

**Town of Northwood
Zoning Board of Adjustment Meeting
April 25 ,2022**

Cases heard at this meeting:

Case 22-5 *Graves Family Revocable Trust (Owner) Paula Fletcher (Applicant)*

Case 22-7 *Coe Brown Northwood Academy*

Vice Chair Sanderson called the meeting to order at 6:30 p.m.

Vice Chair Sanderson stated that Justin Miller has resigned.

PRESENT: Vice Chair Pam Sanderson, Ted Wilkinson, Ginger Dole (alternate) and Betsy Colburn. (Participating electronically)

Ms. Colburn's reason for not being at the meeting in person is medical

VOTING DESIGNATION: Vice Chair Pam Sanderson, Ted Wilkinson, Ginger Dole and Betsy Colburn.

TOWN STAFF PRESENT:

Susan Austin, Land Use Assistant, and Linda Smith, Land Use Specialist

MINUTES

Mr. Wilkinson made a motion, seconded by Ms. Colburn to approve the minutes of March 28, 2022, as amended. Motion carried by roll call vote 3/0/1 Ms. Dole abstained.

CONTINUED CASES

Case 22-5

Graves Family Revocable Trust (Owner) Paula Fletcher (Applicant) Winding Hill Road, Map 238 Lot 2. The applicant proposes to build a single-family home and is requesting the following:

- A variance from Article IV. B Section 1(b) (2) Road Frontage. Lot is located on a private road.

Mr. Wilkinson made a motion, seconded by Ms. Colburn, to keep the legal opinion from the Town Attorney as a non-public document, and the Board will retain it as confidential due to attorney/client privilege. Motion carried by roll call vote 4/0.

Mr. Wilkinson made a motion, seconded by Ms. Colburn, to find that a variance IS required for relief from the Zoning Ordinance for road frontage. Motion carried by roll call vote 4/0.

Attorney Brett Allard and Scott Frankiewicz were present for the application. Vice Chair Sanderson asked the applicant and his attorney how they would like to proceed.

1. They can request that the Board proceed and process the variance application.

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2. If they would like, they can continue so that they may have additional time to determine how they would like to proceed.
3. They can withdraw the application.

Attorney Allard stated that they would like to proceed with the variance application. Vice Chair Sanderson asked Mr. Frankiewicz to give them a summary of the application. He stated that the parcel is on Winding Hill Road, the lot is 14.25 acres, with 648 feet of frontage on Winding Hill Road. The road is maintained year-round. He presented pictures to the board showing the current conditions, as well as conditions with snow on the ground. There was also a picture of the existing driveway. He stated that they have performed test pits, and the wetlands have been delineated. This was part of a two-lot subdivision that was performed in 1973, went through the approval process, and was recorded at the registry of deeds. They are here tonight for a variance from the road type frontage, they have plenty of length and the size of the lot is well above the required 2 acres. The road has a road agreement in place for another subdivision that was done across the street, and the applicant is willing to become a part of that. Mr. Allard distributed copies of the picture that Mr. Frankiewicz was referring to.

Ms. Colburn stated that she would like the pictures that were distributed to not be added to the record since they were not distributed in a timely matter, and she doesn't have a copy of them.

Ms. Colburn made a motion, seconded by Mr. Wilkinson, that the pictures distributed not be added to the record. Motion carried by roll call vote 4/0.

Vice Chair Sanderson stated that she had asked about the road status on the Deerfield side of Winding Hill Road and found out that Deerfield did not maintain the road and it is classified as a Class VI Road, except down at the very beginning by Route 43. It's not town maintained, and there is a major landowner who is up there seasonally and does some work on the road.

Vice Chair Sanderson opened the public comment portion of the meeting.

Arthur Cabrall, 309 Winding Hill Road

Mr. Cabrall stated that he lived approximately two houses past the lot in question. With pictures that they are showing, he stated that he just put down reclaimed asphalt on the road up to that part, which is about a half mile. Ms. Smith asked that the pictures be turned over, as they have been voted out of the record. Mr. Cabrall stated that the section of the road that they were referring to is the good part of the road. The sections that he is concerned about is the narrow area, and somehow, the town has issued a driveway permit for lot one. That's right where the road narrows. He stated that he and the other landowners installed the 18-inch culvert about 7 years ago. Vice Chair Sanderson asked if the low area was prone to any seasonal washout? Mr. Cabrall stated that the left side washed out, prompting them to put the culvert in. So far, it's helped prevent another washout. He would suggest possibly a guard rail in

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the area that has a dangerous cliff. In the wintertime there is the possibility of dangerous freezing that could cause someone to slide off the road off the cliff.

