on behalf of the Applicant for the SWQPA permit and work will not commence until the permit is approved. The Applicant understands that this Board has the authority to condition its approval of this special exception upon the Applicant's receipt of an SWQPA permit from the State.

**(9) Approval of a special exception under this provision is contingent upon receipt of all state and local permits to ensure compliance with Article VII of the Ordinance.**

The Applicant acknowledges this approval contingency requirement; the Applicant or his agents will secure all state and local permits to ensure compliance with Article VII of the Ordinance. The Applicant understands that this Board has the authority to condition its approval of this special exception upon the Applicant's receipt of all applicable state and local permits.



1. THE INTENT OF THIS PLAN IS TO SHOW PROPOSED SITE CONDITIONS AT BISHRA ROAD SUMAPEE, NEW HAMPSHIRE.

2. UTILITIES SHOWN DO NOT PURPORT TO CONSTITUTE OR REPRESENT ALL UTILITIES LOCATED UPON OR ADJACENT TO THE SURVEYED PREMISES. DIGGING UTILITIES ARE APPROXIMATE ONLY. THE CONTRACTOR SHALL FIELD VERIFY ALL UTILITY CONFLICTS. ALL DISCREPANCIES SHALL BE REPORTED TO THE PROJECT OWNER IMMEDIATELY.

3. THE CONTRACTOR SHALL COMPLY WITH 388 CMR (388-344-7233) A MINIMUM OF AT LEAST 3 BUSINESS DAYS (72 WORKING HOURS) PRIOR TO ANY CONSTRUCTION.

4. SPECIAL CONSTRUCTION PRACTICES ARE REQUIRED TO AVOID WETLAND PRACTICES SUCH AS SHEET PILING OR PLACING OF COFF DAMS OR OTHER METHODS AND METHODS OF CONSTRUCTION.

5. CONTRACTOR TO CONFIRM WITH OWNER IF THE EXISTING WELD WILL BE ABANDONED FOR A NEW DRILLED WELD LOCATION, IF A NEW WELD IS PROPOSED THE OLD WELD MUST BE DECOMMISSIONED, MEETING ALL GUIDELINES.

6. SEE SHEET C-10 FOR SURVEY AND WETLAND NOTES

[illegible]

1. INSTALL 4" PERFORATED UNDERDRAIN 6" TO 12" FROM SUBGRADE OF PERVIOUS DRAINAGE. UNDERDRAIN SHALL BE INSTALLED WITH A 1% MINIMUM SLOPE TO DRAIN OUTLET. SHALL BE OUGHT-LET FROM THE OUTLET END AND BE 10' LONG. SEE DETAIL 401-107.4
2. PROPOSED YARD DRAIN W/ BEDWIDE CHARGE  
RVA ELEV. = 1085.5'  
6" PVC INW. OUT = 1083.5'  
6" PVC INW. OUT = 1083.5'
3. PROPOSED YARD DRAIN W/ BEDWIDE CHARGE  
RVA ELEV. = 1085.1'  
6" PVC INW. IN = 1083.5'  
6" PVC INW. IN = 1083.5'
4. PROPOSED 6" SOLID-WALLED PVC OUTLET INW. OUT = 1082.6'  
6" PVC INW. OUT = 1082.6'
5. PROPOSED 6" SOLID-WALLED PVC OUTLET INW. OUT = 1081.3'  
6" PVC INW. OUT = 1081.3'
6. PROPOSED 6" SOLID-WALLED PVC OUTLET INW. OUT = 1081.3'  
6" PVC INW. OUT = 1081.3'
7. PROPOSED 6" SOLID-WALLED PVC OUTLET INW. OUT = 1081.3'  
6" PVC INW. OUT = 1081.3'
8. PROPOSED 6" SOLID-WALLED PVC OUTLET INW. OUT = 1081.3'  
6" PVC INW. OUT = 1081.3'
9. INSTALL UNDERDRAIN CLEANSUIT SEE DETAIL ON CD-501  
UNDERDRAIN SHALL BE 10' LONG. SHALL BE INSTALLED YARD DRAIN TO PERFORM SEDIMENTATION/DEBRIS FROM ENTERING NEW DRAINAGE PIPE OR STRUCTURE.
10. PROPOSED 6" PVC OUTLETS INTO YARD DRAINS

SURVEY CONTROL POINT  
 MONUMENT FOUND  
 PROPOSED WELL  
 YARD SIGN  
 PROPOSED NATURAL WOODLAND BUFFER AREA 50'-150'  
 PROPOSED INTERVALS AREA WITHIN PROTECTED SHORELAND  
 DELINEATED WETLAND  
 PROPOSED PERFOROUS SURFACES  
 PROPOSED DRIP EDGE  
 PROPOSED LINEAR EROSION CONTROL

PROPERTY LINE  
 INVASIVE SETBACKS  
 EXISTING GRAVEL DRIVE  
 PROPOSED DRIVE  
 INLETS REFERENCE LINE & SETBACKS  
 PROPOSED CONTOURS MAJOR & MINOR  
 PROPOSED DRAINAGE PIPE  
 PROPOSED LIMIT OF DISTURBANCE  
 PROPOSED LINEAR EROSION CONTROL  
 PROPOSED RETAINING WALL

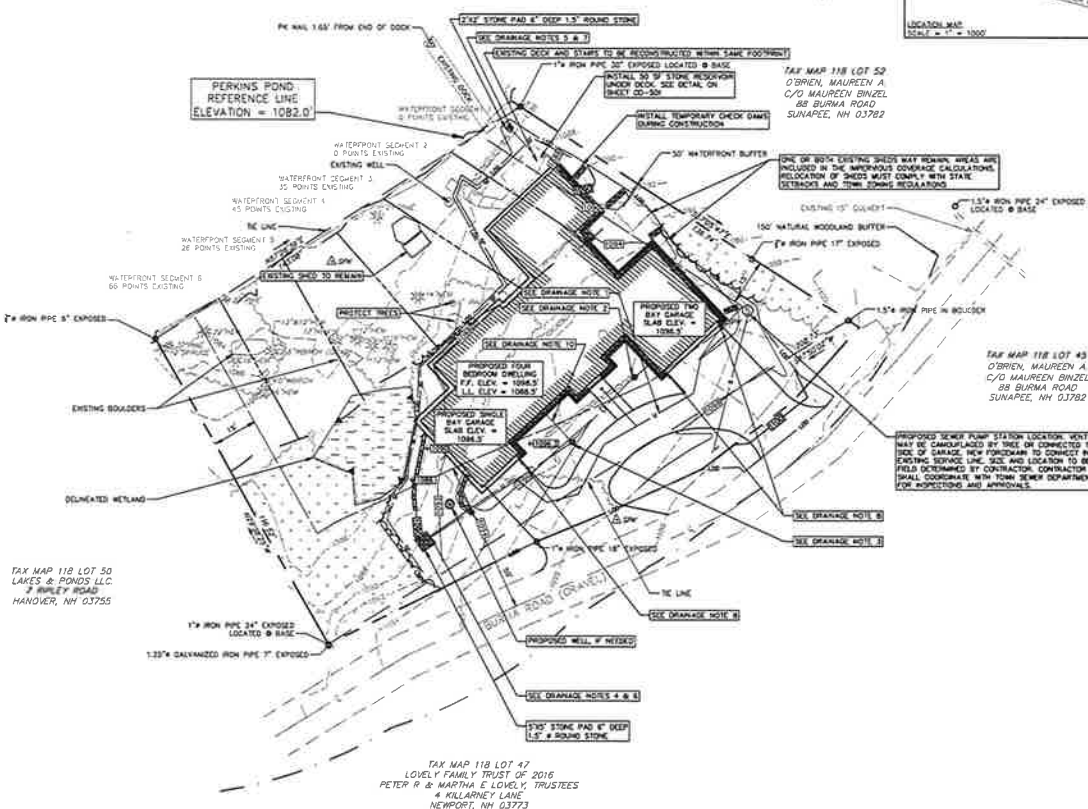
\* SEE C0-100 FOR EXISTING CONDITIONS LEGEND

SHORELAND PROTECTION 0-250'	EXISTING	PROPOSED
DRIVEWAY	825	0
HOUSE & DECK	830	4806
STAIRS, WALKS, & PATIOS	153	113
SHEDS	180	160
DOCK	7	7
TOTAL IMPERVIOUS AREA	1,935	5,066
TOTAL AREA	21,981	21,981
% IMPERVIOUS	9.1%	23.1%

	EXISTING	PROPOSED
PERVIOUS SURFACES	0	2,018
TOTAL IMPERVIOUS AREA	1,995	5,086
TOTAL AREA OF LOT	21,981	21,981
TOTAL IMPERVIOUS AND PERVIOUS AREAS	1,995	7,104
TOTAL LOT COVERAGE	9.1%	32.3%

NATURAL WOODLAND BUFFER AREA (SF ±)	3,734
TOTAL AREA (50'±150') (SF ±)	14,059
% NATURAL WOODLAND	26.6%
25% NATURAL WOODLAND (SF ±)	3,515
NATURAL WOODLAND REQ. TO REMAIN (SF)	3,515

NOTE:  
NO TREES INSIDE THE 50' SHORELAND BUFFER ARE PROPOSED TO BE CUT. ALL EXISTING TREE POINTS AS SHOWN ARE TO REMAIN. IF TREES MUST BE REMOVED DUE TO ACCESS CONSTRAINTS OR HAZARD THEY MUST BE RELOCATED OR REPLACED WITH EQUIVALENT SIZE NATIVE SPECIES TREE WITHIN THE SAME WATCHPOINT SEGMENT.

[illegible]

SCALE

HQ02	1" = 20'
VERT	N/A
DATE	
HQ02	
VERT	

20 10 0 10

GRAPHIC SCALE

**FUSS & O'NEILL**  
11660 K & L AVENUE, SUITE 100  
LOS ANGELES, CA 90025  
TEL: (213) 449-1111



MARYBETH & DAN CAVE  
PROPOSED CONDITIONS  
90 BURMA ROAD  
NEW HAMPSHIRE

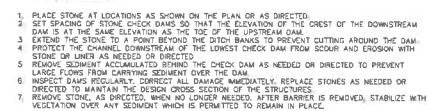
NEW HAMPSHIRE

SINAPPE

PROJ. No. 20200629LA10  
DATE 06/30/2021

CS-101

PROGRESS PRINT  
NOT FOR CONSTRUCTION  
DRAFT DATE 2022-5-13



## SCALE: N.T.S.

CD-501



Town of Sunapee  
Zoning Board

Decision

You are hereby notified that the application of: DANIEL CAVE

For CASE #ZBA22-03: A VARIANCE FROM ARTICLE III, SECTION 3.10 FOR CONSTRUCTION OF A STRUCTURE (GARAGE) 40.5 FEET FROM THE CENTERLINE OF BURMA ROAD WHERE A 50-FOOT FRONT YARD SETBACK IS REQUIRED, 90 BURMA ROAD

PARCEL ID: 0118-0051-0000

Has been APPROVED

The decision was made at the APRIL 7, 2022 Zoning Board meeting.

  
\_\_\_\_\_  
Zoning Board Chair

5.24.2022

\_\_\_\_\_  
Date

*Notes: 1) Any person affected has a right to appeal this decision. If you wish to appeal, you must act within thirty days of the date of the hearing. The necessary first step before any appeal may be taken to the courts, is to apply to the Zoning Board for a rehearing. The motion for a rehearing must set forth all the grounds on which you will base your appeal. See New Hampshire Statutes, RSA Chapter 677 for details.*

*2) If after a period of twenty four (24) months from the date a Variance or Special Exception is granted by the Zoning Board of Adjustment, the applicant has neither applied for nor received a Certificate of Compliance from the Board of Selectmen, the Variance or Special Exception will become void. An extension may be granted by the Zoning Board of Adjustment. Reference Article X, Section 10.16 (e).*



Town of Sunapee  
Zoning Board

Decision

You are hereby notified that the application of: DANIEL CAVE

For CASE #ZBA22-05: A SPECIAL EXCEPTION FROM ARTICLE III, SECTION 3.50 (I) TO REPLACE A PRE-EXISTING NONCONFORMING STRUCTURE WITH A VERTICALLY HIGHER STRUCTURE IN THE SAME FOOTPRINT, 90 BURMA ROAD

PARCEL ID: 0118-0051-0000

Has been APPROVED noting that the portion of the structure located within the reduced side setback is limited to no higher than 25-feet.

The decision was made at the MAY 5, 2022 Zoning Board meeting.

  
\_\_\_\_\_  
Zoning Board Chair

5.24.2022  
\_\_\_\_\_  
Date

*Notes: 1) Any person affected has a right to appeal this decision. If you wish to appeal, you must act within thirty days of the date of the hearing. The necessary first step before any appeal may be taken to the courts, is to apply to the Zoning Board for a rehearing. The motion for a rehearing must set forth all the grounds on which you will base your appeal. See New Hampshire Statutes, RSA Chapter 677 for details.*

*2) If after a period of twenty four (24) months from the date a Variance or Special Exception is granted by the Zoning Board of Adjustment, the applicant has neither applied for nor received a Certificate of Compliance from the Board of Selectmen, the Variance or Special Exception will become void. An extension may be granted by the Zoning Board of Adjustment. Reference Article X, Section 10.16 (e).*





Town of Sunapee  
Zoning Board

Decision

You are hereby notified that the application of: DANIEL CAVE

For CASE #ZBA22-06: A VARIANCE FROM ZONING ORDINANCE ARTICLE III, SECTION 3.40(C) TO PERMIT CONSTRUCTION OF AN APPROXIMATELY 65.28 SQUARE FOOT STRUCTURE 45 FEET FROM THE REFERENCE LINE OF PERKINS POND CONNECTING AN EXISTING COTTAGE TO A PROPOSED NEW DWELLING WHERE A 50-FOOT WATERBODY SETBACK IS REQUIRED, 90 BURMA ROAD

PARCEL ID: 0118-0051-0000

Has been APPROVED

The decision was made at the MAY 5, 2022 Zoning Board meeting.

  
\_\_\_\_\_  
Zoning Board Chair

5.24.2022  
\_\_\_\_\_  
Date

*Notes: 1) Any person affected has a right to appeal this decision. If you wish to appeal, you must act within thirty days of the date of the hearing. The necessary first step before any appeal may be taken to the courts, is to apply to the Zoning Board for a rehearing. The motion for a rehearing must set forth all the grounds on which you will base your appeal. See New Hampshire Statutes, RSA Chapter 677 for details.*

*2) If after a period of twenty four (24) months from the date a Variance or Special Exception is granted by the Zoning Board of Adjustment, the applicant has neither applied for nor received a Certificate of Compliance from the Board of Selectmen, the Variance or Special Exception will become void. An extension may be granted by the Zoning Board of Adjustment. Reference Article X, Section 10.16 (e).*

Town of Sunapee  
23 Edgemont Rd., Sunapee NH  
Phone (603) 763-3194 / Website [www.town.sunapee.nh.us](http://www.town.sunapee.nh.us)  
Email [zoning@town.sunapee.nh.us](mailto:zoning@town.sunapee.nh.us)

CASE# VA 23-04



## Zoning Board of Adjustment (ZBA) Variance Application

Questions? Please contact the Land Use & Assessing Coordinator or the Planning & Zoning Director. All dates and deadlines are published on the ZBA calendar; see Page 6. For helpful guidelines on completing this application, see page 4-5.

**Attach additional sheets of paper as necessary.**

Elizabeth and Stephen Foley

1. Landowner(s) Name(s): SUN-0136-0038-0000 Residential
2. Parcel ID: 84 Birch Point Road 3. Zoning District:
4. Project Location (Street & #): 6 Northgate Road, Wellesley, MA 02481
5. Mailing Address: 617-866-9608
6. Phone Number: sifoley6@gmail.com
7. Email:

☒ **ABUTTERS LIST:** You must prepare a list of all abutting property owners and attach it to your application. If you have any difficulty, consult the town office, but the accuracy of the list is your responsibility. You can download an abutters list by using the Tax Maps/GIS on the Town's website (under Assessing Department).

