



TOWN OF MONTREAT

P. O. Box 423
Montreat, NC 28757
Tel: (828)669-8002 Fax: (828)669-3810
www.townofmontreat.org

Public Hearing Script Henry J. Elliot Variance Application August 27th, 2015

Introduction:

“The second matter of business is a Public Hearing to consider a request for a variance from the provisions of Montreat Zoning Ordinance, Article VII, Section 701.81 Minimum Side Yard: Single-family and Two-family Dwelling Units to construct a small bathroom addition to an existing single-family dwelling located at 523 Big Piney Road. The property is zoned R-1 and is further described as PIN# 0720-09-1108-00000. The hearing on this matter is quasi-judicial in nature and will be conducted in accordance with the following procedure”:

1. Swearing of all persons who will be called to testify.
2. The Hearing will be opened.
3. The Zoning Official will give a summary of the location and relevant zoning ordinances and will review and submit all documentation under oath.
4. Presentation/Testimony of applicant and proponents. Board may question witnesses.
5. Presentation/Testimony of opponents. Board may question witnesses.
6. Rebuttal evidence and arguments of applicant.
7. Rebuttal evidence and arguments of opponents.
8. The Board may ask questions of those who have been sworn and testified.
9. Closing statements from Zoning Official.
10. Closing statements from applicant.
11. Closing statements from opponents.
12. The Chair will summarize the evidence presented.
13. The Hearing will be closed.
14. The Board of Adjustment will deliberate and vote.

“Are there any objections from the Board concerning this procedure?”

Swearing In:

“All persons who wish to speak and testify in this case please come forward and place your left hand on the Bible and raise your right hand. After the swearing in you may return to your seat.”

Clerk conducts swearing-in ceremony by asking of each witness, “Is the testimony you are about to give the truth, the whole truth and nothing but the truth, so help you God?”

Board Conflicts:

“Before opening the hearing, I would like to give Board members a chance to reveal possible conflicts and to withdraw from this proceeding if necessary.” If possible conflict exists, ask, “Do you think you can rule fairly and impartially, or do you wish to withdraw?”

Board members explain conflicts or biases and may withdraw if they wish. The Board is required to vote on whether or not to excuse a member due to a conflict.

Prior Exposure to Evidence:

“I would also like to ask any Board members who have any information or special knowledge about the case that may not come out at the hearing tonight, to please describe that information for the record so that interested parties will know and can respond.”

Board members may reveal prior information or special knowledge about case.

Explanation of Proceeding:

“In this hearing, we will first hear from the Zoning Official, then from the applicant and their witnesses, and then from opponents to the request. Parties may cross-examine witnesses after the witness testifies when questions are called for. If you want the Board to see written evidence, such as reports, maps or exhibits, the witness who is familiar with the evidence should ask that it be introduced during or at the end of his or her testimony. We cannot accept reports from persons who are not here to testify. Attorneys who speak should not give factual testimony but may summarize their client’s case. Before you begin your testimony, please clearly identify yourself for the record.”

Opening of Hearing:

“I now open the Public Hearing on this matter and ask for testimony from the Zoning Official.”

Testimony from Staff

Staff presents and explains background of case and provides a brief summary of the development and location. Staff reviews the requirements for granting a variance. Staff presents evidence and asks that it be admitted into evidence.

At the end of staff's testimony, ask: "Are there any questions from the Board?"

Testimony from Applicant/Proponents

"We will now hear from the applicant and other proponents of the request. If there are attorneys or other representatives who will give a general summary of the client's position, we would like you to go first."

Attorney or other representatives speak and then other witnesses and proponents.

At the end of each person's testimony, ask: "Are there any questions from the Board or staff?"

If a witness has a report, map or exhibit they want the Board to see, it should be submitted as evidence and officially ruled on before the board members are allowed to see it. First, the witness gives the exhibit to the chair and the chair states:

"Is there anyone here who would like to examine this or object to its admission?"

If no objection, the chair states: "As there are no objections, this evidence is admitted."

If there is an objection, the witness should be asked to give copies to objectors and the chair should rule on the objection and the admissibility of the evidence.

Testimony from Opponents

"We will now hear from people opposing the request. If there are attorneys or other representatives who will give a general summary of the client's position, we would like for you to go first."

Attorney or other representatives speak and then other witnesses and opponents.

At the end of each person's testimony, ask: "Are there any questions from the Board, the applicant or staff?"

Follow procedures above for the introduction of evidence. The Chair may limit testimony that is repetitious or irrelevant.

Rebuttal Evidence of Applicant

“We will now hear rebuttal evidence or arguments of the applicant.”

Applicant speaks and presents any rebuttal evidence.

At the end of the rebuttal evidence, ask: “Are there any questions from the Board?”

Rebuttal Evidence of Opponent

“We will now hear rebuttal evidence of any opponents.”

Opponents speak and present any rebuttal evidence limited to the issues raised by Applicant in rebuttal.

At the end of the rebuttal evidence, ask: “Are there any questions from the Board?”

Closing Statement of Zoning Official

“We will now hear a closing statement from the Zoning Official.”

Closing Statement of Applicant

“We will now hear a closing statement from the applicant.”

Closing Statement of Opponent

“We will now hear a closing statement from the opponents.”

Summary of Evidence by Chair

The chair will review documents accepted by the Board as evidence, identify witnesses who testified and allow an opportunity for the applicant and persons opposed to make objections and offer corrections to summary.

Close of Public Hearing

“Are there any additional questions from the Board? If not, I declare the Public Hearing closed and the Board will begin deliberations on the Variance Application.”



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ELLIOT VARIANCE REQUEST EXHIBIT LIST

AUGUST 27, 2015 BOARD OF ADJUSTMENT PUBLIC HEARING

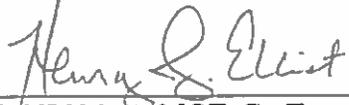
- Exhibit ELLIOT-1: Copy of Authorization to Make Application signed by Henry J. Elliot enabling Samsel Architects, PA to represent his interests in the matter of this hearing
- Exhibit ELLIOT-2: Copy of Variance Application and Application Addendum submitted by Samsel Architects, PA dated July 30, 2015
- Exhibit ELLIOT-3: Copy of subject property deed
- Exhibit ELLIOT-4: Copy of property survey prepared by Robert C. Watts for Henry Elliot dated November 31, 1978 illustrating the subject property
- Exhibit ELLIOT-5: Copy of Zoning Compliance Application submitted by Samsel Architects, PA dated June 22, 2015
- Exhibit ELLIOT-6: Copy of Zoning Determination Letter written by the Zoning Official, David Currie, addressed to Margaret Chandler of Samsel Architects, PA
- Exhibit ELLIOT-7: Copy of Zoning Checklist for Permit Applicants sent to Ms. Chandler and annotated by Mr. Currie which illustrates his reasoning behind the determination provided
- Exhibit ELLIOT-8: Partial copy of the Site Plan submitted by the applicant illustrating the proposed bathroom addition and the "implied setback" referenced in their application documents
- Exhibit ELLIOT-9: Copy of enlarged floor plan view of the proposed bathroom addition clearly illustrating the "line of existing encroachments"
- Exhibit ELLIOT-10: Copy of the Public Hearing Notice published in the *Black Mountain News* on August 13, 2015 and August 20, 2015
- Exhibit ELLIOT-11: Copy of Posting of Property Affidavit signed by the Zoning Official dated August 5, 2015
- Exhibit ELLIOT-12: Copy of Property Owner Notification Certification signed by the Zoning Official dated August 6, 2015
- Exhibit ELLIOT-13: Copy of completed Variance Submittal Checklist signed by the Zoning Official

Exhibit ELLIOT-14:

Copy of relevant sections of Montreat Zoning Ordinance, Articles VI & VII

AUTHORIZATION TO MAKE APPLICATIONS

We, HENRY J. ELLIOT and PAMELA ELLIOT REINHART, Co-Trustees under the Last Will and Testament of Henry Elliot, Jr., the owners of that real property identified in the Buncombe County tax records as PIN 0720-09-1108-00000 (the "Property"), do hereby authorize Samsel Architects, PA, or any of its owners, principals, or employees ("Samsel"), to make applications and filings to The Town of Montreat, or its departments or subdivisions, for development plans on the Property. Such applications and filings may cover, without limitation, zoning compliance, subdivision, variances, administrative appeals, building permits, grading permits, erosion and sedimentation control permits, or any other application to effect our development plans as communicated to Samsel.