Ms. Smith stated that she did speak to the Highway Foreman relative to driveways in general, and he stated that he is obligated to provide an access to a property. That does not guarantee that the property can be developed. A person has the right to go on to their property.

Attorney Allard responds to the five criteria for granting a variance from Article IV.B 1 (b) (2) type of frontage:

- 1. Granting the variance would not be contrary to the public interest because:** For a variance to be contrary to the public interest, the courts have held that it must conflict with the ordinance so much that it violates the ordinance's basic zoning objectives. The relevant test is whether the proposal alters the central character of the neighborhood. There will not be any alteration of the essential character of the neighborhood. We are proposing a single-family use, which is a permitted use in this area. We are not proposing to use the road in a more intense manner than any other property owner on the road. There are six developed properties further down this road before you hit Deerfield. My client is willing to contribute to the maintenance of the road and the upkeep of the road. There was some discussion about that at the last meeting, in terms of how that works, either by joining the existing road maintenance agreement or forming a new one. Regardless, my client is willing to figure out an arrangement with the neighbors to make sure everyone is contributing to the road maintenance, because they will have a vested interest in that as well. The more contributors you have, the better the conditions can become. The example is kind of like a condominium association. Often, the biggest issues that come up in condominium that are two units, three units, or four units, there just not is enough capital there to do what everyone needs to do. The ones that have more contributors or more funds, those are where you'll see less issues. Adding more homes to this road is not necessarily a bad thing in terms of having more people contribute to maintenance and upkeep. The subdivision was approved in 1973, and was subdivided to be built on, and there was actually in 2007, according to the minutes, a variance was granted for Winding Hill Road. In that case, the variance was not found to be contrary to the public interest because it was subdivided in 1973 to be built on. Granting the variance would make this a fair situation. For those reasons, we propose that granting the variance would not be contrary to the public's interest.
- 2. The use is not contrary to the spirit of the ordinance because:** Really, for all the reasons I just said, the courts have found that these two criteria are very related, so if you meet one, you most certainly meet the other. In the case of Farrar v. City of Keene, 2009. I would just incorporate all the comments I made in reference to the first criteria adding that the spirit of the ordinance is to allow building single family homes on properties that were subdivided for that purpose. We could debate back and forth about what sort of grandfathered

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status these types of lots have, but at the end of the day, this is an almost 14.5 acre property that has existed for many years that was subdivided for the purpose of having a single family home on it, and for those reasons we feel that our proposal is not contrary to the spirit of the ordinance.

- 3. Granting the variance would do substantial justice because:** The Supreme Court has held that measuring substantial justice requires balancing public and private rights. “Perhaps the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice.” *Harborside Associates v. Parade Residence Hotel, LLC* (2011). If you look at the original expectations of the landowner in 1973 when this property was first subdivided, that property owner had the expectation that this property was going to be a buildable lot, at least 50 years ago. Just like the subdivision approval that vested the subdivision as a lot of record runs with the land, so do those expectations by the original landowner, in terms of expecting this to be a buildable lot. To reference the 2007 case where the board granted a variance for another nearby owner on the road. The board granted that variance in part because there are other property owners with houses on the road who are not required to bring the road up to Class V standards. Considering that and for purposes of consistency, the proposal is appropriate for that area. Granting variances that are appropriate for that area does substantial justice.
- 4. The proposed use would not diminish surrounding property values because:** There is no change to the character of the site or the area, in terms of what they are proposing, a single-family home in a single-family area. We are not requesting to build in any setbacks, such that the values of any surrounding properties can be compromised. Having one additional user who contributes financially to the maintenance and upkeep of the road will not affect the value of other properties, it will benefit the area. Again, just to reference the 2007 case, this board found with respect to these criteria that there would be no diminution in the surrounding property values because the road is maintained by the residents, emergency vehicles can pass, and the landowner is willing to sign an agreement and release from the town. That’s the same case with this case, as discussed at the last meeting, we are exempt under 674:41, so we don’t technically need to sign that release of liability, but we are willing to do that because we feel it is appropriate. For those reasons, the values of surrounding properties will not be diminished.
- 5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship because: The “special conditions “of this property that distinguish it from other properties in the area are as follows:** In addition to what is in the application, I would just add that it is a large lot at 14.5 acres, it has 648 feet of frontage, it is part of an approved subdivision that predates the Class V or better frontage requirement, although it is situated on a Class VI road now. Where other lots in the area are part of a road maintenance agreement, this one is not, but the owner is willing to become a part of it and

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contribute financially. We feel all of those are special conditions that distinguish it from those in the area.