☒ **FEES:** Application Fee: \$150 \* Make check payable to Town of Sunapee.  
Abutter Notification Fee: \$8.13 \* per abutter. Make payable to US Post Office.

\* NOTE: Rates and fees are subject to change. For the most current rate, please check with the Town Office.

☒ **ATTACHMENTS:** To assist the board, please attach sketches, photos, surveys, plot plans, pictures, construction plans, or whatever may help explain the proposed use. Include copies of any prior Zoning or Planning decisions concerning the property. If you have something in writing stating that your proposed project does not meet zoning, please attach that to this application; it may be a letter, email or denied permit. A professional survey by a licensed surveyor is strongly recommended for variances related to setback requirements. For properties located in the Shoreline Overlay District, a professional survey is required. Supplemental materials for the Board must be submitted no later than five (5) days before the scheduled hearing, however, adequate plans and exhibits must accompany the application. This includes, but is not limited to: lot dimensions, dimensions of proposed and existing structures, identification of abutting properties and roads, locations of water bodies, wetlands, septic systems, etc.

*Applications will not be considered complete unless all the questions are answered, the fees are paid, and an Abutters Mailing List is attached.*

**GENERAL DESCRIPTION:** This is a place to give a general summary of the proposed project as an introduction and overview for the public hearing. For example, where is the property located? Describe the property. Give area, frontage, side and rear lines, slopes, natural features, etc. What do you propose to do? Why does your proposal require an appeal to the board of adjustment?

Property location: 84 Birch Point Road. Lot is ±25,257 SF with 130 linear feet of shoreline frontage. This property is located in the residential zoning

SEE ATTACHED DOCUMENT

Attach additional sheets of paper as necessary.

**SPECIFIC REASON THE VARIANCE IS NECESSARY:** A Variance is requested from Zoning

Ordinance, Article \_\_\_\_\_, Section \_\_\_\_\_ to permit \_\_\_\_\_

**Facts in support of granting the variance:** SEE ATTACHED DOCUMENT

1. Granting the variance would not be contrary to the public interest because: \_\_\_\_\_

2. If the variance were granted, the spirit of the ordinance would be observed because: \_\_\_\_\_

3. Granting the variance would do substantial justice because: \_\_\_\_\_

4. If the variance were granted, the values of the surrounding properties would not be diminished because: SEE ATTACHED

5. Unnecessary Hardship

a. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property because: SEE ATTACHED

- and -

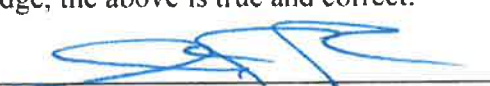
ii. The proposed use is a reasonable one because: SEE ATTACHED

b. Explain how, if the criteria in subparagraph (a) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it. SEE ATTACHED

NOTE:

For person(s) with physical disabilities,  
please see RSA 674:33 regarding alternative hardship criteria for a Variance.

**SIGNATURE:** I understand that the public hearing will be held at the scheduled date and time unless a request is made by me for a new hearing. Any rehearing will require a new public notice and notification to abutters, the cost of which will be borne by the applicant. Further, I hereby give permission to the ZBA members and zoning officials to visit the subject property prior to the public hearing. To the best of my knowledge, the above is true and correct.

  
Landowner(s) Signature(s)

5/2/2023  
Date

## APPENDIX A

### Helpful Guidelines for Completing the Variance Application, Part 1

**This information shall not be construed as legal advice  
or interpretation of the law in any way or form.**

**PURPOSE OF ZONING:** For more information about the “Purpose of Zoning” see Sunapee Zoning Ordinance Article I, Section 1.20 “Purpose”; Article II, Section 2.30 “District Purposes and Description”; and NH RSA 674:17 “Purposes of Zoning Ordinances” (as may be amended).

**ABOUT THE 5 VARIANCE QUESTIONS: (SEE APPENDIX B)** A variance is an authorization which may be granted under special circumstances to use your property in a way that is not permitted under the strict terms of the zoning ordinance. The Zoning Board of Adjustment (ZBA) must determine that the variance request satisfies the following 5 criteria. Please note that all criteria must be satisfied in order for a variance to be granted. Please provide a written response along with any other supporting documentation for each of the following criteria. Attach additional pages if necessary. Failure to satisfactorily prove any single criteria will result in denial of the application. The Applicant has the burden of proof. Applicants should be prepared to present information pertinent to the variance being requested. To obtain a legally granted variance, you must demonstrate/prove that the proposal satisfies ALL FIVE of the variance criteria.

**MORE INFORMATION:** It is recommended that you become familiar with the Sunapee Zoning Ordinance, as well as the state statutes that cover planning and zoning (New Hampshire RSA Chapters 672- 678). You can purchase a copy of the Sunapee Zoning Ordinance at the town office, or download a copy from the town’s website ([www.town.sunapee.nh.us](http://www.town.sunapee.nh.us)). The State’s RSAs can be viewed online at <http://www.gencourt.state.nh.us/rsa/html/indexes/default.html>.

**WHAT HAPPENS NEXT:** The board will promptly schedule a public hearing upon receipt of your properly completed application. Public notice of the hearing will be posted and printed in a newspaper and notice will be mailed to you and to all abutters at least five days before the date of the hearing. You and all other parties are invited to appear in person (or by agent or counsel) to state reasons why the appeal should or should not be granted. After the public hearing, the board will reach a decision. An official Notice of Decision will be made available within 5 business days, along with the minutes of the hearing.

**IF THE VARIANCE IS GRANTED, HOW LONG DO I HAVE TO BUILD IT?** If after a period of twenty-four (24) months from the date a Variance or Special Exception is granted by the Zoning Board of Adjustment, the applicant has neither applied for nor received a Certificate of Compliance from the Board of Selectmen, the Variance or Special Exception will become void. An extension may be granted by the Zoning Board of Adjustment. Reference Article X, Section 10.16 (e).

**WHAT IF I DISAGREEE WITH THE BOARD’S DECISION?** Any person affected has a right to appeal this decision. If you wish to appeal, you must act within thirty (30) days of the date of the hearing. The necessary first step before any appeal may be taken to the courts, is to apply to the Zoning Board for a rehearing. The motion for a rehearing must set forth all the grounds on which you will base your appeal. See New Hampshire Statutes, RSA Chapter 677 for details.

## APPENDIX B

### Helpful Guidelines for Completing the Variance Application – Part 2

**This information shall not be construed as legal advice  
or interpretation of the law in any way or form.**

SOURCE: State of NH Office of Strategic Initiatives, 2020 Handbook for Local Officials  
for The Board of Adjustment in New Hampshire.

<b><u>VARIANCE CRITERIA GUIDELINES</u></b>	
<b>Statutory Requirements (RSA 674:33, I(b))</b>	<b>Explanation</b>
<b><i>APPLICANT MUST SATISFY ALL OF THE FOLLOWING</i></b>	
1. The variance is not contrary to the public interest.	The proposed use must not conflict with the explicit or implicit purpose of the ordinance, and must not alter the essential character of the neighborhood, threaten public health, safety, or welfare, or otherwise injure "public rights."
2. The spirit of the ordinance is observed.	As it is in the public's interest to uphold the spirit of the ordinance, these two criteria are related.
3. Substantial justice is done.	The benefit to the applicant should not be outweighed by harm to the general public.
4. The values of surrounding properties are not diminished.	Expert testimony on this question is not conclusive, but cannot be ignored. The board may also consider other evidence of the effect on property values, including personal knowledge of the members themselves.
<p>5. Literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship can be shown in either of two ways:</p> <p>First is to show that because of special condition of the property that distinguish it from other properties in the area:</p> <p>(a) There is no fair and substantial relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property; and</p> <p>(b) The proposed use is a reasonable one.</p> <p><i>Alternatively</i>, unnecessary hardship exists if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.</p>	<p>The applicant must establish that the property is burdened by the zoning restriction in a manner that is distinct from other land in the area.</p> <p>(a) Determine the purpose of the zoning restriction in question. The applicant must establish that, because of the special conditions of the property, the restriction, as applied to the property, does not serve that purpose in a "fair and substantial" way.</p> <p>(b) The applicant must establish that the special conditions of the property cause the proposed use to be reasonable. The use must not alter the essential character of the neighborhood.</p> <p><i>Alternatively</i>, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance. If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.</p>

### **General Description:**

Property is located at 83 Birch Point Road. The lot is ±25,257 SF with 130 linear feet of shoreline frontage. This property is located in the residential zoning district, subject to the provisions of the shoreline overlay district; the required building setbacks are 50' from the reference line along Lake Sunapee, 10' from the sidelines, and 50' from the road center line.

This is a proposal to reconstruct the existing deck with a small modification to the footprint. The net square footage remains the same as the existing deck (718 SF), but the staircase is moved closer to the house by 10'3" (further from the shoreline), the front face of the deck (running parallel to the reference line) is brought closer to the house by 4", and the same front face is extended horizontally (parallel) to the reference line by 3'9". An infiltration drip-edge will be installed underneath the deck and native plantings beds will replace existing turf adjacent to the new deck.

The proposed modification to the footprint of the deck allows for improved functional gathering space and accessibility throughout those spaces.

### **Specific reason the variance is necessary:**

A variance is requested from Zoning Ordinance, Article VI, Section 6.12 to permit replacement of an existing non-conforming deck that does not stay within the horizontal footprint of the existing structure.

### **Facts in support of granting the variance:**

1. *Granting the variance would not be contrary to the public interest because:* The deck will appear similar to the existing structure and the modification/ reconstruction will enhance the aesthetic appearance and functionality of the deck. This modification will not threaten the public health, safety or welfare or injure public rights in any way.
2. *If the variance were granted, the spirit of the ordinance would be observed because:* The intent is to improve/ maintain the home and property and the modification to the deck and stairs is minimal and simply allows for improved function/ aesthetics. The net square footage is not increasing and a large portion of the deck is being pulled back from the Lake Sunapee reference line to try and reduce non-conformity.
3. *Granting the variance would do substantial justice because:* The benefit to the homeowner improves accessibility and functionality of the existing outdoor gathering spaces without harming the general public. The infiltration drip-edge underneath the new deck will reduce runoff into the lake and the new native plantings will improve the environmental health and natural character of the lakefront.



4. *If the variance were granted, the values of the surrounding properties would not be diminished because:* The net square footage of the deck is the same and the change in shape is very subtle when viewed from the neighboring properties. The infiltration drip-edge underneath the deck and the addition of native plantings will reduce stormwater run-off into the lake and improve the natural character of the shoreline. The aesthetic appearance of the deck will be improved by replacing the existing, older structure with a new deck that ties into the existing architecture of the home more seamlessly.

5. *Unnecessary Hardship:*

- a. *Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:*
- i. *No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property because:* Replacement of the non-conforming deck within same footprint does not allow for functional gathering space.  
-and-
  - ii. *The proposed use is a reasonable one because:* This proposal does not seek to increase square footage of the non-conforming deck or to increase the non-conformity, but merely proposes to reconfigure the layout to improve accessibility and function.
- b. *Explain how, if the criteria in subparagraph (a) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.* The current deck configuration provides limited accessibility and functional outdoor gathering space especially for older family members with limited mobility. Additional patio spaces could be implemented to increase gathering space at the lakefront, but would be less accessible and would have a greater impact on lake front character. This deck footprint modification would provide the most benefit to the homeowner with the least impact on the lake front.



NHDES VEGETATED SCORECARD: EXISTING CONDITIONS										
Diameter of Tree or Sapling	Cell A	Score (pts.)	Cell B	Score (pts.)	Cell C	Score (pts.)	Cell D	Score (pts.)	Cell E	Score (pts.)
1 to 3 inches (1 pt)	1	1	0	0	0	0	0	0	1	1
Greater than 3 to and including 6 inches (5 pts.)	1	5	0	0	0	0	0	0	4	20
Greater than 6 to and including 12 inches (10 pts.)	1	10	0	0	0	0	0	0	9	90
Greater than 12 inches (15 pts.)	1	15	0	0	0	0	2	30	0	0
TOTALS	4	31	0	0	0	0	2	30	14	111

SHORELINE FRONTAGE : 130'  
CONTIGUOUS SHORELINE : 126'

**Pre-Construction Impervious Area Calculations:**  
\*Existing area of lot located within 250' of the reference line = ±25,257 SF  
\*Pre-construction impervious area within 250' of the reference line = 9,161 SF  
\*Percentage of lot covered by pre-construction impervious area within 250' of the reference line = 36.2%  
**Pre-Construction Natural Woodland Calculations:**  
\*Total area of the lot between 50' and 150' from the reference line = 12,070 SF  
\*Total area between 50' and 150' of the reference line within which the vegetation currently exists as natural woodland = 1,290 (10.7%)

**Legend:**

Primary Structure Impervious Surface

Accessory Structure Impervious Surface

Natural Woodland

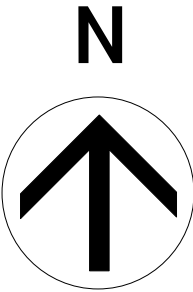
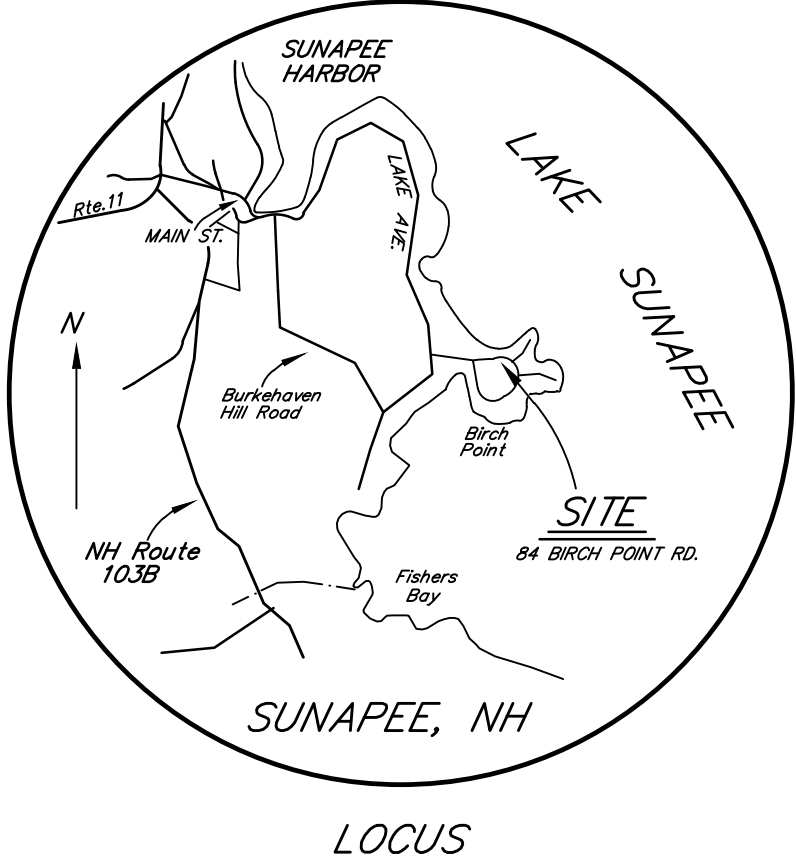


TREES WITHIN 50' LAKE BUFFER

CELL A	CELL E
A1 - 14" Red Oak	E1 - 9" Red Maple
A2 - 12" Red Oak	E2 - 7" Red Maple
A3 - 3" Spruce	E3 - 10" Hemlock
A4 - 5" Spruce	E4 - 9" Yellow Birch
CELL B - No Trees	E5 - 6" Hemlock
CELL C - No Trees	E6 - 12" Red Maple
CELL D	E7 - 9" Red Maple
D1 - 13" Red Oak	E8 - 7" Red Maple
D2 - 13" Red Oak	E9 - 9" Hemlock
	E10 - 6" Red Oak
	E11 - 7" Red Maple
	E12 - 5" Cherry
	E13 - 5" Cherry
	E14 - 3" Cherry

KEY

- Stone Retaining Wall
- Building Setback Per Zoning
- Lake Setback Per Shoreland Protection
- 1" Iron Pipe (found) - or as noted
- 3/4" Iron Rod (set- 2022)
- Stone Post
- Utility Pole/ Overhead Lines
- Edge Road/ Drive
- Culvert
- Edge of Lawn of Plant Bed
- Treeline
- Hardwood /Softwood Tree



NOTE: Landscape plan not intended for construction and is a conceptual representation of the landscape possibilities presented. All construction elements are subject to change. Contractor should verify field measurements at time of construction. Plan not intended for permitting use. Plan not intended for RFP or bid packages.

