



Town of Plaistow
ZONING BOARD OF ADJUSTMENT
145 Main Street - Plaistow, NH 03865

ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
September 28, 2023

The meeting was called to order at 6:35 pm

Roll Call: Peter Bealo, *Chair*
Jim Unger, *Vice Chair*
Jonathan Gifford, *excused*
Michael Murray
Jim O'Brien
Patrick Kiley, *Alternate Member*

Also Present: Dee Voss, *Zoning Official, Administrative Assistant*; Attorney Will Reddington, *Wadleigh, Starr and Peters, PLLC, Counsel for the Zoning Board of Adjustment (ZBA)*.

★ *P. Kiley was appointed as a voting member for this meeting.*

P. Bealo explained the process the Board uses for hearing and deciding (deliberating) on each application. He noted that all motions are made in the affirmative “to grant” format, but that was not indicative as to how any member might vote on a particular application, including the maker of the motion, or the second. P. Bealo added that notices of decision will be sent within five (5) business days, but that no permits will be issued for thirty (30) days to allow for any appeals (requests for re-hearing) as per the NH RSAs

PUBLIC HEARINGS:

The below legal notices were read together to call the matters. #23-07 and #23-08 were heard first, then each were deliberated upon separately. Followed by the public hearings on matters #23-09 and #23-10.

Attorney Thomas MacMillan, *MacMillan Law Offices, Bradford, MA*; Kristin Yassenka, *Yassenka Law, Portsmouth, NH*; and Daniel Kane, *Property Owner 82 Newton Rd (Sweet Hill Farm)* were present for all applications.

Also present: Rick Foye, *Plaistow Building Inspector/Code Enforcement Official* and Attorney Eric Maher, *Donahue, Tucker & Ciandella, PLLC, counsel for the Town of Plaistow, its Administration and Board of Selectmen*

Continued from May 25, and June 29, 2023 – Re-Noticed for 08/31/2023, continued from 08/31/2023

#23-07: A request from Sweet Hill Farm, LLC for an Appeal of the Administrative Decision of the Building Inspector/Code Enforcement Officer failing to act on Building Permit Application filed on February 9, 2023. The subject property of the building permit application is 82 Newton Road, Tax Map 68, Lot 8 in both the LDR and ICR Zoning Districts. The applicant is the property owner of record.

Continued from May 25, and June 29, 2023 – Re-Noticed for 08/31/2023, continued from 08/31/2023

#23-08: A request from Sweet Hill Farm, LLC for an Appeal of the Administrative Decision of the Building Inspector/Code Enforcement Officer failing to act on Building Permit Application filed on March 27, 2023, for a Bee House. The subject property of the building permit application is 82 Newton Road, Tax Map 68, Lot 8 in both the LDR and ICR Zoning Districts. The applicant is the property owner of record.

There was a discussion with the applicant regarding how best to proceed with the four (4) applications. It was suggested, and agreed to that the first two would be heard together, then the Board would deliberate on those two (2) applications before hearing the final two (2) applications.

P. Bealo noted that there had been letters received from Mr. Kane regarding his applications. He asked each Board member to certify for the record that they had all read the three (3) submission from D. Kane regarding these matters. All members, each in turn, so certified.

T. MacMillan asked if the Board had received the September 26, 2023, letter that was submitted by D. Kane. P. Bealo noted that the letter had been received, adding that Mr. Kane had noted it to be his second letter to the Board, when in fact it was the third.

Re: ZBA #23-07

T. MacMillan offered that on or about February 9, 2023, an application for an addition to a livestock pen addition to an accessory structure was submitted to the Department of Building Safety in accordance with the law and the permitting policy approved by the Board of Selectmen (BOS) on May 22, 2017. He added that in derogation of state law and the permitting policies prior procedures and practices, the Building Inspector arbitrarily and capriciously required a detailed cost estimate for the project, but failed to accept a contract that was provided with the overall cost estimate for the project and did not issue the building permit within thirty (30) days, therefore constructively denying the permit application. Mr. MacMillan suggested that there are no provisions in the permitting policies that the review and approval of building cost estimates. He added that the applicant was relying on the submitted application and exhibits, including Mr. Kane's letters, and was requested that the Zoning Board of Adjustment, acting in the capacity as the Building Code Board of Appeals require that the Building Inspector issue the permit.

Re: ZBA #23-08

T. MacMillan offered that on or about March 27, 2023, an application for new construction of a 16' x 24' bee house was submitted to the Department of Building Safety as of the date of the filing of the appeal, more than 30 days had passed and no action was taking on the application, thereby constructively denying the building permit application by taking no action. He cited NH RSA 676:13 which provides that upon submission of a completed application, the Building Inspector has thirty (30) days to either approve or deny the application. He added that there was a

disagreement between Mr. Kane and the Building Inspector as to the time allotted for review of an application. The Building Inspector believes that sixty (60) days is allow, where the applicant believes that since this is an agricultural use, which is dealt with as a residential use, the thirty (30) days residential use is the timeline for acting on the application. Sweet Hill Farm completed and submitted the application in accordance with the policies and procedures adopted by the BOS on May 22, 2017, and in derogation of the state law, and policies and practices the Building Inspector constructively denied the application by not acting within thirty (30) days. Mr. MacMillan added that the applicant was relying on the submitted application and exhibits, including Mr. Kane's letters, and was requested that the Zoning Board of Adjustment, acting in the capacity as the Building Code Board of Appeals reverse the decision of the Building Inspector and grant the building permit.

There was a brief explanation of what a bee house was.

W. Reddington suggested that the record be clear that on these applications the ZBA was acting in the capacity of the Building Code Board of Appeals. T. MacMillan offered that when the memorandum was initially done it was unclear if the ZBA was going to take jurisdiction, but he agreed that the appeals were before the Building Code Board of Appeals.

P. Bealo asked if the Board had any questions.

J. Unger asked if the 24' x 20' sheds would be comparable to a two-car garage where there is a concrete slab.

D. Kane confirmed that it was, with a dirt floor. It was noted to be basically like a pole barn.

P. Bealo noted that the building code, §109.3 if the IBC (International Building Code) specifically states that the Building Inspector can asked for detailed costs estimates, or the final building permit value could be set by the Building Inspector. He added that he was not sure how the Board could waive this. There were two (2) applications filed, additional information was requested, and no permits were issued.

T. MacMillan explained that initially all the was requested was the contract, which was then not accepted. He referenced page 8 of the memorandum which cites the code as P. Bealo read it, but he offered that it was their contention that the provision was not part of the Town's policy and procedures. He also noted that the request for additional information is not noted as part of the Town's permitting policy and sections of the code are not automatically grafted into the Town's policy, nor does it trump the Town's policies, suggesting that it shouldn't be applicable if it's not included in that policy.

P. Bealo offered that the IBC as a whole is grafted on to any application in the Town as it is the code adopted by the State of New Hampshire as the prevailing building codes and to his understanding, the Town can only be more restrictive, not less restrictive than what the State has adopted.

T. MacMillan replied that the Town has a permitting policy that asks for building cost and that was what was provided for in the contract. He also noted there is a difference between cost and value, and the application asks for costs, which is what was provided.

P. Bealo noted that there were no cost details provided in the contract, only a single bottom-line figure.

T. MacMillan offered that Mr. Kane had submitted additional details and that the Building Inspector was looking for the construction value, not the cost, which could be two different numbers, the cost being what it takes to build it, the valuation being what it's worth. He offered that the Building Inspector was looking for the value which he suggested was erroneous.

J. Unger noted that he works in the insurance industry and the words "cost" and "value" are used interchangeably in many industries.

T. MacMillan suggested that for the purposes of a building permit application their position is that are not interchangeable and have different meanings.

