

IN THE WEST VIRGINIA SUPREME COURT OF APPEALS

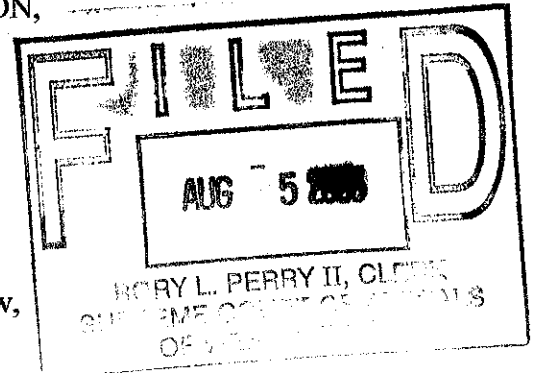
MAPLEWOOD ESTATES HOMEOWNERS ASSOCIATION,
an unincorporated association, Petitioner Below,

Appellee,

vs.) No. 32780

PUTNAM COUNTY PLANNING COMMISSION and
SHERMAN AND HELENE BENNETT, Respondents Below,

Appellants.



**JOINT BRIEF OF THE APPELLANTS,
SHERMAN AND HELENE BENNETT
AND THE PUTNAM COUNTY PLANNING COMMISSION**

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**I. THE KIND OF PROCEEDING AND NATURE OF THE RULING IN THE LOWER
TRIBUNAL.**

This is an appeal from an order of the Circuit Court of Putnam County that reversed a decision of the Putnam County Planning Commission to grant Sherman and Helene Bennett a variance from certain county subdivision regulations.

The Putnam County Planning Commission, after a hearing and extensive findings of fact, granted Sherman and Helene Bennett a variance to create two parcels from a single subdivision lot that was laid out before Putnam County adopted land use regulations. Adjacent property owners disagreed with the Planning Commission's findings of fact and appealed to the Circuit Court of Putnam County, West Virginia. On November 19, 2004, Judge N. Edward Eagloski reversed the Planning Commission's order, a ruling that made the lot the Bennetts wanted to divide worthless as a building lot.

The Putnam County Planning Commission and the Bennetts filed a timely petition for an appeal of Judge Eagloski's order. On July 5, 2005, this Court granted an appeal and ordered the filing of briefs. The Appellants seek a reversal of Judge Eagloski's order and a remand of this case with instructions for entry of an order affirming the decision of the Putnam County Planning Commission.

II. STATEMENT OF THE FACTS OF THE CASE.

On February 12, 1972, Sherman and Helene Bennett acquired Lot 17, Section 1, in Maplewood Estates, a single-family residential subdivision developed in 1951.

When Maplewood Estates was developed, and when the Bennetts acquired their lot, Putnam County did not have any form of land use or subdivision regulation. There were no regulated limitations on lot size or street and right-of-way widths. The street rights of way in the original Maplewood Estates were fixed at thirty feet in width. The Bennett parcel—a large lot more than an acre in size—fronts on the main street in Maplewood Estates—a thirty foot street that forms the western boundary of the property.

After the development of Maplewood Estates, a parcel of land to the east was developed by one Rosemarie Cox. The Cox development, now known as East Maplewood Estates, was on land that abutted the Maplewood tract but shared no common predecessor in title. As part of the plan for East Maplewood Estates, a thirty foot right-of-way for a roadway was laid out that bordered the Bennett lot on both the north and east sides. Because this thirty foot right-of-way, known as Linden Road, was established for the benefit of East Maplewood property owners, neither the Bennetts' property nor any other part of Maplewood Estates had any legal right to use this roadway. East Maplewood Estates was also laid out before Putnam County adopted any subdivision regulations.

When the development of both Maplewood and East Maplewood was complete, the Bennett lot fronted on Maplewood Drive and had a clear legal right to use that thirty

foot right-of-way. The Bennett lot abutted the thirty-foot right-of-way called Linden Road on both the north and east boundaries but had no clear legal right to use that roadway for ingress and egress.

To the south of the Bennett lot are three other lots in the original Maplewood development that front in the west on Maplewood Drive and abut in the east on Linden Road. These three parcels have no legal right to use Linden Road for ingress and egress. Of the four lots in Maplewood that abut on Linden Road only the Bennett lot is bounded by that road on two sides. (See attached map Exhibit A.)

