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Town of Durham

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Planning, Assessing
and Zoning

June 7, 2018

HAND DELIVERED

Durham Zoning Board of Adjustment
Town of Durham
8 Newmarket Road
Durham, NH 03824-2898

Re: Mary Lohnes Enrenworth and Richard Hallett, Applicants
Request for Rehearing Pursuant to RSA 677: 2

Dear Zoning Board Members:

On behalf of Mary Lohnes Enrenworth and Richard Hallett, enclosed please find an original and eleven (11) copies of a Request for Rehearing pursuant to RSA 677:2. Please distribute to the Zoning Board.

Thank you.

Respectfully submitted,



Monica Kieser

MFK/msw
Encl.

cc: Mary Lohnes Enrenworth
Richard Hallett

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MARY LOHNES EHRENWORTH AND RICHARD HALLETT, APPLICANTS

DURHAM ZONING BOARD OF ADJUSTMENT

REQUEST FOR REHEARING PURSUANT TO RSA 677:2

NOW COMES, Mary Lohnes Ehrenworth and Richard Hallett, (“Applicants”), by and through their attorneys, Hoefle, Phoenix, Gormley & Roberts, P.A., and requests a rehearing of the Durham Board of Adjustment’s (ZBA) May 8, 2018 denial of their variance request.

I. EXHIBITS

1. 5/11/2018 Notice of Decision

II. REHEARING LEGAL STANDARD

Within thirty days after any...decision of the Zoning Board of Adjustment...any party to the action or proceedings,...may apply for rehearing in respect to any matter determined in the action...specifying in the motion for rehearing the grounds therefore; and the Board of Adjustment...may grant such rehearing if in its opinion good reason therefore is stated in the motion. RSA 677:2.

A motion for rehearing...shall set forth fully every ground upon which it is claimed that the decision or order is complained of is unlawful or unreasonable. RSA 677:3.I.

The purpose of the statutory scheme is to allow the Durham Zoning Board of Adjustment (“ZBA”) to have the first opportunity to pass upon any alleged errors in its decision so that the Court may have the benefit of the ZBA’s judgment in hearing the appeal. Town of Bartlett Board of Selectmen v. Town of Bartlett Zoning Board of Adjustment, 164 N.H. 757 (2013).

III. THE ZBA ERRED REQUIRING REHEARING IN DENYING APPLICANTS’ VARIANCE REQUEST.

Applicants own 18 and 22 Colony Cove Road (Tax Map 12, Lots 26-0 and 25-0) in the Residence C district and sought a variance from Article XII, Section 175-54 of the Durham Zoning Ordinance to effect a lot line adjustment that would (a) reduce shoreline frontage for Lot 25-0 from 195’ to 120’, providing 75’ to lot 26-0, and (b) result in a non-conforming side yard setback for Lot 25-0 of 25.8’ to the deck and 40’ to the house, where a minimum set back of 50’

is required. Applicants further proposed to merge lots 26-0 and 24-0 eliminating 24-0 as a buildable lot in the neighborhood.

Richard Hallett appeared without counsel to present the Petition on behalf of himself and his wife, Mary Lohnes Ehrenworth. Several abutters supported the Petition in writing and no one opposed. Nonetheless, the ZBA denied Applicant's Petition. Minutes are not yet posted and available for review¹, but the questioning and brief deliberation from Board Members indicates varied concerns about Applicants ability to meet the criteria for a variance. (See <https://dcat22.viebit.com/player.php?hash=AGNewEpgS8vT> for video of meeting.). Subsequently, the ZBA issued a Notice of Decision denying the variance. Applicants assert that rehearing is required because the ZBA erred in its deliberation regarding the elements of the variance criteria and the ZBA's vote and Notice of Decision fails to articulate the reasoning of its denial.

A. Granting the requested relief is not contrary to the public interest and would not violate the spirit of the ordinance.

“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.” Harborside Assocs., L.P. v. Parade Residence Hotel, LLC, 162 N.H. 508, 514 (2011). Accordingly, these two factors are considered together pursuant to Malachy Glen Associates, Inc. v. Town of Chichester, 155 N.H. 102 (2007). To support denial on these grounds, the ZBA must determine that granting the variance would “unduly and in a marked degree conflict with the ordinance such that it violates the ordinance's basic zoning objectives” or whether granting the ordinance would “alter the essential character of the locality. Id. “Mere conflict with the terms of the ordinance is insufficient”. Id.

The Durham Zoning Ordinance (“DZO”) is designed to:

- Implement the Master Plan and other policies designed to promote orderly growth – The requested relief involves no growth or development and slightly increases the size of Lot 25-0. In response to questions about the impact of the lot line adjustment on subsequent upgrades to the septic system at Lot 25-0, Applicant stated that an appropriate area for replacement septic had been identified.

¹ Minutes for the May 8, 2018 hearing were not available as of the date of this Petition. The Applicants reserve the right to amend this Petition upon availability of the minutes pursuant to RSA 677:2.