J. Unger noted that the code does say final permit valuation.

P. Bealo offered the opportunity to for the Town representative to speak,

E. Maher noted that he had submitted objections and would rely mostly on those submission, but that he would like to address a few of the assertions made by Mr. Kane:

- There is an assertion that there is a thirty (30) day timeline to act on the building permit application based on the Town's Zoning Ordinance identifies it as an agricultural use, which is identified as a residential use. This confuses two different bodies of law, the Zoning Ordinance which deals with land use and permits and approvals, and the Building Codes, which are two distinct codes with different purposes.
- There are two (2) codes in question, the IRC (International Residential Code) is the adopted code for one and two-family dwellings, the IBC is for other non-residential types of properties.
- The IRC is for the purposes of consistency and uniformity in building practices for residential construction under the basis that the use is the same, and therefore the practices should be similar. That is why there is a thirty (30) day review period under statute because the amount of time needed to review the application doesn't significantly vary from application to application.
- The IBC has a large spectrum of different types of buildings that are incorporated into it, and the review process can take longer due to the diversity and complexity of the structures and the sophistication level of the plans that are submitted. Which is why the legislature has said that Building Departments have sixty (60) days to review these types of non-residential permits applications.
- The amount of time necessary to review a specific application does not change based upon how a municipality may decide to classify a specific use, that is determined by the Building Code itself.
- The subject structures are identified in the IBC by their use as non-residential structures and is why the sixty (60) day timeline applies in this case.
- The Building Inspector did act in a timely manner, communicating his concerns over the costs, particularly of the livestock pen, prior to the expiration of the sixty (60) days, as to the \$30,000 cost/value that was put on the application.

- There are two (2), 24' X 28', two-story structures on a cement foundation, with doors, windows, internal plumbing, and electricity. If he could find a contractor that would work for the \$30,000 contract for one (1) of the structures and he would hire them to work on his house.
- Mr. Foye is a builder in New Hampshire, and was previously a Building Commissioner in Massachusetts, with his many years of experience, and he looked at that application and found it to be remarkably too low.
- It was supported by other building permit applications, including those for Sweet Hill Farm, that were submitted to the Board
- The Building Inspector asked for a copy of the contract or detail breakdown, which is allowed under the building code. Sweet Hill Farm provided a copy of the contract that did not include any details, just a bottom-line cost for all labor and materials, which did not answer the underlying question as to how the project going to be done for \$30,000.
- The Building Inspector is not obligated to accept that under which is his right under the IBC code.
- Mr. Kane's submittal(s) referred to his ability to get volunteers, use farm labor, and to use materials on site to decrease the overall costs, the contract as submitted is not reflective of all the work that will be necessary to complete the project.
- The Building Inspector is entitled to push back.
- The only matter before the Board is whether the Building Inspector was within his rights to ask for detailed costs, not to even talk about what the costs should be, but whether or not he acted reasonably and lawfully under the Building Code.
- The Town's three-page permitting policy was not intended to replace the IBC or IRC building codes (examples of those books were shown) but are to be used for guidance by the public and not intended to tie the hands of the Building Inspector when he has reasonable doubt as to what is being presented to him.
- They are not here to attack agriculture or the farm, but to ensure that everyone dealing with the town is being treated the same and paying their fair share.
- The terms value and costs are synonymous for review purposes. The Building Department is intended to be self-sustaining, and taxpayers are not paying for the review and processing of building permits. The fee is supposed to represent the complexity of the review, which are represented by the costs/value the higher the value of the costs, the higher the complexity.
- The fact that an applicant may be able to get subsidies in the form of volunteers, or their own labor, presumably being paid for, is irrelevant to the complexity of the review process to ensure that the building is being constructed safely.

T. MacMillan offered the following rebuttal:

- When the Building Inspector asked for additional information, he gave Sweet Hill Farm the option of cost detail or contract, he didn't say that he would need both and it wasn't until he saw the contract that he decided it wasn't sufficient. Mr. Kane produced the contract and wasn't obligated to provide the cost detail once the Building Inspector decided the contract was not sufficient.

P. Bealo offered that the building permit application was a boiler plate, and that sometimes more information was necessary.

T. MacMillan replied that the Building Inspector went one step further, he gave Mr. Kane the option to provide either the contract or the cost details. Once the option was exercised, and the contract was provided, the Building Inspector decided it wasn't satisfactory.

P. Bealo reminded that §109.3 (IBC) states that the Building Inspector can request additional information if he doesn't trust or believe what is submitted.

T. MacMillan offered that is what goes to the heart of this dispute, the farm, which is an agricultural piece of property, is being treated as commercial property under the IBC codes. He added that the IRC codes should be applicable.

P. Bealo noted that the IBC defines agricultural use under its jurisdiction, but under the IRC, it's not what Plaistow says, it's above that level.

T. MacMillan reiterated it should be the IRC that is the applicable code, not the IBC.

P. Bealo using the example if Mr. Kane wanted to put in a chicken processing plant, questioned if that use could only be treated as a residence.

T. MacMillan offered that Mr. Bealo's example was expanding the use of the property. He noted that he couldn't argue against every potential use of the property and was looking at it from what's there now that is agricultural. The Plaistow Zoning Ordinances treats this parcel as residential under §220-23F (Low Density Residential (LDR) permitted uses table) and §220-32G (Integrated Commercial Residential (ICR) permitted uses), which both list agricultural as a permitted residential use.

There was additional discussion regarding the property residential uses are permitted by zoning and what building code was applicable. The discussion included whether the Zoning determines a use to be residential, or if the Zoning determines what uses are allowed in a residential district.

J. Unger noted that Mr. Kane could propose buildings that the IRC wouldn't be technically sufficient enough to cover that review.

T. MacMillan reiterated that agricultural uses were only listed in the Zoning tables as being residential uses, not as commercial/industrial uses.

J. Unger reminded that the argument wasn't about the zoning of the property, but whether the Building Inspector had the right to request additional information regarding the permit application, and costs estimates.

T. MacMillan noted that also included which code was applicable to the property, which he asserts is the IRC.

J. Unger queried if under the IRC does the Building Inspector have to accept anything anyone hands him as the cost.

P. Kiley asked if there was a section in the IRC that addresses agricultural use. Mr. MacMillan replied that he did not know. P. Kiley asked if there was a section in the IBC that addresses agricultural uses. Mr. MacMillan replied that he did not know that either.

E. Maher offered that they were addressed on page 54 of the IBC.

P. Kiley noted that the only code document that addresses agricultural uses is the IBC, and regardless of the permit use of the property, of the alternate uses permitted in a zone, the appropriate building code for the building use, which is agricultural, must be followed. No one is arguing that the building uses are agricultural.

T. MacMillan suggested there was a fundamental difference, and that NH RSA 21-34-a defines agricultural as any land, buildings, or farm structures in which agricultural functions are carried on, so agricultural is the use.

P. Bealo noted that no one was arguing against that.

T. MacMillan offered that there didn't seem to be a nexus between the use and what is required by the Building Inspector to get permits. Even if for arguments sake, it was the sixty (60) days contended by the Building Inspector, not the thirty (30) days they contended, there still hasn't been any action regarding the permits.

D. Kane offered that the discussion was getting caught in the weeds and looking at the IRC it talks about 1-2 family structures, and their accessory use structures, not more than three (3) levels above ground, and that's all they have at Sweet Hill Farm, there is a single-family residence and a bunch of accessory use structures that meet the definition of a farm and agriculture. He added that the size of the IBC buildings is monstrous and not what they have on the farm. Which has been his point all along.

J. Unger noted that the Market Stand is a retail store which required certain egress and safety standards when it was constructed, none of which are covered under the residential code, they all come out of the commercial code.

D. Kane offered that while he built it to that standard, he wasn't required to do so. He reminded that the market building was already constructed, and they were now talking about a goat pen and a bee house, which were modest in size.

J. Unger offered that there were still minimum standards not covered under the residential code and if it hadn't been built to that standard and someone got hurt "God help you."

J. Unger asked if the production of a detailed cost estimate would solve the problem. E. Maher replied that was correct. J. Unger continued that if there had been a detailed cost estimate submitted the buildings would already have been built instead of being in September arguing.