The Bennett lot is quite large and susceptible to division into two separate parcels, both of which would greatly exceed the minimum size for subdivided lots set by Putnam County's land use regulations. In 2002, Mr. and Mrs. Bennett hired a surveyor and had a map prepared showing a proposed division of their lot into two parcels. (See attached Exhibit B.) The Bennetts' existing home would remain on the parcel fronting on Maplewood Drive. Access to the subdivided parcel would be from Linden Road, the thirty-foot right-of-way serving East Maplewood. To make sure their subdivided parcel had a legal right to use Linden Road, the Bennetts entered into an agreement with the East Maplewood Estates Homeowners Association, Inc., giving the Bennetts the right to use that road upon certain express conditions. Importantly, the agreement expressly limited its application to the Bennett lot to the exclusion of any other parcel of land in the original Maplewood development. Because of this agreement, **the Bennett lot is the only part of the original Maplewood tract with the legal right to use both Maplewood Drive and Linden Road.**

The Bennetts filed an application for approval to subdivide their lot with the Putnam County Office of Planning and Infrastructure. Because Putnam County subdivision regulations adopted in the 1980's require any new subdivided parcel to be accessed by a forty foot right-of-way, the Bennett subdivision application was denied, with the advice that the Bennetts could seek a variance from the Putnam County Planning Commission relative to right-of-way width.

The Bennett situation is a common problem in Putnam County where rights-of-way thirty feet in width were the norm until the subdivision regulations were adopted. Since the Bennett lot met all the Putnam County requirements for subdivision *except* the width of the right-of-way for ingress and egress, the Bennetts applied for a variance. To avoid the hardships or practical difficulties of rendering otherwise valuable land unusable because of nonconformity with its regulations, the Office of Planning and Infrastructure had in place a specific, written procedure whereby an aggrieved landowner could obtain a variance from the requirement for access from a forty foot right-of-way. *Article 1400.13 of the Putnam County Subdivision Regulations* provides as follows:

Where the Planning Commission finds that extraordinary hardships or practical difficulties may result from strict compliance with these regulations and/or the purposes of these regulations may be served to a greater extent by an alternative proposal, it may approve variances to these subdivision regulations so that substantial justice may be done and the public interest secured, provided that such variance shall not have the effect of nullifying the intent and purpose of these regulations, and further provided the Planning Commission shall not approve variances unless it shall make written findings based upon the evidence presented to it that all of the following conditions are met:

- a. The granting of the variance will not be detrimental to the public safety, health, or welfare or injurious to other property.
- b. The conditions upon which the request for a variance is based are unique to the property for which the variance is sought and are not applicable generally to other property.
- c. Because of the particular physical surroundings, shape of topographical conditions or the specific property involved, a particular hardship to the owner would result, as distinguished from a mere inconvenience, if the strict letter of these regulations are carried out.
- d. The variances will not in any manner vary the provisions of any other regulations, ordinances or plans adopted by the County.
- e. In approving variances, the Planning Commission may require such conditions as will, in its judgement, secure substantially the objections of the standards or requirements of these regulations.

- f. A petition for any such variance shall be submitted in writing by the subdivider. The petition shall state fully the grounds for the application and all of the facts relied upon by the petitioner.

A variance request must be submitted in writing a minimum of twenty-one days prior to the regularly scheduled Planning Commission. . . .

On January 30, 2004, the Bennetts submitted a planning commission appeal application to the Office of Planning and Infrastructure requesting a variance from the forty-foot right-of-way rule. The Bennetts want to subdivide part of their land and give a lot to their granddaughter so she can build a house next to them. Access to this lot will be provided by the thirty-foot right-of-way of Linden Road. Past practice by the Putnam County Planning Commission was to grant such variances where subdivision lots laid out before adoption of the regulations met all of the requirements of the regulations except for right-of-way width. This was particularly true with exempt subdivisions such as dividing property for purposes of gifts to children or grandchildren.

After due notice to nearby property owners, the Putnam County Planning Commission conducted a full hearing on the Bennett variance application. This hearing was done in two parts, one on February 24, 2004, and the last on the 23rd day of March, 2004. At the conclusion of the hearing, the Putnam County Planning Commission approved the Bennett variance request and made specific and extensive findings of fact.

