STATE OF NEW HAMPSHIRE

TOWN OF WESTMORELAND ZONING BOARD OF ADJUSTMENT

Re: Walter Derjue and June Derjue (hereafter "the Derjues" or "the Applicants")
Application for Variances

Map R 10, Lot 17 (hereafter "the Derjue Property" or "the Property")
Located in the Rural Residential District

Andy Russell
(hereafter Petitioner)

MOTION FOR REHEARING
OF MAY 20, 2015 DECISION

On May 20, 2015, the Westmoreland Zoning Board of Adjustment ("Board," "Zoning Board" or "ZBA"), acting on an Application for Variances submitted by the Derjues, voted to grant the variances as applied for, subject to Planning Board approval. This Motion for Rehearing is filed on behalf of the above-referenced Petitioner. The Petitioner, acting through his attorney, Thomas R. Hanna, asserts that the Board's decision was unlawful and unreasonable, and hereby requests a rehearing in accordance with RSA 677:2.

STANDARD OF REVIEW FOR GRANTING A REHEARING

The Board may grant a rehearing "if in its opinion good reason therefor is stated in the motion." (RSA 677:2.) For the following reasons, including errors by the Board, errors in the Application and the Applicants' presentation, and other important information contained in this Motion, we believe that there is "good reason" to grant a rehearing.

INTRODUCTION

On May 20, 2015, the Board granted the Derjues two variances, to enable a boundary line adjustment between two purportedly previously-existing, non-conforming lots. It was unlawful and unreasonable for the Board to do so because, in fact, the Derjue Property is one conforming 16-acre parcel formerly comprised of four smaller parcels that were voluntarily merged by the Derjues years ago. In granting the variances, the Board erroneously treated those four parcels as separate lots even though they have been merged. In doing so, the Board has granted approval for the creation of two new non-conforming lots.

The Board's decision was also unlawful and unreasonable because, even if the two lots in question are separate lots, which we dispute, then one variance greatly reduced the size of a developed non-conforming lot that already has only half the acreage required by the ordinance, and the other variance reduced the frontage on that same lot so that the frontage no longer conforms with the minimum frontage requirement under the zoning ordinance. Granting these variances is so contrary to the basic objectives of the zoning ordinance that it creates a mockery of the ordinance.

In any event, it was unlawful and unreasonable for the Board to grant the variances because the Applicants did not satisfy the variance criteria established under RSA 674:33.

MERGER OF THE DERJUE PROPERTY

The Derjues' attorney misrepresented the status of the Derjue Property to the Board when he said that the Derjues "own four non-conforming lots of record," that "the tax situation is a disaster," and that "the Town has taxed the four lots as one property even though a merger was

never filed." (Minutes of May 20, 2015 Board meeting.) The Board erred by not conducting an analysis of whether the parcels had been merged as indicated by the Town's records.

The tax situation is not "a disaster" as indicated by Attorney Davis. The Derjue Property has been consistently taxed as one 16-acre parcel for at least 27 years with no request from the Derjues that it be taxed or otherwise treated as four parcels. It is too late for the Derjues now to say that the Town's method of taxing the property "is a disaster." The Derjues acquiesced to the taxation of the Property as one parcel long ago, and they have enjoyed the tax benefit of doing so for at least 27 years.

With respect to Attorney Davis' reference to the four parcels as "four non-conforming lots of record," Attorney Davis misled the Board. The reference was an apparent claim that these four parcels satisfy the requirements of Section 401 of the Zoning Ordinance which governs "Existing Small Lots." Section 401 says:

> "Any legal lot of record in individual and separate and non-affiliated ownership from surrounding properties in existence on the effective date of this Ordinance may be developed for the purposes permitted in the district in which it is located, even though not conforming to minimum lot size requirements, if such lot is not less than one acre and has a minimum of 100 feet of road frontage. All other requirements for the district in which the lot is located must be met."

The four parcels are *not* "lots of record" within the meaning of Section 401 because they are *not* in "individual and separate and non-affiliated ownership," and they have not been for many years. The deeds and tract numbers shown for each of the four parcels on the plan submitted by the Applicants are no longer relevant. They are historic references to deeds that were conveyed to prior owners (Lawson and Derjue) in the 1960's. All four parcels have been owned by Walter Derjue and June Derjue since 1988. In fact, in 2008, the Derjues actually combined the four parcels in one deed. (See attached copy of Derjue deed.) The Derjue

Property is one 16-acre parcel. The Town assigned a single street address for the 16-acre parcel years ago, and once again, there was no request from the Derjues for separate street addresses for the four parcels.

