



## RINDGE BOARD OF ADJUSTMENT

30 PAYSON HILL ROAD  
RINDGE, NH 03461

Tel. (603) 899-5181 X100 Fax (603) 899-2101 TDD 1-800-735-2964  
www.town.rindge.nh.us

### MEETING MINUTES: February 28, 2012 **APPROVED 3-27-2012**

#### Present:

Regular members:..... Janet Goodrich (Chair), David Drouin (Vice Chair), Bill Thomas  
Alternates: ..... Charlie Eicher, Joe Hill, and Rick Sirvint  
Absent: ..... Marcia Breckenridge, Phil Stenersen  
Recusals.....None

The meeting convened at 7:00pm with the Pledge of Allegiance.

#### Kayalov PM Sirene, II, Ltd. / Case #1036:

**Kayalov PM Sirene II, Ltd., c/o James Romeyn Davis, Esq., Sheldon, Davis, Wells & Hockensmith, PC, 28 Middle Street, Keene, NH 03431. 603-355-4700. Property at Henry Lane, Rindge, NH 03461. Map 21, Lot 19-2. Application for a Special Exception to Rindge Zoning Ordinance Article XIV, Section B-2 which states that no building shall be located closer than fifteen (15) feet to an abutter's property or fifty (50) feet from the edge of a right of way.**

**Sitting members: Drouin, Thomas, Eicher, Goodrich, and Hill.**

Sirvint read the case and Eicher read the related ordinances. Eicher sat for Stenersen, and Hill sat for Breckenridge.

Attorney J.R. Davis appeared on behalf of Kayalov and submitted the January 24, 2012 application for a Special Exception from Helen Lovely Francis. Penelope Marvel of Chris William Architects presented the Board the proposed Plan showing existing and proposed structures in relation to the setback lines. In both cases, the proposed distance of the new house and garage will be farther away from Henry Lane than the existing structures. Lot 19-3, behind this one, is owned by the same party and has a combined septic with Lot 19-1. Atty. Davis asserted that both parcels have adequate septic and water, the Plan would not lead to any changes in parking accommodations or population density, and the improvements should enhance surrounding property values.

Ms Marvel showed the Board drawings of the proposed structures, which were attractively designed. The garage would be similar in style to the existing one, but both structures would be further from the right of way.

Atty Davis: If the Board is favorably disposed to grant the Special Exception, we would request that the Administrative Appeal be continued and then we will withdraw it assuming that no one asks for a rehearing.

Drouin: There is a net increase in the square footage that will be within that setback.

Atty. Davis: I believe that's true for both structures. However, the ordinance we're dealing with discusses that the changes (the modification of a non-conforming structure) will make them less non-conforming. The ordinance has no provision mentioning square footage.



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Drouin: Is it impractical to build anything in a higher area?

Marvel: Yes, the land slopes up 8 to 10 feet higher, and building the house there would put it much closer to the garage which would not allow for many trees between the structures and would require a lot of cleared land. The birch trees are a focal point; the owners wanted the birch trees to remain in full view and, because they love them so much, have planted more birches on the lot. The overhang on the garage is deeper than the old structure, but the width of the garage is the same as before—16', though it's deeper for storage.

The application asked for the new structure to be 20' from the right of way, but the new structures will be farther than that under this Plan: 21' for the house and 23.6' for the garage.

Goodrich requested a motion to go to deliberation. Hill so moved, Thomas seconded with unanimous agreement.

### The Board found that:

- 1. The Board finds that the use will not create excessive traffic, congestion, noise, or odors.**

*On these issues, the applicant and others provided evidence that:* There is no change in use.

Vote: Unanimous.

- 2. The Board finds that the proposed use will not reduce the value of surrounding properties:** On this issue, the applicant and others provided evidence that:

The proposed use will not reduce the value of the surrounding properties but will instead enhance their value. The proposed buildings are an enhancement to the existing property.

Vote: Unanimous

- 3. The Board finds that there is adequate sewage and water facilities and sufficient off-street parking provided by the applicant.** On these issues, the applicant and others provided that:

The septic and water serving the lot are new as of 2010 and the parking is increased per the proposed Plan.

