

DUNBARTON ZONING BOARD OF ADJUSTMENT**Monday, December 13, 2021****7:00 p.m. – Town Office****MINUTES OF MEETING**

John Trottier, Chairman, called the meeting to order at 7:00 p.m.

BOARD MEMBERS IN ATTENDANCE: Chair John Trottier, Secretary Alison Vallieres, Dan Dal Pra, Jim Soucy, and Alternate Derrick Labranche.

Derrick Labranche was appointed as a Voting Member in the absence of John Herlihy.

APPROVAL OF PREVIOUS MEETING MINUTES: Dan Dal Pra made a motion to accept the minutes of the August 9, 2021 meeting as written; Jim Soucy seconded the motion. The motion passed with a majority; Jim Soucy abstained as he was not present at that meeting.

PUBLIC HEARING – APPLICATION 2021-ZBA-004, SIFATHULLAH WOODOD & RAHIMULLAH WOODOD, 1011 MEADOW LANE, B4-01-09, IN THE LOW-DENSITY RESIDENTIAL DISTRICT. Request Equitable Waivers as follows: 1) To maintain a shed within the side and rear setback; and 2) To maintain a carport within the side setback.

The applicant was not present. The chair explained that there had been communication with the applicant's agent earlier in the day, letting them know there would be four board members in attendance this evening. There was no response from the attorney's office. **John Trottier made a motion to continue this matter to the meeting of January 10, 2022; motion seconded by Dan Dal Pra. All were in favor.** The meeting will be held at 7:00 p.m. in the Town Offices Meeting Room; there will be no further notification.

PUBLIC HEARING – APPLICATION 2021-ZBA-001, LYNDA GAGNE, 9 STARK HIGHWAY SOUTH, E3-06-11, IN THE VILLAGE DISTRICT. Requests a variance from Article 4, Section C. Non-conforming Lots, Article c, of the Dunbarton Zoning Ordinance to allow the construction of a garage closer than the required 30-foot side setback.

The chair commended the applicant on her efforts of clarifying her application responses. Ms. Gagne apologized for not having a better understanding of the process, saying she worked hard to revise the application for clarity. Board members agreed the revised application helped in their review of the request.

Ms. Gagne explained that she wants to have a 24' x 24' garage built and has discovered that the planned structure will encroach on the side setback by approximately five feet. She stated that she would like to push the structure out a little rather than have it right up against the existing house as she feels it would look better. Ms. Gagne said she has an engineer working on a plan to possibly attach the garage to the existing structure, and depending on the appearance, she might go that route and would not be affecting the setback. She said she is not sure how the roof lines will come together. Ms. Gagne said she would like to continue the process for the variance and have it as an option in the event the engineer isn't able to come up with an

acceptable design. The applicant said she met with the abutter to the south of her property to review the plans; the abutter had no concerns. She noted that all abutters were notified, and none are here, so feels confident that the placement of the garage 25' from the property line will not be an issue. She said the garage/shed is architecturally designed to fit in with the existing house.

The chair asked the applicant to go through the Variance criteria. Ms. Gagne responded as follows:

1. The variance will not be contrary to public interest. Because the proposal neither threatens to alter the essential character of the neighborhood, nor threatens the public health, safety, and welfare, the Applicant respectfully requests that the ZBA find that granting this application will not be contrary to the public interest under the required standard set forth in the case law referenced on her application.

2. The spirit of the Ordinance is observed. This variance application for the garage is consistent with the spirit of the Ordinance because of the reasons stated in Section 1. Accordingly, the Applicant respectfully requests that the ZBA find that by granting this application, the spirit of the ordinance is observed.

3. Substantial justice is done. There is a clear loss to the Applicant that is not outweighed by any gain to the community if this variance is denied. Because of the configuration of the existing non-conforming residence, and the location of the proposed garage, this variance application will allow the Applicant to make reasonable, appropriate use of the property without negative impact to the abutters or the neighborhood. The Applicant has striven to place the proposed garage in such a way as to impact the abutters on the southernly side of the residence and the setback areas in as minimal a degree as possible. Therefore, given the factors listed above, the Applicant respectfully urges this Board to find that granting this application would do substantial justice, while denying this variance would be a substantial injustice in light of the circumstances set forth above.

