



Town of Merrimack, New Hampshire

Community Development Department

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Planning - Zoning - Economic Development - Conservation

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MERRIMACK ZONING BOARD OF ADJUSTMENT

APPROVED MINUTES

WEDNESDAY, JANUARY 25, 2023

Board members present; Chair Richard Conescu; Vice Chair Rod Buckley; Ben Niles; Patrick Dwyer & Alternate Charles Mower

Board members absent: Lynn Christensen

Staff present: Robert Price, Planning & Zoning Administrator & Colleen Olsen, Assistant Planner

1. Call to Order

Chair Rich Conescu called the meeting to order at 6:30 p.m.

2. Roll Call

Mr. Conescu led the Pledge of Allegiance and swore in members of the public who would be testifying. Rod Buckley read the preamble.

3. Catherine Turbett & Clinton Howell (petitioners/owners) - Variance under Section 3.02.4 of the Zoning Ordinance to permit an existing leach field to remain 13 feet from the side property line whereas 20 feet is required. The parcel is located at 19 Whitetail Ridge in the R-1 (Residential, by map) District. Tax Map 4A, Lot 23-09. Case # ZBA 2023-07.

Clinton Howell and Catherine Turbett briefly explained they were seeking a variance for their existing leach field that is encroaching into their side setback. Mr. Conescu asked when the leach field was put in and Mr. Howell replied it was put in around September or October 2021, but this was an approximation, as he wasn't the property owner at the time.

Mr. Conescu questioned how the applicants found out they needed a variance. Robert Price explained the issue arose when the applicants tried to obtain a Certificate of Occupancy, specifically, it was noted during the review of the submitted plot plan. During that process, staff discovered there is no local review for septic plans in Merrimack. The Building Department relies on the State of NH to review the plans. If the State approves the plans, then the system can be constructed. Mr. Price pointed out that Merrimack has a local, and more restrictive leach field setback than the State. He continued to explain the State only takes their own requirements into consideration, so this project ended up slipping through. Mr. Conescu asked if this type of issue was unavoidable. Mr. Price replied that he did not think it was unavoidable; if there was local review of septic plans the issue would have been caught earlier.

Mr. Mower asked if a building permit was issued by the Town. Mr. Howell responded that to the best of their knowledge, yes. Robert Price also commented that from staff's knowledge, the Building Department had issued all necessary construction permits. Mr. Mower continued to ask

if the contractor was familiar with the requirements and regulations set forth by the Town of Merrimack. Mr. Price stated that the contractor was not necessarily familiar with the regulations as there was no local review of any septic plans done. The contractor went forward under the approval for construction that the State issued which is based on State setback requirements. Mr. Mower rebutted that the Town of Merrimack had issued a permit to a construction company for the ability to operate in the Town of Merrimack under that building permit. Mr. Price confirmed there was a permit issued for the dwelling, which is separate from septic review.

Mr. Conescu stated he was unsure of what Mr. Mower's question was. Mr. Mower clarified that his question was why the contractor did not follow the requirements for the Town of Merrimack under a building permit. Mr. Conescu stated this is what Mr. Price was explaining. Mr. Mower said that this was what Mr. Price was attempting to explain, but said he had not yet fulfilled the obligation. Mr. Price said he could not speak for the Building Department as they are not a part of the Community Development Department. He did not know why the Building Department did not complete a local review of the septic system or why they did not try to figure out why the local setback was not adhered to.

Mr. Mower asked who designed the septic system and submitted the plans. Mr. Price responded he did not know. Mr. Howell responded that he believes Fieldstone Land Consultants created the septic design, but he did not know who the installer was. Mr. Conescu asked if the builder had gone bankrupt. Mr. Howell confirmed that was correct. Mr. Mower stated that he would like to know what the alternative plans were and the associated costs. Mr. Conescu replied that he was not sure anyone would have that information. Mr. Mower said he felt this information was necessary for consideration. Discussion touched on the importance of Zoning Ordinances and clarification of the determination the Board had to make in this case.

Mr. Mower felt that damage to the public should be considered, stating the petitioner suggested there was not any but Mr. Mower disagreed. He indicated these types of issues occur in the construction industry frequently and end up being the responsibility of the Town, which he did not feel was the right way to handle things. Mr. Conescu stated that he believes this should have been reviewed at the time the building permit was issued. Unfortunately the process can't be corrected in this meeting.

Mr. Mower rebutted saying that he felt that the Board could make recommendations to correct the process. He said that failure on the part of the Town of Merrimack, as suggested, is a significant accusation. Mr. Conescu stated that this would be worth discussing at the end of the meeting. In terms of the current petition, he was not sure this concern was relevant. His suggestion was to continue with this petition and then discuss process after all petitions were heard. He again clarified the Board's responsibilities in reviewing the case before the Board. Mr. Mower again rebutted that the Board can't determine anything until they have been given the alternative options for other septic designs as well as their associated construction costs. Mr. Conescu disagreed because at this point, it was not relevant. The Board cannot suggest to an owner that they relocate their leach field because of a setback encroachment missed on the builder's part. It's not the owners fault.

Mr. Niles commented the Town also issued a building permit without reviewing the leach field plans, so the Town is partially at fault. The process has a flaw, which will be discussed at the end of the meeting, but the Town can correct this process going forward. Mr. Mower stated this may or may not be true. The true facts of the case are not known, they have been presented anecdotally without evidence. Mr. Conescu noted at this time, he would like to continue to hear the petition

and this discussion can be continued towards the end of the meeting, or when going through a motion.

Mr. Buckley questioned if the owners had a generic sense of what it would cost to relocate the leach field. Mr. Howell stated they had not solicited any quotes for this type of work. Mr. Conescu stated it would be very expensive. Mr. Buckley stated he thought so, too but thought it may be helpful to have a ballpark figure. Mr. Conescu noted he believes he replaced his leach field about 10 years ago and it was around \$15,000 at the time, adding that the price now would be much higher.

Mr. Mower said he could appreciate the position the home owners were in. However, these issues fall on the responsibility of the contractor and the home owner, not the Town of Merrimack. The Board may be looking to ease some of this situation, but it is not the Town's responsibility to find a solution every time a side line setback issue arises for a home owner. Mr. Conescu remarked this was correct. Mr. Mower insisted a contractor or home owner's mistake was not the Town's responsibility. He stated the Town's obligation is to follow the Zoning Ordinances and follow the permitting rules for the Town of Merrimack.

