

APPROVED
TOWN OF PELHAM
ZONING BOARD OF ADJUSTMENT MEETING
September 13, 2021

Chairman David Hennessey calling the meeting to order at approximately 7:00 p.m.

PLEDGE OF ALLEGIANCE

Secretary Matthew Hopkinson called roll:

PRESENT ROLL CALL: David Hennessey – Present
 Matthew Hopkinson - Present
 Jim Bergeron – Present
 Joseph Passamonte – Present
 Alternate Jeff Caira – Present
 Alternate David Wing – Present
 Planning/Zoning Administrator Jennifer Beauregard – Present
 Recording Secretary Jill Atkinson – Present

ABSENT: Peter McNamara
 Alternate John Westwood

MINUTES:

August 10, 2021

It was announced that the review of the August 10, 2021 would occur at the October 20, 2021 meeting as not all of the minutes were forwarded to the board for review.

REQUEST FOR REHEARING

CASE ZO2021-00023

Lebel Land Holdings, LLC – 1013 Mammoth Road – Map 7 Lot 4-188 & 5-43 – Seeking a Variance concerning Article(s) II & III, Section(s) 307-6 #10 & 307-12, 307-13A #2, 307-13B #1, 307-14 of the Zoning Ordinance to permit lot 7-4-188 to become a duplex lot with 198’ of frontage where 200’ is required, and to create another duplex lot 7-5-43-B with 192’ of frontage where 200’ is required. To allow the creation of duplex lots with naturally occurring slope over 20%. To allow a shared driveway for access to the 3 lots and allow two of the lots to not have driveway access from where they have frontage.

Mr. Hennessey said he was taking this first because of the 30-day clock on this. He wanted to make sure this was addressed first.

Mr. Hennessey said he assumed everyone had read the attorney’s notes and what was requested on the rehearing. He noted that he did not see the attorney present at the meeting. He stated that this is not a hearing but a request for rehearing and the board had to either approve or reject the request.

Mr. Hennessey reminded the board this was duplexes on 1013 Mammoth Road. The board voted against approving this project on the basis of creating 2 nonconforming lots. He said he did want to give the argument from the attorney, but it basically said it was necessary. Mr. Hennessey asked the board to take 5 minutes to read the attorney's argument before having a discussion and taking vote on whether or not to have the rehearing.

Mr. Bergeron asked if anyone was appointed to vote for Mr. McNamara.

Mr. Hennessey said he will do it case by case as they have 2 alternates. He asked if either alternate was at the hearing. Both Mr. Caira and Mr. Wing stated they were. Mr. Hennessey asked Mr. Caira to vote on the rehearing.

Mr. Hennessey gave a reminder to those present that masks are not required but strongly recommended, especially for those not vaccinated. He stated the numbers are rapidly increasing for in Pelham. He said it was up to each person whether or not to wear one and that it is recommended but not a requirement.

Mr. Hennessey went back to the request for rehearing on this case. He opened it up for comments.

Mr. Passamonte asked if anything had changed since the last time.

Mr. Hennessey said that reading through the attorney's statement, he doesn't think there's any new information, but the attorney was very eloquent in describing the case. He noted that the board doesn't have to go by the strict rule that there has to be something brand new. The decision could be made on old information that was pointed out in a different way. He said there were no hard and fast rules.

Mr. Bergeron stated he didn't see any new evidence. He said he sees Mr. Groff based his argument on previous cases that people might think are related or not. He said the board didn't deny reasonable use of the property but wanted it to be developed with a proper and correct road and not have a common driveway for 6 units. Mr. Bergeron doesn't think that is an unreasonable request. He doesn't feel the arguments by Mr. Groff sway his decision.

Mr. Hopkinson said he agrees with Mr. Bergeron. He said he may have felt different if other properties in town were presented that were similar this one, with the same type of set up, but no examples were given. He said he hasn't looked at court cases but there were no examples of this type existing in this town. He said without any comparisons or new info he shrugs his shoulders.

Mr. Caira said he drove by property, as it is commonly travelled road. He stated that he agrees with Mr. Bergeron and Mr. Hopkinson and doesn't see the way it was presented as a good idea.

Mr. Wing stated he doesn't see new evidence introduced. He agreed with board's decision from last time.

Mr. Hennessey asked the board to vote on the record as they had already given their reasons.

ROLL CALL VOTE:

Mr. Caira - no
Mr. Hopkinson - no
Mr. Bergeron - no
Mr. Passamonte - no
Mr. Hennessey - no

The request for rehearing was turned down.

HEARINGS

CASE ZO2021-00024

BOUTWELL, Nathan – 1406 Mammoth Road - Map 1 Lot 5-127-1 – Seeking a Variance concerning Article: III, Section 307-12 Table 1 & Article V, Section: 307-18 of the Zoning Ordinance to permit industrial uses to be allowed on a lot of approximately 1.7 acres in size and to allow a building to be used for industrial uses to be constructed 15’ from the side lot line where a minimum of 2 acres is required an a minimum front building setback of 3X the height of a building or a minimum of 40’ is required and a minimum of 2X the height or 30’ for a side/rear setback is required for industrial uses & to permit uses allowed in the Industrial District to be allowed on the property known as Map 1 Lot 5-127-1 which is located in the Residential District.

Mr. Hennessey announced this would be put off until next month because of conflict with Mr. Boutwell.

Mr. Hennessey announced he would be moving to Case #ZO2021-30 because it’s quicker being that it’s a special exception case. He explained that a request for Variance has 5 criteria, which can be debated as to whether the application meets the 5 criteria. Special Exceptions are yes or no based on whether or not it meets the requirements under the zoning law for a Special Exception. He said by nature, these cases don’t take as much time. However, KDS was not present yet.

Case #ZO2021-00025

CHEUNG, Kai & Jennifer – 7 Wilshire Lane – Map 34 Lot 1-10-9 – Seeking a Variance concerning Article VII, Section(s) 307-37 & 307-39 of the Zoning Ordinance to permit placement of rear portion of a shed within the 50’ WCD (Wetland Conservation District). The portion of the shed placed within the WCD will not have an entrance or an exit.

Mr. Hopkinson read the list of abutters aloud. There were no abutters present who asserted standing in the case, who did not have their name read, or who had difficulty with the notification.

Mr. Cheung stated he was there because he wants to put a shed on his property and approximately 4 feet of the back, right corner will fall within the 50-foot boundary of the Water Conservation District.

Mr. Hennessey asked Mr. Cheung to read 5 criteria into record, which Mr. Cheung did.

Mr. Cheung said shed will not have any utilities. There will be no entrances or exits on this portion of the shed. The shed will fall about 4 feet into boundary.

Mr. Hennessey said Mr. Wing will be voting on this case.

Mr. Hopkinson asked if there is anywhere else that Mr. Cheung would be able to put shed.

Mr. Cheung said not realistically with the way they just had their pool installed, with necessary permits. He asked if the board wanted to see the map of the WCD.

Mr. Hopkinson said he had it in front of him. He noted he doesn’t know the lay of land with regards to the property and whether there are trees in the way, etc.

Mr. Cheung said there are trees, other huge stones, etc.

Mr. Wing said he looked at the property from an aerial and did not see water. He asked Mr. Cheung to explain the WCD.

Mr. Cheung stated as he understands it, it's basically wetlands. He said there are some wetlands back at the very edge of the property and 50 feet from those wetlands is the boundary of the Water Conservation District, as he understands it.

Mr. Wing said that on the map that was drawn it looks like it is fully within the Water Conservation District. He asked if that was correct.

Mr. Cheung said, no, just the back corner and if it was drawn that way, it was in error.

Mr. Hennessey noted that for future reference people can go on the Nashua Regional Planning District and get the overlays in showing the WCD and the setback. He explained that it doesn't mean that it's a swamp. The WCD is done by vegetation, not evidence of toads and frogs in the area.

Ms. Beauregard explained that the plan in the packets was done by the staff in the planning office based on Mr. Cheung stating the shed would be 50' from the house. If that was the case, that would put the shed entirely within the WCD and that's what the plan depicted. She explained that if the shed was going to be 50' from back corner of the house there is no way only the corner would be in the WCD. She said maybe Mr. Cheung was mistaken about where he was putting it and it wasn't going to be 50' from the house, maybe it was going to be closer.

Mr. Cheung said it was not going to be 50' from the house. He said it is approximately 40' from the house.

Ms. Beauregard explained to the board that where they see the pink mark on the plan is 50' from the house.

Mr. Hennessey asked to clarify whether they were going to be in the WCD or in the setback.

Ms. Beauregard said it will be in the buffer to wetlands but not in wetland itself.

Mr. Passamonte verified that Mr. Cheung is stating it will be 40' from the house, not 50, and it only puts the shed 4' into the buffer.

Mr. Bergeron said he wanted to help members of the board who are not familiar with WCD with the little he knows from being on the Planning Board. There is an area 50' from area of delineated real wetland called the Wetland Conservation District. He said other towns have 25', 15', 0', 75', 100' areas. Pelham has chosen WCD district as 50' and the town's zoning doesn't permit driveways, etc. in those areas. He said each request needs to be looked at on own merit because WCDs can be high above the flood plain and high above the wetland and is just a physical line delineating the wetland. He said the board has to make a decision on the use intended. He asked Mr. Cheung if the building will have a foundation.

