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August 25, 2017

Ms. Audrey Cline  
Zoning Administrator  
Town of Durham  
8 Newmarket Road  
Durham, NH 03824

RECEIVED  
Town of Durham

AUG 28 2017

Planning, Assessing  
and Zoning

Re: Request for Rehearing  
24 Cedar Point Road

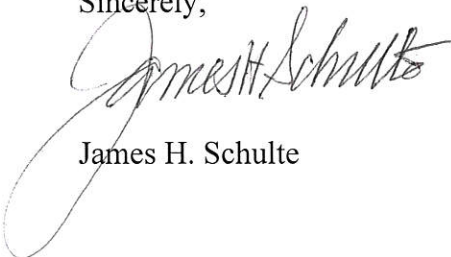
Dear Ms. Cline:

I am enclosing a request for rehearing for the August 8, 2017 denial of the volume variance at 24 Cedar Point Road.

Please include this request on the September 12, 2017 agenda for the zoning board of adjustment.

Thank you.

Sincerely,



James H. Schulte

Enclosure



**TOWN OF DURHAM**  
8 NEWMARKET RD  
DURHAM, NH 03824  
PHONE: 603/868-8064  
[www.ci.durham.nh.us](http://www.ci.durham.nh.us)

RECEIVED  
Town of Durham  
AUG 28 2017  
Planning, Assessing  
and Zoning

**ZONING BOARD OF ADJUSTMENT REQUEST FOR REHEARING**

**MEETINGS:** The Zoning Board of Adjustment (ZBA) meets on the second Tuesday of each month in the Council Meeting Room at the Town Hall.

**FILING OF A REHEARING REQUEST:** A Request for Rehearing must be filed with the office of Planning and Zoning at the Durham Town Hall within thirty calendar days of the decision date of the Zoning Board of Adjustment. According to RSA 677:3, a request for rehearing "shall set forth fully every ground upon which it is claimed that the decision or order complained of is unlawful or unreasonable." The Zoning Board of Adjustment has thirty (30) calendar days to either grant or deny the application for rehearing once it has been filed.

**Please fill out the information below:**

Name of Applicant: James H. Schulte, Esquire

Address: 601 Central Avenue, Dover, NH 03820 Phone # 603-743-6300

Email: jim@jimschultelaw.com

Owner of Property Concerned: Edward Williams  
(If same as above, write "Same")

Address: 68 Miles Pond Road, North Sandwich, NH 03259  
(If same as above, write "Same")

Location of Property: 24 Cedar Point Road  
(Street & Number, Subdivision and Lot number)

Date of Zoning Board Decision: August 8, 2017

Reason for Request for Rehearing: (feel free to use a separate piece of paper)  
See attached

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

For the reasons which follow, the applicant requests that the Durham Zoning Board of Adjustment grant a rehearing of the decision issued August 8, 2017 which denied a variance to increase the volume of an existing non-conforming structure located at 24 Cedar Point Road. The board should not have conducted a rehearing since there was not a valid request for rehearing. The decision of the board was unlawful and unreasonable, was contrary to the clear evidence which supported the variance, was internally inconsistent, and contradicts the other variances which were granted by the board for this same property and this same project. In addition, some board members did not correctly state or apply the criteria which pertain to variances.

Mr. Ed Williams applied for several variances to allow the removal and replacement of the small building currently located at 24 Cedar Point Road. These included requests for variances from the front setback, side setbacks, waterfront setback, and variances for square footage and volume increases which would be greater than what the ordinance allows for the expansion of a non-conforming structure.

The property at 24 Cedar Point Road has 50 feet of road frontage and a depth of 115 to 122 feet from the road to the water. The existing camp is tiny, but since the lot is so small the building is located within 12 feet of the lot side lines. The proposed building will continue to be about 12 feet from the sidelines, but the garage and front of the house will be closer to the road than the current residence currently exists. However, there is an existing shed which will be removed and which is closer to the road than the new house will be located. The new house will not be closer to the water than what currently exists.

The existing square footage at 24 Cedar Point Road is 653 square feet, and the existing structure already encroaches on all setbacks. The proposal is to increase the square footage to 969 square feet, to expand the building closer to Cedar Point Road, and to essentially maintain the existing side and waterfront setback encroachments. The volume would increase from 5,193 feet to 18,116 feet.

All of the variances were approved at the ZBA meeting held on June 13, 2017. The board found that all criteria for each of the requested variances had been satisfied by the application and the evidence presented at that meeting. The board members voted that the variance requests were reasonable, would not adversely affect adjacent properties, were consistent with the spirit and intent of the ordinance, did not violate the public interest, and that granting the variances would do substantial justice. In particular, by approving the 5 criteria for these variances, the board members determined that there is no fair and substantial relationship between the general purposes of the ordinance and the specific application of the ordinance to the proposed use. That is, the board determined that due to the special circumstances of this property, the ordinance did not apply so as to limit the proposed use.

Following the June decision, the owners of one nearby property submitted a letter to the zoning administrator which basically asked why the town of Durham would allow variances from the zoning ordinance. The letter did not provide any new information than what was presented to the board at the June hearing. The letter recited portions of the variance applications themselves,

which the board had fully reviewed at the June meeting. The letter agreed that the property owner should be allowed to construct a new residence which would be larger than the existing structure. Finally, the letter stated that the abutters would agree that the new building could have two stories, but questioned whether a third story should be allowed. The issue of the small room for the new home (which would be the entire third story) was thoroughly discussed by the board at the June meeting.

The letter from the abutters was not presented as a request for rehearing. It did not present any new evidence. It did not allege that the decision of the board was unreasonable or unlawful. It did not comply with the statutory requirement that any request for rehearing set forth the grounds upon which it is claimed that the decision was unlawful or unreasonable. It did not specify which of the several approved variances was being contested. Nevertheless, at the board's July 11, 2017 meeting, 3 members voted to grant a rehearing limited to a rehearing on whether the board should grant a variance to allow the new residence to have a volume increase greater than thirty percent.

Section 175-30 of the Durham zoning ordinance provides that a nonconforming building or structure may be altered or extended if that alteration or extension does not further deviate from the ordinance, with special additional limitations for properties located within the Wetland Conservation Overlay District (WCO) or the Shoreland Protection Overlay District (SPO). Those additional restrictions are that nonconforming buildings or structures may be expanded provided that the building footprint may not be increased by more than fifteen (15) percent and the usable building volume may not be increased by more than thirty (30) percent.

At the June meeting, the board approved a variance to allow an increase in building footprint of more than fifteen (15) percent. The building footprint is proposed to be increased from 653 square feet to 969 square feet, for an increase of 316 square feet. That amounts to an increase of forty-eight percent, which is three times what the ordinance allows. That decision was not appealed and is now final and binding on all parties.

At the August hearing, the applicant, his architect and his builder provided detailed facts and analysis to support the request for a variance to allow an increase in building volume of greater than thirty (30) percent. The proposed increase is to allow an increase from the existing 5,193 cubic feet to 18,116 cubic feet, for an increase of 12,823 cubic feet. Almost all of that increase is attributable to expanding the footprint of the building and constructing a second floor, which even the abutters conceded was reasonable. The volume increase attributable to the small room which constitutes the third floor is about 1,500 cubic feet, and since a portion of that volume is dedicated to utilities it would not be counted as "usable building volume" and so the volume increase attributable to the third floor is less than ten percent of the overall volume increase.

The advocates for the variance reminded the board members that the existing structure on this property is tiny. It is much smaller than the abutting properties, and even if expanded as proposed it will continue to be smaller than abutting residences, including the residence of the abutters who requested the rehearing.

Cedar Point Road is an area which has been changing from tiny fishing camps to year round homes. Even including the few small remaining camps, the average living area for homes in this neighborhood is about 2,333 square feet. The proposed Williams home will be 1,820 square feet. The Ullman home, at 23 Cedar Point Road has 2,128 square feet. The property at 22 Cedar Point Road has 3,296 square feet and the property at 26 Cedar Point Road has 2,030 square feet. The proposed Williams home is smaller than the average home in the neighborhood, and is smaller than the direct abutters. If the existing home on this property was already at the size of the average home in the neighborhood, it would qualify for a square foot expansion equal to the proposed expansion that is being requested here and no variance would be required. The variance is needed only because the existing home is so tiny compared to the other homes in the neighborhood.