Further, the Derjues represented to the State of New Hampshire that the Derjue Property is one 16-acre parcel. When the Derjues applied for, and obtained, State approval for a new septic system on the Property, they represented to the State that the Property is one 16-acre parcel. The septic design they submitted to the State shows the Property just as it is depicted on the Westmoreland tax map – as one parcel of 16 acres. (See attached copy of septic design.) Again, the Derjues benefitted from treating the four parcels as being merged, but they now claim that there are four separate lots.

Attorney Davis gave the impression that lots may only be merged if a voluntary merger is filed pursuant to RSA 674:39-a. This is not correct, but the Board apparently relied upon Attorney Davis' representation. The minutes of the May 20, 2015 hearing indicate that the Board told Theresa Russell, who was representing the Petitioner at the hearing, that "[f]or purposes of land law and the Zoning Ordinances, there can only be a merger of lots if the town is notified in writing." That is not the law and the Board's position was erroneous.

In *Town of Newbury v. Landrigan*, 165 N.H. 236 (2013), when a property owner argued that the only way lots can be merged is when an owner applies to the local planning board for a voluntary merger pursuant to RSA 674:39-a, the New Hampshire Supreme Court reaffirmed the well-established "doctrine of merger by conduct." The Court clarified that a property owner has the "right" to merge contiguous lots by an application to the planning board pursuant to RSA 674:39-a, but that process does not preclude the voluntary merger of contiguous lots through the

owner's conduct. In clarifying the doctrine of merger by conduct, the Court made reference to a case where an "owner had obtained a building permit for a duplex relying on the combined frontage and area of the two contiguous, non-conforming lots," and the Court ruled that "such conduct 'effectively erased the individual lot lines' and resulted in the merger of the two prior non-conforming lots." *Id.* at 239. Such is the case here where the Derjues obtained septic approval by relying upon the combined acreage of the four contiguous, non-conforming parcels. The individual lot lines have been erased as a result of the Derjues' conduct.

The doctrine of merger by conduct was also addressed by the Court in *Roberts v. Town of Windham,* 165 N.H. 186 (2013), where the Court acknowledged "that the acquiescence to taxation as a single lot does not, standing alone, support a finding of voluntary merger," but affirmed that a voluntary merger had occurred as a result of the acquiescence to taxation as a single parcel and by virtue of the owner's conduct, including the construction of a garage within inches of one of the internal lot lines. The plan submitted by the Derjues depicts a shed straddling the internal line between two of the four parcels. The construction of the shed on the internal lot line is further evidence of the Derjues' voluntary merger of the lots through their conduct.

The Derjues have acquiesced to the long-term taxation of the four parcels as one lot, and to the assignment of one street address for the combined lot. They submitted a septic plan to the State representing that the Derjue Property is one 16-acre parcel. They have a shed that straddles the internal lot line between two of the four parcels. The Derjues have not taken any steps to preserve the four parcels as separate lots. Rather, the four separate parcels that existed in the 1960's have been merged as a result of the Derjues' conduct. It was unreasonable and unlawful for the Board to consider the merged lots as separate lots and to grant variances for two of those

lots as if they still existed separately. By doing so, the Board has unlawfully and unreasonably created two new non-conforming lots. The minutes of the May 20, 2015 hearing indicate that Board Member Shonbeck correctly stated that "... the Zoning Board of Adjustment cannot make non-conforming lots," yet that is exactly what the Board has done here. It was unreasonable and unlawful for the Board to do so.

NON-CONFORMING LOTS:

To the extent that the lots might be considered as separate lots, which we dispute, the lots are both already grossly non-conforming. By granting the variances, the Board has unreasonably and unlawfully made both parcels even more non-conforming.

The so-called "ranch house lot" is currently developed with a single-family house, a garage, a shed, a septic system and a well. According to the Applicants' plan, this "ranch house lot" currently has 2.64 acres of land where 5 acres is required, and an average depth of 174 feet, where 200 feet is required. (See Table 505 of the Zoning Ordinance.) By granting the variances, the Board has reduced the size of this developed lot to 1.21 acres, less than half the existing acreage! In addition, the Board has reduced the currently conforming frontage of 686.58 feet on this lot to a mere 318.92 feet where 500 feet is required under Table 505. Frontage and area requirements provide for adequate spacing between homes. In the Rural Residential District the minimum requirements are intended to preserve the rural character of the neighborhood.

The other lot is currently a .96 acre lot, where 5 acres is required. (See Table 505.) This .96 acre lot does not currently qualify for a building permit under the requirements of Section 401 of the Zoning Ordinance because it is less than one acre. By granting the variances, however, the Board has paved the way for this non-conforming lot to become a building lot. The

minutes of the May 20, 2015 hearing indicate that the Applicants were willing to place a condition on the .96 acre lot "that the lot never have a residential dwelling." The Board, however, granted the variance and intentionally negated such a condition. It was unreasonable and unlawful for the Board to do so. The Board has allowed the Applicants to create a potentially buildable lot out of the .96 acre lot by radically diminishing the acreage and frontage of the ranch house lot.