Vote: Unanimous

- 4. The proposed use will preserve the attractiveness of the Town.** On this issue, the applicant and others provided evidence that:

It will; the new structures will be a significant enhancement.

Vote: Unanimous

**MOTION:** Eicher motioned to grant the Special Exception and Thomas seconded; the granting of the Special Exception as all four criteria have been met.

Vote: Unanimous.

Drouin: We continued Case #1035 to this month.

Atty. Davis: I'm requesting that the Board continue the appeal until its April meeting, and you will see in the proposal that, with the permission of the Board, assuming there's no timely request for a rehearing filed in the Special Exception just granted, we will ask for the Administrative Decision to be withdrawn and that no other appearance will be required.



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**MOTION:** Hill proposed to continue Case #1035 to April but not require a further attorney appearance. Drouin seconded. Vote: Unanimous

Connolly, Timothy / Case #1037:

**Connolly, Timothy. 53 Whitney Lane, Rindge, NH 03461. 603-566-3436. Map 10 Lot 35-1. Application for a Variance from Rindge Zoning Ordinance Article VIII, Section A & B to allow a two (2)-family residence in the Commercial District.**

**Sitting members:..... Dave Drouin, Bill Thomas, Joe Hill (alternate for Phil Stenersen), Janet Goodrich and Rick Sirvint (alternate for Marcia Breckenridge).**

Code Enforcement Officer DuVernay: If we adopt a new decision tree, I request that it be temporary for this evening. I want to make sure the Variance, the decision tree, Decision, and template Linda uses will be the same. This is new and we want to make sure that we apply these standards to our thought process. We are using this tonight knowing we will have to visit it twice more.

Eicher read the case and Hill read the related ordinances.

Tim Connolly talked about the right of way, but it was not the issue.

Representing Mr. Connolly, Roberta Oeser: When you went through the decision process, this was for an Accessory Dwelling Unit; it was smaller than 2 acres to begin with (just over 1 acre). His house was built and a variance was granted for the residential use. Do you want to start there? Goodrich: it's your choice.

Oeser: Residential use is already allowed in that house, so the relief requested is for a two family. It's not changing its appearance at all. The septic situation was addressed with ADU – Monadnock Septic said the lot will support a larger septic and he will get that done if this is granted. The special exception was granted for the ADU with a new septic plan.

Goodrich: The Special Exception was not granted. DuVernay: It was granted initially provided that four conditions were fulfilled and they weren't.

Oeser: So, we're starting with this new case. The hardships are several: the lot was pre-existing and then changed to a commercial zone, but the residential use was granted. The lot is very steep and in order to build the only place. The cellar is 10 feet deep to get the entry level to the house at grade. It's a very small footprint, so a stairway would take up a lot of the space. He wanted to live in it in 1994 or 1995. In order for him to live in the basement, the Town required that he put bedrooms on the outside wall and take the garage out. So, now he's left with a finished basement which wasn't its intended use. So, to appease the Town he'll have to rip out everything. During the construction, the Town required him to put in the finished basement and take the garage out since there was no upper level until the construction was complete.

Drouin: We have a temporary electric permit; that's all we have.



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Oeser: the inspectors changed at the time; we went through many of them.

Drouin: What it tells us that this was required and not a temporary progression from temporary electrical.

Goodrich: He was using it as a temporary residence while the rest of the house was being built.

Oeser: For 10 years, because he built it as he got the money.

Goodrich: It was a temporary dwelling unit during the construction period.

Oeser: But the Town in order to allow him to live here required him to put in a door, take out the garage, etc.

Drouin: Did the Town ever say this is not temporary?

Oeser: They gave him an occupancy permit. The original intent was to build the whole thing but it took him 10 years to do it. There was never a requirement in the building permits to remove the temporary improvements.

Goodrich: But “temporary” is self-defining; it doesn’t go on forever.

Oeser: But the “temporary” was for the temporary electrical service. My feeling is that he was required to do an extraordinary amount of work in the basement to satisfy the Town’s request. And there was never any requirement to remove that work.

