

**APPROVED**  
**TOWN OF PELHAM**  
**ZONING BOARD OF ADJUSTMENT MEETING**  
**October 20, 2021**

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

**PLEDGE OF ALLEGIANCE**

Mr. Bergeron called roll:

PRESENT ROLL CALL:       David Hennessey – Present  
                                  Peter McNamara – Present  
                                  Jim Bergeron – Present  
                                  Joseph Passamonte – Present  
                                  Alternate Jeff Caira – Present  
                                  Alternate David Wing – Present  
                                  Interim Planner Kerry Elonis – Present  
                                  Recording Secretary Jill Atkinson – Present

ABSENT:                     Matthew Hopkinson  
                                  Alternate John Westwood

Mr. Bergeron acted as secretary for this meeting in the absence of Mr. Hopkinson.

**MINUTES:**

**August 9, 2021**

**MOTION:**               (Passamonte/McNamara) To approve the August 9, 2021 meeting minutes as written.  
                                  (5-0-0) The motion carried. (Alternate Jeff Caira voted on the minutes.)

**September 13, 2021**

**MOTION:**               (Passamonte/Wing) To approve the September 13, 2021 meeting minutes as written.  
  
                                  (4-0-1) The motion carried. Mr. McNamara abstained as he was not present at the September 3, 2021 meeting. (Alternate Jeff Caira voted on the minutes.)

Mr. Hennessey noted that the board received a letter regarding the Gendron remand. He explained this was the workforce housing proposal for Route 38 that the board had denied a zoning variance on the basis of the hardship criteria. He said the new housing board has remanded this case back to the board ordering the board to rehear the case just dealing with hardship. He explained that in their decision, the housing board alluded to an economical argument that could be made in favor of workforce housing that the board had ignored. The applicant has requested time to prepare and the by the applicant's request, the board will rehear the case at the November meeting, if the applicant is ready.

**CONTINUED****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. Hennessey explained this was a continued case from the October meeting where the board had asked for more information from the applicant and from the town. He noted the board has information from Steve Keach, the town’s consulting engineer, inspection reports, plot plans, building permit application, copies of house plans that were submitted with the building plan application and a copy of the portion of approved septic system. He also explained that there was some question at the last meeting about whether there was a walkout basement and there is not.

It was noted that the abutters were already noticed on this case and their names were previously read.

Joe Maynard, Benchmark Engineering, came forward with Dan Mueller, Cronin, Bisson and Zalinsky.

Mr. Maynard said he was reading through Mr. Keach’s memo, which he received when he got there. He read a portion of the memo that stated, “Based on my reading of draft minutes of the ZBA meeting, I am able to advise the board that it should feel free to focus on the variance application at hand without concern for future adequacy of Cornstalk Lane.” He summarized that Mr. Keach said there had been inspections and so forth completed and his inspectors noted there was no horizontal or vertical control when they went to the site.

Mr. Maynard said the road is where it needed to be from a vertical standpoint. He said that because the road was a variable width right of way, starting at 57 feet wide and going down to 50 feet wide, he believes they kept it to one side rather than in center of the right of way. When the contractor went to put the foundation in, they thought the pavement should be so many feet from the edge of the right of way and they used to set the foundation which ultimately put it in the front setback.

Mr. Hennessey appointed Mr. Wing to vote on this case.

Mr. Mueller said he was there to add to the application. He noted they were there for a setback variance and explained setbacks, in general, serve to prevent the overcrowding of land. He said looking at the plan, there is no issue or appearance of overcrowding, and it is not a situation where the foundation was put in and there was an immediate complaint. It was discovered after the fact with an as built plan. He explained that this looks like other houses and other development in area and does not alter the essential character of the neighborhood, as it’s only a 5-foot distance. There is no effect on the public health, safety, and welfare as it is not close to any other structure, being there is a 5-foot difference from the edge of the right of way. Mr. Mueller said even though it is not in compliance from a spirit standpoint, the appearance looks like what you’d find in the area. He noted under hardship, there are similar considerations. There has been a \$12,000 investment for the foundation. He referenced an earlier economic hardship case, Harrington vs. Town of Warner from 2005. He explained that under reasonableness of use, this is a single-family home, which is allowed on this property. He said that in case law, the supreme court has suggested that if the zoning ordinance permits it in terms of use, it is a reasonable use of the property. He said he felt that diminishing value and substantial justice elements were addressed in the application.

Mr. Hennessey mentioned that in the Boucher case, which got rid of economic arguments on the hardship prompt, has been overturned by the housing board only as it applies to workforce housing. He said he is

not making a comment on the validity of the case, but he said it may be a bit premature to start bringing back economic arguments in cases other than workforce housing.