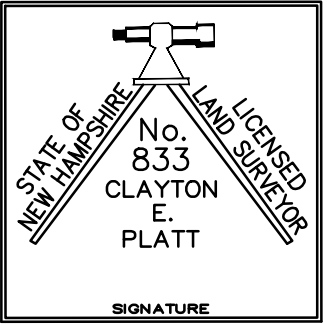
WARNER STONE  
LANDSCAPE DESIGN & CONSTRUCTION  
470 Newmarket Road, Warner, NH 03278

NOTES

- Deed References  
A. SCR Book 1925 Page 851, Robert and Barbara Gill Trusts to Elizabeth and Stephen Foley, September 30, 2014.  
B. SCR Book 270 Page 334, Ethel Dana to John Sullivan, August 9, 1940.
- This plan is the result of a Nikon total station survey, November 29, 2022, having a control traverse relative error of closure greater than 1: 15,000. All datum is referenced to NH State Plane with bearings rotated to magnetic north.
- All elevations are referenced to USGS datum based on GPS observation processed through OPUS. Elevations shown are referenced to NAVD29 datum, approximately 0.5' above NAVD88 datum.
- This property is located in the Residential Zoning District, subject to the provisions of the Shoreline Overlay District; the required building setbacks are 50' from the reference line along Lake Sunapee, 10' from the sidelines and 50' from the road centerline.
- No underground utilities were located as a part of this survey.
- Easements and Restrictions of Record:  
A. Right of way over private roads for the benefit of the subject parcel, granted in SCR 270-334, 1940.  
B. Utility easements reserved in SCR 270-334, 1940.
- There are multiple pipes in the vicinity of the NW corner of the property; a boundary line agreement as set forth in RSA 472:1-4 is recommended. It is advisable to set a new monument at the agreed to corner and removed the existing pipes.

REFERENCE PLANS

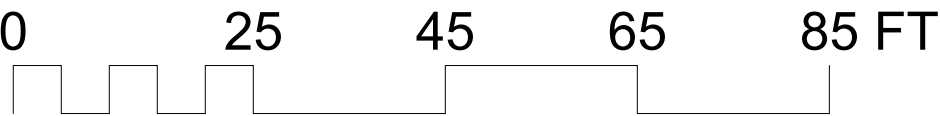
- SCR Pt.04, No.891 - "Property of Alois and Elizabeth Mayer., " by Walter Breckenridge, August 6, 1970.



PENNYROYAL HILL LAND SURVEYING & FORESTRY LLC  
CLAYTON E. PLATT L.L.C. SURVEYOR NO. 833  
418 Pine Hill Road Croydon, NH 03773 (603) 863-0981

Existing Conditions Plan

1" = 20'-0"



Foley Residence  
84 Birch Point Road  
Sunapee, NH 03728

Project:

Date:  
April 1, 2023

Dates Revised:  
May 2, 2023

Existing  
Conditions  
Plan

EX







PHOTO 1



PHOTO 2





PHOTO 3



PHOTO 4





PHOTO 5





PHOTO 6





PHOTO 7



PHOTO 8





PHOTO 9







The State of New Hampshire  
**Department of Environmental Services**

Robert R. Scott, Commissioner



**SHORELAND IMPACT PERMIT 2023-00964**

**NOTE CONDITIONS**

**PERMITTEE:** ELIZABETH/STEPHEN FOLEY  
6 NORTHGATE RD  
WELLESLEY MA 02481

**PROJECT LOCATION:** 84 BIRCH POINT ROAD, SUNAPEE  
TAX MAP #136, LOT #38

**WATERBODY:** SUNAPEE LAKE

**APPROVAL DATE:** MAY 18, 2023

**EXPIRATION DATE:** MAY 18, 2028

Shoreland Permit Application 2023-00964 has been found to meet or exceed the requirements of RSA 483-B as required per RSA 483-B:6, II. The New Hampshire Department of Environmental Services (NHDES) hereby issues this Shoreland Impact Permit with conditions pursuant to RSA 483-B:6, II.

**PERMIT DESCRIPTION:**

Impacts of 10,000 square feet of protected shoreland in order to rebuild and slightly modify an existing deck, install a pervious water access structure and pervious patio off the basement walkout, replace wooden and concrete steps with stone step sand landing, install vegetation, and replacement and modification of the existing driveway as a second phase of the project.

**Impervious Surface Percentage Approved:** 33.8%

**Natural Woodland Area Required per RSA 483-B:9, V, (b):** 1,290 square feet.

**THE FOLLOWING PROJECT-SPECIFIC CONDITIONS HAVE BEEN APPLIED TO THE PERMIT PURSUANT TO ENV-WQ 1406.15(c):**

1. All work shall be in accordance with plans by Warner Stone dated April 1, 2023 and received by the New Hampshire Department of Environmental Services (NHDES) on April 20, 2023 pursuant to Env-Wq 1406.15(f).
2. Within three days of final grading or temporary suspension of work in an area that is in or adjacent to wetlands or surface waters, all exposed soil areas shall be stabilized by seeding and mulching during the growing season, or if not within the growing season, by mulching with tack or netting and pinning on slopes steeper than 3:1 as required pursuant to RSA 483-B:9, V(d) Erosion and Siltation, (1).
3. All pervious technologies used shall be installed and maintained to effectively absorb and infiltrate stormwater as required per RSA 483-B:6, II and Rule Env-Wq 1406.15(c) in order to ensure compliance with RSA 483-B:9, V(g).
4. This permit shall not preclude NHDES from taking any enforcement or revocation action as authorized pursuant to 483-B:5, I, if NHDES later determines that any of the structures depicted as "existing" on the plans submitted by the applicant were not previously permitted or grandfathered.

**THE FOLLOWING STANDARD PROJECT CONDITIONS SHALL BE MET PURSUANT TO ENV-WQ 1406.20:**

1. Erosion and siltation control measures shall be installed prior to the start of work, be maintained throughout the project, and remain in place until all disturbed surfaces are stabilized.
2. Erosion and siltation controls shall be appropriate to the size and nature of the project and to the physical characteristics of the site, including slope, soil type, vegetative cover, and proximity to wetlands or surface waters.

[www.des.nh.gov](http://www.des.nh.gov)

29 Hazen Drive • PO Box 95 • Concord, NH 03302-0095

NHDES Main Line: (603) 271-3503 • Subsurface Fax: (603) 271-6683 • Wetlands Fax: (603) 271-6588

TDD Access: Relay NH 1 (800) 735-2964

3. No person undertaking any activity in the protected shoreland shall cause or contribute to, or allow the activity to cause or contribute to, any violations of the surface water quality standards established in Env-Wq 1700, and the requirements in Env-Wq 1404.01(a) and(b).
4. Any fill used shall be clean sand, gravel, rock, or other suitable material.
5. For any project where mechanized equipment will be used, orange construction fence shall be installed prior to the start of work at the limits of the temporary impact area as shown on the approved plans; be maintained throughout the project; and remain in place until all mechanized equipment has been removed from the site.

**ANY INDIVIDUAL CONDUCTING WORK UNDER THIS PERMIT IS ADVISED OF THE FOLLOWING:**

1. During construction, a copy of this permit should be posted on site in a prominent location visible to inspecting personnel.
2. This permit does not convey a property right, nor authorize any injury to property of others, nor invasion of rights of others.
3. Pursuant to Env-Wq 1406.21, transfer of this permit to a new owner requires notification to, and approval of, NHDES.
4. This project has been screened for potential impact to **known** occurrences of protected species and exemplary natural communities in the immediate area. Since many areas have never been surveyed, or only cursory surveys have been performed, unidentified sensitive species or communities may be present. This permit does not absolve the permittee from due diligence in regard to state, local or federal laws regarding such communities or species. This permit does not authorize in any way the take of threatened or endangered species, as defined by RSA 212-A:2, or of any protected species or exemplary natural communities, as defined in RSA 217-A:3.

APPROVED:



Craig W. Day  
Shoreland/Shoreline Specialist, Shoreland Program  
Wetlands Bureau, Land Resources Management  
Water Division

**THIS PERMIT IS NOT VALID UNTIL SIGNED BY THE PARTIES BELOW (Env-Wq 1406.21(c))**



PERMITTEE SIGNATURE (required)



PRINCIPAL CONTRACTOR SIGNATURE (required, if any)





# 50 foot Abutters List Report

Tri Town, NH  
April 14, 2023

## Subject Property:

Parcel Number: Sun-0136-0038-0000  
CAMA Number: Sun-0136-0038-0000  
Property Address: 84 BIRCH POINT RD

Mailing Address: FOLEY, ELIZABETH & STEPHEN  
6 NORTHGATE RD  
WELLESLEY, MA 02481

---

## Abutters:

Parcel Number: Sun-0136-0037-0000  
CAMA Number: Sun-0136-0037-0000  
Property Address: 90 BIRCH POINT RD

Mailing Address: FARMAKIS SUNAPEE TRST, WILLIAM  
BUCKLEY LIVING TRUST  
24 EAST AVENUE #1350  
NEW CANAAN, CT 06840

Parcel Number: Sun-0136-0039-0000  
CAMA Number: Sun-0136-0039-0000  
Property Address: 82 BIRCH POINT RD

Mailing Address: SUNAPEE RESIDENCE TRUST, THE  
ELIZABETH ROBINS PORTER, TRUST  
5000 SW 25TH PL #UNIT 4115  
GAINESVILLE, FL 32608

Parcel Number: Sun-0136-0063-0000  
CAMA Number: Sun-0136-0063-0000  
Property Address: BIRCH POINT RD

Mailing Address: TOWN OF SUNAPEE  
23 EDMONT ROAD  
SUNAPEE, NH 03782



[www.cai-tech.com](http://www.cai-tech.com)

Data shown on this report is provided for planning and informational purposes only. The municipality and CAI Technologies are not responsible for any use for other purposes or misuse or misrepresentation of this report.

4/14/2023

Page 1 of 1

1 **TOWN OF SUNNAPEE**

2 **ZONING BOARD**

3 **FEBRUARY 2, 2023**

4 **Ms. Silverstein called this portion of the meeting to order at 6:00PM.**

5 **MEMBERS PRESENT IN THE MEETING ROOM:** Ann Bordeianu, David Andrews, Jamie Silverstein, David  
6 Munn, Pierre Lessard, Jim Lyons.

7 **MEMBERS PRESENT VIA ZOOM:** Michael Jewczyn.

8 **ALSO PRESENT IN THE MEETING ROOM:** Scott Hazelton-Planning, Zoning and Compliance Director, Chris  
9 Murphy.

10 **PRESENT VIA ZOOM:** None

11 Ms. Silverstein appointed Ms. Bordeianu, Mr. Andrews and Mr. Lessard as members of the Board, for  
12 the purpose of this meeting.

13 **OTHER BUSINESS:** Alternate Member Interview: Chris Murphy.

14 Ms. Silverstein presented Mr. Murphy as a person who already had experience with a Planning Board in  
15 Massachusetts and said that his application was shared with other members.

16 Mr. Murphy said as of this fall, he is a full-time resident in Sunapee. He did Planning Board duty in  
17 Massachusetts for six years and worked in commercial real estate. He wanted to offer up an opportunity  
18 to help if needed.

19 Mr. Andrews asked if he had gotten involved with the Zoning Board in town at all.

20 Mr. Murphy answered that he had not, but there were a couple issues that overlapped, circumstance  
21 where they have met together.

22 Ms. Silverstein pointed out that they have a counselor who they can consult as a board member and  
23 that as a board they are charged to be impartial and to apply the ordinances. Alternate members are  
24 welcome to every meeting, they deliberate, but the vote is limited to five active members. If the board  
25 members are not present, the alternate members are appointed to vote.

26 **Ms. Silverstein made a motion to approve Chris Murphy as an alternate member for the ZBA for a**  
27 **term period of three years.**

28 **Mr. Lyons seconded the motion.**

29 **The motion was voted in favor unanimously.**

30 **Ms. Silverstein formally ended this portion of the meeting at 6:13PM.**

31 **CONTINUED**

**CASE #22-19 PARCEL ID: 0131-0006-0000 REQUESTING A VARIANCE FROM ARTICLE II, SECTION 2.30 (1)  
WETLANDS OVERLAY DISTRICT - FOR CONSTRUCTION OF A DECK WITHIN THE 25' WETLAND SETBACK.  
BRIAN COER 116 LOWER MAIN STREET; VILLAGE RESIDENTIAL ZONE.**

Brian Coer noted that in the new documents that he had sent, after talking to Renee Theall and after the suggestion from the Board on the last continuance, Article II was changed to Article III, Section 3.40 (c).

Mr. Coer continued presenting that he is the owner of an approximately 0.2-acre lot, in a property with a preexisting unique non-conforming residence situated at 116 Lower Main Street. The home was built in 1864. A variance has been requested to permit construction of a 16'x12' deck, 196 sq. ft. with a setback from Sugar River of 10' at the closest point and 21' at the next closest point. They are at 50' setback, as required. The construction of the deck will yield an impermeable lot coverage of a little bit under 29%, well within the 30% requirement listed in the ordinance. Granting the variance will not alter the essential character of the neighborhood, because the property will remain consistent with the residential use of structures in the area, and the residential structures routinely have decks that are also attached to the main body of a house. He showed the Board letters of support from both his abutter next door and the neighbor who lives across the river. Moreover, the deck would establish a safe and secure play space for his children and their guests. In this regard, the deck cannot only threaten the public health safety and welfare, but it will enhance the public health safety and welfare of his children and their friends, given the close proximity to the Sugar River. The proposed deck is not unreasonably large relative to the existing structure and only represents a 166 sq. ft. increase relative to the current landing and steps that are already there. The proposed location is the only feasible location. Approval of the variance would allow a reasonable use of the property, without harm to the general public and would enhance safety for the public. Construction solely involves three holes for footings, as far away from the water body as deck construction will allow. It will improve safety for the Town of Sunapee, and it is in accordance with the rigorous permeability standards of the decks of a neighboring State of Vermont. In addition, the construction of the deck has already been approved by the NH DES. The proposed addition is not only reasonable but it is consistent with the homes in the neighborhood and throughout Sunapee. The current landing and stairs need replacing. The replacement with a new deck built to the code and standards will enhance the property value and likely the surrounding properties as well. As for the unique nonconforming aspects of his property, he said that his property is the only triangular shaped single parcel within the residence in that area. According to the Sunapee Ordinance it is intended for structures on the use of four sides of parcels, and within the Ordinance, the references are front, rear and side setbacks and his property does not have all those. If the Ordinance were to be applied to his property, it would kind of be arbitrary. In addition, he said applying the Ordinance to dramatically nonconforming lot size for the Shoreline Overlay District and the Village Residential District requires a 1-acre lot and his lot is only 0.2 acres. He said there is no substantial relationship with the Ordinance in his property, therefore he was asking for his property to be relieved from the Ordinance.

