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Via first class mail
Copy by email to BDaigneault@gilmantonnh.org

Elizabeth Hackett, Chair
Zoning Board of Adjustment
Town of Gilmanton
503 Province Road
Gilmanton, NH 03237

Re: 1) Appeal from an Administrative Decision for James M. Virgin and Melanie J. Maheux for Canaan Road, Map 411, Lot 015; and
2) Application for a Variance for James M. Virgin and Melanie J. Maheux for Canaan Road, Map 411, Lot 015.

Dear Chair Hackett and Fellow Board Members:

We represent James M. Virgin and Melanie J. Maheux (the "Applicants"). The Applicants own real property located in the Town of Gilmanton (the "Town") designated in the Town assessing records as Tax Map 411, Lot 015 (the "Property"). *See* Assessment Card, Exhibit 1.[1] The Property is located in the Rural zoning district as designated in the Town Zoning Ordinance (the "Zoning Ordinance"). The Property consists of a forty-acre tract of undeveloped land with frontage on Canaan Road. Canaan Road is a Class V gravel road that runs from Route 140 to a turn-around adjacent to the Property (the "Turn-around"). *See* Photos, Exhibits 2(a) – 2(e). After the Turn-around, Canaan Road becomes a Class VI Road subject to gates and bars and continues to the Belmont town line. *See* Town of Gilmanton Discontinued Roads, p. 6, Warrant Article 50; *See* Photos, Exhibits 4(a) – 4(b). The Applicants acquired title to the Property in 2022 from David Burl. *See* Deeds, Exhibit 5(a) to 5(c)(a series of deeds in the chain of the title to the Property). These Deeds all indicate that the Property is located on a public road.

The Applicants propose to construct a three-bedroom single-family home (the "Project") on the Property. The Project is a use permitted as of right in the Rural District under the Zoning Ordinance. The Town presently assesses a portion of the Property as a two-acre building lot. *See*

[1] The Assessment Card attached as Exhibit 1(a) has a print date of July 3, 2023. The 2023 Assessment Card includes notes that were not shown on an Assessment Card bearing a print date of July 5, 2022. See Exhibit 1(b), including a reference to Class VI road classification and a variance application filed by a prior owner of the Property that was dismissed for non-action and without prejudice. There are no physical gates and bars in the vicinity of the Property.

Exhibit 1(a). On July 26, 2022, the Applicants requested and received a driveway permit from the Road Agent of the Town to construct a driveway from the Turn-around to a nearby clearing that the Applicants have selected as the building site (the "Building Site"). *See* Driveway Permit, Exhibit 6. The Applicants have already roughed in the driveway in reliance on the Driveway Permit. *See* Photo of Building Site, Exhibit 7. In 2022, the Applicants obtained a permit from the New Hampshire Department of Environmental Services to install a new septic system at the Building Site. *See* NHDES Permit, Exhibit 8. The Applicants have also engaged J.E. Belanger Land Surveying PLLC to prepare an existing conditions survey of a portion of the Property showing the Building Site, the Driveway, the Turn-around, and Canaan Road (the "Belanger Survey"). *See* Belanger Survey, Exhibit 9. The Belanger Survey shows that the Property has 153 feet of frontage along Canaan Road from the northerly property line of Tax Map 411, Lot 014 now owned by Andrew and Colleen Beland and formerly owned by Joseph Gomes ("Lot 14" and the "Former Gomes Property") to the most northerly point of the Turn-around. *See* Belanger Survey, Exhibit 9, Beland Assessment Card, Exhibit 10 and deeds pertaining to Lot 14, Exhibits 11(a) through 11(d)(being a series of deeds, showing that the lot previously owned by Joseph Gomes off of Canaan Road is now owned by Andrew and Colleen Beland).