D. Kane replied he gave him what he requested and asked what is he going to do keep giving and giving when everything is found to not be sufficient.

J. Unger referenced the contract, noting that it didn't have any details. He offered that he'd only built one thing in town, and he gave a copy of his 150-page contract, with details, to the Building Inspector.

D. Kane offered that there was nothing on the application that asked for anything more than costs, and that's all he's ever provided on any building permit application. He noted that he didn't have a detail of the costs, he just guessed, which he felt was his right under the application. Mr. Kane added that if the Town Fathers, who had the authority to do so, they would have baked it into the policy. The Board of Selectmen are the only ones with the authority to adopt policy. He noted that it was costs to him, if he has stuff lying around, he's already paid for it, why should he have to include that. He just wants to run the farm the way he wants, and he wants the process, which he feels is currently unfair, to be fair.

E. Maher noted that §312 of the IBC is where barns are addressed. He added that if the three-page policy and the associated minutes that adopted it, there was nothing that suggested the intent to eliminate the authority of the Building Inspector under the IBC or IRC, the difference in the use that is permission in a zone and the use classification under the building code, which is a separate and distinct body of law.

P. Bealo asked if there were any emails or letters that had been received related to the application.

D. Voss read an email from Alysia Spooner Gomez, Plaistow resident and Registered Dietician, in support of Sweet Hill Farm. The email expressed support for the farm and farmers in general but did not specifically address the applications.

P. Bealo asked if there was anyone speaking in favor of the application:

Corinne Martin, 9 Buttonwood Farm, Plaistow, noted the following:

- Excited to know that Sweet Hill was going to remain a farm
- Supported the farm remaining a farm
- Had been wondering about why there were delays in what was being constructed
- Is curious why Plaistow doesn't want to maintain the farm in the community
- Feels the farm is important in the community, especially for the schools and children
- Doesn't understand the hold up over a goat pen, and how the delays look
- Noted that season matter in farming

P. Bealo asked if there was anyone speaking in opposition to the application. There was no one.

P. Bealo asked if the Board had any additional questions.

P. Kiley offered that looking at specifically the Administrative Appeal, there are accessory use provisions in the IRC that address agricultural use or would any of the accessory uses requested by the applicant be addressed in the IRC.

E. Maher offered that he would dispute that the agricultural use on this parcel as accessory to the residential use, it is the primary use of property, and there are no provisions in the IRC related to agricultural structures.

P. Bealo asked if either attorney had any additional comments or questions. There were none.

P. Bealo noted that since this was not a variance request, there were no specific criteria for the applicant to address and he closed the public hearings for #23-07 and #23-08.

DELIBERATIONS:

ZBA #23-07

★ J. Unger moved, second by P. Kiley, to grant the Appeal of Administrative Decision of the Building Inspector as noted in the legal notice as #23-07, and direct that building permit for the livestock enclosure addition be issued by the Department of Building Safety.

Discussion and Finding of Facts:

P. Bealo offered that they were looking at whether the Building Inspector acted reasonably and lawfully in the handling of permit. He added that he believed that the IBC was the standard that applies to the agricultural use of the property and a clear reading gives the Building Inspector the authority to request additional information. Not providing the information is a problem and he felt they would need to find against the applicant.

J. Unger noted that it does say he has the right to ask, P. Bealo added that it didn't say it needed to be asked upfront. J. Unger agreed that it does give him the right. He added that what he read in the contract was not a detailed cost estimate, which would be line-by-line cost information. J. Unger noted that a call to the builder and a short time on his computer would have been able to produce the details and then they could have been building.

J. Unger stated that he didn't think the Board had the right to go against what the Code says the Building Inspector has the right to do.

M. Murray added that even in the most basic of contracts there is usually more detail than the bottom-line number, at least a break out of materials and labor costs. He offered that the Building Inspector's request for additional information was reasonable to properly assess how the job was going to be constructed.

J. O'Brien offered that evidence was submitted and the testimony presented showed that the Building Inspector was acting within his authority per the regulations.

P. Kiley added that he felt it would be irresponsible of the Board to set a precedent of using the IRC for any structural type in a residential zone. He further noted that there are differences in the strict reading of the zoning and the uses on the property and believe that the application should solely fall under IBC as clearly defined in the code and the Building Inspector did nothing wrong in this case.

D. Voss reminded that the motion was made to the affirmative of directing the Building Inspector to issue the permit.

Roll Call Vote: P. Bealo – no; J. Unger – no; M. Murray – no; J. O’Brien – no; P. Kiley – no. The vote was 0-5-0 and the motion did not pass.

ZBA #23-08

★ J. Unger moved, second by J. O’Brien, to grant the Appeal of Administrative Decision of the Building Inspector as noted in the legal notice as #23-08, and direct that building permit for the bee house be issued by the Department of Building Safety.

Discussion and Findings of Fact:

P. Bealo suggested that there was no difference in the process between #23-07 and #23-08.

J. Unger agreed, noting it to be a small building, but all the concepts are the same, the Building Inspector has the right to ask for a more detailed estimate.

D. Voss reminded that the motion was made to the affirmative of directing the Building Inspector to issue the permit.

Roll Call Vote: J. Unger – no; M. Murray – no; J. O’Brien – no; P. Kiley – no; P. Bealo no. The vote was 0-5-0 and the motion did not pass.

Continued from May 25, and June 29, 2023 – Re-Noticed for 08/31/2023, continued from 08/31/2023

#23-09: A request from Sweet Hill Farm, LLC for an Appeal of the Administrative Decision of the Building Inspector/Code Enforcement Officer to issue a foundation only permit for application for Farmhouse Mudroom, Permit No. BP2023-000076. The subject property of the building permit application is 82 Newton Road, Tax Map 68, Lot 8 in both the LDR and ICR Zoning Districts. The applicant is the property owner of record.

Continued from May 25, and June 29, 2023 – Re-Noticed for 08/31/2023, continued from 08/31/2023

#23-10: A request from Sweet Hill Farm, LLC for an Appeal of the Administrative Decision of the Building Inspector/Code Enforcement Officer to issue a foundation only permit for application for Hops Barn, Permit No. BP2023-000071. The subject property of the building permit application is 82 Newton Road, Tax Map 68, Lot 8 in both the LDR and ICR Zoning Districts. The applicant is the property owner of record.

Re: ZBA #23-09

T. MacMillan noted that on or about April 12, 2023, Mr. Kane made application to remodel and expand the farmhouse mudroom. On or about April 17, 2023, he was issued a foundation only permit and it is their position that modifying the requested permit is the equivalent of a denial of the application with respect to those portions of the permit that are not included in the foundation only permit. Sweet Hill Farm takes the position that it properly applied for a permit for the construction of the mudroom expansion, submitting all the required materials and documentation and in degradation of his position and the policies and practices of the department, the Building Inspector issued a foundation only

permit, thereby denied the application for those portions of the building other than the foundation. Relying on the application filings, memorandum, letters from Mr. Kane and the submitted exhibits, the application requests that the ZBA, acting under their authority as the Building Code Board of Appeal, remove or vacate the decision of the Building Inspector and issue the full and complete permit for the mudroom expansion.

T. MacMillan referred the Board to Exhibit 2, which was the foundation only permit that was issued for the mudroom expansion. He noted that this was the first time Mr. Kane had dealt with this with any of his permit applications. The rules and regulations do not provide for it, the procedures adopted by the Board of Selectmen don't allow for the issuance of a separate foundation only permit and then have the individual come back and re-apply for the rest of the building permit (Hops barn).

T. MacMillan offered that it was stated in his memorandum that this takes back to a previous matter before the Board, which was when the Building Inspector issued a Stop Work Order for not having a building permit. It was proven that there was a building permit, and the Building Inspector had taken it and was now requiring a site plan for it to be re-issued. The ZBA resolved that issue by not requiring a site plan for this agricultural use. The issue here appears to be backing into a site plan, because in order to get further permits after the foundation permit, Sweet Hill Farm would be required to show where all the buildings are listed, so that there is confirmation that the building does not violate any setbacks, which can only be done with a site plan. A plot plan was provided with the application and should be sufficient. T. MacMillan asserted that Sweet Hill Farm should not have to file a site plan to get additional building permits and should not have to re-apply to get the permit to build after the foundation after a foundation certification.