Mr. Buckley commented that to some degree, he agreed with Mr. Mower. However, he felt it was unfair for the home owners to take this burden on as the contractor filed for bankruptcy, leaving the home owners with various things to clean up and finish. He did not want to make accusations but felt it was possible the contractor found it was easier to ask forgiveness than permission. His hope is that a discussion at the end of the meeting could help avoid these situations in the future, especially on new construction homes.

Discussion touched on what effect the variance, if granted, would have on the public and whether or not the home owners met the variance criteria sufficiently. Mr. Conescu again stated any discussion of what led up to the issue should be tabled. The focus should be explicitly on the petition itself. He did not feel the public would gain anything from the relocation of a leach field, other than saying the Board strictly enforced an Ordinance, which is not what the Board was here to do.

Clinton Howell then read through the responses to the statutory requirements (outlined below)

Public comment

Public comment was received via letter from Kaila Howe of 17 White Tail Ridge and read into record by Mr. Conescu. A copy of the letter is on file in the Community Development Department.

The Board voted 4-1-0 to determine that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the Variance under Section 3.02.4 of the Zoning Ordinance to permit the existing leach field to remain 13 feet from the side property line whereas 20 feet is required, on a motion made by Patrick Dwyer and seconded by Rod Buckley. Charles Mower voted in opposition.

Findings of Fact:

- 1. Granting the variance would not be contrary to the public interest because:***

The existing leach field location of 19 White Tail Ridge abuts 17 White Tail Ridge's leach field, which is on a leveled part of 17 White Tail Ridge's lot and 30 feet down a man-made retaining wall from the abutter's yard and further from their well and primary dwelling. This placement places both leach fields a substantial distance from 17 White Tail Ridge's building structure, existing well, and usually yard/ Additionally, based on the location of 19 White Tail Ridge's leach field and 17 White Tail Ridge's leach field, it is unlikely that a well will be placed in proximity to either leach field. It is also noted (please see attached letter) that the neighbor residing at 17 White Tail Ridge is in support of the variance and it will not impact their interest in the land. Lastly, the existing leach field location of 19 White Tail Ridge sits on a leveled part of the lot and 30 feet above a man-made retaining wall, where the remainder of 19 White Tail Ridge's property extends behind another approximate 1 acre. Please see attached photos of leach field placement. The request for this variance is not contrary to public interest because it will not be harmful to the public health, safety or welfare. The location of the leach field does not alter the essential character of the neighborhood or be viewable by the neighbors/people. The state inspected and approved the placement of the septic system, including the leach field. The location promotes public interest by maximizing the space of land cleared for the home on the front 1/3 of the lot and avoiding the public easement side of the lot (the opposing property line) and allowing for the back 2/3 of the lot to maintain woods and neighborhood trail access to the Grater Woods conservation area. While the Town of Merrimack requires a 20 foot setback for the leach field, the State of New Hampshire only required a 10 foot setback. As installed, this septic system meets all state requirements.

2. The spirit of the ordinance is observed because:

The existing leach field location of 19 White Tail Ridge abuts 17 White Tail Ridge's leach field, which is on a leveled part of 17 White Tail Ridge's lot and 30 feet down a man-made retaining wall. This placement places both leach fields a substantial distance from 17 White Tail Ridge's building structure, existing well, and usable yard. Additionally, based on the location of 19 White Tail Ridge's leach field and 17 White Tail Ridge's leach field, it is unlikely that any structure will be placed in proximity to either leach field. Lastly, the existing leach field location of 19 White Tail Ridge sits on a leveled part of the lot and 30 feet above a man-made retaining wall, where the remainder of 19 White Tail Ridge's property extends behind another approximate 1 acre. The request for this variance is not contrary to public interest because it will not be harmful to the public health, safety, or welfare. The location of the leach field would not alter the essential character of the neighborhood or be visible by any neighbors/people. The state approved the placement of the septic system, including the leach field. The location promotes public interest by maximizing the space of land cleared for the home on the front 1/3 of the lot and avoiding the public easement side of the lot (the opposing property line) and allowing for the back 2/3 of the lot to maintain woods and neighborhood trail access to the Grater Woods conservation area. While the Town of Merrimack requires a 20 foot setback for the leach field, the State of New Hampshire only requires a 10 foot setback. As installed, this septic system meets all state requirements.

3. Granting the variance would do substantial justice because:

Granting the variance would do substantial justice as the existing leach field location of 19 White Tail Ridge does not do harm to the general public. To further support substantial justice, the existing leach field of 19 White Tail Ridge abuts the leach field of 17 White Tail

Ridge which already renders that part of the 17 White Tail Ridge unfit for the placement of a structure or well for either property. Additionally, the variance allows the leach field to stay at the front 1/3 of the lot opposite the public easement and reduces impact to the remaining woods and neighborhood trail access to the Grater Woods conservation area at the back of the 2/3 of the lot. To deny the request for a variance would be a substantial injustice with no real gain to the public. To grant this variance would take advantage of property that is already unfit for anything else based on the placement of both leach field and maintain the integrity of the woods surrounding them and the public easement side of the lot (the opposing property line). In addition, the property was developed by a builder that is now bankrupt and no longer in business. The owners of 19 White Tail Ridge are left to finish multiple issues left behind by detail designed builders and due to the design of the property, moving the leach field would require significant re-design that could alter the character of the neighborhood.

4. Granting the variance would not diminish the values of surrounding properties because:

Granting the variance would not diminish the values of surrounding properties as their property is in a residential area. The existing leach field is consistent with the existing character of the neighborhood maintain the homes and the surrounding house related items (i.e. septic, well) within close proximity to the homes to maintain the woods structure around them. The design, location, and construction consider the unique downslope characteristics of the property while being cognizant and sensitive to the primary abutting property. In addition, the placement of the leach field on 19 White Tail Ridge abuts the leach field of 17 White Tail Ridge taking advantage of parts of the properties that are already unfit for other uses and maximizing other parts of both properties for other uses.