Mr. Cheung said they are putting in a stone gravel base with 2x6 timbers.

Mr. Bergeron said his question would be will the building affect the runoff that passes through that area in any way. He said because it's not entering into the ground, it will not affect run off because it is up slope from wetland. He asked if there has ever been any flooding in that area or if it is a high and dry area.

Mr. Cheung said he is not aware of any.

Mr. Hennessey said he felt this is fairly clear cut. He asked if anyone wanted to speak to the five criteria.

Mr. Hopkinson said he never likes anything being built in the WCD, especially a shed. He said Mr. Cheung may not be putting chemicals or oil in there but a lot of people put items such as four wheelers and snowblowers in there and those type of items are prone to leaking. He noted he has always hedged against these types of scenarios unless the case has so much merit to it. He prefers to hedge away and usually thinks there is a better alternative. He said he thinks this is almost a 2-acre lot, but he didn't see pictures of the property so he's not sure where else to place the shed. However, with that size lot, he would rather see it outside the conservation area, even if it's within the buffer area.

Mr. Hennessey asked the minimum size of a shed before they have to come before board.

Ms. Beauregard stated they would have to come before the board to put anything in the WCD, regardless of size. She explained that under 100 square feet and under 8' in height is exempt from setbacks.

Mr. Hennessey said there is a misnomer that you can put anything anywhere.

Mr. Hennessey went through the five criteria. He said the courts are telling them they have to be on record.

Criteria 1 – The variance will not be contrary to public interest

Mr. Hennessey said the public interest is expressed in the zoning law.

Ms. Beauregard asked Mr. Hennessey if he had opened it up to the public.

PUBLIC INPUT

No one came forward to speak in favor or in opposition of this Variance request.

Mr. Hennessey asked if Mr. Cheung wanted to add anything in which he said no. Mr. Hennessey brought the discussion back to the board.

Criteria 2 – The spirit of the ordinance is observed.

Mr. Hennessey explained the board exists as a safety valve on the zoning. He said the board is here in case of exceptions and if there are issues.

Mr. Hopkinson said you could probably argue this both ways, but you could look into spirit of ordinance and if the variance is granted, the spirit is not observed because spirit the spirit of the ordinance is to protect the wetlands or conservation area.

Mr. Hennessey said the question Mr. Bergeron asked goes to the heart of why they have the buffer in the conservation. The question is can drainage that was there before the shed is built still operate the same way after the shed is built. He said they have applicant's testimony and response. He reiterated the question is the spirit observed if the variance is granted. Mr. Hennessey said in his opinion, it is. He said he agreed with Mr. Hopkinson in that he doesn't like to see setbacks messed with and doesn't see the wetlands being affected.

Mr. Hopkinson said he hates to make a precedence for this.

Mr. Hennessey said they don't operate on precedence, but on individual cases, which Mr. Hopkinson said he gets. Mr. Hennessey said it is a valid concern but, in his opinion, it's not as valid as in some cases, but it is a personal decision.

Criteria 3 – Substantial justice is done.

Mr. Hennessey explained that by granting the variance, are the needs of applicant being met, but being met at expense of town.

Criteria 4 – The value of surrounding properties are not diminished.

Mr. Hennessey said that the fact that there are no neighbors coming in yelling and screaming doesn't indicate there is a whole lot of opposition and indicates people in the neighborhood don't find it will affect the value.

Criteria 5 – Unnecessary hardship.

Mr. Hennessey explained that Mr. Cheung has spoken about what makes his property special, he has pool and although he has 2 acres, there's not a lot of flat, available land for the shed.

Mr. Cheung said that is accurate. There really is not a lot of area to put the shed.

Mr. Hennessey said to him, the crux is that the drainage is same after as it was before but it's the board's call.

CASE #ZO-2021-00025

ROLL CALL VOTE:

Mr. Passamonte 5 yeses; final vote yes
Mr. Bergeron – 5 yeses; final vote yes
Mr. Hennessey – 5 yeses; final vote yes
Mr. Hopkinson – 4 yeses, 1 no; final vote no
Mr. Wing – 5 yeses; final vote yes

(4-1-0) The motion varied.

VARIANCE GRANTED

Mr. Hennessey noted there was a 30-day right of appeal and told Mr. Cheung not to put his shed up yet.

CASE ZO2021-00027

CHAREST, John – 5 Methuen Road – Map 30 Lot 11-162 – Seeking a Variance concerning Article III, Sections(s) 307-8C, 307-12 Table 1, 307-14 of the Zoning Ordinance to permit the previous construction of a pool with a surrounding deck, a gazebo, and a jacuzzi, to remain on a non-conforming lot.

Mr. Hopkinson read the list of abutters aloud. There were no abutters present who asserted standing in the case, who did not have their name read, or who had difficulty with the notification.

Mr. Bergeron stated that before they start, he needs to disclose that this case was before this board before and has been in front of the planning board a number of times. He stated that he has acted upon this case as member of the planning board and will step away if board feels he couldn't make an impartial decision.

Mr. Hennessey said this is done frequently on the board and the only person who can acknowledge a conflict is the member himself. He said many have done as Mr. Bergeron has and asked for the guidance of the board. No one came forward that they saw a problem.

Mr. Bergeron thanked the board for their vote of confidence.

Mr. Charest said he was there to straighten out some issues with his property that he wasn't aware of. He said he applied for permit in 2001, when having his daughter, to put addition of another bedroom on his house. He said he has since put in a pool, gazebo, pool house and a deck around the pool. Mr. Charest said it was brought to his attention by one of his neighbors that this is not permitted and that's why he's here.

Mr. Hennessey said many members on the board have done a site walk and are familiar with the property. He asked Mr. Charest to read the 5 criteria into the record, which Mr. Charest did. Mr. Hennessey then asked if Mr. Charest had any other comments.

Mr. Charest said he feels that he did have permits and built the structures to town requirements, at the time, and they were inspected.

Mr. Hennessey stated that the zoning administration said Mr. Charest has been working with town to come into conformance, which Mr. Charest said was correct.

Mr. Passamonte asked if the lot line had been approved for Mr. Charest to be on his own property with this.

Mr. Hennessey said the lot line was approved by the planning board.

Mr. Bergeron explained it was a multiple lot line readjustment. He said there was a lot merger. There was a discovery made that a portion of the applicant's structures were on another piece of property but believes Mr. Charest has bought that portion and now owns that property. However, the structures don't meet the town's sideline setbacks, as do multiple other properties in the area.

Mr. Charest said that is correct. He noted that Mr. Crooker, who they bought the land off of, is here tonight too.

Mr. Passamonte confirmed with Mr. Charest that he now owns land.

Mr. Hennessey asked Ms. Beauregard to verify that the lot line adjustment was approved by the planning board, with Ms. Beauregard verified.

PUBLIC INPUT

Kevin Crooker, 2 Andover Street, said he came here in support. He said has been in the area all his life. The structures have been there a long time. He said he has never heard anyone complain about them except recently maybe one person brought it up. He has he knows no abutters have complained. His daughter did work with Mr. Charest on piece of land to settle encroachment and it has been settled. Mr. Crooker said his daughter couldn't make it, so she asked him to speak for her. His daughter and Mr. Charest have worked it out with the land and his family is good. He said he can't speak for anyone else, but he hasn't heard anything, and he knows and gets along with all the neighbors. He said he was just here in support.

No one else came forward to speak in favor or in opposition of this Variance request.

Mr. Hennessey brought it back to the board noting they were still in public meeting.

Mr. Passamonte asked if all the permitting been fixed where permits were not pulled before.

Ms. Beauregard said not yet. She explained the board has to approve the variance first and then Mr. Charest will have to get after the fact permits and inspections and sign offs.

Mr. Passamonte asked where the discharge from pool, the backwash, etc., goes since he is close to Little Island Pond.

Mr. Hennessey rephrased Mr. Passamonte's question. He asked Mr. Charest if he is in the shoreland protection area.

Mr. Charest said he is not. He also explained that his pool is an above ground pool and he doesn't have to backwash.

Mr. Hennessey explained that when they deal with issues around Little Island Pond, if they are in the shoreland protection area, it comes under the state, and he knows this because they had the site walk there.

Mr. Passamonte noted he wasn't at the site walk.

Mr. Hennessey asked if there were any other questions. There were none. He asked Mr. Charest if he wanted to add anything before he closed the public participation.

Mr. Charest said he is good with the process.

Mr. Hennessey stated Mr. Caira is voting.

Mr. Passamonte questioned if there was a timeline for Mr. Charest to get his permits if the variance is granted.

Ms. Beauregard said Mr. Charest has to wait the 30-day right of appeal before he can apply for the permits. She said the board can put a time frame on it. She said it is still a currently open case with the code enforcement officer.

Mr. Passamonte said he doesn't want to put a timeframe on it. He was just asking if there was one.

Mr. Hennessey said they were talking about existing structures. He said in other cases, when a variance is granted, there is a 2-year time limit to get whatever structure built. He explained Mr. Charest has been working with town, as demonstrated, and he has to wait 30 days before code officer can sign off on what's there.

CASE #ZO2021-00027

ROLL CALL VOTE:

Mr. Caira – 5 yesses; final vote yes

Mr. Hopkinson – 5 yeses; final vote yes

Mr. Passamonte – 5 yeses; final vote yes

Mr. Bergeron – 5 yeses; final vote yes

Mr. Hennessey – 5 yeses; final vote yes

(5-0-0) The motion carried.