Earlier this year, the Applicants submitted a Building Permit Application for the Project (the "Permit Application") to the Town. The Applicants subsequently received a letter (the "CDD Letter") from the Community Development Director of the Town dated June 13, 2023. *See* Exhibit 12. In the letter, the Applicants were advised, among other things, as follows:

> The Town of Gilmanton is in receipt of your building permit application for Canaan Rd, Gilmanton, NH, known as map & lot 411-015. Upon review of your application, we find your property is a non-conforming lot according to the current Zoning Ordinances. The property does not meet the Lot Requirements as indicated in Article IV, Table 2 (enclosed). A non-conforming lot can be used to build upon so long as it meets the requirements of Article VII. C:1, as cited below:
>
> *Non-Conforming Lots:*
>
> 1. *A non-conforming lot may be used to build a new structure for residential purposes if:*
>   a. *The lot has frontage on a Class V or better road,*
>
> . . .
>
> We have found the property does not meet sub-paragraph *a*. For this reason a variance is required before issuance of the building permit.

Exhibit 12.

Accordingly, the CDD Letter clearly indicates that there has been a decision not to issue the requested building permit on the basis of the CDD's finding that the Property was not accessed by a Class V road or better. The CDD letter concluded that the lot was a nonconforming use under the Ordinance which would require a variance before issuance of the building permit. In addition, the CDD Letter advised the Applicants that they needed to file an application to satisfy the

requirements of RSA 674:41 with respect to properties located on a Class VI Road or a private road before a building permit could be issued.

Following receipt of the letter, the Applicants submitted to the Zoning Board of Adjustment for the Town of Gilmanton (the "ZBA") an Application for a Variance (the "Variance Application"), requesting a variance from the nonconforming use provisions of the Ordinance. On or around the same time, the Applicants submitted a Private Road Application pursuant to RSA 674:41 to the Select board. Subsequently, the Applicants also filed an Appeal from an Administrative Decision (the "Appeal") with respect to the CDD letter.

The instant letter, on behalf of the Applicants, contains two main sections: one section discussing the grounds for the Applicants' Appeal and a second section supplementing the Variance Application. If the Applicants prevail in the Appeal, then the Variance Application will be moot.

1) Appeal from an Administrative Decision for James M. Virgin and Melanie J. Maheux for Canaan Road, Map 411, Lot 015.

The Applicants hereby appeal the CDD's determination that the Property is without frontage on a Class V road or better and any finding, express or implied, that the Property is not accessed by a Class V road or better. The grounds for the Appeal are set forth below.[2]

i. Standing

As an initial matter, the Applicants' Appeal is appropriately before the ZBA. Under RSA 674:33, the zoning board of adjustment shall have the power to "[h]ear and decide appeals if it is alleged there is error in any order, requirement, decision, or determination made by an administrative official in the enforcement of any zoning ordinance adopted pursuant to RSA 674:16[.]" N.H. Rev. Stat. Ann. § 674:33(I)(a).

RSA 676:5 states, among other things, that "[a]ppeals to the board of adjustment concerning any matter within the board's powers as set forth in RSA 674:33 may be taken by any person aggrieved or by any officer, department, board, or bureau of the municipality affected by any decision of the administrative officer." N.H. Rev. Stat. Ann. § 676:5(I). Additionally, Article IX, Section D, of the Zoning Ordinance states that "[a]ppeals to the Board of Adjustment may be taken by any person aggrieved or by any officer, department, board or bureau of the municipality affected by any decision of the administrative officer, in the manner prescribed by RSA 676:5-7, as amended, within the time limit set by the Board of Adjustment according to said statute." Gilmanton Ordinance, Article IX, Section D.

The Applicants are clearly "persons aggrieved." "Persons aggrieved" include "any person directly affected by the challenged administrative action or proceeding." *Golf Course Invs. of NH, LLC v. Town of Jaffrey*, 161 N.H. 675, 680 (2011) (citations and internal quotations omitted). In

[2] To the extent that any specific findings, determinations, and/or decisions discussed in this letter as being appealed by the Applicants are not expressly included in the Appeal from an Administrative Decision form (submitted on July 13, 2023) this letter is supplementing the Appeal from an Administrative Decision previously filed.

the instant matter, the Applicants are "persons aggrieved" because they are seeking a building permit to build on the lot they own and thus have a direct interest in the outcome of the permit application they submitted. *Id.* Their permit application was not granted, and instead they were instructed to obtain—among other things—a variance from the ZBA.

RSA 676:5 provides definitions—for the purposes of that section—for "administrative officer" and for a "decision of the administrative officer." N.H. Rev. Stat. Ann. § 676:5(II). Pursuant to RSA 676:5, an "administrative officer" means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility." *Id.* RSA 676:5(II) further provides that a "decision of the administrative officer" includes:

> any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.