Goodrich: By definition, temporary does not mean permanent. Permanent wiring does not mean permanent residence; the two are not synonymous.

Drouin: It’s permanent wiring but a temporary residence. This is as a temporary residence, permanent wiring for the house. But it still says temporary residence.

Oeser: That’s what we’re asking—to make it permanent. It was used for 10 years. We’re requesting that relief to make it a two-family. Because so much work was done to the downstairs to make it habitable, we’re asking to let it continue as such.

Goodrich: The plans were for a two-bedroom.

Oeser: Carl Hagstrom sent a letter that a new septic design will be needed – it’s a two-bedroom system and there are three bedrooms. If you walk into the living level of the house, there’s an open loft. One bedroom downstairs, two bedrooms upstairs plus a loft. The septic is designed for a two-bedroom house.

Goodrich: The bedroom downstairs was designed to be temporary. The existing septic design is not designed for a two-bedroom but the land can accommodate a three-bedroom septic design.

Oeser: If you grant relief and it becomes a two-bedroom plus a one-bedroom dwelling, then Mr. Connolly will be required to have a new plan in case of failure.



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Drouin: The question isn't whether it's suitable as residential; it's whether it's suitable as a two-family. It's already a non-conforming residence. Why is this proposed use for a two-family a reasonable one?

Oeser: Because of trying to tie together the two floors. Because of the lay of the land and the height of the basement—you would eliminate a lot of living space from the main living level to put in stairs.

Drouin: The house is 24' x 34' and that's not tiny.

Oeser: the land created the cellar to be so deep that putting in a stair.

Drouin: But that's just three more treads, a circular stair, or a stair with a landing.

Oeser: he tried to figure out how to tie the levels together. A 10' cellar is really deep. The two feet makes a difference.

Drouin: Why is a two-family on a small lot that's zoned commercial consistent with the spirit and intent?

Oeser: It doesn't diminish the intent of the area to be commercial. The frontage is swamp to 202. None of these lots have a lot of frontage. For redevelopment, the whole point of zoning that commercial is for future development. It's not changing the potential use of the land.

Drouin: What about that a two-family is not allowed in that district at all?

Oeser: A two-family is still residential use.

Goodrich: This house was never approved to be a two-family.

Oeser: It's still residential use, and the other houses around are single family homes, and none of those lots are very big.

Goodrich: Does Mr. Connolly have a septic design?

Connolly: There's no reason for me to get one right now.

Goodrich: So you don't.

Sirvint: The safety factors – will they be addressed for a two-family?

Oeser: There are dual egresses from both levels, and there are fire alarms.

Connolly: I did all the things they told me to do.

Drouin: When the improvements were made, why was the permit not for the whole thing?

Oeser: Because Connolly was living in a bus.



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Connolly: I built this out of my basement, and there's no mortgage – it took a long time.

Oeser: An occupancy permit was granted for the basement.

Goodrich: As a temporary residence.

Eicher: So the intent was to build a house, starting as a garage but he had to make changes to the garage, but he didn't change the garage back to a garage after the other changes were made.

Oeser: The cellar is built into the cliff. So where he was planning on living was a hole. There wasn't any access inside except the garage. So he had to make outside access to the basement, building a bedroom. So he had to take the garage out and put the bedroom in.

Goodrich: He had to do that for safety reasons.

Eicher: So the intent was to have a single family house with a garage under.

Oeser: Correct.

Goodrich: The only reason the Selectmen asked that is for safety, so you can get out of your bedroom if the house is on fire. There had to be egress from that room.

Sirvint: What other egress is there?

Oeser: There's a front door, and the bedroom is on the outside wall, and there's a window on the outside wall.

Hill: In 1995, it was a window approved by the fire department.

Connolly: My daughter and grandson live upstairs, and they're not paying rent.

Drouin: That's a two-family

Connolly: I'll be living there the rest of my life.

Goodrich: You told us last time that you go to Florida in the winter. In that time period, you've rented to college students in the past, and you rented it to a gentleman here.