Mr. Mueller said he just wanted it to be clear on the record that Harrington vs. Town of Warner came after the Boucher case. He explained it was a New Hampshire Supreme Court case dealing with an effort to expand a manufactured housing park.

There were no questions from the board. Mr. Hennessey opened it up to the public.

No one came forward in favor of the application.

Bob Shephard came forward representing Fred Nietupski, the direct abutter. He said he had made a presentation at the last meeting and won't repeat the whole thing. He said the applicant states it is consistent with the setback in the area and he disagrees stating many houses are set further back. He said at the last meeting, Mr. Maynard said the problem was with the road and the road was not properly centered, which Mr. Shephard said the board now knows is not true. He stated that he believes there is gross negligence with measuring from the pavement and not the boundary line and they are now asking for forgiveness. Mr. Shephard said he understands the applicant is looking to continue development further down and this is not a great way to start when zoning laws are already violated in the setback requirement. He said his other question regarding a front porch was answered in that there is not going to be one, but he assumes there will be front steps and questions whether that will require a further variance and encroachment on the setback.

Mr. Maynard said he doesn't have that on the plans that were given to him, and he is unsure what will be on the front of the structure. He was in agreement with Mr. Hennessey that that is not what they are here for right now, rather they are here for the bump in the front of the structure.

No one else came forward in favor or opposition

Mr. Maynard said he wanted to point out that he never said the road wasn't constructed properly. He said he had said it wasn't built in the center of the road as it was originally proposed. He explained that he believes this is an honest mistake and they didn't realize the pavement was offset.

Public participation was closed.

Mr. Hennessey explained he was bothered by this application as he didn't know if there was an unsafe condition of the road. The board had asked for information from Mr. Keach and his response was it was not a gross error, just an error. Mr. Hennessey said if the hardship argument was accepted, his opinion was that Mr. Keach said it did not affect the general condition of road.

Mr. Bergeron confirmed with Mr. Hennessey that it has been discovered that the road is not an accepted town road, which plays a huge part in Mr. Bergeron's decision-making process. This will be the start of a new subdivision, which Mr. Maynard agreed. Mr. Bergeron stated that Mr. Keach is a good wordsmith, professional and doesn't take sides. Mr. Bergeron read an excerpt from the zoning administrator where she refers to the building permit application with the front setback proposed at 45 feet. Mr. Keach noted that this is not an accepted road. Mr. Bergeron read Mr. Keach's fourth paragraph to the board. Mr. Bergeron said that this is a professional builder that knows the rules. He also explained that the town adopted a procedure many years ago in which right of ways are put out, foundations are put in place and then as built plan comes back to the town before the plan moves forward. He said someone left an important step out by not laying out a right of way and didn't measure from the right place. Mr. Bergeron explained he can't see anything but a self-imposed hardship. He said this has to go in front of the planning board, as it is an

unaccepted road. It's too close to right of way. He noted they have had issues in the past and were supposed to have fixed this. He doesn't think board the board, "should be in the business of changing what this town has tried to make right from the very inception and to get these foundations located in the right places from the very early stages of construction."

Mr. Passamonte said they are dealing with 5 feet now but putting a front deck on, they will need a minimum of 6 feet further bringing the total to 11 feet if they go at the minimal steps into the house.

Mr. Wing said he wanted to echo Mr. Bergeron's comments. He picked up on the last statement by Mr. Keach stating, "I believe this is an outcome of an error in judgement rather than an outcome of an error in measurement." He believes Mr. Maynard said it was an error, as had Mr. Bergeron. Mr. Wing said he wouldn't be voting in favor of an error, and it is a self-imposed hardship.

Mr. Caira said in regard to hardship, he believes this is a self-created issue. He explained he is a concrete contractor as well. He believes the error was in the contractor. He said the contractor has to have liability insurance to get on site and the contractor is responsible for what is put down. He said it is the fault of the person who put foundation in.

Mr. Hennessey went through the five criteria.

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

Mr. Hennessey asked Mr. Caira if he was saying that because error in judgement, it would not be in the public interest to approve the variance. Mr. Caira and Mr. Wing said yes. Mr. McNamara disagreed saying it doesn't affect public safety and doesn't create a hazard. Mr. Bergeron respectfully disagreed. He said there is a reasonable setback of 30 feet. Where this is the first house in subdivision, he believes it would be contrary to the public interest. Mr. Passamonte said he felt the same as Mr. Bergeron. Mr. Hennessey said he agrees with Mr. McNamara. He said the comment from the attorney was on the Simplex Case and the appearance of the subdivision makes a difference. He said the question is whether it's visually distinct. The board had asked Mr. Keach to weigh in on whether there was a health and safety issue with the road being laid out incorrectly and Mr. Hennessey read it as that is not the case, but it was an error. He said both sides have argued as to whether it's an error in judgement or in another form, but all agree it was an error. Mr. Hennessey said that under Simplex the letter of the law doesn't necessary hold, especially if the board ends up with an economic argument. Mr. Hennessey said he is not saying that yet as he is not the Supreme Court of New Hampshire but feels the board has been given notice that they have to think about what they're doing. A 5-foot difference will cost the applicant a lot of money and Mr. Hennessey feels it has to be considered. Mr. McNamara said he thinks they have to look at the cost-benefit, what remediation cost is versus leaving it and he feels it is a harsh penalty, which Mr. Hennessey agreed. Mr. Passamonte said he might say okay if it was only 5 feet, but it will be more than 5 feet in the end. Mr. Hennessey noted that part is not before the board.

