

**Town of Weston  
Zoning Board of Adjustment**

**Request for Reconsideration of Variance Decision  
Findings and Decision**

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**In re: Leah and Brandan McCanna, 104 Route 100, Weston – Application for a Variance  
Parcel ID # 13-00-17  
Permit Application ZP 17-20**

**Issue before ZBA**

Whether, as required by 24 VSA Section 4469(a)(5) criterion 5, the proposed location of Leah and Brandan McCannas' (the Applicants) storage shed represents the least deviation possible from the requirements of the Town of Weston's Zoning Regulations (the Regulations).

**Introduction**

1. In January 2021 the Applicants applied for a variance for an existing storage shed (10'x14') on their property (the Application) after it was determined by the Zoning Administrator that the location of the shed did not meet (1) the 50 foot side yard setback requirements in the Resource Zoning District or (2) the 100 foot required setback distance from a watercourse.
2. In order to grant a variance the ZBA must find that the Application meets all five criteria of 24 VSA Section 4469(a).
3. Hearings were held on November 17, 2020, December 2, 2020 and January 26, 2021.
4. In a decision dated March 3, 2021, the ZBA found that the application met the first four criteria in 24 VSA Section 4469(a) but denied the application because the application did not meet criterion five (Section 4469(a)(5)): "that the variance, if authorized, will represent the minimum variance that will afford relief and will represent the least deviation possible from the bylaw and from the [town] plan." The ZBA found that the Applicants had not provided sufficient information on the reason the proposed location of their shed was the least deviation from the Regulations.
5. By email dated April 2, 2021, the Applicants requested pursuant to 24 V.S.A. § 4470 that the ZBA reconsider its decision regarding criterion five.
6. By letter dated April 9, 2021, the ZBA granted the Applicants' request to reconsider, stating that the reconsideration hearing would be limited to criterion 5 and that the ZBA would consider only the information presented in the April 2, 2021 appeal email together with any new rationales why the variance should be granted under criterion 5. (The ZBA's decision would be based on any new information presented by the Applicants as well as the ZBA's interpretation of such information.)
7. The ZBA held a hearing on June 10, 2021, preceded by a site visit. The hearing was held partly in person at the Town office and partly via Zoom.
8. There was a quorum of the ZBA present at the hearing at the Weston Town office (ZBA members Deborah Granquist, Deborah Lyneis, Jeff Lennox, Ann Fujii and Susan Morris). Also present at the Town office were Will Goodwin, Zoning administrator, and Brandan McCanna, Applicant. Present via Zoom were abutters Wes and Nancy Westlund and Phil and Karen Schneidermeyer, and Applicant Leah McCanna.
9. The hearing was properly warned, notice was posted in three locations, abutters were notified and a Hearing poster was posted on the property.

### At the June 10<sup>th</sup> hearing

1. The only issue before the ZBA at the hearing was consideration of criterion 5 (24 VSA Section 4469(a)(5)), and whether the existing location of the storage shed was the least deviation from the Regulations.
2. The Applicants provided the ZBA with a letter dated 6/6/2021 outlining the Applicants' position on the reasons criterion 5 should be granted. Mr. McCanna read the letter at the hearing.
3. The Applicants spoke about the need for storage and a safe place for their young children to play. They explained that the location of the existing shed is preferable because of its proximity to the back yard "play area".
4. The Applicants offered two possible other locations for a shed, presumably requiring new construction and both attached to the house. One location was to the back of the house by the rear entrance. That location would require moving utilities and septic pipes, and would result in losing half of an already small driveway. Another possible location presented by the Applicants would take up a substantial portion of the existing deck and presented roof line challenges. The Applicants contend that neither location is a good one for a shed for the reasons described above, and did not meet their desire to have a safe place for their children to play at the rear of the property.
5. There was discussion at the hearing of other possible locations for the shed that might represent a lesser deviation from the Regulations.

### Findings of fact

1. The Applicants property lies in the Resource Zoning District where the minimum lot size is 3 acres. The Applicants' lot is only .25 acres. Thus, it does not conform to the Resource Zoning District minimum lot size requirement, making it a pre-existing, non-conforming lot.
2. In the Resource Zoning District, the side yard setback requirements are 50' from property line (Section 210). There is also a general requirement in the Regulations that the minimum setback from a watercourse is 100' unless otherwise permitted (Section 513(3)). The West River abuts the Applicants' property on one side. Since the Applicants' property is no wider than 70 feet on average, no building or structure on Applicant's property can comply with these setback requirements.
3. Applicants' residence (built in the 1800s prior to zoning) does not meet the front or side yard setbacks, making it a pre-existing non-conforming structure. The house is 3' from Schneidermeyer property and approximately 12' from Westlund property.
4. The purpose of the Resource Zoning District is to protect lands of high natural resource value, usually lands that are not convenient to employment or shopping or have poor access to improved public roads. (ZBA notes that the McCanna property and two adjacent parcels in the Resource District do have direct access to Route 100).
5. Applicants' property is located on Route 100, a State highway with much traffic, in an area that was once one of the three commercial villages in Weston in the 1800s. The neighboring property to the east (Schneidermeyer) is also a small pre-existing non-conforming lot (0.85 acres). Most of the other properties in the Resource District are much larger and were originally farmland and forest. The three properties along Route 100 (McCanna, Schneidermeyer and Westlund) do not match the purposes of the Resource Zoning District. The relatively small parcels across Route 100 on the south side of the road are in the Rural Residential District. Thus, parcels on the north side have side and rear setbacks of 50 feet, whereas the parcels on the south side have side and rear setbacks of 35 feet. The ZBA suggests that any future changes to the Weston Regulations should address this anomaly.