- Preserve air and water quality – The proposal does not alter air or water quality, to the extent that the proposal contemplates the subsequent addition of a dock, piers and docks are permitted uses in the Shoreland Protection Zone provide they are approved by the State and meet additional requirements (no alteration of the surface condition of the land, no obstruction or alteration of the flow of water).
- Conserve open space and agricultural resources – The proposal involves merging Lot 24-0, nearly two acres, with Lot 26-0 conserving open space and pasture.
- Encourage the installation of renewable energy systems and protect access to renewable energy sources – no impact on any renewable energy systems in the area.
- Protect natural and scenic resources from degradation – The proposal ensures that the 75’ of frontage taken from Lot 25-0 for Lot 26-0 will not be developed.
- Provide for recreational needs – The proposal does not infringe on the recreational needs of others and in fact contributes to the recreational needs of abutters who have enjoyed use of the pasture at Lot 24-0.
- Protect life and property from flooding and other natural hazards – No additional development is contemplated on the portion of land deducted from Lot 25-0 or elsewhere on Lot 26-0.
- Preserve historic sites and structures – No historic sites nearby.
- Ensure development is commensurate with the character and physical limitations of the land – No development of the land outside of a dock is contemplated, and 75’ of frontage would meet State standards.
- Ensure the timing, location and nature of new development considers the immediate and long-range financial impacts of proposed uses and enhances the Town’s economic development goals – n/a

Consideration of Applicants’ request and the stated purpose of the DZO indicates that granting the ordinance would not conflict with the Ordinance such that it violates its basic objectives. Similarly, except for placement of a dock regulated by the State, no physical changes to Lots 25-0 and 26-0 would occur result except moving the lot lines. In contrast, the proposal seeks to remove a buildable lot, Lot 24-0 by merging it with lot 26-0, ensuring continued enjoyment of the open pasture. Accordingly, granting the requested relief does not change the character of the area and can only be hailed as a win for abutters. To the extent that frontage is reduced on paper, this is not without precedent as many lots along Little Bay have lot size well under the required 200’ of frontage. Moreover, as indicated below, Applicants’ stated intent for the 75’ of frontage is decidedly less intense than if that frontage remained with Lot 25-0 which they intend to sell.

B. Granting the requested relief will not diminish the value of the surrounding properties.

As indicated above, the removal of Lot 24-0 from circulation as a buildable lot is a net gain to surrounding properties. All the neighbors have enjoyed that open space and the proposal to merge it into Lot 26-0. The other aspects of Applicants' proposal will have no deleterious impact on property values because there will be no change on the ground, save a future dock.

C. Special conditions of the property exist and there is no fair and substantial relationship between the purposes of the Ordinance and the specific application of the Ordinance to these properties.

The existing Lots 24-0, 25-0 and 26-0 have been acquired at different times and at one point. Notably, at one point in time Lot 25-0 had just 100' of water frontage with the additional frontage it has today coming from the conveyance of a zig-zagged parcel from Lot 27 to a predecessor in Title without subdivision approval. Lots 25-0 and 26-0 are also burdened by easements benefitting each other as well as Lot 27-0. These factors combine to create special conditions of the property. As indicated above, Applicants' proposal does not in any way undermine the stated purpose of the DZO, accordingly the purposes of the ordinance are not furthered by specific application of the Ordinance and no fair and substantial relationship exists.

D. The proposed use is reasonable, and literal enforcement results in unnecessary hardship.

Lots 25-0 and 26-0 contain houses and are used for residential purposes – a permitted use in the Residence C Zone. The Applicants do not seek to intensify the use of any of the lots and in fact, will formally take Lot 24-0 out of circulation. Though the Applicants intend to sell Lot 25 in the future, the proposal before the ZBA ensures that an additional .21 acres of waterfront will remain in their custody wooded and undisturbed, but for a future dock. A dock is entirely permitted (and therefore reasonable) provided Applicants do not disturb the land or water and obtain appropriate State approvals. If Lot 25-0 remains the same and is sold, it is likely that more development will take place on those 195' of frontage than if the ZBA grants the Applicant this relief. Literal enforcement where, as here, the Applicant is willing preserve the open space and shoreland area results in an unnecessary hardship.

E. Substantial justice is done by granting the variance.

If “there is no benefit to the public that would outweigh the hardship to the applicant” this factor is satisfied. Harborside Associates, L.P. v. Parade Residence Hotel, L.L.C., 162 N.H. 508 (2011). That is, “any loss to the [applicant] that is not outweighed by a gain to the general public is an injustice”. Malachy Glen, *supra* at 109. Applicants have the right to reasonable use and enjoyment of their land, including the right to alter boundaries among lots they own to achieve their goals. These variances are necessary to achieve the reasonable use of the property, and come with a benefit to the surrounding properties as well as preservation of open space and shoreland frontage. Arguably, in this context, there is no benefit to the public from denial because the result will be development of Lot 24-0 and more intensive development at Lot 25-0. However, even if the Board disagrees with that assertion, the loss to the Applicants from denial of the variance far exceeds any gain to the public from such denial.