Among other things, the Planning Commission specifically found that division of the Bennett lot would not be detrimental to public safety, health or welfare or injurious to other property. (See Final Findings of Fact, p. 16, attached as Exhibit C.)

The Planning Commission also found that the conditions upon which the variance was based were unique to the Bennett property because the Bennett lot was created prior to the adoption of the Putnam County Subdivision regulations when no minimum right-of-way widths were required. The Planning Commission found that the proposed lot met all other requirements of the subdivision regulations. The Planning Commission

specifically found that only the Bennett lot had the legal right to use both Maplewood Drive and East Maplewood Drive or Linden Road. In making this finding, the Planning Commission noted that while other lots in Maplewood Estates also abutted Linden Road, none of those lots had a legal right to use Linden Road unless they somehow obtained permission from the East Maplewood Homeowners Association in the future. (See Final Findings of Fact, p. 17.)

The Planning Commission found that both the proposed subdivided lot and the residue of the Bennett tract would greatly exceed the minimum lot size required by Putnam County Subdivision regulations. The Commission found that all existing improvements were in place so that an additional right-of-way was not needed for improvements to the proposed lot. Importantly, the Commission found that since the proposed lot met all subdivision regulations except the width of right-of-way, the Bennetts, as owners of the lot, would “experience a hardship if not allowed to divide their property.” (See Final Findings of Fact, p. 17.)

The hardship to the Bennetts is obvious; without the variance that the Planning Commission granted, they own a valuable lot that meets all existing subdivision regulations, that is served by a road and right-of-way sufficient for any future development, and that they would be completely unable to use as a residential lot.

Of course, implicit in the Planning Commission’s decision to grant a variance is a finding by the Commission that the threshold elements of extraordinary hardship or practical difficulty resulting from strict compliance with subdivision regulations existed relative to the Bennett lot. Both extraordinary hardship and practical difficulty are obvious when the result of the denial of the variance would have been to render the Bennett property valueless as a residential lot. Indeed, the Putnam County Planning Commission has previously adopted the defined concept of “uniqueness” and “hardship” as applying to the subdivision of a lot that otherwise meets all the requirements of the regulations but fronts on a street that was established before the regulations were adopted. (See Final Findings of Fact, p. 11, 17.)

Within thirty days of the Planning Commission's order granting the Bennett variance, the Maplewood Estates Homeowners Association filed a petition for appeal from that order with the Circuit Court of Putnam County. By order entered November 19, 2004, the Circuit Court of Putnam County ruled that the Putnam County Commission's finding that denial of a variance would result in hardship to the Bennetts was "plainly wrong." It was the final order of the court that the order of the Planning Commission granting the variance be reversed and vacated. It is from this order that the Bennetts seek an appeal.

III. ASSIGNMENTS OF ERROR RELIED UPON ON APPEAL AND THE MANNER IN WHICH THEY WERE DECIDED IN THE LOWER TRIBUNAL.

The Circuit Court of Putnam County, the Honorable N. Edward Eagloski presiding, abused its discretion in reversing an order of the Putnam County Planning Commission and ruling that the Commission's findings of fact were "plainly wrong."

IV. POINTS AND AUTHORITIES RELIED UPON

W. Va. Code §8-24-1.

W. Va. Code §8-24-28.

W. Va. Code §8-24-29.

W. Va. Code §8A-9-6(c).

Putnam County Subdivision Regulations, Article 1400.13.

Burley v. Board of Zoning Appeals, 213 W.Va. 581, 584 S.E.2d 215 (2003).

Corliss v. Jefferson Cty. B.Z.A., 214 W.Va. 535, 591 S.E.2d 93 (2003).

Lambert v. Workers Compensation Division, 211 W.Va. 436, 566 S.E.2d 573 (2002).

Webb v. West Virginia Board of Medicine, 212 W.Va. 149, 569 S.E.2d 225 (2002).

In Re Queen, 196 W.Va. 442, 473 S.E.2d 483 (1996).

Muscatell v. Cline, 196 W.Va. 588, 474 S.E.2d 518 (1996).

Frymier-Halloran v. Paige, 193 W.Va. 687, 458 S.E.2d 780 (1995).

Wolfe v. Forbes, 159 W.Va. 34, 217 S.E.2d 899 (1975).

Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951).

