APPROVED minutes of 01/10/2024

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Zoning Board of Adjustment

Minutes of January 10, 2024

I. The Chair opened the ZBA meeting at 7:00 PM.

A. ROLL CALL

Board Member	Present	Absent
Sam Carr (Alternate)	✔	
Jan Gugliotti	✔	
Beverley Howe	✔	
Barbara Marty (Chair)	✔	
Lucinda McQueen	✔	
Derek Narducci (Vice Chair)	✔	
Harry Seidel (Alternate)	✔	

Also present: Janice Loz, Land Use Administrator, Tim Sullivan, Town Counsel

II. **NEW BUSINESS**

Rehearing of Variance Application
Case: **2023-05**
Applicant: James Gaffney and Joe DeFabrizio
Agent: Mike Harris, Attorney at BMC Environmental & Land Law, PLLC.
Decision being Appealed: Variance granted to the terms of Article VII.C.1.a, to Pier D'Aprile, 115 Bible Hill Road, on November 8, 2023.
Property Owner: Pier D'Aprile
Address: 115 Bible Hill Road
Map/Lot: Map 12, Lot 5
District: R-3 and OC-1

The Chair opened the meeting on Wednesday, January the 10th. 2024 at 7:10 PM. The Chair confirmed with Janice that the abutter notices went out and fees were paid. Janice affirmed.

The Chair asked the Board if anyone had a conflict of interest or if regional impact needed to be considered for this application. The Board affirmed 'no' on both.

The Chair said this is a rehearing, we are going to incorporate all the evidence from the previous hearings on this case into the record. This is the motion for rehearing, for the variance that was granted on November 8th to the terms of Article VII.C.1.a. or Pier D'Aprile on 115 Bible Hill Road. The rehearing is being brought by James Gaffney and Joe DeFabrizio. The Chair said the board will first hear from Attorney Mike Harris for Mr. Gaffney and Mr. DeFabrizio. Mr. Harris, representing Mr. Gaffney and DeFabrizio was invited to the table.

Mike Harris, from BCM Environmental Land Law handed out a few exhibits to the board and the property owner and his lawyer. He started by pointing out what he thought the board already knew and that is the burden of proof here is on the applicant to demonstrate that they meet all five of the criteria. From his point of view, we really only need to demonstrate that one of the criteria, one of the factors is not met for this board to deny the variance. He was going to just focus on three of the five criteria. The three that they really do not believe have been met and the burden of proof hasn't been carried are criteria one, two and five.

Attorney Harris addressed criteria one, the variance would not be contrary to the public interest which would be, in his opinion, obviously not met. The second criteria would be by granting the variance the spirit of the ordinance would not be observed. The fifth criteria has to do with denial of a variance when it results in an unnecessary hardship.

Attorney Harris started by addressing the first two criteria. He referenced the first exhibit, (a chart) to summarize the evidence that was submitted in the original application (by the property owner) as well as the evidence that was submitted in their (abutter) motion for a rehearing. The chart referenced across the top some of the factual issues that have been raised comparing the applicant submittal and the abutters motion for an appeal. Then down the side showing a previous case before the board for Mr. Smith which Attorney Harris said was very similar and was heard in December of 2023. Attorney Harris felt there were findings that were made for criteria one and two that were starkly different than what's present in this case. He thought it was important to point that out.

Attorney Harris felt the amount of discrepancy that was being discussed was a 300-foot setback requirement for the OC-1 district. In the Smith variance, for instance, you know ultimately the finding was that it was just a 15-foot deviation and that was minimal. And in fact, this board had great discussions about whether an extra 10 feet that the applicant may have preferred when the board wanted to keep it more conforming and asked the applicant to go with the original proposal.

Attorney Harris pointed out that the application before the board tonight was asking for 220 feet which he felt was significant. The applicant claims in their submission that the reduced frontage wouldn't create overcrowding. Would it offend the ordinance? Would it not even be noticeable? He said the board would know their analysis on those issues.

The Chair stopped Attorney Harris to say the request is for 170 feet and it's a 250-foot frontage that is required in the R3. The Smith property was an OC-1 and the requirement was 300-foot frontage. The applicant is requesting an 80-foot frontage, from the required 250-foot frontage, which is a difference of 170 feet.

Attorney Harris said he did not have the application in front of him although thought they were using the OC-1 frontage for this variance. The Chair said, no they are in the R3 district. He said, okay, and that they made a mistake in their motion for rehearing.