5. Unnecessary Hardship:

a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of the property:

The significant downslope of the property of 19 White Tail Ridge required that the property be built up using fill material to construct the single family residence. The leach field location was determined by one of the few level portions of the property which would satisfy the requirements of the septic system. The original septic design had the leach field placed outside of the 20 foot setback, however, upon construction of the leach field, due to property characteristics, it was moved slightly closed to the property boundary. This placed it within the Town of Merrimack's 20 foot setback requirement. This septic system as constructed was inspected and approved for use by the State of New Hampshire. Reasonable use of this leach field location is justified by the location of the abutter's leach field at 17 White Tail Ridge, which is on the opposite side of the property line, rendering both property's use of that location unfit for anything other than the leach field. With the existing structures and retaining walls in place, there are no other places on the property of 19 White Tail Ridge to place the leach field without altering the character of the neighborhood.

The Board took up agenda item 10 before item 4.

10. Mark Rivet (petitioner) and Fraser Square Realty, LLC (owner) – Variance under Section 2.02.13 (F) of the Zoning Ordinance to permit a density of 6 multi-family residential units in the Town Center Overlay District on a 19,140 square foot parcel whereas 1 unit per 40,000 square feet is allowed. The parcel is located at 2 Railroad Avenue in the C-2 (General Commercial), I-1 (Industrial), Aquifer Conservation, Elderly Housing Overlay, and Town Center Overlay Districts. Tax Map 5D-4, Lot 79. Case # ZBA 2023-08.

Chris Guida of Fieldstone Land Consultants, PLLC and Mark Rivet (petitioner) presented the project. Mr. Guida gave a brief overview of the project. He explained that the proposal is to repurpose the existing buildings, which are currently a mix of commercial and residential uses, and switch to a primarily residential use. This seems to be the need and demand in the Town, State, and Country. There's not a big demand for commercial properties anymore and the owners have had a difficult time finding a tenant for the space. Mr. Dwyer asked if the first building shown on the provided plans was the flower shop. Mr. Guida responded the flower shop is next door. Mr. Rivet described the buildings on site.

Mr. Niles questioned if the current use of the front building was totally commercial. Mr. Rivet said no. The first floor was an insurance business until around 2016. A brief history of former businesses in the building was given. In response to a question from Mr. Dwyer, Mr. Rivet stated the front building work had now been completed and the stilts beneath the building had been removed (the building's foundation was recently rehabilitated). Mr. Niles asked for the square footage of the two pre-existing apartments that are located upstairs from the commercial spaces. Mr. Rivet explained the two apartments have existed since 2000 and are around 650 square feet each. Mr. Conescu asked if the apartments were studio or one bedroom. Mr. Rivet responded that there is both a one bedroom and a two bedroom apartment. Each has a different layout because of the stairway location. He briefly described the layout of each unit.

Mr. Conescu asked if the plan was to replicate these apartments downstairs. Mr. Rivet explained because of the location of the stairway, the plan was to have two one bedroom apartments. Mr. Conescu questioned what the building at the back of the property currently is. Mr. Rivet said it is currently a two bedroom single family home. Mr. Conescu asked if the plan was to split the home into two units. Mr. Rivet responded because of the stone foundation, he would have to put it up on stilts to fix it (similar to what was just done with the front building). He was thinking of converting it into two units with one bedroom each. The square footage would stay the same. Since it is already a two story home it would just be divided into two units.

Mr. Guida explained that this property is non-conforming, as most in the area are. He pointed out that Mr. Rivet is not looking to expand but is instead looking to change the use of the property from mixed to fully residential. The only changes would be the renovations and repairs needed to convert the pre-existing buildings into apartments. Mr. Conescu asked if the parking along the left side of the building would be for the units. Mr. Rivet replied yes. Mr. Guida stated that there is an excess of parking and he has about twice as much as what is required for a residential usage.

Mr. Conescu noted the apartments were being touted as affordable and asked what the rent would be for the units. Mr. Rivet said the 1 bedroom upstairs unit was \$1,000 a month while the upstairs two bedroom was currently vacant, but would probably be a little over \$1,000 a month. The downstairs one bedroom units would be priced between \$1,000 and \$1,500 a month. He added that the utility cost would be very low in these units since they have been renovated and now have gas heat and efficient furnaces. He added that they are inexpensive compared to other

units in the area because they don't have any real amenities, but some renters are not looking for amenities.

Questions regarding the Elderly Housing Overlay District (which this site is in) were covered, especially in regards to whether or not Mr. Rivet had age limit stipulations for current or prospective renters. Mr. Rivet stated he did not have a stipulation for age. Mr. Price added that just because the property is in the Elderly Housing Overlay District does mean that this specific overlay would have to be used. Mr. Rivet is utilizing the Town Center Overlay District (within which the property is also located). He clarified that overlay district zoning is optional to utilize and can offer specific benefits for those looking to rely upon them, such as in this case where the Town Center Overlay District permits residential use while the underlying C-2 (general commercial) district would require a special exception. Mr. Niles stated that in this case he would withdraw his comment that he felt 55+ stipulations were in the spirit of the ordinance.

Mr. Guida also noted the buildings are served by municipal water, sewer, and gas. Mr. Mower stated he felt the criteria had been met for a variance, but that Mr. Rivet had failed to mention that he had gone to great lengths to maintain a historic building that was essential to the long term character of the community. He felt this was of tremendous public value.

Mr. Conescu asked Mr. Price if the owner decides to remove the current building and construct a new one, would they still be able to have six units if this variance were granted. Mr. Price said yes, because the variance runs with the land. If that building were to be torn down, Mr. Rivet would have the permission to place 6 units on the property. Mr. Conescu questioned if there was any way to stipulate that in the motion. Mr. Price responded that the Board can't condition that the building cannot be torn down.

Mr. Niles pointed out that in the Zoning Ordinances, there is a minimum square footage requirement. A single family or two family has a minimum of 600 square feet per living area and from the information provided, the rear building seems to meet the requirement. He then asked if there would be two separate units on the upper level and two separate units on the lower level in the front building. Mr. Rivet confirmed this was correct. Mr. Buckley and Mr. Dwyer both commented briefly on how Mr. Rivet has been before the Zoning Board in the past and has always done the work he said he would.

Mr. Guida then read through the responses to the statutory requirements (outlined below).

No public comments were received.

