

NOTICE OF DECISION

Washington Zoning Board of Adjustment

Case No: 20-138

Date of Decision: July 27, 2022



The Selectmen, any party to the action, or any person directly affected has a right to appeal this decision. For complete information, see [RSA 677:2 Rehearing and Appeal Procedures](#). This notice has been placed on file and made available for public inspection in the records of the ZBA. Copies of this notice have been distributed to the applicant and the Board of Selectmen.

Applicant	Nancy Caruso
Address	656 Highland Haven Rd. Washington, NH 03280
Owner	Nancy Caruso
Lot	20-138

While it defends its prior actions as lawful and reasonable for the reasons stated below, the Board grants the applicant a rehearing as requested, so that the applicant may:

- Revise, as they see fit, the application to state (a) the correct governing LUO for variance #2 and (b) the correct impermeable coverage percentage for variance #4.
- Consider the Board's revision of its findings regarding setback variances #1 and #2.
- Present any new evidence or arguments in support of the application.

The Board may also raise additional reasons for denial beyond those issues raised in the motion.

The rehearing will be held at the Board's next scheduled public hearing, currently scheduled for 8/31/2022.

Findings

These findings and the narrative supporting them reference the [motion for rehearing of 6/30/2022](#) ("the motion") and the [original variance application](#) ("the application"), as presented to

the Board on 6/1/2022 and [recorded in the minutes](#) of the same date. Additionally, references are made to the [Town's LUOs](#) and to the [Master Plan](#) that forms their basis.

1: The Board has acted within its authority

During the public hearing of 6/1/2022, the Board noted that the applicant sought relief from the incorrect LUO in one of their four variance requests. Specifically, a side setback of 9' 8" was requested where 30' is required by the LUO cited in the application, but only 25' by what the Board deemed to be the correct LUO.

The Board amended variance #2 to reference §403.1 rather than §202. §403.1 is less restrictive and in the applicant's favor as it requires that: "Any nonconforming building may be altered or expanded provided such alteration or expansion does not come within 25 feet of a side or rear lot line." The applicant agreed that §403.1 fits their case and raised no objection at the hearing. The applicant claims in §6 of the motion that the Board exceeded its authority by making this amendment.

No objection was raised also when the Board at the same time corrected the applicant's arithmetic: the percentage of impermeable coverage had been miscalculated. The Board reduced the percentage from 31.4%, again in the applicant's favor, and the applicant agreed with the change. However, no claim of the Board exceeding its authority has been made in this instance.

Furthermore, the Board consulted NHMA, who advised: "So long as the application amendment that was made by the Board was to the correct provision of the zoning ordinance, and the applicant did not object when the amendment was made by the Board, that action by the Board was within its authority."

THEREFORE: The Board acted properly and within its authority when it changed the governing LUO from §202 to §403.1 in the applicant's variance request #2.

2: Claims of hardship imposed upon the applicant's mother rejected

In §1 of the motion, and in §13 and §16 under the section "Unnecessary Hardship", the applicant makes several claims of hardship imposed upon their mother. While the Board has the deepest sympathy for her welfare, any claim of hardship must be of that imposed upon the property and not its owner or occupiers.

The Board also notes that any variances granted likewise attach to the property and not to the owner. The applicant could abandon their plans immediately after obtaining the requested variances and sell the property to a new owner who is unencumbered by an extended family. All subsequent owners are free to exploit the variances in perpetuity.

THEREFORE: The Board concludes that consideration of the welfare of the applicant's mother is not a lawful means of granting the variances requested.

3: Revision of the Board's finding regarding the applicant's setback variances

When the Board objected to the requested land coverage variances at the 6/1/2022 public hearing, it subsequently denied all four variances with the opinion that they were not severable as, without the coverage variances, the setback variances were moot.

THEREFORE: Upon rehearing, if no evidence is presented to the contrary, the Board will revise its finding regarding setback variances #1 and #2 to instead hold them in abeyance, without prejudice, for future reconsideration.

4: The applicant's land coverage variances do not observe the spirit of the LUOs

In order to define the "spirit of the LUOs" in the context of this application, the Board first turned to LUO §102 which states that its purpose is, in part, to:

- Prevent the overcrowding of land.
- Avoid undue concentration of population.
- Ensure proper use of natural resources.

The Board notes that §102 distinguishes "overcrowding of the land" from "concentration of population" so it is clear that the former objective refers to excessive coverage of the land by buildings and impermeable surfaces, and the latter to coverage by residents.

As recommended by the State's official [ZBA Handbook](#), the Board then turned to the Master Plan's Vision Statement which states, in part: "We serve as active stewards of our rural surroundings, scenic vistas and recreation resources to preserve and expand protected open space and perpetuate the rural character our townspeople cherish."

