

*Exhibit #1
9/2/2015*

Subject: Development Review Board / variance request by Herbert
From: Susan Schulman (schulman484@gmail.com)
To: greensborovtzoneing@yahoo.com;
Date: Monday, August 24, 2015 4:07 PM

With my husband Bill Schulman, I own 277 Bayley-Hazen Road, which is the property directly opposite Mr. Herbert's driveway and the southwest corner of his property. Having reviewed his variance request, I have no objection to the variance request, with the caveat that his proposed storage shed will be primarily for personal use and not for commercial use. If that is the case, which it appears to be from his variance request, then I register no objection. I am unable to attend the meeting on Sept. 2.

Very truly yours,
Susan Schulman

Exhibit #3
9/2/2015

GREENSBORO DEVELOPMENT
BOARD ATTEN: NAT SMITH KRISTEN
LEAHY

PLEASE REQUIRE ED HERBERT
NOT TO CLEAR-CUT ANY TREES
ON MY LAND - WHICH ARE DETAILED
TO BE PRESERVED AND SPECIFICALLY
DESIGNATED ~~AND~~ INCLUDED IN MY
LOCALLY STATE AND FEDERALLY APPROVED
FORESTRY PROGRAM.

THANK YOU.

PETER ROUDEBUSCH, NEIGHBOR

Exhibit #4
9/2/2015

Request for a variance

300 Bayley-Hazen Road

by Edward Herbert, Owner

I respectfully request a variance of the 50 foot side setback to 30 feet on the 126.31 foot boundary line as shown following.

For the reasons given below and summarized on the last page, I believe that I have met the conditions for a variance.

Recent history:

I applied for a building permit for a 12 x 24 shed and a curb cut permit to put in a driveway accessing it. Both were approved.

I hired Gary Dimick to do the curb cut and the driveway. I showed him where I wanted to site the 12 x 24 storage shed, and explained that there needed to be room to build a driveway up the hill in the future. His advice was to start the driveway going up the hill right away, as it was unpredictable what might be encountered. His advice turned out to be very good.

We could not go very far up the hill now, as it was very expensive and the available resources are limited at this time. We were able to go well beyond the toe of the slope, so we are well past any obstacles that might impact the design of the driveway on the end toward the road.

Once the driveway was located, with necessary considerations of the topography and safety, it is no longer possible to build the storage shed in the location that I wanted to when I applied for the building permit or any other site on the property without a variance of the setback.

Accordingly, I have applied for a variance on August 12, 2015. I attached a drawing to the application that represented the best information that I had at the time. I was not confident in its accuracy, and I really needed some elevations to make a good evaluation of the driveway, so I engaged Wayne Mutrux to map that portion of the parcel. So, the original drawing should be disregarded in favor of the survey.

GREENSBORO ZONING BYLAW

§ 5.5 Variances

(A) **Variance Criteria.** The Zoning Board of Adjustment (ZBA) shall hear and decide requests for variances as required by 24 V.S.A. §4469(a). In granting a variance, the ZBA may impose conditions it deems necessary and appropriate under the circumstances to implement the purposes of these regulations and the municipal plan currently in effect. The ZBA may grant a variance and render a decision in favor of the appellant only if *all* of the following facts are found, and the findings are specified in its written decision:

1. There are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to these conditions and not to the circumstances or conditions generally created by the provisions of these regulations in the neighborhood or district in which the property is located;
2. Because of these physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of these regulations and that the authorization of a variance is necessary to enable the reasonable use of the property;
3. The unnecessary hardship has not been created by the appellant;
4. The variance, if authorized, will not:
 - (a) Alter the essential character of the neighborhood or district in which the property is located;
 - (b) Substantially or permanently impair the appropriate use or development of adjacent property;
 - (c) Reduce access to renewable energy resources;
 - (d) Be detrimental to the public welfare.
5. The variance, if authorized, will represent the minimum that will afford relief and will represent the least deviation possible from these regulations and from the plan.

Description:

The parcel is 44 acres, mostly on top of a very steep hill. There is 75 feet of road frontage on Bayley-Hazen Road.

Most of the parcel has no access at present due to the very steep topography. There is a relatively flat area adjacent to Bayley-Hazen Road, but at about 115 feet from the road, the topography rises very steeply, so steeply that a building cannot be sited on the slope. The width at Bayley-Hazen Road is 75 feet and the width at the toe of the slope is about 125 feet. This can be seen on the survey by Wayne Mutrux.