4. The proposal will not diminish surrounding property values. Given the location, size, and minimal nature of the area of the proposed garage within the setback, the abutting property to the south will not be impacted at all. Similarly, given the location and size of the garage, behind the existing driveway and in line with the existing residence, the garage will minimally impact the northern abutter in a way that is far less than would be the case if the garage were placed elsewhere on the property. Accordingly, the Applicant respectfully asserts that none of the surrounding parcels would suffer any diminution in value as a result of granting the variance for the garage. Therefore, the Applicant respectfully requests that the ZBA find that the requested variance will not diminish surrounding property values.

5. Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship. A. The Applicant submits that Option A for demonstrating unnecessary hardship is met. The "special conditions" of the property for purposes of this variance application include its size and "as built" condition – including both the layout and non-conforming location of the existing residence and the location of the existing driveway, and existing entrance to the residence. Due to these special conditions, the setback prohibits the proposed reasonable garage to this existing single-family residence.

The purpose of the setback requirements is to protect the integrity of property lines to prevent overcrowding of land, provide adequate light and air, promote health and the general welfare, to secure safety from fires, panic, and other dangers, etc. The purpose of the setback requirements is not to prevent a property owner from making a reasonable use of a property.

Therefore, an unnecessary hardship exists because, due to the special conditions of the property, there is no substantial relationship between the purpose of the setbacks and application of the setbacks to the property or the project; and the garage is reasonable.

B. Alternatively, the Applicant submits that Option B from demonstrating unnecessary hardship is met. The “special conditions” of the property for purposes of this variance application are set forth above. Given the existing driveway, the existence of the non-conforming residence and its entrance, the garage cannot be placed in another location without prohibitive costs and substantial disruption to the existing property. The variance is necessary to enable the Applicant full use of the property.

Accordingly, the Applicant respectfully concludes that all five criteria for the variance requested have been met so that this variance application should be granted.

The chair asked Board members if they had any questions for the applicant.

Dan Dal Pra asked, if approved, about the applicant still having the option to build the garage against the existing structure. It was agreed that the applicant could pursue either option.

Jim Soucy asked if there was any consideration of putting the lean-to section at the rear of the garage, lessening the width of the impacted area. Ms. Gagne said she had looked at that, but the lay of the land is not really conducive to that. She said the engineer is looking at a way to connect the garage to the residence at the back, perhaps with an overhang/roof structure. She said she is concerned about the appearance.

Derrick Labranche and Alison Vallieres had no questions.

John Trottier said the plot plan will need to be revised as follows: 1) orientation of the structure should be reversed/corrected to show the shed portion to the south; 2) Dunbarton is spelled incorrectly; and 3) certification note to be corrected by eliminating one ‘the’ and to state ‘does not’ comply.

There was no public present. The chair closed the public hearing and went through the five criteria with the Board as follows:

1. The variance will not be contrary to public interest. After reading the applicant’s response, the chair asked members if they felt the criteria was met. All agreed that point #1 was met. Jim Soucy said especially if the image is flipped, the garage/shed will be very minimally in the setback.

2. The spirit of the Ordinance is observed. The chair read the applicant’s response. He said he feels the spirit is observed, noting it will be a slight encroachment into the side yard setback and this is a small parcel with a pre-existing, non-conforming building already in the front yard setback. All agreed that point #2 was met.

3. Substantial justice is done. The chair reviewed the applicant’s response. He said he would agree with the applicant’s response, noting it would be impacting the abutter as minimally as possible. Jim Soucy said this is a stand-alone structure that is small enough to serve its purpose, and he does not see it turning into more, such as an ADU. Dan Dal Pra said there is no gain to the public if the variance is denied. All agreed that point #3 was met.

4. The proposal will not diminish surrounding property values. The chair read the applicant’s response. He said there has been no evidence shown otherwise. Dan Dal Pra and Jim Soucy said they would agree. All agreed that point #4 was met.

5. Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship. The chair read the applicant’s response for sections A and B. He said he does not feel

the garage will create overcrowding of the property. Jim Soucy said, if recalling properly, the right side of the house is closer to the hill and would create a line-of-sight issue. He noted that there was once a garage on the southerly end of the existing structure, and it does not appear that it would be usable due to the size if converted back. Dan Dal Pra said he would agree. It was agreed that point #5 was met.