HENRY J. ELLIOT, Co-Trustee
under the Last Will and Testament
of Henry Elliot, Jr.,

Date: July 30, 2015

PAMELA ELLIOT REINHART, Co-Trustee
under the Last Will and Testament
of Henry Elliot, Jr.,

Date: _____



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VARIANCE APPLICATION

I, MARGARET CHANDLER of Samsel Architects, PA, hereby petition the Board of Adjustment for a VARIANCE from the literal provisions of the Montreat Zoning Ordinance because, under the interpretation given to me by the Zoning Official, I am prohibited from using the parcel of land described in the attached application for a Certificate of Zoning Compliance in a manner shown by the plot plan attached to that form. I request a variance from the following Zoning Ordinance language [cite Section number(s)]: 710

FACTORS RELEVANT TO THE ISSUANCE OF A VARIANCE

The Board of Adjustment does not have unlimited discretion in deciding whether to grant a variance. According to the enabling language in the North Carolina General Statutes, the Board is required to reach three conclusions before it may issue a variance: (A) that there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the Ordinance; (B) that the variance is in harmony with the general purposes and intent of the Ordinance and preserves its spirit; and (C) that in granting the variance, the public safety and welfare have been assured and substantial justice has been done. In the spaces below, indicate the facts you intend to show and the arguments you intend to make to convince the Board that it can properly reach these required conclusions. **Additional sheets may be attached to this application where necessary.**

(A) **There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the Ordinance.** The courts have developed three rules to determine whether in a particular situation “practical difficulties or unnecessary hardships” exist. State facts and arguments in support of each of the following:

1. **The hardship of which the applicant complains is the result of a condition or existing features that are peculiar to the applicant’s land.** *(Note: Hardships suffered by the applicants in common with his/her neighbors do not justify a variance. There are extraordinary and exceptional conditions pertaining to the property in question due to its size, shape or topography that are not applicable to other land or structures in the same Zoning District. Also, unique personal or family hardships are irrelevant; a variance, if granted, runs with the land.)*

See Application Addendum.

2. **The special circumstances are not the result of the actions of the applicant.** (*Note: The act of purchasing property with knowledge that circumstances exist that may justify the granting of a variance shall not be regarded as a self-created hardship.*)

See Application Addendum

- (B) **The variance is in harmony with the general purpose and intent of the Ordinance and preserves its spirit.** State facts and arguments to show that the variance requested represents the *least possible deviation* from the letter of the Ordinance that will allow a reasonable use of the land. Also describe how the use of the property, if the variance is granted, will not substantially detract from the character of the neighborhood.

See Application Addendum.

- (C) **The granting of the variance secures the public safety and welfare and does substantial justice.** State facts and arguments to show that, on balance, if the variance is denied the benefit to the public will be substantially outweighed by the harm to the applicant.

See Application Addendum

1. **Granting the requested variance will not confer upon the applicant any special privileges that are denied to other residents of the Zoning District in which the property is located.**

See Application Addendum.

2. **A literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other residents of the district in which the property is located.**

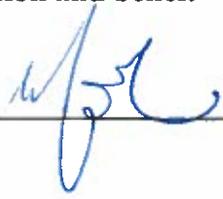
See Application Addendum.

3. **The variance is not to request a use of land, Building or Structure which is not permitted in the subject Zoning District.**

See Application Addendum.

I certify that all of the information presented by me in this application is accurate to the best of my knowledge, information and belief.

Signature of Applicant:



Date:

7/30/15

Exhibit ELLIOT - 2

APPLICATION ADDENDUM

A. There are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of the ordinance.

RESPONSE:

Mr. Phil Reinhart, one of the residents of the home on the owners' property, is handicapped as a result of complications suffered from knee replacement surgery. He has an antibiotic infuser installed in his leg that prevents him from bending his leg, and awaits the insertion of a permanent metal rod that will span the entire length of his leg. He cannot access or use the current bathing fixtures in the home, and will never be able to do so. The owners propose to construct a handicapped accessible curbless shower for his use. The most practical location for the shower requires construction in the area of an existing setback encroachment. The proposal to build within an existing setback encroachment is the basis for the Town of Montreat's denial of the owners' application for zoning compliance. There is no other location available for the installation of the necessary shower, and the absence of design solutions that do not encroach into the setback constitutes the hardship for which the owners seek a variance.

1. The hardship of which the applicant complains is the result of a condition or existing features that are peculiar to the applicant's land.

RESPONSE:

The owners' property is the location of a residence built in 1909, a year well before November 14, 1985, the test date for non-conforming structures under the Town of Montreat Zoning Ordinances (the "Ordinances"). The residence currently crosses over a setback line applicable to the owners' lot, and, as a result, is a non-conforming improved lot under Section 616.2 of the Ordinances. The most practical location for the owners' intended installation of a handicapped-accessible shower is within the area of the existing encroachment. The hardship results from the imposition of zoning rules and regulations 74 years after the construction of the home. The owners had no opportunity to plan around the setback line, including leaving room for future construction.

2. The special circumstances are not the result of the actions of the applicant.

RESPONSE:

The special circumstances with respect to the application of the Town's

setback rules to the owners' property are the result of the enactment of the Ordinances long after the construction of the owners' residence.

B. The variance is in harmony with the general purpose and intent of the Ordinance and preserves its spirit.

RESPONSE:

The intention of Section 710 of the Ordinances is to ensure that buildings are not constructed too closely to one another in order to preserve open space between buildings. The proposed addition encroaches 3'-2" into the side yard setback. The home already encroaches 5'-6" and 1'-11" into the same side yard setback, and the new encroachment is between the two existing encroachment points. The home will become no closer to the nearest property line than it already is. The encroachment does not pass over the line connecting the two existing points of encroachment. The proposed addition is in harmony with the intent to preserve open space between buildings since it does not bring the current home closer to any other building, blocks no views, and occupies minimal space.

C. The granting of the variance secures the public safety and welfare and does substantial justice.

RESPONSE:

As part of their variance application, the owners seek a "reasonable accommodation" under the Fair Housing Act (the "FHA"). Through the FHA, Congress has declared a public policy against discrimination against those with handicaps by denying them an equal opportunity to use and enjoy a dwelling of their choice. Zoning rules can constitute such discrimination, and to prevent that occurrence, the FHA requires cities to "change, waive, or make exceptions in their zoning rules to afford people with disabilities the same opportunity to housing as those who are without disabilities." See United States v. City of Philadelphia, 838 F. Supp. 223, 228 (E.D. Pa. 1993) (citation omitted), (emphasis added) aff'd, 30 F.3d 1488 (3rd Cir. 1994). Meeting the public policy of avoiding discrimination secures the public safety and welfare and does substantial justice. Under the FHA, the owners must demonstrate the following three things: (1) the reasonableness of the accommodation, (2) the necessity of the accommodation, and (3) an equal opportunity. See Bryant Woods Inn v. Howard County, 124 F.3d 597 (4th Cir. 1997)

The accommodation sought here is a variance from the setback rule of the Ordinances. The interpretation requested is that encroaching into an already established encroachment is not an increase in the encroachment. To be reasonable, an accommodation must not require a fundamental alteration of the

regulatory program, and must not impose an undue financial or administrative burden. The requested accommodation does not do either. It is a simple interpretation of the ordinance that does not need ongoing monitoring or administration and requires no additional expenditures. It is also fully supportable from a legal perspective. Other jurisdictions routinely interpret additional encroachment over a setback line not to be violations of setback rules so long as the distance of the encroachment does not increase. These interpretations are upheld on appeal to the courts. See, e.g., McKinney v. Kent County Bd. of Adjustment, 2002 Del. Super. LEXIS 164 (2002) (“any enlargement of a nonconforming structure cannot encroach any further into the setbacks than the current structure; the expansion, however, may encroach as much.”)