When the topography and the 50 foot setbacks are considered, the conforming buildable area is a triangle, about 30 feet wide at the back, tapering to zero closer to the road.

The driveway

Having a driveway to the top of the hill is a reasonable use for the property. Considering that access to the top of the hill is necessary to use that part of the property, the driveway is not just a "reasonable use," it is an "essential use."

A number of constraints dictated the location of the driveway.

I hired Gary Dimick Excavating to make the curb cut and start the driveway. His brother Kelly operated the hoe. I relied extensively on their advice and experience in locating the driveway, and I believe that it was good advice, as it holds up well when analyzed.

Drawings

The next two pages show some drawings based upon Wayne Mutux's survey. The first drawing shows the grade going up the driveway. It also shows the fill that would be needed to make the driveway conform to the Greensboro driveway specification for plowing, 8%.

On the next page, the first little drawing shows the original planned site for the 12 x 24 shed.

The next shows an alternate site that seemed to be OK before the culvert was installed. The underground topography made that impossible.

The third shows the fill and the embankment needed to make the grade 8%.

The fourth shows what curves would be needed to clear the 12 x 24 shed if it was built to the 50 foot setback to the north boundary. If a curve was added near the culvert, it would be fairly sharp (24 °), and the slope there is 9.9 %. Both the angle and the slope are greater than allowed by the Greensboro driveway specification for plowing. It would make it harder to make the hill in winter conditions, and it would make it more dangerous coming down the hill in icy conditions. If the curve is started higher up the hill, it could be more gradual, but that would mean that it starts on the 16.2% grade, which is probably worse.

“Reasonable use of the property”

“Reasonable use of the property” is in quotes, because it is copied directly from the regulations.

There are three reasonable uses of the property can be identified:

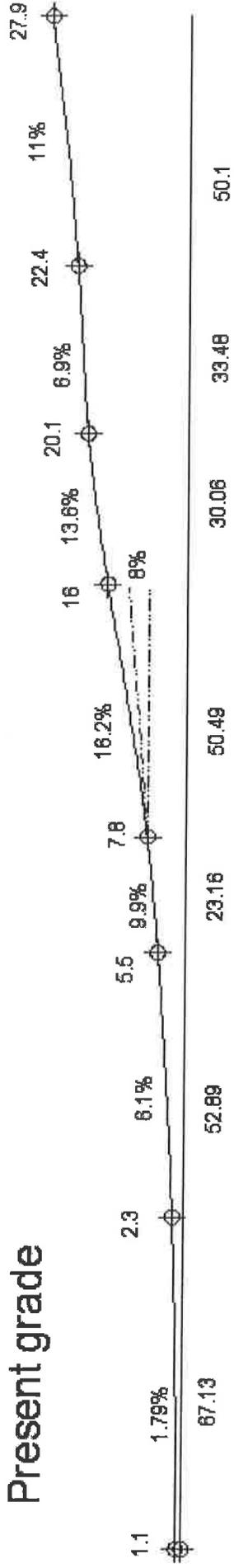
1. Future development of the bulk of the property at the top of the hill. This could include building one or more residences or possibly a sub-division of up to four lots. The sale of one or more lots may make it possible to build a house there.
2. A driveway to access the bulk of the property at the top of the hill. The location and design of the driveway is very constrained by the topography and safety considerations.
3. A storage shed. A building permit has been issued for a 12 foot by 24 foot one story storage shed.

Hardship

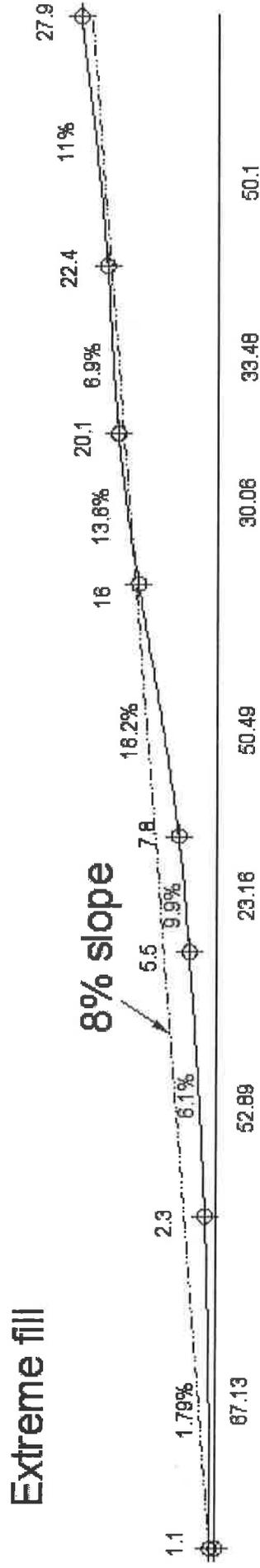
Hardship seems to be an important consideration for granting a variance.