The Board voted 5-0-0 to determine that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact and further, to grant the variance under Section 2.02.13 (F) of the Zoning Ordinance to permit a density of 6 multi-family residential units in the Town Center Overlay District on a 19,140 square foot parcel whereas 1 unit per 40,000 square feet is allowed, on a motion by Rod Buckley and seconded by Charles Mower.

Findings of Fact:

- 1. Granting the variance would not be contrary to the public interest because:***

Granting this variance would allow for the productive use of the existing property. The need for affordable housing has continued to grow and utilizing this site for housing would be a benefit to the public. This development is located in the Town Center Overlay District and will provide a mix of 2 bedroom and 1 bedroom apartments in an ideal location in the center of Merrimack. The nearby properties are also non-conforming lots with a mix of multi-family and commercial uses. This includes a crematorium to the North and flower shop to the South along with non-conforming multi-family residential uses on lots 5D-4 75 & 76 to the northwest. The proposed improvements to the site will create a more consistent neighborhood visual appearance as the multi-family buildings to the northwest were also recently constructed. The design of the site will not create any health or safety problems and will provide additional housing for the community. The uses proposed are permitted in the underlying zoning and will be consistent with surroundings. Since this proposal will provide the above while resulting in no negative impacts to the public, we believe granting this variance would not be contrary to the public interest.

2. The spirit of the ordinance is observed because:

The project is an allowed use in this district and is limited by the size of the lot. The site is already developed and provides many of the necessities for a multi-family residential use. There are adequate parking spaces already provided, utilities on site, drainage, traffic, and other improvements. The new use will not make the lot more non-conforming and will reduce impervious area by providing a landscaped area at the front of the site. We believe that the intent of this ordinance is to limit overdevelopment of parcels and create a harmonious neighborhood in the district. Since the proposed structures are already built, the site will not be overdeveloped and the neighborhoods visual appearance will be improved. Since this proposal will provide the above and will result in no negative impacts to the public, we believe that granting the variance would observe the spirit of the ordinance.

3. Granting the variance would do substantial justice because:

Granting this variance would allow for the productive use of an existing lot and provide needed housing in the center of the town. In the current market commercial spaces are difficult to rent as there is not a large demand. Our client would like to renovate the existing commercial use and create additional residential units. In addition, this project will improve the existing buildings on site, bring them up to code, and enhance visual appearance of the neighborhood. The uses proposed are permitted in the underlying zoning and will be consistent with the surroundings. This project will provide quality housing for the community. This project will also increase the local tax base. Granting this variance would do substantial justice because it would allow for the productive use of the property, as described above, while providing responsible growth in the community. In other words, a denial of this variance request would be an injustice to my client as there would be no apparent gain to the general public by denying this application.

4. Granting the variance would not diminish the values of surrounding properties because:

The existing site is in good condition with new pavement and parking. The projects conversion to all multi-family residential use will allow the buildings on site to be updated and increase the visual aesthetic. The uses proposed are permitted in the underlying zoning and are consistent with the surroundings. It has also been our experience that new

construction and development will actually increase the value of surrounding properties. As a results we would expect this project to have positive impacts on surrounding property values.

5. Unnecessary Hardship:

- a. Owing to the special conditions of the property that distinguish it from other properties in the area, explain how no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:**

The subject parcel 5D-4-79 is 0.439 acres, or 19,140 square feet. It is located in the C-2 Commercial and I-1 Industrial districts, as well as the Town Center Overlay District. The Town Center Overlay District states that residential uses are allowed (Section 2.02.13.C.1). The density regulations of Section 2.02.13.F state that residential uses in the C-2 and I-1 Districts must meet the yard and lot requirements of the corresponding residential districts. Since the site has public sewer and water, R-4 zoning is applied. Those requirements state that each unit of a multi-family development must have 40,000 square feet of area. The subject parcel is unique in that it was created prior to the updated zoning ordinance. The existing commercial use section of the building will be difficult to rent in the current market. This lot is an ideal site for renovation and would suit a multi-family residential development. Based on the above, we do not believe that a fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property.

- b. The proposed use is a reasonable one because:**

We believe that the proposed use is a reasonable one for all of the reasons previously stated. The following is an outline of why we believe the proposed use is reasonable.

- Granting this variance would allow for the productive use of the existing property*
- The existing buildings and improvements already exist so the site will easily handle the residential use.*
- This project would have no measurable negative impacts on the surroundings or their property values.*
- The multi-family residential use would not be contrary to the public interest.*
- This project will not alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public*
- This proposal would in our opinion observe the spirit and intent of the ordinance*
- The site plan demonstrates that there is adequate space on the subject properties to support this redevelopment. Since this proposal will provide the above and will result in no negative impacts to the public we believe that the proposed use is reasonable.*

- 4. Governor's Hill Corp (petitioner/owner) – Variance under Section 3.02.4 of the Zoning Ordinance to permit an existing leach field to remain 10 feet from the side property line whereas**

20 feet is required. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-01.

Eli Leino of Bernstein Shur (attorney), Dana Finn of LaMontagne Builders, LLC, and Steve Keach from Keach Nordstrom (project engineer) presented the petition.

Mr. Leino explained that the reason they applied with three applications for either an Administrative Appeals, Variance applications, or Equitable Waiver applications is because time is of the essence in his client's situation. The property was supposed to close the week before Christmas. The buyer is a single mom with two kids and two dogs who are all now living in a hotel due to the delay. This project was built in accordance with the approved NHDES septic plan. He mentioned the retaining wall was put up after a good faith reading of the Zoning Ordinance, however a Certificate of Occupancy has not been received.

They put in several applications in case the variance applications were denied. If the variances were denied, and they had not applied for the equitable waivers, they would have to return next month resulting in his client's buyer being displaced for a longer period of time. He explained that if relief were to be received for this application, he would ask that the other applications be tabled until next month so that any applicable appeals periods could run. Any applications remaining would then be withdrawn.

Mr. Leino briefly explained this application was similar to the first application heard this evening, though it was under a slightly different provision of the Zoning Ordinance. The applicant submitted a septic design that was approved by the State of NH. The issue arose after review of the Town's Zoning Ordinance while trying to receive the certificate of occupancy.