Attorney Harris said the point still stands though and it's a significant difference. It's hard to accept that this wouldn't be noticeable. Even casually from folks who live along the road. The driveway placement, particularly in the front, is going to occupy a good portion of that frontage. It's a deviance that is significant enough that it would be casually noticeable. Certainly, people who are looking at tax maps would be able to notice that would disagree with what was in the supplemental submission (from the applicant) submitted yesterday. So, I think just factually this is much different than what you heard in the Smith variance application.

Beverley asked Attorney Harris if he had been to the property.

Attorney Harris said he had driven by the property and hadn't got out and surveyed the property, it was raining. The second criteria was the inconvenience to the abutters. The Smith property was surrounded on three sides by Town land. The board found that no abutters would be inconvenienced. No abutters objected and no abutters were present. Here in the application it's described as a rural residential neighborhood. The applicant claims that the abutters won't be impacted. There's a statement that there is probably a second home, that would not even be used.

Beverley asked what does the Smith case have to do with this case (D'Aprile). She didn't feel it was similar at all.

The Chair said the board has to consider each on its own merits. She thought the lawyer was just trying to draw some similarities.

Beverley said, that is not fair.

Harry said, just a point of order that he has always understood that when we look at an application, we're looking at a specific application with the requirements of the ordinance and they measure against that. He said the board would look at the facts of that case. So, he would agree with Bev that it's confusing to start comparing one case with another case. It is not really what they are charged to do. The board is charged with looking at the zoning ordinance and looking at this specific case and the conditions of this case. So, whether there's another case in town that is similar but different or more different or less different he finds that not to be helpful and really confusing to the issue.

Lucinda said the comparison was very illustrative. Because it was what she was thinking as well. When the board had the last meeting here, Peter Smith was before us. They did go back and forth about the amount of frontage needed and were quibbling about 15 feet. She noted that no abutter's came to complain about it and it was out in the wilds. Lucinda thought it was a slam dunk because it was easy to give because there was a maximum amount of frontage. And here we have granted somebody a variance for a very non-conforming lot with a minimum of frontage. crazy minimum of frontage. So, I think this example is very pertinent.

The Chair asked if the board was objecting to Attorney Harris continuing with this comparison. Or does the board find it confusing and not helpful. Beverley responded, not helpful.

Attorney Harris said he appreciated that, but that precedent does play a role. Otherwise, the board would be making arbitrary decisions. It's as if it had completely different findings from time to time and that may come into play as well. So obviously they are different cases, but he was just arguing that they were very similar factors that came into play that were discussed that are different here and could play a role in the board's decision.

Attorney Harris commented in respect to abutters, not only do we have more obvious controversy over this case and there are abutters who have objected. The development back on the OC-1 that would be allowed from this, it's going to be noticeable from the road. Also, they will be talking in a second about the house itself. But it's clearly going to be clear that someone has developed in the back (of the property). Going back to the question about the sort of character of that neighborhood right now. This will be the first that will be there. There will be a driveway that is clearly going back to new development that is going to be a difference to the character of that neighborhood. In addition, there's a disagreement clearly over whether the house will be visible from other houses on the property. I know there's some pictures that were submitted by the applicant. The pictures showed the property looking down on the road from various angles. I think that was when the foliage was on the trees. Attorney Harris has some more recent photos. Including ones from one of the abutters' homes right across the street. He thinks the board will see that, you know, obviously the driveway access and all of that is completely visible.

Attorney Harris referenced a photo from the second bedroom of the home. He said the board could see up to where the development site is. This one is just an awful print job, but it sort of shows the same picture as that second one but with showing a bit more proximity to the road. He was sorry he didn't have copies for everyone. He doesn't have that kind of printing capacity.

Attorney Harris didn't think that it was fair to say that there's no inconvenience to the abutter's here. Whether the board compares it to the fact that they didn't identify any inconvenience to abutter's in the Smith variance. I think you showed here that there is inconvenience to abutters associated with this application itself.

Attorney Harris said the other factual issue about the new driveway impact. With the Smith variance it was pretty clear that there was no driveway directly across from the property that would be affected from this reduction in frontage. Here there is, he didn't think that was disputed by anybody.

Attorney Harris said, now the applicant claims that it will be a minimal impact as was discussed their supplemental materials which they submitted yesterday. Attorney Harris said there is already a logging road there. There would be lights that were already associated with the property/logging road so, therefore the applicant wonders what would be the difference? Attorney Harris said as an aside it is unclear how often that logging road is used at night. That's one thing. But the other thing, and what's more important here, is that if the new driveway that is proposed and the variance is granted and they get the subdivision. The subdivision is going to be reconfiguring that road. It's going to be changing that road. He said as you can see in some of the pictures, they have already started to change the access point. It's not the same impact as the old logging road. It's going to be completely different. The driveway that is coming down is going to cause light intrusion into the neighbor's property across the street. It's going to look different. It's going to be clear that it is now

residential, no longer an old logging road. So, these are alterations that are going to be associated with the new driveway that would be put in there as well.