Connolly: I only rent it if someone's in distress or something. And I won't rent it to college students again.

Sirvint: So your intention is to live there with your daughter?

Connolly: She could find some guy and leave tomorrow; I don't know.

Goodrich: So your daughter moves out and who's going to live there?

Connolly: All I'm asking it to keep that little apartment instead of going through all the expense of tearing it out.



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Oeser: he lived there for 10 years.

Goodrich: that didn't make it right.

Drouin: When it says temporary, that means temporary. So now we're trying to fix a mess because temporary means temporary. Someone would have asked where the cellar staircase is to the upstairs? I can't understand why a staircase can't be put in there? It's very hard to overcome that. I know it's been going on for 20 years. But whatever we decide tonight lives forever with this property. We had an argument last time as to why this should be a residence; I'm not seeing the argument as to why this should be a two family.

Hill: You also have the possibility that his daughter moves out and there are two rental units in it?

Drouin: Maybe the next people who buy it will rent out both units. And the parking plan shows only four spaces.

Eicher: They're asking to make it a two-family dwelling because that is what it is. So the question is, is that reasonable?

Goodrich: he chose to not end the temporary dwelling

Eicher: he was found in violation because it's being used today as a two-family dwelling, and the new variance rules ask whether that's reasonable or not.

Drouin: But if this were a fresh application, where would it stand?

Eicher: But it's existing

Drouin: But that encourages people to go as long as they can in violation until they get caught and then say it's okay because it's existing. After the fact is tough when you're trying to straighten the mess up.

Goodrich: you can't reward ignoring the code.

Eicher: I think the situation is different because it already exists.

Oeser: I think it took Mr. Connolly 12 years to finish the house and he had to do a lot more work in the basement to keep it livable but it had been there a long time. It wasn't the intention of evading; it was simply to have a place to live while the rest was being built. And some of that was required by the Town.

Drouin: But isn't that a reasonable trade-off for the Town to allow him to live there while he was building? The Town is asking someone to be safe.

Connolly: I didn't purposely wait, and don't understand why it's a big issue now. I didn't do anything wrong; I did what you people told me to do and that's it.

DuVernay: The problem with the argument that "I've invested all this money and now you're trying to make me tear it out" is that The town bent over backwards to say: okay, you can live there IF... and the town can now say take all the temporary stuff out of the basement that made it a temporary dwelling, connect the floors, and



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make it a one-family home. All the homes around it are single family homes. There is not adequate parking, the lot slopes severely, and it is 1.52 acres. Frequently, the road is blocked because people park their cars in it.

Oeser: I've parked up by the door.

Neighbor Ben Asaff: "I've never seen more people live in a residence in my life. If Tim was there with his daughter, that would be fine. But people in that right of way, college kids parked in my driveway and I can't get home, and they say they were there first. That's my deeded right of way to get to my house. If my house burned, I couldn't get a fire truck through. The fence with the horses were in the right of way. I'm not one to tell someone to tell someone what to do. There's not enough room there. I built a new garage 50' from the right of way, and I followed all the rules to the setback which is in the ordinance. What about all the tons of people before the two years? Roberta: she's been there two years."

DuVernay: There have been drug situations, college students, people going to his door asking is this where they get the drugs. This was a single family house when it was constructed; the septic was approved for a single family two bedroom. All properties surrounding it are single family. If this were in the res/ag district it would require three acres. We went through the effort to see whether it was grandfathered, but two or three sessions ago we determined it wasn't. It doesn't fit the criteria for the ADU.

Connolly: because of the stairwell

DuVernay: it's still a big issue.

Oeser: Can't you access the basement outside?

Goodrich: for an ADU you can't.

DuVernay: Do not approve the variance and require the conditions: render the basement not as a separate dwelling unit by removing the kitchen facilities so it can't be occupied and rented out and certainly impose the condition that the septic system be designed by DES as a fallback in case of failure of the present system. To make it a single family dwelling, which I believe it is, it would not have separate kitchen facilities in the basement that would allow it to be rented out. The third requirement, if it's granted, is a life safety inspection.