The requested accommodation meets the test of necessity in that it provides a direct solution to the effect of Mr. Reinhart’s disability. By permitting the installation of an accessible shower in the location dictated by architectural design, Mr. Reinhart will not experience the effects of his disability when bathing.

The requested accommodation also meets the requirement of providing an equal opportunity to Mr. Reinhart. He gets no special privilege and will be able to bathe in a dwelling of his choice just as a non-handicapped individual can do.

1. **Granting the requested variance will not confer upon the applicant any special privileges that are denied to other residents of the Zoning District in which the property is located.**

RESPONSE:

The owners seek a variance to allow one occupant of the house, the husband of one of the owners, to be able to remain in the house. Staying in a home of one’s choosing is not a special privilege.

2. **A literal interpretation of the provision of this Ordinance would deprive the applicant of rights commonly enjoyed by other residents of the district in which the property is located.**

RESPONSE:

Other residents of this zoning district enjoy the right of living in a home of their choosing in safety and comfort. The owners seek nothing more for one resident of their property.

3. **The variance is not to request a use of land, Building or Structure**

which is not permitted in the subject Zoning District.

RESPONSE: The property is located in the Town's R-1 zoning district. Under Section 700 of the Ordinances, single-family dwellings are a permitted use. The variance sought concerns the application of setback rules and does not seek to change the property's use from its current use as an allowed single-family dwelling.

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Doc ID: 028312730006 Type: CRP
 Recorded: 04/30/2015 at 01:49:32 PM
 Fee Amt: \$157.00 Page 1 of 6
 Revenue Tax: \$131.00
 Workflow# 0000278519-0002
 Buncombe County, NC
 Drew Reinsinger Register of Deeds
BK 5309 PG 53-58

NORTH CAROLINA SPECIAL WARRANTY DEED

Excise Tax: \$131.00

Parcel Identifier No. 0720-09-2270-00000 (p/o)

Mail/Box to: Begley Law Firm, PA (Box 9)

This instrument was prepared by: Wm. Michael Begley, Begley Law Firm, PA, a licensed North Carolina attorney. Delinquent taxes, if any, to be paid by the closing attorney to the county tax collector upon disbursement of closing proceeds.

Brief description for the Index:

THIS DEED made this 24th day of April, 2015, by and between

GRANTOR	GRANTEE
James N. Elliot, Jr. and wife, Linda F. Elliot 620 Halton Road, Apt. 11201 Greenville, SC 29607	Henry J. Elliot and Pamela Elliot Reinhart, Co-Trustees under the Last Will and Testament of Henry Elliot, Jr. 1890 Windham Park NE Atlanta, GA 30324

The designation Grantor and Grantee as used herein shall include said parties, their heirs, successors, and assigns, and shall include singular, plural, masculine, feminine or neuter as required by context.

WITNESSETH, that the Grantor, for a valuable consideration paid by the Grantee, the receipt of which is hereby acknowledged, has and by these presents does grant, bargain, sell and convey unto the Grantee in fee simple, all of Grantor's interest in and to that certain lot or parcel of land situated in the City of Montreat, Black Mountain Township, Buncombe County, North Carolina and more particularly described as follows:

Being all of Lots 546 and 547 as shown on a Plat of Mountain Retreat Association, which said Plat is duly recorded in the Office of the Register of Deeds for Buncombe County, North Carolina in Plat Book 16, Pages 92 through 97, inclusive, reference to which said Plat is hereby made for a more particular metes and bounds description of said Lots.

Book: 5309 Page: 53 Seq: 1

Exhibit ELLIOT - 3

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Together with the benefits and subject to the burdens of any rights Grantor may have over the existing driveway for purposes of ingress, egress and regress to and from the public right of way.

Each of the Grantor(s) by the execution of this document and the Grantee(s) by the acceptance of this conveyance, for said party and said party's heirs, successors and assigns, hereby

1. adopts as factually accurate those circumstances set forth in the Family History and History of Transfers of Montreat Property (hereafter the "History") attached hereto as Exhibit A and hereby incorporated by reference as if set forth herein verbatim;
2. adopts the analysis of ownership of the undivided interests set forth in the History as consistent with the best information currently available to said parties;
2. verifies that no claim for ownership is currently known to exist contrary to the History;
4. agrees that the respective undivided interests of members of the Elliot family as set forth in the History, as such interests may be held or transferred among such members of the Elliot family, from time to time, shall be deemed to be vested, prior to this and other contemporaneous conveyances, only as set forth in the History;
5. agrees not to assert any claim against the interest of any other member of the Elliot family who shall have held or transferred an interest in reliance upon the History if such claim is based upon evidence of ownership that later may be discovered or become known to exist otherwise than as set forth in the History; and
6. agrees later to execute such other documents as may be necessary or reasonably requested to bring ownership of said undivided interests, prior to this and other contemporaneous conveyances, and later resulting from transfers made in reliance upon the History, into conformity with ownership as set forth in the History and as hereby agreed.

The property hereinabove described was acquired by Grantor by instrument recorded in Book ____, page ____.

All or a portion of the property herein conveyed __ includes or X does not include the primary residence of a Grantor.

A map showing the above described property is recorded in Plat Book ____, page __.

TO HAVE AND TO HOLD the aforesaid lot or parcel of land and all privileges and appurtenances thereto belonging to the Grantee in fee simple.

And the Grantor covenants with the Grantee, that Grantor has done nothing to impair such title as Grantor received, and Grantor will warrant and defend the title against the lawful claims of all persons claiming by, under or through Grantor, other than the following exceptions: Easements, restrictions, rights of way of record, zoning ordinances of the Town of Montreat.

IN WITNESS WHEREOF, the Grantor has duly executed the foregoing as of the day and year first above written.

James N. Elliott, Jr. (SEAL)
James N. Elliot, Jr.

Linda F. Elliot (SEAL)
Linda F. Elliot

State of South Carolina - County of Greenville

I, the undersigned Notary Public of the County and State aforesaid, certify that JAMES N. ELLIOT, JR. and wife, LINDA F. ELLIOT, who are known to me or proved to me on the basis of satisfactory evidence to be the persons described, personally appeared before me this day and acknowledged the due and voluntary execution of the foregoing instrument for the purposes therein expressed. Witness my hand and Notarial stamp or seal this 30 day of April, 2015.