Attorney Harris said that finally in regard to the impact on surrounding properties. He said again, this isn't remote. This isn't where you have large spaces between the existing structures that no development is going to be put out there. I know with Smith it's at the end of the road, and surrounded on three sides by town property. The applicant claims the area is rural and no one will notice the new development. But that new frontage is going to be noticed. The new driveway will be noticed. He personally lives on a street where his house is the only one set back and everyone else is up front too. He said during the summertime, the only reason you would know a house was up there was because of our driveway. It' is clearly a residential driveway. But this time of year, when we have the lights on for the dog in the yard or for the kid's playing basketball, he walked down the street and realized just how noticeable his house is this time of year with the lights on and the snow. So, to say that the house is not going to be an impact, and a change to things is incorrect. More importantly, unlike with the Smith development there are opportunities for a lot of lawful development along that street. There are lots that could be subdivided without a variance.

Attorney Harris said the impact here isn't just a one-time thing in this neighborhood like it was with the Smith property. There is nothing else going to happen in that area because of the town property that surrounds the Smith property. He said that is not true here.

Beverley said Mr. D'Aprile could build himself any size home he wants on that piece of land. He could destroy the old house and put a mansion in there or anything. He also could take the old house out and turn that into six houses. There is room for six houses on 45 acres, so that would really change the neighborhood.

Attorney Harris said if that was to happen then the Planning Board could take into account the considerations of the neighborhood. Those would be different standards that would be applied. He felt Beverley may or may not be accurate on that, but here we are talking about a subdivision with a variance requirement.

Attorney Harris said when you look at those factors and one of them does have to do with the impact on the surrounding community and you need to limit yourself to the facts before the board. Well, the fact before the board is the variance itself could lead to those impacts and the changes in the in the character of the neighborhood.

Harry said to Attorney Harris that he made a statement that coming down the driveway will create light pollution for the neighbor. Harry said he lives in the neighborhood and walks up there all the time. The driveway in question comes diagonally across the slope, and the headlights point down into a low area on the right side of the property and the forest. From there the road and the driveway curls around, it comes up, where it actually meets the road and does not point at another driveway. About all it points towards is a barn or garage. Harry just wanted to make that clarification. He said Attorney Harris was making two points that were factually incorrect, in his view because he walks up there all the time.

Attorney Harris said Joe DeFabrizio and James Gaffney were in attendance. James asked if he could speak.

The Chair said we're not open for public comment, yet.

Attorney Harris said the existing road (driveway) is going to be reconfigured. It's not going to be the same. The applicant is clearing the exit/access point.

Harry said he was talking about that and was up there today and stood right at the entrance to the driveway, and looked straight down the driveway, took a photo, turned around and took a photo straight out the driveway. If a car was traveling down the driveway there was a house out of the way and straight ahead was a garage, there is no driveway across from this proposed driveway.

Attorney Harris said he would move on to the fifth criterion, the hardship. He received Attorney Lick's (attorney for the applicant) letter yesterday and has read through it several times. Pertaining to the legal part of a hardship and setting out the recent history before the Supreme Court and how we got to RS6 743:3. He didn't have any disagreement. He thinks it's an accurate statement of the test. The question isn't whether there's a hardship if the variance was denied. It's not as if there would be no reasonable use of property anymore. That test is clearly set forth in the statute now. The problem that they have with the letter is really how it doesn't address the application of that standard.

Attorney Harris said they go into some depth in their motion for rehearing, particularly with that key provision that's in both hardship tests a hardship refers to the special conditions of the property. The letter refers to the Simplex case before the Supreme Court.

Attorney Harris said the Supreme Court has asked under that Simplex test, what is a special condition? The court has said special conditions refer to the properties unique setting in its environment. He tried to explain in their motion for rehearing how the property was found at the time you want to get the variance. That is something about the property, whether it was non-conforming because of changes in the zoning ordinance. Whether or not portions of the property were taken because of some type of utility easement or eminent domain. Whether there were erosion issues that might cause it to be undeveloped or to violate portions of zoning ordinance. Whether there were soil issues or anything else that might turn that property into coming into conflict with something in the zoning ordinance and needing a variance. But what it clearly doesn't refer to is where that special condition of the property is self-imposed, by the applicant, created by the landowner. This is textbook, the examples are all over the place, whether it's the owner trying to sell off a portion of their property and then trying to get a variance for that or seeking a subdivision. These are the self-imposed hardships; you cannot self-impose a hardship.