VARIANCE GRANTED

Mr. Hennessey noted there was a 30-day right of appeal. He thanked Mr. Charest for working with the town to try and get resolved.

Mr. Charest thanked board for working with him, too.

CASE ZO2021-00022

MAGIERA, Donald – Bridge Street (Rt. 38) – Map 10 Lot 13-2-1 & Map 11 Lot 13-3 – Seeking a Variance concerning Article(s): II & III, Section(s): 307-6 #10 & 307-13B #1, 307-14 of the Zoning Ordinance to permit a shared driveway to two lots in a location other than where the proposed lots have the required 200' of frontage and allow a shared driveway for access to these two lots.

Mr. Hopkinson read the list of abutters aloud. There were no abutters present who asserted standing in the case, who did not have their name read, or who had difficulty with the notification.

Mr. Hennessey asked Ms. Beauregard if, in her opinion, this case was of regional importance.

Ms. Beauregard said she doesn't think so.

Mr. Hennessey said he wanted it on the record because any time they are that close to the state line with that many abutters from another town, if it was declared to be of regional interest, they would have to notify the town of Salem itself. He said he wanted it on the record that they are operating on the basis this is not of regional importance.

Mr. Hennessey noted Mr. Wing was going to be voting on this case.

Mr. Bergeron disclosed this case has been in front of the planning board twice for conceptual hearings and the planning board has asked, by unanimous consensus, for Mr. Bergeron to speak to this. He stepped down and said he would be speaking from the floor to bring forth the message from the planning board in regard to this case.

Mr. Hennessey stated Mr. Cairra will vote, too, and noted they would have the two alternates participating.

Joseph Maynard from Benchmark Engineering came forward representing Mr. Magiera and Peterson Built homes. He said the property has been to the planning board for conceptual discussion. He explained the property is zoned residential and combined is about 37 ½ acres. It is an undeveloped lot with large amounts of frontage along Route 38. He explained the main reason they went to the planning board originally was to have a discussion between conservation or open spaced subdivisions and conventional layout and it became clear they would be moving forward as conventional subdivision. He said there are 2 lots that would have frontage on 38 and they are the two lots they are asking for this request on. There would be two curb cuts for these lots and a third curb cut for the proposed road going into project. Mr. Maynard explained the planning board had concerns about the number of access locations along 38 due to its location and has asked them to proceed to the zoning board to allow them to have access for these 2 lots come in from the proposed road to keep all of the traffic and curb cuts to one location. He explained that the way the zoning is written, when lots are subdivided, they have to have their driveway from where they have their legal street frontage. The legal frontage for these 2 lots is Route 38. These lots would both have over 200' of frontage and meet 2 acres in zoning and all they envelope requirements. Mr. Maynard explained

they would like driveway to be a shared driveway before branches into the second lot and there is a requirement in the zoning that the ordinance doesn't allow for shared driveways, which is the second part of their request.

Mr. Hennessey asked Mr. Maynard to go through 5 criteria, which Mr. Maynard read into the record.

Mr. Hennessey asked Mr. Maynard if he wanted to add anything else and Mr. Maynard said he will wait for questions.

Mr. Passamonte asked what the site distance is on each side when you come out of the proposed road onto Route 38.

Mr. Maynard explained that the DOT requirement is 400 feet in each direction and he can achieve that with some clearing by cutting back brush that has grown up into the right of way.

Mr. Wing asked if this request for variance was only on a driveway easement, which Mr. Hennessey said was correct.

Mr. Maynard said it was actually 2 pronged because the legal frontage is at Route 38 but they're looking to access a shared driveway off of the proposed street, instead of access off of Route 38.

Mr. Hopkinson said he sees the driveway easement looks like it skirts WCD. He said he wanted to make sure it doesn't go into the WCD.

Mr. Maynard explained it is actually part of lot. He calls it an easement because it serves both lots but will be part of one of the two lots for ownership. He said they are able to develop around the wetlands except maybe some minor encroachment for drainage issues, which is a special permit to the planning board.

Mr. Hennessey asked what the frontage was for lot 1. He asked if it was on Youngs Crossing Road.

Mr. Maynard said it has 200 feet on Youngs Crossing.

Mr. Hennessey said they don't need a variance for that part of application, for the frontage not matching where the driveway is.

Mr. Maynard said the driveway is supposed to come in from where you have your frontage and that would need to come in from Youngs Crossing or right at the intersection of Route 38. He explained he was asking for the variance not to do that and to come in off of the proposed road.

Mr. Hennessey said he could legally have frontage on Youngs Crossing and not need the variance for that particular part of the proposal.

Mr. Maynard explained that the planning board has asked him not to come out on Youngs Crossing or Bridge Street. They want him to minimize curb cuts down to one and the request makes sense. He explained he meets sight distance anywhere along this for the ordinance but keeping all points on one section keeps all access in one area. He said the difficulty with Youngs Crossing Road is it isn't a 90-degree intersection, and the planning board has asked them to get everything they can away from there and by allowing these two lots to come out on this proposed street, it leaves about 700 feet of distance from the Youngs Crossing/Plower Road intersection to their proposed street.

Mr. Caira asked if the driveway was 700 feet long and Mr. Maynard explained it was about 700 feet from Youngs Crossing to the proposed street.

Mr. Caira asked about fire access and Mr. Maynard said the new road will meet town standards and the driveway will meet the driveway regulations for access in, including some form of fire turn around. He said this will all be taken care of at the planning board level. Mr. Caira said it was just not shown on yet, which Mr. Maynard agreed. He said that was because it's a planning board matter and he tried to focus on what was in front of them tonight.

There were no other questions from the board and Mr. Maynard had nothing to add before Mr. Hennessey opened it up to the public.

PUBLIC INPUT

No one came forward in favor of the application.

John McCullough, 28 Koper Lane, came forward with more of a question than opposition at this stage. He said he has been to several planning board meetings listening to the proposal that is part of an overall plan for development of the 30 acres behind their property. He said he understands that the proposal by Mr. Peterson going forward on this property is not finally defined and is still being worked on by the planning board. He questioned whether this request for a variance is premature. He said the ideas that have been discussed at the planning board are being addressed here, which is a good thing. He said he understands the entrance is now being moved down Bridge Street towards the Salem line. He, again, questioned if this is premature because the final determination has not been made as to what the project is ultimately going to look like.

Mr. Hennessey said he is not sure how to answer this except that what is before them is the exception to zoning rules.

McCullough said he understands that, but it is part of the overall project that is before the planning board.

Ms. Beauregard said it is not premature, in her opinion, because the planning board can't act on either approval of whether they come in with a conservation subdivision, open space subdivision or a conventional subdivision without Mr. Maynard first knowing how to design this and getting the variance first. She said she believes they are proceeding with a conventional subdivision.

McCullough said he doesn't agree with that at all. He feels if they need a variance, they can come back as one of the criteria described by the planning board.

Mr. Hennessey said if the variance is granted and they can't build that way because of constraints by the planning board, they have to come back to the zoning board.

Mr. McCullough said he understands that and that's why he says it's premature.

Mr. Hennessey said in the past, they would have had a joint hearing, but it's not being done that way and the board has to deal with what's in front of them. He explained that if the variance is granted, any changes to the terms of the variance that are caused by changes imposed by planning means they have to come back to the zoning board.

No one else came forward in opposition or with questions.

Mr. Hennessey said he wants to hear from Mr. Bergeron as part of the planning board. He said that the board's notes say this is a product of a request from the planning board.

Jim Bergeron came forward as a crossover member to the planning board and a member of the zoning board. He said he would try to explain this in his terms and leave the board with what the planning board has asked/decided at this point. He said he believes this has been in front of planning board twice. He asked Mr. Maynard to correct him if says anything inaccurate. It came in as a conceptual idea of whether it would be an open space or conventional subdivision. At the last planning board meeting, the proposal showed 2 curb cuts on Route 38 that raised the board's concern as it is a difficult, interesting area. Mr. Bergeron said he has lived close by his entire life. He stated the planning board cannot waive a requirement of zoning, only the zoning board can. The planning board saw an opportunity to have the applicant rearrange the subdivision to minimize curb cuts on Route 38. He explained it originally showed a driveway onto Youngs Crossing, which wouldn't work out for public safety reasons, and another curb cut onto 38 in addition to the curb cut for the planned road. He said the applicant said he would have to go to the board of adjustment and a discussion amongst planning board decided that if he could obtain a variance, they could entertain the idea of a single cut from Route 38, a single, town-maintained road, but the planning board has no authority to do that. He explained that before they asked that, there was a unanimous consent, full and alternate, that the spirit and intent of the zoning ordinance and the public safety served best by just one entrance and the least amount of curb cuts would be safest and best. The driveway is less impacting than trying to get a road over there and they are trying to have the least effect on abutting neighborhoods. He explained that the applicant has done a good job of staying away from WCD and has reconfigured some lots into better shapes after the planning board asked him to make adjustments. He reiterated that the planning board would like to see a driveway to 2 lots in order to end up with better results for the town in terms of public safety. He noted the planning board would go with the zoning board's wishes. He addressed Mr. Hennessey's question on regional impact, which he felt was an excellent question. He noted that the planning board had some abutters from Salem showed up. He also noted that to north, there is a residential development that the town of Salem has approved common driveways to access those lots, for which he believed to be the same issue.