## Decision

The ZBA concluded in its March 3, 2021 decision that a storage shed for lawn and other maintenance equipment is a reasonable use of the Applicants' property. Determining reasonableness of a proposed use is a requirement of 24 VSA §4469(a)(2). Having thus concluded the reasonableness of the proposed use as a storage shed, the Applicants would be entitled to have a shed on their property as long as the location of the shed represented the least deviation from the Regulations.

Development may only occur in the Town of Weston when it is determined to conform to the Regulations. Variances, when granted, allow for development that is not in conformity with a town's bylaws provided that it has been determined that all five of the variance criteria have been satisfied (24 VSA § 4469(a)).

In the March 3, 2021 decision all of the variance criteria were deemed met in the Applicants' favor except criterion 5. Therefore, the sole question before the ZBA is whether the Applicants' proposed shed location of the existing shed represents the minimum deviation from the Town's applicable zoning provisions as required by criterion 5 (24 VSA Section 4469(a)(5)).

This has been a very long, difficult and complicated decision process for the following reasons:

1. First is the difficulty of granting a variance in Vermont. In Vermont, there is traditional reluctance to grant variances since by their very nature they constitute individual exceptions to the applicable zoning provision. In re Mutshler, 2006 VT 43, ¶ 7, 180 Vt. 501 (mem.) (citing in re Maurice Memorials, 142 Vt. 532, 535 (1983)). As a matter of fact, most Vermont case law supports denying a variance.
2. Second is the anomaly of the Applicants' property being located in the Resource Zoning district. Because of its small lot size, the lot is considered to be a pre-existing, non-conforming lot and the house is a pre-existing and non-conforming building/structure. As noted in the ZBA's earlier decision denying the variance request, there is no opportunity to build anything on this property without a variance because of the overlapping side yard setbacks. Similarly, because of the narrow width of the property (average 70') there is no way that any new building or structure could meet the required 100' setback from a watercourse. Because of its size, this property is more akin to the properties in the Village Zoning district in Weston. If this property were located in the Village district, the proposed location of the shed would be permitted because it would be compliant with the 10' side and rear yard setback requirements.
3. Because there is no possibility of further developing this property with a free standing building, the question is whether there is a place to locate a proposed storage shed that is a lesser deviation from the Regulations. A possible location for a shed is supported under Section 511.2(2) of the Regulations which states that: "any nonconforming building or structure [like the McCanna house] may be altered, including additions to the building or structure, provided such alteration must comply with the provisions of these Regulations and/or not increase the degree of nonconformity." This Section has been interpreted to mean that if a building/structure is nonconforming, such as the Applicants' house, the Applicants could add on to the house as long as the addition did not increase the degree of nonconformity. This would mean that since the Applicants' house is 3' from the Schneidermeyers' property line and 12' from the Westlunds' line, if the Applicants proposed to build a storage shed that was an "addition" to the house, as long as the shed was at least 3' from the Schneidermeyers property line and at least 12' from the Westlunds, the new structure would be permitted. As a matter of fact, such a structure would not even need a variance from the side yard setback requirements. The Zoning

Administrator could grant the permit if the shed complied with Section 511.2 (2) and any other applicable Regulations.