NOTARY SEAL



Mary P. Wald
Notary Public

My Commission Expires: 2-29-2020

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EXHIBIT A

FAMILY HISTORY AND HISTORY OF TRANSFERS OF MONTREAT PROPERTY

- A. Agreement of Parties as to Family History.** Upon information and belief, the parties hereto do hereinafter set forth their understanding of the family history of Effie McL. Elliot, who died as a widow in Florida in or about 1963, and those circumstances they believe to be relevant to their respective interests in Montreat property owned by various members and descendants of the Elliot family; and to that end, the parties hereby agree for themselves, their heirs and successors and assigns, (i) to adopt said family history and circumstances as binding upon said parties for purposes of this conveyance and other conveyances made contemporaneously herewith, together with consideration given and received for such conveyances, and (ii) to execute such later documents as may be necessary to align the actual ownership interests in the real property to the interests in the real property intended to be conveyed hereby to the extent that such actual ownership may later be determined to deviate from the ownership resulting from this conveyance and such other contemporaneous conveyances.
- B. Ownership of Montreat Property by Effie McL. Elliot.**
1. **Lots 546 and 547.** At the time of her death, Effie McL. Elliot was the sole owner of real property described as Lots 546 and 547 shown on a Plat of Mountain Retreat Association, which said Plat is duly recorded in the Office of the Register of Deeds for Buncombe County, North Carolina in Plat Book 16, Pages 92 through 97, inclusive, reference to which said Plat is hereby made for a more particular metes and bounds description of said Lots, having acquired said Lots in 1910 by Deeds recorded in Deed Book 170, Page 433 (Lot 547) and Deed Book 171, Page 521 (Lot 546).
 2. **Undivided Interest in Lots 537 and 538.** Also, at the time of her death, Effie McL. Elliot was the owner of a 1/4 undivided interest in real property described as Lots 537 and 538 shown on a Plat of Mountain Retreat Association, which said Plat is duly recorded in Plat Book 16, Pages 92 through 97, inclusive, reference to which said Plat is hereby made for a more particular metes and bounds description of said Lots, having acquired said 1/4 undivided interest in said Lots in 1952 by a Deed recorded in Deed Book 721, Page 142, which said deed also conveyed a 1/4 undivided interest to each of the three children of Effie McL. Elliot, namely, Mary Effie Elliot, Henry Elliot, Jr., and James N. Elliot.
- C. Title Passes from Effie McL. Elliot.** After the death of their mother, Effie McL. Elliot, the three children of Effie McL. Elliot, namely, Mary Effie Elliot, Henry Elliot, Jr., and James N. Elliot, each owned a 1/3 (being 4/12) undivided interest in the aforesaid Lots (537, 538, 546, 547), each having acquired his or her respective 1/3 undivided interest as follows:
1. **Lots 537 and 538.** Each of said children of Effie McL. Elliot became the owner of a composite 1/3 (being 4/12) undivided interest, consisting of
 - a. a 1/4 (being 3/12) undivided interest by prior ownership, and
 - b. a 1/3 of a 1/4 (being 1/12) undivided interest by inheritance, and
 2. **Lots 546 and 547.** Each of said children of Effie McL. Elliot became the owner of a 1/3 (being 4/12) undivided interest by inheritance.

D. Title Passes from Children of Effie McL. Elliot.

1. **Interest of Mary Effie Elliot.** Mary Effie Elliot conveyed her interest in all of said Lots (537,538,546,547) by gift through a Special Warranty Deed dated December 18, 1990 recorded in deed book 1634 page 584 to her nieces and nephews, namely Pamela E. Reinhart, Francis E. Kempen, Henry J. Elliot, Susan E. Clineburg, and James N. Elliot, Jr., thereby vesting in each a 1/5 of a 1/3 (being 1/15) undivided interest in said Lots.
2. **Interest of Henry Elliot, Jr.** Henry Elliot Jr. died on or about August 19, 1984, and his estate was probated by ancillary administration filed in the Office of the Clerk of Superior Court for Buncombe County, North Carolina in File 85E934. Pursuant to his Last Will and Testament, Henry J. Elliot, Ancillary Administrator, C.T.A. of the Estate of Henry Elliot Jr., Deceased conveyed the 1/3 undivided interest in the aforesaid Lots (537, 538, 546, 547) to Henry J. Elliot and Pamela Elliot Reinhart, Co-Trustees under the Last Will and Testament of Henry Elliot Jr. by Deeds recorded in Book 1523, Page 685 and Book 1583, Page 642.
3. **Interest of James N. Elliot.** James N. Elliot died on or about July 23, 1991 in Atlanta Georgia, and his estate was probated by ancillary administration filed in the Office of the Clerk of Superior Court for Buncombe County, North Carolina through which his 1/3 undivided interest in the aforesaid Lots (537, 538, 546, 547) was transferred in equal shares to his children Susan Elliot Clineburg, and James N. Elliot, Jr., resulting in each child owning a 1/6 undivided interest in said Lots.
4. **Resulting Interests after the Death of All of the Children of Effie McL. Elliot.** Ownership of the aforesaid Lots (537, 538, 546, 547) following the death of all of the children of Effie McL. Elliot was vested as follows:
 - a. 1/15 (or 2/30) Pamela Elliot Reinhart
 - b. 1/15 (or 2/30) Frances Elliot Kempen
 - c. 1/15 (or 2/30) Henry J. Elliot
 - d. 7/30 Susan Elliot Clineburg, consisting of
 - (1) 1/15 (or 2/30) and
 - (2) 1/6 (or 5/30)
 - e. 7/30 James N. Elliot, Jr., consisting of
 - (1) 1/15 (or 2/30) and
 - (2) 1/6 (or 5/30)
 - f. 1/3 (or 10/30) Henry J. Elliot and Pamela Reinhart, Co-Trustees

30/30 = 100% Total

E. Acquisition of Additional Property. All of the owners by the same respective undivided interests as set forth in the preceding Section B, Subsection 4 acquired additional property as follows:

1. **Property Acquired by Road Closing.** By closure of a platted right of way, thirty (30) feet in width and adjoining the Eastern boundary of said Lots 537 and 538, said owners acquired Lot 2 and Lot 3 shown on a Plat duly recorded in Plat Book 63, Page 167.

6

2. **Property Exchange.** Subsequent to said road closing, said owners conveyed said Lot 2 to Margaret P. Flowers by Deed recorded in Book 1888, Page 508 in exchange for conveyance by Margaret P. Flowers to said owners of Lot 10 shown on Plat Book 63, Page 167, being a strip of land 8.88 feet in width along the entire Southern boundary of said Lot 537, by Deed recorded in Book 1888, Page 503.

F. **Further Conveyance by Susan Elliot Clineburg.** By Deed recorded in Book 5271, Pages 1405-1407, Susan Elliot Clineburg conveyed her entire undivided interests (7/30) in said Lots 537, 538, 546 and 547 to her three children, Allison C. Hopkins, Melissa M. Clineburg, and Patricia L. Clineburg, thereby vesting in each of said children a 7/90 undivided interest. This conveyance failed to include her undivided 7/30 interest in said Lot 3 and said Lot 10, but Susan Elliot Clineburg intends to convey her undivided interest in these Lots to her three children immediately prior to the contemporaneous transactions contemplated by all of the owners.

G. **Inheritance and Further Conveyance of Undivided Interest Formerly Owned by Frances Elliot Kempen, Deceased.** Frances Elliot Kempen died on or about February 8, 2001 a resident of Kern County, California, and her Last Will and Testament was admitted for ancillary administration in Buncombe County, North Carolina (see File 03-E-194). By the terms of said Will, her undivided 1/15 interest in the aforesaid Lots 537, 538, 546, 547, 3 and 10 were devised to Co-Trustees of a "Family Trust" (see Will). The Co-Trustees of the Family Trust conveyed said undivided interest to Co-Trustees of a "Credit Shelter Trust by Deed recorded in Book 3566, Pages 291-294 (see Deed and recitals contained therein). The Co-Trustees of the Credit Shelter Trust conveyed said undivided interest to John Harold Kempen (1/30) and Laura Charlotte Kempen (1/30), as tenants in common by Deed recorded in Book 3571, Pages 728-730 (see Deed and recitals contained therein).