Mr. Hennessey asked if Mr. Bergeron's testimony was that this is normal and usual in that general area.

Mr. Bergeron said it is. He explained there are duplexes and common driveways in that area and this plan would have the least impact on public safety with just one curb cut. He noted this is a significant development and that was the board's opinion, but up to the zoning board to decide as the planning has no authority to waive zoning regulations. He stated he had spoken to chairman of the planning board today to double check on this and Mr. Bergeron told him he would give the best explanation he could.

Mr. Hennessey explained that in the past, it was unusual to have members of planning board active on ZBA and vice versa and they have been fortunate to have Mr. McNamara and Mr. Bergeron bring that type of coordination, which is important because of comingling. He said to get this planning board perspective, the town is lucky to have that communication and it is appreciated.

Mr. Bergeron said he cannot speak for the planning board except on this one decision that was made.

Mr. Hennessey opened it up for other questions.

Mr. Maynard said it's hard to call things premature with what goes into these projects. He said he can't go to DOT, etc. unless he has more of a final plan and he can't work a final plan without knowing what direction they're going in. He feels this is step 2, as step 1 was going to the planning board to try to do this as an open space development. They are now moving forward as conventional development. He said this

is one of the steps that has to be taken before they can start sending out applications for permits, they need to obtain to go back to the planning board with.

Mr. Wing asked how long the proposed driveway is.

Mr. Maynard said he was guessing approximately 450 feet. He said the driveway will meet all town regulations

Mr. Cairra said he heard testimony that when the plan was in front of planning board that they had to rearrange some of the lot shapes and sizes. He said to him it looks like he's squeaking 2 more houses. He said he thinks there could have been more thought on a couple of the lots.

Mr. Maynard said he is trying to minimize WCD impacts. He said he could revisit that lot line, but he would have to cross wetlands in order to get driveways to those two lots or skirt the edge of the WCD. He said the layout shown avoids that. He said he's not skirting it but just rearranging it to meet more of what the planning board has asked. He said he manipulated some of the lot lines on some on the back because of discussion with the planning board and he revisited the end of the circle based on those comments. Mr. Maynard said he has made sure his roadway alignment and grades work and has the drainage areas set for this layout. He reiterated that the reason for driveway being the way it is is to avoid the WCD buffer.

Mr. Cairra said he was looking at lots 18 and 17 and then across from them are smaller ones and that's concerning to him. He noted it's a big subdivision.

Mr. Maynard said all the lots meet town's requirements and they have done the basic work to justify the yield of lots, but the layout is hanging until they get past this.

Mr. Hennessey closed the public hearing since there were no other questions and no one else from the public came forward.

Mr. Hennessey went through the 5 criteria.

Criteria 1 – The variance will not be contrary to public interest

Mr. Hennessey said he believes this is the pivot point in this case, although they don't see many cases like that. He said he was glad to hear Mr. Bergeron speak. He noted the zoning board is an independent body and doesn't bow to the planning board, but he is listening to them when they talk about public safety and health. He said he assumes everyone has seen how Youngs Crossing comes into 38. He said the road is dangerous and mitigation of potential hazard is a big deal. Mr. Hennessey said he is bowing to the expertise of the planning board for these criteria.

Mr. Passamonte said the way it is designed to come in off the proposed road is much better than trying to do cuts on Youngs Crossing or Bridge Street. He said he agrees with one entrance.

Mr. Hennessey said it's in the town's interest to grant the variance, for the good of the town, not necessarily good of applicant, which Mr. Passamonte agreed.

Mr. Hopkinson said he feels it's for the good of the town and those who drive on 38. He noted he is not usually in favor of shared driveways.

Mr. Hennessey stated they just turned down a request for rehearing on a shared driveway but wanted to note, for the record, there are big differences between the two. He said the request from planning board, in

terms of safety, is leading the pack. Mr. Hennessey said he would hope that the courts would understand the huge difference between two cases.

Mr. Caira thinks that having 1 curb cut is safer than 2 on the main road.

Criteria 2 – The spirit of the ordinance is observed.

Mr. Hennessey said he often questions the need of duplexes.

Criteria 3 – Substantial justice is done.

Mr. Hennessey said he is willing to go along with this as the planning board has asked them to do.

Criteria 4 – The value of surrounding properties are not diminished.

Mr. Hennessey explained they have to keep in mind that abutters often confuse what is meant by diminishing values. He said subdivisions are allowed by law, but they can't be so egregious that neighboring property values would be diminished by the configuration or type of construction. He said he thinks the values are not diminished.

Criteria 5 – Unnecessary hardship.

Mr. Hennessey said the angle where Youngs Crossing Road comes into 38 is awful and avoiding that opening is self-evident for him.

Mr. Wing said the proposed road being moved much further down from Youngs Crossing and having a single curb cut is favorable to the town, in which case he thinks the easement is beneficial.

Mr. Hennessey confirmed with Mr. Wing that he was referring to the common driveway, which he was.

Mr. Hopkinson said the reason he would vote in favor of the shared driveway is to promote the public safety and he feels that trumps everything else. He said he believes the builder can still use the land fair and reasonably.

Mr. Hennessey explained that he has been involved in towns with common driveway as the normal course of building. He said this is not the town's way of doing things. He thinks the variance approach, looking at beyond the norm, is the way this town has chosen; however, the board has ability to approve it if town's needs override the needs of the developer to maximize the property. He feels in this case, the variance is for the needs of the town, not the applicant.

CASE #ZO2021-00022

ROLL CALL VOTE:

Mr. Passamonte – 5 yeses; final vote yes

Mr. Wing – 5 yeses; final vote yes

Mr. Caira – 5 yeses; final vote yes

Mr. Hennessey – 5 yeses; final vote yes

Mr. Hopkinson – 5 yeses; final vote

(5-0-0) The motion carried.

VARIANCE GRANTED

Mr. Hennessey noted there was a 30-day right of appeal.

At approximately 8:36 Mr. Hennessey said the board would be taking a break. They board returned at approximately 8:42.

CASE ZO2021-00028

CMK Equipment, LLC – Cornstalk Lane – Map 40 Lot 6-158-14 – Seeking a Variance concerning Article: III, Section 307-12 Table 1 of the Zoning Ordinance to permit a new foundation to be 25’ from the edge of the Right of Way where 30’ is required in the Residential District.

Mr. Hopkinson read the list of abutters aloud. There were no abutters present who asserted standing in the case, who did not have their name read, or who had difficulty with the notification.

Mr. Joe Maynard came forward representing CMK Equipment. He noted this is his least favorite type of variance he ever has to ask for, but he would say there’s some hardship in this case. He explained this lot was subdivided in 2016 and used to be a frontage lot on Patriot Drive. The Nietupski family, who owned the land on the southerly side of this had bought it when Patriot Drive went in because they were looking to do a subdivision of their property at some point. He said in 2016, they asked him to do a subdivision of one lot. They developed a plan and went to the planning board to extend the street into the property to be known as Cornstalk Lane. A one-acre lot was left as residual land, which had some frontage on Patriot Drive and the remainder of the frontage on Cornstalk Road. He explained that around 2017 the Nietupski brothers built Cornstalk Road. Mr. Maynard said he never got a call for any layout when Cornstalk Road was built. Around 2019, 2020, CMK made deal with Nietupskis to buy the back land in this lot. They went back and forth with the planning board in 2019/2020 between doing a conservation subdivision and a conventional subdivision and they weren’t able to proceed with conservation subdivision when the citizen’s petition was posted. Everything sat until this year and they are now working on a conventional subdivision on the backside of the property for CMK. The lot was approved at the street with a stipulation that they couldn’t build a house on it unless they put a residential fire sprinkler or a fire system for the road extension, in which they chose the residential fire sprinkler standpoint. They went out and measured off edge of pavement, which is standard. Mr. Maynard said they did an as built and ended up finding out that the pavement is not in the center of the right of way. Mr. Maynard said he kind of figured out what had been done explaining that Cornstalk Lane is not a typical 50’ wide right of way where the edge of pavement usually ends up 11’ from the edge of the right of way. Everything shifted over about 5’ to the right in this case and he feels they were trying to hit the center of what the right of way was in one spot, being it’s 57’ wide at one end and tapering down at the other end. He said when CMK went to do the foundation it became obvious that it was in the front setback. It is the correct set back from the edge of pavement to a foundation but not from that to the lot line. Mr. Maynard said what makes property a little unique is it doesn’t have the typical 50’ platted right of way and with the dimension requirement, it sits the right distance off the pavement, but not off the right of way.

Mr. Hennessey noted he ran into this in Kittery, Maine a few years ago.

Mr. Passamonte asked if the only thing that’s in question is the little bump out, to which Mr. Maynard said yes.

Mr. Wing asked Mr. Maynard to clarify the red line on the plan.