(6:39 pm)

Ms. Silverstein noted two things: first was that if he put up a fence, he would not need a variance, and the second thing was that if he did a pervious patio, he would not need a variance. That way he would address the issue of child safety that he had mentioned.

Mr. Coer replied that a patio is a lot harder to enclose, and a lot more expensive to build than a deck.

73 Mr. Andrews mentioned that they had talked about it last time and asked if it is possible to push the  
74 deck away from the river.

75 Mr. Coer replied because of the nature of the house, there is nowhere for the deck to be moved further  
76 to the left of the property due to the construction of the house. It is built in 1860, so opening walls is a  
77 huge issue. The only access is through the garage.

78 Mr. Andrews noted that it is possible but just not convenient.

79 Mr. Coer replied that they are going to have setback issues if they go closer, just because of the lot size.

80 Mr. Lyons asked what the setback requirements for that zone are.

81 Ms. Silverstein noted that it could be fine on a 15' setback if he did it at 16'x12' deck and just pushed it  
82 over, away from the river.

83 Mr. Lessard asked Mr. Coer if he had any idea where the setback lines overlay on top of that, and the  
84 answer was negative.

85 Mr. Hazelton noted that side rear setbacks for preexisting nonconforming lot below the minimum sides  
86 are 10'.

87 Ms. Silverstein called for the members' attention to Appendix D from their current handbook, which  
88 addressed the discussion of hardship. Financial hardship was not enough, and the state is subordinate to  
89 the local Sunapee Ordinance. It was also noted that hardship does not exist if it just relates to the  
90 personal circumstance of the owner, which was child safety. She said that the challenge is to connect  
91 the hardship.

92 Mr. Andrews added that unnecessary hardship requires special conditions and as an example he  
93 mentioned the unusual shape of a lot that causes setback requirements to eliminate any reasonable  
94 building envelope. He said that Mr. Coer has an unusual lot but asked him does that unusual shape  
95 prevents eliminating any reasonable building envelope. If he could not move the deck one way or the  
96 other, that is one thing, but if sounds like he has chosen something that is convenient not necessarily  
97 the only option that is possible. (6:45 pm)

98 Mr. Lessard said that if they overlay the setbacks on top of this property line, they will find that is  
99 practically nowhere that they can build something that is not within setbacks.

100 Mr. Hazelton noted that it is 10' for nonconforming structures from side and rear setbacks, and in this  
101 case, side and rear setbacks are not defined, due to the triangular shape.

102 Mr. Lyons commented that he is not sure that this property is unique.

103 Dan Cave said that he reviewed the case and looking at the photographs, it looks to him that there is a  
104 deck there as far as can be in egress, and there is also a door there.

105 Ms. Silverstein explained that it is just a stair system, not a deck. She said that the question is if the door  
106 was not there, he would congest the existing egress to try and make the variance work or does the  
107 applicant have to consider putting an egress in.

108 Mr. Coer replied that under the Town Ordinances, he is allowed to put any 8'x4' structures out of any  
109 egress.

110 Ms. Silverstein asked Mr. Coer to show him where that is stated in the Ordinance. After looking at the  
111 Ordinance, members concluded that that part does not relate to the structure in his application.

112 Mr. Lyons was concerned about the fact that this particular variance might have to rest on the river  
113 front, considering the congestion along the shorefront.

114 Mr. Coer said that his question on that is whether the variance has its hardship to the land owner not  
115 hardship to the rest of the Town of Sunapee or the riverfront.

116 Ms. Silverstein replied that he is right, the hardship has to be related to the use of his land.

117 Mr. Lyons said this is related more to the spirit of the Ordinance in the sense that if that deck were to be  
118 expanded out, that might make a difference to other people who choose to use the river there or any  
119 water body.

120 Ms. Silverstein said that if it is safety that Mr. Coer is concerned about, a fence can provide it.

121 Mr. Coer replied that he is trying to be kind to his neighbors as well, since they had expressed in their  
122 letters of recommendation that they are both very anti-fence. The deck will increase the value of the  
123 property, which on the other hand the fence will decrease the value. (6:55 pm)

124 Mr. Jewczyn said that there is a lot of talk and mention about the safety of his children in Mr. Coer's  
125 application, but that should be disregarded because the property may not be suitable for someone who  
126 has individuals who are drawn to a water source. Any decision they make goes with the property.

127 Mr. Coer replied that a lot of the questions in the application talk about public safety, public health and  
128 welfare and that is the actual variance when it is described in those five questions. He added that he  
129 disagrees with Mr. Jewczyn's opinion.

130 Mr. Jewczyn replied that it is a misunderstanding because the ruling that they make goes with the  
131 property. The fact that Mr. Coer has safety issues is not a safety issue for the public; it is a safety issue  
132 that he perceives for his family and that is not considered there. The Board is making judgements on  
133 something that goes with the property; it has nothing to do with him personally. It is possible that the  
134 house he had purchased is not compatible with the way that he wants to use it and that is too bad.

135 Ms. Silverstein stated that the challenge for the Board is to connect the hardship to land use. She said  
136 that as mentioned to him last time, they are not in a business to put each other in harm's way, but he  
137 does have other options. He can fence in part of his yard; he could put a patio with a fence around it.  
138 The challenge is that the variance he is seeking has criteria that the Board must apply. They are in no  
139 way impeding his use of the land, the question is can he extend the footprint on the land.

140 Mr. Coer replied that due to the nonconforming unique nature of the property and the small parcel.

141 Dan Cave said that he feels as if they were a little bit off-path. The first question is if the property is  
142 unique or not. He does not think that they can argue that a 0.2-acre triangle that is bordered along the  
143 Sugar River is not unique. Secondly, he is not violating their coverage provision. Thirdly, he has a  
144 constitutional right to reasonably use the property, and his application is not an unreasonable use of the

145 property. A hardship can be caused by denying the variance and thereby denying the landowners  
146 constitutional of reasonably use of the property.

147 Ms. Silverstein stated that she thinks he is calling the hardship their decision or the Town Ordinance.  
148 (7:00pm)

149 Dan Cave replied that the language in the Ordinance says that the Zoning Board cannot place an  
150 unnecessary hardship on the landowner. So, the question was is that an unnecessary hardship on the  
151 landowner denying them their constitutional right to reasonably use the property. That he believed was  
152 the legal principle.

153 Ms. Silverstein said that the mischaracterization is that they are going to deny the use of this property,  
154 but there are other options.

155 Mr. Coer added that the other thing with putting a fence is that it takes digging to about fifteen holes to  
156 pour a concrete and that is a bigger environmental impact versus just three holes in a pervious deck.

157 Mr. Jewczyn commented that most people that buy a piece of property feel that they can do whatever  
158 they want with it. He said that you do not have that constitutional right to do whatever you want on a  
159 piece of property and asking a gear to hold for zoning regulations. The whole idea of prosecution should  
160 be thrown out, because that does not even apply. The building is closer to the water, it is not allowed,  
161 and it is not within the footprint, and he has options.

162 Mr. Coer replied that he is there to ask for exception for a relief from this variance, because his property  
163 is unique, nonconforming and it is less environmental impact in building the deck.

164 Mr. Hazelton stated that one of the things that he looks at is potential environmental impact. He had  
165 walked the property and seen the stone wall, which was technically the reference line of the river. If you  
166 were to bring in crew and equipment there would be significantly more environmental impact. The  
167 retaining wall folds back underneath the land so that does not overturn. The second thing that he had  
168 looked at was the back of the structure and he understands what the applicant had said about the  
169 location of the deck, so the opportunity to move that deck one way or the other, he thinks that that is  
170 the most suitable location that cost the applicant. It is not an undue hardship for the applicant to put it  
171 there. If he starts to reconstruct the house to put a deck in the other location, that is significant and that  
172 is something that he thinks the justice of their Ordinance speaks to. His overall concern was the  
173 environmental impact on the river and the things he looks at are the wetland overlay district, the  
174 shoreland overlay district, and the uniqueness of the lot. When they look at all these issues, it does not  
175 give the applicant any options, and that is why he is in front of them, because he has no options. He said  
176 that the applicant is asking for something that is standard use in a residential district. There are not  
177 many lots that are triangle and abut a force of a stream. When they look at the potential for a patio,  
178 there is obviously a lot more land disturbance. He also said that in his experience he had found out that  
179 people do not like fences, because they are not aesthetically pleasing and they fall apart.

180 Ms. Silverstein commented to Mr. Hazelton that it sounds like he is advocating.

181 Mr. Coer asked to make a phone call before they continued. After he reentered the meeting, he added  
182 that Mr. Claus had reached out to Alex Feuti, who is a wetlands and shoreline specialist from the NH DES  
183 and asked the members if Mr. Claus had shared his findings with them. (7:07 pm)



184 Ms. Silverstein replied that she did not know what the context of that discussion was and asked Mr.  
185 Coer if that was related to his case. (7:09 pm)

186 Mr. Coer replied that it was related to his case when he had talked to Alex Feuti, who was surprised that  
187 the State has approved it and the wetlands and shoreline specialist had approved it, and he had shared  
188 those thoughts with Jeff Claus in support of it.

189 Ms. Silverstein commented that the State was concerned about the pervious vs. impervious.

190 Mr. Coer replied that the State was looking at the closest to the river, not the pervious and impervious,  
191 and they have proved that it is less than 30%, which was within his right.

192 Mr. Andrews commented that they have not heard from Mr. Claus and it is up to Mr. Coer whether he  
193 wants to wait for a continuance until they hear from Mr. Claus or go ahead with a vote tonight.

194 Mr. Coer decided to move forward with the vote.

195 Ms. Silverstein closed the public session and went into deliberative. (7:10 pm)

196 Mr. Lyons said that he is concerned about the spirit of the Ordinance by having extra shoreline  
197 congestion along the Sugar River. He was concerned that this property is not unique. He said that it may  
198 be the only triangular property there, which he did not think it is, but added that there are certainly  
199 other irregular shaped properties all along Sugar River, some of which have structure, and some do not,  
200 but it does not matter. He did not find this property unique and did not think that this was a variance  
201 that they should grant.

202 Mr. Lessard read Appendix D, third paragraph which basically was saying that they are moving away  
203 from restrictive approach to something that is more considerate of constitutional right. He said that he  
204 disagrees with Mr. Lyons and his opinion was that the application is in line with the Ordinance and is not  
205 abnormal use of the property. The property is unique due to the size, shape, location and related  
206 setbacks. It is probably the least disruptive place you could put the deck without any additional costs.  
207 Environmentally, if it is good enough for the State, he did not see why they would not approve it.

208 Mr. Munn agreed with Mr. Lessard given that the property is so restrictive because of its physical layout.  
209 He could not see how else the applicant could put a deck there.

210 Mr. Jewczyn commented that it is possible that the property by its very nature is just not suitable for this  
211 encroachment on the water. Just because you want to do it, it does not mean that you should be able to  
212 do it. The fact that the applicant is professing that somehow it enhances the safety of his current  
213 situation, that is a non-argument. The applicant is definitely going beyond his footprint, he is  
214 encroaching on the water course. It is possible that when the house was purchased, these things should  
215 have been thought through. The fact that it is a financial burden is not a factor. He said that he is  
216 surprised that this was even brought before them.

217 Ms. Silverstein commented that she questions the hardship as well in the face of the fact that there are  
218 other options, in terms of a patio or a fence, that would allow the concerns of the applicant to be  
219 addressed, without further encroaching on the water side of the property.

220 Mr. Andrews commented that it may not be the only odd shape lot along the river, there are a few  
221 others, but he still thinks that they are in a minority, in terms of its shape, particularly with the river that

222 goes through the property. The odd shape is a hardship and he thinks that what the applicant is adding  
223 is reasonable.

224 Ms. Bordeianu agreed that it is an oddly shaped property and thinks that the alternatives are not as  
225 good as what the applicant is suggesting, mostly because of the disturbance of the land that would  
226 require. The abutters have been in support of it, so she thinks it seems reasonable.

227 **Ms. Silverstein made a motion to approve Case #22-19 Parcel ID: 0131-0006-0000 Requesting a**  
228 **Variance from Article III, Section 3.40 (c) the minimum setback between structures or parking areas**  
229 **and water bodies shall be 50' – to construct a deck no larger than 16'x12'. Brian Coer 116 Lower Main**  
230 **Street; Village Residential Zone. (7:20 pm)**

231 **Mr. Lyons seconded the motion.**

232 **The motion was voted in favor, with three votes for (Mr. Munn, Mr. Andrews, Ms. Silverstein) and**  
233 **two votes against (Mr. Lyons, Mr. Jewczyn). (7:26 pm)**

234 Ms. Silverstein called the next cases.

235 **NEW CASES**

236 **CASE # 22-22 PARCEL ID: 0127-0015-0000 SEEKING APPROVAL OF A SPECIAL EXCEPTION VIA ARTICLE**  
237 **III, SECTION 3.50(K) ADD A 50SQ FT ADDITION ONTO A PRE-EXISTING HOUSE LOCATED PARTIALLY OR**  
238 **ENTIRELY WITHIN THE 50' WATER BODIES SETBACK. 169 LAKE AVE DUR-HAM CORPORATION, SCOTT**  
239 **SCANLON. (7:29 pm)**

240 Ms. Silverstein called attention to the Board that there are two separate cases. They will hear from the  
241 applicant to discuss both, they will vote on them separately, but in the case of a special exception, there  
242 is no discussion of hardship. If the criteria are met, it is approved. In the case of a variance, they all seem  
243 to know what to do.

244 Chris Kessler, landscape architect from Gradient Architects LLC presented both cases on behalf of Scott  
245 Scanlon and Dur-Ham Corporation. Greg Grigsby from Gradient Architects LLC was present via ZOOM.

246 Mr. Kessler presented that the property is unique in nature due to its size and the steepness of the lot as  
247 it abuts Lake Sunapee. The structure itself was built originally around 1900's and it has been mostly  
248 unchanged since. The owners purchased it several years ago and it had been used as a summer  
249 residence. They are now interested in making some minor improvements, both interior and exterior, to  
250 help with the usability of the house, but their goal is to keep their structure as intact as possible. He  
251 presented both cases, one for the special exception, which was for the addition of the landward side of  
252 the structure, which was to add an approximately 2' bump out to the lower portion of the structure, and  
253 then a 3' bump out of the side of the building. The goal of the 3' bump out was to allow for a slightly  
254 more modern kitchen with slightly larger appliances and a little bit more room. Some of the unique  
255 features of the site that make both cases difficult to do were both the front and rear setbacks. The  
256 buildable land that was available on this lot was completely within steep slope. Therefore, there was no  
257 option besides a variance to move or continue to expand structure towards the road or into the  
258 buildable area without substantial excavation that would be needed in the steep slope district. Partially  
259 that was the reason that in the special exception they were coming up at that 2' mark. He clarified that  
260 there is already an existing small concrete wall that was about the 2' window that the building would be

261 taking up, so there was not a lot of disturbance that would be done by pushing the foundation back.  
262 They are not really getting into the hillside; they are utilizing some of the existing features. They were  
263 not looking for an extension of the roof line on that side, it will be under 25'.

264 Mr. Lessard asked for clarification if the owners are going to be rebuilding something, not just knocking  
265 down the wall and bumping everything out.

266 Mr. Kessler replied that there is a little bit of unknown with this because it is a renovation and not a  
267 whole reconstruction. The intent is to keep as much of the building as they can, but one portion is going  
268 to have some excavation that is going to need to happen, in order to support the utilities, within the  
269 footprint of the building itself. For the expansion on the addition on the kitchen and the upstairs  
270 bedroom, the reason that was in that area was that was no way to reasonably reconfigure the interior of  
271 the structure to get the slightly additional sq. footage without some form of variance.