Alison Vallieres said the applicant did a good job addressing the criteria. Ms. Gagne said she would be willing to assist others going through the application process, as she learned a lot when researching other cases, the ZBA handbook, and trying to better understand the criteria.

Dan Dal Pra made a motion to grant a variance from Article 4, Section C. Non-conforming Lots, Article c, of the Dunbarton Zoning Ordinance to allow the construction of a garage/shed closer than the required 30 feet from the south side boundary at her property located in the Village District, with the conditions noted during Board discussion; Jim Soucy seconded the motion. All were in favor. Variance granted.

REVIEW OF DRAFT RULES OF PROCEDURE

The Board reviewed changes proposed at the last meeting.

1. Page 1, Officers – It was agreed to hold officer elections “*at the first board meeting after Town Meeting*”.
2. Page 1, Members and Alternates (2) – It was agreed to delete “*Once the board moves into deliberations, alternates shall remove themselves from the table and no longer participate with the board.*”
3. Page 3, Applications/Decisions (1. a) - It was agreed to delete “*For/At each meeting, the secretary and/or zoning administrator shall present to the board all applications received by him/her at least seven days before the date of the meeting.*” It was agreed to add “*The secretary shall distribute, at least seven days before the date of the meeting, to the board members all applications received by the posted deadline.*”
4. Page 4, Public Hearing (4. b) – It was agreed to add “*The applicant and/or his/her duly designated agent shall be called to present his/her appeal.*”
The Board agreed to remove items (4) g, h, i, and j. from the items.
5. Page 4, Public Hearing (4. new item g) - It was agreed to add “*The secretary will read the list of abutters; abutters will have the opportunity to speak to the application as called.*”
6. Page 4, Public Hearing (4. new item h) - It was agreed to add “*Other parties with a direct interest in the application may testify in person at the hearing or in writing at or before the public hearing.*”
7. Page 4, Public Hearing, (4. new item i (formerly k): “*Any person who wants the board to compel the attendance of a witness shall present his/her request in writing to the chairperson not later than three days prior to the public hearing.*” Donna inquired to N H Municipal Association for clarification of the intent of this item. The NHMA legal services counsel responded as follows: The chair of the ZBA is granted the statutory authority to administer oaths and to compel the attendance of witnesses. RSA 673:15.

The attorney provided a couple of examples where this authority could be used in contested cases.

8. Page 4, Public Hearing, new item k (formerly m): It was agreed to delete "*Opportunity shall be given for correction from the floor*".
9. Page 4, Public Hearing, new item l (formerly n): It was agreed to revise the sentence as follows: "*Upon hearing no further discussion on the appeal, the chairperson shall declare the public portion of the hearing closed.*"
10. Page 4, Deliberations: It was agreed to add a section titled Deliberations as follows: "*The ZBA shall deliberate the merits of the application after the chairperson closes the public hearing. ZBA deliberations shall be conducted in a manner so as to permit all members of the ZBA (including non-voting alternate members) to express opinions, influence voting, and ensure that the questions before the ZBA are considered, deliberated, and ultimately decided in an orderly fashion.*"
11. Page 4, Voting: It was agreed to revise the section as follows:
 - a. *The ZBA shall determine whether to grant a variance by voting separately on each of the criteria that are set forth in RSA 674:33, I (a) (2).*
 - b. *The chair shall entertain a motion from members of the Board for approval or denial of the application. All motions shall include findings of fact in support of the Board's determination. The chairperson shall also entertain motions for any conditions imposed upon granting of an application or motions to defer the Board's decision.*
 - c. *The chairperson shall then call for a vote of the seated members. Pursuant to RSA 674:33 III, the concurring vote of any three members shall be necessary to take action on any matter. If a motion should result in a tie vote or not receive the necessary three votes to decide in favor of the applicant, the opposite of the failed motion does not automatically prevail. The board must put forth a new motion to affirmatively set forth a decision.*

ADJOURNMENT: The Board having no further business, **Dan Dal Pra made a motion to adjourn the meeting at 8:10 p.m. Jim Soucy seconded the motion. All were in favor.**

Respectfully submitted,

Donna White, Office Administrator

- Attachment A -

REVISED VARIANCE APPLICATION FOR LYNDA GAGNE (APPLICANT)
9 STARK HWY SOUTH, TAX MAP LOT NUMBER: E3-06-11 ("THE PROPERTY")

VARIANCE FROM ZONING ORDINANCE ARTICLE V.D-4 AND TABLE OF DIMENSIONAL REGULATIONS TO RESTORE AND EXPAND THE FORMER GARAGE ON THE SOUTHERLY SIDE OF THE SINGLE FAMILY RESIDENCE FACING STARK HWY SOUTH. THE GARAGE WILL BE BUILT BETWEEN THE EXISTING RESIDENCE AND 25 FEET FROM THE SOUTHERLY SIDE BOUNDARY LINE.