- (i) **Owing to the special conditions of the property, set forth above, that distinguishes it from other properties in the area: No fair and substantial relationship exists between the general public purposes of the ordinance and the specific application of that provision to the property because:** We don't think there is a fair and substantial relationship between the purpose and the application of the zoning ordinance's prohibition of development on Class VI roads in this case. Again, because there will not be any change to the character of the neighborhood. The Planning Board approved this as a building lot back in 1973. The zoning changes since that time really create a substantial hardship where they are now asking this board to grant a variance for construction of a single-family home in a single-family area. It would be fundamentally unfair to deny the variance and require that the lot remain vacant forever, all 14.5 acres. To refer to the 2007 case, where this board granted a variance in 2007, the board found that it would be a substantial injustice to deny this type of variance because the lot is part of a 1973 development intended for houses to be built, there are already houses on both sides already, and that it is reasonable to continue to add houses, and so we are here for that purpose, to ask for a variance to continue to add houses, as this board felt was appropriate back then. For all those reasons, we submit that the proposed use is reasonable.

- (ii) **The proposed use would be a reasonable one because:** We are proposing a single-family residence which is a use permitted by right on this property, and permitted uses are per say reasonable *Malachy Glen Associates v. Town of Chichester (2007)*.

Vice Chair Sanderson asked if there were any additional abutter comments

Arthur Cabral, 309 Winding Hill Road

Mr. Cabral stated that his only concern is that they are talking about an existing lot from 1973, and the rules changed in 2020. The lot that received the variance in 2007 was before the 2020 RSA law that went into effect, which says that the road has to be upgraded to a Class V Road. With the condition of the road the way it is now, it's not even close to a Class V Road. It's not just this lot. If this lot gets approved, there are 4 more behind it. It's not adding more money to a condominium, it's not just an easy fix to add people to the association. There is no association. Mr. Cabral states he does the road maintenance for the people on the road. If they have the money, they give it to him. That's how it works. If they are going to add more houses, lets make the road safe to the standard that is required.

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Mr. Wilkinson stated that so far, he has not heard any testimony or seen any evidence from the applicant that makes this lot unique. This is a Class VI Road, and it is against the law for the town to make any improvements on a Class VI Road.

Attorney Allard stated that they have 648 feet of frontage, but still need a variance to build a house on this lot. He stated that he appreciates the sentiment, but he would just clarify that towns can still do maintenance on Class VI roads, in fact, if they do maintenance on a Class VI Road for 5 years or more, it converts back to a class V road automatically. In terms of the special conditions, this is 14.5 acres, 648 feet of frontage, on a Class VI Road that has other properties in the area that are part of a road maintenance agreement, but this one is not. They are in a tricky situation, combining a subdivision approval from 1973 with presumably at that time a vested right to build a house on it, but then things change over 50 years. When you have a property with 14.5 acres and 648 feet of frontage that was approved as a building lot, with six properties in the area that are situated further away from Route 4, the main thoroughfare. The road is passable. He stated that he drove it all the way from Deerfield the last time he was in Northwood. There are some parts on the Deerfield side that are not great, but getting to this property from the Northwood, it's a dirt road but it's passable. We think we've satisfied the variance criteria. We think we've satisfied the hardship criteria based on the evolution of the ordinance and the strict application, and we would ask that you grant the variance.

Vice Chair Sanderson stated that she was questioning the terminology of "passable". Passable is not a safety term that they would use. Again, the concern is public safety and safety for the residents. She does note that this falls into non-conforming status because of the Class VI Road frontage. In 2020 the voters changed the regulation so it became "all lots "for building development, no longer "newly created lots" "All lots for building development shall front on a state road or town road with the classification of I, II or V as defined by RSA 229:5 or Class VI or private road proposed to be improved to current town standards as found in subdivision regulation, for which adequate financial security has been posted with the town to ensure completion of improvements." As of yet, the applicant has not provided data to back up that second provision as type of frontage, which would clearly say "road proposed to be improved to town standards." Mr. Wilkinson asks the applicant if they have looked at other options such as establishing a village district.