Regardless of whether the .96 acre lot had been limited to a non-buildable lot, it was still unreasonable and unlawful for the Board to increase the size of the .96 acre lot by making the ranch house lot ***more*** non-conforming. A variance is intended as a means of providing relief for property owners whose property has been rendered non-conforming by the adoption of the ordinance. A variance is not intended as a means of creating *new* non-conformities as the Board has done here.

Section 409 of the Zoning Ordinance deals with "Reduction of Lot Area." It says:

> "No lot shall be so reduced in area that the area, yards, lot width, frontage, coverage or other requirements of this Ordinance shall be less than herein prescribed for each district."

By granting the variances the Board has made the previously developed, non-conforming lot significantly more non-conforming, in complete contradiction with the terms of the Zoning Ordinance, and it has allowed for the potential construction of another residence on a substandard lot in the Rural Residential District.

Section 501 says:

"The purpose of each of the districts listed herein is as follows:

...

D. Rural Residential District ("RR")

> This area is limited to secondary agricultural, forestry, and certain other non-intensive land uses. Low-density residential and related uses are permitted in cases where it would not be inconsistent with the Master Plan. The purpose of this district is to prevent premature development of land, to retain certain areas for non-intensive uses, to prevent development where it would be a burden on the community, and to retain areas for open space. A density of one (1) family per five (5) acres is permitted."

These variances were granted with complete disregard for the purpose of the Rural Residential District. By granting the variances, the board has allowed for an intensive residential land use in a district where minimal residential development is desired. By doing so, the ZBA has circumvented the purpose and intent of the zoning ordinance by allowing what equates to two building lots on a total of 3.59 acres in the Rural Residential District.

VARIANCE CRITERIA:

It was unlawful and unreasonable for the Board to grant the requested variances in light of the following facts that require denial of the variances pursuant to the variance criteria in RSA 674:33.

1. It is contrary to the spirit of the ordinance to allow someone to create a new building lot that does not conform to the zoning ordinance. See Section 204, Section 301.1.C., and Section 401 of the Zoning Ordinance.

2. It is contrary to the spirit of the ordinance to allow someone to reduce the area and frontage of a lot so that it is less than what is required for the district. See Section 409 of the Zoning Ordinance. It is the clear intent of the ordinance that non-conformities should not be increased.

3. It is contrary to the spirit of the ordinance to allow for the development of two residential building lots in the Rural Residential District on land with a total of 3.59 acres. See

Section 501.D. and Table 505 of the Zoning Ordinance. It is the clear intent of the ordinance that new building lots in the Rural Residential District require a minimum of 5 acres.

4. The Applicants applied only for variances from the area and frontage requirements of Table 505. They did not apply for variances from the provisions of Section 409 or Section 501.D. of the Ordinance, nor would they have satisfied the criteria for obtaining such variances if they had applied.

5. The Board should not have granted a variance to the Applicants just because they WANT "to protect the brick house from development across the road" and because they "are going to sell the ranch house and they believe it would be in the interest of the buyer to have a smaller lot which would not have covenants or easements attached and the Derjues would be assured that they would not face any outbuildings or eyesore directly across the road from their house." (See minutes of May 20, 2015 Zoning Board meeting.) The stated reasons for requesting the variances do not support the granting of the variances. There is no unnecessary hardship. It is totally within the ability of the Derjues to restrict development on the land across the road from their brick house. The Derjues could subject the undeveloped land across the street from their brick house to a conservation restriction, thereby preventing development as noted by Board Member Ranson. The fact that such an easement might "make the ranch house harder to sell" as stated by Attorney Davis, does not justify the granting of the variances. When considering unnecessary hardship, "the burden must arise from the property and not from the individual plight of the landowner." *Harrington v. Town of Warner,* 152 N.H. 74 (2005). The burden was upon the Applicants to demonstrate to the Board by clear and convincing evidence that they satisfied the statutory criteria for a variance and that there would be an unnecessary hardship if the variances were denied. The Derjues failed to provide any meaningful support for

obtaining the variance and it was unreasonable and unlawful for the Board to grant them. There is no hardship if the Derjues simply choose to protect the land across the street from their brick house.and they choose not to subject that land to restrictions on development.