Mr. Maynard said the red line on the plan is where the actual edge of pavement is in the field. He explained he did not originally ask the field crew to locate the edge of pavement. He asked if they made a mistake and sent them back out because he wanted to make sure what he was seeing was right. He explained that

his experience with builders is they usually lay this out for them, but they did not do any layout for this but discovered the pavement area when they went back to check themselves on the foundation location. He said he tried to put as much info as he could on the map. He explained that looking down toward Patriot Drive, the width is 57' and then tapers to a 50' right of way. He said he put dimensions on it showing it's 41' from the bump out on the front of the house to the edge of pavement and is 25' to the right of way where it should be at a 30' set back and the edge of pavement should be 11' off the right of way but the edge of pavement isn't where it's supposed to be and makes it a little unique.

Mr. Hennessey asked Mr. Maynard to read the five criteria, which Mr. Maynard read into the record.

Mr. Hennessey asked if this is a town accepted road and Mr. Maynard said not yet. Mr. Hennessey then asked if there is a bond on the road, which Ms. Beauregard said there was. Mr. Hennessey asked if the bond could be used to correct problem. Ms. Beauregard said not without the planning board calling the bond, which she said she didn't know they would typically do for this type of issue.

Mr. Maynard said they are proposing a subdivision, which would extend this road, so things could be somewhat corrected. He explained the pavement did get inspections when it was being built and from construction standpoint, it was built to the standards of the town but it's off center.

Mr. Hennessey stated that if it was put in the wrong place then it is not built to town specifications.

Maynard explained what looking at town specifications means in terms of gravel depths, etc.

Mr. Hennessey said it starts with where it's supposed to be.

Mr. Maynard said, yes, but he gets what they did. He said they took the distance of the 57' wide area and held their lines in based on that. He said from construction standpoint, he doesn't think you can say it wasn't built with the proper gravels and drainage and utilities lines, etc.

Mr. Hennessey said the state took away the board's right to consider financial loss as a piece of granting a variance.

Mr. Maynard said they did but people do ask the financial aspect and he wanted to let the board know this was about a \$12,000 foundation wall that would have to be ripped out to be slid back 5 feet.

Mr. Hennessey said he feels they are turning into the planning board. He asked what the town engineer says about this road.

Ms. Beauregard said she doesn't know if he's aware that it's off center in any way.

Mr. Maynard said he doesn't think anyone realizes it. They never did an as built as it wasn't required.

Mr. Hennessey asked if all that's there is the foundation, which he gets it's worth \$12,000, and Mr. Maynard confirmed it's only the foundation. Mr. Hennessey said they're not supposed to discuss the cost, to which Mr. Maynard said he thought was an important factor to let people know that there is a cost and it's not as easy as just knocking it down and moving it back.

Mr. Hennessey said he is out of his depth here. He said he doesn't know the ramifications of having a crooked road in town and leaving it where it is. He asked if he was correct that the road is not where it is supposed to be, which Mr. Maynard said it is off center from where it was planned. Mr. Hennessey said he is nervous about approving a variance that would cement what is there.

Mr. Maynard said he still has to go back to planning board for the extension of this road into the new subdivision and they will have to be told that he has a variance that it's not centered in this right of way. He said he will either need a waiver to leave it or his client will have to shim the side of road and fix the location to meet whatever standard he doesn't get a waiver for. He explained the reason for a right of way is to give enough room for the pavement, utilities, etc. This right of way is 57', almost 10' wider than it needs to be at the beginning section. He asks, from a construction standpoint, does it matter if the road is a little off set in the right of way.

Mr. Hennessey said he disagreed with the person saying the request was premature in the previous case but is wondering if this is not premature to handle as it will be going in front of the planning board as part of the presentation for the subdivision. He stated he is afraid he'll lock them into a mistake.

Ms. Beauregard said that looking at the plan, regardless of the pavement, he will still need variance in terms of the lot line because it's too close to the lot line. She said she doesn't think the location of the pavement matters in terms of whether or not a variance is needed for the lot line.

Mr. Hennessey questioned Ms. Beauregard that by approving the variance, they would not be making the planning board do anything.

Ms. Beauregard said she doesn't think it will have any bearing on the planning board later saying they want the road centered.

Mr. Passamonte wondered why this wasn't picked up if it was reviewed by Steve Keech's office.

Mr. Maynard said it wouldn't be picked up unless an as built was done and it wasn't required at the point they were at. He said it would come up at some point.

Mr. Passamonte said he looks at it as big mistake by someone.

Mr. Hennessey asked the board to go back to just looking at zoning. He said if doesn't impose a problem for planning and improving the subdivision down the road and they just deal with a simple mistake, approving it would save them \$12,000, which sounds okay to him, but he wants to make sure they are not tying the planning board's hands down the road.

Mr. Wing questioned that the board would be approving a variance to distance to the lot line of a road that's not in the right spot. He asked if there's any chance they'll be forced to put road in right spot.

Mr. Maynard said that because this was discovered, they will have to ask for a waiver for that portion. If the waiver is not granted, the road will have to be recentered around the original plans.

Mr. Wing asked, a follow up, if it's not in right spot, is someone's property affected.

Mr. Maynard said no. He said the town hasn't accepted the road yet and the land under the road is still owned by CMK, the same person asking for the variance, because they haven't transferred a deed to the town.

Mr. Caira asked how long the road is.

Mr. Maynard said the first stretch is a little over 200 feet.

Mr. Caira asked for confirmation that it was off by 5', which Mr. Maynard said the set back is supposed to be 30' and they're at 25' to the right of way line. Mr. Caira asked what the condition of the road was and Mr. Maynard said it was brand new in 2017 and it has seen very little traffic and was blocked off for a long time. Mr. Caira said it would be seeing a lot of traffic if they are proposing a subdivision.

Mr. Maynard said they are proposing what he believes to be 8 lots off the additional length of road.

Mr. Caira asked if they would be doing paving in the future.

Mr. Maynard said he believed the road was only a binder, not finished pavement.

Mr. Caira replied he thinks it would be easier to move it over 5 feet.

Mr. Maynard said the relief he is looking for is for the foundation.

PUBLIC INPUT

No one came forward to speak in favor of the Variance.

Mr. Robert Shephard came forward representing Fred Nietupski, 60B Patriot Drive, the person who sold the property to the current owner. He explained he was a lawyer from Nashua and lives in town. Mr. Shephard said he met with Fred Nietupski on Friday and that Mr. Nietupski is not ambulatory and able to attend the meeting. He said his brother had died in December of last year. He said he knows Mr. Nietupski is watching on tv and is sure is he vehemently opposed to the characterization of this road. Mr. Nietupski told Mr. Shephard the road was put in at the direction of town and there where changes made at the direction of the town, including a catch basin put right where Patriot Drive and Cornstalk Lane intersect. He said the issue is where the boundary line is and doesn't have anything to do with where the pavement is. Mr. Shephard said his first impression was how did this happen when you have to know where the boundary line is. He said his understanding is it is typical for a foundation to be staked out. Their conclusion was that this is intentional or grossly negligent. Mr. Shephard said the other issue that has not been raised yet, that Mr. Nietupski wants him to speak on, is a walkout basement in the back of foundation. He said he was unsure if the board has been out there but distributed pictures for the board to look at. He explained that Mr. Nietupski's position is this walkout basement is why they put the foundation where it is because putting it back an additional 5' would have required more than \$12,000 in excavation. He asked if there were going to be stairs entering the house, as he is assuming the bump out is where stairs will go, making it 10' encroachment. He said he doesn't know the design of the house but questioned whether it will have a front porch. Mr. Shephard said the issue at hand for the board to consider is why this happened and said it was amazing that they're trying to blame the position of pavement as to why the foundation was put where it is, and it has nothing to do with it. He said the excuse is a complete farce. He also explained that Mr. Hennessey is correct that you cannot cite a financial hardship and he thinks the case law is clear in saying you can't have self-created hardship, which is what happened here. Mr. Shephard said it might have been different if they came to the board in advance saying because of a walkout basement they wanted to come closer to the setback, but the foundation is in. He said they have resources in order to hire an engineer and properly stake out where the foundation should be so they could have figured it out in advance. He said the property owners either did this and ignored it or were grossly negligent in allowing this to happen. In conclusion, he said his client is opposed for the previously stated reasons and the applicant should be required to comply with setback requirements.

Mr. Hennessey asked Ms. Beauregard if there was a building permit pulled for the foundation and she told him there was and they have the plans in the office. He asked if there was walkout basement and Ms. Beauregard was unsure.

Jaie Bergeron, 55 Patriot Drive, came forward with questions. He said the abutters' notice was very vague and he was trying to gain an understanding. He said he saw the foundation was already in and doesn't get why red flags weren't seen before the foundation was put in. He said it seemed like it may have been a let's build and ask for forgiveness after situation. Mr. Bergeson said he thinks the rules are the rules and they don't have the 30 feet. He would hate to see a precedent set.

Mr. Hennessey said he hasn't seen a lot of people do this but has run into before. He said it doesn't make sense that a builder would take that kind of risk because it will show up at some point.

Mr. Maynard agreed. He said he works in some towns that require a footing as built, not even a foundation as built and this would typically be found at that point.

No one else came forward in favor or opposition to this Variance request.

Mr. Maynard said that in his conversations, he thinks this was an honest mistake, that they pulled from edge of pavement, which not centered in right of way.

Mr. Hennessey said he is sympathetic and there are lots of mistakes in real estate. However, if it had been seen before and if they knew ahead of time and they could not build the house that was filed with the building permit then by granting this Variance, they are allowing them to build what could not have been built if it had been legitimately done.