V. DISCUSSION OF LAW

A. STANDARD OF REVIEW

When this case was appealed to the circuit court, the procedure for that appeal was governed by the provisions of *W. Va. Code §8-24-1*, et seq. While this appeal was pending, Chapter 8, Article 24 was repealed in its entirety. Newly enacted Chapter 8A, Article 9 governing the appeal process in land use planning issues was in effect when the circuit court decided this case. While §8A-9-6(c) empowers the circuit court or judge to “reverse, affirm or modify, in whole or in part, the decision or order” of the planning commission, the statute sets no specific standard of review. The standard of review remains that set forth in *Wolfe v. Forbes*, 159 W.Va. 34, 217 S.E.2d 899 (1975): “While on appeal there is a presumption that a [planning commission] acted correctly, a reviewing court should reverse the administrative decision where the [commission] has applied an erroneous principle of law, was plainly wrong in its factual findings, or has acted beyond its jurisdiction.” *See also, Corliss v. Jefferson Cty. B.Z.A.*, 214 W.Va. 535, 591 S.E.2d 93 (2003).

On appeal this Court reviews the decisions of the circuit court under the same standard of judicial review that the lower court was required to apply to the decision of the planning commission. *Webb v. West Virginia Board of Medicine*, 212 W.Va. 149, 569 S.E.2d 225 (2002). After applying the appropriate standard of judicial review to the decision of the planning commission, this Court must review the final order of the circuit

court and its disposition of the case under an abuse of discretion standard. *Muscatell v. Cline*, 196 W.Va. 588, 474 S.E.2d 518 (1996).

B. THE COURT'S FINDINGS

In this case, there was no allegation by the Appellee nor any finding by the circuit court that the planning commission applied an erroneous principle of law in deciding this case. Likewise, there was no allegation that the planning commission had acted beyond its jurisdiction. Since §8-24-1 and §8-24-28, 29 specifically granted to county planning commissions jurisdiction to approve the subdivision of property and maps of subdivisions, it is plain that the planning commission here was acting within its jurisdiction in granting the variance applied for by the Bennetts.

The circuit court reversed the planning commission because the circuit court found that the planning commission was "plainly wrong" in some of the factual findings it made in support of granting the variance.

The plainly wrong standard of review applied by the circuit court is a deferential one. The reviewing court must presume that an administrative tribunal's actions are valid as long as the decision is supported by substantial evidence. *Lambert v. Workers Compensation Division*, 211 W.Va. 436, 566 S.E.2d 573 (2002); *In Re Queen*, 196 W.Va. 442, 473 S.E.2d 483 (1996); and *Frymier-Halloran v. Paige*, 193 W.Va. 687, 458 S.E.2d 780 (1995). An agency action that is supported by substantial evidence or a rational basis is reviewed in a deferential manner and presumed valid. *Frymier, supra*, at 695, at 788.

"Substantial evidence" requires more than a mere scintilla of proof. Substantial evidence is such relevant evidence that a reasonable mind might accept it as adequate to support a conclusion. If such evidence exists to support the administrative agency's finding, that finding is conclusive. The circuit court may not supplant a factual finding of a county planning commission merely by identifying an alternative conclusion that could be supported by substantial evidence. The reviewing court may not displace the planning commission's choice between two fairly conflicting views even though the court would

justifiably have made a different choice had the matter been before it *de novo*. *Universal Camera Corp. v. NLRB*, 340.S. 474, 488 (1951); *In Re Queen, supra*.

Since the circuit court reversed the Putnam County Planning Commission in this case by ruling that certain of the Planning Commission's findings were plainly wrong, it is incumbent upon this Court to review the proceedings of the Planning Commission to determine whether substantial evidence supported its findings. If such evidence exists to support the Commission's findings, then they are conclusive and the circuit court's reversal of those findings is an abuse of its discretion.

Fortunately, the Putnam County Planning Commission has long adopted a procedure that produces extensive written findings of fact and explanations of its actions when ruling on land use issues. Unlike *Burley v. Board of Zoning Appeals*, 213 W.Va. 581, 584 S.E.2d 215 (2003) and other earlier cases involving insufficient findings by administrative parties, the Putnam County Planning Commission produced extensive and specific findings and reasoning in support thereof.