6. It was unlawful for the Board to grant the variances given that there are no "special conditions of the property that distinguish it from other properties in the area" as required by RSA 674:33. "This factor requires that the property be burdened by the zoning restriction in a manner that is distinct from other similarly situated property." *Harrington, supra.* The special conditions cited by the Applicants' attorney at the hearing, namely "the depth of the lots" and the "lack of size" are not special conditions that justify the variances. They are reasons why a variance is needed! The Applicants failed to demonstrate that the Derjue Property is burdened by the frontage and acreage requirements of the Zoning Ordinance in a manner that is distinct from other similarly situated properties. If anything, the non-conforming depth and the size of the lots support the denial of these variances and the need to retain as much acreage and frontage as possible on the developed lot. Further, if the existence of non-conformities may be used to justify the granting of a variance, then any lot owner would be entitled to a variance, thereby rendering the zoning ordinance meaningless.

7. It was unreasonable and unlawful for the Board to grant variances to allow the creation of a new, non-conforming building lot in the Rural Residential District. The Board should be *limiting* development in this district to protect the rural character of the area. Contrary to the provisions of RSA 674:33, the Board granted the variances even though there *is* a "fair and substantial relationship ... between the general public purposes of the ordinance provision and the specific application of that provision to the property." (RSA 674:33, I(b)(5)(A)(i)) The ZBA has unlawfully granted variances that are contrary to the public interest and not in keeping with

the spirit of the ordinance. The public in general, has an interest in this application because of the rural character of the neighborhood. As discussed above, minimum frontage and area requirements are a way to reduce density and prevent overcrowding and undue concentration of population in a Rural Residential District. It was unreasonable and unlawful for the Board to grant variances that are contrary to the public interest and contrary to the spirit of the ordinance. Further, if the existence of previously developed, non-conforming lots may be used to justify the granting of a variance, then any lot owner would be entitled to a variance, thereby rendering the zoning ordinance meaningless.

8. The Board unreasonably and unlawfully failed to consider or discuss the fact that a reasonable use is already being made of the property for which the variances were sought. The variances were sought to reduce the area and frontage on the *developed* lot! The fact that reducing the area and frontage of the developed lot would allow the Applicants to make better use of the adjoining *undeveloped* lot cannot support the granting of the variances, and thereby increasing the non-conformities on the developed lot. At the hearing "Attorney Davis said that the Tract 4 lot is less than an acre and has few uses." As discussed above, the reason that a variance is desired or needed cannot be the reason for granting the variance, otherwise all properties would qualify for a variance. Applicants must demonstrate that they satisfy the statutory variance criteria to obtain variances.

9. The Board unreasonably and unlawfully failed to adequately discuss the variance criteria or to make findings of fact to support the granting of the variances. Rather, the Board repeatedly concluded that the granting of the variances "would not make a difference."

SUMMARY:

*Merger:* The subject parcels were voluntarily merged by the Derjues years ago. The Derjues acquiesced to the Town's assessment of the four parcels as one 16-acre lot and to the Town's assignment of one street address for the four merged parcels. When the Derjues applied for septic approval for the ranch house, they represented to the State that the house was on a 16-acre parcel of land. Having voluntarily merged the prior parcels, the Derjues may no longer treat them as separate parcels. It was unreasonable and unlawful for the Board to consider the parcels as separate lots and to grant variances for a lot that no longer exists separately.

*Variances*: The Board unlawfully and unreasonably granted two variances that made a non-conforming lot more nonconforming. The ranch house lot is already a severely non-conforming lot of 2.64 acres, but the Board granted a variance to *reduce* the size of that lot to 1.21 acres. The Board also granted a variance that *makes* the frontage for the ranch house lot non-conforming by reducing the frontage from 686.58 feet to 318.92 feet where 500 feet is required. It is contrary to the spirit of the ordinance and contrary to the public interest to make a non-conforming lot more non-conforming and the Board erred by doing so.

In any event, the Applicants did not satisfy their burden of establishing that they met the variance criteria. They simply said that this is what they wanted to do. The Board apparently thought that was sufficient. If the Derjues want to protect the land across the street from their brick house, land that they own, they have the option of subjecting the land to protective restrictions. There is no hardship, and the variances should have been denied.

The Board's erroneous approval of variances that make a non-conforming lot more non-conforming, the Board's failure to adequately discuss the statutory variance criteria, the Board's

failure to make findings of fact to support its decision, and the Board's failure to address the issues raised by abutters, including the merger issue, constitute legally sufficient grounds for granting a rehearing.

The Board should grant a rehearing so that the Board may have the first opportunity to correct its own errors (*Colla v. Town of Hanover,* 153 N.H. 206).

WHEREFORE, for the reasons stated above, the Petitioner, by his attorney, respectfully requests that the ZBA:

A. Grant a rehearing on this matter, and

B. Following the rehearing, deny the Derjues' Application for frontage and area variances.

Respectfully submitted by the Petitioner,
Andy Russell

By his attorney:

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