Attorney Harris said the property itself is not in conflict with the zoning ordinances, as it sits today. Whether the Planning Board allows it or not is a different question. They won't be here giving setback variances. But being self-imposed is something that is just what the law says. It's not discussed in the applicant's materials. But it's clearly something that's accessible to the board and town's counsel, and they think that's the standard the board needs to apply in making the decision on hardship.

Derek said James wanted to say something and then the board said we would wait for the public to speak. He said that James is the applicant, so we really shouldn't have to wait to hear from him. So, if he has something to add, he should really add it now.

The Chair asked James to approach the table and sit beside his lawyer.

James thanked the board. James said in reference to the point that Harry was talking about and looking at the lot. This board has previously determined that the light shining across the

back of my house diagonally was severe enough to warrant mitigation through an attempt to add a condition to install screening. So, to say, those lights won't shine across the back of my house, is a false statement. This board has already acknowledged that. As far as the lights that go directly across the street and shine directly into Joe's house. He suggested that Joe could speak to that, if he wanted. James said there were videos that show the applicant standing in the new proposed driveway site where Joe took a video, and you can hear and see them speaking on the video. I mean it's quite overt. Thank you very much.

Sam clarified with James that he lives on the same side of the road as property owner and that Joe was on the opposite side of the road. James affirmed. Sam clarified with the board that the vegetative screening was intended to screen Joe's house on the opposite side of the road.

James said that is not possible to do because if you were to put vegetative screening to screen off Joe's house the property owner could not exit the house (driveway). The vegetative screening was to address the last bottom curve at the bottom just before it crosses the stream.

Sam said that was not his understanding. He understood the driveway would come down perpendicular to the road, where the vegetative screen would be located, then turn around it. There is probably a little bit that would be clarified with a sketch.

James said the meeting (minutes) would support his assertation as well.

Jan G. clarified that she believes she first mentioned the vegetative screening. It was an assertion not a fact that it had been demonstrated that there were or were not lights shining on anyone's house. No one had established that there were lights coming into other people's houses.

James said it's a condition this board applied. He said a condition of the variance right, that was a fact.

Jan G. said, the condition was a fact, but the board's motivation was not because it was backed by any evidence that there was, or wasn't, light pollution. It was just what the heck, you know, put up a couple of pine trees and if it makes a difference, that's great.

The Chair said it was based on testimony by the abutters that they had experienced cars coming off the logging road before it has been reconfigured to a driveway that they have experienced the lights shining into their house. Many of the board walked the property or have driven by the property, and it's really hard to tell, you know, when they come down is it hitting the barn, or is it going into the living room. When the brights are on or if they're not, how wide is the field of light. It is hard to tell when standing there during the day. Like Jan G. and Sam, the Chair's assumption was that the board was trying to alleviate some of the lights shining across the street, not into James' house. She apologized if they misunderstood what the objection to the lights were. But it appears to her that the car comes pretty straight down the hill and she doesn't know if the driveway is going to reconfigure that angle or not.

James said the light shining into Joe's house is a product of roughly a 100 foot plus section where the car is driving parallel to the lot line. The lot line that divides the two of us and so for roughly 100 plus foot section, it is shining directly into his house.

The Chair said that was the testimony she understood from the board's September meeting.

Harry said this discussion that they are having about headlights and lights is something that he might imagine happening in a Planning Board session where somebody has a hotel or a wedding venue and there is lots of traffic. Harry said he is a resident of Bible Hill Road. All the houses on Bible Hill Road are close to the road, the vast majority of them are. He has headlights all day long and all night long on his house and there is nothing he can do or say about it, except just have a shade to pull down. He hasn't ever noticed the board discussing the merits of the case based on residential use and headlights. It was a friendly gesture to suggest that a vegetative screen could be planted. But now it's taking on a life of its own. It has become almost a precedent setting requirement that somebody can't do development because a neighbor might not like the headlights that come from it.

The Chair said if you live on the road, you are going to have traffic. There is nothing you can do about that, about those headlights. But, the board can make it a condition of a variance. It is something that the board can hope to help mitigate. If it is something that is a nuisance or potential nuisance to an abutter, and she thinks it is a very small thing. She was sure Mr. D'Aprile's attorney would speak to it. But she draws a distinction between public roadway headlights and the headlights in this case where the board is potentially granting a variance.

Sam said he would echo Harry's statement. Sam said his neighbors across the road, when they are backing into their driveway, their headlights shine into Sam's house. He has no way to impact that. So, he thinks it is just a circumstance of having a house.