The limitations on increases in square footage and volume are limited to structures located in the WCO and SPO overlay districts. It is apparent that the purpose of the ordinance is to limit impacts on wetlands and shorelands. Increases in square footage would have the greatest impact on wetlands and shorelands by increasing impervious surfaces and surface water runoff. Increases in volume would have less impact on the concerns being protected by the ordinance, as long as the volume increase did not increase septic system requirements. In this case, the existing septic system will continue to be sufficient for the proposed building, so the increase in volume has no adverse impact on the values being protected the ordinance. Given that an increase in square footage would potentially have a greater impact on the purpose of the ordinance, the fact that the ZBA has approved the variance for increased square footage demonstrates that a denial of the variance for volume increase is unlawful and unreasonable.

At the August 8 meeting, the board members reviewed the 5 criteria required for a variance. The consensus of all board members was that the variance for the increase in volume would not adversely affect the value of adjacent properties.

With respect to the public interest, the board members noted that the existing structure is the smallest in area in the neighborhood, and that granting the variance would not be contrary to the public interest. As defined by the New Hampshire Supreme Court, the public interest is affected if the proposed variance would constitute a fundamental change in the neighborhood or if there would be a substantial impact on health or safety. In this case, the variance would allow the existing nonconforming structure to be replaced by one which will still be smaller than the average home in the neighborhood, and there will be no impact on health or safety.

With respect to the hardship criterion, the board members unanimously stated that the proposed use was reasonable and that the particular characteristics of the property justified the variance. The property has only 50 feet of road frontage, is covered by protective overlay zones, and would be difficult to develop. Board members noted that the ZBA exists to deal with properties where the ordinance does not fit. The existing house is so small that a 30% limitation on expansion is not realistic. The property owner and his architect have developed a design which accommodates the neighborhood so as to protect the neighbors' views as much as possible. One member noted that if the footprint was not expanded but a second floor was added, that by itself would double the volume. It is important to note that the statute itself states

that part of the hardship criteria is that the proposed use is reasonable and that no fair and substantial relationship exists between the general purposes of the ordinance provision and the specific application of that provision to the property. By finding that the hardship criterion had been met, the board members determined that the volume limitations in the ordinance should not apply to the proposed increase in volume because there is "no substantial relationship" between the purpose of the ordinance and the proposed use.

When discussing the "substantial justice" criterion, some of the board members did not correctly state or apply that criterion. The New Hampshire Supreme Court has held that an injustice to the variance applicant occurs when the injury to the applicant from denying the variance is greater than any benefit that would accrue to the general public if the variance is denied. The requirement is that the particular harm to the applicant is to be compared to any potential to the general public. One member erroneously stated that the member felt that the comparison should be between the harm suffered by the applicant if the variance is denied to a harm claimed by one abutter if the variance is granted. That is not the correct standard. The issue of potential harm to one abutter is covered by the first factor which is whether granting the variance would adversely affect adjacent properties, and the board members had already unanimously stated that there would not be an adverse impact on individual neighboring properties.

It appears that the vote to deny the variance was based on consideration of the fifth criterion, which is whether the variance is consistent with the spirit and intent of the ordinance. The board members who voted to deny the variance based on this factor did not correctly apply the standard which is required by New Hampshire court decisions, and contradicted their prior vote on the public interest and hardship criteria. Two board members stated that they felt the need to protect the ordinance and that the proposed volume increase was excessive. One member stated that the ordinance has to mean something and that granting the variance would be contrary to the ordinance.