272 Ms. Silverstein wanted to clarify that the hardship for the Variance was the steep slope.

273 Mr. Andrews asked between a 40' variance and/or a steep slope variance, which is most in the public  
274 interest?

275 Mr. Kessler replied that gets into the question of what the reasonable use of the building is. Because this  
276 is a renovation of an existing building and not a request to tear it down and rebuild it, they are kind of  
277 constrained by what the use is in the building itself. If they were going to go for the variance for the  
278 steep slope district, they would have to either rebuild the structure in a different footprint in order to  
279 get the bedroom indoor kitchen back into the steep slope area so that the sq. footage would be  
280 appropriate correctly versus in their case keep the majority of the structure and renovate what is  
281 already there, which the Master Plan recommends, trying to use the housing stock that is currently  
282 available to them, rather than rip it down and rebuild it, and change the character in the use, as in  
283 interior usable space.

284 Mr. Andrews replied that it is not clear what the public interest is, there is an impact on the homeowner  
285 and his cost of what he does, but it is not clear in terms of the difference in public interest.

286 Mr. Kessler said that he does not know if the cost is the right way to look at that. He had a feeling that  
287 the cost of renovating that building would be similar, if not more than taking it down and rebuilding it. It  
288 is the functionality of the building itself and how it is currently oriented on the site that makes it difficult  
289 to ask for a variance in the steep slope district. That is the hardship to the owner in trying to maintain a  
290 building that is already there. From the public's point of view, from an environmental standing point it is  
291 much more difficult to construct, retain and reestablish land in the steep slope district than on a leveled  
292 portion of ground.

293 Mr. Grigsby commented that one of the things that is going to benefit the public is less excavation on  
294 steep slope. They are identifying the highest leveled area that they can there. That is far less impact and  
295 therefore it is going to protect the water quality of the lake more so than digging an extra 4' into a steep  
296 slope district within 50' of the lake.

297 Mr. Hazelton commented that he would be concerned is if the applicant considers using the steep slope  
298 area, which could destabilize the indictment and temporary impacts needed for construction; the  
299 roadways would be cracking and that is going to be a reconstruction issue for the town.

300 Mr. Grigsby added that their proposal aims to avoid that.

301 Mr. Kessler said that in addition to the location, what they try to do is put it in a location where there is  
302 already a disturbed area and that is between the walkways that currently go down to the lake. In terms  
303 of distance to abutting properties taking into a side setback consideration, this is a location that is  
304 furthest to both abutters as they can possibly get. In terms of the public view, looking at the building  
305 from the lake, it should be a very minimal change from what exists now. In addition to the location, both  
306 additions create very little coverage or additional impervious area on their own. They are talking  
307 hundreds of sq. ft. or less than 0.5% for each of them, so there won't be substantial coverage that is  
308 going to be degrading the stormwater. They are going to have an engineered stormwater management  
309 plan at the end as part of the CZC, because there is going to be a different access way. (7:54 pm)

310 Mr. Jewczyn asked if they were going to rebuild the chimney.

311 Mr. Kessler answered that the specific chimney that Mr. Jewczyn is referring to is in the special  
312 exception application and his understanding from the architectural plans that were submitted was that  
313 this is going to go down as a one chimney house instead of a two-chimney house. He then went through  
314 the Criteria from the application.

315 Suzanne and Jim Gottling (Via ZOOM) stated that they are very pleased with this plan, and they are fully  
316 supportive as abutters.

317 Ms. Silverstein went into deliberative session.

318 **Ms. Silverstein made a motion to approve Case # 22-22 Parcel ID: 0127-0015-0000 Seeking approval of**  
319 **a Special Exception via Article III, Section 3.50(k) add a 50sq ft addition onto a pre-existing house**  
320 **located partially or entirely within the 50' water bodies setback. 169 Lake Ave Dur-Ham Corporation,**  
321 **Scott Scanlon. (8:01 pm)**

322 **Mr. Lyons seconded the motion.**

323 **The motion was voted in favor unanimously. (8:04 pm)**

324 **CASE # 22-23 PARCEL ID:0127-0015-0000 REQUESTING A VARIANCE FROM ARTICLE III, SECTION 3.40(C)**  
325 **THE MINIMUM SETBACK BETWEEN STRUCTURES OR PARKING AREAS AND WATER BODIES SHALL BE**  
326 **50' TO BUILD A 100SQ FT. ADDITION. 169 LAKE AVE DUR-HAM CORPORATION, SCOTT SCANLON.**

327 Mr. Kessler said that granting the Variance would not be contrary to the public interest. The public  
328 interest would not be altered because the character of the building is to remain the same. The use of  
329 the building being a residential structure is not going to be changed. The setback of the proposed  
330 addition is sufficient from both side and front setbacks, where both abutters and the public right away  
331 will not seek any increase in structure or use. The amount of impervious area that this structure is going  
332 to provide or create is minimum as well below the minimum standards of the Town. The location of the  
333 addition is such that it will not impact steep slopes for the building itself, which will create a better slope  
334 environment. If the variance were granted, the spirit of the Ordinance will be observed, because the  
335 structure as it is drawn meets the lot coverage building front and side setbacks, it does not make the  
336 building any more nonconforming in terms of its setback to the lake. The effect on the abutters will be  
337 minimal and it follows the intent of the Master Plan, which encourages the renovation of the existing  
338 housing stock, where feasible. Granting the Variance will do substantial justice because there will be no

339 negative impact on the surrounding neighbors or the public and will allow for the owner to exercise  
340 their rights to utilize their property in a safe manner. If the Variance is granted, the values of the  
341 surrounding properties would not be diminished, the addition is small in nature, so the massing of the  
342 structure would not be such that it would have a negative impact on any of the abutters. The sq. footage  
343 that will be added will not have any negative effect on the stormwater management. Unnecessary  
344 hardship-no fair and substantial relationship exists between the general public proposed the Ordinance  
345 provision and the specific application provided on the property. The special conditions that are on the  
346 site do not allow for any buildable buildings to be constructed without a variance. The proposed use is a  
347 reasonable one, it is maintaining a single-family residential home.

348 Mr. Andrews commented that the property is along the Lake Avenue which runs maybe 2-3 miles  
349 around from the harbor all the way-out Burk Haven. He asked if along that entire span is a steep slope.

350 Mr. Kessler answered negative because he said that according to the definition of the steep slope  
351 ordinances, it is a 25' slope with a minimum of a 25' rise in elevation change. The horizontal distance is  
352 defined by the 20' rise, so if you were to go over the entirety of Lake Avenue, very few have the 20' of  
353 elevation change in conjunction with a 25% slope.

354 Mr. Hazelton commented that he did not hear anything about erosion and sediment control on the lake.

355 Ms. Silverstein replied that the applicant mentioned that when he talked about the new stair system  
356 and had said that they are going to submit an erosion and stormwater management plan.

357 Mr. Kessler answered that part of the reason that they do not have the plan this evening was that the  
358 decisions that the board makes will affect how this gets permitted at the state level. The plans will be  
359 submitted as part of the CZC's.

360 Suzanne and Jim highly approved of this particular plan as abutters and hoped it passes.

361 Ms. Silverstein went into deliberative session. (8:16 pm)

362 Mr. Andrews stated that he struggles a little bit with the last issue that he raised in terms of reading the  
363 Ordinance. What the applicants are planning seems reasonable and it is a relatively minor change, so  
364 that does not seem to be hurting the public interest and the abutters are supportive. They had heard  
365 that if they have other choices and would have to go further back into the steep area is not necessarily a  
366 good thing from road maintenance perspective. In his mind, the question was how they interpret that  
367 portion of the town, is that big enough to be not considered a special condition, or do they accept that  
368 everybody in that section would want a special condition.

369 Ms. Silverstein agreed that the variance would make the property/house more nonconforming, but the  
370 other option tearing it down and rebuilding is a much more significant impact to the lake, to the  
371 property than granting the variance. The hardship is the steep slope that they want to reuse the existing  
372 home; a renovation is much harder than knocking the house down and starting it over, and the  
373 applicants want to have the minimum land impact. She sees merit in approving this variance.

374 Mr. Munn agreed that maintaining the largest portion of the house and the existing structure and the  
375 compromise of the 3' expansion was reasonable.

376 Ms. Bordeianu said she made notes on four things: it maintains the character of the existing house and it  
377 does not change the use of the house. It also is within the spirit of the Master Plan and being careful  
378 with not destroying too much land.

379 Mr. Lessard added that it does not go against any intents of the Ordinance.

380 **Ms. Silverstein made a motion to approve Case # 22-23 Parcel ID:0127-0015-0000 Requesting a**  
381 **Variance from Article III, Section 3.40(c) the minimum setback between structures or parking areas**  
382 **and water bodies shall be 50' to build a 100sq ft. addition that is measured as 3' deep by 10' long as**  
383 **shown on the plans presented. 169 Lake Ave Dur-Ham Corporation, Scott Scanlon. (8:24 pm)**

384 **Mr. Munn seconded the motion.**

385 **The motion was voted in favor unanimously. (8:25 pm)**

386 MISCELLANEOUS: Review Minutes from Previous Meeting(s).

387 The Board reviewed the December 1, 2022, Meeting Minutes and had no proposed changes.

388 The proposed changes for January 5, 2023, Meeting Minutes were as follows: line 82, the words have to  
389 do, to be added before the word something; line 244, number 320 to be changed to number 120.

390 The Board approved the reviewed Minutes, with the proposed changes. (8:47 pm)

391 **Ms. Silverstein made a motion to adjourn the meeting at 8:47PM.**

392 **Mr. Lyons seconded the motion.**

393 **The motion was passed unanimously.**

394 Respectfully submitted.

395 Rajmonda Selimi

**MARCH 2, 2023**

1 **TOWN OF SUNNAPEE**

2 **ZONING BOARD**

3 **MARCH 2, 2023**

4 **Chairman Claus called the meeting to order at 6:32 PM.**

5 **MEMBERS PRESENT IN THE MEETING ROOM:** Ann Bordeianu, Michael Jewczyn, Jeff Claus, Jamie  
6 Silverstein, Pierre Lessard, David Munn, Jim Lyons, Chris Murphy.

7 **MEMBERS PRESENT VIA ZOOM:** None

8 **ALSO PRESENT IN THE MEETING ROOM:** Scott Hazelton-Planning, Zoning and Compliance Director.

9 **PRESENT VIA ZOOM:** Shannon Martinez-Town Manager.

10 Chairman Claus announced the first case.

11 **NEW CASES**

12 **CASE # SE 23-01 PARCEL ID: 0104-0084-0000 SEEKING APPROVAL OF A SPECIAL EXCEPTION VIA**  
13 **ARTICLE IV, SECTION 4.10 FOR THE USE OF A MARINA IN THE VILLAGE COMMERCIAL DISTRICT. 1282**  
14 **ROUTE 11 GOODHUE SUNAPEE REAL PROPERTY LLC, PHILLIP HASTINGS.**

15 Phillip Hastings, attorney with Cleveland, Waters and Bass, Will Davis from Horizons Engineering and  
16 Cody Gray from Goodhue Marina presented the case. The project was a 5400 sq. ft. retail boat show  
17 room, a former single-family residence in a village commercial district. It would be a single-story building  
18 with parking for the sale of boats and watercraft. Mr. Hastings presented that there will be no service  
19 provided and there would be no storage. It would be solely a retail facility.

20 Chairman Claus asked why was it being classified as a marina?

21 Mr. Hazelton explained that under the definition of the ordinance, it is classified as a marina because it  
22 provides boat sales.

23 Mr. Hastings asked the Board if they could determine that this is not a marina, it is a retail sale, because  
24 this business only provides sales of boats and watercraft. He then continued with reading the five  
25 Criteria, as per their application.

26 Mr. Munn asked the applicant if the retail space would have a lighting sign out on the road?

27 Mr. Hastings answered that they have planned a signage on the building but not on the road.

28 Mr. Jewczyn asked the applicant about the received order from the DES and the caveat on the deed.

29 Mr. Davis answered that there was an inquiry about tree cutting which has been cleared and that there  
30 is no issue since it was cleared by the DES.

31 Chairman Claus noted that per their counselor the ZBA does not enforce the restrictions therefore they  
32 are not to be engaged in that matter.

33 Mr. Hazelton commented about the setback.



34 Ms. Bordeianu asked if the parking is going to be used just for the customers/visitors or is it going to be  
35 used for the boats as well. She also asked if there is going to be provided any kind of boat launch or  
36 concierge service. Her last question was if there has been any traffic study done at the location?

37 Mr. Hastings answered that there will be no boat parking there, just for the people visiting the  
38 showroom.

39 Mr. Gray answered that there will be no service provided from that side of their business.

40 Mr. Hazelton answered that the traffic study would be done during the site plan review process.

41 Mr. Jewczyn asked the applicant where are they going to put the snow?

42 Mr. Davis answered that there will be no need for the whole parking space in the winter, so there should  
43 be an adequate space in some of the parking spaces for the snow.

44 Mr. Lyons asked if there is going to be outside lighting for security purposes to prevent theft on the  
45 property.

46 Mr. Hastings answered that whatever lighting is going to be installed on the property will comply with  
47 the Town's Ordinance and site plan review regulations.

48 The Board members and the applicants discussed their concerns with the road access, occasional  
49 obstruction of the traffic, the high number of parking spaces on the premises, the possible increase of  
50 traffic and the visibility issues possibly implicated by the opening of this business. They also discussed  
51 the possibility of making Cooper Street a one-way street. During their discussion it was established that  
52 the showroom would rarely sell one boat a day and that would not contribute to safety risk increase in  
53 the parking due to trailer movements in and out of the parking and the driveway. The visibility issues  
54 would be overcome by regarding the property and cleaning up the vegetation around it.

55 Robin Saunders asked if there is going to be any water management plan, because of the impact that  
56 this project may have on the area, because the property is below previous surfaces to a lot of  
57 impervious surfaces, and the Otter Pond being next to it?

58 Mr. Davis answered that there will be a water management plan in the final design.

59 Cynthia Currier (Via ZOOM) asked if there is going to be asked for a fence variance since there is already  
60 a over 6' fence on that property? She also asked if the fence is going to remain there or be replaced. She  
61 commented that there was a natural woodland buffer to be replanted and asked if that was going to  
62 happen in that area?

63 Chairman Claus answered that there is where the retaining wall is planned to be built.

64 Mr. Davis answered that there will be a fence for safety and protection purposes at the top and the  
65 existing fence would be removed. He added that the plan is for the natural woodland buffer to be  
66 replanted.

67 Member of the audience asked if there is ever to be a change of use of this facility, would there need to  
68 be additional special exception?

69 Chairman Claus replied that it would have to be looked under allowed uses in a village commercial  
70 district and depending on what the use falls under, it would determine if there is a need for a special  
71 exception or variance.

72 After a discussion on the change of use topic, the Board brought up the option of putting a condition to  
73 this special exception regarding the change of use in the future.

74 Don Dupont asked if there is any plan for the 37 parking spots to be used for more parking functionality,  
75 so that the marina business could be increased.

76 Mr. Gray commented that the property and its use is not part of the principal plan, the proximity to the  
77 waterfront could help alleviate some of the parking congestion that exists in that area. He added that  
78 they also own the marina waterfront, former Sargent's Marina location, so the overflow short-term  
79 parking could utilize their parking area up top.

80 Paul Brown commented that the fence that was referred to earlier provides some protection to them as  
81 residents as well, so they have a concern when they hear that the fence is going to be replaced or  
82 modified. He asked if and how the fences are controlled in Sunapee?

83 Chairman Claus replied that depending on the heights there are restrictions, and 5' is the maximum, up  
84 to the property line. Anything above 5' falls into a minor structure and it needs to be applied by the  
85 setbacks.

86 Cynthia Currier (Via ZOOM) asked about the restriction that the property had in the deed.

87 Chairman Claus replied that it is not valid at the moment, because the restriction had been removed and  
88 the issue does not impact any decision that the Zoning Board needs to make.

