

Leng has met the requirements for a special exception. R. Weaver concurred. L. Routhier moved to grant the special exception. W. Morrison seconded. W. Morrison - yes; D. Chesebrough - yes; L. Routhier - yes; R. Weaver - yes; A. Howe - yes. 5 in favor. 0 opposed. Motion carried. Special exception is granted.

CASE #227-137-000-98-003Z - HELENA L. BRYANT, TRUSTEE/PHILIP R. BRYANT & HELENA L. BRYANT REVOCABLE TRUST - 2 HATCH DRIVE

Applicant is seeking a variance concerning Section 5.1.1(b) (Lot Size) of the Gilford Zoning Ordinance to separate two pre-existing lots of record, Lot 47-A and Lot 52, obtained by two separate deeds.

Attorney Philip Brouillard represented the applicant. P. Brouillard explained the proposal. At one time the lots were separate. The lots were merged by the Town because they were in the same name. The ordinance itself creates the hardship. The subdivision was approved prior to zoning. The proposal is to re-subdivide and to separate into two lots. The Planning Board referred the applicant to the Zoning Board of Adjustment under Section 5.1.1.(b). P. Brouillard then reviewed the 5 points of Gelinas. P. Brouillard spoke relative to the applicant's hardship, noting that the lots are pre-existing, non conforming, and in 1976 the two lots were merged. The Bryant's were not aware of the lots being merged. When the building permit was applied for it was discovered that the lots had been merged. P. Brouillard believes that the owner shouldn't be penalized this severely as a result of the application of the Zoning Ordinance, noting that the application of the ordinance in this particular case, creates the hardship.

Mrs. Bryant gave an overview of the history of the property. Mrs. Bryant has resided in the Town of Gilford since 1958. The Bryant's have kept the property up very nicely over the years. Mrs. Bryant respectfully thanked the Board for their consideration relative to this proposal.

QUESTIONS FROM THE BOARD

D. Chesebrough stated that P. Brouillard said the lot was always shown as 2 lots, yet the tax map shows it as 1 lot, #227-137.000. The Town considers it as 1 lot and has since 1969. P. Brouillard stated the subdivision plan and the Registry of Deeds shows it as 2 lots. P. Brouillard stated he did not mean that the Town considered it as 2 lots. D. Chesebrough: Are you contesting the Nighswander doctrine? D. Chesebrough: How does the Bryants' two lots differ from any other lots that have been merged by the Nighswander doctrine? P. Brouillard stated if the lots had been placed in different names, they would be legal buildable lots. R. Foley asked P. Brouillard to explain the Nighswander Law. P. Brouillard explained. J. Vorel: When did Mrs. Bryant first know that the two lots had became one? P. Brouillard stated last year. J. Vorel asked P. Brouillard to restate what the water and septic situation is for the 2 lots. P. Brouillard explained. J. Vorel:

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If the lot was subdivided, would the community water supply service that lot? P. Brouillard stated yes. J. Vorel: How many tax bills does the owner receive? P. Brouillard stated two, up to 1976. D. Chesebrough inquired about the wetlands on the property. P. Brouillard stated we are asking for a variance from the wetlands. P. Brouillard believes that the wetlands area is a smaller area than is depicted. D. Chesebrough stated the State has also supplied a doctrine similar to the Nighwander doctrine for subdivided lots with septic systems, noting that if they are under the same name, the lots are merged into 1 lot. Mrs. Bryant stated she did not know that her 2 lots were considered 1 lot, no one told her, noting that she has two deeds and they are registered in Laconia. J. Vorel: If justice is found, the Board could grant a variance. J. Vorel stated whether or not a septic can be put on the property, is up to the State. D. Chesebrough stated if the Board should approve the re-subdivision, the applicant may then find out that the State might not approve for a septic system. W. Morrison asked the applicant, are you willing to accept the responsibility if the Board approves the variance and the State does not approve the septic permit. Mrs. Bryant stated yes.

INPUT FROM THE PUBLIC

There was none.