At this point Ms. Smith suggests the board should consider closing and going into deliberation.

Attorney Allard stated that he was happy to provide clarification on that question. Eventually, whether this variance is granted or denied, the road owners could petition the town for a layout and try to get this upgraded to a Class V Road or do it through a warrant article. That's not to say that this variance should be denied because they haven't explored the possibility of upgrading this to a Class V Road, because that is the very reason they are asking for a variance.

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Vice Chair Sanderson closed public comment and discussion with the applicant and opened deliberations.

Ms. Smith responds to comments from Attorney Allard (to provide guidance to the board) noting that clearly, every single ZBA application stands on its own merits. Every case is distinctive. Boards must look at all the information that is provided by an applicant. There was a lot of testimony about a former board's decision The regulation was different at that point in time. That is not a reason to deny or grant a variance. It's a separate matter. The other point is that it keeps being said that this lot is unbuildable. The zoning ordinance clearly allows this lot to be built on. It requires that the road be upgraded. The application came in asking for complete relief from having to do anything on the road. They did not submit a different plan saying they would do some upgrades on the road, there was no road plan provided for the board to consider. That is something that they could have provided. In this case they did not, which was their choice. To be clear on the record, the town cannot bind private maintenance agreements to another property. The applicant has stated that they would provide one, but if that was the case, it should have been provided with the application. There was no testimony relative to emergency vehicles or the safety of the town's emergency personnel. The important point to remember is that this is a buildable lot, but they are seeking relief for upgrading the road.

Ms. Colburn stated that she had a few concerns. They have a letter from the Fire Chief talking about issues with Class VI roads. The town just spent \$1,000 getting one vehicle out and there was damage to it. The Police Chief has sent a memo expressing concern about the road. They also have a letter from the Highway Foreman expressing concern. She stated that the regulations were changed in 2020 so it required that everyone upgrade the road to a Class V. The town has held other developments to this before they can build. There is no proof of any upgrading, there is no maintenance agreement. She stated that she feels that they have an obligation to hold this applicant to the regulations.

Attorney Allard asked if he could make a request to ask for a continuance so that the applicant can discuss potential upgrades to the road? That wasn't something that they knew was an option. He stated that he thought it was only an option to upgrade it to a Class V Road. He was not aware of a middle ground.

Vice Chair Sanderson stated that they are in the closed portion of the meeting, and they are now deliberating. She stated that he was given the option in the beginning of the meeting to proceed with the application, continue, or to withdraw.

Attorney Allard stated that he felt that the Board might like more information in that regard, and they could come back next month with that information for them.

Mr. Wilkinson stated that based on the testimony that he has heard, and the information provided, he has a few concerns, the main one of course being the road. There has been continual reference to the maintenance agreement, and if it weren't for

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one of the abutters performing the maintenance that he does, the road wouldn't be as passable as it is right now. A private maintenance agreement is not worth the paper that it's written on. When people move, they sell their land and things change. Whether it's this applicant or everyone in the neighborhood, there is a significant injustice going on because the abutters have invested significant time and money trying to keep the road passable. He notes there are other options including a village district.

Vice Chair Sanderson asked if they were in any obligation to allow any additional testimony from the applicant's attorney?

Ms. Smith stated that if the board so chooses, they could stop their deliberation and ask for a motion to allow additional testimony. To be clear, the comments she made were about several different items to consider. Her comments were guidance to the board, not to the applicant.

Vice Chair Sanderson asked the board if they should they allow a continuance at this point for just the issue of the road? Ms. Smith stated that she would suggest that if they are allowing for a continuance, if they feel strongly that they want to give the applicant another opportunity to present more information, she suggests that they do not make it so narrow, rather allow them to resubmit an entirely new application if they so choose. The other option is to continue the case as deliberations and seek legal advice.

Vice Chair Sanderson stated that she would not be in favor of a continuance at this point because they have been through this for several months now. They have entered deliberation and the comment portion is closed.

Mr. Wilkinson stated that he was not in favor of continuing this any further.

Ms. Colburn stated that she would like to take the vote on the application.

