



Town of Hopkinton

Planning Department

330 Main Street, Hopkinton NH 03229-2627 - (603) 746-8243 – planzone@hopkinton-nh.gov

HOPKINTON ZONING BOARD OF ADJUSTMENT

MINUTES

AUGUST 2, 2022

The Hopkinton Zoning Board of Adjustment held a meeting on Tuesday, August 2, 2022, at 5:30 PM in the Hopkinton Town Hall, 330 Main Street, Hopkinton. Members present: Chairman Daniel Rinden, Andrew Locke, Jonathan Cohen, Eric Buck, and Kristen Cummings. Staff present: Planning Director Karen Robertson.

I. Roll Call. Buck, Cummings, Locke, Cohen, and Chair Rinden.

II. Applications.

#2022-07 Rose Beardsley Kukla Variance from Zoning Ordinance 4.2 Table of Dimensional Requirements to construct additions with less than the required side setback, 237 Rolfe Pond Drive, Tax Map 209, Lot 15, R-2 district.

Ms. Kukla of Hillrose, California, representing owners Kathy Gerber and Martha Beardsley Shaw, attended the meeting via Zoom. Ms. Kukla explained that the Variance is to construct a 6' x 27' addition to the West of the seasonal cottage approximately 15 feet from the side property line.

The property was purchased by L. Benedict and Alice Beardsley in 1954. The Beardsley family built the current 594 SF cottage, and for the past 68 years, the family has used the cottage during the summers without improvements. During the same time, the family used an outhouse for a bathroom. Now, the owners would like to construct an addition providing space for an indoor bathroom and roll-away cots. They intend to install a propane toilet rather than continue using an outhouse.

Ms. Kukla reviewed photographs that had been provided with the application showing various locations on the property. The photographs showed the proximity of adjacent cabins. In particular, a blue cabin that was also built in the 1950s. At the time, Ms. Kukla's grandparents had permitted a portion (bathroom) of the blue cabin to be built over onto 237 Rolfe Pond Drive. Ms. Kukla noted that the proposed addition would be located on the opposite side and would not impact the existing trees or vegetation. The addition will be 15 feet from the property line and approximately 36 feet from the neighbor's cabin.

The Applicant's response to the criteria for a Variance as outlined in Section XV of the Zoning Ordinance was as follows:

1) The proposed use would not diminish surrounding property values because:

"The proposed addition will be consistent with the existing cabin and will have a

Adopted: 10/04/2022.

minimal visual impact for abutting properties. In fact, the closest abutters would appreciate our not having an outhouse. Sounds travel easily near the lake, and our using the outhouse at night undoubtedly may disturb our favorite neighbors. The addition, if approved, would actually reduce outside activities for the nearest abutters and likely improve property values."

2) Granting the Variance would not be contrary to the public interest because:

"The proposed addition will not result in any increase of traffic or noise. Since Rolfe Pond Drive is a private road, if the Variance were approved, the addition would essentially not be seen by the public."

3) By granting the Variance, substantial justice would be done because: "There is no benefit to the public by denying the requested Variance; in fact, approving the Variance essentially benefits the environment and therefore the general public by no longer using an outhouse for bathroom facilities. The outhouse has been used since 1954, and adding a bathroom seems a better alternative than the continued use of a latrine. The undersized 12,832.4 SF lot, which was created prior to the adoption of the current Zoning Ordinance, is restricted based on the expected lot size of 80,000 SF for those in the R2 district. The setback requirements and distance from the lot line applied to a lot significantly less than 80,000 SF seems restrictive, even if not intentional."

4) The spirit and intent of the Ordinance will not be broken by granting the Variance because: "Granting the Variance will not alter the terrain or impact any trees, shrubs, or plants. The modernization of an indoor bathroom is far from novel, and the continued use of an outhouse is not the best option for the land. The cabin is quite small by most standards, and having a storage space for roll-away beds will increase the space and enjoyment of our small cabin. The abutters on the west side of the cabin were quite pleased when we discussed the addition of a bathroom and storage. They were most pleased for us to no longer use an outhouse. While the distance from the cabin to the lot line will be reduced to 15 feet, the distance between the cabins on lots 15 and 14 will remain approximately 36 feet apart. A setback of less than 20 feet for lots on Rolfe Pond is not unusual. This is due to smaller lot sizes than the Zoning Ordinance states and especially true for those cabins built in the 1950s and 1960s."