Hill: we can deny, but if we approve, we can attach conditions.

Sirvint: I don't think it creates an unnecessary hardship because the property can still be used as a single-family dwelling. People can live in it. A family, father, daughter can still live there. He can live there with his daughter. It would only place restrictions on future rentals. No one will be putting him and his daughter out on the street.

Drouin: And there are no restrictions for him to rent it as a single family residence.

MOTION: Hill moved to go to Deliberative, Sirvint seconded. Vote – unanimous..

Special conditions now (under the new rules for a Variance) asserting "uniqueness" can relate to either the property or the building.



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### **1. The variance use would be contrary to the public interest because:**

It does alter the character of the neighborhood and there has been testimony indicating that it has threatened public safety, health, and welfare. It has inadequate parking, has been blocking access for public safety vehicles, and has blocked access to the homes of the residents who live beyond it.

Vote – Unanimous in favor.

### **2. Literal enforcement of the ordinance would not result in an unnecessary hardship due to special conditions of the property that distinguish it from other properties in the area because:**

The structure is a single family home in a neighborhood of single family homes.

Vote – Unanimous.

#### **a) No fair and substantial relationship exists between the general purposes of the Zoning Ordinance provisions and the specific application of the provisions to the property because:**

It is specifically contrary to the intent of the zoning ordinance as it is not a permitted use. It's already a residence and was accepted as a single family so it wouldn't serve the purpose of the zoning ordinance to make it a two family. It's contrary to the purpose of the zoning ordinance in that multi-family is not allowed and it would devalue properties around you and infringes the character of yours if you can't have access to your home.

Vote – Unanimous in favor

**AND**

**b) The proposed use is not a reasonable one because:** The property can be used as a single family home.

Vote – Unanimous in favor.

### **3. The variance is not consistent with the spirit and intent of the Rindge Zoning Ordinance because:**

The intent of the Rindge Zoning Ordinance is to preserve the health, welfare, safety and character of the town. Testimony has attested that granting the variance would change the character of the neighborhood and infringe on the health, safety and welfare of the neighbors.

Vote – Unanimous in favor

### **4. Granting the variance would not do substantial justice because:**

The loss to the landowner is substantially less than the potential loss to the neighbors as per received testimony. The loss of a second dwelling unit is outweighed by the loss of the quality of life of neighboring properties as per the testimony received.

Vote - Unanimous in favor.

### **5. Granting the variance would diminish surrounding property values because:**

Another dwelling would reduce the already minimal access to neighboring properties and Experience has demonstrated that this would decrease their value.

Vote - Unanimous in favor.

### **Variance Denied because:**

Drouin moved that the variance be denied because it has not met the criteria for a variance. Hill seconded.

Vote – Unanimous in favor.



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Oeser: You voted the exact opposite on three of the questions as last time. Jan: Testimony this evening has warranted those responses.

Mr. Connolly was advised by the Board that he has 30 days to appeal the decision.

A rehearing would be based only on procedural error or new evidence. The applicant can apply and has to supply either new evidence or procedural evidence. The board says either yes or no. If no, the applicant can go to superior court.

### Last Month's Minutes:

Eicher moved to approve the Draft Minutes of January 24, 2012, Hill seconded. Vote – Unanimous

Eicher and Hill volunteered to review applications for the next meeting. New applications must be received by March 6th at 4:30pm.

A first reading and discussion ensued on the revised Variance Decision Tree. Hill will work with DuVernay on finalizing it. See attached addendum.

