

Rec'd  
12/4/20  
@ 1:30pm (MS)

Application for: Rehearing

Date: 12/4/20

Map# 33 Lot# 12-1

Name & address of applicant: William A. McGrath  
77 Lake Shore Dr. Winchester, NH 03470

Email: williammcgrath77@comcast.net Phone: 603 834-7072

Name & address of owner: \_\_\_\_\_

Email: \_\_\_\_\_ Phone: \_\_\_\_\_

Location of property: \_\_\_\_\_ Zoning District: \_\_\_\_\_

Description of property (include a plot plan, frontage, side & rear lines, water, structures, etc.) \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Proposed use/existing use: \_\_\_\_\_  
\_\_\_\_\_

Fill out the attached abutters list and submit the non refundable fee of \$150 with the completed application and other necessary forms at least 21 days prior to the review by the ZBA. The ZBA generally meets on the second Thursday of each month if there is business. A complete application will be reviewed for acceptance before a public hearing is held within 30 days. You or your representative must be present at the hearing. All owners NOT representing themselves must submit a letter of representation for the applicant with the application.

Please complete and submit the following appropriate page(s) for the request of a variance, a special exception, an equitable waiver of dimensional requirements, an appeal from an administrative decision or a rehearing. Attach all other supporting documentation to the application.

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After the public hearing, the board will typically render a decision within 30 days. You will be sent notice of this decision. If you believe the board's decision is wrong, you have the right to appeal. The Selectboard or any party with standing has similar rights of appeal. With an appeal, you must first ask the board for a rehearing. All requests shall be submitted on the appropriate ZBA forms and include the required fee. The motion must be made within 30 days of the decision and must set forth the grounds on which the claimed the decision is unlawful or unreasonable. The board may grant a rehearing if it is determined there were errors of law or new information is stated in the motion. Notice to the public and abutters are required for a rehearing. Refer to RSA 677:2 and RSA 676:7 for details.

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**SHELDON, DAVIS, WELLS & HOCKENSMITH, PC**

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*Attorneys At Law*

James Romeyn Davis  
G. Jeremy Hockensmith

Gary H. Sheldon, *Retired*  
Christopher F. Wells, *Of Counsel\**  
Also admitted in MA\*

December 4, 2020

**BY HAND & VIA E-MAIL**

msharra@winchester.nh.gov

Margaret Sharra,  
Land Use Administrator &  
Zoning Board of Adjustment Clerk  
1 Richmond Road  
Winchester, NH 03470

**Re: O'Donnell Variances - Tax Map 33, Lot 12-1 (Winchester Zoning Board of Adjustment Decision 11/05/2020) - Notice of Representation & Rehearing Request**

Dear Ms. Sharra,

Please be advised that our firm represents, **William & Sandra McGrath** (jointly "McGraths"), relative to the above-identified matter (two decisions rendered 11/05/2020) by the Winchester Zoning Board of Adjustment ("ZBA") granting so-called "setback" variances for the William & Suzanne O'Donnell property, 44 Headlands Road, in Winchester, being Winchester Tax Map 33, Lot 12-1 ("Subject Premises").

For the reasons stated hereinafter, the **McGraths respectfully request that the ZBA grant rehearing regarding both variances.**

Under the "*Town of Winchester, New Hampshire Zoning Ordinance*" ("ZO"), the Subject Premises are located in the following zoning districts: **i) Residential District, ZO Art. V; ii) Forest Lake Overlay District, ZO Art. X; & iii) Shoreland Protection District, ZO Art. X-A.**

The applicable setbacks are as follows: **i) 30' front setback, ZO Art. V, ¶C & Art. X, ¶D; & ii) 10' side & rear setback, ZO Art. V, ¶C & Art. X, ¶D.**

The ZBA granted two variances as follows:

1. Variance from the 10' rear setback, ZO Art. V, ¶C & Art. X, ¶D, allowing construction of a new ground level covered porch at the rear of the existing house, approved at 7.5' x 12.0' which when constructed will be approximately 5' 2" from the Subject Premise's rear lot line ("1<sup>st</sup> Fl. Var."); &

2. Variance from the 30' front & 10' side & rear setback, ZO Art. V, ¶C & Art. X, ¶D, allowing construction of a new second floor open deck on the left end of the house (facing the house from the street), approved at 10.0' x 10.0' which when constructed will be approximately **a) 17' from the Subject Premise's front; & b) 18" from the Subject Premise's rear lot line ("2<sup>nd</sup> Fl. Var.")**

McGraths respectfully submit that both the 1<sup>st</sup> Fl. Var. & the 2<sup>nd</sup> Fl. Var. violate the statutory conditions governing variances, RSA 674:33 I(a) (2) & I (b) (LexisNexis 2020 Cum. Supp.), & the extensive, applicable variance case law.

