


Newton NH Zoning Board of Adjustment

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REQUEST FOR REHEARING

DO NOT WRITE IN THIS SPACE.

Fees Paid \$ _____

Certified Plot Plans _____

Map #14 Block #1
Lot#1=1.2.27-3.27-6. 27-7

Applicant For Rehearing: **Abutter** Greenfield Hill Estates Homeowner Association _____

Address PO Box 575 Plaistow NH 03865 _____

Owner 125 Development NH Corp _____

Location of Property Newton Tax Map 14, Block 1, Puzzle Lane, Newton NH 03853
(street address)

NOTE: This application is not acceptable unless all required statements have been made, plot plans supplied, and all fees paid. Additional information may be supplied on a separate sheet if the space provided is inadequate.

Appeal for Rehearing

Relating to the rehearing of a decision of the Newton Board of Appeals.

Decision of the Newton Board of Appeals to be reviewed _____

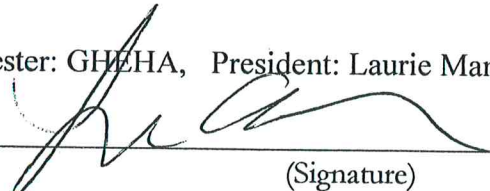
date of original hearing 1/3/2024 _____ of section appealed Article XXV, Section 1
_____ of the zoning ordinance.

Reason(s) for rehearing

See Attached Document - regarding Jurisdiction, 5 tests required for variance, and Procedural Issues.

Additional sheets may be attached

Requester: GHCHA, President: Laurie Mancinelli


(Signature)

Date 1/29/2021

Adopted 5/10/2021

Based the NH Supreme Court in Harborside Associates, L.P. v. Parade Residence Hotel there are two tests to determine whether there would be unnecessary hardship caused by the application of the current regulation:

- Test 1) This property must have special conditions that distinguish it from others; and as a result there is no substantial relationship between the public-good purpose of the ordinance and this specific property.
 - The applicant's property does not have any distinguishing characteristics that makes it significantly different from other properties in the area:
 - Wetlands are common to all properties in the area.
 - The 200' offset has been in place since before the applicant purchased the land.
- Test 2) The property cannot be used in conformance with the ordinance.
 - This is not the case. The current location of the road is a clear counter-argument that the land cannot be used without a variance.
 - Though the applicant's engineer makes the case that the radius of the current road bend must be adjusted to conform to DOT requirements, there are several options for placement of the road that would not necessitate moving it closer to the abutters' properties. For instance, it could be more gradually looped into the northern area that the developer hopes to develop. This would avoid wetlands while not causing additional injury to abutters.

3.2 Procedural Issues

In addition to the clear failure of the applicant to successfully argue their case for variance on the merits of the 5-part test in RSA 674:33, there are procedural issues that justify a rehearing:

- The applicant bypassed the authority of the Newton ZBA by getting approval of the roadway engineering from NHDES prior to the ZBA having any influence in the location of the roadway.
 - Instead of the ZBA or Planning Board having a say in the design of the roadway, the plan was provided to the ZBA as a fait-accompli, where any requested changes were argued to require significant expense and negotiation with NHDES.
- It seems there may have been Ex-parte discussions outside of official ZBA meetings regarding this matter, some of which may have influenced the ZBA decisions without the ability of interested parties to make counter-arguments.

- We would argue that because of the specific characteristics of the land, that the buffer should be greater, not less – but that it should at least be the full 200’.
- The reasoning that the developer’s Plaistow land acts as additional buffer to road noise is seriously undercut by the developer having largely clearcut into this Plaistow land, significantly reducing any buffer.
- All of this is clearly contrary to the spirit of the ordinance.

3.1.3 Substantial justice is done.

This requires that the benefit to the applicant cannot be outweighed by the substantial harm to be done to the general public or other individuals. The NH Supreme court also notes that this cannot be the case if the other 4 factors are not proven by the applicant.

The applicant has many, many acres in which to place the road. Indeed, the current road is already further from the abutters’ land. The abutters, however, have no flexibility to avoid the road’s impact, and will suffer substantial harm both in the enjoyment of their property, and to their property values.

