

**TOWN OF WEBSTER, NEW HAMPSHIRE**  
***Zoning Board of Adjustment***  
**945 Battle Street/Rte. 127**  
**Webster, NH 03303**  
**Tel. (603) 648-2272**

**Zoning Board of Adjustment Minutes May 14, 2013**  
**Rehearing of Case No: 13-01 Variance Application**  
**Susan D. Panilaitis et al c/o Richard Benson**  
**118 Westwind Village Road, Map 13 Lot 4**

Members present: Chairman Marty Bender, Bob Drown, Jr., David Barnes, and Barbara Corliss; Alternate Members: Secretary, Jaye Terrazzano and Dee Blake. Alternate Terrazzano acted as a voting member in the absence of Member Don Koberski.

**7:03 pm:** Chairman Bender opened the rehearing. Secretary Terrazzano took attendance. Chairman Bender asked who was representing the applicant. Dr. and Mrs. Benson were in attendance with their agent, Mark Moser. Mr. Kenneth H. Naide, Esquire was representing the opposition, Dr. & Mrs. Berryman. Chairman Bender asked the applicants what were they asking for, the variance or the special exception or would the applicant want to build on the same footprint? Dr. Benson stated they would prefer not to build on the same footprint. Chairman Bender explained that with a rehearing, the applicant is basically starting all over. Chairman Bender stated the applicant still had a variance pending or they could go ahead with a special exception. Mr. Moser replied that the preference was to get a variance and locate the building at a position that would be more reasonable with neighbors and the abutting properties and not have the building 13 feet from the Berrymans' property line. Chairman Bender stated that one of the reasons that the Board granted the rehearing was because the porch on the current building had been added in 1990 without the ZBA granting or denying a variance because at the time the Board could not determine the boundary lines. Hence, the porch was added without the benefit of a variance and therefore was illegal. A brief discussion ensued regarding the history of the deck construction. Chairman Bender stated that unless there was any evidence that the deck was built before zoning, i.e., before 1974, then the Board would have to assume the deck was not there legally. Mr. Moser stated they would definitely apply for the variance. Chairman Bender then stated that a variance was much more difficult to get than a special exception. The granting of a variance requires five criteria that must be established per RSA 674:33. Mr. Dean Anderson, a local contractor, asked the Board what those criteria were. Member Corliss read them out loud to all in attendance. Chairman Bender stated that the applicant would have to address each one of those five criteria.

Mr. Moser presented to the Board a third set of revised site plans which showed the deck on the easterly side completely removed which would increase the setback from the

easterly property line to 16 feet and then maintains 25 feet on the Berrymans' side. The footprint of the current dwelling is 36 feet long by 24 feet wide; the proposed building would be 53 feet long by 28 feet wide. Chairman Bender stated that the proposed house was substantially larger than the existing one. Member Corliss clarified that the variance was for the 16 foot setback. Chairman Bender stated that if it was 25 feet it would be a special exception.

Mr. Moser stated that the primary reason to increase the footprint of the building was because the Bensons' would like to be able to live on the first floor with bedrooms upstairs to accommodate their very large family when they visit during the summer. A brief discussion followed regarding the setbacks of neighboring camps and the history of Westwind Village. Alternate Blake asked if the applicants could change the design of the building so as to increase the setback from 16 feet to 25 feet by adding on to the back of the building going closer to the road. Dr. Benson stated that would be less desirable because the view is toward the water hence the reason for making it wider. Mr. Moser then stated that topography was an issue, too. It would be impractical to fill on the downhill side 40 to 50 feet off the lake and really change the grades with such a small lot. Chairman Bender asked for clarification with regards to the site plans. Mr. Moser went over the plans with the Chairman clarifying measurements. Chairman Bender stated that the applicant could build on the same footprint without having to apply for a special exception or a variance. Chairman Bender reiterated to the applicants that the burden was on them to establish the five criteria for a variance.

Mr. Moser presented the following arguments to meet the variance conditions:

1. **There would not be a diminution on value of the surrounding properties as a result of the granting of a variance because** the proposed replacement of the existing cottage, which is in poor condition, represents an overall improvement to the property in question.
2. **The granting of the variance would not be contrary to the public interest because** the property is currently developed with a like structure.
3. **Denial of the variance would result in unnecessary hardship since:**
  - (a) **The proposed use is reasonable and the zoning restriction as applied to the property interferes with the reasonable use of the property considering the unique setting of the property in its environment such that** the width of the parcel, topography, and road location at this site are unduly restrictive.
  - (b) **There is not a fair and substantial relationship between the general purposes of the zoning ordinance and the specific restriction on the property because** the lot dimensions would render this property **unbuildable** and not suitable for the Bensons' needs.