Id.

In the instant case, the language of the CDD Letter concludes that the Property does not have any frontage on—and is not accessible by a Class V or better road, a conclusion apparently made by the Community Development Director and/or the building inspector/code enforcement officer. There can be no question that at least one or both of these individuals are "administrative officers" in that one or both individuals appear to have the responsibility for issuing permits or certificates under the Zoning Ordinance, or for enforcing the Zoning Ordinance. Further, the finding(s) or determination(s) that the Property does not have any frontage on—and is not accessed by—a Class V or better road involve the construction, interpretation, and/or the application of the terms of the Zoning Ordinance and, thus, constitute a decision of the administrative officer.

ii. Class V frontage

The Permit Application should have been approved, and a building permit for the Property should have issued, for the following two reasons:

(1) the Property (Tax Map 411, Lot 015) has 153 feet of frontage on a Class V or better road; and

(2) the Property is accessed by a Class V or better road.

It is undisputed that the Property is located on Canaan Road and that Canaan Road runs from Route 140 in the Town of Gilmanton to the Belmont Town Line.[3] *See* Road List, Exhibit 13. Notably, the Road List describes Canaan Road as a Class V road up to a certain undefined point before its classification changes to Class VI.

[3] Exhibit 13, attached to this letter, is the "Road List" obtained directly from the Town of Gilmanton website.

The administrative decision or determination related to the Permit Application apparently relied upon, or potentially included the erroneous determination that, Canaan Road was a Class V road from Route 140 up to a line coextensive with the northerly boundary the Former Gomes Property (i.e. Lot 14) and then immediately became a Class VI road thereafter.[4] There is no evidence to support that determination.

Without question a portion of Canaan Road was reclassified by a vote of the Town at a town meeting in 1978. However, the Town's conclusion regarding the point where the Class V portion of the road changes to Class VI is wrong. Article 50 of the town warrant dated March 14, 1978, reads: "Voted to close the following Class VI roads, subject to gates and bars: . . . (h) Canaan Road: From the turn-around by Joseph Gomes' place to the Belmont Town Line." Exhibit 3.

Exhibits 11(a) through 11(d) establish that the lot previously owned by Joseph Gomes off of Canaan Road is now owned by Andrew and Colleen Beland. The language of the 1978 Warrant makes clear that Canaan Road remains a Class V Road up to and including the "turn-around by Joseph Gomes' place." Notably, the Belanger Survey, Exhibit 9, and the aerial photograph attached as Exhibit 14, which purports to show the demarcation between the Class V and Class VI portions of the Canaan Road as the northerly line of Lot 14, show only one "turn-around" in the vicinity of Lot 14. The language in Article 50 of the town warrant (stating "[f]rom the turn-around by Joseph Gomes' place to the Belmont Town Line") makes clear that the Class VI portion of Canaan Road goes *from* the turn-around shown in Exhibits 9 and 14 to the Belmont Town Line. This language does not indicate that the northerly property line of Lot 14 is the terminus of the Class V section of Canaan Road. Therefore, the Class V portion of Canaan Road includes all of Canaan Road from Route 140 and goes until the northerly end of the turn-around shown on Exhibit 9 and Exhibit 14. Simply put, the end of the Turn-around is the critical point on Canaan Road where the classification changes. The portion of the road south of that point has Class V status, and the portion of the road north of that point has Class VI status all the way to the Belmont Town Line.

Significantly, as shown on the current conditions survey attached as Exhibit 9, the distance from the property line between the Property and the Former Gomes Property (i.e. Lot 14) and the northerly end of the Turn-around is 153 feet. Accordingly, based on the above, the Property has 153 feet of Class V frontage on Canaan Road. Also, the physical condition of Canaan Road is the same for the entire length of the road from Route 140 to the turn-around, thus confirming that the portion of Canaan Road from Route 140 to the end of the turn-around is a Class V road. *See* Photos, Exhibits 2(a) – 2(e).

The fact that the Property has 153 feet of Class V frontage on Canaan Road means that the Property is in fact a conforming lot, contrary to the determination contained in the CDD Letter. Under Article VI, Table 2, of the Zoning Ordinance, "[a]ny lot that conforms with the 150' frontage requirement in the Rural District in effect prior to March 14, 2000, shall be treated as a conforming lot for the frontage requirement purposes of this ordinance." Ordinance, Article IV, Table 2.