*Criteria 2 - The spirit of the ordinance is observed.*

Mr. Passamonte said no. Mr. Bergeron stated the representative said it was not compliant from a spirit standpoint. Mr. McNamara said he didn't believe counsel said that. He said he made some reference to it but didn't say that. Mr. Bergeron said he doesn't need clarification. Mr. Bergeron believes the spirit is clear and it violates the spirit and intent of the ordinance. Mr. McNamara disagreed. Mr. Wing thinks the spirit observed. He thinks it's an error. He said going back to previous criteria, he may allow one, but how many times does the board let it go without setting a precedence. Mr. Wing said it goes to similar arguments of water view housing. He said he would say the spirit observed and it's an error. Mr. Caira believes it's been violated. Mr. Hennessey believes it's a violation. He said in terms of precedence, "the fabric of the

zoning ordinance get a little bit torn every time,” a variance is granted but it is not a formal precedence, not setting the bar for decisions later on. Every case is decided on own merit. Mr. Hennessey said he has a problem with it weighing the penalty for 5-foot error. He noted the penalty may be lifting someone’s license for engineering. In terms of zoning, Mr. Hennessey doesn’t think it’s egregious.

*Criteria 3 – Substantial justice is done.*

Mr. Wing believes substantial justice is done. Mr. Caira said no. Mr. McNamara said yes for the same reasons spoken previously. Mr. Bergeron said he thinks substantial justice plays to the question of whether or not a precedent set. He said by waving the condition in beginning, no justice is being done to the people who do things legitimately every day. He believes substantial justice will not be done by granting this. Mr. Passamonte said no.

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

Mr. Passamonte said they are not diminished. Mr. Bergeron said no. Mr. McNamara said no. Mr. Hennessey feels this is self-evident and won’t make a difference. Mr. Wing said the value of surrounding properties is not diminished. Mr. Caira said no.

*Criteria 5 – Unnecessary hardship.*

*Part A:*

Mr. Caira said the hardship was self-created. Mr. Wing said he would vote no. This is self-created. He sees an error, not a hardship of the land. Mr. McNamara said the proposed use is reasonable. He thinks that looking at the particular property, not the road or anything else, looking at 5 feet and what he believes was a \$14,000 amount to tear out the foundation and move it back 5 or 10 feet, that the applicant has met the burden. Mr. Bergeron said he reads these literally. He doesn’t see the property as being characteristically different from anything else in neighborhood and thinks that’s the real hardship test. He said this could have been done properly. There is nothing limiting the property from being used in the way it was designed to be used. He believes the hardship was created by an error that shouldn’t have happened. He noted that he has seen it before in his time on the boards and has seen houses and foundations moved. He doesn’t see this hardship being in the land. Mr. Passamonte said no. Mr. Hennessey said he is reading it differently. He said the general public purposes of the ordinance provision, which was previously stated by the attorney, is for spatial uniformity and to provide enough space between properties and the road. He said he doesn’t see a 5-foot difference affecting a \$600,000. house. He said the proposed use is reasonable. He doesn’t feel that there’s that kind of major defect in the property.

*Part B:*

Mr. Hennessey said the board doesn’t have to look at part B if they are satisfied a hardship was claimed under A but in this case, he feels it’s necessary to discuss it.

Mr. Passamonte said no. Mr. Bergeron said variance conditions are hard to meet and it says can the property be reasonably used in strict conformance of the ordinance, and it could have. There is nothing distinguishing it from other properties. Mr. Bergeron said the mistake of physically placing a foundation out of where it’s required is not distinguishable. Mr. McNamara said that’s why they’re here for the variance. Mr. Bergeron said he understands why they are here but when the hardship is self-created, it’s not a variance that he can vote favorably for. Mr. McNamara said the board is not creating precedence. Each case is an individual case as each applicant is here because of a specific condition. There is a 5-foot difference, however it was created, and that’s why the applicant is here. Mr. Hennessey said it is not a

precedence. Mr. Wing said he would vote no. He agrees there's no reason the property couldn't have been used the way it was intended. He clarified that looking back through minutes, it's \$12,000 on the foundation, not \$14,00. Mr. Caira said he understands what Mr. McNamara is saying, it's only 5 feet, but in concrete, 5 feet translates as a lot. Mr. McNamara said he hears the arguments but believes they proved their hardship and all the criteria.