5) Literal enforcement of the Ordinance results in unnecessary hardship.

a) For purposes of this subparagraph, "unnecessary 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. "The size of the lot is key here. The lot was created before the lot size, and setback requirements were established. A 12,632.4 SF lot is a fraction of the minimum required lot size, and therefore, it would seem reasonable that the side distance should be proportionally reduced when

requested. Since Rolfe Pond Drive is a private road, it does not seem possible that the proposed addition would impact the general public."

ii) The proposed use is a reasonable one. "Given the small size of the existing structure (594 SF), the addition will still result in a small structure of under 800 SF. Especially when compared to most structures on 80,000 SF lots. Most important is the positive impact on the environment and pond. Stopping the use of the outhouse by changing to a propane or electric toilet will stop the continued impact that a latrine has on the property."

b) If the criteria in subparagraph (a) 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.

Mr. Locke inquired about proposing the addition from north to south rather than east to west. In response, Ms. Kukla noted the location of the trees and road and their plans to install a well and septic system later.

Mr. Buck asked if there were plans to remove the outhouse. Ms. Kukla was unsure but assumed they would replace the floor and use the structure for storage.

Mr. Cohen asked if the addition would cause runoff onto the adjacent property. Ms. Kukla replied no, advising that the roof pitch would remain the same and the addition would be 15 feet from the property line.

Chair Rinden opened and closed public testimony as there was no one present wishing to speak.

The Board reviewed the Applicant's response to the criteria to be granted a Variance. All agreed that the situation is unique given the age of the lot and cabin that were created before zoning. Furthermore, granting the Variance will lessen the environmental impact given the pond's location.

Andy Locke moved to **APPROVE** Application #2022-07 as presented. Jonathan Cohen seconded the motion. The motion passed unanimously. Roll Call vote: Locke – in favor, Cummings – in favor, Cohen – in favor, Buck – in favor, and Rinden – in favor. The Applicant successfully addressed all criteria to be granted a Variance as outlined in Section XV of the Zoning Ordinance. Overview of reasons for approval:

1) Property Values:

- No evidence surrounding property values would diminish because of the 162 SF addition.
- The addition will be 15 feet from the side lot line and approximately 36 feet from the cabin on the adjacent lot.
- The addition would have a minimal visual impact on abutting properties based on the information provided.

- The addition will allow utilization of a more modern form of bathroom facilities, thereby eliminating the use of the outhouse and, more importantly, positively impacting the environment.
- 2) Public Interest:
- No evidence that the public's interest would be negatively affected.
 - The addition will allow utilization of a more modern form of bathroom facilities, thereby eliminating the use of the outhouse and, more importantly, positively impacting the environment.
- 3) Substantial Justice:
- The public would realize no appreciable gain from denial of the Variance.
 - The addition will allow utilization of a more modern form of bathroom facilities, thereby eliminating the use of the outhouse and, more importantly, positively impacting the environment.
- 4) Spirit and Intent:
- The nature and character of the surrounding properties will not change as the property will continue to be used for residential purposes.
 - The addition will be 15 feet from the side lot line and approximately 36 feet from the cabin on the adjacent lot, with minimal visual impact on abutting properties.
 - The addition will allow utilization of a more modern form of bathroom facilities, thereby eliminating the use of the outhouse and, more importantly, positively impacting the environment.
 - The location of the addition appeared limited when considering the location of the cabin and the Applicant's intentions to construct a well and septic system later.
- 5) Unnecessary Hardship:
- Literal enforcement of the Ordinance will result in unnecessary hardship since the Applicant would have to utilize an outhouse for bathroom facilities.
 - The cabin is unique in that it was constructed in 1958, before zoning, and has had no indoor bathroom for the past 68 years.
 - The addition will allow utilization of a more modern form of bathroom facilities, thereby eliminating the use of the outhouse and, more importantly, positively impacting the environment.

#2022-08 Cedar Street Holdings, LLC Variance from Zoning Ordinance 4.2 Table of Dimensional Requirements to construct a deck with less than the required side setback, 16 Cedar Street, Tax Map 101, Lot 18, VB-1 district.

Attorney Maria Dolder, on behalf of owner Brian Cressy, presented the Applicant's request for a Variance. The property is a corner lot having two frontages and one side yard. Currently, the property contains a restaurant which is permitted in the VB1 District. The Applicant intends to renovate the restaurant completely and proposes constructing a new deck to provide seasonal outdoor seating overlooking the river. The side yard of the property abuts the Contoocook River.

The Applicant received a Variance in January 2022 for the proposed deck. Since then, the NHDES has required design modifications to the deck that is part of granting a Shoreland Permit. As a result, the proposal now is to construct a bump out of decking consisting of 137 SF and the removal of 185 SF of decking. The Applicant will maintain

a setback from the river of approximately .4 feet on the east and 5.1 feet on the west. Since the project design has been modified, a new Variance is required.