H. **Current Ownership Preceding Contemporaneous Transactions.** Ownership of the aforesaid Lots 537, 538, 546, 547, 3 and 10, following the intended conveyance specified in the last sentence of the preceding Section F, will be vested as follows:

- 1. 2/30 Pamela Elliot Reinhart
 - 2. 1/30 John Harold Kempen
 - 3. 1/30 Laura Charlotte Kempen
 - 4. 2/30 Henry J. Elliot
 - 5. 7/90 Allison C. Hopkins
 - 6. 7/90 Melissa M. Clineburg
 - 7. 7/90 Patricia L. Clineburg
 - 8. 7/30 James N. Elliot, Jr.
 - 9. 10/30 Henry J. Elliot and Pamela Reinhart, Co-Trustees
- 30/30 = 100%

828-254-7316 fax
808-253-1124

0001

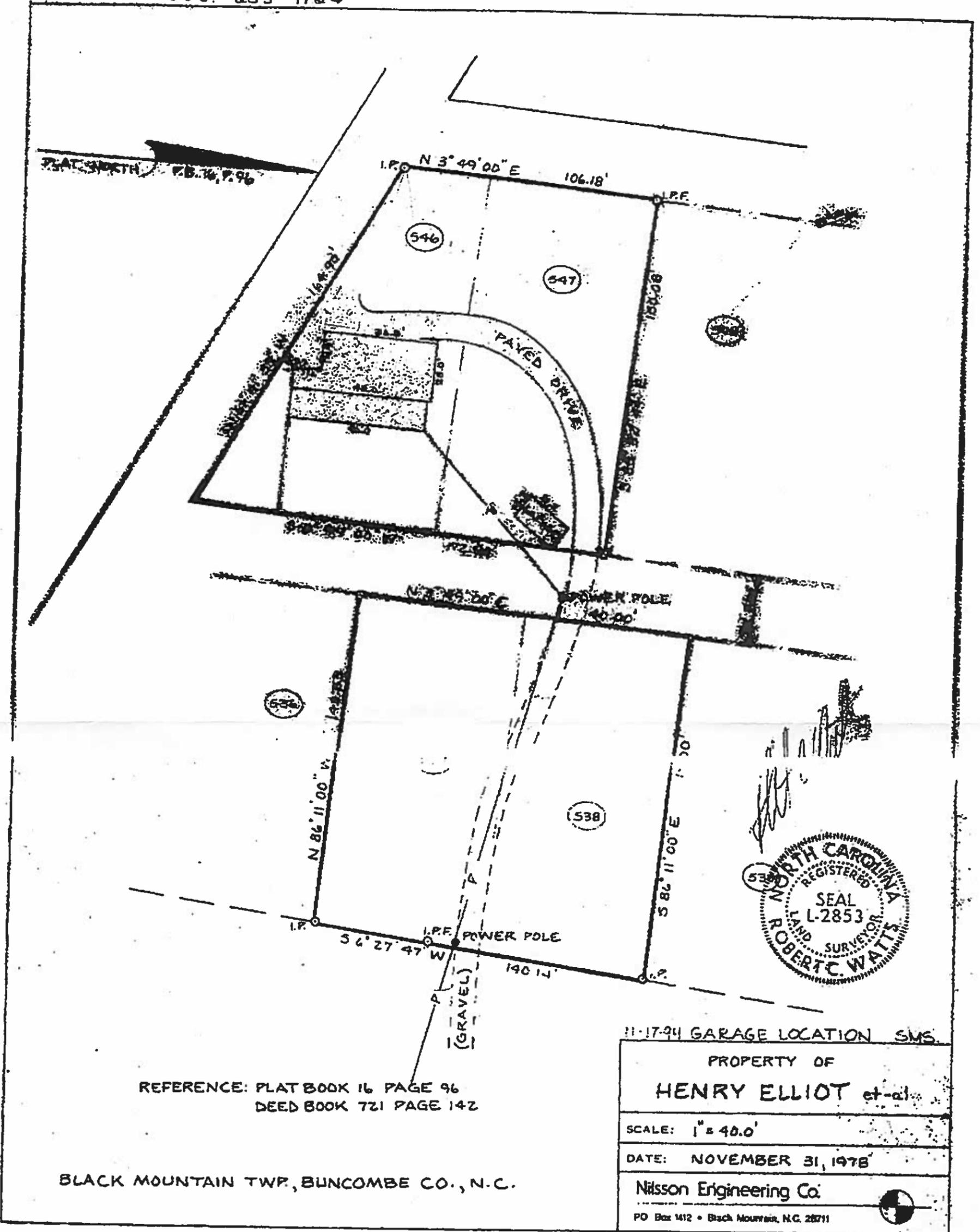
KINKOS NORTHLAKE

10/19/00 THU 16:30 FAX 770 270 0066

0002

KINKOS NORTHLAKE

10/19/00 THU 15:31 FAX 770 270 0066



REFERENCE: PLAT BOOK 16 PAGE 96
DEED BOOK 721 PAGE 142

BLACK MOUNTAIN TWP, BUNCOMBE CO., N.C.

11-17-94 GARAGE LOCATION SMS.
PROPERTY OF HENRY ELLIOT et al
SCALE: 1" = 40.0'
DATE: NOVEMBER 31, 1978
Nilsson Engineering Co.
PO Box 1412 • Black Mountain, N.C. 28711

78-086

Elliot family owns lots 537, 538, 546 + 547.

Exhibit ELLIOT - 4



COPY

TOWN OF MONTREAT

ZONING AND INSPECTIONS DEPARTMENT
P. O. Box 423
Montreat, NC 28757
Tel: (828)669-8002, ext. 303
Fax: (828)669-3810
www.townofmontreat.org

ZONING COMPLIANCE APPLICATION AND CERTIFICATE

Project Address: 523 Big Piney Rd Montreat, NC 28757
PIN#: 0720-09-0122 & 0720-09-1108 Zoning District: R-1
Parcel Tax ID Sheet #: Lot#: 546 Private Lot #:
Owner Name: Pamela Reinhart & Henry Elliot
Mailing Address: 821 Kirk Rd
City: Decatur State: GA ZIP: 30030
Owner Phone: 404.858.9571 Email: p.reinhart@yahoo.com
Contractor/Agent Name: Samsel Architects
Contractor/Agent Mailing Address: 609 ... State: NC ZIP: 28801
City: Asheville License #:
Contractor/Agent Phone: 828.253.1124
Contractor/Agent E-mail: margaretc@samselarchitects.com

DENIED

Short description of proposed project and intended use: In the proposed design, a handicap-accessible shower is installed. Because it already encroaches over the lot's zoning setback line, the home is a non-conforming structure on which maintenance is permitted. The proposed maintenance activity does not expand the encroachment over the existing setback line.

Special Conditions, C.U.P. or Variance Granted? Yes (see attached) No

This is to certify that I, the Owner/Contractor/Agent, am aware of the zone the lot is in, the purpose for which the zone is used, the minimum setbacks for the lot, the maximum building height, the off-street parking requirements and the fact that drainage during and after construction is m responsibility. These plans conform to the Town of Montreat's present Zoning Ordinance. The contractor shall protect adjacent properties and the general public and shall be responsible for all damages that occur during construction. Driveways are NOT automatically included in the zoning and building permits.

Signature of Owner/Contractor/Agent

Date 6.22.15

This is to certify that I, the Code Administrator for the Town of Montreat, North Carolina, have reviewed the attached plans and hereby deem the intended use of the structure and/or lot to be in full compliance with the Zoning Ordinance of the Town.

Signature of Code Administrator

Date 6/26/2015

FOR OFFICE USE ONLY

Permit Fee: \$ 35.00 Cash: \$ Check #: 20309 Date Paid: 6/26/2015



Town of Montreat
Office of the Zoning Administrator

July 2, 2015

Margaret Chandler
Samsel Architects, P.A.
60 Biltmore Ave.
Asheville, NC 28801

Dear Ms. Chandler:

On June 26, 2015 you submitted an application for zoning compliance to erect a small bathroom addition to the detached single-family residential structure on portions of Lot #546 & 547 located at 523 Big Piney Road in Montreat. The parcel (#0720-09-1108-00000) is currently listed with Buncombe County Register of Deeds as owned by Henry J. Elliott (Trustee) (Et Al) of Atlanta, Georgia. The subject property is located within the R-1 (Low Density) Residential District which establishes a minimum fifteen feet (15') building side-yard setback requirement from the property line.

The following items I note in reference to your request:

1. The submitted site plan also lists Lot #547 [separately] as bearing a parcel identifier # 0720-09-0122-00000 for which I find no record.
2. The proposed addition to the southern face of the structure is in violation of the setback requirement as provided in Montreat Zoning Ordinance, Article VII, Section 700 – Zoning District Regulations. Based upon my evaluation of the site plan you provided, the proposed addition encroaches approximately four feet (4').
3. The site plan you provided also references the term “implied setback,” ostensibly created by drawing a line connecting the southern portion of structure corners that already encroach the setback line – a term which has no defined basis in our ordinance.