ACTION BY THE BOARD

W. Morrison moved to approve the variance. There was no second. D. Chesebrough stated he has very serious problems with the application. 1. The merger doctrine stands. 2. Nothing was presented that shows this lot is any different from many lots under the same circumstances. This is a request to create two substandard lots. D. Chesebrough: There may not be an adequate place on the original lot to put a septic on, and he questions the ability of lot 52 to support a septic system because of the wetlands swale. If the State was aware of the lots, they would no longer be considered separate lots, noting that the State would not approve a substandard system. D. Chesebrough does not see a peculiar hardship. J. Vorel spoke relative to the Nighwander doctrine, noting that any doctrine or regulation that comes before this Board . . . the Board does have the authority and the right to grant a variance. The proposal does not have to have a peculiar hardship, just a hardship. By granting the variance, a substantial justice will be done. The owner had no chance to address the issue. If the State deems it appropriate to grant a septic system, that is their jurisdiction and not the jurisdiction of this Board. J. Vorel finds it inappropriate to discuss something that this Board has no jurisdiction, noting that he would urge the Board to consider granting the variance. (J. Vorel spoke as a non-voting member). W. Morrison feels that the merger doctrine is a bad rule. The Bryant's were unaware of the lots being merged. W. Morrison feels that the variance should be granted. D. Chesebrough stated-

the requirements for a variance are, that all 5 of the points be met. The Board is to follow the ordinance of the Town. It would be grossly contrary to the spirit of the ordinance to grant the variance. D. Chesebrough: The acreage must be 1 or more, and the hardship must be unique.

D. Chesebrough moved to deny the variance. R. Weaver seconded. A. Howe asked D. Chesebrough to summarize his reasons for denying the variance. The granting of the variance could cause upheaval in the Town of Gilford, noting that other situations will want to do the same thing. The use is contrary to the spirit of the ordinance. Substantial justice will not be done. The hardship is not a peculiar hardship to the property. W. Morrison asked to speak. A. Howe stated yes, if you have new comments. W. Morrison stated I have a right to speak. A. Howe stated yes, if you have something new to add other than the comments that we have already heard from you. W. Morrison stated Mrs. Bryant bought two lots, the doctrine combined the two lots, prior to 1976 there were two tax bills, the Bryant's were never notified of the merger. W. Morrison feels that the 1 lot should be made into 2 lots. W. Morrison stated he feels pressure from the chairman when speaking. A. Howe stated he is just asking for new comments. W. Morrison feels that the Bryant's should receive approval. L. Routhier stated for the last 22 years the property has been considered 1 lot, noting that there has been 1 tax bill. L. Routhier stated he doesn't see where the unnecessary hardship falls into play. J. Bobula stated, reference to the Nighswander doctrine, the doctrine has been codified in the Zoning Ordinance at least for the last 10 years in Section 9.1.1. It is no longer just a policy, it is an ordinance. J. Bobula spoke relative to hardship, the hardship has to be inherent in the lot itself. The physical nature of the lot has to be so different from other lots similarly situated, that a hardship, almost to the extent of disabling any use on the lot, would be created, which is not the case. W. Morrison - no; D. Chesebrough - yes; L. Routhier - yes; R. Weaver - yes; A. Howe - yes. 4 in favor. 1 opposed. The variance is denied. Reason for denial: 1. There is no particular hardship to the property. 2. The use is contrary to the spirit of the ordinance. 3. Substantial justice will not be done.

CASE #254-139-000-98-004Z - COUNTY OF BELKNAP/THE GUNSTOCK AREA COMMISSION/NEXTEL COMMUNICATIONS OF THE MID-ATLANTIC, INC. - 719 CHERRY VALLEY ROAD

Applicant is seeking a special exception concerning Section 4.3.17 (Radio & TV Towers) of the Gilford Zoning Ordinance to attach antennas to the existing communication tower with equipment shelter and appurtenances.