Attorney Dolder noted that the new design reduces the overall area that will impact the setback; furthermore, as previously indicated, there will be no pylons located within the setback area. The only encroachment will be the overhang of the deck.

The Applicant's written response to the criteria for a Variance as outlined in Section XV of the Zoning Ordinance was as follows:

1) The proposed use would not diminish surrounding property values because:

"The use itself is not only permitted by right within the VB1 zoning district but it is already established on the property. The property is a corner lot; therefore, it has two frontages and one side yard. In the VB1 District, there is no required front yard setback. Although the required side yard setback is 10 feet, in this specific case, the entire side of the property abuts the Contoocook River. In fact, if, instead of the river, the property were abutted by an additional street, there would be no setback requirement at all. Furthermore, the general area surrounding the property is commercial in nature. Accordingly, a waiver of the side yard setback will not have any effect on any neighboring property. On the other hand, the Applicant is proposing an extensive renovation to the existing building, with the addition of outside seating, all of which will increase the value of the property and the neighboring area. Given that the relief being requested shall not have any adverse impact to the neighborhood, but instead is beneficial to the area and the community, the variance relief would not diminish surrounding property values."

2) Granting the Variance would not be contrary to the public interest because: "o be contrary to the public interest, the Variance must unduly, and in a marked degree conflict with the Ordinance such that it violates the Ordinance's basic zoning objectives. To ascertain whether granting the Variance would violate basic zoning objectives you must examine whether it would alter the essential characteristics of the neighborhood or would threaten the public health, safety or welfare of the public. The Applicant's requested Variance does neither. As stated above, the use itself is not only permitted by right within the VB1 Zoning District, but it is already established on the property. The general area surrounding the property is also commercial in nature and shall not be impacted by the proposed deck. In fact, in the VB1 District, there are no front setback requirements. Since this property is a corner lot, therefore having two frontages, it is not required to meet any setbacks on the portion of the property that is along the roadway and faces abutting properties. The only area of the property that is required to comply with a setback is the side yard, which abuts the Contoocook River. Therefore, a reduction in the required side setback will not have any impact on the area. This is further demonstrated by the fact that the NHDES has issued a permit for the project as currently proposed. Accordingly, the granting of the relief requested herein shall have no impact on public safety, health, or the general welfare of the public and will not be contrary to the public interest. Instead, granting the Variance will allow the property to be utilized in a reasonable manner, consistent with the intent of the Zoning Ordinance."

- 3) By granting the Variance, substantial justice would be done because:** "One of the guiding rules in evaluating substantial justice is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. Under this standard, the Applicant clearly satisfies this requirement. As stated above, the use itself is not only permitted by right within the VB1 Zoning District, but it is already established on the property and fits in with the general commercial uses in the area. Accordingly, it will not have any adverse impact on the neighborhood. Since the portion of the property where the setback relief is requested abuts the river, which is more similar to abutting a roadway than an established property, such as reduction in the required side setback will not have any impact on the area. The addition of outside seating for restaurants has become a critical issue and important to the public welfare. By granting the variance relief, substantial justice will be done since a denial would be a tremendous loss to the Applicant without any justified gain to the public.

Substantial justice is also achieved by granting variances which do not adversely impact on nearby property owners and which allow a property to be used reasonably. As stated above, even with the requested relief, the difference between that required under the Zoning Ordinance and that being proposed is so minimal that it shall not create any adverse effect on the adjoining neighborhood. With the pandemic, outside seating has become increasingly important for restaurants and their customers. Given the configuration of the lot, the Applicant cannot reasonably accommodate outside, covered dining while maintaining the side setback. The fact that the NHDES has issued a permit for the project as currently proposed further demonstrates that the proposal shall not have any adverse impact on the area. Since the proposed use will not adversely impact on nearby property owners, but alternatively, will allow the property to be used reasonably, granting the relief requested would result in substantial justice."

- 4) The spirit and intent of the Ordinance will not be broken by granting the Variance because:** "Once again, the use itself is permitted by right under the Zoning Ordinance and is already established on the property. The general area surrounding the property is commercial in nature and consistent with this use. In fact, the Zoning Ordinance itself does not require any front yard setback in the VB1 District. Although the Zoning Ordinance does require a 10-foot side setback, in this case, the entire side yard of the property abuts the river and shall have no impact on surrounding properties. The deck will be constructed along the waterfront and shall provide critical seasonal outdoor dining. In fact, in this zoning district, the Ordinance does not require any front yard setback, which is the portion of the property that would be most visible to abutting properties. It is also of importance to note that there shall be no pylons located within the setback area, and the only encroachment will be the overhang of the deck. As a result, there is no conflict with the proposal and the intent of the Zoning Ordinance. One of the general purposes of the Zoning Ordinance is to encourage the most appropriate use of land throughout the Town. In this particular case, granting the relief would be consistent with such a purpose."