Mr. Hennessey re-read part B. He said he reads it to say the property, as the board is dealing with it, could not be used because of a 5-foot error made when laying it out. He feels that by definition, this is a hardship and it's self-evident that it's a hardship. Mr. Hennessey said that in balancing between public and private good, if the board doesn't allow some variances, it would be inherently unfair to those with unusual cases. He said it should not be the norm but, in this case, he believes it's self-evident that it's an unusual case. Mr. Hennessey's concern was did the error affect the general public and was road itself made unsafe. He said the board has the answer from the town engineer. He is voting for the variance.

#### **Case #ZO2021-00028**

#### **ROLL CALL VOTE:**

Mr. Wing – 2 no, 3 yesses; final vote NO  
 Mr. McNamara – 5 yesses; final vote YES  
 Mr. Passamonte – 5 Nos; final vote NO  
 Mr. Bergeron – 5 Nos; final vote NO  
 Mr. Hennessey – 5 Yesses, final vote YES

(2-3-0) The motion was rejected.

#### **VARIANCE REJECTED**

Mr. Hennessey noted the 30-day right of appeal.

#### **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 and 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 as 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. Bergeron read the list of abutters aloud. There were no persons present who asserted standing in the case, who did not have their name read, or who had difficulty with notification.

Joe Maynard, Benchmark LLC, came forward with Mr. Boutwell, a resident of Pelham, who has run a family-owned shop on Route 38 for a long time. He explained Mr. Boutwell bought the subject property around 2013, which is along Mammoth Road, directly across from the industrial park. The property to the north has variance from 1993 for a residential home with a commercial business. The lot south has some preexisting, nonconforming industrial uses on the property. He explained that Mr. Boutwell bought the property with the intention of someday moving his shop to get off Route 38. He felt good it was a good

area in town with the industrial park across street and properties around him with uses being similar to his long-term goal. The property was a salvage yard in the '60s and then subdivided. This lot has a house, and the lot south has duplex. The lot has approximately 250 feet of frontage along Mammoth Road with the back side along Beaver Brook. The lot is currently developed with single a family home sitting adjacent to Mammoth Road. The property's terrain grades away from the street with a low spot behind the existing structure. Mr. Maynard explained they were in front of the board to ask for a couple of things. They are looking to allow Mr. Boutwell to construct a garage on the property with a setback of 15 feet from the side lot line. He explained that with industrial uses in the zoning that the setback is three times the height of the building, so they are looking to meet the residential setback. Mr. Maynard pointed out that the building will be down behind existing house because of the way the grade drops off. By doing this, the doors wouldn't face the abutter and the building would be used as a buffer. Any work Mr. Boutwell would be doing would face his yard area and the doors would not be open to the neighbor. Mr. Maynard explained that in this area in general, the road does about 5,000 cars per day according to DOT records. Directly across the street is Industrial Drive and in front of the house on the lot is another industrial property, a street sweeping and landscaping material sales company. They are looking for variance for the setback for the structure, and under zoning, industrial use properties need to be 2 acres, and this is 1.7 acres.

Mr. Hennessey appointed Mr. Caira to vote on this case.

Mr. Maynard explained that with the zoning, you need 2 acres for industrial uses. He said that Ms. Beauregard had pointed out the "industrial uses", and they had to refile with additional information, which was the lot size criteria, and the structure itself being 3 times the height of the structure. The second portion of this variance is because they wanted to be closer to lot line. He explained the requested variance is primarily a use variance along with the dimensional relief for building. He said their application said industrial uses, which is what the property across the street is zoned as. Mr. Maynard explained that a lot of what Mr. Boutwell does is welding, fabrication, small excavation, bobcat, more industrial type of use. Being that the property directly across is an industrial property, Mr. Maynard didn't feel it was a stretch for what Mr. Boutwell is looking to use the property for. Mr. Boutwell is looking to move his business here and operate on the property. Mr. Maynard gave pictures to the board of the property and the properties to the north and south and the general area.

Mr. Maynard read the 5 criteria into the record.

Mr. Passamonte asked if the board can allow industrial use in residential zone. Mr. Hennessey said the board can grant a variance to allow that.

Mr. Caira questioned welding fabrication. Mr. Maynard said that's what Mr. Boutwell does, and he is a "man of many hats." Mr. Caira asked if it was more inside noise. Mr. Boutwell said he has excavation, outside yard storage. Mr. Caira asked if the fabrication would be inside. Mr. Maynard said if size permits.