89 Ms. Silverstein went back to the concern around the use of the facility and asked the applicant for  
90 suggestions to help alleviate the Board's concern surrounding approve of a special exception based on  
91 their application today, understanding that they are wary that the use could change at some point.

92 Mr. Hastings replied that they can take the rational reading of the Ordinance and determine that the  
93 business is not a marina because it is not located in the water and they are not doing any of the other  
94 things, other than the sale of boats. If the Board determine that it is not a marina, the applicant would  
95 not need a special exception, but if they did add the other uses in the future, they would be changing  
96 their classification from a retail use to a marina use, for which they would need a special exception.

97 Ms. Silverstein raised the question how would they approve them to be a retail facility if they are selling  
98 marina equipment?

99 The Board decided to take a short recess at 7:37 PM in order to consult with an attorney.

100 Don Dupont expressed concerns about the pedestrians crossing the road at the general store, regarding  
101 allowing people to park at the facility parking space, because the cross blocks were far apart, and asked  
102 the applicant what is the plan of getting them safely to cross the road?

103 Chairman Claus asked the applicant to list their intended use of the facility, so the Board can make a  
104 condition based on that.

105 Mr. Hastings replied that the intended use is for the retail, sales and display of boats and other  
106 watercraft inside the facility.

107 Mr. Gray added that they want to leave the option open for the property to be utilized for parking, as  
108 short-term customer parking, which could take some of the congestion off the waterfront property.

109 Chairman Claus went into deliberative session. He presented that the applicant had described what their  
110 use is going to be, so the Board can limit their decision on that. He mentioned the conditions that they  
111 had discussed: DES Shoreland Permit, Traffic Study by a third-party engineer and asked the members if  
112 they have exceptions or concerns to any of the Criteria.

113 The Board concluded that the Criteria are met, taking into consideration all the permits that the  
114 applicant would need to obtain. They discussed the conditions that needed to be set prior to making a  
115 motion of approval.

116 **Ms. Silverstein made a motion to approve Case # SE 23-01 Parcel ID: 0104-0084-0000 seeking approval**  
117 **of a Special Exception via Article IV, Section 4.10 for the use of a marina in the village commercial**  
118 **district. 1282 Route 11 Goodhue Sunapee Real Property LLC, Phillip Hastings. The use would be**  
119 **approved exclusively for retail sales and indoor display of watercraft and other marina equipment.**  
120 **Parking will be reserved for retail customers and Goodhue waterfront marina customers. Snow will**  
121 **not be stored or pushed over the bank from the parking lot toward Otter Pond Brook. A traffic study**  
122 **will be commissioned by a third-party engineer in advance of the site plan review and application to**  
123 **the Planning Board. This is contingent based on approval of the DES Shoreland Permit and as**  
124 **presented on a February 1, 2023 application and plan submitted tonight.**

125 **Mr. Lyons seconded the motion.**

126 **The motion was voted in favor unanimously.**

127 Chairman Claus called the next case.

128 **CASE # VA 23-01 PARCEL ID: 0104-0084-0000 REQUESTING A VARIANCE FROM ARTICLE III, SECTION**  
129 **3.40(J) THE CONSTRUCTION OF A RETAINING WALL OVER 42" IN HEIGHT WITHIN THE FRONT AND SIDE**  
130 **SETBACK. 1282 ROUTE 11 GOODHUE SUNAPEE REAL PROPERTY LLC, PHILLIP HASTINGS.**

131 Mr. Hastings presented that they had heard a lot of facts in the analysis of the previous hearing, so the  
132 record should reflect those facts as well. He stated that there were couple of unique features about this  
133 site that require a retaining wall along the easterly boundary. One was its general topography, which  
134 sorts of slopes afterward Otter brooks with its high point to the east. He noted that they need to be  
135 sensitive to the Otter brook watershed in terms of snow water management and erosion control in their  
136 site design. Because of the intersection and the traffic, there was an optimal location for the driveway  
137 on the site, on the easterly side. As mentioned previously, they are dropping the site by at least 6', to  
138 level it off and increase safety for vehicles entering and exiting from the site, as well as the Cooper  
139 Street. All of those factors that are unique to this property require some soil stabilization along the  
140 easterly boundary, which drives a retaining wall exceed 3 ½' maximum required by the Ordinance.

141 Mr. Davis presented the wall's vertical height as 10.73' and the proposed wall starts at the property line  
142 and comes down along the edge of the parking. The area from that point was the 10' setback. He  
143 presented the part of the proposed wall that was not compliant, which they were asking a variance for.

144 That portion was inside the 10' setback and the height was starting at 5' and ended up to 11'. Because of  
145 the proximity of the property line, the structural portion of the wall would be driven metal sheet pile  
146 with a wood finish material.

147 Mr. Hastings went through the Variance Criteria listed in their application.

148 Mr. Jewczyn asked what is on the other side of the fence and is there a roadway?

149 Mr. Davis answered that it is the boat club property and there is no roadway, it is a 30' wide strip of  
150 property.

151 Mr. Jewczyn commented that if for an unknown reason the wall should fail, it will seriously impact that  
152 property.

153 Mr. Davis agreed with that statement and Chairman Claus added that regarding those kinds of concerns  
154 the Board could make a condition of how the wall would be engineered.

155 Mr. Jewczyn commented that there would be a significantly high wall with a fence on top and that they  
156 have rules about the height of fence. He asked a hypothetical question if he can build any height fence  
157 and put one thing underneath it and another fence on top. He also asked for clarification if the proposal  
158 is a retaining wall plus a fence or a fence.

159 Chairman Claus explained that when it comes to fences, the visual impact is usually from the  
160 neighboring property. Therefore, the neighbor looking at that property is only going to see a 5' fence,  
161 not the wall itself.

162 Mr. Jewczyn argued that he is going to see what is beyond that as well and that it seems like an  
163 attractive nuisance.

164 Mr. Hastings added that the reason they have proposed the safety fence at the top was because they  
165 had anticipated that that would be a concern of the Board.

166 The Board agreed that it is absolutely a huge concern and hazard.

167 Ms. Bordeianu asked if there is going to be drainage along the bottom of the wall on the parking lot side  
168 and on the ground?

169 Mr. Davis answered that they have not done the final design but their intent is to do an underground  
170 detention and treatment system, so under a parking lot will be a chamber system for storm water and  
171 catch basin.

172 Mr. Lyons proposed a mandatory periodical cleaning out of the catch basin in the Variance.

173 Chairman Claus asked is the natural grade of the wall falling away from the wall on the backside?

174 Mr. Davis confirmed that and Mr. Hastings added that they would not be increasing any flow because of  
175 the retaining wall, since they are not changing the grading and the natural flow would continue.

176 Mr. Lyons noticed that at the south-eastern corner there were some contour lines that actually came  
177 out and it looked like they were touching the line angle and the elevations were 11.44' at the wall,  
178 11.46' south and east of it and 11.48' south. He added that it does pitch down to the wall at that corner.

179 Chairman Claus noted that the proximity to the property line would be a challenge but that was the only  
180 way of doing it.

181 Ms. Silverstein turned into Section 10.42 and wanted to discuss Criteria C: "Denial of the permit would  
182 result in unnecessary hardship to the owner". She added that the Board would have to connect  
183 statements of fact to any decision that they make, related to the Ordinance. She noted that the  
184 applicant is maintaining that the hardship is due to the topography of the land.

185 Mr. Hastings responded that the hardship is largely due to the topography, the size of the lot, as well as  
186 the safety issues with this location. All of those factors together require a driveway and a parking lot in a  
187 certain configuration, and to do that, they need to increase safety and drop the site down, which  
188 requires a retaining wall. So, it is a combination of factors that are unique to the site that require a  
189 variance from the Ordinance that creates an undue hardship.

190 Ms. Silverstein asked if the reason to drop the parking lot is to make it more leveled.

191 Mr. Hastings confirmed that and added, to improve the site distance for the driveway. The alternative,  
192 he presumed, would be, instead of dropping the site down and not having a retaining wall of that size,  
193 or any at all, to have a site that is above grade at the street level, which would come down at a very  
194 sharp pitch to Route 11. By depressing the site, it improves the access in and out, creating safer access  
195 and also increases the safety of the site lines between Cooper Street and this driveway. He added that  
196 literal enforcement of the Ordinance would increase the safety hazards.

197 Mr. Hazelton commented that he is not 100% sure that the overall explanation is a hardship, because  
198 there is a limitation whereas physical improvement of the site distance can happen.

199 Ms. Silverstein asked what if the retaining wall was not in the setback?

200 Mr. Hastings responded that they would lose a significant amount of the parking, which he said the  
201 Board acknowledged in their previous granting of the Special Exception that is important to have.

202 Ms. Silverstein denied that the Board had acknowledged that.

203 Mr. Lyons said that one of the reasons he agreed with granting the Special Exception was that the  
204 applicant got rid of the dirt. He believed that the property is truly unique based on the topographic  
205 constraints, the steep incline.

206 Chairman Claus disagreed with the safety concerns about the grading on the entrance. Based on his  
207 calculations with the current information given by the applicant, it would not be even a 2' of grade  
208 change in 50', or about 4%. The applicant would have to provide more information to contribute the  
209 claim that it is a hardship to get from the driveway out on that road in a safe manner, because that has  
210 been a driveway for many years.

211 Ms. Silverstein stated that they have to connect the hardship to a statement of fact, so, it cannot be  
212 extrapolated, it has to connect back to the Ordinance; just because they want more parking spots, does  
213 not make it a hardship.

214 Mr. Hastings argued that they are proposing a number of parking spots to serve the use and it is a design  
215 of the parking that is reasonable. They could probably do something different, but then the variance  
216 criteria would no longer be based on no other practical alternatives. After the Simplex decision, in the

217 number of cases, the use has to be reasonable. That is the only standard, whether there are other ways  
218 to do it, is irrelevant, if what they proposed is objectively reasonable. They think that for variety of  
219 reasons, building a 11' high retaining wall within a setback is reasonable, given the unique setting of that  
220 property.

221 Chairman Claus responded that Simplex in that case also states that a determination whether the zoning  
222 restriction has applied in the fears of the land owners reasonable use of the property and that  
223 reasonable return is not maximum return. When they take that into consideration, the 37 parking  
224 spaces look like are maximizing the lot as opposed to is there another reasonable outcome where  
225 parking is reduced so the wall does not have to be built there.

226 Mr. Hastings stated that he does not think that is the correct reading of Simplex and the correct reading  
227 is that the Board need to make a determination of whether the proposed variance is reasonable, not  
228 whether there are other reasonable ways to avoid having a variance.

229 Chairman Claus asked what is the unique characteristic of the site that distinguishes it from others.

230 Mr. Hastings replied that it is the size, the topography and the location.

231 Steve Root from the audience commented that the steep slope is a concern and the ADA Compliance  
232 about making the parking area flat should be taken into consideration as well. He asked about the  
233 service life of a retaining wall.

234 It was concluded that that the service life of a retaining wall could be hundreds of years.

235 Member of the audience asked about the secondary effect of the retaining wall with the snow removal  
236 which seemed to him that the only way is Route 11.

237 Ms. Silverstein said that the applicant had stated that they will use part of the parking lot in the winter  
238 for the snow.

239 Mr. Murphy asked is the protective fence on top of the retaining wall part of the application.

240 Mr. Hastings replied that they do not need a variance for that.

241 Chairman Claus went into deliberative session. He noted that the hardship criteria is always the  
242 challenging one, so it was challenging for him as well, because it was not clear to him from the  
243 applicant's answers. His opinion was that the elevation of the site is not consequential.

244 Mr. Jewczyn questioned the decision of lowering the lot 6' and instead suggested lowering it less.

245 Mr. Murphy raised the question of compromising the maneuverability needed to move the boats inside  
246 the lot if part of parking is lost and the lot remains as it is and does not get lowered.

247 Ms. Silverstein's opinion was that whether it is a 6' or a 10' retaining wall from the public space on the  
248 street and from the boat club side, it is not going to be visible, and that is a benefit aesthetically.

249 The Board had a discussion about the unique features of the site related to the hardship criteria, and  
250 had found it hard to classify the site as unique.

251 Ms. Silverstein stated that the denial of the variance does not limit the use of the site. Essentially the  
252 Board could not find fact in the hardship to grant the variance.

253 **Ms. Silverstein made a motion to deny Case # VA 23-01 Parcel ID: 0104-0084-0000 requesting a**  
254 **Variance from Article III, Section 3.40(j) the construction of a retaining wall over 42”in height within**  
255 **the front and side setback. 1282 Route 11 Goodhue Sunapee Real Property LLC, Phillip Hastings.**

256 **Mr. Jewczyn seconded the motion.**

257 **The motion was voted in favor with four votes for and one vote against (Mr. Lyons).**

258 Chairman Claus recused himself for the next case.

259 Ms. Bordeianu recused herself as well.

260 **Ms. Silverstein made a motion to appoint Mr. Lessard as an acting board member in place of**  
261 **Chairman Claus.**

262 Ms. Silverstein called the next case.

263 **CASE # AP 23-01 PARCEL ID: 0115-0030-0000 APPEAL FROM AN ADMINISTRATIVE DECISION MADE ON**  
264 **DECEMBER 8, 2022 OF THE PLANNING BOARD REGARDING THE DECISION OF THE TREE CUTTING &**  
265 **VEGETATION CLEARING UNDER SECTION 4.33 (B)(8)(b)(I) CUTTING AND REMOVAL OF NATURAL**  
266 **VEGETATION WITHIN THE NATURAL WOODLAND BUFFER ON NORTH SHORE ROAD (VACANT LOT).**  
267 **THE APPEAL WAS REQUESTED BY ROBIN SAUNDERS.**

268 Ms. Silverstein announced the first order of business was the rules and procedure of who has the right  
269 to make an appeal and asked Ms. Saunders is she is an abutter?

270 Ms. Saunders replied that she is an abutter in the sense that the lake, Perkins Pond abuts all of the  
271 people that live on it and that this was an issue of ecology in Perkins Pond.

272 Ms. Silverstein noted that the Board will have to determine whether or not the abutter has standing to  
273 an appeal of administrative decision. She asked Ms. Saunders to share with the Board why she feels that  
274 she has standing to appeal the Planning Board’s decision.

275 Ms. Saunders shared that she had thought that she would come to the Board to appeal the decision, but  
276 then was told that the reason will be only to find out if she is eligible to appeal the decision. Otherwise,  
277 there would have been a number of other people present there, including one of the abutters.

278 Ms. Silverstein told Ms. Saunders that she was misinformed and if the Board could determine during the  
279 discussion that she has cause to appeal the decision, they will hear the case at this meeting.

280 Ms. Saunders stated that she was not prepared to appeal the decision because she had been told  
281 different information.

282 Ms. Silverstein moved forward with the request for the appeal and said that if it is granted, they will  
283 schedule the actual appeal probably for May, because she will not be able to be present in the April  
284 meeting and Chairman Claus will have to recuse himself.

285 Mr. Murphy asked for clarification if there are two things going on; one was to determine whether there  
286 is a standing and then the other issue is the appeal itself.

287 Ms. Silverstein clarified that they were supposed to make the determination and have the hearing at  
288 this meeting.

289 Town Manager Martinez explained that the Town Attorney had recommended a continuance to the  
290 next meeting, since there is not enough information in the application to determine that the applicant  
291 has standing. She said that if the Town Attorney was present, her recommendation would be to  
292 deliberate and discuss whether or not there is standing or continue the case to the next meeting  
293 because of lack of information.

294 Mr. Lyons asked for clarification if the Town Attorney's legal opinion was that they do not have enough  
295 information to determine whether the applicant has standing.

296 Town Manager Martinez confirmed that and added that since Ms. Saunders is there, if the Board is open  
297 to it and Ms. Silverstein finds it reasonable, they can deliberate and come to a conclusion.