Not being able to build a storage shed now that has reasonable access now would be a hardship, because I have appliances, furniture and other possessions that must be stored now. Alternative storage is prohibitively expensive.

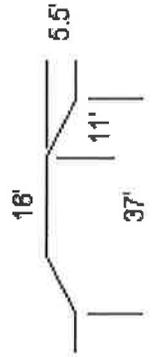
Present grade



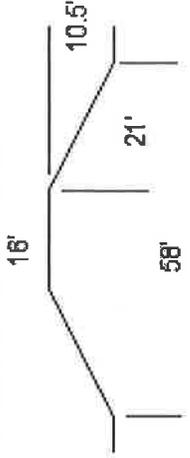
Extreme fill

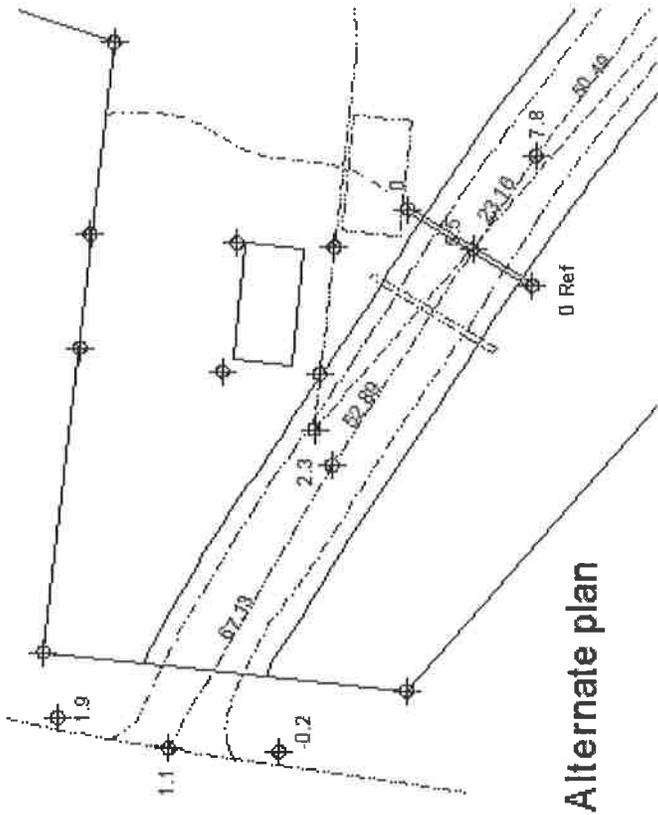


Fill over culvert
with 1 in 2 slopes

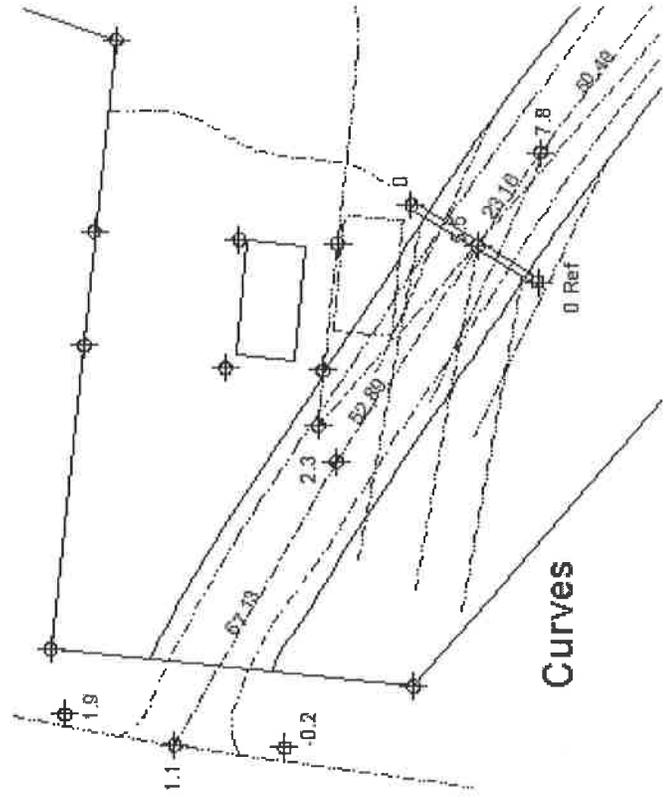


Extreme fill over culvert

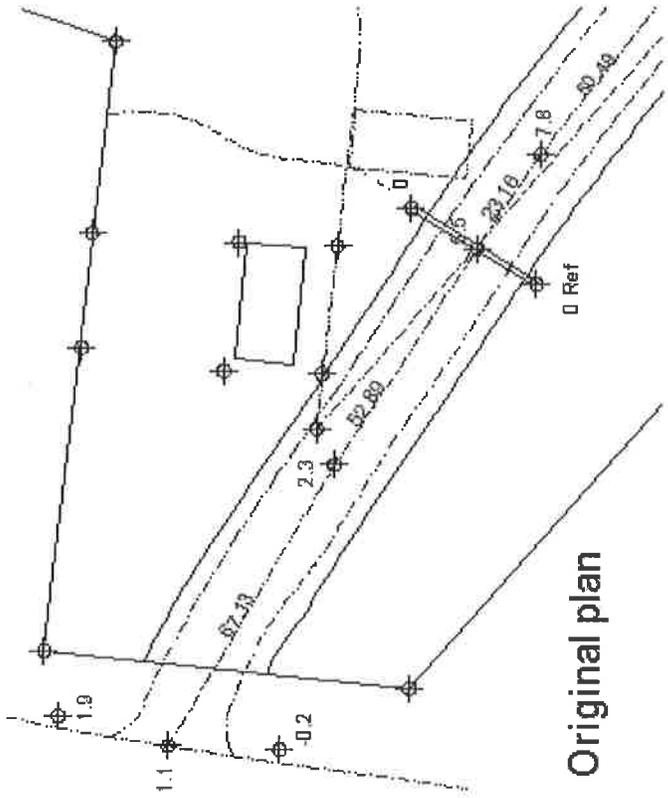




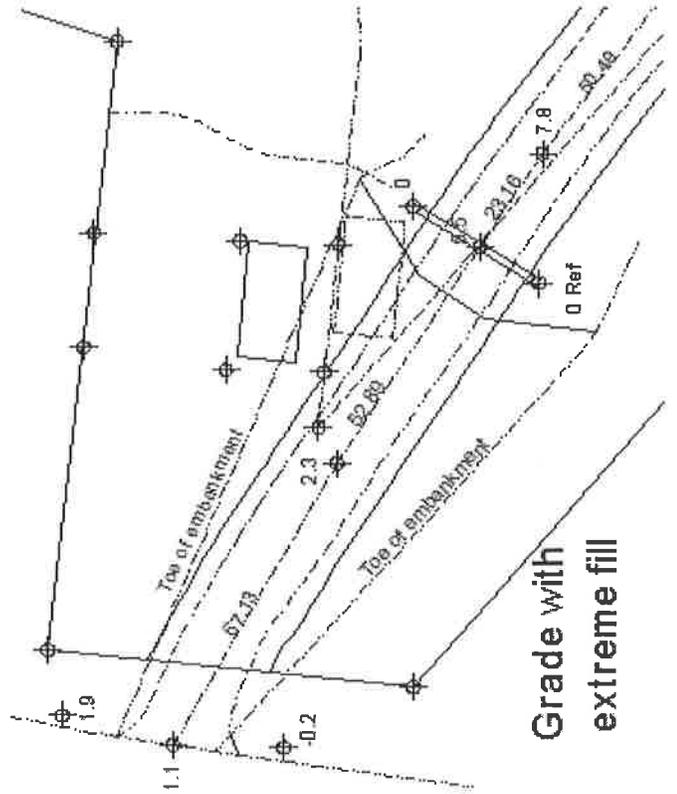
Alternate plan



Curves



Original plan



Grade with extreme fill

At Bayley-Hazen Road:

Gary and Kelly had discussions with the road commissioner. After careful measurements of the elevations, it was determined that the ditch along Bayley-Hazen Road at the north end of the property was 1.9 feet above the low point on the property, so a ditch at right angle to the road would be a better design than a culvert and a ditch along Bayley-Hazen Road. At the south end of the property on the road, the ditch at the road was actually lower than the low point on the property. Accordingly, the driveway had to be located as far north as possible at the road. This was constrained by ledge in that area, so the present location of the driveway at the road is the best compromise of avoiding ledge and having sufficient elevation to make the required ditch.