Mr. McNamara asked how far away from the setback are the abutters' buildings on either side of the property. Mr. Maynard said he would guess on the south 60 to 75. On the north, is on other side of lot from this property. He was unsure what they have for frontage. He said it's more than 65 to 70 feet. Mr. Boutwell explained there are other outbuildings, small, older, storage structures. Mr. McNamara asked the height of the proposed building. Mr. Maynard explained it is a metal building with about a 12-foot ceiling, a 40-foot span with 5 pitch so he is guessing 24' or less.

Mr. Wing asked for clarification that for a business or industrial use in residential zone is a special exception required. Mr. Hennessey said it requires a variance. Mr. Wing mentioned that he believed there were about 15 criteria in regard to noise, etc. Mr. Maynard thought Mr. Wing might have been talking about home occupations and explained this was different.

Mr. Maynard explained the property needs a number of state permits due to the location. They can't go into the 50-foot buffer of the brook and there are other restrictions. He also said that they would need site plan approval if a variance granted and DOT will chime in regarding a curb cut, etc.

Mr. Hennessey asked if there was a septic and Mr. Maynard said there was. Mr. Hennessey said there has been discussion at the state level that for use changes they need to get a site assessment. Mr. Maynard said this was done for lake front properties now. Mr. Maynard said the new building will probably have its own septic associated with it because of the placement of the current septic. The new building will need a bathroom and sink. Mr. Boutwell said the property is serviced by public water, Pennichuck.

Mr. Bergeron said the plan indicates a 30-foot roof but Mr. Maynard's answer to Mr. McNamara was 24-foot. Mr. Maynard said he didn't remember 100% what it was. Mr. Cairra said the plan says a 6 pitch. Mr. Maynard said if they reduce it to 5 pitch, it will come down a few feet.

No one came forward in favor of the proposal.

Charlene Armstrong, 1394 Mammoth Road came forward. She explained she is the southern neighbor, an immediate abutter. She said she bought her property in 2011 and knew it was a residential area, which made her comfortable. She knew what was across the street but couldn't do anything about that. She took comfort in the fact there was a house on either side and in the back beyond brook. She explained that she believes once a property is deemed industrial in residential area, it goes along with the new owner, if property is sold, and they can do whatever they want, and it could make a lot of noise. She said she also takes issue with the fact that this wouldn't make a lot of noise.

Mr. Hennessey said the board can put restrictions on a variance, not a zoning change. He explained that as a variance the board is granting an exception to zoning laws. The applicant is asking for the property to be treated as an industrial use still in a residential area and the board can put restrictions on it. The variance does run with the property, if sold, and the restrictions would go with it. Mr. Hennessey said planning will also put restrictions on it as they have to approve the layout. He said a variance would make it an industrial use in residential area. It would not change the zoning, if granted. It would allow a different use, other than what normally be allowed in a residential area and the board could put restrictions on it.

Ms. Armstrong said that as the closest abutter, she feels it's not right to put something like that on the property. She has owned hers for 10 years and has had to put up with noise across the street but said this is really close and "ugly."

Mr. Hennessey explained permitted uses are not necessarily what's listed under industrial land. It would be what the board permits as an industrial use on this particular residential property. In regard to the question of how the Armstrongs would know which ones the board says can't be, Mr. Hennessey said the board will hopefully thrash that out through with discussion and the applicant's input and the variance may not be approved at all. He asked the Armstrongs to stay for the discussion and asked them to pay attention to the Simplex case. Mr. Hennessey said he hears their opposition. He knows they bought their property as residential property and are opposed to the change in use.

Ms. Armstrong said she believes it will make their value go down.

Mr. Hennessey said an expert opinion may be useful. He explained that the board has had several cases regarding the 5 criteria, and he has taken on as an expert in some cases, having been in real estate for 47 years. Mr. Hennessey said he is not doing so here because he is not involved in commercial property. He



will not address the board as expert on valuation because of the lack of background he has on the effect of commercial/industrial land on the values of residential properties.

Edward Lynch came forward citing he had just bought 1329 Mammoth Road, up the road a bit, and he owns another piece of land closer to property. He said he has known Mr. Boutwell for a long time and has nothing against him. He said that simply they want to turn a residential piece of land into an industrial piece of land and would be pulling the industrial park across the road. He explained the industrial park is somewhat contained on left hand side. He doesn't think this is good and feel there has to be a limit, a boundary at some point. He stated it is residential piece of land and he is opposed to it. He said they are trying to turn the property into an industrial lot. He explained that he doesn't know the rules enough to go into the details. He said he is heavily invested in the neighborhood and is concerned. He explained that right now, the industrial park stays where it is, and this would be pulling it across the road. He hopes the board will vote against this.