J. Vorel and A. Howe excused themselves from this case. R. Weaver will sit as an alternate member, and D. Chesebrough will act as Chairman in this case. J. Vorel stated he has authorized Rick Holpp to present this case. R. Holpp explained the proposal. The

IMPORTANT TO APPLICANT:

Follow instructions carefully and completely. Mail or deliver the completed form, with all attachments and fees (\$20.00 plus \$3.00 per abutter) to the Board's Administrative Assistant, 47 Cherry Valley Road, Gilford, N.H. Make check payable to TOWN OF GILFORD. If the application is incomplete or is not properly filled out, it will be returned and will delay action on your appeal.

NOTE: Applications must be filed at the Office of the Zoning Board of Adjustment by 12:00 Noon of the 2nd Tuesday of the month to be eligible to be on the agenda for hearing on the 4th Tuesday of the month.

This Space for ZBA
CASE # 227137000 98003Z
FEE PAID 41.00
Received (date) 3/5/98
Initials: mt

OWNER OF PROPERTY CONCERNED:

NAME: Helena L. Bryant, Trustee
Philip R. Bryant and Helena L. Bryant Revocable Trust

ADDRESS: 2 Hatch Drive, Gilford, New Hampshire 03246

NAME OF APPLICANT: Same

ADDRESS: _____

If applicant is not the owner, attach an explanation of the applicant's interest in the property.

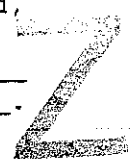
Name of Agent or Counsel (optional) Philip A. Brouillard, Esquire
16 Academy Street, Laconia, NH 03246

Location of Property: Be specific. Include directions to assist Board Members to locate your property. 2 Hatch Drive, Lot 47-A
Undeveloped Building Lot, Lot 52

Description of Property; (give area, frontage, etc.) _____
Lot 47-A .55 A
Lot 52 .92 A

Are there any existing VARIANCES or SPECIAL EXCEPTIONS on this property?
No. If yes, give particulars: _____

Has an application for VARIANCE or SPECIAL EXCEPTION on this property ever been denied? No If you are not sure, check with the Board's Administrative Assistant. If yes, applicant must show either that the use proposed now is materially different from the use that was denied, or that there has been a material change in circumstances. Give particulars: _____



PROPOSED USE: Explain what you want to do. Attach plans, sketches or other information.
Separate two pre-existing lots of record, Lot 47-A and Lot 52, obtained by two separate deeds.

REASON FOR APPEAL: Why do you need to appeal to the ZBA? Cite Ordinance section, building permit denial, etc.
See Denial of Jurisdiction from Planning Board dated February 5, 1998 attached.

FORM OF APPEAL: (check and complete as applicable)

Application for a VARIANCE from Ordinance section 5.1.1.(b) Lot. Size (Attach page 3.)

Appeal FROM AN ADMINISTRATIVE DECISION ON section (Attach page 4.)

Application for a SPECIAL EXCEPTION to section (Attach page 5.)

Does your proposed use also require SUBDIVISION APPROVAL (yes/no)?

SITE PLAN APPROVAL? ; HISTORIC DISTRICT APPROVAL?

SIGNED: Helena L. Bryant Date March 4, 1998
APPLICANT

Helena L. Bryant, Trustee of Philip R. Bryant and Helena L. Bryant Revocable Trust

Attach completed page 3, 4, or 5; drawings, sketches, and other information in support of this application; notice of Building Permit Denial or of action by the Planning Board or other Board or Official as may be appropriate; and abutter list verified by APPRAISER'S OFFICE.

Complete and attach this page if you are applying for a VARIANCE.

1. The Proposed Use would not diminish surrounding property value because:

a) Other surrounding lots are of similar size to the lots sought to be split and Lot 52 is only .08 acres short of conformance.

b) The proposed use, which is residential use, is the predominant use in this zone.

c) No decrease in value of surrounding properties would result from construction of a new home in this area.

2. Granting the Variance would be in the Public Interest because:

a) Other surrounding lots are of similar size to the lots sought to be split and Lot 52 is only .08 acres short of conformance.

b) The proposed use, which is residential use, is the predominant use in this zone.

c) The majority of lots in this area are of similar size because this subdivision was in place prior to zoning and lot size requirements.

d) The subdivision has utilities and other subdivisions in other areas of Town have lots of similar or smaller size because they have utilities.

e) Town of Gilford Master Plan encourages Quality Residential Development in areas where it is the prevalent use. This area is suitable for residential use and would be in the public interest because it would fill a public need for housing.