Going up the steep slope

There was a natural swale going up the hill, and the elevations were such that there was no choice but to follow it. Either side of the natural swale, north or south, the slope was much steeper. We tried to put it somewhat further south, but a ledge outcropping made it impossible to move the driveway much at all, given that a lot of water flows off the hill and good ditches are a necessity.

The grade of the driveway is very steep going up the hill, initially 9.9%, then 16.2%, then 13.62%. The driveway needs to be as straight as possible going up the hill to have a reasonable chance of making it up the hill in winter conditions, and for safety going down the hill in icy conditions.

The culvert.

There needs to be a culvert across the driveway at the low point of the property, and it has to be sufficiently deep so that the ditch from the road will drain there.

In the north-south direction, it needs to align with the driveway going up the hill, which follows a natural swale.

In the east-west direction, it looked as if it could be close enough to the road so that the north-east corner of the conforming buildable area could be used to site the 12 x 24 shed. However, we tried several locations, but struck ledge and had to move it again and again, eventually finding sufficient depth in its present location. This location effectively cutoff the intended alternate location of the storage shed making it impossible to site it there, and forcing it to be closer to the road where the lot is narrower.

The driveway from the slope to the curb-cut.

I was advised by Gary and Kelly that the approach to the steep part of the driveway should be as straight as possible and aligned with the steep part of the hill.

The grade going up the steep part of the hill is 9.9%, increasing to 16.2%, then moderating to 13.6 %. This is more than twice the grade permitted for snow plowing by the town and presents a significant problem for winter driving conditions. Going up the hill, it is important to have as long a straight section as possible before the hill to gain momentum. Coming down the hill, it would be a safety concern to put a bend on the hill or at the bottom of it. Anti-lock brakes are very effective at keeping a car going in a straight line. They are not very effective at all on a curve.

If a car left the road going down the hill in icy conditions, it is not just going into a ditch, it is going down the embankment. It would be a serious accident with a good possibility of a roll-over.

It is not only cars that need to go up and down the hill. Ambulances, firetrucks and utility vehicles must be considered as well.

It is likely that the grade will be moderated in the future with more fill. To provide sufficient fill to make the grade 8% to the road and up the hill requires fill to a depth of 10-1/2 feet in the vicinity of the culvert. Presently it is filled to a depth of 5-1/2 feet at the culvert, so that is five feet more on top of what is there.

Embankment

Greensboro does not have a specification for embankments that I could find, so I looked for guidance in other towns.

Jericho has a drawing that shows that the embankment should have a maximum slope of one foot vertical for two feet horizontal for fill up to two feet, and one foot in three if it is deeper. That seems unnecessarily conservative and an embankment built to that specification could not be located within the property line on the south if the driveway is filled to an 8% grade.

Fairfax allows one foot vertical for 1-1/2 feet horizontal. This looks too steep, particularly for a high embankment. I question whether it would be stable, and it certainly would be hazardous for pedestrians or cars if they went down the bank.

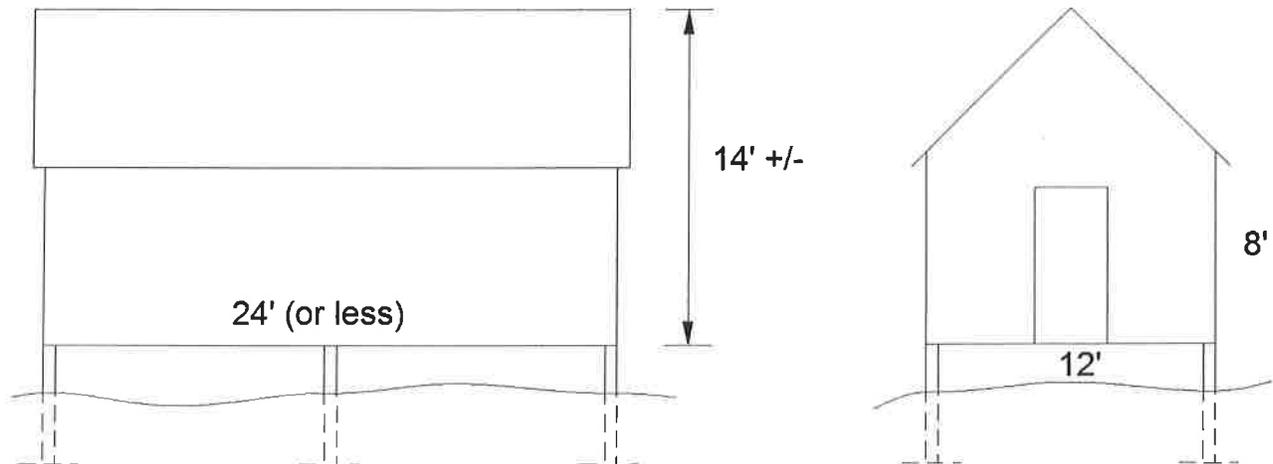
Richmond shows one foot vertical for two feet horizontal, and I chose that for discussion purposes. With that embankment, a 10-1/2 foot fill, with a 16 foot driveway on top, would be 58 feet wide at the toe, side to side.