Dana Latour, 1412 Mammoth Road, came forward as a direct abutter. He said he is not in favor of this. He explained that he is the one that owns the commercial building, 30x40, put up around 1989 and had worked out of there for quite a long time. He said he never got a complaint because he had respect for his neighbors. He said Mr. Boutwell bought the property knowing it was residential and now wants to make it industrial and he doesn't agree with. He said if Mr. Boutwell were to open a welding shop, he would want hours to be put in place.

Mr. Hennessey asked what Mr. Latour would think would be reasonable hours.

Mr. Latour said 7:00 to 5:00, 10 hours a day, and 4 hours on Saturday, 8:00 to 12:00. He doesn't think it will help the value of the surrounding homes, especially for him, right next door. He said he would imagine places rented outside the building, such as landscapers and places like that, and that is something else an abutter would have to put up with. In regard to a hardship, Mr. Latour said Mr. Boutwell doesn't even live there. He already has place on 38, a used car lot on 38 that he rents out. He doesn't see a hardship, as he already has a place of business.

Wendy Lundquist came forward and explained she lives in Windham, directly across the brook. She said she has quite a few concerns. She mentioned that the picture of the street sweep across was passed around and it is a self-contained, little property. As was previously mentioned, the industrial park is down the street and self-contained and you don't hear the noise. She said from their property, they can currently hear the construction of the new neighborhood next to the industrial park. She said the street sweeper and landscape company is very quiet and not very industrial. She explained the industrial area is across from this property and there is nothing industrial on that side with the property. Putting the building lower on the lot would be closer to her property and the brook. Ms. Lundquist said the information that was sent out was not specific as to what's going in there. It was redundant but vague as to the use of the property and the size of the building. She questioned that once it's there, what's to say what he wants to do won't change. Since Mr. Boutwell doesn't live there, she doesn't consider hardship. She wouldn't consider it a hardship even if he lived there because putting an industrial place in residential area is not the same as having a business out of your home. Mr. Boutwell bought the house knowing it was residential, and he could have bought anywhere. He wasn't forced to buy the property. He bought it of his own free will. She said if you want to buy industrial then buy industrial and don't make the neighbors suffer because of his wants. Ms. Lundquist said there is no buffer between Beaver Brook and the houses in Windham and they can hear things across from Mammoth Road. They can hear the street sweepers starting up and can hear the equipment working on the development and can hear when the gas pipeline lets off gas, even though there is a huge buffer between them and the gas line. She cited concerns with lighting in the area and if it is considered industrial, will there be parking lights and will they shine all night. She said in the winter, they can see through the trees across the brook. She explained they have a farm with alpacas and chickens

and a few years ago, there was a noise issue, and their chickens weren't laying eggs. Ms. Lundquist explained they use the money from the selling the eggs to pay for the animals' feed and if the chickens don't lay eggs they might as well close their farm down. She reiterated it is not a hardship as Mr. Boutwell could have bought anywhere and choose there. He already has his business somewhere else, and it is thriving. She questioned why you would move a good thing to somewhere the neighbors won't be happy.

Mr. Hennessey confirmed that Ms. Lundquist was in Windham. He asked if the property was zoned agricultural across the brook. Ms. Lundquist said they were zoned rural across the brook. Mr. Maynard said that Windham's agricultural zone was rural, and they didn't specify anything different. The rural has an agricultural component.

Mr. Hennessey asked Ms. Zelonis if this was noticed to town of Windham, beyond immediate abutters. Ms. Zelonis and Mr. Maynard said it was not. Mr. Maynard said it wasn't regional. Mr. Hennessey said he believed Mr. Maynard was right and wouldn't argue that.

No one else came forward in opposition.

Mr. Maynard said that Mr. Latour's variance from 1993 is also nonspecific and just says it will bring his use of land in perspective with the surrounding properties. Mr. Maynard said that is pretty much the same agreement they have. He pointed out that Mr. Bergeron voted on that case. He explained that the variance that was granted north of the property is pretty much what they are asking for.

Mr. Bergeron commented each and every case on own merit, which Mr. Maynard said he understands 100%.

Mr. Boutwell added that when the word industrial is dropped, people need to know that he is not putting in a nuclear power plant. He said he has owned the property for 10 years and plans on owning until he dies, unless a financial hardship forces him to sell. He said he has a wonderful tenant that he treats like family and wouldn't put them in a position to have to move out and wouldn't jeopardize the relationship they have. He explained that he didn't create the neighborhood. Mr. Boutwell said that his being "tarred and feathered" in front of the board is not right and he won't tolerate it. He explained that Mr. Latour has been in real estate for a long time and has had two opportunities to buy the property and he did not. He explained that he is in front of the board because he can't just put a garage up and expect to do business. Unfortunately, his business is considered industrial type uses, as his neighbor with a trucking business with a variance from 1993, and his abutter to the south who works with an industrial type of business. He said that pretty much the neighbor's whole life there was a logging type of business out of the property. He reiterated his property was a scrap yard at one time many years ago.