He explained that the subject lot is a pre-existing non-conforming lot, with the bulk of the lots in the area being developed in the 1970's. Mr. Leino shared that they had reviewed Town Ordinances and noted that the DES regulations were referenced, so the leach field was designed in such a way that it is compliant with those regulations. His client then applied to NHDES and received an Approval for Construction, which was sent to the Building Department and apparently not reviewed as part of the building permit application process. On December 1, 2022 the petitioner received an Approval for Operation from the State and this was also sent to the Town. The information was not reviewed until Mr. Price noted that this doesn't fall under Section 3.02.4 requirements.

Mr. Conescu asked if this lot was recently built to which Mr. Leino confirmed that it was a new build construction. He noted the site was rather challenging in that the terrain at Constance Street flows steeply downhill towards the Reeds Ferry Elementary School. He noted that a retaining wall was built to try to create a level driveway and house lot, which took a significant amount of site work. Due to the retaining wall bifurcating the site, this is the spot that made the most sense for the septic system while complying with NHDES regulations.

Mr. Conescu asked if the Board requested the leach field be moved to follow the Ordinance, if the retaining wall would also need to be moved in the case of the Variance being denied. Mr. Leino said he is not the project engineer, but his understanding is that the as-built location is the most logical place for the system and if it were moved 10 more feet away from the property line, according to Mr. Price's understanding of the Ordinance, the leach field would be in the house whereas it is currently in the side yard. The other option would be to possibly level the lot without the use of a retaining wall and not encroaching on the back setback. Currently, it is out of the way

of the house and driveway on a flat spot. Mr. Conescu clarified that his question was whether or not anything else on site would need to change if the leach field were to be moved. Mr. Leino stated he believed that substantial site work would need to be undertaken in that case.

Mr. Niles questioned if the houses in this area were on Town water and if any wells would be affected. Mr. Leino responded the neighborhood is on Town water, but added that the neighborhood is a mix of septic and Town sewer. Mr. Keach responded that no wells would be affected. One of Mr. Keach's employees devised the layout. He referred to a copy of certified plot plan in the Board members' packets and stated Mr. Price had used this to determine there was a problem with the site. The leach field in question is situated at the Northeast corner of the lot approximately 10 feet off the property line. The contractor put the leach field where it was designed to be in accordance with NHDES regulations but it does not meet the town of Merrimack's 20 foot side setback regulation.

Mr. Keach explained the location of the house is such that it needed foundation drains around the perimeter. There is a minimum setback to the house to avoid issues with the foundation drain. Because of the reasons Mr. Leino explained earlier, there aren't a lot of options on the site. Because of the way the home is situated on an elevated area, it required the retaining wall, which resulted in the creation of a plateau. This lot which was created in 1966, is part of the Level Acres Subdivision and was very steep; perhaps the reason why it sat so long without being developed. He reiterated that the lot is a pre-existing non-conforming lot, with the bulk of the lots in the area being developed in the 1970's. The location of the septic system meets NHDES criteria for both construction and operation. He noted there is a bit of a disconnect between interpretation of Sections 3.02.4 and 3.06 today and what it has been in the past when the Town did review septic side setbacks before construction. With the bifurcation of the Building and Planning Departments, apparently this has changed.

Mr. Conescu asked for clarification that there was no expectation that the Town reviews the septic plan and that's why this issue arose. Mr. Keach responded that if you look at Section 3.06 it references the State's regulations, and this has typically been enforced. Historically, Section 3.06 has applied to either lots of record or for system replacements. Section 3.02.4 refers to the 1978 zoning changes which created the R-1 through R-4 zones. He had no argument that Section 3.02.4 which requires the 20 foot setback applies to lots created after 1978. He has been in business for about 30 years and has many systems designed and sited precisely the way this system was in reliance on Section 3.06.

Mr. Mower indicated he did not accept this as meeting the criteria for a variance. He understands the issue is very complicated, most of which has nothing to do with the Town of Merrimack. Ultimately, the Board is being asked to give a variance for financial hardship and he does not believe the criteria was met. Mr. Leino pushed back stating that this is a strictly dimensional variance question. There is not really another place to put the system. Financially, he concurred there will be a significant cost incurred if it needed to be relocated, but he reiterated that due to the significantly sloped lot, there is not another reasonable place for the system to be put so that it conforms to the Zoning Ordinance.

Mr. Mower questioned if he was to take this as an unequivocal denial that there is a financial hardship. Mr. Leino remarked he did not believe he unequivocally denied anything and did agree with Mr. Mower that there were financial concerns at play.

Mr. Niles said he had visited the site during the day and what Mr. Leino said was very accurate and precise. He briefly explained the site and said he felt what Mr. Leino was proposing was very logical and reasonable. A few hypothetical questions were discussed regarding potential problems with moving the leach field. Mr. Keach commented that the biggest difficulty from a construction standpoint to move the system below the retaining wall would be accessing the area for construction, and more importantly future maintenance. He spoke of how the petitioner had worked hard to make improvements and maintain a reasonable appearance on the property. He continued to cover some concerns briefly as well as some factors for the Board to consider.

Mr. Keach explained it is not just the initial costs that have to be considered, but the long term costs and benefits to the home owner as well. If the system were to be moved behind the retaining wall (facing the elementary school) issues may not be easily visible which could eventually present a public health concern.

Mr. Conescu asked if the petitioner would need to remove the retaining wall in order to relocate the leach field. Mr. Keach responded he thinks the retaining wall would need to be excavated completely and reinstalled if the system were to be moved behind the retaining wall. The wall would most likely need to be removed again when the system needed to be replaced. Mr. Keach feels this is the most practical place for the system considering it needs maintenance. He stated if it were moved below the retaining wall he is concerned the cost would be so exorbitant that the home owner would avoid repairs for as long as possible. Mr. Dwyer noted he felt like there is a larger issue at hand which needs to be discussed at the end of the meeting.

Discussion touched on how more similar issues may continue to arise, especially for non-conforming lots, if a solution is not found. This is partially due to lots that were previously too challenging to build on now being developed.

Mr. Leino then read through the responses to the statutory requirements (outlined below)

No public comments were received.

The Board voted 4-1-0 to determine that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the Variance under Section 3.02.4 of the Zoning Ordinance to permit an existing leach field to remain 10 feet away from the side property line whereas 20 feet is required, on a motion made by Patrick Dwyer and Seconded by Ben Niles. Charles Mower voted in opposition.