I. INTRODUCTION:

The Applicant is seeking relief from the Town's Zoning Ordinance ("The Ordinance") 30-foot property line setback ("the Setbacks") of Article V.D-4 and the Table of Dimensional Regulations ("the Sections") to enable the Applicant to (i) restore and expand the former garage ("the Garage") on the southernly side of the family residence facing the Stark Hwy South. The Garage will be within the 30 foot setback from the reference line of Stark Hwy South and the bulk of the Garage will be outside the 30 foot setback from the southernly side property line.

The Residence consists of approximately 1700 square feet of gross living area and is non-conforming to the current setbacks. The Residence has two bedrooms and has its own septic system and well. See, "Plot Plan" as prepared and stamped by Jacques E. Belanger of J.E. Belanger Land Surveying, PLLC, a copy of which is attached to the Original Variance Application (and is also attached here as Exhibit A). The Plot Plan also shows the existing driveway, existing septic, existing well, as well as existing deck.

The Applicant seeks to restore and expand the former garage by building the Garage five feet from southernly side of the existing Residence, pushing beyond the southernly setback by 5 feet. The proposed Garage is approximately 24 X 24 feet. A set of the proposed project plans as prepared by Donald J. Berg, AIA, of Rockville Centre, NY were included with the original variance application.

Additionally, the Applicant explored other locations (north side of the property) for the Garage on the Lot; but any alternative location would propose significant aesthetic and financial burden given the existing driveway is on the southernly side of the Property and building a Garage on the northernly side would require a second driveway and entry way on the northern side of the Residence and Property. The Applicant also explored putting the proposed Garage closer to the existing Property but was advised that the aesthetic integrity of the existing property would be compromised.

The Applicant respectfully requests variance relief from the Sections to allow the Garage as shown in the Plot Plan (Exhibit A).

II. VARIANCE CRITERIA

Pursuant to RSA 674:33, to obtain a variance in New Hampshire, an applicant must show that; (1) the variance will not be contrary to the public interest; (2) the spirit of the ordinance is observed; (3) substantial justice is done; (4) the values of surrounding properties are not diminished; and (5) literal enforcement of the provisions of the ordinance would result in an unnecessary hardship, meaning that, owing to special circumstances of the property that distinguish it from other properties in the area: 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 the Proposed Use is a reasonable one; or 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 RSA 674:33, I(b).

1. The variance will not be contrary to public interest.

The New Hampshire Supreme Court has indicated that the requirement that a variance not be "contrary to the public interest" is coextensive and related to the requirement that a variance be consistent with the spirit of the ordinance. See *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580 (2005); *Malachy Glen Associates, Inc. v. Town of Chichester*, 155 NH 102, 105-06 (2007); and *Farrar v. City of Keene*, 158 N.H. 684, 691 (2009). A variance is contrary to the public interest only if it "unduly, and in

(5)

a marked degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives." *Chester Rod & Gun Club*, 152, NH at 581; *Farrar*, 158 NH, at 691; see also *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 514 (2011) ("[m]ere conflict with the terms of the ordinance is insufficient.") Moreover, these cases instruct us to make the determination as to whether a variance application "unduly" conflicts with the zoning objectives of the ordinance "to a marked degree" by analyzing whether granting the variance would "alter the essential character of the neighborhood" or "threaten the public health, safety or welfare" and to make that determination by examining, where possible, the language of the Zoning Ordinance.

Here, the Applicant seeks relief to construct the Garage within the 30-foot Setback from the southernly property boundary, shown on the Plot Plan, Exhibit A.

Because the proposal neither threatens to alter the essential character of the neighborhood, nor threatens the public health, safety, and welfare, the Applicant respectfully requests that the ZBA find that granting this Application will not be contrary to the public interest under the required standard set forth in the case law referenced above.