Given the nature of the submitted plans and documentation, *I must hereby deny your request.*

At this point you have multiple options:

1. Do not pursue the matter further;
2. Reapply for a zoning compliance permit with necessary modifications to comply with the referenced ordinance requirements;
3. Appeal this decision to the Zoning Board of Adjustment within thirty (30) days of receipt of this letter if you feel my interpretation of the Zoning Ordinance text and/or determination is in error;

4. Seek a variance from the Zoning Ordinance requirements through the Zoning Board or Adjustment; or
5. Seek to have the Montreat Board of Commissioners amend the Zoning Ordinance.

Please let me know if you plan to pursue items numbered 3-5 so that I may send you the proper forms. If you have questions or if I can be of further assistance in this matter, please do not hesitate to contact me at (828) 669-8002.

Sincerely,



David E. Currie, CFM, CZO
Building Inspector/Code Administrator
Town of Montreat

Zoning Checklist for Permit Applicants

NO building permit shall be issued involving new construction, addition to, or the alteration of, existing structure footprints without first applying for a Certificate of Zoning Compliance with the Town of Montreat

- The Site Plan must provide complete details of the driveway location and dimensions, as well as compliance with required parking accommodations. *(Requests for on-street parking intended to meet a portion of the overall required parking accommodations for the site shall be considered on a case-by-case basis by the Town Administration)*

A complete Site Plan includes:

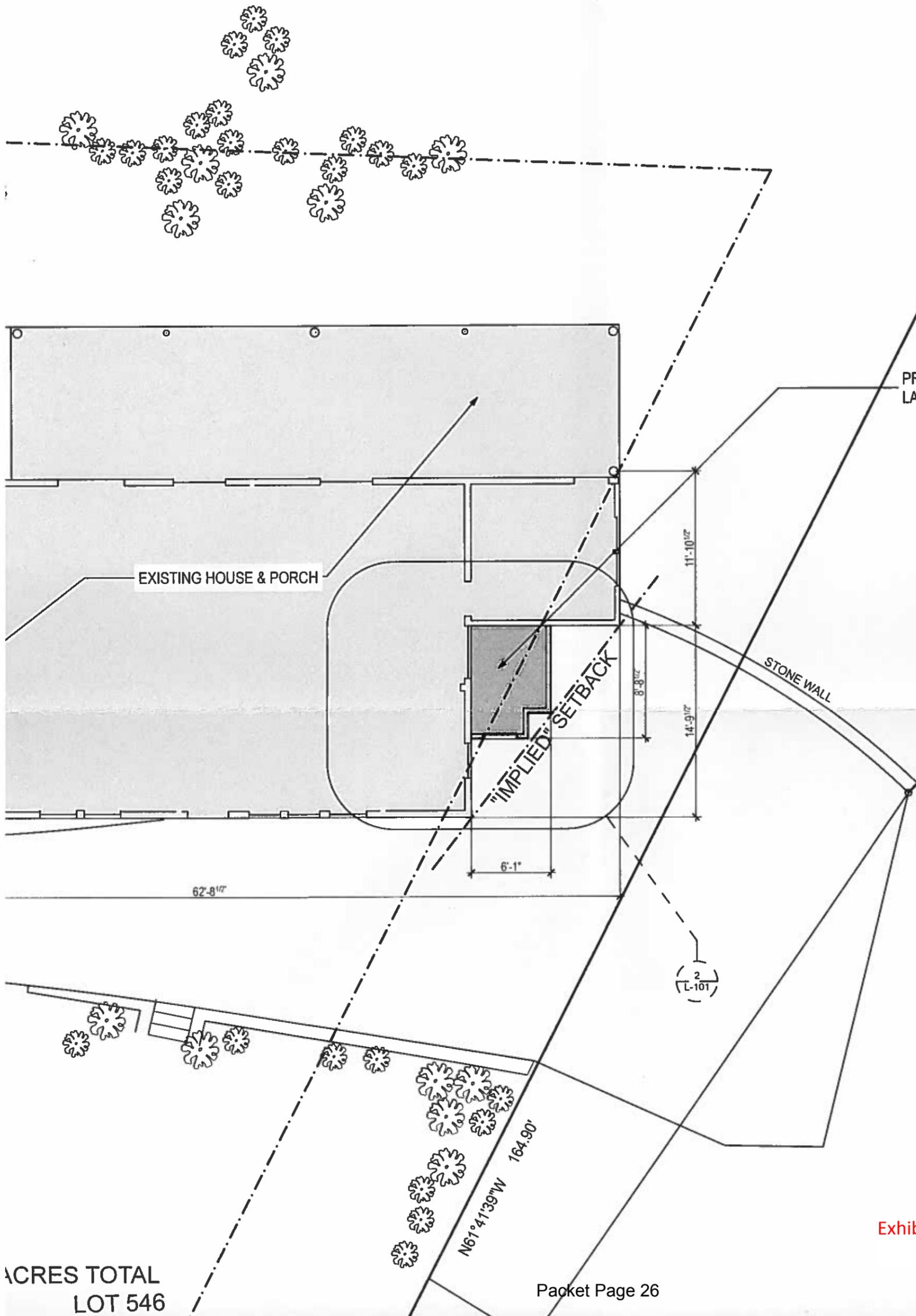
- Orientation referencing north meridian;
 - Scale of the drawing;
 - Boundaries and acreage (or square feet) of the parcel;
 - Adjacent streets and any easements;
 - Existing and/or proposed structures including clearly delineated setback lines;
 - Structure dimensions and separation distance(s);
 - Utility locations – existing or proposed;
 - Contour interval – showing pre- and post-construction contours; and
 - Clear graphic representation of any proposed alterations, additions or details indicating changes to the topography or site characteristics. *This includes the location and details of any existing or proposed Stormwater Control Measures (SCM's) associated with the parcel.*
- An as-built survey must be provided for any construction project where a finished structure is located at or near the required setback line(s).
- A landscaping plan must be submitted for all commercial projects and – at the discretion of the Zoning Official – may be required for residential projects as well.
- The project must be evaluated for additional requirements under the Hillside Development Ordinance and Stormwater Management Ordinance, which may involve the applicant hiring a *N.C. Registered Design Professional* to prepare supplemental calculations and project specifications to achieve compliance.
- An Erosion and Sediment Control Plan must be included with the permit application submittal if there is to be any grading associated with the proposed scope of work.
- The proposed project must be a permitted use in the zoning district associated with the structure location(s) - **NO** use variances are permitted. (See MZO – Table 700)
- No expansion of an existing non-conforming structure is permitted without first securing a variance from the Zoning Board of Adjustment. **Expansion includes: vertical or horizontal enclosure above, below or adjacent to existing improvements that do not conform to the current provisions of the zoning ordinance. (See MZO – Article VI, Section 616)**

Adding enclosed square footage beyond the existing setback line violates the zoning ordinance and is not considered "maintenance" of a non-conforming structure. There is no "implied setback" defined in the zoning ordinance.