3.1.4 The values of surrounding properties are not diminished.

The argument that property values in the area as a whole are increasing, and that this somehow justifies development that will clearly impact the character of the neighborhood is false on its face.

The question is whether this specific development will diminish the property values of the abutting homes versus the value of other properties not abutting the development.

The current plan simply does not account for additional noise and pollution that will be caused by the location of the roadway.

While it is difficult to gauge the impact of this, we do have an instance of a home sale of an abutting home where a sale fell through in 2020 due to this development. The home needed to be pulled off the market for a time, and was later sold at a lower asking price.

3.1.5 Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

First, if the other 4 tests for a variance are not met, then the 5th test does not override them.

This is where this developer has traditionally made many of their arguments, many of which are not justified by the law.

RSA 674:33, I(b) contains two definitions of unnecessary hardship. See RSA 674:33, I(b)(5)(A), (B). Under the first definition:

(A) ... [U]nnecessary 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.

(3) The definition of “unnecessary hardship” set forth in subparagraphs (1) and (2) shall apply whether the provision of the ordinance from which a variance is sought is a restriction on use, a dimensional or other limitation on a permitted use, or any other requirement of the ordinance.¹

3 REHEARING JUSTIFICATION

We hold that the decision to allow the 150’ variance of the 200’ structural setback between zones for the purpose of building a private roadway for the development is in error.

3.1 Argument vs 5-Part Test

3.1.1 The variance will not be contrary to the public interest.

The removal of this setback significantly alters the essential character of the abutting residential areas. This is a key measure of a variance being contrary to the public interest.

We know that the developer is intent on developing the area to the north of the road for industrial use. In the past, this has included discussions of industrial warehouse and distribution centers. The engineer’s argument that the road must support a radius to support tractor trailers supports this argument.

The resulting traffic would significantly increase noise, nighttime light, and traffic fumes in a quiet residential neighborhood, significantly altering the character of the neighborhood.

This is clearly in contrary to the interest of the abutting homeowners.

3.1.2 The spirit of the ordinance is observed.

There are several arguments here on the letter of the ordinance:

- Newton does not have jurisdiction in Plaistow, therefore variances should be considered from the Town line.
- The citizens of Newton have repeatedly voted to uphold the 200’ structure setback between zones. A 150’ variance on this setback guts the regulation.
- Additionally, the developer has clearcut the land, reducing the natural buffer below the 50’ required (Section XXV.1.a-b).

With regard to the spirit of the ordinance:

- The reasoning for the ordinance is to provide sufficient distance and buffer to protect residential areas from the noise, light, and pollution caused by industrial activity. In this specific instance, the road and future buildings in question lie downslope of the residential area. This means that there is no natural geological buffer. Houses abutting the development can already see and hear traffic on the road as if it were in their back yard. Placing the road even closer to their land will make this significantly worse.

1 INTRODUCTION

The Greenfield Hill Estates Homeowner Association is looking for a rehearing on the matter of 14.1.1.1.2.27.3.27.6.27.5_125_development-Variances for driveway.

We believe that for both procedural reasons and for material reasons, the zoning variances should be re-heard.

2 VARIANCE CONSIDERATIONS

As you are fully aware, variances must pass the 5-part test from RSA 674:33 - Powers of Zoning Board of Adjustment, and that each of these 5 parts must be proven by the party requesting the variance, for each variance.

I(a) The zoning board of adjustment shall have the power to:

(1)

(2) Authorize, upon appeal in specific cases, a variance from the terms of the zoning ordinance

if:

(A) The variance will not be contrary to the public interest;

(B) The spirit of the ordinance is observed;

(C) Substantial justice is done;

(D) The values of surrounding properties are not diminished; and

(E) Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.

I(b)(1) For purposes of subparagraph I(a)(2)(E), "unnecessary hardship" means that,

owing to special conditions of the property that distinguish it from other properties in the area:

(A) 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

(B) The proposed use is a reasonable one.

(2) If the criteria in subparagraph (1) 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.