Harry said they are really only talking about one resident. It is not a restaurant or something commercial with lots of volume of traffic.

Attorney Harris said it's easy to get caught up in the issue of lights as being a factor. He thinks that the board has to look at this from a broader standpoint and that is in criterion #1 and #2. When the board did the Smith application, they looked at how close the driveways were to one another. The board has it in their findings. In the findings that were signed. The board looked at whether it was rural and looked at other abutters. The board looked at whether it was changing access around the area. You looked at how the neighbors were going to be affected by that variance and all that could have been addressed before the Planning Board too, whether or not Mr. Smith decides to developed it. The board went directly to the factors that are needed to find and issued written findings on that. So yes, it does matter that alterations will happen to the neighborhood as a result of this variance, whether it's light or drainage issues coming off of that. Also, whether or not it is because someone is now developing in the back and that changes the character, whether or not you have frontage that looks shorter because of two driveways that are more compacted to one another.

Attorney Harris said all of these points are fair for abutters to make and it does go to factors #1 and #2. The board could say, well, the Smith case was different. That's fine. But you can't say, well, it's important in the Smith case that there's no driveway across the street. But over here, you say oh well there's a driveway across the street, and it is just lights. That is a completely arbitrary approach. It is unfair to all advocates in the future because they don't know what the board is going to need to look at. There needs to be something systematic. That is why he brings the Smith decision in because all he is trying to say is these are important things, and they're much different here, and they're different in a way that brings out a lot of controversy. The controversy itself raises some questions about whether it is in the public interest.

Harry said he wanted to make the point that the driveway was not right across the street from the applicant.

The Chair thanked Attorney Harris for his presentation and invited opposing counsel for the property owner to take the presenter's table

The property owner, Pier D'Aprile said that during a September board meeting he clearly recalls Derek and Janice talking about a conference they had attended. One of the things they learned was that Zoning Boards should not use precedence.

The Chair said each property has to be evaluated on its merits. Although, the courts may refer to precedents.

Pier said he finds most of Mr. Harris' arguments that were just heard honestly, are irrelevant as board members have already brought up. He agrees with both board members that the attorney's arguments are irrelevant. He thinks the argument essentially is illegal and you should not make a precedence decision as a Zoning Board. That was not his opinion, this is a result of what Derek and Janice said in referencing the conference. So, he thinks the board should really seriously consider that and he finds all the attorney's arguments therefore invalid.

The second comment Pier wanted to make was there is a lot of disinformation. One example was a photo, the photo they said was showing the buildable lot. That photo does not show the buildable lot. It was presented as evidence tonight (by the applicants). Pier said if Mr. Fabrizio and Mr. Gaffney had attended the site visit, they would clearly know this is not the site for the house. In fact, it is not even the road. The road bears to the right on the top, so this is not valid. The third comment Pier said was that Mr. Gaffney stated that the vegetation was for his property. That clearly was not Pier's understanding. He has heard from other board members that wasn't their understanding as well. So, we need clarity around that, but that is not true. So, there is lots of misinformation. He thought this could be avoided by good communication. He believes there is a better way to go forward. Lastly, regarding the driveway and the last 100 feet (of driveway) and lights shining on Mr. DeFabrizio's house. The driveway can be curved in such a way it will not point at his (Mr. DeFabrizio's) house. It can be curved such that it will point between his house and his barn and will be of minimal to absolutely no effect. The Chair asked if that would be his intention. Pier said that would be his intention. He doesn't have to shine it directly at his house, they can curve it between the house and the barn. They will minimize it as much as possible and put a vegetative screen.

Jan G. asked if Pier had given consideration to the drainage issue. Pier said it turns out the drainage issues or things like that will be part of the Planning Board and part of the building permit process. He said he plans to address that in detail at that time. That is why Pier has an Environmental Consultant in attendance with him at tonight's hearing. He said the board could ask him questions about the drainage but they are at the variance stage at this point.

Attorney Derek Lick, from Orr & Reno law office, introduced himself and is here to assist the property owner Pier D'Aprile. His goal tonight is to be very brief and direct the board to what are the salient and key things that they need to be thinking about. He submitted a lengthy letter prior to the hearing to supplement the original application before the board. Also to respond to many of the legal propositions that were put forward by Attorney Harris. He hopes it was somewhat helpful and educational, it is a bit down in the weeds because sometimes that is what happens in these cases. But it's important for the record to be clear

and if this goes up on appeal to the courts, the judge will be able to look at our letter and the basis for it. Along with everything else in the application.

