

**MOUNT VERNON BOARD OF APPEALS  
REPORT OF FINDINGS AND CONCLUSIONS**

**UNDUE HARDSHIP VARIANCE APPEAL  
BY  
RILEY, DOUGLAS on behalf of OSMER, PATRICIA  
(APPLICANT)**

**PUBLIC HEARING JULY 10, 2018, CONTINUED JULY 12, 2018**

A Public Hearing was held at 6:00 pm on July 10, 2018 at the Mount Vernon Town Office. The Hearing was continued to 6:00 pm on July 12, 2018. The Board of Appeals (Board) met to consider the application for an undue hardship variance by Riley, Douglas on behalf of Osmer, Patricia (Applicant). The Applicant requests a variance to the Mount Vernon Land Use Ordinance (Ordinance) to permit the construction of a single family dwelling and garage on her property on Demariano Road (Map U-1 Lot 43).

**HEARING CALLED TO ORDER:**

Chairman Carl Rogers called the July 10, 2018 meeting to order at 6:00 p.m. Randall Oakley recused himself as his company is doing the survey and elevation work for the Applicant. A quorum was present.

Chairman Carl Rogers called the July 12, 2018 meeting to order at 6:00 p.m. Randall Oakley recused himself as his company is doing the survey and elevation work for the Applicant. A quorum was present.

**APPEAL BOARD MEMBERS IN ATTENDANCE:**

July 10, 2018: Carl Rogers (Chair), David Fuller, Malcolm Hardy, Scott Herrick, Heather Roberts and Randall Oakley.

July 12, 2018: Carl Rogers (Chair), David Fuller, Malcolm Hardy, Scott Herrick, Heather Roberts and Randall Oakley.

**OTHERS IN ATTENDANCE:**

July 10, 2018: Douglas Riley (Applicant), Andrew Marble (Code Enforcement Officer), Jon Olson, Donald Peseux, Alice Olson, Debra Roe, Len Roe, Michael Maskwa

July 12, 2018: Douglas Riley (Applicant), Andrew Marble (Code Enforcement Officer), Jon Olson, Donald Peseux, Alice Olson, Debra Roe, Len Roe, Michael Maskwa

**FACTS IN EVIDENCE:**

- Patricia Osmer is the owner of the subject property.
- Patricia Osmer authorized Douglas Riley to represent her for this application.
- The Board has the power and duty to hear and decide requests for variances to the requirements of the Ordinance.
- The Board is required by the Ordinance to grant variances only from dimensional requirements including, but not limited to, lot width, structure height, percent of lot coverage, and setback requirements.
- A variance can only be granted under Section 5 No. 8 if the Board finds that:
  - A. The proposed structure or use would meet the provisions of this ordinance except for the specific provision which has created the non-conformity and from which relief is sought and,
  - B. The strict application of the terms of this ordinance would result in undue hardship.

The term undue hardship shall mean:

- (i.) that the land in question cannot yield a reasonable return unless a variance is granted,
  - (ii.) that the need for variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood.
  - (iii.) the granting of a variance will not alter the essential character of the locality; and
  - (iv.) that the hardship is not the result of an action taken by the applicant or a prior owner.
- Section 3 of the Ordinance states that “A financial hardship shall not constitute grounds for granting a variance”.
  - An application for a permit to construct a single family dwelling and garage dated May 28, 2018 was received by the Code Enforcement Officer (CEO) Andrew Marble. A letter dated June 12, 2018 from the CEO to the applicant rejected the application.
  - In his letter, the CEO cited insufficient setbacks from Flying Pond and the Demariano road.

- The Applicant submitted an Application for an Undue Hardship Variance to the Board. The Application was dated June 5, 2018 and received by the Town Clerk on June 5, 2018, which is within the 30 days stipulated by the Ordinance for an application for variance to be valid.
- The Board scheduled the Public Hearing to hear the request for July 10, 2018, within the 35 day limit required by the Ordinance. Notice of the Public Hearing date, time and location was provided by Certified Mail to the applicant and five abutters. It was also posted in five public places within the Town, in the *Kennebec Journal*, and provided to the Selectmen and the CEO.

#### **FINDINGS AND CONCLUSIONS:**

- The Board has jurisdiction over the appeal.
- The Applicant has standing and therefore the right to appeal.
- The Board agrees the appeal should be considered appellant.
- Douglas Riley represented the appellant and based the appeal on undue hardship stating that the land in question cannot yield a reasonable return unless a variance is granted. Douglas requested two setback variances
  - 1) Reduction of the one-hundred foot high water setback defined in Section 5.c.2.a of the Ordinance, to eighty five feet. and
  - 2) Reduction of the seventy-five foot setback from the center line of the road defined in Section 5.b.1 of the Ordinance, to fifty feet.

Douglas also discussed that the land was purchased prior to the current setbacks being adopted by the Town.

- The Board distributed the letter received from the Department of Environmental Protection (DEP) stating it is the DEPs opinion that the parcel already yields a reasonable return in its current state. The Maine Supreme Court has consistently held that reasonable return does not mean maximum rate of return. The DEP suggests that the Board deny the variance application on the basis that the applicant cannot reasonably demonstrate undue hardship.
- Comments from the DEP must be considered by the Board of Appeals according to Section 11.I.11 of the Zoning Ordinance of the Town of Mt. Vernon.