Under RSA 674:33 I(a) (2) (LexisNexis 2020 Cum. Supp.), the ZBA has power to *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.*

McGraths respectfully submit that the ZBA had insufficient evidence based upon the record before the ZBA to find any of the above quoted five findings that the ZBA must make in order legally to grant a variance under RSA 674:33 I(a) (2) (LexisNexis 2020 Cum. Supp.).

Both the 1<sup>st</sup> Fl. Var. and the 2<sup>nd</sup> Fl. Var. violate the “*spirit of the ordinance*” contrary to RSA 674:33 I (a) (2) (B) (LexisNexis 2020 Cum. Supp.). Neither the 1<sup>st</sup> Fl. Var. nor the 2<sup>nd</sup> Fl. Var. do “*substantial justice*” contrary to RSA 674:33 I(a) (2) (C) (LexisNexis 2020 Cum. Supp.).

Most tellingly, the O'Donnells failed to establish that “*literal enforcement of the provisions of the ordinance would result in an unnecessary hardship*” as required under RSA 674:33 I (a) (2) (E) (LexisNexis 2020 Cum. Supp.).

The General Court has defined what is an “*unnecessary hardship*” for purposes of RSA 674:33 I (a) (2) (E) (LexisNexis 2020 Cum. Supp.) as follows:

(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.***

(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.*

RSA 674:33 I (b) (LexisNexis 2020 Cum. Supp.) (*emphasis supplied*).

Under either RSA 674:33 I (b) (1) (LexisNexis 2020 Cum. Supp.) or RSA 674:33 I (b) (2) (LexisNexis 2020 Cum. Supp.), for there to be an “*unnecessary hardship*” – a necessary prerequisite for lawfully granting a variance, the Subject Premises must have “*special conditions*”.

Here the Subject Premises have no such statutorily required “*special conditions ... that distinguish it from other properties in the area.*” RSA 674:33 I (b) (1) (LexisNexis 2020 Cum. Supp.) & RSA 674:33 I (b) (2) (LexisNexis 2020 Cum. Supp.). Absent such “*special conditions*”, a variance cannot be granted, *Garrison v. Town of Henniker*, 154 N.H. 26, 34-35 (2006) *citing Rancourt v. City of Manchester*, 149, N.H. 51, 54 (2003). As such, neither the 1<sup>st</sup> Fl. Var. nor the 2<sup>nd</sup> Fl. Var. should have been granted.

The ZBA failed to make any written or express findings of fact or analysis of the five statutory requirements necessary in order to grant a variance under RSA 674:33 I(a) (2) (LexisNexis 2020 Cum. Supp.). As such, neither the 1<sup>st</sup> Fl. Var. nor the 2<sup>nd</sup> Fl. Var. were legally granted.

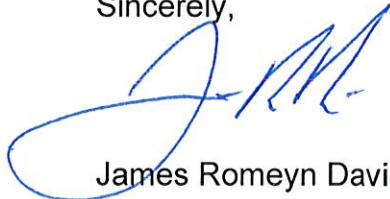
To the extent that the ZBA either **i)** considered the claim that either the 1<sup>st</sup> Fl. Var. or the 2<sup>nd</sup> Fl. Var. were somehow “grandfathered”; **or ii)** found that the two proposed uses were in fact “grandfathered”, then the ZBA erred as a matter of law and fact.

The O'Donnells bore the burden of showing that they have legally protected “grandfathered” rights. They failed to do so.

The Town records do not show that a building permit was ever issued for either **i)** the prior first floor covered porch, which prior porch was smaller than approved by the 1<sup>st</sup> Fl. Var.; **or ii)** the prior second floor deck, which prior porch was both smaller than as approved by the 2<sup>nd</sup> Fl. Var. and was on a different wall from the 2<sup>nd</sup> Fl. Var. No prior variance was granted for either the prior first floor porch or the prior second floor deck – both of which violated the applicable setbacks.

Thank you for your attention to this matter.

Sincerely,



James Romeyn Davis

cc: Mr. & Mrs. William McGrath *via* e-mail; &  
Mr. & Mrs. William O'Donnell *via* e-mail