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May 15, 2018

**VIA FEDERAL EXPRESS**

Zoning Board of Adjustment  
Town of Center Harbor  
36 Main Street  
Center Harbor, NH 03226

RE: ***Sudbey***

Dear Chairman Volz:

Enclosed please find the original and seven copies of the following:

1. Letter of Authorization on behalf of the landowner.
2. Motion for Rehearing.

If you have any questions, please let me know.

Thank you for your attention to this matter.

Very truly yours,



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Jonathan S. Springer

JSS/sml  
Enclosures

cc: Stephens Landscaping  
cc: Mark Sudbey  
cc: Kenneth Balance, Code Enforcement Officer

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May 12, 2018

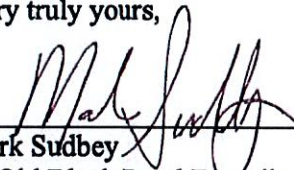
Zoning Board of Adjustment  
Town of Center Harbor  
P.O. Box 140  
36 Main Street  
Center Harbor, 03226

**RE: 24 Dew Point Lane, Center Harbor, NH**

Dear Zoning Board of Adjustment:

Please be advised that I am the current owner of the property located at 24 Dew Point Lane, Center Harbor, NH. I purchased the property on April 27, 2018, from the prior property owner Joseph Battaini. Please accept this letter as a letter of authorization allowing Springer Law Office, PLLC to file and to pursue, on my behalf, a motion for rehearing of the variance denial of April 19, 2018. If you need additional information or authorization please let me know.

Very truly yours,

  
\_\_\_\_\_  
Mark Sudbey  
27 Old Black Road Turnpike  
Fairfield, CT 06824

cc: Stephens Landscaping Professionals, LLC  
Springer Law Office, PLLC

Town of Center Harbor Zoning Board of Adjustment

**MOTION FOR REHEARING**

Petitioner: Mark Sudbey of 27 Old Black Road Turnpike, Fairfield, CT 06824 (“Applicant”)

Property: 24 Dew Point Lane; Map 103, Lot 015 (“the Property”).

Variance Request: Zoning Ordinance Section 5:3:1

Mark Sudbey, by Springer Law Office, PLLC, hereby moves for a rehearing in the above referenced matter pursuant to RSA 677:2, as follows:

1. Mark Sudbey purchased the Property on April 27, 2018 from the prior landowner Joseph Battaini. Mr. Sudbey is therefore the proper party to pursue this rehearing.

2. The Applicant’s predecessor sought a variance from Section 5:3:1 of the Town of Center Harbor (“Town” or “Center Harbor”) Zoning Ordinance (“the Ordinance”) which provides, in part, that “A single patio shall be allowed per lot, within 50’ to 75’ of the shoreline that meets the following criteria: Does not exceed 150 square feet in footprint.”

3. The Applicant’s predecessor replaced an existing 587 sq. foot (+/-) bluestone patio with fieldstone walls, granite steps and stepping stones with a 750 sq. foot (+/-) bluestone patio/kitchen area with fieldstone walls, granite steps and stepping stones. The Applicant’s landscaper, Stephens Landscaping Professionals, Inc. (“Stephens Landscaping”), obtained a shoreland permit from the State of New Hampshire Department of Environmental Services prior to doing the work.

3. The Zoning Board of Adjustment (“ZBA”) accepted the variance application and held an initial hearing on April 9, 2018. A site walk was conducted at the Property on April 16,

2018. At the ZBA's April 19, 2018 meeting the hearing was continued and at that meeting the ZBA, by a vote of 4 -0, with one abstention, denied the variance request. The ZBA denied the application for the following reasons:

(a) Granting the variance would be contrary to the public interest because the requested amount of impervious surface is five (5) to six (6) times in excess of the permitted area and therefore violates the basic zoning objective unduly and in a marked degree.

(b) The zoning board also denied the variance application because granting the variance would be contrary to the spirit of the ordinance because the requested amount of impervious surface is five (5) to six (6) times in excess of the permitted area and therefore violates the basic zoning objective unduly and in a marked degree.

(c) In addition, the ZBA denied the variance request because there are no special conditions unique to the property which warrants a variance of this magnitude because the slope is both gentle and shared by neighboring properties, and the shape of the parcel does not make the ordinance effect the property differently.

(d) In addition, the ZBA found that the improvements could have been constructed in compliance with the ordinance on other portions of the property.

4. The Applicant respectfully requests that the ZBA rehear this matter, and upon rehearing, approve the request for the variances for the following reasons.

A. Granting the variance will not be contrary to the public interest and granting the variance will not be inconsistent with the spirit of the ordinance.

“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.” Malachy Glen Assocs., 155 N.H. 102, 105 (2007). To be contrary to the public interest or injurious to the public rights of others, the variance must unduly, and in a marked degree, conflict with the ordinance such that it violates the ordinance's “basic zoning objectives.” Section 5:3:1 is contained in the Ordinance section entitled “Construction Buildings, Non-Conforming Uses and Structures”, and specifically, under the “Setback” subsection. Section 5:3:1 is also incorporated

in Section 10:6:2, entitled “Permitted Uses within the Protective Buffer”. First and foremost, then, Section 5:3:1 is a “setback.” The purposes of any general setback are the free circulation of light and air, aesthetics, the protection of neighboring property values and property rights, and ingress/egress purposes<sup>1</sup>. It is clear that none of these setback purposes are violated in any way by the patio area, either in its grandfathered form or the new patio area.

