

**AMENDED APPLICATION FOR VARIANCE MEMORANDUM  
Center Harbor Zoning Ordinance**

**APPLICANTS: DAVID M. ANDERSON & LAUREN R. ANDERSON**

**Tax Map 104-006-000**

**Brookside Lane**

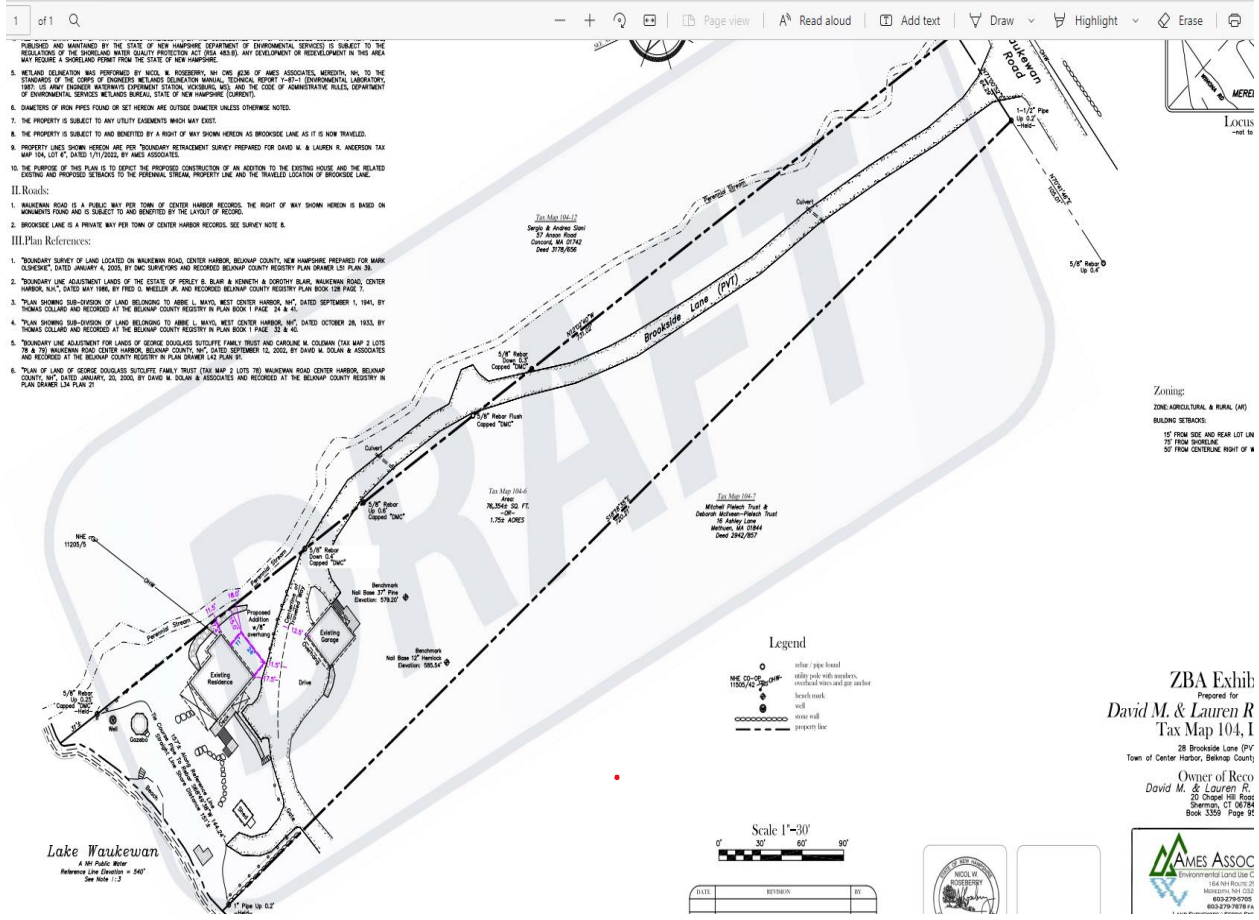
**Zone: Agricultural/Rural**

Variations are requested from Sections 5:3:1, Structure Setbacks; 5:11:3, Changes to Non-Conforming Structures; and 10:4, the Water Resources Conservation Overlay District Boundaries of the Center Harbor Zoning Ordinance. The variations requested will be to permit the construction of an addition to an existing structure within the right-of-way setback, that would be a change to a non-conforming structure which increases the total square footage and potentially is within fifty (50) feet of a non-designated stream. In support of this application, the Applicants state as follows:

**BACKGROUND:**

David Anderson and Lauren Anderson, the Applicants, are seeking to construct an addition on to their existing house. They have had a plan of the property prepared showing the proposed location of the addition. The specific contours of this parcel and the location of the existing right-of-way and the stream prevent the addition to this home that would conform to the zoning ordinance as the lot is very steep, the private road used for access by the neighboring properties cuts through their property immediately next to the house, there is a seasonal stream that is eighteen (18) feet from the corner of the proposed addition at its closest, and the proposed change would increase the total square footage of a structure which is an existing non-conforming structure. Therefore, there is no ability to add on to their house without the proposed variations.