- Scott Herrick asked if there were other homes in the neighborhood that were thirty to forty feet from the high water mark. Douglas said yes.
- David Fuller asked if there were neighboring wells that would be impacted. Douglas said no. Douglas also added that there was a trailer on site years ago. The exact location was unknown.
- Donald Peseux asked what the single-family dwelling would look like. Douglas showed him the sketches included in the application. Donald also stressed that the abutters are seasonal residents and they would like this concluded before they head south for the winter. The Board assured him it would be.
- Debra Roe asked if there had been consideration of moving the principal structure further from the lake. Douglas said that a three to four bedroom home was a typical size, and with that constraint, moving it further from the lake had not been evaluated.
- Andrew Marble discussed his reasons for denying the application. The reason for denial was that it didn't meet the high water or road setbacks defined in the Ordinance. Unvegetated land or structure height was not evaluated. Andrew's personal opinion is that he agrees with DEP. He thinks the one-hundred foot setback from the lake could be met for a principal structure if the principal structure were reduced in size, which would in turn reduce the size of the septic required, as well as placing the principal structure on a slab versus a full foundation. Additional options were discussed for the septic system, specifically but not limited to an Eljen system. Andrew agreed with Douglas that a setback from the road might be required for a principal dwelling at this location.
- David Fuller made a motion for a site visit, Malcolm Hardy seconded.
- Douglas Riley, Andrew Marble and all members of the Board, minus Randall Oakley, went to the site visit.
- Douglas Riley confirmed that the location is out of the flood zone, this was recently confirmed to him by Randall Oakley.
- There were many houses that were less than seventy five feet from the center of the road in the neighborhood. The house to the right of the proposed location, when looking at the lake, was approximately thirty five feet from the center of the road. Measurements were made from the high water mark and the center of the road for visual aids.
- Upon conclusion of the site visit, discussions were had around revisions to the proposal to ensure the one-hundred foot setback from

the water and exploring the potential for reducing the setback from the road.

- Douglas stated that Appeal Boards could waive setbacks set by Ordinances. David Fuller stated that this language is included in the Appeals Board Handbook.
- David Fuller made a motion that the Board cannot accept the application for a variance as it is written. The Board would consider the appeal if the application was re-written respecting the one hundred foot setback from the high water mark, and requesting a fifty foot setback from the center line of the road. The Board does not require a new application for this change. Malcolm Hardy seconded.
- The hearing was continued at 7:40 pm until Thursday July 12, 2018 at 6 pm when Douglas would provide a new proposal.
- Chairman Carl Rogers presented a summary of the Tuesday July 10, 2018 meeting.
- Douglas Riley distributed a new drawing showing a single family dwelling and garage which respected the one-hundred foot setback from the high water line. The new drawing showed a fifty foot setback from the center line of the road. The new drawing also included an Eljen septic system. Douglas discussed the very tight dimensions that he dealt with to make this plan work. Douglas also provided a redline version of the application showing the changes, even though an updated application was not required.
- Discussions were had stating there would not be room for a deck on the lake side of the principal structure. A smaller home could provide more room flexibility and that drilling a well could be problematic due to access.
- Andrew Marble thinks this is a happy medium from the original proposal and the Ordinance restrictions.
- David Fuller made a motion to accept the updated proposed lay out with a variance for setback from the center line of the road to fifty feet for the principal structure. Malcolm Hardy Seconded.
- Discussion was had regarding reasonable return. It was discussed that a member of the neighborhood recently purchased and sold a non-buildable lot on Demariano road. Town assessment data was reviewed for that lot as well as the lot involved with the requested variance. The lot recently sold was assessed at a much lower value than the lot involved with the variance.

- The Board voted on each of the four items defining undue hardship as shown in the table below.

The Term "Undue Hardship" shall mean	Appeals Board Members Vote					Majority Vote	Required for Approval
	David Fuller	Malcolm Hardy	Scott Herrick	Heather Roberts	Carl Rogers, Chair		
i. that the land in question cannot yield a reasonable return unless a variance is granted	Yes	Yes	Yes	No	Yes	Yes	Yes
ii. that the need for variance is due to the unique circumstances of the property and not to the general conditions in the neighborhood.	No	No	No	No	No	No	No
iii. the granting of a variance will not alter the essential character of the locality	Yes	Yes	Yes	Yes	Yes	Yes	Yes
iv. that the hardship is not the result of an action taken by the applicant or a prior owner	Yes	Yes	Yes	Yes	Yes	Yes	Yes

The Appeals Board finds that the Riley/Osmer appeal does meet the strict application of undue hardship in that the land in question cannot yield a reasonable return.

**MOTION TO ADJOURN:**

Malcolm Hardy, second David Fuller. Meeting was adjourned at 6:45 p.m.

**SIGNATURES OF BOARD MEMBERS IN ATTENDANCE:**

*Paul R. Fulk*

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*A. J. Ry*

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*M. W. W. W.*

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*Scott C. Hennis*

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