Both these statements convince the Board that the "spirit of the LUOs" is inextricably bound to the preservation of the rural nature and natural beauty of Highland Lake for the benefit of all the Town's residents.

The Town has, by majority vote at its annual meetings, set a baseline maximum of 10% land coverage by buildings and 20% by impermeable surfaces. Board members are appointed because of their interest in the future of the Town and their knowledge of local conditions. They are expected to use that knowledge together with their judgment to balance the interests of the Town with that of property owners seeking relief.

The Board finds that it properly exercised its judgment to determine that the proposed land coverage of almost $\frac{1}{4}$ by buildings and $\frac{1}{3}$ by impermeable surfaces clearly “frustrates the purpose of the LUOs” and “unduly, and to a marked degree, conflicts with the LUOs such that it violates their basic zoning objectives.”

The Board notes that the applicant has submitted three different values for the percentage of impermeable coverage and has no confidence that it has yet received the last and most accurate figure.

The Board also analyzed the cumulative impact of granting similar variances, should approving the applicant’s variance set a precedent. The “what if everyone did it” consideration is supported by [Maureen Bacon v. Town of Enfield](#), 150 N.H. 468 (2004) and [Perreault v. New Hampton](#), 171 NH 183 (2018). If even a fraction of the 169 lakefront lots did as the applicant proposes, the Board finds that the result would devastate the natural beauty of Highland Lake.

Perreault also established that the existence of other garages in the area does not require the Board to grant the variance at issue. Some may be allowed by variance granted under a prior legal standard, or be on land that is distinguishable from the applicant’s property, or be pre-existing, nonconforming structures.

THEREFORE: The Board concludes that the applicant’s land coverage variances do not observe the spirit of the LUOs.

5: The applicant fails to identify special conditions of the property

A claim of “unnecessary hardship” may in all cases only be made once the applicant has demonstrated the predicate of “special conditions that distinguish the property from others in the area”.

[Rancourt v. City of Manchester](#), 149 N.H. 51 (2003) informs the Board that “special conditions” are defined as the property’s “unique setting ... in its environment.” The applicant claims special conditions in ¶9 of the motion based solely upon the size and shape of their lot: 0.3 acres in size, roughly rectangular, and approximately 96 feet wide. No claim is made of wetland, marsh, ledge, rock, or other similar factor that restricts building locations or opportunities.

To test the property’s claimed unique setting, the Board analyzed lots in the Highland Lake area using [freely-available software](#) published by the Town. To give a fair apples-to-apples comparison with the applicant’s lot, only lakefront lots along that part of the shoreline of Highland Lake which lies within the Town limits were analyzed.

	All lakefront lots		Highland Haven Road only	
	Count	%	Count	%
≤ 0.5 acres	109	64%	10	67%
≤ 100 feet wide	69	40%	8	53%
TOTAL	169	100%	15	100%

This analysis makes it abundantly clear that, far from being unique or even unusual, the applicant's lot is in fact commonplace. The Board declines to accept any claim of an unique setting that rests upon conditions that apply to the majority of the lots on the same street as the applicant.

The applicant makes an ancillary claim of special conditions in ¶10 and ¶11 of the motion, which appears to be based upon the observation that the neighboring lot to the north (20-137) has a building configuration that favors the applicant's plan.

The Board also rejects this claim. Any neighbor of the applicant is free to independently make their own building plans and seek their own variances at any time, any of which potentially negate an advantage that the neighbor's property might offer.

THEREFORE: The Board concludes that the applicant fails to identify special conditions of the property.

6: Alternative definition of unnecessary hardship unavailable to applicant

In ¶16 of the motion, the applicant claims that the property is subject to an unnecessary hardship under the alternative definition provided by [RSA 674:33](#). From the State's official [ZBA Handbook](#):

“Alternatively, the applicant can satisfy the unnecessary hardship requirement by establishing that, because of the special conditions of the property, there is no reasonable use that can be made of the property that would be permitted under the ordinance.”

Yet the Board observes that the property is in fact currently being used as the applicant's residence, as permitted either by prior variances or by LUO ¶402 (non-conforming uses.) Also in the same section of the Handbook (emphasis added):

“If there is any reasonable use (including an existing use) that is permitted under the ordinance, this alternative is not available.”

THEREFORE: The Board concludes that the alternative definition of unnecessary hardship is unavailable to the applicant.

7: Substantial justice and diminution of property values not addressed by the Board

As the applicant points out in ¶22 and ¶23 of the motion, the Board did not address in its 6/1/2022 decision the variance criteria of substantial justice and the diminution of surrounding property values.

THEREFORE: The Board may address these issues in its August rehearing.