While the Applicants may not need all three variations based on the plain language of the zoning ordinance and the associated zoning maps, as a result of the Applicants' understanding of the position of the ZBA, and out of an abundance of caution, all three are being requested. The proposed addition will permit the Applicants to house their entire family and permit them to have a bedroom and bathroom on the ground floor of the home which will enable them to continue living in the house as they age. The proposed addition also conforms with the other setback requirements.



The proposed addition is highlighted above. As shown in the above plan the existing right-of-way runs within feet of the house and the contour of the land prevents building elsewhere on the lot because it is so steep. The proposed addition will be within feet of the right-of-way and is located entirely within the setback. It is impossible to add on to this house without variances. The seasonal stream is not identified on the zoning map 6.1 which identifies the protected water resource areas, but it is noted on the plan above and a variance is requested out of an abundance of caution. The proposed addition does constitute an increase in the square footage of an existing non-conforming structure.

The Applicants are requesting variances from the Section 5:3:1, Section 5:11:3, and Section 10:4 of the Center Harbor Zoning Ordinance which 1) requires a fifty foot (50') setback from the centerline of the improved surface used for travel if the private road is intended for public use, 2) prohibits changes or additions that increase the square footage of a pre-existing non-conforming structure, and 3) requires a fifty-foot buffer from non-designated streams if the stream is described in the *Natural Resources Inventory of Center Harbor December 2014* and is shown on the *Center Harbor Water Resource Map*, approved by the Town on March 11, 2014.<sup>1</sup>

1 The seasonal stream in question does not appear on the Map or in the Inventory.

‘The variance was originally conceived as a means to ensure the constitutionality of zoning ordinances by building in a mechanism that would avoid imposing hardship on individual landowners.’ *Bacon v. Town of Enfield*, 150 N.H. 468, 477, 840 A.2d 788 (2004) (quotation omitted); *see also* RATHKOPF, *supra*, § 58:1 (identifying the ‘common purpose behind allowing variances’ as a means to correct the ‘occasional inequities that are created by general zoning ordinances’).”

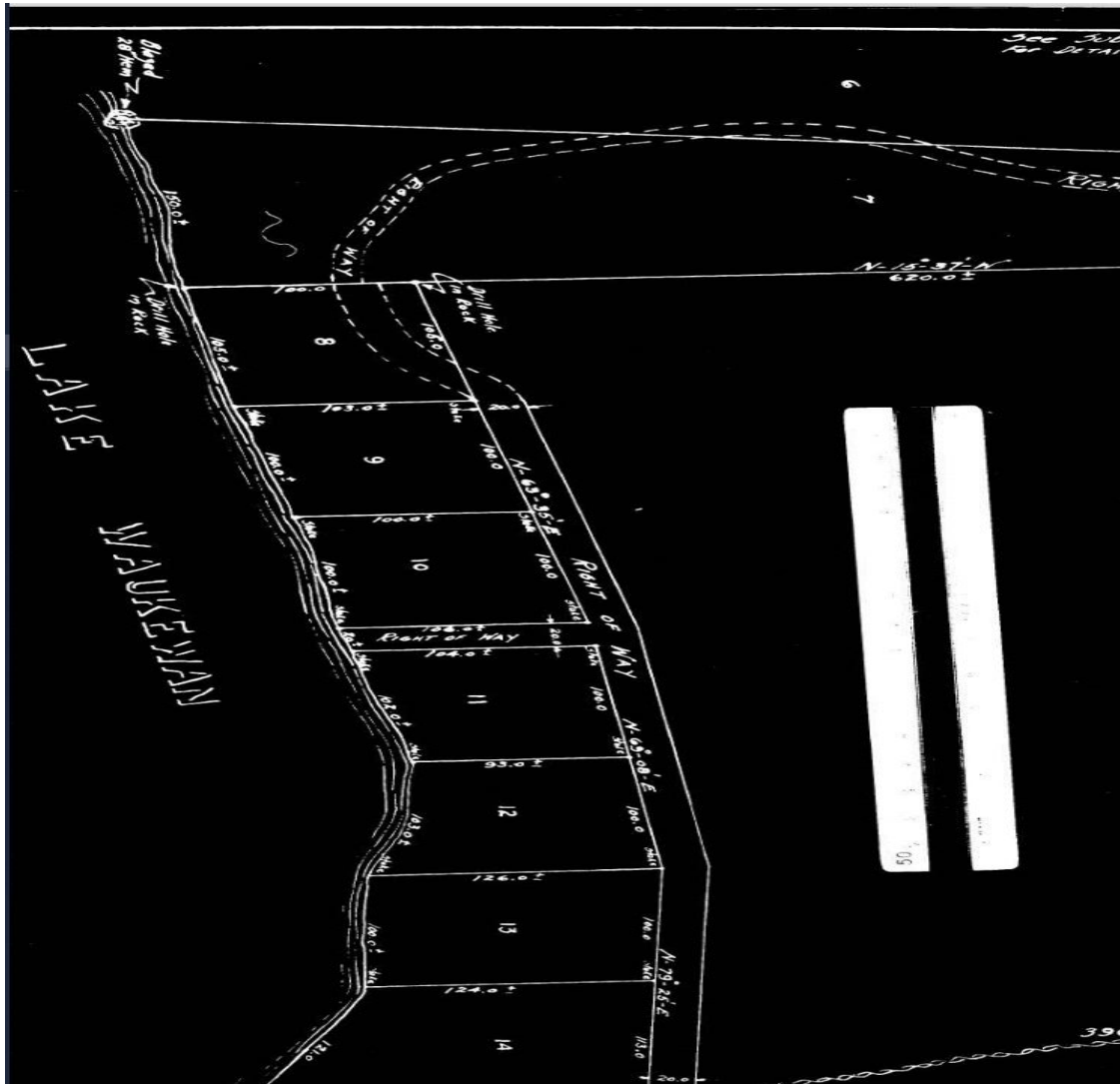
*Brandt Development Co. of New Hampshire, LLC v. City of Somersworth*, 162 N.H. 553, 559 (2011).