P. Bealo asked if there was any documentation that showed Mr. Kane would have to re-apply for a permit for the rest of the structure.

T. MacMillan offered the wording on the foundation only permit where it read "foundation only" with the noted conditions "A rebar inspection is required before pour a foundation certification is required before building starts"

P. Bealo referenced an email on page 37 of the application (#23-09) that is an exchange between the Building Inspector and D. Kane, and it notes that all permits are issued as foundation only first, and then upon certification the permit for the remainder of the build is issued. He noted that the email doesn't state that a second application is required.

J. Unger asked who required that the foundation certification locate all the other buildings on the property, which was stated to be a back way of getting a site plan. The foundation certification should only show the location of the foundation for the specific permit, in relation to the lot lines.

There was discussion on the certification of the foundation. It was noted that this is to ensure that the foundation is placed where the application reports it to be.

T. MacMillan reiterated that he believed the certification requirement was backing into the requirement for more engineering, which he believes is backing into a site plan. If the

language had read “plot plan”, which is easily done he didn’t think there would be the same issues.

There was discussion on what would be required for a foundation certification versus a plot plan.

J. Unger offered that a plot plan can show the same thing and can be provided by a surveyor.

T. MacMillan replied that a certification would take someone with a license, where a plot plan could be done for about \$200-\$250.

J. Unger reiterated that it could be provided by a surveyor and didn’t require an engineer. A surveyor could shoot a couple corners of the foundation and tie them into the bounds and quickly provide the plot plan.

T. MacMillan offered that he didn’t think that an engineer would provide that as their license could be on the line. Engineering involved in a plot plan is different than what’s involved in a certification.

J. Unger offered that it wasn’t an engineer that would be needed, it would be a surveyor. The surveyor would not be looking at the construction, or the rebar, just where the structure would be placed in relation to the property lines.

D. Kane reported that the costs were four (4) times that of a plot plan, adding that a plot plan was submitted with the application.

J. Unger noted that was for the proposed location.

P. Kiley reminded that the issue at hand was whether or not the Building Inspector was allowed to issue a permit in two (2) parts.

T. MacMillan offered that he didn’t believe there was any authority. It noted it was more common in Massachusetts and that he was not aware of it being common practice in New Hampshire.

P. Kiley noted that in both the IBC and the IRC there is a provision that states that the Building Official does have the authority to issue a foundation, or any other part of the construction, before issuing the permit for the rest of the building.

D. Kane offered that there was another section that noted that to be applicable when there hasn’t been a complete submission of the application materials. Then the applicant assumes the risk that the rest of the project may not be approved for construction.

P. Kiley read IBC §107.33 which notes the Building Official is authorized to issue a permit for the construction of foundations or any other part of a building or structure before the construction documents for the whole building or structure have been submitted, without any assurance that the rest of the construction will be approved.

D. Kane asked where the assertion was in the section that noted he did not have to submit a second application. His application was complete, and no one has asserted otherwise.

P. Kiley replied that he was not making that assertion.

T. MacMillan added that he believed this was the first time this was done in the Town of Plaistow.

P. Bealo added that he had been given a bifurcated permit when his own house was built in 1995.

T. MacMillan suggested that was a different situation, the way the permits are written now, there is a list of inspections, you weren't required to get a certification. The Building Inspector just came out and took a look, and then construction moved on, which is what they contend should have been done here.

D. Kane offered that inspections are sequential by nature and the next steps cannot happen without inspection of each one before it. He offered that there was no need for the foundation only permit, or the cost of certification.

E. Maher noted that they had submitted an objection to the Board on this matter, and noted this has been the practice of the Department, and a placard stating the process has been on display since 2003 and had not been challenged in the twenty (20) years since. Not Town Meeting, not the Board of Selectmen, not a single builder in the Town of Plaistow has challenged the practice.

E. Maher offered that he wasn't sure that Mr. Kane has standing, as he hasn't been aggrieved, as he was given a permit, and it has been the practice of the Town that if it is clear that the structure is outside of the setbacks, that the Building Inspector waives the foundation certification requirement. The certification requirement is in place for the close calls. He added that not only has it been a practice in Town, but it was also done with Mr. Kane's mudroom. The foundation permit was issued, it was inspected, and the structure is built, adding he is not aggrieved by this policy, and he doesn't know why this is before the Board. E. Maher also noted that a fully engineered site plan was not what was required. He noted that Planning Board has requirements for a site plan, what was needed for this purpose was not onerous or unreasonable. He also noted that since the bifurcation policy has been posted for over five (5) years, without challenge, NH RSA 31:126 concludes it to be presumptively valid, and this policy has been in effect for twenty (20) year, so it is conclusively valid. Mr. Maher also noted that the Building Inspector does not need the authority of the Board of Selectmen, or the Town Meeting, as is provided in the Building Code that he has wide discretion as to what he can require for a permit. The Building Inspector is charged with ensuring that projects are done in accordance with the zoning ordinance is part of that charge. He noted that it is important as twenty (20) years ago, there were problems with issuing the whole permit as builders had put entire structures in a setback for not calling for their foundation inspection. If it is clear that Mr. Kane's structures are well out of the setback, then it is being publicly represented at this meeting, and on the record, that the certification requirement will be waived.

It was noted that the mudroom construction was nearly complete, despite the non-issuance of the second building permit. The Building Inspector has been making note of additional inspections on the foundation only permit.

J. Unger questioned, if the mudroom was already under construction, then why was this application even before the Board.

D. Kane responded that it was only partially constructed and reminded the Board that this application had been filed in May, and then continued, and Mr. Foye had never come to him and told him that it was waived. He added that there has not been a final inspection so he doesn't know what might happen then.

There was discussion over why the second permit had not been issued. It was suggested that it may have been prepared and had just not been picked up. Inspections have been ongoing.

P. Bealo directed that the second building permit for the mudroom construction be issued, or re-issued if it already had been, as soon as possible.

E. Maher asked that it be noted that there is no requirement for re-application for the second part of the permit.

T. MacMillan expressed concern that this would be recurring issue.

P. Bealo noted the Board was only dealing with these two issues, and does not set policy, but he offered that there was a recognized communication issue between the applicant and the Building Inspector, which he hopes can be solved in the future.

T. MacMillan offered that the actions that are being taken are not in any written form that an applicant can review, adding that they can't be expected to refer to the IRC or the IBC, as was done with the 2017 BOS approval of the current permitting policy. He asked if someone is subject to the discretion and whim of the Building Inspector what's the benchmark for when a waiver of the certification requirement can be granted and when it applies. He asserted there should be a written rule for when any applicant may be required to provide a certification. He added that since the waiving of a certification has not been communicated to Mr. Kane, it's possible that the Building Inspector could come for the final inspection and say that the proper procedure wasn't followed for that certification, and he could refuse to sign off on the final inspection.

P. Bealo offered that the Board was trying to avoid that.

J. Unger reminded that it was stated that the sign has been up in the office for twenty plus years that states the two-part process. He noted that it was also noted on the permit, so he assumed that both would be notification.

There was additional discussion regarding the building permit and when certification was required. T. MacMillan offered that Sweet Hill Farm was looking for some kind of guidepost.

J. Unger asked E. Maher who the certification policy applies to.

E. Maher offered that it applied to everyone unless they were clearly outside of the setbacks in which case a waiver of the certification requirement can be given.

J. Unger asked if the possibility of the certification waiver is communicated to applicants.

E. Maher explained that it wasn't on the placard, but he saw no reason why it couldn't be added and could be done on Monday.

P. Bealo suggested that it not be expected by Monday, but that it would be better to take time to do it right. It was decided that it would be done within thirty (30) days.