Attorney Lick directed the board to two primary issues to help guide the decision. He hoped it would give the board some comfort in order to reach the same decision they did the first time around and to approve it on the merits. Looking at the first two criteria and the 5th criteria that was the focus of Attorney Harris for the abutters.

Attorney Lick thought the board needed to look at criteria 1 and what is the purpose of the frontage requirement. A minimum frontage requirement of 250 feet in this area that is acknowledged and the question is why? Attorney Lick posited in his letter the reason for the frontage requirement, and that is to avoid clutter and very tightly spaced homes along the roadway. This is a rural residential neighborhood and as he read the ordinance and interpreted the reason for that minimum frontage requirement, is to avoid a whole series of houses lined up right next to each other. That is his reading of the interpretation. If somebody has a different view as to why you would have that frontage requirement, they can state it although that is his belief and understanding. With that in mind, we now have to turn to how does that requirement apply to this particular parcel. He said Attorney Harris is right the focus of a variance is, is there something unique with this lot that makes the application of a particular ordinance requirement really not come into play here or not make sense?

Attorney Lick referenced a document he handed out which was a copy of the tax map submitted with the initial application. On the map Mr. D'Aprile's lot is circled and this is described in the Attorney Lick's letter as looking like a flag or a flagpole shaped lot. What you see is he has a 48-acre parcel. What the property owner is trying to do is utilize it in a way that makes sense and is reasonable. The problem with that is a lot of the property is on the backside of the parcel. What Mr. D'Aprile is asking for is for a variance so he can carve out the historic home on the front end of the property with a conforming lot. That lot has the minimum acreage of three plus acres. It also has the minimum frontage of 250 feet and it would allow you to keep that a conforming lot. What we're asking for really is for a variance for that other lot to have 80 feet of frontage. But, really all those 80 feet serves as is a driveway. Because of the way the lot is created, the way it exists when he bought the property was that it makes that dog leg down to the road minimal and compared to the rest of the lot. So, when I look at the purpose of the ordinance, which is to avoid cluttered homes that are too close together along the roadway, applying that to this, this parcel doesn't make any sense because there's not a place to put more homes along that roadway because it's got a relatively narrow access point abutting the road and all the properties. Mr. D'Aprile is proposing a subdivision for a second lot, which will have 40 plus acres to serve one home. And the only reason they are here is because that driveway access is not 250 feet, but is instead proposed to be 80 feet.

Attorney Lick said in their view, you don't need 250 feet for a driveway to serve the back portion of the lot. Also, the purpose of the ordinance is not going to be served by restricting and not allowing the second home in the back portion of the parcel because ultimately the ordinance is trying to keep that home from the front of the parcel and keep things from being cluttered. Given the unique shape of this lot, that's not going to happen. What is being proposed is a second home being put in the back of what would be a second lot. That home

would be far away from the road, as the letter says, it's more than 1,000 feet away from the roadway.

Attorney Lick said when wearing his lawyer hat and wearing his hat as Chair of the Zoning Board in Sutton, he asks if there is something unique in this lot that makes it different from the other lots in the neighborhood. Something that makes the application of the ordinance not really fit. When the board looks at this, he thinks you have to agree with him that this lot stands out as being different than practically all, if not all, of the other lots in that area. When the board applies the hardship test, the unnecessary hardship is there is something unique here that makes the application of this provision not makes sense. He thinks that is true. The question is whether it's reasonable. Attorney Lick thinks it is. It's a second home in a residential neighborhood.

Attorney Lick said that is his view of both when it comes to the purpose and the spirit of the ordinance, is it followed and is it indeed basically trying to upset the nature of the neighborhood? The answer is if you grant this variance, no, you are not violating the spirit of the ordinance. You are not cluttering homes at the front of the lot and no, you are not going to change this neighborhood.

Attorney Lick said in his letter, that anybody driving along this road, if you grant this variance and he builds that house and he puts the driveway in basically improving the existing logging road no one is going to have any idea whether you have given the variance for frontage, or not. They are going to drive by and see a driveway going to the back for personal use and that is it. There is nothing unique in this neighborhood.

Attorney Lick wanted to address a couple of concerns raised by the abutters. He understands the neighbor across the street is concerned about lighting from cars that are coming down the driveway. There is nothing about cars coming down that driveway that is any bit unique to this neighborhood that would make it stand out from any other driveway in the neighborhood. Mr. D'Aprile went out and took some videos along the roadway that are consistent with what we have heard. Other board members say, even tonight, about this roadway and lights from cars. You are going to have headlights shine on your home if you're anywhere near the road, whether you're across the street from the driveway or not, it's the way we live in a modern society. The only way to avoid it is if the town passes an ordinance that says you can only build on one side of the road. Otherwise, you're going to run into this type of thing. So, we all live with those minor inconveniences. I do appreciate the fact that the board last time around wanted to be extra cautious and was trying to be accommodating and proposed a condition for a vegetative screening. I know Mr. D’Aprile was supportive of that. If you drive down a driveway, you are going to have lights.