Mr. Hennessey confirmed Mr. Boutwell said he has a tenant living there. He asked if he was going to maintain the residential use, to which Mr. Boutwell replied absolutely. Mr. Boutwell explained the house is close to the road into the offset. He couldn't utilize space if he tore down the house because the house is in the offset. Mr. Hennessey clarified that Mr. Boutwell would be adding an industrial use to the rear of property. Mr. Boutwell said yes, like his neighbors to the north and south.

Mr. Maynard said as Mr. Boutwell pointed out, the neighbor to the north has a variance and to the south has industrial type use. He said the neighbor in Windham talks about not hearing noise but also mentioned hearing noise from the construction down the street. Mr. Maynard said he knows the street sweeping company and they are in and out at all hours. Mr. Boutwell is not anticipating a 24-hour business and not looking to have odd hours.

Mr. Hennessey asked if they would accept a restriction on hours. Mr. Maynard said in regard to the fabrication business, yes, but there may be times when he is bringing equipment down to drop off and he doesn't want someone calling on that. Mr. Hennessey said that would be up to planning and the board would make a recommendation. Mr. Boutwell said that neither property around him has time restrictions. Mr. Maynard said he believes that is something that could be worked out.

Mr. Maynard said he doesn't believe Mr. Boutwell has intentions to put streetlights, maybe motion lights for security purposes. He doesn't see lights being on all night but from a security standpoint. The lighting would have to be dark sky compliant and would have to be reviewed by the planning board. Mr. Maynard said he doesn't remember reading used cars sales are allowed in the industrial zone and there isn't an intention for that because it's not allowed. He pointed out that Mr. Boutwell is preexisting, nonconforming where he operates now. It's a commercial district. He said Mr. Boutwell bought the property knowing the area was somewhat developed and it made sense with the house, and he is looking to use the property and get set up so his other property could probably be sold to something more suitable for Route 38.

Ms. Armstrong was allowed to speak again. Mr. Hennessey noted this is not usually allowed. She said she has owned the property since 2011. Anything that went on before her has nothing to do with her. She said there is no business going on at the location. There is a garage that was there when she purchased the property and there are hobby machines in the garage. There is no money made, just a hobby. She mentioned that she had been told by a neighbor that Mr. Boutwell wanted to move his used car lot there.

Mr. Hennessey explained, for people here and watching., that nonconforming use means it was there before zoning and they are all over town, as well as other towns. Businesses that were there before zoning laws are allowed to continue. He said the Armstrongs' property sounds like it was commercial or industrial at one point. It was discontinued and can no longer be used that way. Mr. Hennessey explained the remark from the first case's attorney about Simplex. He said that in New Hampshire, it is not as simple as lines on a map saying an area is residential, industrial, commercial, etc. He said that by the courts' orders, they have to look at what is. Mr. Hennessey said he was interested in talking to the woman from Windham (Ms. Lundquist) because she's in the immediate area. By the pictures, the area looks more than simply residential, and the courts say the board has to look at that, what exactly is there. Mr. Hennessey said he appreciates Ms. Armstrong's remark as to why not they are industrial, even though it looks that way with an industrial building, because they are not using it that way.

Mr. Maynard said he thinks they've covered everything, and he thinks his client's intentions are clear. He is maintaining the residential home and wants to operate his business out of the rear section. It will not be highly visible from street because it will sit down behind the house. Mr. Maynard reiterated they will need planning board approval for a site plan, and they would typically put hour restrictions, lighting, etc. Mr. Maynard said they can address that with their application because he knows the concerns from listening to the neighbors.

Mr. Hennessey said he was leaving public input portion open.

Mr. Bergeron said that Mr. McNamara asked key question earlier on about the sideline setback requirements. He believes the requirements are met for the case that Mr. Maynard previously mentioned Mr. Bergeron had voted on in 1993. He reiterated every case on its own merit. And in this case, the applicant is asking for dimension variance for the sideline setback for a commercial/industrial building where the northern abutter clearly meets that.

Dana Latour came back to ask how much usable land Mr. Boutwell will have set back from the brook with the house and set back from the sides.

Mr. Hennessey said it is on the application. He reiterated that because it's so close to the brook, it comes under the state's shoreland protection and the state DES will have to approve whatever Mr. Boutwell does, not just the zoning board. The board can grant the variance to allow the usage, but he will still have to meet the state's DES requirements because it's within the shoreland protection.

Ms. Lundquist asked if letters are read from abutters during the meeting or during closed session. She said she knows letters were mailed in before the August meeting.

Ms. Zelonis said the letters should be in the folder. She would think they had been read at the previous meeting. Mr. Hennessey explained they did not hear the case previously. He explained that Mr. Boutwell was here earlier for a hearing, but they never got to it, ran out of time and letters were never read.