298 Ms. Silverstein suggested to continue the case and let the applicant revise the application, so that the  
299 record could reflect whether she has standing and that way it is all well thought out and the applicant  
300 would not be under any pressure at that point to try to convince the Board.

301 Mr. Jewczyn argued that it sounds like Ms. Silverstein is advising the applicant and that the Board can  
302 choose how to handle things.

303 Brad Allen, attorney for the landowner, present there for this case, requested that the Board move  
304 forward on determining whether or not there is jurisdictional standing without continuing it, because  
305 the application has been submitted, the applicant is present and he is present and ready to discuss on  
306 behalf of the landowner, and the Town Attorney had indicated that it would be appropriate. He stated  
307 that they could at least have a preliminary discussion about whether there is standing in jurisdiction. If  
308 the Board finds that is not, then the appeal can be dismissed, and if the Board finds that there is, they  
309 can come back for a substitute hearing on the application.

310 The Board decided to move forward on determining whether the applicant has standing.

311 Ms. Saunders stated that the abutter fff at first had signed the application but then was afraid of  
312 repercussion and that is why Ms. Saunders had decided to represent her and filled out the appeal form  
313 herself. She continued that she was a full-time yearlong resident on Perkins Pond for the past 22 years  
314 and water quality has been her number one focus and concern. Her education, knowledge and  
315 experience protecting waterbodies in Sunapee have earned the appointment by the Governor on the  
316 NH Public Water Access Advisory Board. While her home is not a physical abutter to the property on  
317 Northshore Road, all homes on the pond are connected by the pond, and together they share the  
318 responsibility for its care, maintenance and protection. According to NH RSA 676:5 she has standing to  
319 challenge the recent Planning Board decision involving tree cutting on the steep slope located on the  
320 North Shore Road property. As an aggrieved party, she believed that the environmental impact of tree  
321 cutting on the steep slope on the North Shore Road property will have a significant and negative impact  
322 on the water quality of Perkins Pond. She was deeply concerned about the potential damage of the eco  
323 system, including erosion, loss of habitat for wildlife, and additionally, this activity could lead to



324 increased runoff under Perkins Pond, which would further harm the delicate balance of this important  
325 natural resource.

326 Ms. Silverstein asked what is the proximity of Ms. Saunders's home to that property.

327 Mr. Jewczyn asked Ms. Saunders if she has a letter in writing saying that she is representing that person.

328 Ms. Saunders replied that she does not have it but she could get a letter and that she has a signed  
329 application.

330 Mr. Jewczyn noted that they do not have evidence that Ms. Saunders is representing the abutter and  
331 from everything she had said can be concluded that she is not an abutter.

332 Ms. Silverstein noted that they are not going to litigate the case, they are going to simply focus on  
333 whether or not Ms. Saunders has a cause to bring this case. She asked her to help the Board understand  
334 why she feels that she has a cause to bring this action and how she is harmed.

335 Ms. Saunders said that this property has a tremendous slope on it, somewhere between 30-52% and has  
336 always been a non-buildable lot.

337 Ms. Silverstein responded that if the owner chooses to build and they should get the permit and they  
338 are paying taxes, it is an allowed use.

339 Ms. Saunders argued that according to the Ordinance any undeveloped piece of property that has a  
340 slope over 25% is unbuildable.

341 Ms. Silverstein stated that Ms. Saunders is not qualified to testify what the slope of the property is and  
342 whether is buildable or not.

343 Ms. Saunders stated that the tree cutting application will cause a tremendous erosion and disruption to  
344 the ecological habitat around Perkins Pond and destroy the water quality.

345 Mr. Jewczyn said that what she is telling them is her opinion and not a statement of facts, without the  
346 engineering data. He added that technically everyone is affected by the lake dying due to ecological  
347 disaster. However, if the person wants to build on that lot and they can afford the engineering, they can  
348 do whatever they want, in the scope of things that are allowed.

349 Ms. Silverstein noted that Ms. Saunders is maintaining that she has the right to appeal any  
350 administrative decision on every lot on Perkins Pond.

351 Ms. Saunders responded that she is not, if it does not affect the water quality.

352 The Board determined based on the map that Ms. Saunders is not a direct abutter to the property.

353 Mr. Allen addressed two components. The first one was the jurisdiction and under the RSA 676:5 sub-30  
354 the ZBA only has jurisdiction over the administrative appeals that come from the Planning Board in the  
355 context of subdivision approval and site plan review. He stated that if someone thinks that the Planning  
356 Board made an error, should go through the Superior Court. To the extent of the appeal, under RSA  
357 677:15 the applicant had 30 days to appeal the tree cutting permit directly to the Appeals Board of  
358 Superior Court, which did not happen. The decision of the Planning Board has become final and the ZBA  
359 lacks jurisdiction over the appeal at this point. With regards of standing, even if this Board did have

360 jurisdiction over this appeal, under 676:5 sub-1, appeals to the ZBA may be taken by the person in  
361 grieved. He noted that an abutter has a specific meaning under RSA 672:13 and Ms. Saunders is not  
362 entitled as an abutter in this case. Based on the facts stated, he established that she is also not an  
363 aggrieved party.

364 Ms. Silverstein went into deliberative session.

365 Mr. Lessard said that he believes the landowner's attorney made a case under the RSAs.

366 Mr. Munn agreed with the facts as well.

367 Mr. Jewczyn stated that under their rules and laws, Ms. Saunders has not met the criteria.

368 Mr. Lyons was referring to Section 10.2 and asked for clarification and after a brief discussion, the Board  
369 determined that Ms. Saunders does not qualify to file an appeal under that Section.

370 **Ms. Silverstein made a motion to deny Case # AP 23-01 Parcel ID: 0115-0030-0000 appeal from an**  
371 **Administrative Decision made on December 8, 2022 of the Planning Board regarding the decision of**  
372 **the tree cutting & vegetation clearing under section 4.33 (B)(8)(b)(I) cutting and removal of natural**  
373 **vegetation within the natural woodland buffer on North Shore Road (Vacant lot). The appeal was**  
374 **requested by Robin Saunders. Based on the fact that the petitioner lacks standing and is not an**  
375 **abutter to this parcel.**

376 **Mr. Jewczyn seconded the motion.**

377 **The motion was voted in favor with four votes for and one vote abstained (Mr. Lyons).**

378 MISCELLANEOUS: Review Minutes from Previous Meeting(s).

379 There were no Minutes of Meeting reviewed.

380 OTHER BUSINESS:

381 **Mr. Munn made a motion to adjourn the meeting at 10:30 PM.**

382 **Mr. Jewczyn seconded the motion.**

383 **The motion was passed unanimously.**

384 Respectfully submitted,

385 Rajmonda Selimi

**APRIL 6, 2023**

1 **TOWN OF SUNNAPEE**

2 **ZONING BOARD**

3 **APRIL 6, 2023**

4 **Chairman Claus called the meeting to order at 6:34 PM.**

5 **MEMBERS PRESENT IN THE MEETING ROOM:** Michael Jewczyn, Jeff Claus, David Andrews, David Munn,  
6 Pierre Lessard, Chris Murphy, Jim Lyons.

7 **MEMBERS PRESENT VIA ZOOM:** Ann Bordeianu.

8 **ALSO PRESENT IN THE MEETING ROOM:** Scott Hazelton-Planning, Zoning and Compliance Director.

9 **PRESENT VIA ZOOM:** Shannon Martinez-Town Manager.

10 Chairman Claus announced the process of electing a Chairman and a Vice-Chairman of the Zoning Board.

11 **Ms. Bordeianu read a nomination request from Ms. Silverstein, where Mr. Claus was nominated for**  
12 **Chairman of the Zoning Board. Mr. Lyons seconded the nomination. All voted in favor.**

13 **Chairman Claus nominated Ms. Silverstein for Vice-Chairman of the Zoning Board. Mr. Lyons seconded**  
14 **the nomination. All voted in favor.**

15 **Chairman Claus nominated Mr. Andrews to sit in as an acting member, in absence of Ms. Silverstein.**  
16 **Mr. Lyons seconded the nomination. All voted in favor.**

17 Chairman Claus announced the cases.

18 **NEW CASES**

19 **CASE # VA 23-03 PARCEL ID: 0134-0037-0000 SEEKING APPROVAL OF A VARIANCE FROM ARTICLE III,**  
20 **SECTION 3.10 FOR THE CONSTRUCTION OF A TWO-CAR GARAGE WITHIN THE FRONT SETBACK. STEVE**  
21 **& HEATHER HORAN 231 LAKE AVENUE RESIDENTIAL ZONE.**

22 Steve Horan presented that they are seeking to build a 24'x24' two-car garage on the parcel of land  
23 across the street from the lakeside of Lake Avenue. They have no plans for water and sewer hookup, just  
24 for electricity. He explained the lot as roughly 100' wide by 200' back, largely predominately a steep  
25 slope. He said they tried to kind of balance the two variances. They want to build the garage on the  
26 north-east corner of the lot, which is the flattest piece of the lot. The lot immediately steps up about 6'  
27 from the edge of the road and then flattens out certainly less than 25% grade for maybe 30', and then  
28 continues up steeply from there. He presented it as arguably the only spot on the entire lot that they  
29 could likely build something. He thinks that potentially there is a spot suitable for building, all the way in  
30 the back, similar in grade, but that would create a significant amount of disruption.

31 Barry Paddock, from Paddock Construction mentioned a couple of other things concerning the building.  
32 He said the plan is for the building to be within the requirement of 25' or less in total height. They would  
33 be utilizing the entrance to the driveway at the far-left side of the lot, where there is an existing parking  
34 area, just to facilitate less disruption. The proposed digging was to try and bring the contour that is on  
35 the roadside of the building and chisel that with a hammer and an excavator, as close as possible to that

elevation, so the driveway would be constructed with the least amount of grade change as possible. Concerning the front setback of 30', the reason for the distance was that it was measured from the center line of the road, and that being considered, Mr. Paddock thinks that it is a reasonable distance from the street. He clarified that they are looking for a 20' reduction from the front setback. He then continued to read the facts in support of granting the variance and the criteria, from the applications, for both Variances.

Chairman Claus agreed that the entire lot is considered a steep slope and no matter where they would plan to build on that property, it would be a steep slope. The thing that the Board needs to consider under the hardship is the unique characteristic of the property, that is causing the hardship. He said that the characteristics that were noted under the facts in support of granting the variance and the criteria, such as a nonconforming lot, the majority of lots in that area are nonconforming. The steep slope is one of the characteristics of this lot, but all the lots have that. He added that he is failing to understand and see what is the unique characteristic of this property. He acknowledged the steep slopes, but added that there is nothing precluding them from building on that steep slope somewhere else where it conforms with the setbacks.

Mr. Jewczyn said that the regulation especially says that there is no construction on slopes exceeding 25%. It only refers to driveways, utilities and it does not address buildings. He added that there is a reason for that being in place, such as erosion and contamination issues.

Mr. Lyons noted that under Article III, Section 3.40 (I) states that there shall be no construction on slopes which exceed 25% and have an elevation change of more than 20'. Driveways, utilities and stairways would be exempt from this requirement providing drainage and erosion control plan is prepared.

Chairman Claus explained that if there was a portion of the property that was less than 25% slope and reasonably it could be built some form of structure there, they would not need for a variance, but the fact of the matter is that every inch of this property is in the steep slope. Therefore, there is no place to build without asking for relief from the Ordinance. In this case, if the Board were to deny the applicant's steep slope variance, they could not do anything with the property, and the Constitution does not allow that.

Mr. Jewczyn argued that they would not deny them the use of the property.

Mr. Hazelton noted that this lot was a nonconforming lot that was created prior to Zoning Ordinance and at that time was considered a buildable lot. The applicants now are asking for a variance for that steep slope issue.

Mr. Horan stated that it is unclear if the steep slopes refer to the entire lot or to a specific area of it.

Chairman Claus explained that it is based on calculations of the contours and that the average percentage of the grade.

Mr. Murphy said that if the Board agrees that they cannot restrict the applicant's right to use the property reasonably, then by denying the variance they would be creating an unnecessary hardship.

Chairman Claus asked the applicants if they have erosion control plans and the answer was that they were allowed to seek for approval for the variances without the plans.

75 Ms. Bordeianu asked if there was any input from the abutters about this proposal. She also asked what  
76 is the second story of the garage planned for.

77 Mr. Hazelton replied that he had received a phone call from an abutter who was asking questions and  
78 wasn't not supportive about the project and did not have any issues with the project.

79 Mr. Horan reacted that that gentleman was not an abutter and that Mr. Hazelton should have received  
80 an email and a letter from their abutters, which are very supportive of the project. About the second  
81 floor of the garage, his answer was that it is planned to be a workshop.

82 Chairman Claus went into deliberative session.

83 Mr. Jewczyn noted that they do not want to deny the applicants the use of the lot. He suggested for  
84 them to go further in, so they do not have to deal with the variance from the front setback.

85 Mr. Murphy argued that to create all this extra disturbance by moving the building all the way back, to  
86 him is not within the spirit of the Ordinance, because they all prefer for the land to be less disturbed.

87 Chairman Claus struggled with the hardship with this property. He asked what characteristics of this  
88 property are that are forcing the applicants to be nonconforming inside the setback.

89 The Board then had a discussion about the criteria. They had divided opinions about the application  
90 fulfillment of Criteria 1 and 2 and the argument was mostly about the unnecessary hardship and the  
91 uniqueness of the property.

92 Chairman Claus went through the conditions that the Board would like to put in place for both motions:  
93 Applicant must have an approved shoreland permit, approved driveway permit, erosion control plan  
94 prepared by a licensed engineer and that all retaining walls shall conform to the Ordinance.

95 **Chairman Claus made a motion to approve Case # VA 23-03 Parcel ID: 0134-0037-0000 Seeking**  
96 **approval of a Variance from Article III, Section 3.10 for the construction of a two-car garage with a**  
97 **Reduced Front Setback of 30'. Conditions that were previously integrated apply. The approval is based**  
98 **on drawings submitted with this package dated March 10, 2023. Steve & Heather Horan 231 Lake**  
99 **Avenue Residential Zone.**

100 Mr. Munn seconded the motion.

101 The motion was not passed, with three votes against (Mr. Jewczyn, Chairman Claus, Mr. Lyons) and  
102 two votes for (Mr. Andrews, Mr. Munn).

103 **CASE # VA 23-04 PARCEL ID: 0134-0037-0000 SEEKING APPROVAL OF A VARIANCE FROM ARTICLE III,**  
104 **SECTION 3.40(L) FOR THE CONSTRUCTION OF A TWO-CAR GARAGE ON A 0.360-ACRE NON-**  
105 **CONFORMING LOT, WITH A SLOPE WHICH EXCEEDS 25%. STEVE & HEATHER HORAN 231 LAKE AVENUE**  
106 **RESIDENTIAL ZONE.**

107 Chairman Claus made a motion to approve Case # VA 23-04 Parcel ID: 0134-0037-0000 Seeking  
108 approval of a Variance from Article III, Section 3.40(l) for the construction of a two-car garage on a  
109 0.360-acre non-conforming lot, with a slope which exceeds 25%. Part of this motion includes  
110 conditions of approval, as previously noted. The approval is based on drawings submitted with

111 architectural plan dated December 10, 2022. That structure will meet all dimensional controls. Steve  
112 & Heather Horan 231 Lake Avenue Residential Zone.

113 Mr. Lyons seconded the motion.

114 The motion was passed unanimously.

115 After a discussion and consultation with the members, it was decided that the Board needs to make a  
116 motion to deny for the first case.

117 Chairman Claus made a motion to deny Case # VA 23-03 Parcel ID: 0134-0037-0000 Seeking approval  
118 of a Variance from Article III, Section 3.10 for the construction of a two-car garage within a Reduces  
119 Front Setback of 30'. Steve & Heather Horan 231 Lake Avenue Residential Zone.