### **1. The variance will not be contrary to the public interest.**

[T]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. In determining whether granting a variance violates an ordinance’s basic zoning objectives, we look to, among other things, whether it would alter the essential character of the locality or threaten public health, safety or welfare. Such examples are not exclusive. The requirement that the variance not be ‘contrary to the public interest’ is ‘related to the requirement that the variance be consistent with the spirit of the ordinance.’ The public interests are protected by standards which prohibit the granting of a variance inconsistent with the purpose and intent of the ordinance, which require that variances be consistent with the spirit of the ordinance, or which permit only variances that are in the public interest.’

*Nine A, LLC v. Town of Chesterfield*, 157 N.H. 361, 366 (2008) (internal citations and quotations omitted).

The Applicants’ property is challenging. The property was created in approximately 1941 when a subdivision plan from 1933 was updated. This is lot 7 as shown on the original plan which is recorded in the Belknap County Registry of Deeds at Plan Book 1, Page 41 and is shown below.



The location of the right-of-way as shown on the plan is roughly the same as shown above. The proposed addition provides the Applicants with more living space so that they may continue to enjoy the property while providing for the ability of family to visit and all stay in the home. This section of the Zoning Ordinance (5:3:1) contains setback requirements that function to ensure the safety of residents by requiring that vehicles do not pass too closely to residences. However, in this case, the right-of-way already passes very closely to the residence and the garage and the contours and unusual layout of the lot prohibit development elsewhere. The proposed encroachment into the setback would be consistent with the character and nature of the area, the existing structure and the other neighboring houses. While it is an expansion of an existing non-conforming use, it is a reasonable expansion which does not impact the neighbors or the public health, safety or welfare of the neighborhood. In addition, the Applicants are willing to include a deed restriction preventing any further additions to the house which would require a variance, thereby preventing this property from continued development in this location. The seasonal stream will not be impacted by the proposed addition and no runoff will flow into the seasonal

stream. The restriction the Applicants are willing to include on the property will also ensure that this stream is protected in the future.

Permitting the encroachment into the setback and the expansion of a non-conforming existing structure for the purpose of increasing the living space in an existing home would not alter the essential character of the neighborhood and given the issues with the lot, there is no other reasonable option to increase the living area of the home. Granting the variances would not threaten the public health, safety, or welfare of the neighborhood or the community as the proposed encroachment is consistent with the existing structures and in the only possible location. The requested variance would not have a negative impact on the public interest.

## **2. The Spirit of the Ordinance is observed.**

The requirement that the variance not be contrary to the public interest is "related to the requirement that the variance be consistent with the spirit of the ordinance." *Chester Rod & Gun Club v. Town of Chester*, 152 N.H. 577, 580 (2005).

[T]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.

One way to ascertain whether granting the variance would violate basic zoning objectives is to examine whether it would alter the essential character of the locality.