Given the language of 5:3:1 and that of Section 10:6:2, an additional purpose of Section 5:3:1 is to limit runoff impact into the lake. The increase in square footage did not violate that purpose and in fact, improved the Property’s ability to handle rainwater and drainage issues. The new patio was designed and constructed to achieve exactly what the ordinance intended: limit water runoff into the lake.

The ZBA focused on the increase in size of the new patio (“the requested amount of impervious surface is five to six times in excess of the permitted area”) as the basis for finding the applicant failed these two prongs of the variance test. The new 750 square foot patio replaced an existing 587 square foot bluestone patio; the original patio was grandfathered under the Ordinance. The net increase of the new structure is 163 square feet, or an increase of approximately 28%. The proper comparison in this case, then, is to compare the then-existing footprint of 587 square feet (which existed prior to the adoption of Section 5:3:1) with the new patio area of 750 square feet. Thus, while the new patio area is five to six times larger than what is allowed under the current Zoning Ordinance, the new patio area is not a substantial, five- or six-fold increase over the old, grandfathered patio area.

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<sup>1</sup> The ZBA found that surrounding property values would not be impacted by the variance and therefore the application met the “property value” element. It naturally follows there are no aesthetic concerns raised by the variance application. See, Comments by Code Enforcement Officer at April 9 hearing minutes: “[the] property does not lend itself to easy visibility to [the public]...it’s definitely hidden from the front and ... obviously no one complained.”

Further, looking at the amount of square footage alone does not properly apply the Malachy test, as the ZBA did not account for the fact that the increase in size, by itself, did not adversely impact the purposes of the setback ordinance. As stated previously, the new patio handles run-off better than the old patio and the other setback purposes (protection of neighboring properties, ingress/egress and the like) are not adversely impacted. In short, there is no injury to the public rights of others as a result of the new patio.

It should also be noted, substantial justice is done by granting the variance. Regarding the variance factor of “substantial justice”, the guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. Malachy Glenn, 155 N.H. at 109. The loss to the individual here is clear, should the variance not be granted, whereas there really is no loss to the general public in that situation. If the variance is granted, the general public actually gains by having better drainage.

**B. Literal Enforcement of the Variance Would Result in Unnecessary Hardship.**

- (i) No Fair and Substantial Relationship Exists Between the General Public Purpose of the Ordinance Provision and the Specific Application of That Provision to the Property, and
- (ii) The proposed use is a reasonable one.

As stated previously, the general public purpose of Section 5:3:1 and 10:6:2, is to create a “setback.” The setback here protects the lake from water run-off, and the neighboring properties from improvements built too close to the property line. However, all of those purposes are still met even with the larger patio area, and in fact, the new patio improves the Property’s ability to handle water run-off. Thus, by applying the Section 5:3:1 strictly and literally, those purposes are not better served. It would be an unreasonable hardship to remove the new patio and restore the land to the old patio, or even, “restore” the land with no patio at all, as there would then be no

improvements dealing with the run-off. Accordingly, there is no fair and substantial relationship between the general public purpose of Section 5:3:1 (water run off into the lake) and the specific application of that provision to the Property. Indeed, if the new patio area and improvements are removed and the restored to the original grandfathered patio, the water runoff situation into the lake will worsen.

The new patio area is a reasonable use for the Property, and indeed, a patio area is actually permitted under both Section 5:3:1 and Section 10. The only issue is, the size of the new patio area. The Property, in terms of set back issues and physical layout, can easily accommodate the new patio area. And, the new patio area, although larger, was approved by the State of New Hampshire DES and actually improves the Property's ability to handle drainage and run off. The Property and the new patio do this without being visible to the general public at large.

Pursuant to RSA 674:33, even if the ZBA finds that the foregoing criteria are not established, an unnecessary hardship will be deemed to exist if, owing to special conditions of the Property that distinguishes 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 establish a reasonable use of it. In this case, given the size and shape of the Property, the size and location of the grandfathered "old" patio, and the location of the house on the Property, special conditions exist which support granting the variance.

5. Finally, the work to perform the improvements to the Property occurred between March, 2016 and the end of June, 2016. The most recent version of the Town of Center Harbor's Zoning Ordinance ("the Zoning Ordinance") reflects that Section 5:3:1 and Section 10 (the Center

Harbor Water Resources Conservation Overlay District) were adopted as amendments to the Zoning Ordinance in March, 2016.

6. Pursuant to RSA 675:6, III, “no [amendment to a zoning ordinance] adopted under this Section shall be legal or have any force and effect until copies are it are certified by a majority of the board or commission and filed with the . . . town clerk . . . .”


7. Despite a diligent search of the 2016 minutes of the planning board (along with the zoning board and select board), the Applicant’s attorney has been unable to find any such certification by the Planning Board (or the other boards) in the relevant time frame in 2016. Accordingly, these sections are not legally effective and, to the extent that the Town and/or the ZBA is requiring the Applicant to seek a variance from those sections, no such requirement exists.

Wherefore, the Applicant respectfully requests a rehearing by the ZBA in this matter, and upon rehearing, grant the variance request and grant such additional relief as may be just and appropriate.

Respectfully submitted,

Mark Sudbey  
By His Attorney,  
Springer Law Office, PLLC

Dated: May 15, 2018

By:   
Jonathan S. Springer, Esq.  
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(603) 319-8741