- 5) Literal enforcement of the Ordinance results in unnecessary hardship.**

a) For purposes of this subparagraph, "unnecessary 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.** "This property is certainly unique in several ways. First of all, as already stated a number of times, the property is located within the VB1 District, where the proposed use is permitted by right and in fact, is already established on the property. The lot is a corner lot, which has two frontages and one side which abuts the Contoocook River. Even though the lot itself is larger in size than the .17 acres required in the Zoning Ordinance, given the existing location of the building, the required side setback unreasonably impacts the Applicant's ability to construct the deck and provide outside dining. With the pandemic, outside seating became critical for restaurants and has remained an important feature for customers and their comfort. It is also important to once again point out that the area of the property where the setback relief is being requested directly abuts the river and shall have no impact on the neighboring area. It is of even greater importance to note that there shall be no pylons located within the setback area, and the only encroachment will be the overhang of the deck. On the other hand, the proposed use will allow the Applicant to utilize the property in a reasonable manner.

As stated above, the Applicant did obtain a variance from this ZBA for a proposed deck in January 2022. Since that time, the Applicant obtained its approval from the NHDES for the project; however, the NHDES required certain changes to the proposed deck which has caused the Applicant to modify its design. Specifically, the Applicant is now proposing a new bump out of decking consisting of 137 square feet and is removing 185 square feet of decking that was previously proposed. The new proposal results in a reduction of the overall decking by 48 square feet. In the reconfiguration of the deck, the Applicant is able to provide emergency access in both locations that have doors to the rear of the building, as well as an additional egress off the new bump-out deck. Since the bar area and dining room are separated by an internal wall, the walkway is designed to be a critical access point for seating on the outside deck and to allow wait staff to safely move from the inside area to the deck. On the newly proposed bump out, the Applicant shall be able to maintain a setback from the river of approximately .4 feet on the east and 5.1 feet on the west. Although the overall circumstances have not changed since obtaining the Variance in January 2022 and the Applicant has been able to reduce the overall amount of area that will impact the setback, the project design has been altered and therefore, a new variance is being required.

With that said, the relief being requested by the Applicant is the minimum relief required in order to allow the Applicant to reasonably use the property and to provide critical outside seating. It is also important to once again note that even with the proposal, the proposed use will not alter the essential characteristics of the neighborhood or the property. Accordingly, there is no fair and substantial

relationship between the general purposes of the Zoning Ordinance and the specific restrictions of the property."

- ii) **The proposed use is a reasonable one.** "As stated above, the use of the property is permitted by right under the Zoning Ordinance and, in fact, already established on the property. The addition of outdoor seating in connection with a restaurant is not only reasonable but has also become an important feature."

b) If the criteria in subparagraph (a) 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. "As stated above, this property is certainly unique in several ways. First of all, as already stated a number of times, the property is located within the VB1 District where the proposed use is permitted by right and, in fact, is already established on the property. The lot is a corner lot, which has two frontages and one side, which abuts the Contoocook River. Even though the lot itself is larger in size than the .17 acres required in the Zoning Ordinance, given the existing location of the building, the required side setback unreasonably impacts the Applicant's ability to construct the deck and provide outside dining. With the pandemic, outside seating became critical for restaurants and has remained an important feature for customers and their comfort. It is also important to once again point out that the area of the property where the setback relief is being requested directly abuts the river and shall have no impact on the neighboring area. It is of even greater importance to note that there shall be no pylons located within the setback area, and the only encroachment will be the overhang of the deck. On the other hand, the proposed use will allow the Applicant to utilize the property in a reasonable manner. With that said, the relief being requested by the Applicant is the minimum relief required in order to allow the Applicant to reasonably use the property and to provide critical outside seating. It is also important to once again note that even with the proposal, the proposed use will not alter the essential characteristics of the neighborhood or the property. Accordingly, 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 ."

Board members reviewed the plan presented with Mr. Buck, noting that the Applicant now proposes a lower deck instead of the patio NHDES approved. He recommended the Applicant consult with NHDES to determine whether the change is permitted.

Attorney Dolder noted the positive testimony given at the January 2022 meeting for basically the same request.