\* \* \*

Another approach to determining whether granting the variance would violate basic zoning objectives is to examine whether granting the variance would threaten the public health, safety or welfare.

*Id.* at 581 (quotations and citation omitted).

The Applicants' property is in the Agricultural/Rural Zone. The proposed encroachments into the setbacks would not alter the essential character of the locality as this right-of-way already runs close to the houses in the area, including the subject property. The seasonal stream will not be impacted at all and the proposed addition is further away from the seasonal stream than the existing structures. In addition, the natural contours of this area make placing an addition to the house impossible elsewhere on the lot. While this is an expansion of a pre-existing non-conforming structure, it is a reasonable expansion which has a total footprint of only 264 square feet that would permit the Applicants to continue living in the home as they age and enable their entire family to share the space together when visiting.

The proposed variance does not violate the basic objectives of the Center Harbor Zoning

Ordinance as there already exists structures within the setback. Given the limited nature of the proposed encroachments and the fact that this proposed addition is otherwise in compliance with the setbacks, there would be no alteration of the basic and essential character of the neighborhood by the granting of the variance. The proposed additional square feet would have no impact on the neighborhood.

The proposed variance from a setback requirement would be consistent with the spirit of the ordinance, because granting the variance would not increase any existing impact on the public health, safety, or welfare of the area.

### **3. Substantial Justice is done.**

Within the framework of this application, “substantial justice” is understood in the following manner:

"Perhaps the only guiding rule [on this factor] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." In *Labrecque v. Town of Salem*, 128 N.H. 455, 459 (1986), we also looked at whether the proposed development was consistent with the area's present use.

*Malachy Glen Assocs. v. Town of Chichester*, 155 N.H. 102, 105 (2007) (quoting 15 P. Loughlin, New Hampshire Practice, Land Use Planning and Zoning § 24.11, at 308 (2000)).

The New Hampshire Supreme Court also discussed the issue of substantial justice in *Harborside Associates, L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 516 (2011), and explained that there must also be consideration given “to whether the general public stood to gain from a denial of the variance.” In other words, would denying the variance provide a benefit to the Town of Center Harbor? The Applicants believe the answer to this question is “No.” There would be no benefit to the Town in denying this variance because denial prevents the proposed addition but would not provide any benefit to the Town. Denying the variances provides no benefit to the Town but prevent the Applicants from using their property in a reasonable manner. In addition, the Applicants are willing to restrict further expansion of their house by placing a restriction in the deed to that effect. Denying the variances is not a reasonable trade-off and does not create a substantial benefit for the Town, so the variances should be granted.

### **4. The values of surrounding properties will not be diminished.**

Improvements to homes generally increase the property values of the surrounding homes and, in this case, the proposed improvement is going to be one of the first things people see when coming down the right-of-way off of Brookside Lane. The proposed variances would not negatively impact any of the surrounding properties or their values. Granting these variances will help ensure that this property's value will increase and that increase is likely to increase the

values of the surrounding properties.

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

Under the statute, N.H. RSA 674:33, I (b), there are two methods of determining whether, owing to the special conditions of the property, an unnecessary hardship exists. The first method has two prongs and requires an applicant to establish, to the satisfaction of the Zoning Board of Adjustment, the following:

- (i) No fair and substantial relationship exists between the general purposes of the ordinance provision and the specific application of that provision to the property: and
- (ii) The proposed use is a reasonable use.

The second method of determining whether an unnecessary hardship exists is available if the criteria in the first method are not established, and provides as follows:

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.

In *Harborside Associates*, 162 N.H. at 516, the Court considered whether the Portsmouth Zoning Board had properly followed the requirements of the first method in determining whether the hotel owner, Parade Residence Hotel, LLC, had established an unnecessary hardship that would warrant granting a variance to permit the construction of marquee signs on the hotel. In its analysis, the Court noted that the issue to be decided is not whether the “*signs* would be unique in their settings, but that its *property* – the hotel and conference center – has unique characteristics that make the signs themselves a reasonable use of the property.” *Id.* at 518 (emphasis in original).

The applicants’ property has unique characteristics that make building anywhere else on the lot impossible and these variances therefore enable the Applicants to make reasonable use of their property. The contour of the land, the location of the existing home, the location of the seasonal stream, and the location of the right-of-way work to ensure that expansion of this house in conformance with the zoning ordinance is impossible. This use is a reasonable one as the proposed addition to the residence is limited in scope, the Applicants are willing to forego any future development, and the setbacks are only minimally infringed upon. The proposed location of the addition is the only location that would not encroach upon the setback with the neighboring parcels or Lake Waukewan.

The general purpose of the ordinance is to ensure that development occurs in reasonable locations that protect the safety of the public. However, in this case the layout of the existing lot