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[4] Notes contained on the assessment card for the Property—attached as Exhibit 1(a)—state, among other things, the following: "...Class VI rd, rolling, wooded, w/ some wet areas, need to upgrade rd to improve w/ dwelling, lot at end of Class V frontage . . ." *See* Exhibit 1(a).

Regardless, the fact that the Property has frontage on—and accordingly can be accessed by—the Class V portion of Canaan Road means that even if the Property is erroneously considered a non-conforming lot, under the Zoning Ordinance it can still be used to build upon. *See* Ordinance Article VII, Section C.

On the basis of the foregoing Applicants respectfully request that the ZBA (1) determine that the portion of Canaan Road from the northerly line of Lot 14 to the northerly line of the Turn-around is a Class V road; (2) determine that the Applicant has 150 feet of frontage on a Class V road; and (3) reverse the CDD's determination that the Property is without frontage on a Class V road or better and any finding, express or implied, that the Property is not accessed by a Class V road or better.

2) Variance Application for James M. Virgin and Melanie J. Maheux for Canaan Road, Map 411, Lot 015.

Following the issuance of the CDD Letter, and pursuant to the instructions therein, the Applicants submitted the Variance Application on June 22, 2023, in which they requested a variance from Zoning Ordinance Article IV, Table 2, to permit building of the Project—a single-family residence on the Property. Article VI, Table 2, of the Zoning Ordinance provides that the minimum frontage for conventional lots in the Rural District is 200 feet and also provides that "[a]ny lot that conforms with the 150' frontage requirement in the Rural District in effect prior to March 14, 2000 shall be treated as a conforming lot for the frontage requirement purposes of this ordinance." Ordinance, Article IV, Table 2.

In the event that the ZBA denies the Applicants' Administrative Appeal, the Applicants request the ZBA to review their Variance Application as supplemented by this letter. Further, the Applicants request to add an additional and alternative variance request to their application—a variance from Zoning Ordinance Article VII, Section C-1(a) to permit a Single-Family Dwelling on a Class VI road. Article VII, Section C(1) lists several requirements for when "[a] non-conforming lot may be used to build a new structure for residential purposes." One of those requirements—the requirement that the Applicants now also seek a variance from—listed in paragraph "a" of Article VII, Section C(1), is that "the [non-conforming lot] has frontage on a Class V or better road." Ordinance, Article VII, Section C(1)(a).

The discussion contained herein is in support of the Applicants' request for a variance from Article IV, Table 2, Section 2, and also their request—in the alternative—from Article VII, Section C-1(a) of the Zoning Ordinance. Notably, both requests have overlapping issues. Therefore, for the sake of brevity, the discussion hereinbelow addresses both variance requests together except where otherwise noted. The analysis is combined for the convenience of the ZBA and is not intended to imply that the ZBA may not consider each of the individual requests on its own merits or otherwise limit the ZBA's consideration.

i. The variance will not be contrary to the public interest.

A variance is contrary to the public interest when it unduly, and in a marked degree, conflicts with the Zoning Ordinance such that it violates the Zoning Ordinance's basic zoning

objectives. *Malachy Glen Assocs., Inc. v. Town of Chichester*, 155 N.H. 102, 105 (2007). There are two methods for determining whether a variance would violate a Zoning Ordinance's basic zoning objectives: (1) "whether granting the variance would alter the essential character of the neighborhood" or (2) "whether granting the variance would threaten the public health, safety or welfare." *Harborside Assocs., L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 514 (2011).

The variances requested by the Applicants would not alter the essential character of the neighborhood. The Project that the Applicants seek to build is permitted in the Rural District and is consistent with other homes in the area. On the west side of Canaan Road, from where it begins at Route 140 to where it reaches the Property, there are five lots. Each one of those five lots has a single-family residence located on it. Accordingly, adding a single-family residence to the very next lot, following those five lots where homes have been built, will certainly not alter the essential character of the neighborhood.