T. MacMillan offered that they were still dealing with a retrospective action.

P. Bealo said that he wasn't sure that was the case as the structure was already under construction or done, not sure why it's still being hear, there was ample opportunity to be withdrawn.

T. MacMillan reminded that the ZBA appeal application was filed in May.

J. Unger added that the hours it took to write the letters to the Board could have been used to send an email to request a withdrawal.

T. MacMillan offered that there should be a procedure in place that lets applicants know when certification will be required or waived.

There was additional discussion regarding the "stick" part of the permit not having been issued. It was noted that the foundation had been inspection and that the Building Inspector had completed three (3) inspections on the structure, where the signoffs for each were noted on the foundation only permit.

E. Maher stipulated that by Wednesday of next week, there will be a permit issued and it will be noted that certification of the foundation is not required, where the continued inspections didn't indicate as such.

P. Bealo stated that it should be hand-delivered.

J. Unger offered that his motion would be that the application be withdrawn.

T. MacMillan referred again to the foundation only permit that was issued, granting that construction had continued despite there not being a second permit issued, which he contends goes to the arbitrary and capricious nature of the Building Inspector's actions, without having written policies in place.

P. Bealo offered that the Building Inspector is asserting that the second permit was drawn up and is waiting in the office for whatever reason, at the very minimum he would have thought at a minimum at any time of the subsequent inspections, he could have crossed out and initialed “foundation only.” It’s more of an issue of how to get the second permit to the applicant.

T. MacMillan question what would happen if Mr. Foye were to leave his position and a new Inspector takes over and says that construction cannot continue because a foundation-only permit was all that was issued.

J. Unger noted that subsequent inspections were being signed for.

T. MacMillan offered that there wasn’t much difference between he #23-09 and #23-10 permits, and all the same arguments are presented, except the Hops Barn has not been built.

P. Bealo noted that he’s been doing planning and zoning things forever, and also worked in the industry for 50 plus, adding he’d never seen a manufacturing policy or procedure that was in notebooks that folks had to follow that was 100%, not necessarily right, but is reality that there is no such thing as a bullet proof procedure.

D. Kane offered that with respect to the practice, in 2018 the author of the policy issued a building permit, no foundation only, no certification and the building was built in accordance with the permit. The buildings were 100s of feet away from the setback. Now that he’s building these structures and was told he needs a certification, is what drives him a little “bonkers.” He noted that he’s a slave to process, been in business a long time, he suggested that the process be clear and consistent, asking if it mattered if it was two (2) feet over.

P. Bealo noted that it has been an issue in the past.

J. Unger questioned if Mr. Kane had asked about getting the waiver as had been done in the past.

D. Kane responded that he was not the public servant, adding that it should just be that they are all waived.

J. Unger offered that it wouldn’t be appropriate to issue a blanket waiver as some people try to put structures 6” from the property line.

D. Kane offered that it wasn’t a blanket waiver, it’s on the plot plan.

J. Unger replied that he wasn’t just speaking about the farm, but that everyone needed to be treated the same.

D. Kane noted that it wasn’t’ stated in the policy.

P. Bealo noted that BOS set policy, the Building Inspector can set his own procedure.

D. Kane asked how he would know that it would be waved for the next one.

J. Unger suggested by speaking with the Building Inspector.

D. Kane replied that was not the environment that he was dealing with.

P. Bealo suggested that needed to be corrected.

P. Bealo called for a five (5) minute recess at 8:25pm. The meeting was called back to order at 8:32pm.

T. MacMillan offered that there had been discussions between the applicant, the Building Inspector, and their counsel that would allow for the two (2) applications, #23-09, and #23-10 to be withdrawn. He offered that he would defer to Attorney Maher for the explanation that would be case specific to these two but would allow for some policy/procedure changes going forward.

E. Maher noted the following:

- Agree with the applicant on the policy in general so within thirty (30) days the policy will be amended to express the opportunity of a waiver when it's clear that a structure is outside of the applicable setbacks.
- Also, will address in policy the impact of whether a second building permit will be necessary.
- Re: Mudroom expansion – it will be investigated if there was a permit issued, and if there was not it will be generated and provided to the applicant.

P. Bealo noted that he wanted the building permit to be hand-delivered and no further reliance on mail or scanning. He added that he didn't want any further delays for this.

- Re: Hops Barn – Mr. Kane has provided a plot plan, and if the barn is constructed per that plan, which is clearly outside of the setback, then a waiver will be issued for the foundation certification. The second building permit will be issued upon inspection of the foundation.

★ T. MacMillan requested to withdraw the application for ZBA Matter #23-09

Re: ZBA #23-10

★ T. MacMillan requested to withdraw the application for ZBA Matter #23-10

Continued from 08/31/2023

#23-11: A request from Josh Manning, Lewis Builders Development, Inc, for a variance from Article V, §220-32.F.C(1)(b) to allow a property to be subdivided into two (2) parcels with less than the required 200' of frontage for each parcel. The two (2) parcels are proposed to have 157.6' and 157.7' of frontage. The property is located at 17 Harriman Road, Tax Map 50, Lot 78 in the LDR Zoning District. Gerald E. Holt is the property owner of record.

Attorney Patricia Panciocco was present for the application representing Mr. Holt. It was noted that there was a letter in the file allowing for the representation.

P. Bealo noted that although the Board has heard similar applications in the past, this is a new application and nothing from the past has any bearing on this public hearing. Everything will be starting from scratch.

P. Panciocco offered that she wasn't sure she agreed with the Chair's statement, noting that there was a "snafu" in the notification of abutters from the last application and there was already an order from the Housing Appeals Board. She added that they were at this meeting to allow the one (1) abutter that was omitted to be heard.

P. Bealo stated that he disagreed, noting the application was because the company failed to notify all abutters.

P. Panciocco offered that was false, adding there was a discussion between Lewis Builders and the Town over a setting on the GIS map that needed to be adjusted and didn't include one abutter who shared a corner point with the property, noting that it wasn't a failure of her office.

D. Voss explained that she took in the application, noting that there was no discussion regarding how to develop the abutters list and that it was her understanding that there were four (4) abutters who were not included on the submitted list.

P. Bealo stated that the application would be heard from scratch or not at all.

P. Panciocco offered that they would take the application from scratch to get things resolved at this meeting but reiterated that the only reason they elected to resubmit was the abutter issue.

P. Bealo reiterated that the Board would be hearing it as a new hearing.

P. Panciocco noted that she accepted the Board's position but wasn't going to necessarily agree with it as it was not her understanding, and she was ready to move forward and see how things go.

P. Bealo offered that he wasn't sure about the "see how things go" comment.

P. Panciocco suggested that the Board's Counsel could weigh in.

P. Kiley suggested that the Board take a short break to consult with Counsel.

P. Bealo called for a break at 8:42PM and asked everyone but the Board to leave the room. The meeting was called back to order at 8:49PM

P. Bealo noted that the application has new evidence in it, including a traffic (accident) study.

P. Panciocco replied that information had been submitted to the Board with the previous application, adding there was nothing new in this application.

P. Bealo offered that he didn't recall the accident report from the previous application, but regardless, when an issue comes up with abutter notification, there is no mechanism that allows just the omitted abutter(s) to be heard, those who weren't at the previous meeting deserve to be able to hear the entire presentation. So, the Board is either going to start from scratch at this meeting if Ms. Panciocco is prepared to do so. If not, the Board would be happy to continue to the next meeting.

P. Panciocco stated that she was prepared to go through the whole application at this meeting. She added that she felt it was important to put on the record what occurred and requested that Heidi Tombarello, Legal Counsel at Lewis Builders join her at the table to offer an explanation of what had happened with the abutter notification.