- (c) **The variance would not injure the public or private rights of others since** the nature of the land use will remain the same.
4. **By granting this variance, substantial justice would be done because** the current residential use of the property would continue.
  5. **The use contemplated by the petitioner as a result of obtaining this variance would not be contrary to the spirit of the ordinance** since reasonable setback distances have been proposed and because similar setback distances from adjacent buildings are in existence for surrounding properties.

Chairman Bender asked if anyone wished to speak in favor of the application. Mr. Malfait, a neighbor of the Bensons, addressed the Board. He stated the home that the Bensons' are proposing is only going to help the neighborhood. He stated that he loved to see their kids come home and play with the family. Mr. Malfait stated that he thought it would be a shame if the Town of Webster did not give the Bensons a variance. They have been great neighbors; they are not wild and crazy people.

Chairman Bender recognized Mr. Naide, Esq., who spoke in opposition on behalf of the Berrymans, who were not in attendance. Attorney Naide clarified with Chairman Bender that the special exception that was previously approved had been withdrawn. Attorney Naide stated that he understood the feelings of the applicants and the neighbor, none of which he disputed, however, none of them were relevant. Attorney Naide stated that he did not think that based upon the rationale that had been set forth by the applicant, that it remotely satisfies the majority of the *Simplex* [*Simplex Technologies v. Town of Newington*, 145 N.H. 727 (2001)] criteria. Attorney Naide pointed out that the NH Supreme Court cases are very clear that if the Board makes an arbitrary decision because the Bensons are nice people and they have a lot of grandchildren and they want to have a nice view, that decision would fall very short of the law that was set forth on this issue. Attorney Naide continued by stating that a variance is a much tougher, much higher burden, much higher standard than a special exception, and the reason for returning to the variance issue was because of the violation of the illegally added porch in 1990; one cannot get a special exception for 25 feet on the other side unless it corrects the existing violation. Attorney Naide further stated that no one was saying the Bensons can't rebuild; there are options. He stated that site was not impossible to develop and there is no substantial hardship to preclude them from rebuilding if they do it legally. Attorney Naide stated that none of the reasons that were presented by the applicant satisfy the criteria. Attorney Naide stated that the Supreme Court in New Hampshire codified the criteria to eliminate compassion, sympathy, etc. Mr. Naide stated that his position was to object to a variance or a special exception simply because he did not think they would ever be upheld by the State of New Hampshire. He stated that there was a solution; the applicants could rebuild on the footprint assuming they take the footprint from the original 28 foot distance from the requested variance lot line. They can't get the benefit of an illegal violation. In

conclusion, Mr. Naide stated that because of those reasons he felt that neither the variance nor the special exception would satisfy the rules of the State.

Member Drown raised the question that if the Bensons were to build on the original footprint and have the floor space they want by building three stories wouldn't the Berrymans be happier if the Bensons built a two story building? Attorney Naide stated he had not seen any building plans but to address Member Drown's hypothetical issue, he stated that adhering to the correct property line and to the laws of this State in terms of variances and special exceptions is the most important thing. He stated if the building were to be three stories, adhering to the footprint would be the most important issue.

Secretary Terrazzano inquired about the *Simplex* case. Attorney Naide stated it was a 2001 New Hampshire Supreme Court case which is significant because of the codification of the five criteria. The New Hampshire Supreme Court found that case as important as to not only state it in the law, but to take that opinion and put it into a statute. A brief discussion ensued.

**7:50 PM** Chairman Bender gave the applicants and those in favor of the application their turn for rebuttal. Mr. Moser stated he felt that keeping the proposed structure set back 25 feet from both side property lines to be a significant hardship. He stated that most towns in New Hampshire measure setbacks from the corner of the foundation, not from an accessory structure such as a deck. Chairman Bender disagreed. A brief discussion ensued.

Mr. Anderson stated he believed that based on what the opposition stated that if the Bensons' did not build on the exact same footprint, then they could possibly take the Town to court. Mr. Anderson felt it made perfect sense if a special exception was granted for the setbacks to be 25 feet from each side property line. Chairman Bender stated that this rehearing is for a variance, not a special exception. Mr. Anderson asked what would they do if the variance was denied; start over again? Chairman Bender stated he never had anybody who was denied a variance and file for a special exception. Mr. Anderson asked Chairman Bender what if the special exception was denied, could the applicant still be able to go back to the original footprint? Chairman Bender stated definitely; one can replace anything on the original footprint; the ordinance says you have two years in which to replace, and therefore there would be no problem.