Findings of Fact:

1. *Granting the variance would not be contrary to the public interest because:*

The purpose of the setback requirement is to prevent overdevelopment of lots to be detriment of neighboring lots at large. The leach field, which has already been approved and installed pursuant to septic regulations, will present visually as a continuation of the side yard. Furthermore the leach field location cannot be further built upon without significant risk to the functionality of the septic system. Granting the variance would not alter the essential character of the neighborhood, nor harm the public health, safety, or welfare, and is therefore not contrary to the public interest.

2. The spirit of the ordinance is observed because:

The spirit of the ordinance is reflected in the Zoning Ordinance's efforts to protect both the character of the neighborhood and the public interest. Taken in conjunction with the first criteria, the granting of this variance will not diminish the lot's essential use as a residential lot in the residential zone (and in fact enhances that use), nor will it harm the neighbors or the public. As such, the spirit of the ordinance is being observed.

3. Granting the variance would do substantial justice because:

Substantial justice required balancing the potential loss to the applicant against the gain to the public. If this variance is denied, the public will not reap any material benefit and the applicant will be significantly disadvantaged by being forced to redesign and reinstall the septic system. The septic system is an essential component of this house and has been sited and approved (under septic regulations) in its most logical location on the lot.

4. Granting the variance would not diminish the values of surrounding properties because:

Each of these lots is serviced by private septic systems with a leach field. The proposed leach field minimally encroached into the side setback set forth in Section 3.05 of the Ordinance and should have no impact on property values as any encroachment will be underground.

5. Unnecessary Hardship:

a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:

This property is unique in that it required significant fill and the installation of a retaining wall to flatten and stabilize the building envelope. As reflected on the plan, the septic system location is as far removed as possible from the retaining walls and slopes because that is the most logical location on site. As noted, the purposed of setback requirements is to prevent overcrowding of buildings and structures, and that goal of the Zoning Ordinance will be upheld even if the variance relief is granted.

b. The proposed use is a reasonable one because:

Septic systems are allowed in this zone and each of the neighboring lots is also served by private septic. The Supreme Court in NH has upheld that an allowed use is inherently reasonable.

5. Governor's Hill Corp (petitioner/owner) – Variance under Section 3.06 of the Zoning Ordinance to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-02.

Mr. Leino said that if the setbacks were 100 feet and the retaining wall started 3 feet from the side setback, it would make a visual difference. Whereas, if you were to move the retaining wall to make it conforming, visually it would not be very noticeable because it is not a large setback. He believes that he and Mr. Price have a good faith disagreement of the definitions of structures and buildings. Mr. Conescu asked how the retaining wall got missed during the building process. Mr. Leino mentioned canons of instruction for reviewing Zoning Ordinances. He referenced the definitions of yard and side yard in the Zoning Ordinances. He said one of the definitions allowed accessory structures within setbacks, which the retaining wall would be by many definitions. They decided to install the retaining wall in the most logical place which was compliant with the Ordinances. A Variance is now being sought after the fact as their reading of the Zoning Ordinance was incorrect. Mr. Leino did mention he was unsure if the reading was in fact incorrect, but for the sake of the variance stated it was.

Mr. Dwyer questioned if the wall was on the side of the house. Mr. Leino replied yes. Mr. Dwyer asked if the Zoning Ordinance was talking about the wall not being allowed on the side of the house. Mr. Leino said the distinction is that there is a definition for yard setback and side yard setback. Side yard setback references buildings while yard setback mentions structures. If this said structure, it would absolutely be a structure in the side setback. Mr. Keach added there is not a definition of the term structure in the Zoning Ordinance.

Mr. Price interjected that staff disagrees, noting there is a definition of structure in the Zoning Ordinance. He went on to read the definition. Mr. Leino stated his point was that under side yard setback, the Ordinances refer to a building rather than a structure. He continued that his understanding was that a structure was anything in a fixed location with a roof. Mr. Conescu commented that when he heard the definition of a structure, he was thinking of a gazebo, not a retaining wall. He was unsure of how a retaining wall and fence were different in terms of how zoning would treat them. Mr. Leino stated that his client was seeking the variance relief for being non-compliant with the setback. Mr. Price explained that from staff's viewpoint, anything that would require a building permit is considered a structure. Under the 2018 International Building Code, a retaining wall that is greater than 4 feet in height does require a building permit and engineering, therefore it would be considered a structure.

Mr. Conescu clarified if it was a structure because it was a retaining wall or because of its dimensions. Mr. Price reiterated that anything over 4 feet in height is considered a structure. Questions about the height of the wall were discussed with Mr. Price confirming the highest portion was 18.3 feet tall within the setback. Mr. Conescu remarked that he understood why the variance was before the Board, however he would be frustrated as a homeowner if he had to get a variance to build one.

It was questioned whether or not this would need to go before the Planning Board or Building Department. Mr. Price said it would not need to go before the Planning Board. Staff's understanding, based on the way the building code reads, is that since the wall is over 4 feet in height, it would require a building permit and therefore be reviewed by the Building Department. Staff's understanding in this case is that review and permitting did not occur.

Mr. Buckley questioned if the petitioner would need to go to the Planning Board. Mr. Price responded there is no reason to go before the Planning Board for the retaining wall on a single family home lot. This would have been caught during the building permit review process. Mr. Keach commented that during the process, the building permit for the house and all the

construction was obtained, and routine inspections required by the building department occurred favorably. It wasn't until Mr. Price reviewed the plot plan and reviewed it for zoning compliance, as part of the issuance of a Certificate of Occupancy, that the problem was discovered. Mr. Buckley clarified if the Building Department came and saw the wall and did not say anything. Mr. Price said he could not speak to that.

Mr. Leino commented the wall was correctly built and engineered. Mr. Buckley still questioned how this step may have been missed. Mr. Keach said he could not speak directly to this piece of construction, but often times in the case of a single family home, when you apply for a building permit it is issued as a single permit. It could have been presumed that the wall construction was covered under the permit that was issued for this construction.

Mr. Mower commented that he failed to believe that the configuration of the lot and situation before the Board evolved in a way that was unregulated and that this is the only possible solution. The representation of this case is that this problem, as it exists, could not have any other outcome and the responsibility lies on the Town to grant relief. He noted it came down to financial hardship, as the last case had and reiterated he found it hard to believe that the option being presented was the only possible one. Mr. Conescu remarked that the petitioners stated this was not the only configuration available, it is just the most practical one. Mr. Mower asked the minutes reflect that he believes this to be an inappropriate adjudication at this venue and would be voting in opposition.