Attached to this brief as Exhibit C is an 18-page document prepared by the Putnam County Planning Commission in the matter of Sherman C. and Helene F. Bennett, Jr., Variance 04-4 captioned "Final Findings of Fact." This document was prepared by the Planning Commission after extensive proceedings relative to the Bennetts' application for a variance.

Article 1400.13 of the Putnam County Subdivision Regulations permits the Planning Commission to grant variances from these regulations where "extraordinary hardships or practical difficulties may result from strict compliance." The circuit court opined that there was a lack of evidence to show that this prerequisite for the consideration of a variance existed. Indeed, the Planning Commission heard evidence and found that denial of a variance would deprive the Bennetts of the use of a significant part of their property since they would not be permitted to divide their property in a manner that would otherwise be perfectly legal. The Planning Commission also found

that the Bennetts are elderly and in poor health and wished for their granddaughter to obtain a portion of their property so that she could build a house thereon and help care for them. This evidence, all of which was uncontested by the Appellee, is more than adequate to support a finding by the Commission of either "extraordinary hardships" or, more importantly and perhaps more applicably, "practical difficulties" should a variance not be granted. The fact that the circuit judge may disagree with the severity of a hardship or the practicality of difficulty to the Bennetts is not a legitimate basis for the court's reversal of the Planning Commission's order.

The circuit court made a specific finding that the Planning Commission's finding that the Bennett property was unique was "not supported by the evidence and, as such, plainly wrong." The record just does not support the circuit court's conclusion.

The Planning Commission heard commentary from its senior planner regarding the six conditions set out in Article 1400.13. (See Exhibit C, pp. 8, 9 and 10.) After hearing its staff recommendations and evidence presented at a public hearing, the Planning Commission approved the variance request by the Bennetts. In doing so, the Commission made specific findings regarding the uniqueness of the Bennett property so as to satisfy subsection b of Article 1400.13 of the regulations. The Commission stated these findings:

"The conditions upon which the variance is based are unique to this property. Maplewood Estates is a subdivision that was placed on record in the County Clerk's office prior to the adoption of the *Putnam County Subdivision Regulations*. **At the time the subdivision was created, there was no minimum right-of-way width required in Putnam County.** The proposed lot meets all other requirements of the regulations.

There are only four lots in Maplewood Estates subdivision that are adjacent to two existing subdivision roads. The Bennett lot is one of those lots. These lots are unique because of the fact they have frontage on two subdivision roads. The other lots in Maplewood Estates do not have this uniqueness.

East Maplewood Homeowners Association granted the right to use their subdivision street, Linden Road, to only the Bennetts and their

granddaughter for that one lot and did not give permission for the other three lots that have frontage on Linden Road to use that road. Those property owners will be responsible for acquiring the legal use of Linden Road from East Maplewood Estates Homeowners Association prior to a proposed division of their property. They will also be required to apply to the Planning Commission for approval of a right-of-way variance.” (emphasis supplied.)

When the Commission made these findings that only the Bennett lot had the legal right to use the road in question, it had before it all of the items set forth in the 34 separate entries listed under Section C of its final findings of fact, including maps, deeds, and court orders specifying the Bennett lot as the **only** parcel of ground in Maplewood Estates having a legal right to use a roadway in an adjoining subdivision. In this regard, the Bennett property is “one of a kind” and, therefore, unique in the eyes of the Planning Commission. The circuit court’s disagreement with the Planning Commission’s fact-based finding is an abuse of discretion.

The circuit court also made a specific finding that the Commission’s determination that hardship to the Bennetts would result from a denial of the variance was not supported by the evidence and plainly wrong. Part of this finding by the circuit court was based upon its interpretation of the Commission regulations. With all due respect to the circuit court, the Planning Commission is the appropriate arbiter of the meaning and interpretation of its regulations absent some allegation of arbitrariness or abuse. Since no such allegation was made in the case, the Commission’s interpretations are entitled to deferential treatment and presumed to be correct.

Regardless, there is in this record substantial and uncontroverted evidence that the Bennetts will be deprived of the use of a significant portion of their property which otherwise meets all the requirements for subdivision unless a variance is granted. The Planning Commission made these specific findings regarding the element of hardship because of the specific property involved:

“The lot is bordered on the north and east by Linden Road in East Maplewood Estates and on the west by the Maplewood Estates’s street, and both the 0.46 acre lot and the residue of the parent tract on which the

Bennetts' house is situated will greatly exceed the minimum lot size required in the subdivision regulations. All improvements are existing so additional right-of-way is not needed for improvements to the proposed lot. **Since they meet all requirements of the subdivision regulations except the width of the right-of-way, they would experience a hardship if not allowed to divide their property.** (emphasis supplied.)