Attorney Lick said he appreciated the fact that the driveway can be slightly offset and that Mr. D'Aprile is willing to do that. So, that in and of itself is not a basis to deny the variance on the merits. If there is an argument there, it would be that it somehow diminishes the value of the home. That is where that would come in and that is not what the attorney has said, I don't think that would apply. Does what is being proposed change the nature of the neighborhood such that a variance is not going to work here, and that is not going to happen.

Attorney Lick said the only other concern is with respect to visibility of the home. Mr. D'Aprile addressed that when showing the photographs. The abutter said they don't quite understand where the home is going to be situated. Attorney Lick's view is that doesn't matter either unless you can look along the roadway and say that no other home on the roadway in the neighborhood can see another home from its windows and then that would change the nature of the neighborhood. But, that is of course that is not the way it is. All of us that live in any kind of residential neighborhood, unless you are set way back from the road (deal with light intrusion). He lives in an old house like Mr. D'Aprile does. His house is right on the road. He sees all his neighbors and they see him. It's just the nature of the beast here. Mr. D'Aprile's home is going to be 1,000 feet off the roadway and Attorney Lick would reiterate that his client is trying to avoid tearing down the historic house and being able to make use of the 40 extra acres in the back. It just makes no sense to him that a variance would be denied for that reason. Ultimately, he could just destroy the current house and build whatever he wants there and have a much greater impact. We are trying to minimize the impact and he just doesn't think it is significant.

Attorney Lick said the bottom line is if you look at the purpose of the ordinance is to stop the clutter along the roadway. If the board looks at the unique nature of this lot it is a very little bit of his parcel at the front end near the road. The provisions of the ordinance as applied to this lot simply are not and do not make sense and are not necessary. That's what the variance allows for, it is a relief valve for unique properties. Unique situations like this. So that is it. He asked to take comments or questions from the board.

The Chair said three times in Attorney Lick's letter he said the subdivision would allow for the preservation of the historic home. The last owners didn't want to keep that home. The current owner doesn't want to keep that home. How would selling it, preserve it? Because the next owner may not want to keep that home either. It's not guaranteeing in any way that home will be preserved. The next owner could come and bulldoze it.

Attorney Lick said you're exactly right. I mean a strong storm could come in tomorrow and destroyed it. But it certainly has a better chance of being preserved if it's sold off as a separate conforming lot that allows someone to live there. If ultimately Mr. D'Aprile's hand is forced and he says you either have the home you want or the tinier home, that is the issue. So, if the variance isn't granted, it's more likely that the home would be destroyed than if the variance is granted.

The Chair said, so if the variance isn't granted Mr. D'Aprile would probably knock it down and build the home where he wants.

Pier D'Aprile responded, it is clearly an option.

Attorney Lick said that is not a desired option. He and Pier have had discussions about this. We all like the older homes. But I think the issue here is and he will go back to the beginning it would be one thing if the house sat on a 2-or-3-acre lot. But it's one house on 45 acres and essentially what's happened is just because of the way this lot is structured and fashioned and shaped, the ordinance is basically saying for this particular lot it means that 42 acres are basically unusable. The property owner can't do anything with it, they are completely unusable in any way. This (the variance) would allow the use of those extra acres. Attorney Lick said in his letter this extra house on those 45 acres, could serve what 15 homes and we're really asking for only one home. Which is not too much to ask.

The Chair asked if the board had questions.

Lucinda said that stating that leaving 42 acres of back land is a lost cause is not my idea of what the Zoning Board was intending initially, and the requirement of the hardship as well. She said the property owner has kind of created his own hardship and that was the initial statement. You don't have a house, you have land, you can use it. The board has said a certain amount of frontage is required. Your frontage is that you're going to be set up now is a fraction of what is needed and I agree with the Attorney Harris and she doesn't like sort of being threatened that using a comparison is illegal. Because she sat here in this room while the board were discussing a case with a certain amount of frontage and this case made to me, it's totally wrong to make such a non-conforming lot in a historic district and you're basically threatening that you're going to tear the little house down and put whatever you want there, if we don't give you a variance. She doesn't actually see any impetus on why the board should give you a variance. Because you're just going to do what you want to do anyway?