Exhibit ELLIOT - 7

S3°49'00"W 172.86'

PROPERTY LINE



PROPOSED SHOWER/
LAVATORY ADDITION

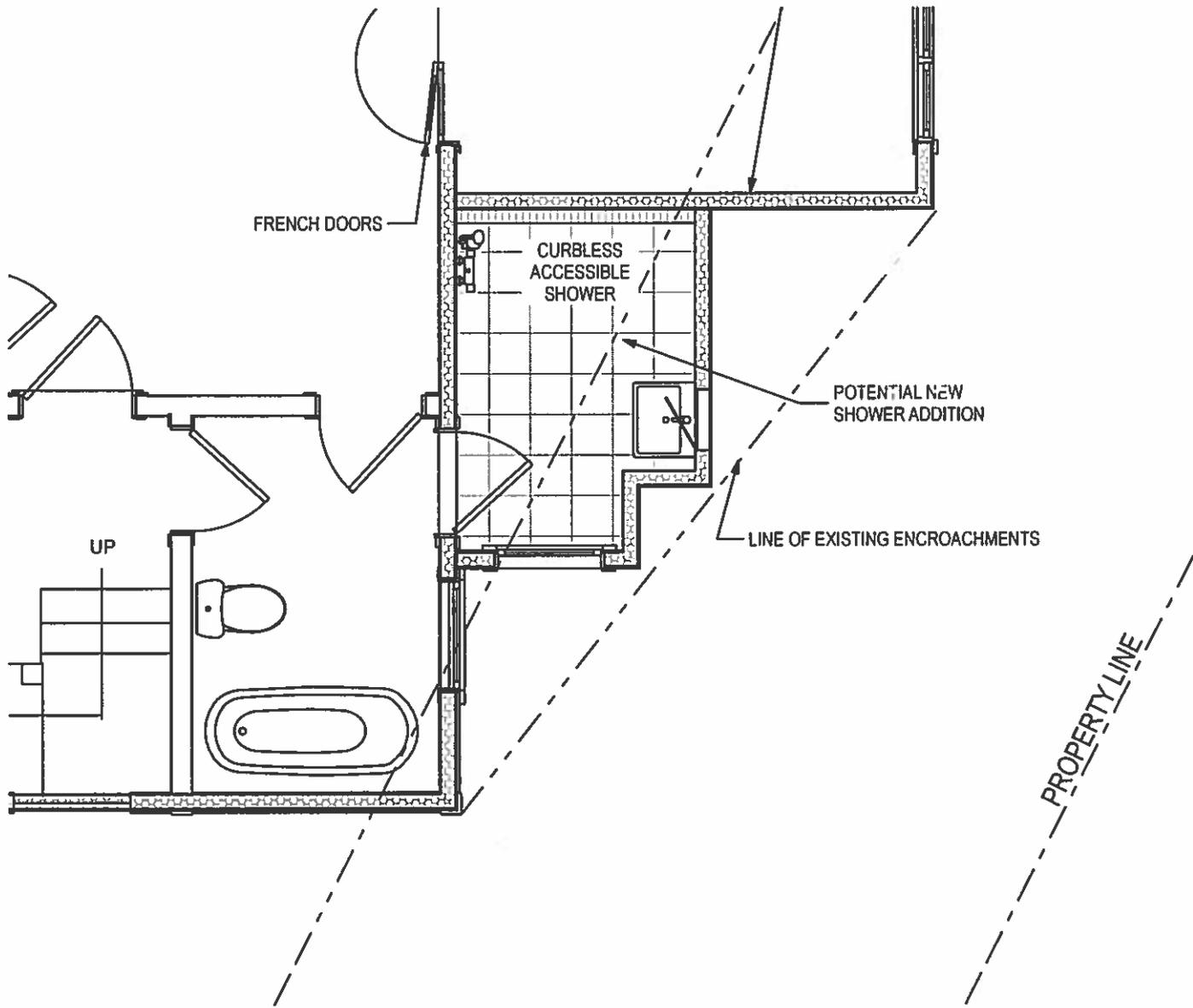
EXISTING HOUSE & PORCH

"IMPLIED" SETBACK

STONE WALL

(2)
(L-101)

ACRES TOTAL
LOT 546



2

NEW BATH PLAN

SCALE: 1/4" = 1'-0"

Exhibit ELLIOT - 9



TOWN OF MONTREAT

P. O. Box 423
Montreat, NC 28757
Tel: 828.669-8002 Fax: 828.669-3810
www.townofmontreat.org

PUBLIC HEARING NOTICE – VARIANCE REQUEST

**Thursday, August 27, 2015 – 7:30 p.m.
Walkup Building**

The Montreat Board of Adjustment will hold a Public Hearing on Thursday, August, 27, 2015 at 7:30 p.m. or as soon as possible thereafter in the Walkup Building, 300 Community Center Circle, Montreat, NC.

The purpose of the hearing is to consider a Variance Application to reduce the required fifteen foot (15') side yard setback to eleven feet (11') pursuant to construction of a small bathroom addition on Big Piney Rd. in Montreat. The property is zoned R-1 Low Density Residential and is further described as PIN# 0720-09-0198-00000.

The Town of Montreat will comply with the American Disabilities Act (ADA), which prohibits discrimination on the basis of disability. Anyone needing special accommodations when attending this meeting and/or if this information is needed in alternative format because of a disability, please contact Deputy Town Clerk Stefan Stackhouse at (828) 669-8002 or sstackhouse@townofmontreat.org, or the North Carolina Division of Services for the Deaf and Hard of Hearing – Asheville Regional Office at (800) 681-7998 or TTY (800)-681-8035.

This meeting is open to the public.

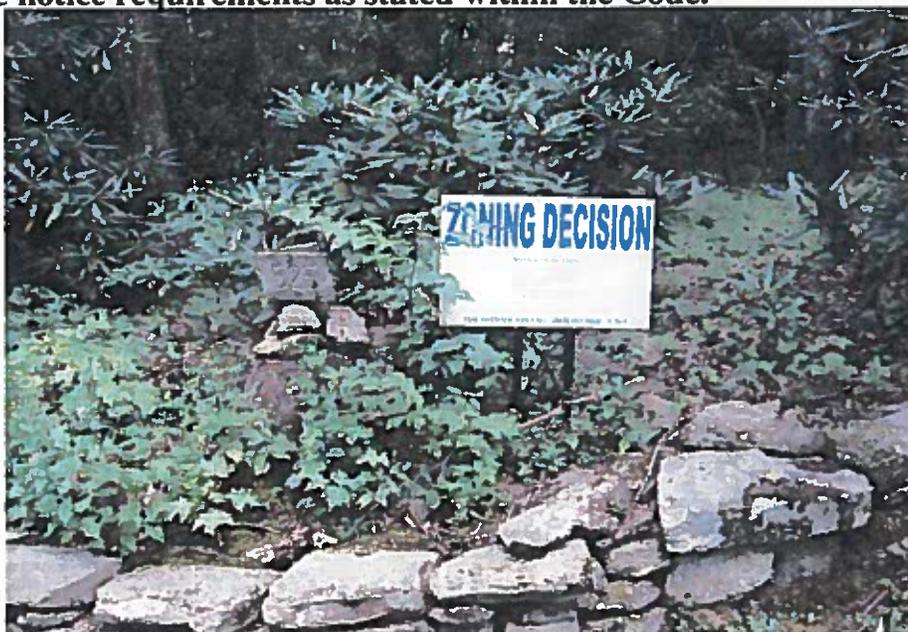
Stefan Stackhouse
Deputy Town Clerk

Exhibit ELLIOT - 10



TOWN OF MONTREAT POSTING OF PROPERTY AFFIDAVIT

This affidavit is required from the Town Planning and Inspections Department when the provisions of the Town Of Montreat Code require that notice be posted on a property subject to the notice of a scheduled public hearing or notice of violation. This affidavit shall serve to demonstrate that the Town is in compliance with the applicable notice requirements as stated within the Code.



Failure to comply with the applicable notice requirements shall result in the postponement and re-noticing of the public hearing or notice of violation.

I certify that on the 5 day of August, 2015 in accordance with Section 1204(D) of the Town Code and other applicable regulations, sign(s) were posted on the property located at 523 Big Piney Rd. (physical address) with the PIN No. 0720-09-1108 so as to be clearly seen from approach to property entrance/right-of-way giving notice to file No. ZV2015-3.

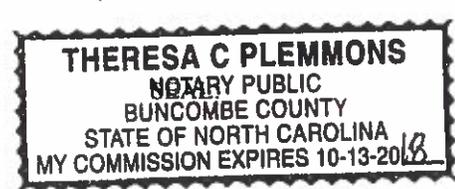
[Handwritten Signature]
Signature of Town Staff

David Currie
Print Name

Sworn and subscribed before me this 5th day of August 2015.