Mr. Hennessey read the letters into the record from Robert and Pamela Lundquist and Matthew Naylor.

Mr. Boutwell commented on one issue brought up in the letters. He explained the remote-control race car track mentioned was one of earlier people in opposition, her husband that had it and had people coming from all over. The had migrated into the backyard of his property and his tenants were complaining they were urinating in the backyard. He explained that he had to deal with things like this but doesn't make a complaint and he is trying to be a good neighbor. He also said that Mr. Latour, on the north side, within the last year or so has been leasing out his property to line crews that were putting new lines in town with trucks going in and out, metal trailers, spools of wire and they were going in and out seven days a week. Mr. Boutwell said he is here to be a good neighbor, not a bad neighbor

Mr. Maynard pointed out that Mr. Bergeron said their building didn't meet the setback or the neighbor's building didn't meet the setback. He pointed out that in Mr. Latour's variance request, his building was 20 feet from a lot line so it's a similar situation. He also pointed out that if the building has the 30-foot setback, the structure that Mr. Boutwell would like to construct wouldn't fit within the setback that would meet all the setbacks for a 30-foot-tall building and he wouldn't be able to build that structure on the property. Mr. Maynard reiterated that they put the building on that side to create a buffer on the south side and it would be like having a fence on the lot line, being 15 feet off of it with green space. He believes landscaping would be required by the planning board. In regard to noise and light pollution, the noise is already here. Mr. Maynard doesn't see Mr. Boutwell's business as a high-volume type of production. Light pollution would be taken care of with the planning board and there is no intention to leave any high illumination of the property.

Mr. Hennessey brought it back to board and left the public hearing open. He explained that he is concerned with the Simplex case and concerned the neighborhood is de facto industrial, or a portion of it, from what can be seen through pictures. He said this means that despite the zoning by town, the zoning that is in fact there, what people are using their land for, almost means they have to grant the variance. He explained that the heard through testimony that on the other side of the brook, in the immediate area, there is rural zoning from the town of Windham. Mr. Hennessey said he thought the board needed to have a site walk to look at what is there. He wants to see where the building is going and how close things are. Mr. McNamara agreed. Mr. Bergeron said he won't disagree.

Mr. Bergeron said it seems the board has delved into getting testimony from others that may be experts in the area, as with Keach-Nordstrom in the last case. He explained that in this case, there are other extenuating circumstances that separate it from other cases. For example, Mr. Bergeron said he knows there is a 100-year flood line that is not shown on the print. He also said they are unaware of the dimensions of other buildings in the area and is unsure if Mr. Boutwell will be able to meet 60 feet, the minimum for the height of the building. Mr. Bergeron asked if the board could ask for the conservation committee's opinion on a location of industrial use within the shoreland protection area. He also explained that an

industrial use would stay with the property past Mr. Boutwell's lifetime and could turn for the worst. He stated that the Simplex case didn't have an issue with dimensional requirements, which are asked to be waived in this case. Mr. Bergeron explained this property is 1.7 acres in sensitive acre with shoreline protection going through 7/8 of it. He said he needs a lot more information.

Mr. Hennessey explained that the board routinely invites conservation to site walks but that in NH, the conservation commission has no statutory responsibility to come. Individual members of conservation are invited to give their opinions, but they may not be able to have a formal vote depending on their meetings. Mr. Hennessey said he doesn't want to see this go past the next meeting and hold up the applicant. They won't ask conservation for formal but will ask that they be invited to the site walk. Mr. Hennessey said they can ask for a summary from the planning dept in terms of the envelope that would be allowed on the property.

Mr. Hennessey stipulated this case will be at the November 8 zoning board meeting. There was discussion that they generally like to have site walks on a weekend. There was an agreement with Mr. Maynard to have the site walk on Saturday. Mr. McNamara noted he may be away but wants the board to schedule it as there are time constraints. The site walk was scheduled for 9:00 a.m. on 11/6.

Mr. Hennessey said he wants to see a general outline of building, which Mr. Maynard agreed to stake it off. Mr. Hennessey explained that a site walk is a meeting, a continuation of this meeting. The public is invited. He asked Mr. Boutwell to let his tenant know. He explained all questions will go through him. The public won't be allowed to walk around but will have to stay together. He said he foresees it as being very quick. They are trying to see the general neighborhood, the location, get dimensions and see it. It was noted that this will be the first item on the agenda on the 11/8 meeting.

CASE CONTINUED TO THE 11/8 MEETING AFTER 11/6 SITE WALK.

### **ADJOURNMENT**

**MOTION:** (Passamonte/Caira) To adjourn the meeting.

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

The meeting was adjourned at approximately 9:00 p.m.

Respectfully submitted,  
Jill M. Atkinson  
Recording Secretary