Mr. Maynard said he hadn't seen the proposed house plan and doesn't know if there is walk out. He said when the septic plan was produced, it was based upon the design plan. The design plan showed the pavement in one location. He said all he knows is they were called for an as built and found it was in the setback and the setback issue comes in because the pavement is out of whack a little.

Mr. Hennessey explained they had a person who has interest in case who is objecting to house being built of this style, with a walkout, because of the error made by Mr. Maynard's client and that scares him. He said if it was an honest mistake, it's not a big deal. But they have someone mad enough to send a lawyer, and based upon what he is saying, that house should not have been built that way on this lot if followed the rules.

Mr. Maynard said he has not seen the plans. He doesn't think it was designed as a walkout scenario based on the septic plan they did.

Mr. Hennessey said it looks like in pictures and showed Mr. Maynard the pictures.

Mr. Maynard said looking at the foundation, it's not a walkout. It's for a bulkhead and is shown by the tar line.

Mr. Caira said a walkout would have been wider and the tar gives it away. Mr. Hennessey agreed.

Mr. Hennessey said he has never asked to move a question in front of the board that they believed they had all the facts, but he is going to suggest the wait. He said the house could have been built 5 feet back, which Mr. Maynard agreed.

Mr. Caira thought he heard that it was pushed 5' that was because of the walkout, which Mr. Maynard said he did not have a walkout on his septic plan.

Ms. Beauregard asked Mr. Maynard if the bump out is the furthest encroachment into setback or if there a proposed porch or stairs.

Mr. Maynard said he didn't believe there was a porch on the plan that was sent to him, but he can't speak for stairs.

Mr. Hennessey said he wasn't sure the board needed to know what caused this in order to make a judgment as the attorney for Mr. Nietupski stated. He asked to put this off for another month to get the original building plan for the property. Mr. Hennessey doesn't feel the board knows enough on this.

Mr. Maynard said he is under impression honest mistake.

Mr. Hennessey said believes Maynard but is worried the "honest mistake" had ramifications. He explained the chair can't make a motion but as the chair, he would like to put it off for a month and ask the planning department to look into what was permitted at the time and why.

Ms. Beauregard explained they issue permits in phases and they only have permit for the foundation until they get the certified foundation location plan showing that all setbacks are met.

Mr. Hennessey said he would like the town engineer to look at this and weigh in. He asked if someone would make a motion for that.

MOTION: (Passamonte/Hopkinson) to postpone until the board gets more information.

(5-0-0) The motion carried.

Mr. Bergeron said the bulkhead doesn't moot the argument for whether it will cost something to move the foundation and the cost has no association to his decision-making process. He thinks it's a bad way to get off for a subdivision. He said he didn't know what the planning board will think about Cornstalk Lane or the road. He said as a planning board member, he would look at a privately built road and say we don't know what's under the road and we need to know. He said he is reluctant to move for a variance on this request. Mr. Bergeron said in his time on the boards, he has seen improperly placed foundations moved. He said as a builder, you have a real issue if you don't know where your right of way is and he questions why someone would not be sure as to where they were placing something of this consequence. He said he won't need another meeting or more info and he is ready to deny the variance right now. He feels this is a simple thing. There is a property line with a new building starting a new subdivision that is not right and doesn't meet town standards.

Mr. Hennessey said he doesn't know if it doesn't meet town standards and he would like Mr. Keech to look at this and give the board some advice.

Mr. Bergeron said he doesn't think Mr. Keech will be able to look at something he didn't see happen. He said unless the landowner had it certified or inspected at the time of construction, Cornstalk Lane will only prove to be a piece of pavement over piece of dirt. He said he will do whatever board decides.

Mr. Hennessey said he is queasy about moving ahead either way and will take a vote for a one-month delay.

Mr. Passamonte asked if they will know who approved or reviewed what happened with the foundation and the road when they get the information.

Mr. Hennessey said they will get what they get. He knows they don't have enough info on this.

Mr. Wing asked if the request will include what Cornstalk Lane is supposed to be or where it's supposed to be.

Mr. Hennessey said he wants all the information he can get from the town's point of view, starting with their consulting engineer.

Mr. Maynard said date and time specific, October 20 at 7:00 p.m.

Ms. Beauregard said the next meeting is October 20, a Wednesday night, which Mr. Hennessey explained was because of the holiday and he didn't want to push it back and start delays again.

CASE ZO2021-00029

ALBERTSON, Dolores and M&B Investments, LLC – 15 Kens Way – Map 15 Lot 9-38 – Seeking a Variance concerning Article: III, Section(s): 307-13 (B-1) & 307-14 of the Zoning Ordinance to permit a subdivision on one lot into three lots having their frontages and accesses on an existing private road and not a class V public road, and for one of those lots to have 198.7' of frontage where 200' is required.

Mr. Hopkinson read the list of abutters aloud. There were no abutters present who asserted standing in the case, who did not have their name read, or who had difficulty with the notification.

Karl Dubay came forward. He explained that Kens Way is a private right of way, private road, and goes through the middle of the owner's property, which is almost 5 acres in size. He explained that Dolores has existing house on left side of Kens Way and about two acres on the right side of Kens Way that was preplanned by her husband for two future lots and they were never built on. He said they have done surveys and the soils are very good and there are no wetlands on site. He said the two new lots are square in shape, excellent soils, flat topography, no flood zone, almost perfect lots except for one being 16" short of frontage and this is one of the pieces of the variance couplet. Creating 2 extra lots and holding the existing lot and Kens Way, they would need a variance for creating lots on a road that is not a class V public road. He explained Kens Way has been there for a long time. They would engage in a cost sharing program, if the neighbors would like to do, and work it out with the planning board and abutters. He said they are proposing two lots. They have an existing full survey, a condition plan, a subdivision plan, a topographic subdivision plan and they meet all the other criteria for the town. There would be no additional relief or waivers needed. He said they have a predevelopment plan for the 2 homes on those 2 lots. They would work with abutters and board on improving Kens Way. He explained that it starts off wide and then narrows. Mr. Dubay said they would promise to improve Kens Way for the areas they are accessing. He explained there are two subsections to the variance and Ms. Beauregard was helpful in getting them together. He said the lots are in good shape but are on Kens Way, which is not a public street. They are offering to improve Kens Way in their fair share and continue to maintain in their fair share in whatever arraignments they have with the homeowners on Kens Way already. He said they have a predevelopment plan showing septic, grading, setbacks, wells, tree lines and it all works well. He said the prove out plan for the subdivision is the same as their development plan and because the lots are so good, they can absolutely do that and not play any games with anything the planning board would need to deal with later.

Mr. Hennessey asked Mr. Dubay to read the criteria, which Mr. Dubay read into the record.

Mr. Hennessey asked if there an agreement amongst those with frontage on the road in regard to maintenance.

Mr. Dubay said he can't find any filed with the registry of deeds, like there would be now. He said the neighbors here tonight might be able to explain further. He said just because they can't find one with the registry doesn't mean there isn't one as there may be a verbal agreement. He said people may say there are none, but they have been doing it all along.

Mr. Hennessey stated that the problem, in this day and age, is if the house was to be sold, they wouldn't get a mortgage without any agreement.

Mr. Dubay said there are lots recorded at the registry that enjoy Kens Way and people that are maintaining Kens Way right now and they would enjoin them, in a reasonable agreement, to pay their own way. He said if the board was to approve this, it would be conditioned on some sort of agreement that the town's attorney would review.

Mr. Hennessey said he knows Kens Way is a private road but asked if it was a public right of way.

Mr. Dubay said it is a private, 50' right of way and is a private road on top of that.

Mr. Hennessey asked if there was any public access to that road.

Mr. Dubay said there technically isn't, but people drive up and down it. He said he believes there is a driveway off of it that goes to the town land and someone uses it to get to back and forth to the town land. He said they would probably honor that if they knew purpose behind that and would put some kind of registry....

Mr. Hennessey said he still didn't understand who owns the road.

Mr. Dubay said Kens Way goes back beyond Delores property.

Mr. Hennessey said he saw that there are a number of houses out there. He asked if they own the road.

Mr. Dubay said he knows that Delores owns the land underneath where the 50' wide right of way is shown and that is shown in deeds, etc. He said beyond that, it may legally morph into other rights of passage but not necessarily a full right of way all the way down and around. He said it would be fair to ask that a legal instrument be put forth at registry of deeds, that is approved by the planning board, to clean up that up. He agreed that it would need to be recognized and not just verbal.

Mr. Hennessey asked if Mr. Dubay understands the selectman also have to approve this.

Mr. Dubay said he was aware, through the RSA. He said he thinks the abutters would also want to consummate that and would be a part of offering to do that. He said if the abutters didn't want to, they would still do their frontage.

Mr. Hennessey opened it up to the board for questions.

Mr. Hopkinson asked what Mr. Dubay envisions when he talks about improving the road.

Mr. Dubay said they would want to meet with the people that use the road and get their thoughts and recommendations. He said they haven't heard from anyone yet, but it would be part of the planning board

process. He explained that Kens Way starts out wide at the beginning and then beyond 2 driveways (Delores' being the second), it starts narrowing further. He said they would offer to widen the pavement to a point the abutters would enjoy if they wanted it wider. He said that by working with the town and the fire department for a number of years he knows that they usually like to see 18-24' wide all the way and his client would offer to do that for the portion on their land. He explained that the request is usually 18-20' wide, properly crowned and drained.