The present embankment is steeper than it should be. If it is moderated, the distance from toe to toe will increase. If fill is used to make the driveway conform to Greensboro's driveway specifications (8% for plowing, 16 feet wide with 12 foot clear area each side), then the distance toe to toe is much larger yet. This probably cannot be done, but the possible need for greater width needs to be considered.

Conclusion:

1. Having a driveway to the top of the hill is a reasonable use of the property.
2. The location at Bayley-Hazen Road is constrained by topography to provide drainage.
3. The location up the slope is constrained by topography, to follow the best natural grade and by ledge.
4. The location of the culvert north-south is constrained by the topography of the driveway going up the slope so as to have reasonably straight alignment. The location of the culvert east-west is constrained by topography beneath the surface, ledge.
5. Requiring curves in the driveway would limit the “reasonable use of the property” in winter conditions and would make it less safe in icy conditions.

The storage shed.



Reasonable use:

Having a storage shed is a “reasonable use of the property.”

A building permit was issued for the storage shed.

Hardship:

It would be a hardship for me if I cannot build a storage shed now, with good access now, as I have appliances, furniture and personal items that need to be stored. Rented storage is prohibitively expensive and is not a reasonable alternative.

Siting

The desired siting is on the relatively flat portion of the property with good access to Bayley-Hazen Road. It is not possible to site the shed within the setback lines, given narrowness of the lot shape in that area and the topography where the driveway must located be for “reasonable use” of the driveway.

Siting the shed on the relatively level land at the top of the hill is not possible because there is no access to it. Access is a necessary condition for “reasonable use.” It is not possible for me to

provide access to the top of the hill at this time. The fact that a very rich person with unlimited resources would be able to provide access is not a reason to conclude that I could do it. It would not just be a hardship for me, it is not possible with the resources that I have.

Siting the shed on the relatively level land at the top of the present driveway on the right would not conform to setbacks, so that is not possible either. With the driveway only partially completed, year round access probably is not possible.

Siting the shed on the top of the present driveway on the left is not possible because of the steep topography there. It is not now possible to know the path that the driveway must follow in that area. It is an 11 % slope in that area, meaning that the path of the driveway must follow the lowest possible elevation, which cannot be known without excavation, and it must be as straight as possible. It needs to be located further to the north than shown on the survey. . With the driveway only partially completed, year round access probably is not possible.

That is all of the sites that there are to be considered.

Conditions for a variance.

I believe that I have met the conditions for a variance.

1. Use of the site for a 12 x 24 storage shed is a "reasonable use." A building permit has been issued for that use.
2. There are "unique physical conditions" including narrowness of the lot shape in that area and exceptional topographical conditions.
3. I have immediate need for a storage shed, and being unable to build a storage shed now would be a hardship.
4. It is necessary to have a driveway to access the land on the top of the hill.
5. It is not possible to site the shed within the 50 foot setback due to the topography and the narrowness of the parcel in that location, given the necessary location of the driveway. Altering the driveway by introducing curves is not possible without limiting its "reasonable use," and without introducing unnecessary hazards in icy conditions.
6. Alternate locations for the shed are not possible, for the reasons given.
7. The unnecessary hardship has not been created by me, the appellant. There is a clear need to provide a driveway to the top of the hill, and the location of the driveway is determined entirely by the exceptional topographical condition of the property, in view of the "reasonable use" of the driveway and its safety.
8. Because the shed can be built behind the 50 foot setback to the road, it will not alter the essential character of the neighborhood.
9. Because the shed is a low building and the proposed site is a low point on the property, it will not substantially or permanently impair the appropriate use or development of the adjacent property.
10. It will not reduce access to renewable energy resources.
11. It will not be detrimental to the public welfare.
12. The variance requested represents the minimum that will afford relief and the least deviation possible from the regulations and the plan.

