



December 6, 2023

Via E-Mail and Hand Delivery

Janice Loz
Landuse Administrator
5 Main Steet
PO Box 265
Warner, New Hampshire 03278

**RE: Motion for Rehearing
D'Aprile Variance Application, 115 Bible Hill Road (Map 12, Lot 5)
Case No. 2023-05**

Dear Ms. Loz:

I represent James Gaffney and Joe DeFabrizio. Enclosed please find their Motion for Rehearing of the Town of Warner Zoning Board of Adjustment's grant of a Variance to Pier D'Aprile, 115 Bible Hill Road (Map 12, Lot 5) to the terms of Article VII.C.1.a of the Warner Zoning Ordinance.

Please feel free to contact me if you have any questions.

Sincerely,

Mike Harris

Mike Harris
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Cc: Client
Ms. Karen Coyne, Planning Board Chair

**Motion for Rearing
Filed December 6, 2023**

**Town of Warner, N.H.
Zoning Board of Adjustment**

***In re* Pier D'Aprile Variance Application
115 Bible Hill Road (Map 12, Lot 5)
Case No. 2023-05**

Dear Chair Marty and Members of the Board:

I represent James Gaffney and Joe DeFabrizio, who respectfully submit this Motion for Rehearing of the Town of Warner Zoning Board of Adjustment's grant of a Variance to Pier D'Aprile, 115 Bible Hill Road (Map 12, Lot 5) to the terms of Article VII.C.1.a of the Warner Zoning Ordinance. This Motion is brought under RSA 677:4.

Factual Background

The Applicant, Pier D'Aprile, owns an approximately 48.5-acre lot at 115 Bible Hill Road in Warner, N.H. (Tax Map 12, Lot 5). As on other Bible Hill Road properties, a historic home (circa 1798) stands on the Applicant's property close to the existing road. Similarly, like other properties on Bible Hill Road, a portion of the property is undeveloped. This, among other things, makes the current configuration of Applicant's property consistent with the unique historic nature of this neighborhood.

The Bible Hill Road community is unique for several reasons. First, many properties are within two town Zoning Districts. In most cases, the portion of the property fronting Bible Hill Road is in District R3, which provides for low-density residential use on land remote from municipal services and requires larger minimum lot sizes. The portion of the property further back from the Road is within District OC-1, the Open Conservation District. This dual zoning has preserved Bible Hill Road as a historic community, where older homes are close to the road, and the back portion of the lots remain undeveloped and rugged.

Second, this area includes rugged terrain, steep slopes, and limited access. Bible Hill Road is difficult to navigate, with steep grades and limited places for turnarounds. Development on property located in the OC-1 District would not only change the character of this community but could create neighborhood-wide problems with drainage, emergency access, and light glare.

Finally, the community on Bible Hill Road is within two towns—Warner and Bradford. As such, both towns must work to preserve the character of this neighborhood.

Here, the Applicant seeks to subdivide his land to accommodate new development on the back portion of his property. The proposal is to create two lots. The first, located close to Bible Hill Road, is for a 3.5-acre lot within the R03 District. On this property sits the

existing home. The second property would be approximately 45 acres, consisting of the currently undeveloped back portion of the property, which is largely in the OC-1 District. A new home is proposed for this second lot. If built, it would be located more than 1000 linear feet and 100 feet in elevation from Bible Hill Road.

The Applicant sought approval for a minor subdivision before the Warner Planning Board. The Planning Board determined that there is insufficient frontage along Bible Hill Road to support creating two lots under the Zoning Ordinance. A minimum frontage of 250 feet is required within the R-3 District. A minimum frontage of 300 feet is required within the OC-1 District.

The Applicant's property has only 330 feet of frontage on Bible Hill Road. This is due to the "L" shaped nature of the property. As such, while the smaller proposed lot can meet the minimum frontage requirement in the R-3 District, it would leave only 80 feet of frontage for the larger lot, well below the OC-1 District requirement.

The Planning Board determined it could not approve the minor subdivision without a variance from Article VII.C.1.a. The Applicant submitted a Variance Application to this Board on August 25, 2023. The Board held a Public Hearing on September 13, 2023. After a 2-month continuance, the variance was granted on November 8, 2023, by a 3-2 vote of the Board.

Mr. Gaffney and Mr. DeFabrizio, who both testified at the public hearing, timely move for a Rehearing.

Basis for Rehearing

The Town of Warner Zoning Ordinance incorporates the statutory criteria for granting a variance in Article XVII.D. To grant the requested variance, the Board must find that the Applicant has satisfied the five standards of RSA 674:33, I(b)(1)-(5). The Applicant bears the burden of proving **all** five of the variance standards. Bartlett v. City of Manchester, 164 N.H. 634, 637 (2013).