In this particular case, **there is also a hardship due to the fact the Bennetts are elderly and in poor health, and the granddaughter is being conveyed the property so she can build a house for her occupancy so she can help care for them.**"

The Planning Commission obviously believed that depriving an individual of the lawful use of his property, including the right to subdivide the same and give a portion to a beloved family member, constitutes a hardship to the specific property involved. This is a determination that the Planning Commission had every right to make and was supported by substantial and uncontroverted evidence. The circuit court's reversal of this finding is an abuse of discretion.

The Planning Commission also made specific findings relative to the other requirements of Article 1400.13, but these were not contested in the subject appeal.

Obviously, the people who oppose the Commission's order did not agree with the Commission's factual findings and filed an appeal which sought relief stating "the variance clearly should not have been granted because the Bennetts cannot find sufficient facts to meet the six conditions required in order for a variance to be granted." The aggrieved parties filed this petition for appeal but neglected to submit to the circuit court a transcript of proceedings before the Planning Commission. The Planning Commission did, however, submit to the court a complete record of its proceedings, including its detailed final findings of fact and all of the exhibits that had been considered by the Commission as attachments.

In its November 19, 2004, order (attached as Exhibit D), the Circuit Court found that the Planning Commission's finding that the Bennett property was unique "was not

supported by the evidence and as such plainly wrong.” The evidence that the Planning Commission considered on this issue was (1) the fact that the Bennett parcel was the only parcel of land which had the legal right to use the streets in East Maplewood Estates, (2) that the Bennett parcel was in a subdivision that was laid out before the Putnam County Subdivision Regulations were adopted, and (3) that the Bennett parcel met every other requirement set forth under the subdivision regulations. In short, on the day the Planning Commission approved the Bennetts’ variance, the Bennett property was the only parcel of land in the universe that had the right to use both streets in Maplewood Estates and streets in East Maplewood Estates. The circuit court ignored this finding of absolute uniqueness and appears to have simply adopted the argumentative statements of the aggrieved parties that because other parcels might acquire rights to use these streets in the future, the Bennett situation was not unique. This is merely a substitution of the Court’s judgment for that of the Planning Commission.

The Court also disregarded the Planning Commission’s finding that a hardship would result from denial of the variance by concentrating on the fact that one of the Bennetts’ claims of hardship was that their granddaughter would not be able to live next to them and care for them in their old age. The Court arbitrarily ignored the other finding of the Planning Commission that refusal to grant this variance would prohibit the otherwise legal division of the Bennett property, by implication depriving the Bennetts of a significant portion of the value thereof.

In short, this is a case in which the circuit court, for whatever reason, gave no value to the presumption that the Planning Commission had acted correctly, disregarded the substantial evidence considered by and findings made by the Planning Commission and arbitrarily imposed the court’s own interpretation of the record to reverse the lawful order of the Planning Commission.

The effect of the court’s order is to deprive Sherman and Helene Bennett of a significant portion of the value of their property. The circuit court’s order should be

reversed and this matter remanded with direction to dismiss this appeal and affirm the Planning Commission's actions.

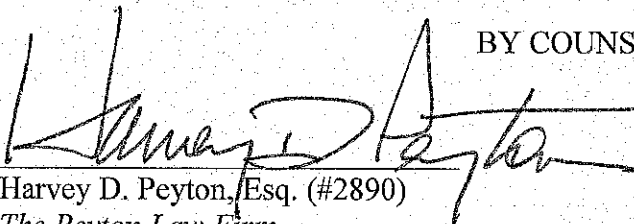
VI. RELIEF PRAYED FOR

The Petitioners pray that the November 19, 2004, order of the Circuit Court of Putnam County, West Virginia, be reversed and remanded with directions to dismiss the underlying proceeding and affirm the order of the Putnam County Planning Commission granting Sherman Bennett and Helene Bennett the variance requested.

RESPECTFULLY SUBMITTED,

SHERMAN C. BENNETT and HELENE F.
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