F. Rehearing is justified because the ZBA did not provide adequate factual and legal reasonings/support for its decision.

The ZBA must provide adequate justification and its reasoning for denial of each and every variance. The ZBA “must provide the applicant with written reasons for disapproval... .” Loughlin, Land Use Planning and Zoning, 15 N.H. Practice§21.16 (4th Ed., 2010); See also Motorsports Holdings, LLC v. Tamworth, 160 N.H. 95 (2010) (relating to Planning Board decisions).

In the instant case, review of the video indicates some members did not believe the Applicant demonstrated special conditions of the property existed, while another member shared that belief, but was also concerned that no substantial justice would be done from granting the variance and that the spirit of the ordinance was not met by granting the requested relief. The ZBA did not, however, identify evidence supporting its decision or detailing the reasoning for its decision on each of the required elements of each of the required variances. The Notice of Decision (Exhibit 1) provides no support or explanation. Adequate explanation and support for the ZBA’s decision on each and every variance is required in order to permit the applicant to effectively request rehearing and/or appeal the decision to the Superior Court. Since the Zoning


Board did not provide detailed explanation/support for its decision each required element of each required variance, that alone is justification for rehearing.

IV. CONCLUSION

Applicants incorporate by reference herein all previous applications, submissions and evidence provided to the ZBA. For all of the reasons herein stated, Mary Lohnes Ehrenworth and Richard Hallett respectfully submit that rehearing is justified and request that the ZBA grant this rehearing request.

Respectfully submitted,
**Mary Lohnes Ehrenworth &
Richard Hallett**
By their attorneys,
Hoefle, Phoenix, Gormley & Roberts, P.A.

Dated: June 7, 2018

By: 

Monica F. Kieser, Esq.
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 DURHAM, NH 03824
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Property Referenced:
 Tax Map 12, Lots 25 & 26

ZONING BOARD OF ADJUSTMENT

RE: PUBLIC HEARING on a petition submitted by Mary Lohnes Ehrenworth & Richard Hallett, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Durham Zoning Ordinance to reduce the non-conforming shoreline frontage for Lot 25-0, increase the non-conforming shoreline frontage for Lot 26-0 and create a new non-conforming side setback for Lot 25-0. The properties involved are shown on Tax Map 12, Lots 25-0 & 26-0, are located at 22 Colony Cove Road and 18 Colony Cove Road respectively, and are in the Residence C Zoning District.

DECISION OF THE BOARD

After review of the pertinent sections of the Zoning Ordinance of the Town of Durham, and after full consideration of the evidence submitted by Mary Lohnes Ehrenworth & Richard Hallett and testimony given at a Public Hearing on May 8, 2018 a motion was made and seconded:

that the Zoning Board of Adjustment deny a petition submitted by Mary Lohnes Ehrenworth & Richard Hallett, Durham, New Hampshire for an APPLICATION FOR VARIANCE from Article XII, Section 175-54 of the Durham Zoning Ordinance to reduce the non-conforming shoreline frontage for Lot 25-0, increase the non-conforming shoreline frontage for Lot 26-0 and create a new non-conforming side setback for Lot 25-0.

The motion PASSED on a vote of 5-0-0 and the application for variance was denied.

11 MAY 10
 Date

Chris Sterndale
 Chris Sterndale, Chair
 Durham Zoning Board of Adjustment

NOTE: Any person affected by this decision has the right to appeal this decision. If you wish to appeal, you must act within thirty (30) calendar days from 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 of Adjustment for a rehearing. The motion for rehearing must set forth all the grounds upon which you will base your appeal. See New Hampshire Statutes, RSA Chapter 677, for details.

As per RSA 674:33 Variances and Special Exceptions shall be valid if exercised within 2 years from the date of final approval, or as further extended by local ordinance or by the zoning board of adjustment for good cause, provided that no such variance shall expire within 6 months after the resolution of a planning application filed in reliance upon the variance.

Any questions should be directed to Audrey Cline, Zoning Administrator/Code Enforcement Officer.



TOWN OF DURHAM
8 NEWMARKET ROAD
DURHAM, NH 03824
Tel: 603/868-8064
www.ci.durham.nh.us

May 14, 2018

Mary Lohnes Ehrenworth
Richard Hallett
18 Colony Cove Road
Durham, NH 03824

Dear Mary Lohnes Ehrenworth & Richard Hallett,

Enclosed you will find a copy of the Zoning Board of Adjustment's decision that was rendered May 8, 2018, at the Zoning Board of Adjustment meeting. The application for variances regarding the shoreline frontage and sideyard setback for 18 & 22 Colony Cove Road was denied. If you or any abutters wish to appeal this decision, the deadline to file an application of appeal with the Zoning Board of Adjustment is within thirty calendar days beginning May 9, 2018. According to RSA 677:3, a motion 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 in the office of Planning and Zoning at the Durham Town Hall.

If you have any questions, please call me at 868-8064.

Sincerely,

Audrey Cline
Zoning Administrator/CEO

Enclosures (1)

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