Mr. Leino then read through the responses to the statutory requirements (outlined below)

Public comment

Timothy Dutton speaking on behalf of Pauline Hall (20 Constance Street) raised concerns about the location of the retaining wall. With it being 1.6 feet from the property line, and with a steep slope, they are concerned with potential road runoff affecting Mrs. Hall's land. He noted that over the summer, there was a lot of debris that had washed from the construction site and onto Mrs. Hall's land during heavy rain events. When Mr. Dutton was recently at the property, from the top of the road down to approximately 184 feet, there is no silt fencing. The fencing starts at the edge of the retaining wall and goes around the back where there are wet soils. Their concern over time is that water will flow onto Mrs. Hall's property and cause problems and they are looking for a way to solve that problem.

Mr. Conescu questioned if Mr. Dutton could define what types of debris washed onto Mrs. Hall's property. Mr. Dutton responded it was soil that had flowed down from the property. They are worried that over time water flow may be directed from the space between the driveway and retaining wall onto Mrs. Hall's property. Mr. Conescu questioned the amount of debris. Mr. Dutton responded that he unfortunately had not taken any pictures. Mr. Conescu clarified that the concerns are runoff and runoff impact from the retaining wall. Mr. Dutton confirmed this and stated they are looking for a solution to prevent this. Questions about how recently runoff had been an issue and whether it was during construction or afterwards were also covered.

Mr. Price added that Public Works was at the site when fill was first placed. To the best of his knowledge, he believes at some point well before construction of the house, there was at least one instance of a good amount of erosion that brought debris down towards the property line. This may be where the concern stemmed from. Mr. Dutton added that the silt fence starts at the corner of the lot and goes around. Mr. Conescu again confirmed that the primary concern was

runoff and how drainage will be handled. Mr. Dutton agreed. Mr. Conescu said he could relay these concerns to the petitioner.

The Board's decision is based on the configuration of the property and how the retaining wall is currently set up. He noted that he cannot speak for the petitioners. Mr. Dutton responded that they would like to know how the wall was built 1.6 feet from the property line. This was their biggest question and they were unable to get an answer from the Town. Mr. Conescu asked if runoff was not an issue, would there still be a concern about how close the retaining wall is to Mrs. Hall's property. Mr. Dutton said yes, they would still like an answer regarding the placement of the retaining wall.

Mr. Keach said he could respond to Mr. Dutton's first question. He stated that during construction on some lots in Level Acres, the construction crews did have some difficulties with erosion control. He spoke about a stormwater prevention plan being in place with regular inspections to be completed for compliance with MS4. Mr. Keach stated that when he was made aware of the issue, he went out to take a look. The area of the retaining wall is what he would now consider stable. He continued to explain the purpose of the retaining wall and the ways in which it could assist with drainage issues. Mr. Leino explained how the problem had occurred after the State went from a drought to very rainy conditions this past summer. Mr. Keach explained they had reviewed the site after being made aware of erosion issues by the petitioner and believes the problem has most likely dissipated.

Mr. Dutton pointed out his specific area of concern and reiterated some drainage concerns due to the layout of the site. Mr. Keach spoke to the fact that the petitioner will need to do some fine grading, loaming and seeding in the spring. Mr. Keach asked that Mr. Finn, an employee of the petitioner, complete some of this work in the spring. He said he would walk the property with Mr. Dutton to identify problem areas. Mr. Conescu asked if the Planning Board had to visit the site. Mr. Price responded no, the Planning Board did not have any jurisdiction in the matter.

The Board voted 4-1-0 to determine that the petitioner's responses to the statutory criteria are sufficient, proved each criterion is met, and the Board adopts the petitioner's responses as the Board's findings of fact, and further, to grant the Variance under Section 3.06 of the Zoning Ordinance to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required, on a motion made by Patrick Dwyer and Seconded by Rod Buckley. Charles Mower voted in opposition.

Findings of Fact:

1. *Granting the variance would not be contrary to the public interest because:*

The retaining wall was built with boulders from this lot and neighboring lots and is significantly screened by existing mature trees. Additionally, due to the natural contour of the lot with relation to Constance Street, the visual impact of the retaining wall is minimized. Granting the variance allows for a desirable flat home site and driveway and will not negatively impact the public health, safety, or welfare, nor alter the essential residential character of the neighborhood.

2. *The spirit of the ordinance is observed because:*

The goal of the ordinance is to prevent overcrowding and this natural stone retaining wall provides separation through both the retaining wall and the resulting elevation difference between this home and the property at 20 Constance Street. Granting this variance enhances the lot's essential use as a residential lot by stabilize the severe natural slopes without negatively impacting the neighbors or the public. As such, the spirit of the ordinance is observed.

3. Granting the variance would do substantial justice because:

In balancing the rights of the lot owner with the rights of the public, removal of the existing retaining wall and redevelopment of the site will be very expensive, and a better alternative location does not exist. Based on the topography of the site, a denial of this variance would not be outweighed by any gain to the public. Moving the retaining wall out of the 15-foot setback would require removal of the driveway and essentially create a multilevel house lot. Doing so would not materially benefit the neighbor or neighborhood, as a retaining wall would still be necessary and only marginally further setback from the lot line if it were to comply with the 15-foot setback.

4. Granting the variance would not diminish the values of surrounding properties because:

The unique natural contours of this site require fill and stabilization to provide a level building and yard areas. The new house will provide favorable comparable values and should help raise property values in the neighborhood. Additionally, retaining wall of various construction (poured concrete, pressure treated wood, fieldstone etc.) are common on Constance Street, so this retaining wall is not out of place in the area.

5. Unnecessary Hardship:

a. Owing to the following special conditions of the property that distinguish it from other properties in the area, explain how no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property:

While many lots on Constance Street feature slopes and retaining walls, the severe elevation change present on this lot, in conjunction with the developer's effort to provide access and a yard on the same level as the house, required more site work and fill than nearly any lot on Constance Street. Furthermore, the preexisting lot configuration and dimensions greatly minimized the options available for overcoming the severe elevation change. Given the difficulties presented by the lot, the purpose of the ordinance will be upheld.

b. The proposed use is a reasonable one because:

Installing the "accessory structure" retaining wall directly corresponds to use of the lot for a single-family residence, and allowed and customary use in the zone.