Additionally, there is no reason to conclude that granting the requested variances for the Project will threaten the public health, safety, or welfare of the Town and its residents. Notably, NHDES has approved the proposed septic system to be installed on the Property in connection with the Project. Consequently, the new septic system will not pose any reasonable threat to the public health, safety, or welfare. The Road Agent has already approved and issued a driveway permit for the new driveway to the Building Site. The physical condition of Canaan Road from the northerly property line of Lot 14 to the Turn-around is no different than the physical condition of Canaan Road from the northerly property line of Lot 14 to Route 140. Further, the Town routinely uses the Turn-around for maintenance, and the portion of Canaan Road needed to access the Property appears to already be maintained by the Town. *See* Photos, Exhibits 2(a) – 2(e) and 4(a) – 4(b).

ii. The spirit of the Ordinance is observed by granting the variance.

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 Zoning Ordinance." *Malachy Glen Assocs., Inc.*, 155 N.H. at 105. Article I of the Zoning Ordinance, states:

> In pursuance of authority conferred by RSA 673-677, as amended and for the purpose of promoting the health, safety, prosperity, convenience and general welfare, as well as efficiency and economy in the process of development of the incorporated Town of Gilmanton, NH by securing safety from fire, panic, **congestion** and dangers, providing adequate areas between buildings and various rights-of-way, **by preserving the rural charm now possessed by our Town of Gilmanton**, the promotion of good civic design and arrangements, wise and efficient expenditures of public funds, now therefore the following ordinance is hereby enacted by the voters of the Town of Gilmanton, NH in official meeting convened.

Ordinance, Article I (emphasis added). Notably, the Property includes approximately 40 acres of land. As a result, permitting the Applicants to build one single-family home on approximately 40 acres of land is consistent with several of the express goals outlined in Article I of the Ordinance.

For example, some of the goals or purposes listed above include securing safety from congestion and also preserving the rural charm possessed by the Town. In no way will permitting the Applicants to build a single-family home on approximately 40 acres of land reasonably interfere with the intentions and objectives of the Zoning Ordinance.

iii. Substantial justice will be done by granting the variance.

The "substantial justice" element of a variance is guided by two rules: that any loss to the individual that is not outweighed by a gain to the general public is an injustice, and whether the proposed development is consistent with the area's present use. *Malachy Glen Assocs.*, at 109. In *Malachy Glen Associates*, the New Hampshire Supreme Court "upheld the trial court's conclusion that the proposed storage facility project worked a substantial justice because it "pose[d] no further threat to the wetlands[,[... [was] appropriate for the area [,] and [did] not harm its abutters[;] [therefore,] the general public [would] realize no appreciable gain from denying this variance." *Harborside Assocs., L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 515 (2011)(citing *Malachy Glen Assocs.*, 155 N.H. at 109).

Similar to *Malachy Glen Assocs.*, denying the Applicants' variance requests in the instant case would be detrimental to the Applicants. A denial would prohibit them from building a home on their land. Further, this detriment to the Applicants would not be outweighed by any gain to the general public given that the Applicants' proposal is appropriate for the area, and there is no reasonable expectation that it will present any degree of harm to the abutters of the Property.

Lastly, as mentioned above, the Applicants' proposal is consistent with the area's present use, including the present use of all five lots situated with frontage on the west side of Canaan Road between the Property and Route 140.

iv. The values of surrounding properties will not be diminished.

As explained above, the Applicants' proposal is consistent with the area's present use and would be bringing a newly constructed three-bedroom single-family home to the neighborhood. There does not appear to be any reasonable likelihood that the values of the surrounding properties will be diminished to any degree should the variance be granted.

v. Literal enforcement of the provisions of the Zoning Ordinance would result in an unnecessary hardship.

In 2001, the New Hampshire Supreme Court relaxed the unnecessary hardship standard to require only that the zoning restriction interfere with the applicant's "reasonable use of the property, considering the unique setting of the property in its environment." *Simplex Techs., Inc. v. Town of Newington*, 145 N.H. 727, 731 (2001). In other words, if the proposed use is reasonable, considering the unique setting of the property, a hardship may still exist to justify a variance even if other reasonable uses exist which would be permitted under the zoning ordinance. *Id.*