Supplement to previously submitted requests for a variance.

Edward Herbert

Property location: 300 Bayley-Hazen Road.

September 2, 2015

Introduction:

I am an engineer by trade and a member of the Patent Bar. As an engineer, I try to find pragmatic solutions to problems and be creative when necessary. As a member of the Patent Bar, I am used to parsing legal documents for their correct meaning and looking at case law when it is necessary.

Severe criteria

I was disheartened when I was told by several people that the Greensboro Development Review Board had such strict guidelines that no variance was likely to be issued. I was not able to get a copy of those criteria, but they appear to be based upon the document VERMONT ZONING AND SUBDIVISION LAW, prepared by Burak Anderson & Melloni, PLC.

Several of the criteria are so severe as to be unreasonable and not consistent with the Greensboro Zoning Bylaws and 24 V.S.A. §4469.

First, I note that the document VERMONT ZONING AND SUBDIVISION LAW, prepared by Burak Anderson & Melloni, PLC. contains a disclaimer:

“This publication is for educational and informational purposes only and is not intended as legal advice or as an opinion about any individual situation. ---“

As nearly as I can tell, there are no officially adopted guidelines equivalent to the rules of practice as there are with patent law and many other agencies. I question whether it is proper for the Development Review Board to rely only on the interpretations of Burak Anderson & Melloni, PLC. Instead, they should rely on the plain English language of the Greensboro Zoning Bylaws, case law, and common sense to find a pragmatic solution. I believe that there must be a balance of the public good, the rights of the neighbors and the needs of the applicant. If all can be accommodated, the variance should be granted.

Another document by the same law firm, LAW AND LAND DEVELOPMENT IN VERMONT-- A Practical Guide has the following advice, which gives me some encouragement:

“Because this test [24 V.S.A. §4469] is so rigorous, you will rarely receive or retain a variance over opposition. A zoning board of adjustment or development review board, however, will often apply these tests more leniently and grant a variance if there is no opposition. As long as you have a good faith argument supporting your application (you can be creative) and no one appeals the decision within 30 days, you can rely on the variance.”

I am trying to be “creative,” and I hope that you will be able to “apply these tests more leniently and grant a variance.”

Dimensional variance vs. use variance

In reading various cases, there seems to be a distinction between a variance for a non-conforming use and a dimensional variance, with much greater leniency given where the use is clearly permitted and the only question is dimensional.

In *Lewis v. Pickering*, 134 Vt. 22, 349 A.2d 715 (1975), Judge William C. Hill wrote:

“In the present controversy, the defendants sought and obtained a permit for a use of their property which was in conformance with the uses of area lots. The variance sought was not for a use, but for a dimensional variance, or an area variance. “In most states the courts will approve an area variance upon a lesser showing by the applicant than is required to sustain a use variance.” 3 R. Anderson, *American Law of Zoning* § 14.45, at 3 (1968). There can be no dispute that the defendants would have been entitled to construct a summer camp upon their lot under the zoning regulations of Hinesburg had their lot been of the physical size called for in the ordinances.”

In my case, there is no question that use as a storage shed is a permitted use. If I could locate it 20 feet further south, it would be done already.

Hardship

VERMONT ZONING AND SUBDIVISION LAW, prepared by Burak Anderson & Melloni, PLC., states that

“The financial hardship of the landowner is not a consideration for board members in their review of variance requests. Ordinarily, a financial hardship is self-created, and thus violates this criterion.”

I protest that financial hardship is not necessarily “self-created.” In my case, my problems are largely attributable to being hospitalized for several months with necrotizing pancreatitis followed by many months of rehabilitation. It would be incredibly cynical and insensitive to characterize that as “self-created.”

Burak Anderson & Melloni cite several cases where hardship did not prevail. In *In re: Appeal of Allen Mullheron; Town of Highgate v. Allen Mullheron*, Docket No. 217-9-00 Vtec, the expense was blasting a ledge within the envelope of a house. That is a minor expense compared to the rest of the project.

In re: Appeal of John R. Mullen, Docket No. 259-12-99 Vtec, there is discussion of the added expense of a staircase and such. Judge Merideth Wright appears to give consideration to the expense, but the case was ultimately decided on other grounds, that is, that the requested variance did not represent the minimum needed.