H. Tombarello explained the process that was used to identify the abutters with the previous equal frontage variance application in 2022. She noted that the settings in the Town's online GIS system caused different abutters lists to be generated between the different applications that had been filed over time. When the application was being prepared in 2022, the GIS setting was at "0" and it did not identify five (5) properties that are abutters. Now the settings were back at 100' for their 2023 Planning Board application, which is how it was discovered that some of the abutters were not notified of the ZBA application. She further explained that the application in 2022 was denied and then appealed to the Housing Appeals Board (HAB), who sided with Lewis Builders, which allowed the Planning Board application to move forward. He added that they applied to this meeting to re-open the record to allow those abutters who were missed to participate.

P. Bealo offered that the only part he disagreed with was that the Board was not re-opening the matter, they were hearing it as a new matter. While the HAB made a ruling, that ruling was based in part on an abutters list that was not valid, which invalidates the whole process.

H. Tombarello replied that the abutters who were not notified are against the application, which the Board had denied, so their participation would not have changed the outcome of the previous public hearing.

P. Bealo suggested that Lewis Builders could not speak for the abutters.

H. Tombarello offered that she wasn't trying to speak for the abutters, and they could put their comments on the record, but she noted that there were the "tea leaves" from the HAB, and she felt that they would rule against the abutters, and she didn't see the need to waste the time.

P. Bealo responded that he wasn't going to take that for granted, and the Board will be starting from scratch.

J. Unger noted that there was now a voting member on the Board who wasn't part of the previous public hearing and couldn't be expected to vote on an application he wasn't able to participate in.

H. Tombarello offered that she wanted to make it clear that there was no malicious intent on the part of Lewis Builders to exclude the abutters from the previous application.

P. Panciocco offered the following information regarding the variance application:

- The parcel is Tax Map 50, Lot 78
- The property is located in the LDR Zoning District
- The parcel is 49.3AC with 315' of frontage on Harriman Rd
- The proposal is to subdivide the lot into two (2) parcels, one with 157.6' and the other with 157.7' of frontage on Harriman Road
- The premises is located in a strictly residential area and until the late 1980's the frontage requirement was 150'
- The parcel was not subdivided at that time, when it would have met the requirements
- There was a variance granted in 1996, however, it had expired
- There was a previous variance application to create a totally compliant lot with 214.8' of frontage and a request for the second lot to only have 100.4' of frontage, which was denied
- That variance was appealed to the HAB and the ZBA decision was affirmed
- A last variance application for the same frontage dimensions as this application was made, and the Board denied that application for not meeting the hardship test
- The HAB reversed the ZBA's decision and granted the variance with conditions
- It came to their attention, when it was too late that some abutters had been overlooked in the application, no re-hearing was requested

There was discussion of some of the exhibits submitted with the application showing the sizes of surrounding lots and their frontages; sight distance calculations; proposed sight distance maintenance easement; and a proposed location of a driveway on the resultant 46AC lot that meets all applicable standards.

P. Panciocco offered the following responses to the criteria for the granting of a variance:

- Granting the variance will not be Contrary to the Public Interest because:
 - o The Holts property is located in an area where the surrounding lots have 150' frontage and the proposed frontages exceed that
 - o The public interest in minimum frontage is to control lot sizes, prevent overcrowding and ensure safe emergency vehicle access
 - o Because there are also improvements proposed to the property frontage as part of the subdivision, it addresses all the noted safety concerns
 - o Both lots will otherwise conform with the district requirements
 - o Former member Burri offered in previous deliberations that the public interest favors not lots mirroring the characteristics of the surrounding properties, which this application achieves
- The Spirit and Intent of the Ordinance is observed because:
 - o The granting of a variance would allow two (2) lots to be created with 21% less frontage than required by the ordinance, but more frontage than many of the surrounding lots, with additional safety improvements
 - o There will not be increases hazards to motorists or pedestrians
 - o It will not increase traffic in any measurable way because the use of the lots will be consistent with others in the area

- The proposed improvements to the sight distance will substantially improve visibility for the traveling public
- There is Substantial Justice in granting the variance because:
 - The public stands to gain nothing from denying the application and will gain from the increased visibility and enhanced public safety
 - The property owner would suffer a substantial loss if he were not allowed to subdivide the property
- The Values of Surrounding Properties will not be Diminished because:
 - The applicant requests a 21% reduction in the required 200' frontage for each lot
 - The resulting frontage will be greater than, or equal to the frontage on surrounding lots
 - Mr. Holts home will remain on one (1) lot
 - Any single-family home built on the second lot will be set back from the road by 235' to maintain proper spacing and privacy
 - The planned residential use of the lots will not reduce the value of the surrounding residential properties now or in the future
- Literal enforcement of the provisions of the ordinance would result in Unnecessary Hardship because:
- First Test – *No fair and substantial relationship exists between the general purpose of the ordinance provision and the specific application of that provision to the property because:*
 - The property's special condition is its 315.2' single access point on Harriman Road.
 - The frontage prevents any reasonable use of the +/-46AC located to the rear if it cannot be separated without Mr. Holt giving up his home because the frontage does not numerically conform
 - The unique parcel is shaped unlike others in the surrounding area
 - Because it was not subdivided before 1986, when the frontage requirement was 150', it cannot be subdivided into two (2) conforming lots without a variance
 - When the 200' frontage requirement is strictly applied, it imposes an unnecessary hardship and denies Mr. Holt any reasonable use of the acreage to the rear without giving up his home
 - Homes are already located on most of the lots in the area, they are not overcrowded, and there is no impediment to emergency vehicles shows there is no fair and substantial relationship between the additional 50' frontage requirement in this area
 - Mr. Holt should not bear the unnecessary hardship alone and need to leave his home to subdivide and sell his acreage
 - Granting the variance to allow a two (2) lot subdivision where each lot has at least 157' in an area where most lots have 150' is reasonable
- Alternative Test – *If the criteria in the first test are not established, an unnecessary hardship will be deemed to existing if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be*

reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable the use of it.

- The +/-46AC portion of the property and its corresponding excess frontage cannot be reasonably used in strict conformance with the ordinance because its 315.2' of frontage along Harriman Road is not evenly divisible by the required 200' of frontage
- Mr. Holt's reasonable desire to stay in his home and his need to sell his acreage requires a variance to reduce the required frontage to 157' per lot for reasonable use of the acreage

P. Kiley offered that he wanted to give a little pushback on the public safety improvements. He referred to the traffic/accident reports, nothing that it speaks to what had happened in this area, but offered no comparison to other similar areas to know if the figures were higher or lower. He added that he did appreciate the desire to offer improvements.

P. Panciocco noted that the police reports were requested in response to complaints that there were high numbers of traffic incidents at this location. She added that the sight distance issue had been identified, and a remedy was proposed with the enhancements and maintenance easement.

There was a brief discussion of some of the numbers and locations of accidents on Harriman Road. It was noted that there were higher instances nearer to Pollard Road.

P. Bealo asked if the Board had any additional questions; there were none. He asked if there was anyone speaking in favor of the application. There was no one. P. Bealo asked if there was anyone speaking in opposition to the application, or just had general questions.

Meghan Martin, 9 Buttonwood Farm, Plaistow offered the following:

- She asked for clarification as to what was materially different in this application that the last application that was denied, cited the prohibition in Fisher v. Dover

P. Bealo noted that because of the faulty abutter notification, it was as if the former application never happened, so Fisher didn't apply

- Concern over the proposed location of the driveway and impacts to the line of sight
- Concern over the maintenance easement and it not being a guarantee that the sight distance would be maintained

P. Panciocco offered that the application was materially different in the way they addressed the hardship test. She added that two (2) licensed professionals reviewed the sight distance plan and noted it to be a vast improvement over the existing conditions. She added that it would be reviewed once again as part of the Planning Board review process.

J. Unger asked who was responsible for the maintenance of the sight distance.

P. Panciocco responded that it was incumbent upon the property owner, but the easement would give the Town the authority to take care of it if they do not.