[Handwritten Signature]
Signature of Notary Public

Personally Known / Produced Identification.
Type of ID Produced NCAL





TOWN OF MONTREAT

P. O. Box 423
Montreat, NC 28757
Tel: (828)669-8002 Fax: (828)669-3810
www.townofmontreat.org

Property Owner Notification Certification

The following property owners were notified by first class mail on August 6, 2015 of the Variance Hearing scheduled for August 27, 2015 for the Variance Application submitted by Henry Elliot

<u>NAME</u>	<u>PARCEL ID</u>
James E. & Jane Anderson	0710-99-8047-00000
Philip S. Arnold	0720-09-2497-00000
Brownie House LLC	0720-09-2387-00000
Henry Elliot	0720-09-2270-00000
Ann Kelso & Daniel Hewitt	0710-99-9329-00000
John & Edith Kuhnle	0720-09-5247-00000
David Marshall & Mary Sandifer (Et Al)	0720-09-1208-00000
Grace McKinnon	0720-09-1305-00000
Jerry M. Newbold Jr.	0720-09-1412-00000
Eric & Grace Nichols	0710-99-7590-00000 & 0710-99-9437-00000
Pamela E. Reinhart	0720-09-2288-00000; 0720-09-2163-00000 & 0720-09-4240-00000
Margaret Flowers Rich & Benjamin Scott Rich (Et Al)	0720-09-3058-00000

Certified By:


David Currie, Zoning Administrator


Date



Variance Submittal Checklist

The applicant for a variance request shall submit the following materials to satisfy the minimum requirements of a complete application package:

- Completed variance request application form provided by the Town;
- Neatly-drawn scale map of the property showing the location of any building(s) or improvement(s) that are the subject of the requested variance or appeal, with all adjoining street/road frontage illustrated;
- N/A If the appeal or variance request concerns the elevation of a building, a drawing providing elevation views of the building(s) and other improvements located on the property that are the subject of the requested variance or appeal;
- A copy of the deed indicating current ownership of the subject property;
- A copy of the plat or recent survey, if available, showing such property;
- N/A Any contract to purchase or other relevant documentation;
- A fee set by the Town as listed in the current fee schedule as adopted by Town Council;
- Any other materials reasonably required by the Chair of the Board of Adjustment.

I, David Currie, Zoning Official for the Town of Montreat have reviewed the attached material for completeness in the matter of Henry Elliot and a requested variance, and hereby verify that the submittal meets the minimum requirements of Article XII, Section 1204(B) of the Montreat Zoning Ordinance.

David E. Currie

Signature

7/31/2015

Date

Exhibit ELLIOT - 13

Montreat Zoning Ordinance

Article VI

616.2 Non-Conforming Improved Lots.

- 616.21 A non-conforming improved lot is a lot upon which a Structure was located on November 14, 1985, but which does not meet the minimum requirements for the zoning district in which it is located. This definition includes situations where both the lot and Structure are non-conforming and where only the lot is non-conforming.
- 616.22 Any improvement on a non-conforming improved lot may be used, without expansion, by a conforming use or may be expanded in accordance with the following requirements:
- 1) If a non-conforming improved lot adjoins one or more lots in the same ownership at any time since November 14, 1985, then the provisions of this Section shall not apply to such non-conforming improved lot until the owner of the non-conforming improved lot combines the non-conforming improved lot with the adjoining lot or lots to create one lot. The intent of this Subsection is to require non-conforming lots to be combined with other lots to create conforming lots under the circumstances specified herein; and
 - 2) Any expansion of any improvement on a non-conforming improved lot must comply with all other minimum requirements for the zoning district in which the non-conforming improved is located or a variance must be obtained from the Zoning Board of Adjustment.

616.3 Non-Conforming Structures on Conforming Lots.

- 616.31 A non-conforming Structure on a conforming lot is a Structure which was in existence on November 14, 1985, but which does not meet the minimum requirements for the zoning district in which it is located but which is located on a lot which does conform to the zoning district regulations.
- 616.32 A non-conforming Structure on a conforming lot may continue to be used in and may be expanded in accordance with all other minimum requirements of this Ordinance or a variance obtained from the Zoning Board of Adjustment.

Article VII

701.4 Minimum Lot Area.

701.41 **Ten thousand (10,000) square feet for all Single-family Dwellings.**

701.42 Fifteen thousand (15,000) square feet for Two-family Dwellings.

701.43 Fifteen thousand (15,000) square feet for other uses.

701.5 Minimum Lot Width. **Seventy-five feet (75').**

701.6 Minimum Lot Depth. **One hundred feet (100').**

701.7 Minimum Front Yard. **Thirty feet (30').**

701.8 Minimum Side Yard.

701.81 **Single-family and Two-family Dwelling Units: Fifteen feet (15')**

**Town of Montreat
Board of Adjustment
Variance Consideration Worksheet
Elliot Public Hearing
August 27, 2015**

Applicant: Henry J. Elliot
Property Location: 523 Big Piney Road, PIN# 0720-09-1108-00000
Proposed Use of Property: Single-Family Dwelling Addition
Zoning District: R-1 Residential District

I. Completeness of Application:

- The application is complete.
 - The application is incomplete in the following ways:
-
-

II. Compliance with Factors Relevant to the Issuance of a Variance (North Carolina General Statutes and Montreat Zoning Ordinance Section 1203)

(A) There are unnecessary hardships in the way of carrying out the strict letter of the ordinance. The courts have developed the following rules to determine whether in a particular situation “unnecessary hardships” exist. Facts and arguments must be presented in support of each of the following:

- 1. The hardship of which the applicant complains is the result of a condition or existing features that are peculiar to the applicant’s land.** There must be extraordinary and exceptional conditions pertaining to the property in question due to its size, shape or topography that are not applicable to other land or buildings in the same Zoning District. *(Note: Hardships suffered by the applicants in common with his/her neighbors do not justify a variance. Also, unique personal or family hardships are irrelevant, since a variance, if granted, runs with the land.)*

This conclusion is based in the following **Finding(s) of Fact:**

2. **The special circumstances are not the result of the actions of the applicant(s).**
(Note: Purchasing property with knowledge that circumstances exist that may justify a variance is not considered a self-created hardship.)

This conclusion is based in the following **Finding(s) of Fact**:

- (B) The variance is in harmony with the general purpose and intent of the ordinance and preserves its spirit.** Arguments and facts must be presented showing that the requested variance represents the least possible deviation from the letter of the Ordinance(s) that will allow a reasonable use of the land, and that the use of the property will not substantially detract from the character of the neighborhood.

This conclusion is based in the following **Finding(s) of Fact**:

- (C) The granting of the variance secures the public safety and welfare and does substantial justice.** Arguments and facts must be presented showing that if the variance is denied, the benefit to the public will be substantially outweighed by the harm to the applicant(s).

This conclusion is based in the following **Finding(s) of Fact**:

-
- 1. Granting the requested variance will not confer upon the applicant(s) any special privileges that are denied to other residents of the Zoning District in which the property is located.**

This conclusion is based in the following **Finding(s) of Fact**:

- 2. A literal interpretation of the provisions of this Ordinance would deprive the applicant(s) of rights commonly enjoyed by other residents of the Zoning District in which the property is located.**

This conclusion is based in the following **Finding(s) of Fact**:

- 3. The variance is not to request a use of land, Building or Structure which is not permitted in the subject Zoning District.**

This conclusion is based in the following **Finding(s) of Fact**:

III. Granting the Application

- The application is granted, subject to the following conditions:
 1. Any variance granted by the Board of Adjustment must be acted upon within six months or it shall become null and void. The Board of Adjustment may grant one six-month extension of a variance if so requested by the applicant.
 2. Other Conditions: _____

IV. Denying the Application

- The application is denied because it is incomplete for reasons set forth above in Section I.

- The application is denied because, if completed as proposed, the development probably (insert one or more reasons from Section II):

- For the following reasons:

