

The applicant, Kimberley Laris, requests that the Durham Zoning Board of Adjustment grant a rehearing of the decision issued on February 12, 2019 due to the fact that it was unlawful and unreasonable and was contrary to the clear evidence which supported the variance.

The denial of the variance request was primarily based on the Hardship criteria, and whether the applicant's lot was part of the Cedar Point community. Although the owner and some neighbors of interior properties were available to ask, a number of critical points were made in error only during deliberation when they could not be corrected. There was much information presented to overlook. Therefore, the information is presented to provide better yet more context and insight. Also, relevant information was found adding significant credibility to concern over usurped shoreline access rights, to appreciate potential bias from other sources.

Inflexibly only makes this lot unfairly bear all the cost to offset the harms caused by the excesses of many well-enjoyed smaller lots surrounding it, and slows the lot's recovery from abuses of deferred maintenance and foreclosure. It is time to return ownership rights, when reasonable proposals provide a safe balance.

Hardship Criterion

General

Some board members did not correctly apply the criteria. A variance is granted under New Hampshire law when the literal enforcement of the ordinance would result in an unnecessary hardship – such as this case. Zoning boards provide needed balance for unique situations.

This case is in great need of fairness. This lot should be allowed enjoy a stewardship burden more in keeping with its community. Allowing two lots more in keeping with its unique area's surroundings is a reasonable way to provide fairness without public harm. As New Hampshire Supreme Court states:

... “zoning ordinances must be consistent with the character of the neighborhoods they regulate. the “uniqueness” is the character of the entire neighborhood, not just the specific property. Thus “unique” should be thought of, not as absolutely unduplicated, but rather the particular setting of the property in its environment. Belanger v. City of Nashua, 121 N.H. 389 (1981).”

*PARAGRAPH (5)(A)—SIMPLEX STANDARD: 1. Special Conditions. The applicant first has to establish that there are “special conditions of the property that distinguish it from other properties in the area.” different, in a meaningful way, from other properties in the area. “The property must be ‘burdened by the zoning restriction in a manner that is distinct from other similarly situated property.’” if the **size, configuration, location, or other characteristics make the property truly unique, the applicant probably can clear this hurdle.***

PARAGRAPH 5B... where there is clearly a “fair and substantial relationship ... between the general purposes of the zoning ordinance and the specific restriction on the property” Thus, there has to be a secondary “safety valve,” since the alternative would be for a court to invalidate the zoning restriction altogether. Subparagraph (5)(B) provides relief for the applicant in that rare case. (Source: [VARIANCES IN THE 21st CENTURY by Cordell Johnson](#))

40 of Cedar Point's 41 lots never could meet Durham's current Residential Coastal (RC) Zone 3.25 minimum area requirements, because it is a unique environment. The 1 lot that can meet the 3.25 acre area requirement is an outlier, because it is less geographically confined with mainland ownership at the neck of Cedar Point, with large prime wetlands unsuitable for subdivision. That leaves this lot onto itself above 1.43 acres at 3 acres, making a split of 1.18 and 1.82 acres reasonable.

It is important to again recognize the realities of the context of this property's surroundings. Contrasting with large lot area size intentions, Cedar Point is labeled in Durham's Natural Resources report as "fragmented", and "developed"; and

“urban” by the 2010 Federal Census. Cedar Point’s Scammel Bridge hosts Durham’s US Rt 4 onramp to Rt16 for I95 access, under a direct line of Pease airport traffic.

Cedar Point’s geographically confined area has had lot sizes averaging .63 acres for many years (though the vast majority are smaller), and has never been able to meaningfully contribute to any mainland-appropriate 3.25 lot size intention. No fair and substantial relationship exists between the general purpose of a rural 3.25 acre area zoning ordinance as it applies to 40 Cedar Point lots lacking direct mainland.

Within lots totaling 24 acres, Durham’s ordinances and NH soil combination requirements successfully terminated excessively small lots (or “chopping-up” as stated by the board). This variance request is not ill-fitted – but the unsuitability of RC Zone dimensional requirement to this circumstance that creates a burden.

Financial Factors

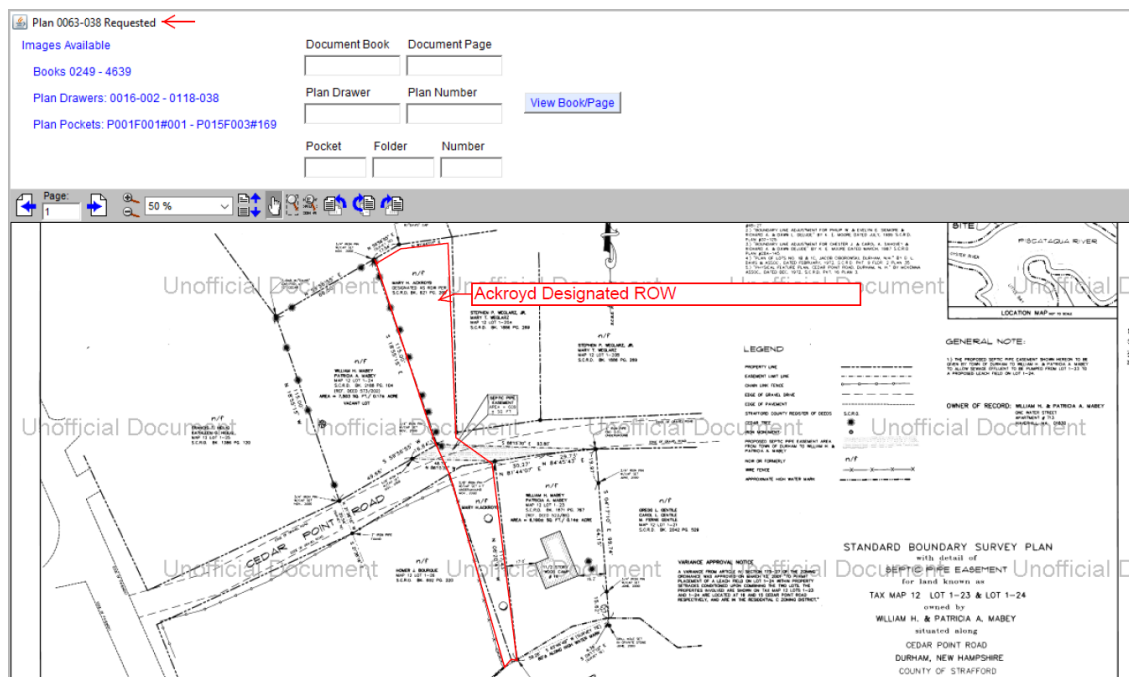
The Ordinance interferes with the petitioner’s asset management decision to attain a lower maintenance burden as benefits the smaller lot size her neighbors enjoy. In the case of Malachy Glen, 155 N.H. at 107:

... burden must arise from the property and not from the individual plight of the landowner. ... the Court considered the “final” condition—the surrounding environment, i.e., “whether the landowner’s proposed use would alter the essential character of the neighborhood.” Id., at 81.

This is not a use variance, but the result of honoring the size request would be lots that match the essential character of the neighborhood. Farrar v. City of Keene, No. 2008-500 (N.H. May 7, 2009):

“the Court acknowledged that the applicant submitted minimal evidence of a reasonable return of his investment in the property,” slip op. at 4, but still concluded that unnecessary hardship was established, see id. at 4-5.”

Charles Hart’s complaint letter (the pass-through owner of Rusell Realty with title to 15 Cedar Point), bright-lined property asset value disparities at the lot boundary. Mr. Hart’s abutting .18 acre lot gained significant value by replacing a modest cottage with an 2 story accessory rental over 30% of its original size to improve his investment (source: <http://gis.vgsi.com/durhamnh/Parcel.aspx?pid=1262>). The eastern boundary of 15 Cedar Point is the west side of this lot’s shared ROW to Cedar Point Rd. Subdivision provides resources to enrich this lots capability to improve from deferred



maintenance to be more healthy and reasonable in character with the surrounding lots.

Mr. Hart also states the zoning limitation was known at the time of purchase, is a reason to deny the variance request. However, note *Hill v. Town of Chester*, 146 N.H. 291, 293 (2001):

... self-created hardship does not preclude the landowner from obtaining a variance since “purchase with knowledge” of a restriction is but a “nondispositive factor” to be considered under the first prong of the Simplex hardship test. Id., at 83. ... the variance was not contrary to the spirit ... of the ordinance ... would not change the use of the area; and ... able to sub-divide his land, the applicant would have sufficient minimum acreage ... “substantial justice ... was done”.

Additionally, the applicant learned after the meeting that Mr. Hart had just filed a survey with Strafford County about the same time as he filed the complaint, which disappears the applicant’s shoreline access shown above by ignoring multiple deeds, and prior surveys and sales records aligning a direct shared ROW for this lot to the shoreline. Disruption of the private shared ROW’s shoreline access is now being contested as well as the dredging into the ROW that encouraged invasive plants to heavily impact the value of this lot while owned by elderly folks who couldn’t keep up with it. Subdivision would provide needed resources to help correct many problems inherited with this property, including a neighbor with a property litigation hobby. The owner should not be unreasonably withheld from investing in the long-term health and welfare of her asset.

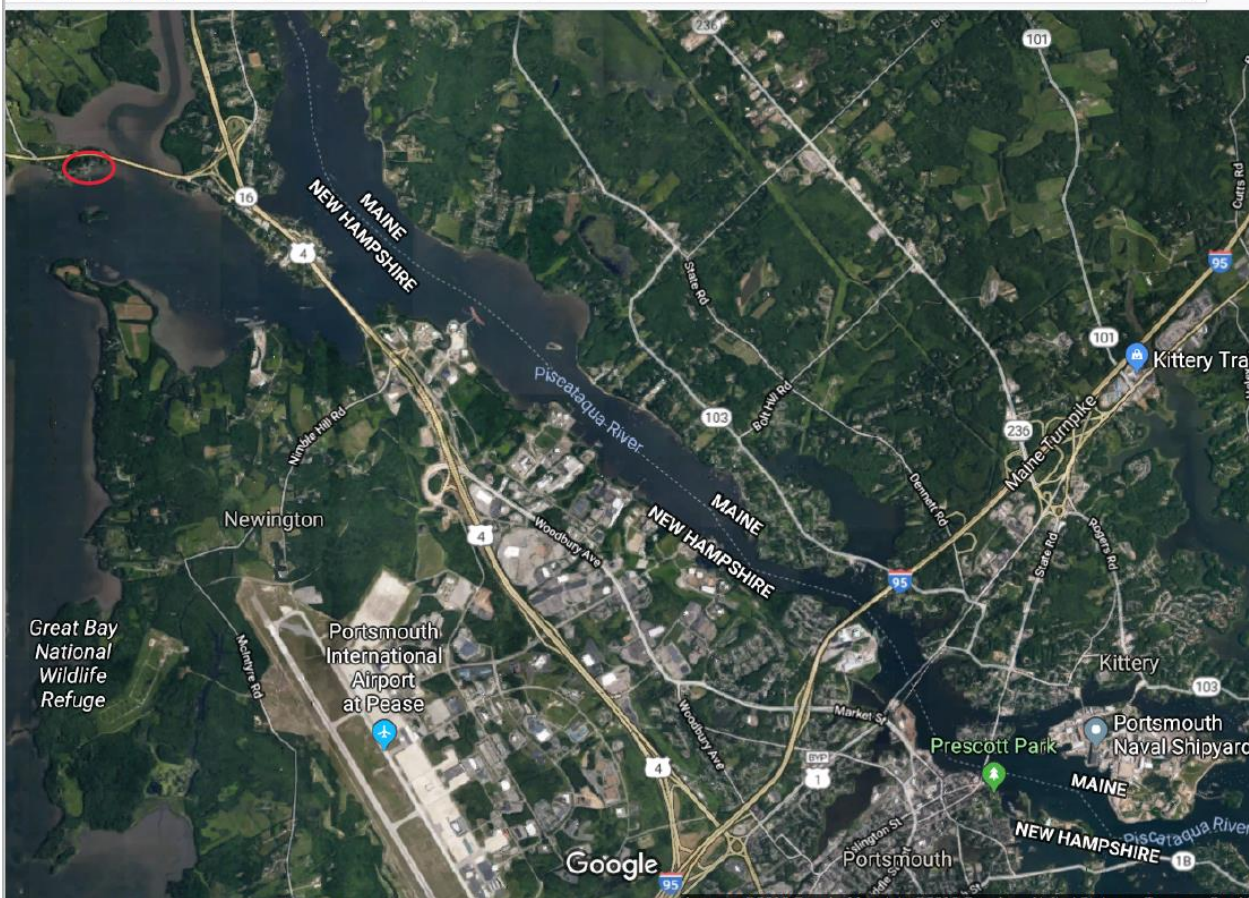
Community Definition

Introduction

The Board attempted to self-define “The Cedar Point community”, with the most poignant nuances primarily in closed deliberations, so could not be promptly corrected. The publicly available Durham tax maps and statistics from tax records provided compelling data. The need to find nuisances to exclude this property from its community should not have been necessary.

Board members relied mostly on input from a few members claiming familiarity via a few south shore properties/homeowners and US4 pass-through driving experience, rather than the Cedar Point community as locals enjoy it. Naturally, most visitors drive around the circle of road, gazing to the waterfront rather than the interior. Also, interior properties and accesses are difficult to obtain context from the roads when hill height and trees obscure sightlines. All of these factors may have provided for the misassumptions drawn regarding the "community setting" warranting review, so they are covered out of respect and courtesy for the volunteer Board’s time and care.

For the purpose of those who do not live in Durham that need to evaluate this rehearing information a larger Town of Durham Map 12a is in the next section. Note this lot is clearly in the *center* of Cedar Point. Cedar Point is distinguishable as within an area geographically confined by water (nearly an island in Great Bay) – bisected by a high traffic US4 access path to high speed corridors of Route 16/I95 and Pease Airport overhead – creates a very unique shared living experience.



Map of proximities for Cedar Point to tidal Great Bay, US 4, NH Route 16, US I-95, Pease Airport, Dover, Newington, Portsmouth, and Kittery.

Corrections to Address

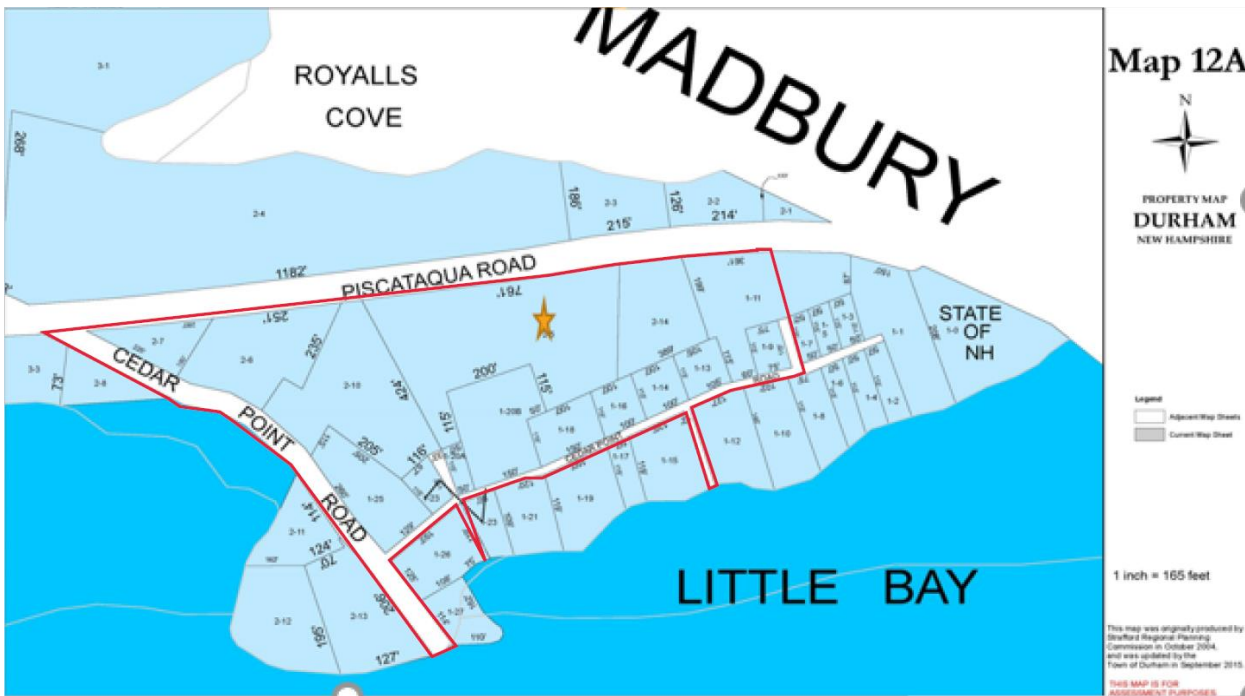
A. Cedar Point is not a 45 mph zone, as stated. US Rt4 recognizes the start of the thickly-settled area with a reduction with two 35 mph signs, a caution, and a traffic light before entering. This lot has the only south side driveway between the last 2 stop lights prior to joining Route 16.



B. This lot does enjoy practical shoreland access. Shoreland access should not be necessary to determine a fair subdivision decision. However, any definition of Cedar Point lots would include access to the shoreline, so it is a moot point. But, the relative rights of ways are summarized:

- 1) the State of NH Fish & Game Department provides public boat launch on the eastern shore, easily seen driving to the US4 bridge;
- 2) the Town of Durham's public boat launch on the southwest shore, accessible from the public portion of Cedar Point Rd;
- 3) along with others living inside the paved circle of road (see below), direct access to Durham's boat launch and the shallow landing are possible via the private portion of Cedar Point Road (as discussed, this lot's deeded ROW can access the private portion); and,
- 4) as noted, this lot likely does have a direct right to access Cedar Point's deep water shoreline, as the ROW is defined in multiple prior deeds to continue straight across Cedar Point Road to the shoreline.
- 5) across Route 4 to the north, a shared private dock for tidal access only was made privately available to this lot.
- 6) a southern neighbor provides the right to cross her lot for the applicant's child to access her school bus, and to access the shared tidal landing more directly for kayaking.
- 7) a western neighbor provides the right to cross anytime to access the public portion of Cedar Point Road (formerly Piscataqua Bridge Road), if the invasives situation can be contained.

C. Lots north of US 4 are not larger on the whole. Only 1 lot is larger, with the average not exceeding the smallest lot size requested. Additional information about size is provided below:

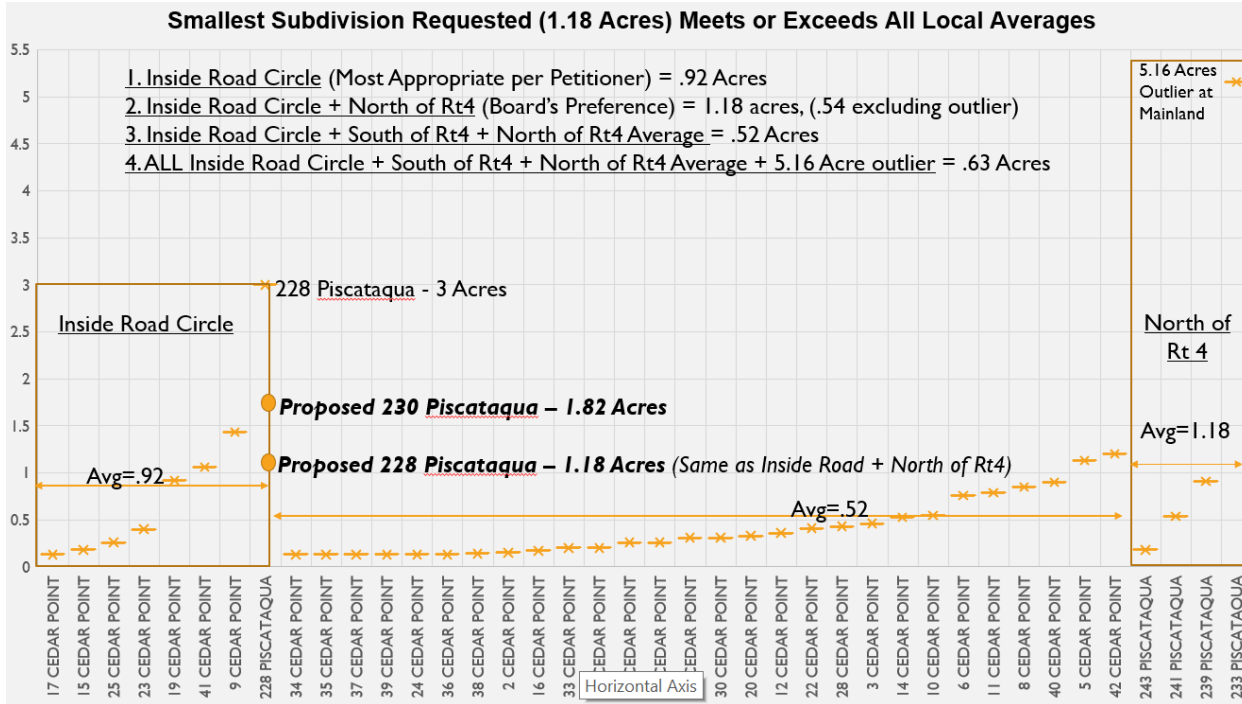


Source: Durham Taxlot Map. Redline shows a safe circle walking area interior lots enjoy

Relative Size

It is the safety of the Cedar Point Road segment south of Route 4 which caused the first population shown, because that is the section draws more "home" activity for this lot, such as school bus access, family nature walks, bicycles, public kayak launches use, deliver baked treats, etc. Out of all the neighbors this lot has, only 2 small fences exist to separate them. Cedar Point is not only about exclusive south shore homes, but many families live in the interior circle. And as discussed, this lot's deeded ROW provides direct access to Cedar Point Road to access the nearby Cedar Point public boat launches, and maybe direct shoreline access if legally restored.

Context for how the property interacts with its local environment below may be helpful, but the relevant facts show that any reasonable sub-sample or full population for the community definition that can be contrived within the geographically constrained Cedar Point, results in the same size disparity:



- 1) Within the paved circle of road (Applicant’s preference) - owners safely cross lot boundaries within Cedar Point and Route 4.

Average lot size = .92 acres for 8 lots

- 2) Inside paved road circle + North Shore lots (Board Preference) – Route 4's noise/traffic reduces casual chat, but neighbors graciously provide private dock access to kayak in the safer Royalls Cove and help is swapped in driveway snow emergencies. It was stated the northern properties are larger, but only the 1 less constrained by being connected to the mainland is larger (see the statistical chart).

Average lot size = 1.18 acres (.54 when excluding the outlier at 5.16 acres)

- 3) All of Cedar Point except 1 outlier -

Average lot size = .52 acres for 40 lots (.63 acres for 41 lots with outlier)

Note: This is not new information. The same conclusions can be independently drawn from data in artifacts made available in the meeting and public records. It is just sorted to address board nuances.



Worn walking path crossing this and neighbor's lot to for school bus pick-up on Cedar Point Road.

Conclusion

This situation exemplifies what NH Supreme Court empowers Zoning Committees to cure - an unfair and unnecessary property hardship that prevents a property from sharing the same benefits valued by all other neighbors within its unique community environment due to ill-fitting ordinances.

... on "substantial justice" ... whether the loss the applicant will suffer by its inability to reasonably use its land as it desires without the variance outweighs any gain to the public by denying the variance. See, U-Haul Co. of N.H. & Vt., v. Concord, 122 N.H. 910, 912-13 (1982) Inc.

... Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. ... capable of relief by the granting of a variance that meets the other qualifications. See Loughlin, §24.11, page 308, the New Hampshire Office of State Planning Handbook

... for the proposition that satisfaction of unnecessary hardship peculiar to the property "is most clearly established where the hardship relates to the physical characteristics of the land." K. Young, Anderson's American Law of Zoning §20.36, at 535 (4th ed. 1996),

One lot should not bear the whole burden of imprudence by others on its boundary. No other legal, practical opportunity reducing overwhelming long-term lot stewardship was raised. This lot can provide a healthy subdivision within the context of its surrounding without harm to others, and should not be denied a variance.

No appreciable public impact of adding one home within such a large parcel was raised. The Board acknowledged public health impacts were adequately considered by meeting the NH state soil requirements, when approving the septic structure exception. Note that the NH State lot size requirements also act to prevent further subdivision.

Instead of challenging the impossible RC Zone dimensional restriction, or requesting a subdivision of multiple lots to achieve Cedar Point's average .63 acre lot size, the petitioner seeks only a variance to subdivide her lot into modest

subdivision of two lots (1.82 and 1.18 acres) to enjoy her property more equally as her neighbors. Subdivision provides the Board an opportunity to provide reasonable relief simply by smoothing the transition zone from the larger rural mainland lots sizes, into thickly settled Cedar Point. Durham's Planning projects recognize the need to take advantage of such opportunities at similar boundary areas to increase capacity and revenue, and improve community relationships that have suffered since imposing the area restriction. Therefore, the request is reasonable both locally and is well-aligned to support the Town of Durham planning goals.

The vote to deny the area variance was unlawful and unreasonable, and contrary to New Hampshire law, and should be reversed.

Reference Table: Cedar Point Lot Sizes – Immediate Neighbors and all Cedar Point Lots

17 CEDAR POINT	0.13
15 CEDAR POINT	0.18
25 CEDAR POINT	0.26
23 CEDAR POINT	0.4
19 CEDAR POINT	0.92
41 CEDAR POINT	1.06
9 CEDAR POINT	1.43
228 PISCATAQUA	3

34 CEDAR POINT	0.13
35 CEDAR POINT	0.13
37 CEDAR POINT	0.13
39 CEDAR POINT	0.13
34 CEDAR POINT	0.13
24 CEDAR POINT	0.13
36 CEDAR POINT	0.13
38 CEDAR POINT	0.14
2 CEDAR POINT	0.15
16 CEDAR POINT	0.17
33 CEDAR POINT	0.2
32 CEDAR POINT	0.2
29 CEDAR POINT	0.26
27 CEDAR POINT	0.26
26 CEDAR POINT	0.31
30 CEDAR POINT	0.31

20 CEDAR POINT	0.33
12 CEDAR POINT	0.36
22 CEDAR POINT	0.41
28 CEDAR POINT	0.43
3 CEDAR POINT	0.46
14 CEDAR POINT	0.53
10 CEDAR POINT	0.55
6 CEDAR POINT	0.76
11 CEDAR POINT	0.79
8 CEDAR POINT	0.85
40 CEDAR POINT	0.9
5 CEDAR POINT	1.13
42 CEDAR POINT	1.2
243 PISCATAQUA	0.18
241 PISCATAQUA	0.54
239 PISCATAQUA	0.91
233 PISCATAQUA	5.16

|