4. The ZBA reviewed the Applicants' property to determine whether there could be a potential location for a shed that complied with Section 511.2(2) and thus met the variance requirement by being a location that has a lesser impact on the Regulations. The first question for the ZBA to answer was whether the shed has to be actually attached to the house. Past decisions in Weston have answered that question in the affirmative. The next question was whether the deck attached to the house should be considered as part of the house for purposes of Section 511.2(2). The ZBA found that in this case the deck is an integral part of the house and therefore, the ZBA finds that the Applicants' deck is a logical extension of their house for purposes of attaching a small storage shed pursuant to Section 511.2(2). It should be noted that in order to make this conclusion the ZBA had to interpret the intent of Section 511.2(2). When changes are made to the Regulations, the ZBA suggests addressing this section to add clarity of purpose. There is a split rail fence attached to the deck which raises the question of whether the fence could/should be considered as an extension of the house, since a fence is defined as a "structure" in the Regulations. For purposes of this decision, the ZBA would not have to formally address the issue of whether a fence is part of a house for purposes of Section 511.2(2) if the ZBA finds a location for a storage shed attached to the deck. Regardless, the ZBA during deliberation did not believe that the intent of the term "structure" with respect to additions to a house would be to include onto a fence. The ZBA suggests the definition of fences in general and their relation to Section 511.2(2) should be considered in any future changes to the Regulations.
5. The ZBA finds that in order to comply with Section 511.2(2) the proposed addition must be attached to the house and that for purposes of this decision a deck is to be considered as an extension of the house. Therefore, if there is a location for a proposed shed attached to the deck that meets the requirements of Section 511.2(2), then the variance request must fail because there is a possible location that is a lesser deviation of the Regulations than the location proposed by the Applicants.
6. There is another issue that has further complicated this decision which is worth mentioning -- the fact that the shed in question already exists. The Applicants are not applying for a permit to build a shed in a specific location. Rather they are looking for permission for an existing pre-fabricated shed that has already been placed in a location that does not meet setback requirements. It should be noted that the Applicants have testified that they were not aware that the shed they put on their property had to meet setback requirements. They testified that they mistakenly thought that because the shed was less than 144 square feet, it did not need a permit and thus did not have to meet setback requirements. However, Section 702.1 (1)(a) of the Zoning Regulations states that a permit is not needed for the placement or construction of a tool shed, pumphouse, dog house, or other such accessory structure, provided that the floor space of the structure does not exceed 144 square feet and does not exceed 12 feet in height and provided that such structure is located no closer than the setbacks required in the zone in which it is located [emphasis added]. The Applicants have been working diligently to address this problem.
7. Asking permission for an existing shed differs from a request to build a new one. However, Vermont League of Cities and Towns advised the ZBA early in the process that the ZBA should consider the Application as if the shed had not been built. Intellectually, this is an easy task, but in practicality, it is not always easy to think as if the Applicants' shed did not exist. For example, if this were a de novo application, the ZBA would likely try to work with the Applicants to find a location that worked within the Regulations or had a lesser impact on the Regulations. The ZBA might have questioned the size of the shed -- was it necessary to have a 140 square foot shed to solve their storage problem? They might

have questioned the real use of the shed – was it for storage or to have a safe place for their children to play? The question of what is the real purpose of the shed was complicated by the fact that the new shed did not have lawn care or recreational items stored in it but rather bunk beds.

8. As noted in paragraph of the review of the June 10<sup>th</sup> hearing, in order to advance their contention that there were no other possible locations on the property for a shed having a lesser impact on zoning regulations, the Applicants offered two possible locations for a shed. But the Applicants testified that neither of these two locations solved their problems because of difficulties in constructing a shed in those locations and because neither location met the needs of a safe place for children to play at the rear of the property. The ZBA agrees with their contention about the difficulty of building in the suggested locations but makes no comment on whether the location at the rear of the property is a better location for play. While the ZBA may agree with the Applicants that a shed location at the rear of the property is a “better” location, because that was not the issue before the ZBA. The issue is whether the proposed location of the existing shed represents the least deviation from the Regulations.
9. In assessing the Applicants’ property to determine if there is a location representing a lesser deviation, the ZBA found at least one location for a possible shed that meets the requirements of Section 511.2(2) and the required 100’ setback from the river, and thus, results in a lesser deviation from the Regulations. This location would require attaching a shed to the existing deck behind the house, keeping the shed at least 3 feet from the Schneidmeyer property line and 12 feet from the Westlund property line. The shed could be tucked alongside the pre-existing, non-conforming shed on the Schneidmeyer property. While this location may not meet all of the desired wishes of the Applicants, it does exist and in the opinion of the ZBA this location has less impact on the Regulations than the Applicants’ proposed location at the rear of the property. Thus, the ZBA’s denial of the variance request must be upheld.

**Conclusion and Decision**

We conclude that the facts in this case indicate that the Applicants have not satisfied variance Criterion 5 (24 VSA §4469(a)(5), and we are compelled to uphold the denial of the variance request. The vote taken was 4 in favor of upholding the denial and one against.

Dated at Weston, Vermont, this 13<sup>th</sup> day of July 2021.

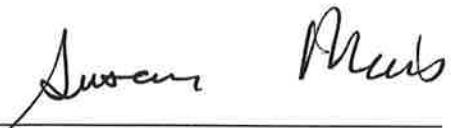
Approved:

  
Deborah Granquist

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Ann Fujii

  
Jeff Lennox

  
Debra Lyneis

  
Susan Morris

**Notice:** This decision may be appealed to the Vermont Environmental Court by an interested person who participated in the proceeding(s) before the Zoning Board of Adjustment. Such appeal must be taken within 30 days of the date of this decision, pursuant to 24 VSA § 4471 and Rule 5(b) of the Vermont Rules for Environmental Court Proceedings.