120 The motion was passed, with three votes for (Mr. Jewczyn, Chairman Claus, Mr. Lyons) and two votes  
121 against (Mr. Andrews, Mr. Munn).

122 MISCELLANEOUS: Review Minutes from Previous Meeting(s).

123 There were no Minutes from Previous Meeting(s) reviewed.

124 OTHER BUSINESS:

125 Mr. Lyons made a motion to adjourn the meeting at 9:18 PM.

126 Mr. Munn seconded the motion.

127 The motion was passed unanimously.

128 Respectfully submitted

129 Rajmonda Selimi

**MAY 4, 2023**



1 **TOWN OF SUNAPEE**

2 **ZONING BOARD**

3 **MAY 4, 2023**

4 **Vice Chairman Silverstein called the meeting to order at 6:35 PM.**

5 **MEMBERS PRESENT IN THE MEETING ROOM:** Michael Jewczyn, Jamie Silverstein, Pierre Lessard, David  
6 Munn, David Andrews, Chris Murphy, Jim Lyons.

7 **MEMBERS PRESENT VIA ZOOM:** Jeff Claus.

8 **ALSO PRESENT IN THE MEETING ROOM:** Cordell Johnston – Town Attorney, Scott Hazelton-Planning,  
9 Zoning and Compliance Director.

10 **PRESENT VIA ZOOM:** None

11 Vice Chairman Silverstein asked Peter White, Chairman of the Planning Board to join the discussion on  
12 informing the members that this week the Selectboard had made the decision not to enforce the  
13 Ordinance surrounding the short-term rentals. Basically, properties that were STR's prior to December 1,  
14 2022, will now not need to seek a special exception to the Zoning Board, for Rural Residential Zone.  
15 During the Vote in March, the popular vote had stated that they do need to seek a special exception.  
16 She pointed out that Peter White, Jeff Claus, Joe Butler, and herself had attended the Selectboard  
17 meeting that Monday evening and asked them to reconsider, and their request was denied. She added  
18 that she had shared the Minutes of Meeting with the members of the board. As part of their discussion,  
19 they emphasized the fact that the Zoning Board was prepared to hear all the cases and the same was  
20 expressed by Mr. White, on behalf of the Planning Board.

21 Mr. White noted that it is important to understand where the Selectboard is coming from, in a sense the  
22 Selectboard members who are the agents on enforcing the Ordinance basically are choosing not to  
23 enforce over at what they are calling a preexisting STR's with the ones in existence on and before  
24 December 1, 2022. Anyone after that will have to comply with the Ordinance. He added that there is still  
25 a registration process that everyone must go through, but the regulations will not apply to preexisting  
26 STR's, no matter what districts they are in. He noted that the Selectboard had recognized that it would  
27 be packed with cases and it would be too much for the Town's staff, and that was their excuse for  
28 choosing not to enforce the Ordinance.

29 Vice Chairman Silverstein announced that Chairman Claus was going to recuse himself at that point and  
30 appointed Mr. Lessard as an acting board member. She then called for the case.

31 **NEW CASE**

32 **CASE # VA 23-02 PARCEL ID: 0115-0030-0000 SEEKING APPROVAL OF A VARIANCE FROM ARTICLE III,**  
33 **SECTION 3.40(L) TO PERMIT THE CONSTRUCTION OF A SINGLE-FAMILY DWELLING ON A SLOPE THAT**  
34 **EXCEEDS 25%. THIS INCLUDES SLOPES MEASURED AS AN AVERAGE ACROSS AN AREA WITH AN**  
35 **ELEVATION CHANGE OF 20' OR MORE. VACATION HOMES, LLC BRETT W. ALLARD ESQ. NORTH SHORE**  
36 **RD. RURAL RESIDENTIAL ZONE.**

37 Brett W. Allard, legal counselor for the applicant, presented the case. He introduced Andy Mason,  
38 landowner, Jeff Claus, landscape architect and George Chadwick, engineer. The vacant lot was situated  
39 in the Rural Residential District and the Shoreline Overlay District, with approximately 0,16 acres which  
40 has shoreline frontage on Perkins Pond and a legal preexisting nonconforming record. The lot does have  
41 the capacity to be tied into the municipal water and sewer on North Shore Road. He stated that the  
42 Zoning Board had granted a variance to reduce the front yard setback on this property from 50' to 20' in  
43 July 2021. The proposed single-family dwelling with that variance fits in entirely within the building  
44 envelope without what is now the building envelope. At that time, it was the town's code enforcement  
45 staff's opinion that no other variances were required to permit this development. On March 8, 2022, the  
46 Zoning Ordinance was amended to prohibit construction on lots with slopes that exceed 25% including  
47 the lots with an average elevation change of 20' or more. He pointed out that the method in which the  
48 measurements were made was a little bit unclear in terms of the language of the Zoning Ordinance. He  
49 believed that they satisfy the variance criteria and pointed out that the new slope requirements exempt  
50 driveways, stairs, and utilities with submission of a drainage and erosion control report, which they have  
51 done. The only variance that they were asking for was to allow construction of a single-family home  
52 itself, and the proposal is zoning compliant.

53 Mr. Mason introduced himself and his family and said that they have been spending a lot of time in  
54 Sunapee and since 2019 have been thinking about the possibilities of buying a new house in Sunapee.

55 Mrs. Mason mentioned that Vacation Homes LLC caused some concerns amongst the residents and  
56 explained that it was her sister-in-law's idea who, as a lawyer, advised them to form up an LLC for  
57 financial reasons when they bought the house.

58 Mr. Allard went through the five variance criteria from their application. He also believed that they have  
59 satisfied the first hardship tests as well as the second test, owing to the special conditions of the  
60 property that distinguishes it from others, the property cannot be reasonably used in strict conformance  
61 with the Ordinance and therefore the variance is necessary to enable a reasonable use. This is a unique  
62 case and just like how the ZBA granted the front yard setback variance because there is no building  
63 envelope with the front yard setback and the shoreline setback overlapping, same thing with the slopes;  
64 they stretch across the entire lot, and they make it so there is no building envelope. He stated that if the  
65 Board were to deny the variance, and since there is nowhere else to put the house, the lot would remain  
66 vacant forever and the landowner is deprived of any reasonably viable use of it, which is contrary to the  
67 owner's Constitutional right to reasonably use and enjoy the property.

68 Mr. Chadwick presented the drainage report. He stated that the soil on this lot is well drained and that  
69 the lot is great for infiltration. For those reasons they have proposed pervious pavement infiltration type  
70 wells, to handle the runoff from the site. The site was being designed with multiple retaining walls in  
71 order to level out the slope that is about 33% currently. There is a 26' of grade change from the front to  
72 the back, and the 20' is maximum allowed, which is the reason they ask for this variance. All the roof  
73 water and the two driveways, the patios, the walkways are going to be built of either permeable  
74 material, or in the case of the roof, the water will be collected and put in a drywell situation, which  
75 allows the stormwater infiltrate into the ground. They have found that there is about 65% decrease in  
76 stormwater runoff as a result of this proposed development or design. It was his professional opinion  
77 that with this design and if constructed properly that the proposed design will actually be better for the  
78 lake than the existing 33% slope. It not only reduces flow to the lake, but it also reduces the velocity of

79 stormwater getting to the lake, as velocity creates erosion. A sill fence was designed around the entire  
80 perimeter of work and if that fence is built and installed correctly will stop any runoff from the site, as a  
81 means of stopping stormwater from proceeding down the hill.

82 Vice Chairman Silverstein opened the session for public questions.

83 April Royce from the audience, a direct abutter to the property, stated that this project does not meet  
84 the criteria at all, based on the 25% slope, added that the criteria existed since 2004, way before the  
85 property was bought by the actual owners. She also pointed out that the surrounding properties would  
86 suffer diminutive value, that the project could affect the watershed, the size of the home would not fit  
87 with the rest of the existing neighborhood, due to the proposed large size of it. The public had clearly  
88 voted to prohibit construction on slopes that are more than 25% in 2022, and that was originally  
89 adopted in 2004. She said that denial of the variance request would not result in unnecessary hardship  
90 to the owner, because they had purchased the property with the zoning language in place.

91 Lynn Arnold noted that other variances would be required for the retaining walls and side setbacks.

92 Robin Saunders said that protection of Perkins Pond is her only goal. She stated that the plan submitted  
93 by JCLA Land Design listed the slope of the lot as 29% plus or minus while Mr. Claus' testimony on July 1,  
94 2021, Zoning hearing for variety of variances was that the slope is between 30-42%. She further talked  
95 about the regulations that Sunapee has in place to protect Perkins Pond from steep slope erosion.

96 Catherine Priest said that they finally built a permanent home five years ago and they could not extend a  
97 deck because their house was 50' from the water, so they had to move the house back.

98 Domenic Tripoli said that he was requesting for a 12' extension to his 9' deck and was not allowed.

99 Tanner Royce, abutter (Via ZOOM) noted that none of the other houses on that road are constructed on  
100 a slope of that nature. His home was actually built closer to the water, in the 40's or 50's, and that is  
101 why it was able to avoid the slope regulations. He emphasized that each of the five criteria has to be  
102 met and that he had a hard time understanding the spirit of the Ordinance is not to prohibit  
103 construction on slopes of 25% or more, as that language was adopted in 2004 and had additional  
104 language added in 2022.

105 Mr. Allard responded to the comment that other variances were denied, so this one should be denied as  
106 well. He reminded the Board that other decisions on variances do not set precedent, whether they are  
107 approved or denied, as each case is unique. They know that the slopes are steep, and the erosion is bad  
108 for the water quality of the lake, but as they heard from Mr. Chadwick, they are going to make things  
109 better than existing conditions. Their erosion control plan reduces the stormwater runoff into the lake  
110 to 65%, based on stabilizing the site by reducing the slopes. In terms of relying on the Master Plan, he  
111 noted that the Master Plan is a document that guides the town's development of the Zoning Ordinance,  
112 and once it is in place, they must look at the requirements and apply the variance criteria. In regards of  
113 the variances for the retaining walls in the setbacks, he stated that it's not the case; they can go up to  
114 42' in the setbacks. Lastly, about the comment that his client should have known about the slope  
115 restriction or did know about it when they bought the property, therefore they cannot demonstrate  
116 hardship, he noted that the Supreme Court has weighed in on this exact issue.

117 Vice Chairman Silverstein closed the public session and went into deliberative session.

118 Vice Chairman Silverstein recessed the meeting at 7:51 PM to consult with the counsel.

119 The deliberative session continued at 8:03 PM.

120 Mr. Andrews said that his sense is that they do have a lot of neighbors who are objecting, but they have  
121 an expert opinion about the erosion as well, because most of objections are sent around the impact of  
122 erosion on the lake. He added that It was not clear if there is any evidence presented contrary to the  
123 expert about the impact of erosion on the lake, so it was hard in his mind to justify that this variance  
124 was against the public interest. In terms of hardship, it did seem that the property has an unusual slope  
125 to it, so there is a uniqueness to the property. The slope requirement is there to protect the lake, but if  
126 they have a plan to mitigate the erosion issues that the rules are intended to protect, he thinks that  
127 would provide a pathway to grant the variance, subject to that erosion plan.

128 Mr. Jewczyn said that looking at the five criteria, whether or not any value was being diminished to the  
129 surrounding properties, knowing the general nature of the neighborhood and the fact that it is new  
130 construction would be a benefit to the public interest, if properly done. He added that the owner could  
131 also use the land for other purposes besides the house. It all comes down to the ability of the engineer  
132 to make it work, taking the steep slopes into consideration. Granting the permit is substantial justice and  
133 he would vote yes for this case, the use will not be contrary to the spirit of the Ordinance.

134 Mr. Lessard said that looking into the five criteria in terms of being contrary to the public interest,  
135 having a residence on a residential property, lakefront is similar to the other neighbors. He hears the  
136 concerns about the water quality, but he thinks that from their erosion plan and the statements from  
137 their expert, the applicants are considering that and looking to mitigate and improve it, which is in line  
138 with the spirit of the Ordinance about protecting from erosion. As far as substantial justice, the only  
139 person that is affected by the decision is the applicant. Some of the feedback goes to the erosion and  
140 the water quality, but he does not think that if the Board denies the variance and the applicant don't  
141 build there, the erosion process will stop, because it takes more than just one property to address that.  
142 There is a problem, but not specific to this lot, it is something that the whole community has to do. He  
143 concluded that the applicant had met the criteria.

144 Mr. Munn mentioned that there was a relief valve put in to control erosion and that concern about the  
145 lake is going to be mitigated by the use of construction materials to prevent it. It leads him to believe  
146 that with the erosion plan, they have made the effort to address the water flow.

147 Mr. Murphy said that it is a real dilemma to have so many folks in the neighborhood oppose something  
148 like this and then to have to balance that with the criteria that the Board has to look at, which he thinks  
149 the applicant had met, especially the hardship. He thinks the property is unique and distinguished from  
150 others due to the steep slope, but it's still troubling that so many people in the neighborhood oppose it.  
151 Nevertheless, they still must go by the rules of their ordinances and laws.

152 Mr. Lyons was not sure that this is not contrary to the spirit of the Ordinance, he worries about erosion  
153 control not working, that it is not designed up to that task. He has no way of knowing whether the  
154 values of the surrounding properties are being diminished, because one house on a 23% grade probably  
155 won't trip the lake in bad things, but certainly if every 25% grade was built, it would clearly be a  
156 contributor to the degradation of the waterbody. The biggest problem for him was the hardship,

157 because he believes that this property is not unique. He did not think that this was a reasonable  
158 proposal for this particular lot, mainly due to the proposed size of the house.

159 Vice Chairman Silverstein replied that to her, the remark of Mr. Lyons about the size of the house is  
160 subjective and their job is to evaluate the application as is. From her perspective, the expert testimony  
161 solidified that there is a benefit to the public interest, because the erosion will be controlled and the  
162 runoff into the lake will be reduced. The spirit of the Ordinance is observed through the drainage they  
163 have included in the plan, as well as the maintenance schedule. The substantial justice, public versus  
164 private, is also served. In terms of the hardship, there were two different criteria, and she thinks that  
165 they both have been met. This is a reasonable use and with strict conformity of the Ordinance, it is a  
166 hardship. It is buildable, except for the steep slope, so she would support the application.

167 Mr. Lyons asked if the motion would include the maintenance plan and Vice Chairman Silverstein  
168 answered affirmative.

169 Mr. Hazelton suggested a condition for the motion that third-party engineers observe construction and  
170 inspect the erosion and sediment control, as they have done for other projects.

171 **Ms. Silverstein made a motion to approve Case # VA 23-02 Parcel ID: 0115-0030-0000 Seeking**  
172 **approval of a Variance from Article III, Section 3.40(I) to permit the construction of a single-family**  
173 **dwelling on a slope that exceeds 25%. This includes slopes measured as an average across an area**  
174 **with an elevation change of 20' or more. Vacation Homes, LLC Brett W. Allard Esq. North Shore Rd.**  
175 **Rural Residential Zone, with the following considerations: there will be a third-party engineer to**  
176 **observe and inspect construction and sediment control; the Town will be supplied with a maintenance**  
177 **plan for erosion control that the property owner will support.**

178 **Mr. Jewczyn seconded the motion.**

179 **The motion was passed, with one vote against (Mr. Lyons).**

180 MISCELLANEOUS: Review Minutes from Previous Meeting(s).

181 There were no Minutes from Previous Meeting(s) reviewed.

182 OTHER BUSINESS:

183 Board members discussed the collaboration between the two boards with Peter White, Chairman of the  
184 Planning Board.

185 **Mr. Lyons made a motion to adjourn the meeting at 8:41 PM.**

186 **Mr. Munn seconded the motion.**

187 **The motion was passed unanimously.**

188 Respectfully submitted

189 Rajmonda Selimi