Mr. Cohen asked Attorney Dolder to explain the configuration of the lot as it relates to the setback requirements. Attorney Dolder reiterated that the property fronts along two roads; as a result, the river is considered a side property line. She then noted if the river were a road, the Applicant would not be before the Board as there is no setback requirement from a front property line. She stated that the property is unique in that not many properties have a setback from a river.

Mr. Locke agreed that the property is unique because it is located downtown, adjacent to the river. When considering impacts on the river, NHDES has approved the proposal. He agreed that the request is reasonable, given that the deck will be cantilevered and that there will be no pylons in the setback. Other members concurred.

Chair Rinden opened public testimony.

Abutter Scott Crathern, the owner of 25 Cedar Street, believed that the changes would improve the neighborhood and may encourage other owners to improve upon their buildings.

Abutters Katherine Mitchell and Scott Clay, owners of a mixed-use building at 905 Main Street, favored the overall proposal; however, they expressed concern about the impact that noise from the outdoor seating and possibly music will have on their residential tenants. The plans presented indicate that the restaurant will be open until midnight seven days a week; the January 2022 plan indicated a 10 PM closing. In addition to noise, Ms. Mitchell and Mr. Clay were concerned with lighting and parking, noting that five of their tenants have windows that face Cedar Street and that during the winter parking ban, tenants use the public parking designated for overnight use. They were concerned that the restaurant's customers would use the spaces.

In rebuttal, Attorney Dolder stated that the concerns raised were issues to be addressed by the Planning Board during Site Plan Review.

Chair Rinden closed public testimony.

The Board members deliberated with members reiterating Mr. Locke's previous statement concerning the uniqueness of the downtown property adjacent to the river and that NHDES had approved the proposal. In addition, the deck will be cantilevered with no pylons in the setback. Furthermore, the proposed deck is smaller than what was approved in January 2022.

Kristen Cummings moved to **APPROVE** Application #2022-08 as presented. Eric Buck seconded the motion. The motion passed unanimously. Roll Call vote: Locke – in favor, Cummings – in favor, Cohen – in favor, Buck – in favor, and Rinden – in favor. The Applicant successfully addressed all criteria to be granted a Variance as outlined in Section XV of the Zoning Ordinance. Overview of reasons for approval:

1) Property Values:

- There was no evidence that surrounding property values would diminish because the deck would overhang into the setback. There will be no encroachment at ground level as the deck will be cantilevered to the building.

2) Public Interest:

- There was no evidence that the public's interest would be negatively affected.
- The non-conforming portion of the deck is to be located to the rear of the building and will not be at ground level.
- There was considerable public interest in January 2022 in favor of the proposal.

- 3) Substantial Justice:
 - The public would realize no appreciable gain from denial of the Variance.
 - A large portion of the side deck and patio meet the setback requirements.
- 4) Spirit and Intent:
 - The building will continue to be utilized as a restaurant.
 - The nature and character of the surrounding properties will not change as the abutting properties are used for commercial and residential purposes.
 - Requiring the Applicant to limit the size of the deck to only that part that conforms to the setback is not necessary in order to give full effect to the purpose of the Zoning Ordinance, as there will be no impact at ground level.
- 5) Unnecessary Hardship:
 - Literal enforcement of the Ordinance will result in unnecessary hardship as it would be unreasonable only to allow a part of the deck to be constructed based on the design.
 - The rear deck will hang within the 10-foot setback with no ground support.
 - The supports for the side deck that go into the ground will align with the building and meet the setback.

III. Minutes and Notice of Decision of April 5 and May 3, 2022.

Andy Locke, seconded by Eric Buck, moved to approve the Minutes and Notice of Decision of April 5, 2022. Motion passed. Roll Call vote: Locke – in favor, Cummings – in favor, Cohen – abstained, Buck – in favor, and Rinden – in favor.

Jonathan Cohen, seconded by Andy Locke, moved to approve the Minutes and Notice of Decision of May 3, 2022. Motion passed. Roll Call vote: Locke – in favor, Cummings – in favor, Cohen – in favor, Buck – abstained, and Rinden – abstained.

IV. Other Business.

- (a) Revised Rules of Procedure (Draft) – Review deferred to the September 6, 2022 meeting.

V. Adjournment. Andrew Locke moved to adjourn the meeting at 7:05 PM. Kristen Cummings seconded the motion. Motion passed unanimously.

Karen Robertson
Planning Director

Ordinance §15.10. "Representations made at the public hearing or material submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking, or uses which are subject to regulations pursuant to subsection 15.8.2 or 15.8.3 shall be deemed conditions upon such special exception or variance."