Hill moved to adjourn, Goodrich seconded at 9:12pm. Vote – unanimous

Joseph C. Hill MD  
Alternate  
Linda Stonehill  
Clerk

Approval vote: Yes: Goodrich, Drouin, Breckenridge, Thomas, Sirvint, Hill. Abstain: Stenersen. Absent: Eicher

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Janet Goodrich  
Chairman

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David Drouin  
Vice Chairman



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## Variance Decision Tree

**A variance can be granted only if an applicant satisfies all five variance criteria.**

**1. The variance use would/would not be contrary to the public interest because:**

*A variance is contrary to the public interest if it violates "basic zoning objectives" by, for example, altering the character of the neighborhood or threatening public health, safety, or welfare.*

*Mere conflict with the terms of the ordinance is insufficient. Rather, to determine whether granting a variance is not contrary to the public interest and is consistent with the spirit of an ordinance, the board must look at whether granting the variance would unduly, and in a marked degree, conflict with the ordinance such that it violates the ordinance's basic zoning objectives. Thus, for a variance to be contrary to the public interest and inconsistent with the spirit of the ordinance, the result of granting the variance would be to violate the ordinance's basic zoning objectives.*

*In addition, it is no longer relevant for the ZBA to consider whether the applicant could achieve the same results by another means that conforms to the ordinance without the need for the variance.*

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Vote: Y \_\_\_\_\_ N: \_\_\_\_\_

**2. Literal enforcement of the ordinance would/would not result in an unnecessary hardship, due to special conditions of the property that distinguish it from other properties in the area because:**

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Vote: Y \_\_\_\_\_ N: \_\_\_\_\_

**a. No fair and substantial relationship exists between the general purposes of the Zoning Ordinance provision(s) and the specific application of the provision(s) to the property because:**

*Consider the purpose of the zoning restriction and whether applying it to the specific property serves the purpose of the Zoning Ordinance.*

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Vote: Y \_\_\_\_\_ N: \_\_\_\_\_

**AND**

**b. The proposed use would/would not be a reasonable one because:**

*The ZBA may find unnecessary hardship if, and only if, owing to special conditions that distinguish the property from others in the area, "the property cannot reasonably be used in strict conformance with the ordinance," and a variance is necessary for its reasonable use. This is the old, pre-Simplex variance standard. Under it, a variance can be granted if the owner has no reasonable use of the property without a variance.*

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Vote: Y \_\_\_\_\_ N: \_\_\_\_\_

**3. The variance would/ would not consistent with the spirit and intent of the Rindge Zoning Ordinance because:**

*The intent of the ordinance is to promote health, safety and welfare, and to preserve the values and character of the Town; consider whether the variance is inconsistent with these goals. In addition, as noted for the other standards above, it is no longer relevant for the ZBA to consider whether the applicant could achieve the same results by another means that conforms to the ordinance..*

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Vote: Y \_\_\_\_\_ N: \_\_\_\_\_

**4. Granting the variance would/would not do substantial justice because:**

*This requires a balancing test; a loss to the landowner that is not outweighed by a gain to the general public is an injustice. The Board should identify the loss the landowner would suffer if the variance is denied, and weigh it against the interests of the public. It is no longer relevant for the ZBA to consider whether the applicant could achieve the same results by another means that conforms to the ordinance.*

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Vote: Y \_\_\_\_\_ N: \_\_\_\_\_

**5. Granting the variance would/would not diminish surrounding property values because:**

*Evidence from an appraiser or realtor would be relevant; the Board can also rely on its knowledge of the area.*

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Vote: Y \_\_\_\_\_ N: \_\_\_\_\_

### Variance Granted / Denied because:

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Vote: Y \_\_\_\_\_ N: \_\_\_\_\_

*NOTE: A variance applicant under item IX of the Rindge Floodplain Management Ordinance must also show that:*

- a. *The variance will not result in an increased flood height, additional threats to public safety or extraordinary public expense.*
- b. *If the requested variance is for activity within a designated regulatory floodway, no increase in flood levels during the base flood discharge will result.*
- c. *The variance is the minimum necessary, considering the flood hazard, to afford relief.*
- d. *The ZBA must notify the applicant in writing that:*
  - 1. *The issuance of a variance to construct below the base flood level will result in increased premium rates for flood insurance up to amounts as high as 25 for \$100.00 of insurance coverage, and*
  - 2. *Such construction below the base flood level increases risks to life and property.*

*This notification must be maintained with a record of all variance actions and variances issued under the Floodplain Management Ordinance must be reported to FEMA's Federal Insurance Administrator.*

Original 1/10  
Revised 1/11, Approved 2/22/11  
Revised 10/11