Corinne Martin, 9 Buttonwood Farm, Plaistow, NH offered the following:

- She was one of the abutters not notified, so she thanked them for honoring their request to cease and desist
- If the Town is forced to maintain the sight distance because the property owner does not, that will provide additional hardship to the taxpayers
- There were inconsistencies in the presentation, as it was noted to only be one (1) abutter that wasn't notified, when it was five (5)
- If there is grading of the vegetation, how will that impact runoff from the property as it was noted that the +/-46AC has a lot of wetlands

P. Bealo noted that drainage would be an issue for the Planning Board's purview and encouraged Ms. Martin to attend those meetings when notified.

- Ms. Martin recalled a number of safety concerns that were raised in the very first variance application with letters from Marilyn Senter, former member of the Highway Safety Committee, and former Police Chief Stephen Savage adding that times change, people change, but the curvature of the road has not changed
- Ms. Martin suggested that the attorney had not driven the road, adding that conditions change seasonally and that it wasn't safe to walk.
- She reiterated her safety concerns and adding concerns over the loss of wetlands and woodlands

P. Bealo asked if there were any letters or emails that had been received. It was noted that there were none.

There was discussion over the conditions that had been affirmed by the HAB in their reversal of the Board's previous denial. There were no objections from the applicant that those conditions would be applicable to this application if granted as well.

P. Bealo asked once more if anyone had any additional questions or comments. There was no one and the public hearing was closed.

DELIBERATIONS:

★P. Kiley moved, second by J. O'Brien, to grant the request for a variance from Article V, Table 220-32F.C(1)(b) to allow the property at 17 Harriman Road Tax Map 50, Lot 78 lot to be subdivided into two (2) lots with 157.6' and 157.7' of frontage, where 200' is the minimum required, with the following conditions:

- ***A subdivision application must be filed with the Plaistow Planning Board within 180 days of the date of this decision or the approval of the variance is denied***
- ***A sight distance easement shall be referenced in any deeds conveying either lot created by the subdivision plan, the easement shall require any property owner be responsible for the maintenance of the sight distance as shown on the sight distance profile plan, dated February 11, 2021 with revisions through August 8, 2022, represented as Exhibit A(2) at this meeting.***

- *The sight distance profile plan, Exhibit A(2), as presented at this meeting, is included with the subdivision plan that is submitted to the Planning Board.*
- *The sight distance easement to be prepared by Owner in favor of the Town of Plaistow shall have language that notes the costs of continually maintaining the required site distance are the responsibility of the property owner(s).*
- *This variance is valid only for subdivision of the lot as depicted on the plan titled “Harriman Road Subdivision” and dated February 1, 2021 with revisions through August 8, 2022, as submitted with the application. Any change in the frontage calculations will invalidate this variance.*
- *Revisions to the Plan, as may be required by the Planning Board during their subdivision review process, that do not change the frontage as granted by this variance, will not invalidate this variance.*
- *Any structure on the property must maintain a setback of 235’ from Harriman Rd.*

Discussion and Findings:

- The Public Interest is not served by denying the frontage variance that would give the property owner the right to subdivide his 49Ac parcel into two (2) parcels.
- The Spirit and Intent of the Ordinance is preserved as there will be ample frontage to support each lot.
- There is Substantial Justice in granted the variance as the is gain or loss to the general public in a two-lot subdivision, yet the property owner would suffer a loss in not being able to subdivide the property if the frontage variance is not granted.
- There was no evidence presented that the frontage variance would impact the surrounding property values.
- There is a hardship in that there is limited frontage for such a large, unusually shaped parcel.
 - o The general purpose of the ordinance is not served in the denial of the variance which would prevent the proposed two-lot subdivision
 - o It is reasonable to grant the variance in consideration of the size of the parcel and the available sight distance.

D. Voss reminded that the motion was to grant the variance with the stated conditions.

Roll Call Vote: M. Murray – yes; J. O’Brien – yes; P. Kiley – yes; P. Bealo – yes; J. Unger – yes. The vote was 5-0-0 U/A

Continued from 08/31/2023

#23-12: A request from Barbara J. Bryer for a variance from Article III, §220-17.6 to allow the temporary use of a camper as living space, which is not permitted by zoning, for purpose of healing a broken back peacefully. The property is located at 14 Spinney Av, Tax Map 38, Lot 15, in the MDR Zoning District. The applicant is the property owner of record.

Barbara Ryan, applicant’s daughter, was present for the application.

It was noted for the record that there was an agent letter submitted with the application to allow B. Ryan to represent the applicant.

B. Ryan offered some background for the application, noting the following:

- Her sister had broken her back
- Before moving to the camper their home had caught on fire
- She spends lots of time in the camper because it's more peaceful than in the home
- The mother and brother also live in the house
- The brother is handicapped with Alzheimer's Disease
- The sister occasionally sleeps in the house, but needs the camper for when the brother gets out of hand
- Eventually they would like to build an attached Accessory Dwelling Unit (ADU)
- A new septic has been installed in preparation for the ADU, but income is limited so they need to take things a step at a time
- The electric has been permitted
- The take is pumped every two (2) weeks by Peter's Sewer Service
- There was a letter from the mother requesting some understanding during this time that they are trying to figure everything out

P. Bealo asked how long they needed to use the camper.

B. Ryan replied that it would not be longer than a year, adding that they were trying to move the ADU process forward as quickly as possible

P. Bealo asked if there was a contractor for the ADU.

B. Ryan answered that they had not yet, adding getting the septic replaced was the first step. She offered that there had been some issues between her and one of the abutters, which was now being handled in a different legal venue.

P. Bealo asked if six (6) months would be sufficient. B. Ryan noted that would be in the middle of winter.

J. Unger asked if the camper was already owned or if it had been brought in for this purpose. It was noted to have already been there.

P. Bealo asked B. Ryan to go through her responses to the variance criteria.

B. Ryan offered the following responses to the variance criteria:

- The proposed variance will not be Contrary to the Public Interest because it is no way interferes with anyone else's property
- The Spirit and Intent of the Ordinance are preserved because it is neatly places and groomed, adding it will be on the property anyway
- There is Substantial Justice in granting the variance because the sister (daughter of property owner) is facing a medical hardship and cannot do stairs. The camper is her escape. She lost her job over all the issues and has been burned out of her house
- The Values of Surrounding Properties will not be Diminished because people can store campers on their property

- Literal enforcement of the provisions of the ordinance would result in an Unnecessary Hardship:
 - o No fair and substantial relationship exists between the general purpose of ordinance provision and the specific application of that provision to the property because it is not the principal building
 - o The proposed use is a reasonable one because it is a medical necessity and is only temporary

P. Bealo questioned the waste water removal.

B. Ryan noted that it had been reported to the EPA (Environmental Protection Agency) and there were no findings.

J. Unger noted that he had overall safety concerns in that a camper is not designed to be heated 24/7 for long periods of time.

B. Ryan responded that they were not sleeping in it on a regular basis.

M. Murray asked how the access would be maintained when it snowed.

B. Ryan replied that she hoped that her sister would be walking better by then.

P. Bealo asked if there had been any letters or emails received.

D. Voss read a copy of an email that was sent to a Melissa Burleigh by a Ron and Jackie Cocolin, 15 Massasoit Blvd, Plaistow that noted the following:

- Their backyard was adjacent to the subject property
- It recalled a conversation with a neighbor (Dave) regarding how the sister was injured and lost her job and that it was disputed
- Dave complained about the conditions in the yard and the daughter and son-in-law living in the camper
- Dave suggested that there was an issue with the mail and hadn't received the certified notice of the meeting
- Dave was seeking the Cocolin's assistance in opposing the variance application, but the Cocolins provided a letter of support instead

P. Bealo asked if there was anyone speaking in opposition or with general questions.

Michelle Tighe Frongillo, 17 Chandler Ave, Plaistow, NH read a statement that noted the following:

- She moved to Plaistow in 2018.
- She felt that she was not able to peacefully enjoy her property because of disruptions.
- She alleged that since 2019 the subject property had been gradually, but quickly, becoming a junkyard with occupants and non-occupants storing items on the property.
- She noted items that had been accumulating on the property and stacked, sometimes covered with tarps, or stored in a shipping container.