Mr. Hennessey told Mr. Dubay he can save that for the planning board because they would have to approve subdivision. He said he is concerned if there's legally such a thing as this road. Do the lots that extend further up have frontage on a legal way?

Mr. Dubay said there is note on the plan that showed up in their research, which shows as note 9. He read this note into the record. He said it was, under administrative decision, recognized as a private road and that is a good distinguishment that it's not just a driveway that someone is calling a private road. He said the town attorney and town engineer would say it was recognized as a private road, which has certain standing under case law.

Mr. Hennessey said he gets that. He explained there was a law passed 3 years ago that clarified the rights of those in private road. He said that even though that relieved some of the burden for forced maintenance agreements, there still needs to be something in order for most mortgage companies to grant a mortgage on these properties. Most lenders need to see maintenance agreement. Mr. Hennessey is concerned about granting variance on road with no such legal agreement and creating unsellable property.

Mr. Dubay said there is an agreement on utilities, shown in note 7. He said there is a 50' access and utility easement. Mr. Dubay read this note into the record. He said this was depicted on prior recorded survey plans. He explained this road does have history and didn't just pop up and has the utilities' rights and is not just coming up out of thin air

Mr. Hennessey said he believes Mr. Dubay but wants to get to the nub of things. He asked Mr. Dubay if he has anything else on the application.

Mr. Dubay said he did not but wanted to hear from anyone that showed and could provide more information on Kens Way.

PUBLIC INPUT

No one came forward to speak in favor of this variance request.

Michael Craven, 32 Kens Way, explained that in regard to a maintenance road agreement they don't really have one and it is kind of a free for all in winter. They would like to see taken care of and include 9 houses on that. He said they would have an issue in regard to fire safety. He explained that it is so narrow that just one car can go down. He said having a turnaround for fire truck won't happen as there is no real place to turn around. He said he has pictures of the road showing it's wide in the beginning, narrows down to one car and then widens towards the end. Another concern would be drainage as they get a lot of icing right now. He wants to make sure new lots wouldn't drain onto Kens Way. Mr. Craven said they are lucky to have a neighbor with backhoe to scrape the ice up. He would like a definition of what the improvements on the road will be and believes that will be worked out with the planning board. Mr. Craven added that even though he was on the abutters' list, he didn't get any letter or anything. He said he was on the list when they called it but did not get any official notification as Mr. Hennessey asked.

Mr. Hennessey asked Mr. Craven how long he's been living on Kens Way. Mr. Craven said since around 2003.

Mr. Hennessey asked who takes care of road. Mr. Craven said the neighbors take care of the road and share the burden and hire someone, if needed, to do the plowing, but there is no agreement.

Mr. Wing asked if Mr. Craven said there were 9 other lots. Mr. Craven said including theirs, there are 9 other lots in total that access Kens Way.

Ms. Beauregard asked if there was a homeowners' association, which Mr. Craven said there was not. She asked if the residents would be amenable to being part of one and Mr. Craven said he thinks it would help them out in the long run and would be beneficial to them.

Mr. Hennessey said he thinks it's time they get together and get something. He explained the banks look for this type of agreement now.

Ms. Beauregard said the planning board has typically been putting conditions to establish a homeowners' association and a maintenance agreement to be reviewed by town council and recorded.

Mr. Dubay said that's why he brought it up, even though he knows it's planning board issue. He said he would be asking the same questions as the neighbors sitting there but they can work out fire turn arounds and could add those easements to their own lot. He said they would make improvements and work with the abutters to create an approved road in that section that is most advantageous and a win/win for all.

Rick and Debra Elwell, 178 Hobbs Road, came forward. They said they have 2 pieces of property that abut the property in question. They asked if the proposed lot for which the variance is being sought is going to be clear cut?

Mr. Hennessey said that is not up for review.

Mr. Elwell said it was relevant if they let him ask a few questions.

Mr. Hennessey said they won't tell people how to handle land on their own property.

Mr. Elwell explained they were Map 15 Lot 139, and they were lower in elevation than the other lot. He said they are concerned with stormwater drainage. He said they have an approved lot and approved septic and want to maintain that if a variance is approved and they do not want to see their property diminish in value.

Mr. Hennessey said he understand. He explained the process is convoluted and confusing. He explained that what is before the board is a variance because the property is not on a public road and the other variance is for a small amount of frontage missing. He said it is rare to turn someone down for a variance to allow them to go before the planning board to allow the lots to be created. He explained the planning board can create these lots. He explained that ordinarily they would not have discussion on clear cutting, etc., but knowing the planning board, they would take it amongst themselves to admonish the builder, etc. that they cannot harm the abutters through any drainage issues. Drainage problems would be up to the person doing the subdividing. Mr. Hennessey said the planning board will look at that and plans, swales, etc.

Mr. Elwell asked if one of the conditions was the diminishment in value of abutting property and that is what they are addressing now.

Mr. Hennessey said one of the criteria is that the applicant does not diminish the value of their property by the board granting a variance. He explained they do have the right to develop their land and the condition to keep trees, etc. is beyond this committee. Mr. Hennessey said he is concerned about approving lots or subdivisions on roads that don't really exist and he knows the planning board and selectmen will share his concern. He said the zoning point of view is easy but when it gets to planning and the selectmen, they will get into the potential drainage issues.

Robert Pace, 31 Kens Way, came forward and gave some history. He said this started off as one lot, his lot. They approached Delores because Ken has passed away. He said Ken didn't want any lots back there. He wanted it as it was, but that was besides the point. He said he originally got the 50' right of way because it was explained that if you get the 50' then you can get more lots, so they went that route. He said Delores signed off and they got the 50' right of way to get back to father-in-law's property where he and his wife built a house on five acres. He said it was a dirt road. He put in the underground power, 1350 feet, and subsequently put in driveway. After that, two brothers-in-law approached the town, got approvals, and all three have over 5 acres. He asked if there is anything down the road saying the same as they are trying to subdivide, can they all subdivide. He asked if there is a number as to how many houses can be put back there based on the acreage, stating this is convoluted, as Mr. Hennessey said. He said the board was big on safety on other projects similar to this. He explained his mother-in-law had a head on collision on Kens Way that totaled car. He explained there is a narrow passageway up past Delores' property. Mr. Pace said there are 17 registered vehicles on this road. He explained that the neighbor across from Kens Way is concerned because every time he pulls out, there is a near collision because he's going slow because he's afraid of coming out onto Hobbs Road because he can't see. There is not 400 feet of vision. Mr. Pace said he and his wife drive larger vehicles, are higher up and can see further down, but have had near collisions many times because of the lack of vision from both sides. He thinks there needs to be a lot of concerns addressed, safety concerns, amount of run off, etc. He said he sees 1 more house at most. He thinks the first 1,000 should be turned into a town-maintained road with a teardrop cul-de-sac for firetrucks, etc. to turn around. He explained that from Hobbs Road, it is a ½ mile to his sister in law's house and any medical emergency or just any emergency can become fiasco, especially in winter. Mr. Pace said he maintains the road with bobcat, if he has to, to make it safe for passage. He said the one guy in front has a machine and only maintains first 100 feet. He feels this should have been nipped in the bud years ago. He said this came about because his father-in-law wanted his daughters to have land. He feels bad because Dolores has said if it was only one house, she had no problem. She didn't want lots of traffic. He said they opened a can of worms. Mr. Pace said there has never been an agreement, but things have changed over time, they didn't have 17 registered vehicles. He said there are issues from a maintenance and safety standpoint and it needs to be reviewed. He feels people need to go down there and see what's there in order to get a real understanding.

Mr. Hennessey said he remembers some of the cases. He said he doesn't know what to say except they need to get a lawyer and get together to put a maintenance agreement in place for the property. He said the easiest thing is for the board to either approve or deny the zoning request, but it is problematic under the five criteria, and they could be sued. Mr. Hennessey said he doesn't mean to pass the buck, but the planning board and selectmen will take a hard look at this. He said the residents need to get a maintenance agreement and approval to have it safe. He said in New England, it is dangerous to live up there five months a year. He said they are going to have to do it if they ever want to sell their property. He explained that in order to get this approved, everyone will have to get together and come up with an agreement.

Mr. Pace said he is opposed to doing 2 lots. He would say only 1 at most. He feels The Dubay Group should come up with agreement, drafted by lawyer, at their cost. Mr. Pace said because of hazards of getting in and out and because of 50' right of way and the town property has 4 acres that abut it after Delores, there should be town-maintained tear drop in front of his house and the Craven's.

Mr. Hennessey said whatever is done with this board, it will go to the planning board next.

No one else came forward in favor or against this variance request.

Mr. Hennessey brought it back to board saying he doesn't know where to go with this. He said he doesn't want to dump another case and they make decisions in the same night. Mr. Hennessey said he thinks Mr. Dubay needs to have a meeting with the neighbors and come up with plan to proceed. He said the board will make a decision tonight if Mr. Dubay chose not to do that.

Mr. Dubay asked to speak with his clients.

Mr. Passamonte said he lost now. He questioned who actually owns Kens Way and whether it's private property or a town right of way.

Mr. Hennessey said that's one his questions. He said Mr. Dubay said it's a 50' right of way somewhere. He said he has taken 6-hour classes on NH laws on roads and came out dumber than he started.