In this case, the Applicant provided little information to support the application for the variance. The entire basis for the variance is based upon the Applicant's assertion that the property is large enough to accommodate two residences and that the second residence would be located far enough off Bible Hill Road not to be a problem to neighbors.

There are several problems with the variance request that prevents the Board from finding that all five criteria are met. First, the Applicant failed to address abutter's concern that the proposed subdivision will alter the neighborhood's historic nature, where homes are located relatively close to Bible Hill Road to preserve the rugged and steep open space to the North in the OC-1 District. Contrary to Member Seidel's assertion at the November 9, 2023, meeting, the spirit of the Zoning Ordinance is not "to allow property owners the right to use their land for their purposes as long as it does not hurt the public domain." To the contrary, the preamble to the Zoning Ordinance makes its purpose crystal clear: to promote

the health, safety, and welfare of Warner's inhabitants and **preserve the values and charm now attached to the town.** The Applicant has failed to demonstrate how granting the variance to allow a subdivision of the property and creation of a non-conforming lot would meet this purpose of the Ordinance.

Second, the Applicant failed to adequately address the abutters' concerns that the proposed home development on the back of the property—some 100 feet above the existing road—would impact the public interest. Specifically, Movants raised concerns that: (1) the limited frontage along Bible Hill Road would not provide sufficient distance from the current septic system; (2) the development of the steep grades on the property for a new driveway, along with additional impervious surfaces, would alter drainage from the property; (3) the historic views of the undeveloped hillside will be altered because the driveway and house will be visible from nearby homes, including that of Movant DeFabrizio; and (4) that the steep and curved driveway would create light glare onto neighboring properties from automobiles entering and exiting the property at night. Although the Board did require a vegetation buffer as a condition of approval to address light glare, it otherwise had inadequate information to make proper factual findings on any of these issues.

Finally, and most significantly, nothing unique to this property would prevent the Applicant from using it as allowed under the zoning ordinance. This is an existing conforming residential lot in productive use. As member McQueen noted at the public hearing, it is not a hardship when someone buys an existing lot with a house but wants to develop the land behind it in non-conformance with the zoning ordinance. **As the New Hampshire Supreme Court has long held, in determining whether a hardship exists, the land's unique characteristics, rather than its owner's plight, will be dispositive.** *Labrecque v. Town of Salem*, 128 N.H. 455, 458, 514 A.2d 829, 830 (1986). Where an existing legal parcel can be put into productive use, it cannot be the basis of a hardship claim in a Variance proceeding. The frustration of an Applicant's plans to subdivide their lot, rather than a characteristic of their property itself, "creates the claimed hardship that is insufficient to permit a variance." *Goslin v. Farmington*, 132 N.H. 48, 561 A.2d 507 (1989).

Granting the variances is contrary to the public interest and does not observe the spirit of the Ordinance.

These first two variance standards, from RSA 674:33, I(a)(2)(A) and (B), are related and can be considered together. See *Harborside Assocs. v. Parade Residence Hotel*, 162 N.H. 508, 514 (2011). "The first step in analyzing whether granting a variance would be contrary to the public interest or injurious to the public rights of others is to examine the applicable zoning ordinance." *Chester Rod & Gun Club, Inc. v. Town of Chester*, 152 N.H. 577, 581 (2005). For a variance to be sufficiently contrary to the public interest, it "must unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives." *Nine A LLC v. Town of Chesterfield*, 157 N.H. 361, 366 (2008). While judging whether "granting a variance violates an ordinance basic zoning objectives, [the court considers], among other things, whether it would alter the essential character of the locality or threaten public health, safety, or welfare," but "such examples are not exclusive."

Id. This includes determining if a variance violates basic zoning objectives is to examine whether granting the variance would "alter the essential character of the neighborhood." Harborside Assocs., 162 N.H. at 514.

Here, the applicable provision of the Zoning Ordinance is Article VIII, which states that the Open Conservation District OC-1 is designated for agricultural, forestry, and **very limited residential uses on inaccessible land, which, because of the steepness of slopes, poor drainage, or periodic flooding shall not be intensively developed.** Neither the Applicant nor the Board addressed how granting the variance would comply with the spirit and public interest nature of this provision. As currently configured as a single-family residence, productive use of the property does not conflict with the Ordinance. As contemplated, development is placed with the R-3 District nearest Bible Hill Road, while the steep and rugged portion of the property remains undeveloped in the Open Conservation District. This is also consistent with the "essential character of the neighborhood."

Granting the variances does not do substantial justice.

"Perhaps the only guiding rule [on this standard] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007) (*citing* 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 24.11, at 308 (2000)). In analyzing this standard from RSA 674:33, I(a)(2)(C), courts have also considered whether the proposed development was consistent with the area's present uses. *See Labrecque v. Town of Salem*, 128 N.H. 455, 459 (1986).