3. The use will not be contrary to the Spirit of the Ordinance because:

a) Other surrounding lots are of similar size to the lots sought to be split and Lot 52 is only .08 acres short of conformance.

b) The proposed use, which is residential use, is the predominant use in this zone.

c) The majority of lots in this area are of similar size because this subdivision was in place prior to zoning and lot size requirements.

d) The subdivision has utilities and other subdivisions in other areas of Town have lots of similar or smaller size because they have utilities.

e) Lot 52 is almost 1 acre and with community water and other smaller lots in the area it would be unjust to deprive applicant of the use of her property.

4. By Granting the Variance, Substantial Justice will be done because:

a) The lots were always treated separately, as a developed house lot and an undeveloped lot, and the title of the lots were held in different names as recently as 1996.

- b) Other surrounding lots are of similar size to the lots sought to be split and Lot 52 is only .08 acres shore of conformance.
- c) The majority of lots in this area are of similar size because this subdivision was in place prior to zoning and lot size requirements.
- d) The subdivision has utilities and other subdivisions in other areas of Town have lots of similar or smaller size because they have utilities.
- e) The loss to applicant if the variance is not granted is outweighed by any gain to the general public if the variance is granted.
- f) Lot 52 is almost 1 acre and with community water, and other smaller lots in the area it would be unjust to deprive applicant of the use of her property.

5. Denial of the Variance would result in Unnecessary Hardship to the Owner because of the following Special Circumstances of the Property that distinguish it from other properties similarly zoned:

- a) Application of Ordinance is so great as to effectively prevent the owner from making any use of the land.
- b) Size and Dimension create hardship when use would not create any threat to public health or safety where no reasonable permitted use can be made of the parcel without the variance.
- c) The owners obtained two separate deeds to two separate lots of record at two different times, Lot 47-A in 1958 and Lot 52 in 1961. At the time of obtaining the deeds each lot was conforming because minimum lot size was 22,500 square feet in 1962.

The Zoning Ordinance was enacted in 1962 which created residential zones but even then the lots were conforming lots because the minimum lot size was 22,500 square feet.

In 1972 the minimum lot size was changed to 1 acre, but even then the lots were preexisting non-conforming lots.

In 1976 by operation of the so-called Nighswander Doctrine or Rule the Town without notice to the owners, public hearing or Town Meeting Vote merged the two lots.

This subdivision has lots of similar size and has a community water system.

Each lot is capable of supporting a residential dwelling unit and in fact lot 47A has been supporting a dwelling on .55 acres since 1958. Thus Lot 52 which is .92 acres can certainly support a dwelling unit.

There are many areas of Town, Ridgewood Avenue Area (SFR 1 acre) and Gunstock Acres (SFR 1 acre) where there are lots of similar size (under 1 acre) served by a community water system. It would be unjust to treat owners of smaller lots in one area of town differently than others, and inequitable, unjust and unfair to treat similarly situated lots in different areas of Town differently.

The lots, which were at one time conforming, became non-conforming under the Zoning Ordinance and then were merged by the Nighswander Doctrine in 1976.

Therefore, the hardship is not even created by the Zoning Ordinance, which allows building on non-conforming lots, but by a non-codified, non-voted upon restriction which was originally imposed by the Town without Notice to the property owner, and then incorporated into the Zoning Ordinance.

If the instant lots were separated by one lot and were not contiguous they would be non-conforming buildable lots. If applicant and her husband had each placed a lot in their name, the lots would be non-conforming buildable lots.

Under the circumstances of this case it is clear that absent this rule both lots would be buildable and legal lots. Thus, it is reasonable and fair to grant a variance in this case.

APPLICANT: Helena L. Bryant

Date: March 4, 1983

Helena L. Bryant, Trustee of Philip R. Bryant and Helena L. Bryant
Revocable Trust

Telephone No.