Mr. Malfait spoke in rebuttal. He asked the Board if the Berrymans' house was built on the exact square footage of the original house. Chairman Bender did not know. He asked Mrs. Larson if she knew if the Berrymans ever came asking for a special exception. She stated she did not know; she would have to research the records. At this point, Attorney Naide stated that the issue before the Board is 118 Westwind Village. He did believe that the Berrymans' replacement house conformed to every applicable setback.

Before the opposition's rebuttal, Member Drown stated that when the Berrymans bought their property, they must have known of the existence of the porch and deck next door to them; they must have known how close the structure was to their lot line. Dr. Benson agreed.

There was no more discussion.

**8:02 PM** Chairman Bender turned the floor over to the opposition for rebuttal. Attorney Naide wanted to address Member Drown's statement. He stated there had been no recognition of a waiver or estoppel when the property owner purchased the property. The burden of reporting a violation was not the responsibility of the abutters, in this case the Berrymans. Attorney Naide stated that the applicants' compassionate, sympathetic plea was completely devoid of anything that would satisfy the laws and statutes that were put in place to eliminate such discussions. Attorney Naide stated that he felt granting the variance would fail any test under State law. In conclusion, Attorney Naide stated that for those reasons, the Berrymans would be in opposition to the variance.

There was no further testimony.

**8:05 PM** Chairman Bender closed the testimony and the Board discussion began. Member Corliss asked Attorney Naide the meaning of estoppel. He stated that in the previous testimony he wanted to clarify that the burden of reporting a violation was not the responsibility of the abutters, in this case, the Berrymans.

Member Corliss stated she was inclined to strip all the emotion out of the decision and look at the law. She did not see grounds to grant a variance. Member Corliss asked Mr. Moser to read through numbers two and three of the responses to those criteria. She stated she understood what was said, but could not see the point of law; the responses were more on the emotional side. Member Corliss further stated that she would love to have a better building there. Chairman Bender then stated that the applicants could have a better building, but not as big as they proposed. Member Corliss stated that there was no hardship if they built on the same footprint and there would have been no need to have a ZBA hearing in the first place.

Secretary and Acting Member Terrazzano and Member Barnes agreed with Member Corliss. Chairman Bender then stated that the applicant was not entitled to a variance; the applicants can still put their house there, just not as big as they want.

Chairman Bender asked if anyone else would like to speak. Mr. Moser stated that the Bensons would like to get started on their project. They were hoping for a favorable outcome. He asked the Board if it would be appropriate to consider a revised footprint after the discussion. Chairman Bender stated no because they had asked for a variance at the beginning of the hearing. Chairman Bender stated if the variance were to be denied

then the applicants would be right back to the footprint without the porch. Mr. Moser clarified that Chairman Bender was suggesting that they reapply at a later date for a special exception or build on the original footprint. Chairman Bender reminded the applicants that the special exception may be challenged.

Member Corliss made a motion to vote in favor or against the Bensons' request for a variance, seconded by Acting Member Terrazzano. Acting Member and Secretary Terrazzano polled the Board: Chairman Bender – “against”; Member Drown – “against”; Member Barnes – “against”; Member Corliss – “against”; Acting Member Terrazzano – “against”. The application for a variance was unanimously denied.

Chairman Bender restated that if the applicant wanted to apply for a special exception, which he said that nobody had ever done that before, he did not see any reason why they could not. Chairman Bender reminded them of the timeframe to go through the process. He asked Mrs. Larson if they were too late for the June meeting. Mrs. Larson stated that the application deadline was May 22, 2013 at 3:00 PM, however, there were already three hearings scheduled for June 11, 2013. Mr. Moser asked if the Board would consider a fourth. Mrs. Larson stated that it was up to Chairman Bender, that the ZBA By-Laws stated that applications may be limited to three in an evening. Chairman Bender stated that if the Bensons' application was the fourth, he usually stops the hearing at 10:00 PM. If the Board did not get to it, then the hearing could be continued as long as the date, place and time were stated in the minutes.

Dr. Benson then spoke stating he had hoped this could have been done in a timely manner as the process had begun in February. He had hoped the Board would have looked favorably upon their application. In addition, Dr. Benson stated the Mr. Anderson had lost a lot of work in the last four months waiting for an outcome. Dr. Benson added that there were a lot of people that weren't being well served by ongoing discussions month after month after month.

At this time Member Corliss stated that she felt badly that the Board could not oblige or accommodate the applicant but, the Board has to apply the law. Member Drown then stated when the Board granted approval for the special exception on March 19, 2013, they were not aware of the illegal porch. A brief discussion followed.

**8:27 PM** The meeting was adjourned.

These minutes were approved as written at the ZBA meeting June 11, 2013.

Respectfully,

Jaye Terrazzano  
ZBA Secretary