The analysis of the New Hampshire Supreme Court in *Simplex* was based on the constitutional protections afforded to landowners. "Inevitably and necessarily there is a tension between zoning ordinances and property rights, as courts balance the right of citizens to the enjoyment of private property with the right of municipalities to restrict property use. In this balancing process, constitutional property rights must be respected and protected from unreasonable zoning restrictions." *Id.* The Court found that the New Hampshire Constitution limits "all grants of power to the State that deprive individuals of the reasonable use of their land" and held that the prior standard was too restrictive. *Id.*

Since *Simplex*, the unnecessary hardship standard has been clarified by statute and further Court decisions. *See, e.g., Rancourt v. City of Manchester*, 149 N.H. 51, 54 (2003) ("Where as before *Simplex*, hardship existed only when special conditions of the land rendered it uniquely unsuitable for the use for which it was zoned, after *Simplex*, hardship exists when special conditions of the land render the use for which the variance is sought 'reasonable.') (internal citations omitted). Accordingly, an applicant for a variance need not show that the proposed use is "necessary," only that it is "reasonable." *See Harborside Assocs., L.P. v. Parade Residence Hotel, LLC*, 162 N.H. 508, 518-19 (2011). "This factor, however, does not require the landowner to show that he or she has been deprived of all beneficial use of the land." *Harrington v. Town of Warner*, 152 N.H. 74, 80-81 (2005). The question of whether the property can possibly be used differently from what the applicant has proposed is not a material consideration. *Malachy Glen Assocs., Inc.*, 155 N.H. at 108.

A. Special conditions of the Property distinguish it from other properties in the area.

An unnecessary hardship may arise from conditions that are not shared by all lots within the district. *See Cmty. Res. For Just., Inc. v. City of Manchester*, 154 N.H. 748, 752 (2007) ("While the property need not be the only such burdened property, the burden cannot arise as a result of the zoning ordinance's equal burden on *all* property in the district") (internal quotations omitted). Moreover, an unnecessary hardship does not require the special characteristics to be detrimental characteristics. A hardship may arise if characteristics of the Property render it unusually suited to a proposed use that is otherwise prohibited by the ordinance. *See Rancourt v. City of Manchester*, 149 N.H. 51, 54 (2003).

In the instant case, assuming for the purposes of this section that the Property does not have Class V frontage, the Property is larger than all of the surrounding developed lots on the west side of Canaan Road that have Class V frontage and, accordingly, have single-family homes. The Property at issue, containing approximately 40 acres of land, is especially suited for the building of a single-family residence that is consistent with certain goals of the Zoning Ordinance, such as avoiding congestion and preserving the rural charm of the area. The Property is so large that any single-family home built upon it could easily comply with any setback requirements with respect to the road and/or abutting lots. The surrounding area is sparsely developed and rural, which is highly compatible with and not impaired by the proposed use. The proposed Build Site on the Property is easily accessible from the Turn-around and the condition of Canaan Road along the first 150 feet of the Property's frontage is no different than the condition of Canaan Road from the southerly property line of the Property to Route 140. In addition, the Applicants have already

obtained permits for the proposed septic system and the driveway for the Project from the Turn-around. *See* Exhibits 6 and 8. This further demonstrates the suitability of the Property for the Project. If the variance is denied, the Applicants would be prohibited from enjoying the full use of the Property. Also, the Applicants are already being taxed for a 2-acre building lot with respect to the Property, as indicated on the assessment card. *See* Exhibit 1.

a. No fair and substantial relationship exists between the general public purposes of the Zoning Ordinance provision and the specific application to the Property.

The harms a zoning ordinance is designed to prevent are not created by this use. Zoning Ordinances, for example, are often intended to prevent overcrowding of land, undue concentration of population, and negative externalities such as traffic, noise, or odors. The Project does not violate any of those zoning objectives. Given the size of the lot, the size of the proposed single-family residence, and the nature of the proposed use, the Applicants' Project would pose no material impact on overcrowding, population density, traffic, noise, or odors.