Ms. Dole stated that she felt that they should continue with the deliberations as well.

Mr. Wilkinson made a motion, seconded by Ms. Colburn that the ZBA vote to deny the application for a variance from Article IV.B 1 (b) (2) (type of frontage) based on the failure to produce evidence of the uniqueness of the lot, criteria 5.

Mr. Wilkinson made a motion, seconded by Ms. Colburn to amend the motion to add that this application was also contrary to the public interest, which is criteria 1, because of safety to both the emergency personnel and the residents of Winding Hill Road. The 2020 ruling on Section 7 clearly states what the requirements are. Those requirements are a benefit to public safety.

Motion on the amendment to the motion was carried by roll call vote 3/0/1 with Ms. Dole abstaining.

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Motion to deny the application was carried by roll call vote 3/0/1 with Ms. Dole abstaining.

Vice Chair Sanderson called for a 5-minute break

CASE 22-7 Coe Brown Northwood Academy, 907 First NH Turnpike Map 217 Lot 1 Applicant seeks to build an addition to Wiggin Hall and is requesting the following relief:

- A variance from Article IV.B. (5) Structure Height. Structure heights shall not be greater than 35 feet, proposed structure is 38 feet.

Carl Olsen, Board Trustee for CBNA and Matt Angle from Bonnette, Page and Stone were present for the application.

Vice Chair Sanderson asked the applicants if they were okay with an alternate hearing this case. They said that they were.

Mr. Olsen stated that they were asking for a variance for the elevator/stair tower project. They have other ways of getting around the height restriction, but from an aesthetic standpoint and from a feasibility standpoint, it doesn't do the job that they are looking to do. There are two story lower level, and a two-story upper level, which creates an overall three story in the middle, and they are trying to get compliancy for all three stories, so that students and staff in the lower level of the existing Wiggin Hall, wouldn't have to go outside of the building in inclement weather to gain access to the upper levels. They could make it a two-stop elevator, and not be out of compliance with the 35-foot rule by putting a retaining wall on the back side and bringing the foundation level up, but that doesn't give them a stop on that lower level. If they went the other way, it would only give them access to two stories on the lower level. They could also go with a flat roof on that stair tower, but from an aesthetic standpoint, everything else is rather colonial looking with the building, and they would like to keep the same overall look.

Ms. Smith stated that before they get into the board questions, she would like to discuss a procedural issue.

Ms. Smith stated that she would like to clarify the process and what they are going forward with tonight, because it came to light when the application for the building permit for the stair tower came in, that Wiggin Hall is over height. It was built beyond what was allowed, without the benefit of a variance. She stated that she pulled the application and the application states that it was to be built at 27 feet. That is what was presented to the town. That was brought to the attention of Mr. Angell. She stated that she understood that when the applicant came forward with the variance application, they were going to ask for relief for that construction that ended up being

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over height, and the elevator tower. The only variance request that they have received is for the elevator tower. It's important for the board to understand that because it's a standing violation, there are a couple of ways to address this. They can hear the one request tonight, or they can withdraw and resubmit everything in one application, or they can add a second variance request to this one, and the board can continue this until the next meeting.

Complete list of requested documents:

- Dimensions, please delineate the newly built section, and the tower section.
- Plot plan, building on location, walls, height.
- Tower structure and newer structure.
- Existing meaning "as built"

Mr. Wilkinson made a motion, seconded by Ms. Dole, to continue Case 22-7 until May 23, 2022, with all new information for this request received no later than May 12, 2022 by 4 PM. Motion carried by roll call vote 4/0

INTERNAL BUSINESS

Election of Officers: The Board chose to table this until all members were present.

New Department Review Form:

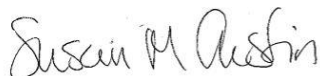
Ms. Smith stated that they have created a new form for Fire, Police Building and Highway to have better communication with the other departments as far as ZBA applications were concerned. Ms. Smith stated that the members would need to vote on this new form.

Mr. Wilkinson made a motion, seconded by Ms. Colburn to allow the Department Review Form to be added to new applications. Motion carried by roll call vote 4/0.

Dave Copeland was present to observe the meeting, he is contemplating joining one of the land use boards and will be observing the Planning Board meeting on Thursday as well.

Motion to adjourn was accepted at 8:47 PM

Respectfully submitted,



Susan M. Austin, Land Use assistant