- A previous Zoning Official had been contacted in 2019, he viewed the property, but never did any follow-up.
- In July 2022, the camper was brought on the property and a man and woman were living in it full-time.
- The camper is hooked up to electricity and the to the main house for water, cable. The couple have been living in the camper with their dog.

She offered the following reasons why the variance should be denied:

- The camper has been lived in for well over a year in violation of the zoning ordinances. It is clear to Ms. Frongillo that it has been made a permanent year-round home by the fencing, ramp, gardens, winterizing, and the décor.
- The camper is a hazard to surrounding properties, with hoses leaking from beneath it and the sewer being pumped.
- There are multiple lines coming from it for electricity, water and cable all running to the main house.
- Along with the piles of junk the camper is a breeding ground for animals to nest under and she had noted an influx of rodents to her home.
- There are certain zoning requirements for building accessory dwellings, shed and additional onto properties to ensure privacy and encroachment to abutters and the camper is placed in a spot where all are violated, and their children are uncomfortable in their own backyard.
- The camper is bringing down surrounding property values and as taxpayers she fears that any potential buyer for her home would be wary of their neighbors, and she would suffer a financial loss. Other neighbors would be impacted the same way.
- If it is allowed on this property, there will be a trickling effect throughout the community. Others will think it's okay to have family, friends and even tenants in campers on their properties.
- When the camper arrived on the property and was found to be used as a dwelling the Zoning Officer was alerted and also informed of other violations on the property.
- She has been assured by Rick Foye, as well as the Town Attorney, on multiple occasions that the issue would be rectified and there would be compliance with the zoning ordinances.
- There were Court dates set and continued without follow through.
- It was noted that another structure on the property had caught fire.
- Ample time has been afforded for the property to be brought into compliance and the situation has become unreasonable.
- The application states there is one (1) occupant in the camper in need of recovery, but there are two (2) people living in the camper.
- They are sympathetic to people's hardships, but the camper would be better suited to a campground that is set up to accommodate the camper legally.
- They ask the Board to deny the request for the variance and bring the property up to code
- The letter was signed Michelle Frongillo and David Tiberio

M. Frongillo also provided the Board with pictures they had taken to illustrate the conditions on the property.

B. Ryan acknowledged that there were issues between her family and the abutters and offered that they were being addressed in another Court. She noted that those issues were not the subject of her application and requested that the focus be on the subject of the application.

P. Bealo suggested that the records from the Department of Building Safety be requested and that the public hearing on this matter be continued to the next meeting.

David Tiberio, 17 Chandler Ave, Plaistow, NH offered the following:

- The applicant was already in Court with the Town over violations on the property
- The sister (daughter), her husband and the dog have been in the camper for more than a year
- They have had ample time to comply

B. Ryan offered additional rebuttal with the following:

- There is ongoing litigation and Mr. Foye is no longer allowed on the property without their lawyer present
- They have been working on compliance and have resolved many of the other issues with the property
- There is litigation pending with the abutters that was not the subject of this application
- Requested the focus be on what is in the application

M. Frongillo reiterated her concerns, as did D. Tiberio. They noted the impact on their property and their family's privacy adding that they couldn't afford to purchase a fence.

Dominic Leggeri, 12 Spinney Ave, Plaistow, NH offered the following:

- He also owns the property at 16 Spinney Ave, which is a small slice of land in front of the subject property.
- The property has an easement for his septic, and he has concerns over the applicant and driving over his leach field.
- He noted that the conditions on the property have become a concern for the neighborhood with accumulation of trash, garbage, and smells.
- He tries to be a good neighbor, but the trailer has become an eyesore
- They have been cleaning up, but there is heavy equipment on the property on a regular basis
- He has concerns about the depreciation of his property value over declining aesthetics

J. Unger expressed concern over the one (1) occupant vs. the two (2) people and a dog.

M. Murray questioned how the file would be reviewed.

B. Ryan asked if it was overstepping to bring up the code enforcement action, that was already being handled, into consideration of her variance request.

P. Bealo directed that the entire Department of Building Safety file for 14 Spinney Av be requested and provided for the next meeting on October 26, 2023.

★ *P. Bealo noted that the public hearing was continued to October 26, 6:30PM and that this was the official notice of the continuance. No additional notice in writing would be forthcoming.*

Minutes of August 31, 2023

★ *M. Murray moved, second by J. Unger, to approve the minutes from the August 31, 2023, meeting. There was no discussion on the motion.*

Roll Call Vote: J. O'Brien – yes; P. Kiley – yes; P. Bealo – abstain; J. Unger – yes; M. Murray – yes. The vote was 4-0-1 and the motion to approve the August 31, 2023, minutes passed.

OTHER BUSINESS:

ZBA By-Law Amendments

D. Voss read the proposed changes to the Board's By-Laws, noting that this was the second reading of the proposed amendments.

Bold italics designates added language

~~*Bold italics strikethrough*~~ designates deleted language

Proposed Change #1: New section to follow the section titled "Meetings"

TRAINING:

Members of the Board are expected to keep up to date with changes in local ordinances and NH RSAs. Therefore, each member is required to attend at least one (1) approved training session, during each three (3) year term as a member, or an alternate member of the Board, providing that approved training is available. The cost, if any, for member training opportunities shall be covered by the Town. Members may seek training on their own but must have it pre-approved by the Board as appropriate training, and by the Town for payment of training. Confirmation of training attendance shall be submitted to the Town for reimbursement. If the Town pre-pays for training, and the member does not attend, the member may have to reimburse the Town for the cost of the training.

Proposed Change #2: Changes/edits to the checklist for a completed application under the "Application/Decision" section:

Only a completed application, submitted prior to the posted deadline, will be accepted. A complete application shall consist of the following items:

- Completed and signed application form.
- Original signature authorization to proceed letter if applicant is not the property owner.
- Names and *mailing* addresses of all abutters, property owner(s) and ~~other~~ consultant(s), including legal counsel, if applicable.

- Mailing labels for all abutters, property owners, and other consultants, including legal counsel, if applicable, with each name/address appearing three (3) times. See application form for specific label size.
- ***If the application is for a variance, then it must include Any letter(s) of denial or recommendations ~~or other referral~~ from an appropriate ~~other~~ boards, committees, commissions, or departments, and/or a Zoning Determination document from the Zoning Officer, detailing the specific need for the variance as requested.***
- Any related plans or deeds if required *for the specific application*.
- Electronic/Digital copies of all listed items, *except the mailing labels*.
- All applicable fees

Proposed Change #3: New paragraphs under “Decisions” heading:

Per RSA 674:33, 1-a(a) and IV(b) any variance or special exception shall be valid if exercised within two (2) years from the date of final approval, or as further extended by the local ordinance or by the Zoning Board of Adjustment for good cause, provided that no variance or special exception shall expire within six (6) months after the resolution of a planning application filed in reliance upon the variance or special exception.

Requests for extension of time beyond the two (2) year requirement shall be considered as part of a legally noticed public hearing and such requests must be filed prior to the expiration of the two (2) year period. All requests shall be in writing and shall demonstrate good cause as to why the two (2) year period should be extended. The costs of legally noticing the public hearing to consider an extension shall be the responsibility of the applicant.

Variations and special exceptions that are not exercised or extended by the Zoning Board of Adjustment, as noted above, shall be considered as denied with prejudice.

★P. Bealo moved, second by J. O’Brien, to adopt the changes to the Zoning Board of Adjustment’s By-Laws with the changes as read at both the August 31, and September 28, 2023 meetings.

Roll Call Vote: P. Kiley – yes; P. Bealo – yes; J. Unger – yes; M. Murray – yes; J. O’Brien – yes. The vote was 5-0-0 U/A

There was no additional business before the Board and the meeting was adjourned at 11:02 pm.

Respectfully Submitted,

Dee Voss
Administrative Assistant