Accordingly, there is no fair and substantial relationship between the purposes of the Zoning Ordinance provision and their application to the Property.[5][6]

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[5] In *Metzger v. Town of Brentwood*, an applicant for a zoning variance related to frontage owned a property with 558 feet of frontage on a particular road, but only 123 feet of that frontage was on the part of the road that qualified under the zoning ordinance at issue. *Metzger v. Town of Brentwood*, 117 N.H. 497, 500 (1977). The ordinance in *Metzger* required 200 feet of frontage on the qualifying part of the road in question in order to build, and the applicant's property was 77 feet short of the frontage requirement. *Id.* The Court in *Metzger* noted that the stated reason for prohibiting building on roads closed subject to gates and bars was that there must be access for fire trucks, police cars, ambulances and school busses. *Id.* at 502. Notably, however, the Court stated that "there is no substantial relationship between these needs and the 200-foot frontage requirement[,]" and that "[t[hese vehicles would have as ready access to plaintiffs' house with the 123-foot frontage as they would with 200 feet of frontage provided plaintiffs' driveway is within the 123 feet which has not been closed." *Id.* Although, in *Boulders at Strafford, LLC v. Town of Strafford*, the New Hampshire Supreme Court, several years after the *Simplex* opinion, held—in a case involving a declaratory judgment action against a town—that the rational basis test under the state constitution requires that legislation be only rationally related to a legitimate governmental interest, overruling *Metzger v. Town of Brentwood*, 117 N.H. 497 (1977), due to the fact that in *Metzger* the Court included an inquiry into whether legislation unduly restricts individual rights when applying the rational basis test and also included a least-restrictive-means analysis as part of the rational basis test. *Boulders at Strafford, LLC v. Town of Strafford*, 153 N.H. 633 (2006). However, the Court's concerns in *Metzger* stated above certain appear relevant in the instant case when applying the fair and substantial relationship factor included by the Court in the unnecessary hardship analysis in *Simplex* in 2001. *Cf. McKenzie v. Town of Eaton Zoning Board of Adjustment,* 154 N.H. 773, 780 (2007).

[6] It is also interesting to note the metamorphosis of the Zoning Ordinance since it was first adopted in 1970. In 1970, there was one zoning district, and the frontage requirement for a building lot was 125 feet. There were no restrictive provisions concerning nonconforming uses. By 1998, several zoning districts existed and the frontage requirement for single family dwellings in the Rural District was 150 feet. The provisions regarding nonconforming lots required compliance with all other requirements of the Zoning Ordinance except lot size (subject to receipt of a special exception), which definition is the antithesis of a nonconforming lot. The current Zoning Ordinance increases the frontage requirement for single family dwellings in the Rural District to 200 feet and has extraordinarily restrictive provisions regarding nonconforming lots. These restrictions are not rationally related to the zoning objectives they purport to achieve.

b. The proposed use is a reasonable use.

A proposed use is presumed to be reasonable if it is a permitted use under the Town's Ordinance. *Malachy Glen Assocs., Inc.*, 155 N.H. at 107. The Applicants' proposed use is already permitted in the Rural Zone and, notably, is the same use as the abutting property (the Former Gomes Property) and the same use as all the other properties on the west side of Canaan Road, from Route 140 to the Turn-around.

Accordingly, permitting the construction of a single-family residence on the Property as the next in sequence to the existing five lots where homes have been built, will certainly constitute a reasonable use. The only reason the Applicants have to obtain a variance, apparently unlike some the other lot owners on Canaan Road, is that at some point years ago the Town decided to make the part of Canaan Road that runs along the Property to be the beginning of the Class VI portion of that road. Given that (1) the portion of Canaan Road needed to access the Property, from the northerly property line of Lot 14 to and including the Turn-around, appears to already be maintained by the Town and (2) the physical condition of Canaan Road from the northerly property line of Lot 14 to the Turn-around is no different than the physical condition of Canaan Road from the northerly property line of Lot 14 to Route 140, the requested variances are reasonable. *See* Photos, Exhibits 2 and 4. Accordingly, under these circumstances, a denial of this variance would result in an unnecessary hardship.

On the basis of the foregoing, the Applicants respectfully request that the ZBA grant their Variance Application with respect to variances from Zoning Ordinance Article IV, Table 2, Section 2 and from Zoning Ordinance Article VII, Section C-1(a) to permit the Applicants to construct a Single-Family Dwelling on the Property.

We look forward to further discussion at the September meeting of the Zoning Board of Adjustment.

Respectfully Submitted,

James Virgin and Melanie Maheux,
By their Attorneys,
CLEVELAND, WATERS AND BASS, P.A.

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