6. Governor's Hill Corp (petitioner/owner) – Equitable Waiver of Dimensional Requirements under Section 3.05 of the Zoning Ordinance to permit an existing leach field to remain 13 feet

from the side property line whereas 20 feet is required. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-06.

7. **Governor's Hill Corp (petitioner/owner)** – Equitable Waiver of Dimensional Requirements under Section 3.02.4 of the Zoning Ordinance to permit an existing rock retaining wall to remain 1.6 feet, at its closest point, from the side property line whereas 15 feet is required. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-05.
8. **Governor's Hill Corp (petitioner/owner)** – Appeal from an Administrative Decision issued on December 13, 2022 that determined a newly installed (2022) leach field shall adhere to the Town's 20' property line setback despite being installed on a legal nonconforming lot of record. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-03.
9. **Governor's Hill Corp (petitioner/owner)** – Appeal from an Administrative Decision issued on December 13, 2022 that determined a rock retaining wall that is over 4' in height is considered a structure and is subject to setback requirements. The parcel is located at 22 Constance Street in the R-1 (Residential, by soils) and Aquifer Conservation Districts. Tax Map 6D, Lot 104. Case # ZBA 2023-04.

At the petitioner's request, the Board voted 4-0-1 to continue ZBA Case # 2023-06, 2023-05, 2023-03 and 2023-04 to February 22, 2023 at 6:30pm in the Matthew Thornton Room, with no further written notice to abutters, on a motion by Patrick Dwyer and seconded by Rod Buckley. Charles Mower abstained.

11. Discussion/possible action regarding other items of concern

Mr. Conescu expressed confusion about what had occurred tonight specifically regarding how to manage some of the issues not being caught during the building permit process. Mr. Price stated that unfortunately, the Building Department is a separate Department and he has no jurisdiction to make changes to their processes. He can only look at things from the perspective of Zoning. It would take an internal measure such as discussion between Departments. To him, there seem to be two options available. One would be for the Building Department to review septic designs before sending them to the State for construction approval. If that is not possible, then he suggested it might make sense to amend the Zoning Ordinance to eliminate the local septic setback requirement and let it default to the State's setback requirement.

Mr. Buckley questioned steps the Board could take to move towards a solution. Mr. Dwyer said that it may be helpful to bring the issue before the Town Council. He feels they will probably see many more cases like this. Home owners may not know specifics of where things like a leach field or retaining wall should be placed, but may end up stuck with unexpected expenses due to circumstances out of their control. Mr. Buckley agreed, but was wondering if there is a way to make home owners or contractors aware of requirements to avoid last minute issues. Mr. Dwyer said it would need to come from the Building Department. Mr. Price said yes, from staff's viewpoint. He thinks the easier option would be to amend the Zoning Ordinance to remove septic setbacks. If there is no local review, no issue would arise and end up falling on either Community Development or the Zoning Board.

Mr. Conescu agreed and stated if there was no way to enforce the local requirement, then why have it. Mr. Dwyer commented this could be a slippery slope as there may be other Ordinances that the Town doesn't strictly enforce. This could lead to other Ordinances going unenforced. It could be an easy solution, but may cause more issues in the long run. Mr. Conescu noted some of the Ordinances are enforceable, but this does not seem to be one. He continued you can't always enforce in hindsight, or you will be creating unnecessary expenses. Mr. Niles stated the Board had two choices. They could either revise the requirements to lessen the septic setbacks or have the Building Department review the septic plans against the Zoning Ordinance in order to grant building permits. Mr. Conescu said this was one component. The other which he thinks could have led to more issues would have been to go through the appeal process for the retaining wall. He thinks this may have left the Board battling semantics for a long time.

Mr. Niles stated that they could require an engineering study for anyone building a wall greater than 4 feet to provide an affirmative conclusion. Mr. Dwyer asked about the first case before the Board. He noted how the petitioner had said that 19 Whitetail Ridge's leach field bordered the system on 17 White Tail Ridge. He questioned why it wasn't an issue or violation for this property as well. Mr. Niles said you don't know what the setback was for that property. The leach fields are both together between the houses, but they did not know what the setback was for the system located at 17 White Tail Ridge. Mr. Price commented that as he recalls, the system at 17 White Tail Ridge was closer to a 20 foot setback and was in compliance. Mr. Price said if it pleases the Board, he could make a request to the Planning Board on behalf of the Zoning Board to amend the Zoning Ordinance. The septic setbacks could either be eliminated, or made to match the State's requirements. He stated the setbacks would by default be the State's, there's not any requirement for the Town to also have septic setbacks.

Mr. Mower felt it was short sighted to try to make a recommendation to the Planning Board to change the Zoning Ordinances. Mr. Conescu asked how he would recommend they solve the problem of the Ordinance not being enforced. Mr. Mower said he would recommend that the Planning Board chair speak to Community Development and seek the counsel of the Town Manager and Town Council. Mr. Price said this was a reasonable alternative and this course of action could be followed.

Mr. Conescu felt that the Ordinance should be enforced, rather than removed. However, if there are many new construction homes, and this issue continues to arise, it doesn't make sense to keep hearing these cases. Mr. Niles agreed stating that land being built up now, which was subdivided decades ago, will have issues with current Zoning requirements. Mr. Conescu agreed stating that much of this land was not built out for a reason, but is now being developed. Mr. Mower wouldn't limit this to non-conforming lots. He felt this could potentially continue to be an issue if lawyers spoke for their clients.

Mr. Conescu and Buckley questioned the best next steps. Mr. Price said he could discuss this with the Community Development Director to try and address the issue internally. If unsuccessful, they would have no choice but to review an amendment to the Zoning Ordinance. Mr. Price answered questions regarding the process to amend the Zoning Ordinance.

12. Approval of Minutes – December 28, 2022

The Board voted 4-0-1 to approve the minutes of December 28, 2022, as submitted, on a motion made by Patrick Dwyer and seconded by Rod Buckley. Chuck Mower abstained.

13. Adjourn

The Board voted 5-0-0 to adjourn at 8:46 p.m. on a motion made by Rod Buckley and seconded by Patrick Dwyer.