2. The spirit of the Ordinance is observed.

As referenced in Section I, above, the requested variance observe the spirit of the underlying ordinance provisions involved. As the New Hampshire Supreme Court has indicated in both *Chester Rod & Gun Club* and in *Malachy Glen*, the requirement that the variance not be "contrary to the public interest" is coextensive and is related to the requirement that the variance be consistent with the spirit of the ordinance. See *Chester Rod & Gun Club*, 152 NH at 580. A variance is contrary to the spirit of the ordinance only if it "unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance's basic zoning objectives." *Chester Rod & Gun Club*, 152 NH at 581; *Farrar*, 158 NH at 691.

As discussed above, this Variance Application for the Garage is consistent with the spirit of the Ordinance because of the reasons stated in Seciton 1. Accordingly, the Applicant respectfully requests that the ZBA find that by granting this Application, the spirit of the ordinance is observed.

3. Substantial justice is done.

As noted in Malachy Glen, "perhaps the only guiding rule [on this factor] is that any loss to the individual that is not outweighed by a gain to the general public in an injustice." Malachy Glen, citing 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning 24.11, at 308 (2000) (quoting New Hampshire Office of State Planning, The Board of Adjustment in New Hampshire, A Handbook for Local Officials (1997)). In short, there must be some gain to the general public from denying the variance that outweighs the loss to the Applicant from its denial.

In this case, there is a clear loss to the Applicant that is not outweighed by any gain to the community if this Variance is denied. Because of the configuration of the existing non-conforming Residence, and the location of the Proposed Garage, this Variance Application will allow the Applicant to make reasonable, appropriate use of the Property without negative impact to the abutters or the neighborhood. The Applicant has striven to place the proposed Garage in such a way as to impact the abutters on the southernly side of the Residence and the setback areas in as minimal a degree as possible. Therefore, given the factors listed above, the Applicant respectfully urges this Board to find that granting this Application would do substantial justice while denying this variance would be a substantial injustice in light of the circumstances set forth above.

4. The proposal will not diminish surrounding property values.

Given the location, size, and minimal nature of the area of the proposed Garage within the setback, the abutting property to the south will not be impacted at all by the proposed Garage. Similarly, given the location and size of the Garage, behind the existing driveway and in line with the existing Residence, the Garage will minimally impact the northern abutter in a way that is far less than would be the case if the Garage were placed elsewhere on the Property. Accordingly, the Applicant respectfully asserts that none of the surrounding parcels would suffer any diminution in value as a result of granting this Variance for the Garage.

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Therefore, the Applicant respectfully requests that the ZBA find that the requested Variance will not diminish surrounding property values.

5. Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.

As set forth in the provisions of RSA 674:33, I, there are two options by which a ZBA can find that an unnecessary hardship exists:

(A) For purposes of this subparagraph, "unnecessary hardship" means that, 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.

Or,

(B) 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.

(A) The Applicant submits that Option A for demonstrating unnecessary hardship is met.

The "special conditions" of the Property for purposes of this Variance Application include its size and "as built" condition – including both the layout and non-conforming location of the existing Residence and the location of the existing driveway, and existing entrance to the Residence. Due to these special conditions, the Setback prohibits the proposed reasonable Garage to this existing single-family Residence.

The purpose of the setback requirements is to protect the integrity of property lines to prevent the overcrowding of land, provide adequate light and air, promote health and the general welfare, to secure safety from fires, panic and other dangers, etc. The purpose of the setback requirements is not to prevent a property owner from making a reasonable use of a Property.

Therefore, an unnecessary hardship exists because, due to the special conditions of the Property, there is no substantial relationship between the purpose of the Setbacks and application of the Setbacks to the Property or the Project; and the Garage is reasonable.

(B) Alternatively, the Applicant submits that Option B for demonstrating unnecessary hardship is met.

The "special conditions" of the Property for purposes of this Variance Application are set forth above. Given the existing driveway, the existence of the non-conforming Residence and its entrance, the garage cannot be placed in another location without prohibitive costs and substantial disruption to the existing Property. The Variance is necessary to enable the Applicant full use of the Property.

Accordingly, the Applicant respectfully concludes that all 5 criteria for the Variance requested have been met so that this Variance Application should be granted.