Here, granting the Variance does not outweigh the gain to the general public of denying the variance. This is not a case in which productive use of a property is being restricted due to the frontage restriction of Article VII.C.1.a. While justice may be served in the granting of such a variance where an existing legal lot can otherwise not be built upon, here the Applicant is claiming injustice and hardship solely based on the desire to subdivide the lot most likely to be able to sell one or both parcels for profit. Such harm is not recognized as a valid basis for a Variance. To recognize it as such would substantially undermine the Warner zoning ordinance. As Chair Marty noted at the public hearing, extending Variances to this case creates a right that everyone "should be afforded a non-conforming lot to put a second house on [the additional acreage of] their property."

Granting the variances does diminish the values of surrounding properties.

Granting this variance would likely diminish the values of surrounding properties, including the Movants. The Applicant did not adequately address the issues raised regarding the development of the higher elevations of the property and a change in the essential character of the neighborhood. The Board had no basis to decide that the property values would not be diminished.

Literal enforcement of the frontage provision will not result in unnecessary hardship.

In this case, the Board determined that the "unnecessary hardship" element was satisfied "owing to special conditions of the property that distinguish it from other properties in the area: (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, and (ii) The proposed use is a reasonable one." *See* RSA 674:33, I(b)(5)(A).

Specifically, the Notice of Decision states: "A majority of the Board found that there is no substantial relationship between the general public purposes of the ordinance and this specific application because the frontage variance will not change the character of the neighborhood yet will allow the owner to create a new single-family residential lot and use the property as desired."

There are three fatal problems with this determination of hardship. First, as discussed below, the determination is not supported by a single factual finding. It is stated solely in a conclusory fashion.

Second, it ignores ample evidence that the frontage variance will change the neighborhood's essential character. As previously stated, Bible Hill Road, in both Warner and Bradford, currently consists of older historic homes built close to the road, preserving the back portions of the property as open space.

Finally, as already stated, an unnecessary hardship exists when the Ordinance unduly restricts the use of land and "when the deprivation resulting from the application of the ordinance effectively prevents the owner from making any reasonable use of the property." Rowe v. Town of North Hampton, 131 N.H. 424, 428, 553 A.2d 1331, 1334 (1989). Such a hardship stems only from "a special condition of the land which distinguishes it from other land in the same area with respect to the suitability for the use for which it is zoned." Margate Motel, Inc. v. Town of Gilford, 130 N.H. 91, 94, 534 A.2d 717, 719 (1987). In determining whether a hardship exists, **the land's unique characteristics, rather than its owner's plight, will be dispositive.** Labrecque v. Town of Salem, 128 N.H. 455, 458, 514 A.2d 829, 830 (1986). However, the size and dimensions of a parcel of property do not create a hardship **when the land could still be used for the purposes permitted by the zoning ordinance.** Rowe at 429, 553 A.2d at 1334; Richardson v. Town of Salisbury, 123 N.H. 93, 96, 455 A.2d 1059, 1061-62 (1983).

In short, the Board cannot consider the Applicant's sole desire to subdivide the land, whether for profit or not, as a basis for a hardship determination. Indeed, the Applicant may use the property, as currently situated, for the residential and other uses for which it is zoned. **That the Applicant presently has only one buildable lot instead of two "does not create a hardship when the land can still be used in a way permitted by the ordinance."** Goslin v. Farmington, 132 N.H. 48, 561 A.2d 507 (1989)(emphasis added).

The Board's decision does not satisfy the requirements of RSA 676:3.

RSA 676:3 requires that the Board make "specific written findings of fact that support the decision." As the New Hampshire Municipal Association has recognized, "The degree in which a local land use board should make detailed findings of fact in support of an approval may vary based on the level of controversy associated with the application. If there is a level of controversy, the board should consult with their town counsel to prepare complete and legally sound findings of fact. In general, the board should be clear with identifying how the application meets their regulation and checklist requirements for the findings of fact portion of the approval."

The November 14, 2023, Notice of Decision states that the "decision was based on the following findings/criteria." However, what follows are three conclusory paragraphs that parrot the Variance criteria from state law and the information contained in the application. No attempt was made to develop factual findings regarding the public benefit, adherence to the spirit of the Zoning Ordinance, analysis of substantial justice, impact on property values, or hardship to the Applicant due to unique characteristics of the land.

In short, the Board did not have enough information to evaluate these issues and make the required mandatory findings.

Conclusion

For the above reasons, the Applicant has not provided sufficient, credible information to meet its burden of proof on all criteria. Therefore, on behalf of the Movants, I respectfully request that the Board grant the rehearing and deny the requested variance.

Sincerely,

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