The point is that no case law cited by Burak Anderson & Melloni, PLC. addresses a situation where the added expense is extraordinary, is all out of proportion to what is being proposed, and is totally unnecessary for the proposed use.

It is plausible that the outcome might be different if extraordinary and disproportionate expenses were considered, and the fact that 24 V.S.A. § 4469 includes “hardship” suggests that the legislative intent is not so rigid.

Suggested accommodation in 24 V.S.A. § 4469

Provisions in 24 V.S.A. § 4469 show an accommodation to the person seeking a variance.

The phrase “other physical conditions peculiar to the particular property” shows flexibility. Factors such as safety and winter driving conditions as they relate to “physical conditions” of a driveway can be considered. The location of a driveway can be considered if it is caused by the exceptional topography.

The inclusion of “hardship” suggests that the burden placed upon the applicant is a consideration, particularly when extreme and disproportionate, despite the severe interpretation of Burak Anderson & Melloni, PLC.

My case

The conditions from the Greensboro Zoning Bylaws that must be satisfied are copied below.

My arguments are below each condition, indented.

1. There are unique physical circumstances or conditions, including irregularity, narrowness, or shallowness of lot size or shape, or exceptional topographical or other physical conditions peculiar to the particular property, and that unnecessary hardship is due to these conditions and not to the circumstances or conditions generally created by the provisions of these regulations in the neighborhood or district in which the property is located;

This has been discussed elsewhere and seen by the Development Review Board on the site visit, so only a summary is provided here.

There is a very steep slope about 130 feet from Bayley-Hazen Road, so steep that buildings cannot be sited on it.

The property is narrow in the area discussed, 75 feet at the road, widening to 130 feet at the toe of the slope. So, the conforming area for building is a triangle of less than 0.02 acres, 30 feet wide tapering to zero about 80 feet from the road.

The start of a driveway occupies all of the conforming area. Its location is determined by the “exceptional topographical or other physical conditions peculiar to the particular property.”

2. Because of these physical circumstances or conditions, there is no possibility that the property can be developed in strict conformity with the provisions of these regulations and that the authorization of a variance is necessary to enable the reasonable use of the property;

Given conditions as they exist today, there is no access up the slope to the rest of the property from Bayley-Hazen Road.

Any other reasonable use would require access, and there is none. So no other use is possible at this time under presently existing conditions of the property.

It is not possible to provide access at this time. There is no obligation to provide access at this time.

Given that the proposed reasonable use for a storage shed can be accomplished despite the exceptional topography, there is no obligation to incur an additional extraordinary and

disproportionate expense just to remedy the exceptional topography so as to provide access for hypothetical other possible uses.

(Granted, I hope to be able to provide access at some time in the indefinite future, but that hope and the preparations for it to date do not alter the conditions as they exist today.)

Timeliness is a valid criterion for the variance that I am seeking at this time, under the presently existing conditions of the property.

3. The unnecessary hardship has not been created by the appellant;

The unnecessary hardship is caused by the exceptional topography.

4. The variance, if authorized, will not:

(a) Alter the essential character of the neighborhood or district in which the property is located;

Because the use is permitted 20 feet to the south, it clearly would not alter the essential character of the neighborhood or district in which the property is located.

(b) Substantially or permanently impair the appropriate use or development of adjacent property;

Because the use is permitted 20 feet to the south, and the use for a storage shed is very low intensity, it clearly would not impair the appropriate use or development of adjacent property.

It is a one story building in a low area on the property. Some small trees and shrubbery could make it so that it could not even be seen from the adjacent property.

(c) Reduce access to renewable energy resources;

It would not reduce access to renewable energy resources.

(d) Be detrimental to the public welfare.

It would not be detrimental to the public welfare.

5. The variance, if authorized, will represent the minimum that will afford relief and will represent the least deviation possible from these regulations and from the plan.

The "reasonable use" in question is for a storage shed.

To use a storage shed, there must be access. There must be parking for a truck to back up to the door for loading and unloading, and the parking must be reasonably level.

Proximity to Bayley-Hazen Road is a factor, as is the ability to access it year-round.

There is a small distance from the present driveway embankment to the proposed site of the storage shed, but the present driveway is a modest start and it will need to be improved to use it in the future. That will necessitate broadening the embankment, which will require all of the area between the 50 foot side setback and the proposed building location.