Mr. Passamonte said that's only for utilities and it doesn't show who owns it or if there's an easement for others to use it all the way through. He asked if this portion is privately owned by Delores and she can close it down.

Mr. Hennessey said there is a difference between public and private and there is no question this is a private something, meaning the selectman and planning need to look at it. He explained there is also a case where you can have private road that is a public right of way and they had talked about town cars going up to reach town land.

Mr. Passamonte questioned if that was the case, would there need to be an easement right for others to go through.

Mr. Hennessey said that can be implied or explicit but at some point, it needs to be written down. He explained this is complicated and the state legislature and realtors got involved four years ago because nobody could get a mortgage on private road. The decision was that as long as people get together and come up with an agreement...

Mr. Passamonte said he understands that but questions who the owner of the property is.

Mr. Hennessey said he doesn't know and they don't know.

Mr. Passamonte asked if they owned all this at one time and then put the road through there and they still own that.

Mr. Hennessey said if Mr. Passamonte checks the deeds, he will probably find that.

Mr. Dubay said after consulting with his client, they would agree to widen Kens Way from 18' to 20'.

Mr. Hennessey said he will not negotiate an agreement. He said the planning board does that type of stuff, but this board cannot. He said they have one of three things they can do with the Variance request, approve it, deny it, or upon Mr. Dubay's request, it can be pushed out a month for him to get it straightened out.

Mr. Dubay said it feels like they're being pressured to do a town road, which is not in the best interest. He said it will cost them a lot of money to widen Kens Way for their frontage and that's why they're asking for the second lot, which meets the criteria.

Mr. Hennessey asked Mr. Dubay if he wants to make a decision tonight or push it off for a month.

Mr. Dubay said they would like the board to make a decision so they can move forward and work with the abutters.

Mr. Hennessey asked if there was anything else before public discussion was closed. No one came forward.

Mr. Hennessey said Mr. Caira will vote on this case.

Mr. Hennessey went through the 5 criteria. He asked everyone to chime in saying he needs their input and hasn't made up his mind.

Criteria 1 – The variance will not be contrary to public interest

Mr. Hennessey said this is a good chunk of land where they will keep the existing house and want to subdivide the rest of land into 2 parts, with a small variance required for the frontage, which he doesn't feel is an issue. He explained there is a line on a map and they are looking for a variance on so much frontage, but the board doesn't know what the ownership of the line is, nor do they get into ownership.

Mr. Passamonte said on question 1, it is not contrary to public interest. Mr. Hennessey verified Mr. Passamonte was saying yes to question 1, which Mr. Passamonte verified.

Mr. Hopkinson said he would vote yes, too. He said hearing the issues, such as ice buildup, is concerning. They say they want to take care of it, which the board can't hold them to, but that would be addressed by the planning board. He feels these issues would be taken care of more. He said it's hard to say and hasn't been down Kens Way.

Criteria 2 – The spirit of the ordinance is observed.

Mr. Hennessey said looking at the lines on the proposal, on the face of it, the Variance is warranted if it was a normal road in normal place. He said this is a small frontage issue and it's hard to say it isn't under the spirit of the ordinance to issue the Variance.

Mr. Hopkinson said everything is aesthetically in the homogeny of community.

Criteria 3 – Substantial justice is done.

There was no disagreement from the board. Mr. Hennessey cited Mr. Dubay saying this has been planned for a long time.

Criteria 4 – The value of surrounding properties are not diminished.

Mr. Hennessey explained they had case turned over 2 years ago when he said the values in that particular case was determined on items other than what the Variance was being granted on. Mr. Hennessey said the judge said he shouldn't have said that and he didn't establish himself as an expert. He stated that he is not doing that here. He is saying the values of the other properties would not be affected by this variance

request. He said he understands one abutter isn't on this line on map but given the size of land, etc., he doesn't think will affect value. Mr. Hennessey said if not done correctly with drainage, etc., it could be affected but not the Variance that is in question.

Nobody disagreed.

Criteria 5 – Unnecessary hardship.

Mr. Hennessey said he thinks they have some problems on whether the proposed use is reasonable. He explained the Variance is to create 2 new houses on undefined, public road. There has been testimony of people living there telling the board how dangerous it is in winter.

Mr. Hopkinson said the houses must have some type of right of way, easement, something, whether it's on the deeds or implied. He said it makes sense that there is some kind of easement, whether it's a handshake or deeded but they should get it on the deeds.

Mr. Hennessey said it's been long practice that the board doesn't get involved in ownership issues and it's up to private people. He said looking at the lines on a map, doing what they're asking is not an unreasonable request, existing house, large parcel, as Mr. Dubay put it, close to ideal piece of land. Mr. Hennessey said he is still concerned on the safety of the road coming down but that is up to planning board, which Mr. Passamonte agreed.

Mr. Hennessey said he thinks it's under A but B as well and he is voting in favor. He asked board members to speak up if they weren't voting in favor so it's on record if it does go to court.

Mr. Passamonte said he is voting yes because he knows it will go to planning.

Mr. Hennessey stated it will go to the selectmen as well. He said he thinks the neighbors all need to get together.

Mr. Bergeron said he is voting no and then he won't have to vote on it on the planning board side. He cited the last case as showing when things are done correctly with engineers going in front of the planning board first and getting a conceptual idea. By circumnavigating and looking for all rules to be thrown out, he says no. He said the applicant made the best argument to build an upgraded road up to the parcel that can be affected and they can't legally affect anything beyond that point. Mr. Bergeron said he sees a lot of wetlands on the back 5 acre lots and that would be the issue that would affect future development to Mr. Pace's question. He said if this board votes affirmatively, the planning board is going to make them do a lot of things such as making them straighten out first section. He stated his final vote will be no and he is telling everyone up front. Mr. Bergeron said the applicant made the best argument that he could have built a road up to standards and the planning board has seen this problem before and he doesn't want to deal with it there.

CASE #ZO2021-0029

ROLL CALL VOTE:

Mr. Hopkinson – 5 yeases; final vote yes

Mr. Caira – 4 yeases, 1 no; final vote no

Mr. Passamonte – 5 yeases; final vote yes

Mr. Bergeron – 3 yeases, 2 nos; final vote no

Mr. Hennessey – 5 yeases; final vote yes

(3-2-0) The motion carried.

VARIANCE APPROVED

Mr. Hennessey noted there was a 30-day right of appeal.

CASE ZO2021-00030

KDS Properties, LLC – Wildwood Road- Map 7 Lot 9-135-23 – Seeking a Special Exception concerning Article: XII, Section: 307-74 of the Zoning Ordinance to permit construction of a 1000 sf 2-bedroom Accessory Dwelling Unit within a portion of the basement of the proposed house in an approved Conservation Subdivision.

Mr. Hopkinson read the list of abutters aloud. There were no abutters present who asserted standing in the case, who did not have their name read, or who had difficulty with the notification.

Mr. Gendron said he appreciated the board trying to get him in earlier, but he had to do 2 meetings in 2 different towns.

Shane Gendron, Herbert Associates, came forward representing KDS Properties in this application. He explained it was a subdivision they did in 2018 and was approved through the planning board as an approved conservation subdivision. He said it was important to note that the lot was undersized for zoning, but it is in in conservation subdivision. He said the owner, David Mendes, is building homes on the subdivision right now and has a buyer interested in buying a 3-bedroom home with a 2-bedroom Accessory Dwelling Unit. He said the lot was checked to make sure it meets lot loading and is serviced by Pennichuck Water so there is no well radius. The septic design has been approved. He said Mr. Mendes gave a layout of what he will do for apartment, and it will be a 2-bedroom apartment in basement with a floor plan of about 950 square feet. Mr. Gendron said he believes it meets all the common wall requirements and other criteria.

Ms. Beauregard said the town no longer has common wall requirements. It meets all other requirements and has been reviewed by the building

inspector and he has confirmed the square footage. She said they have confirmation of the septic being approved by the state.

Mr. Hennessey explained that for the folks watching, this can be a market value rental as long as the owner is in one of the two units. There are no longer in laws. Accessory Dwelling Units can be rented.

Mr. Hennessey said there was no public to open it to.

Mr. Wing is voting on this case.

CASE #ZO2021-0030**ROLL CALL VOTE:**

Mr. Hennessey – yes
Mr. Passamonte – yes
Mr. Bergeron – yes
Mr. Wing – yes
Mr. Hopkinson – yes

(5-0-0) The motion

SPECIAL EXCEPTION GRANTED

Mr. Hennessey noted there was a 30-day right of appeal.

DATE SPECIFIED CASE(S) – October 20, 2021

CASE ZO2021-00024 – Map 1 Lot 5-127-1 – BOUTWELL, Nathan 1406 – Mammoth Road

CASE ZO2021-00028 – Map 40 Lot 6-158-14 – CMK Equipment, LLC – Cornstalk

ADJOURMENT

MOTION: (Mr. Passamonte/Mr. Hopkinson) To adjourn the meeting.

VOTE: (5-0-0) The motion carried.

The meeting was adjourned at approximately 10:36 p.m.

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Respectfully submitted,
Jill M. Atkinson
Recording Secretary

The meeting was adjourned at approximately 9:10 p.m.

Respectfully submitted,
Jill M. Atkinson
Recording Secretary