The New Hampshire Supreme Court has held that the "public interest" and "spirit of the ordinance" factors are closely related and involve the same policy concerns. As stated in Harborside Associates, LP v. Parade Residence Hotel, LLC, 162 NH 508 (2011) :

We first address the public interest and spirit of the ordinance factors. " The requirement that the variance not be contrary to the public interest is related to the requirement that [it] ... be consistent with the spirit of the ordinance." Farrar v. City of Keene, 158 N.H. 684, 691, 973 A.2d 326 (2009). The first step in analyzing whether granting the variance would not be contrary to the public interest and would be consistent with the spirit of the ordinance is to examine the applicable ordinance. See Chester Rod & Gun Club v. Town of Chester, 152 N.H. 577, 581, 883 A.2d 1034 (2005). " As the provisions of the ordinance represent a declaration of public interest, any variance would in some measure be contrary thereto." *Id.* Accordingly, to adjudge whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, we must determine whether to grant the variance would "unduly, and in a marked degree conflict

with the ordinance such that it violates the ordinance's basic zoning objectives." Id. Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, its grant must violate the ordinance's " basic zoning objectives." Id. Mere conflict with the terms of the ordinance is insufficient.

We have recognized two methods for ascertaining whether granting a variance would violate an ordinance's " basic zoning objectives." One way is to examine whether granting the variance would "alter the essential character of the neighborhood." Id. Another approach "is to examine whether granting the variance would threaten the public health, safety or welfare."

Thus, the test for both "public interest" and "spirit of the ordinance" are the same: would the variance unduly, and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives by either altering the essential character of the neighborhood or by threatening the public health, safety, or welfare.

By voting that the variance would not be contrary to the public interest, the board members had already made the unanimous determination that the volume variance would not change the essential character of the neighborhood and would not threaten the public health, safety, or welfare. Since those are the same factors which apply to the test for the spirit of the ordinance, it was inconsistent for the board members to vote that the volume variance would be contrary to the spirit and intent of the ordinance. That is particularly the case when the board members had also decided that the applicant met the hardship test, which included a finding that there was no fair and substantial relationship between the provision of the ordinance and the application of that provision to this property. Further, the volume restriction applies only in the WCO and SPO overlay zones. The apparent purpose of that restriction was to protect wetlands and shorelands from over expansion of structures. The board unanimously determined that the square footage expansion would be allowed, and that expansion has greater implications on wetland and shoreland impacts than does a volume increase. The concern expressed by two members to protect the ordinance was not appropriate where those members had already determined that the proposed expansion would not adversely impact the purposes for which the ordinance was enacted.

As some of the board members noted at the August hearing, the Cedar Point neighborhood has changed to a neighborhood of larger homes. Many of the homes are non-conforming because of the small lot sizes. The New Hampshire Supreme Court has held that a zoning board of adjustment must consider the current character of a neighborhood when acting upon a request for variance. For example, in Belanger v City of Nashua, 121 NH 389 (1981), the court held that where a neighborhood had undergone substantial changes from when it was zoned for single family homes, the zoning board committed an error when it refused to allow a commercial use in the area where other commercial development had already occurred. The zoning board was wrong when it denied the variance primarily because the property was zoned residential and the application was for commercial use. The board should have considered the changed character of the neighborhood when it acted on the variance request. The concern of some of the board members that they needed to protect the Durham ordinance from variances was misplaced considering that many of the properties in the Cedar Point neighborhood had

already been changed from small fishing camps to larger year round homes, and that many of which are larger than what this applicant is proposing. In essence, this applicant is seeking to make his property more conforming to what exists elsewhere in the neighborhood, but the variance is required because the conditions which existed when the ordinance was adopted have now changed.

In summary, the vote of the ZBA members to deny the volume variance was inconsistent with its votes to grant variances for setbacks and expansion of the square footage. The vote to deny the volume variance as being contrary to the spirit and intent of the ordinance was inconsistent with the members' actions on the other variance factors, particularly their actions on the "public interest" and the "hardship" factors. Some of the board members did not correctly articulate the correct standards which the New Hampshire courts have held apply to variance requests. The board should not have conducted a rehearing of the June variance approval since no valid request for rehearing was submitted. The vote to deny the volume variance was unlawful and unreasonable, was contrary to New Hampshire law, was internally inconsistent, and should be reversed.