Attorney Lick said that Mr. D'Aprile can exercise his right. Lucinda said of course he can. Attorney Lick said he is trying to do something in what I think is a positive way to preserve the historic use while also allowing the use of the extra property.

Lucinda said she didn't think it was 'extra' property. It is an existing lot with an old home. In the neighborhood of old homes with back land that actually is open land, and she doesn't think that open land is meaningless, animals can use it. It's left open for a purpose.

Attorney Lick said that is his second and third point. The second point is this was not created by Mr. D'Aprile. The lot was an existence well before zoning, and it was not designed with today's the zoning in mind. It would not be created today. So, it's not a self-created situation with a lot in existence in that shape well before Mr. D'Aprile purchased it.

Lucinda said she wasn't saying it was created by Mr. D'Aprile. But what he will do If the variance is granted is put a house on the back land. That was not the intention of the original land/lot.

Attorney Lick said his third point is that lot is actually in the conservation district, Warner's ordinance specifically says that residential use is a permitted use in the conservation district. He agrees with Lucinda, we all like open space. He has a couple of acres where a lot of the land is, but he doesn't have 40 acres. He said if the town's view was that 45 acres was appropriate for every house and that the minimum lot size was 45 acres because we want to preserve it. That would be one thing. That's not what the town ordinance says. It says 3 acres is appropriate for housing and that allows appropriate open space. Here we have 15 times that so following the ordinance and looking for what the ordinance itself says is sufficient per home, this more than meets it by 15 times.

Lucinda said the frontage does not.

Attorney Lick said if Mr. D'Aprile was planning to put the house right up against the road, with only 80 feet of frontage he would 100% agree with Lucinda. But really what this is, is almost like a landlocked back parcel. All the time there are driveways that are put through with easements across the front lot to get access to the back. The owner is just trying to be able to access that back lot and use it in a way that is, in our view again, reasonable.

There's a concern about folks maybe not wanting to have houses in that open space, but I think it's reasonable given the ordinance.

Pier D'Aprile clarified that 80-foot width and the driveway requirement is only 10 feet. So he is asking for 80 feet of width to make a curve to angle this in such a way to have a minimum impact on the abutters. No one means to threaten anybody he was simply repeating the knowledge that he gained at the September meeting from Derek from Janice about a conference about the framework that zoning boards are supposed to follow as part of the RSA in the state of New Hampshire. That was the point he was making, it was not his opinion.

Attorney Lick said the issue of precedence with respect to the Smith lot and obviously he thinks the board's view is that you can't rely on that. You would look to what was done before and it can be a basis for this case.

Lucinda said what she was basically addressing was she doesn't want the board to be hypocritical. When the board addresses one variance in one way and the very next application, the board somehow finds reasons for granting it.

Beverley said the board has had a discussion on this case twice. Once five years ago and again now.

Lucinda said this is a different board.

Beverley said, okay but the board granted this last time and this time.

Lucinda said this is a totally new hearing. She said she wanted to voice her opinion as a board member.

Beverley of course you can and should.

Lucinda said she didn't think making a wildly non-conforming lot in that particular area is something that this Zoning Board should do. In a variance one of those conditions, if it's not met, then the applicant doesn't get the variance. She is strenuously saying she does not think that has met the hardship rule.

Attorney Lick said he appreciates her view and he thinks Zoning Boards all across the state struggle with that very question. What precedent are you setting with each application? The way he thinks folks get through it is it really depends on the particular lot and the particular application. So yes, you want to be as consistent as you can, but understanding that each lot is different.

Beverley said she thinks it does meet the criteria.

The Chair asked the Board if there were any other questions for Attorney Lick? Hearing none Mr. D'Aprile and Attorney Lick left the table. The Chair gave Attorney Harris (for the applicant) the option for a rebuttal statement or to hear from the public first.

Attorney Harris commented that he wasn't at the previous hearing but, read the minutes. He knows how this precedence issue comes up. So, it's his understanding the question kept coming up at the last hearing about whether other lots might be subdivided if the board granted. That is like thinking what precedence will the board set if they make a decision.

That is a lot different than decisions already made that need to be consistent with future decisions. The board has already said when looking at criteria one and two there are already factors that are important here. The board voted “yes” on the last one, the board can still be consistent and vote differently on different application. When considering issues that go to the character of the neighborhood, the board can address them here when you have already established that it is relevant to the factors in the Smith case for instance.

Attorney Harris thought the nature of it is different. Last time, he heard the Chair and others expressed if others are going to rush in here and want to subdivide their lots.

Attorney Harris said the whole notion of let's look solely or mainly to the purpose of the frontage. Why the frontage ordinance is there isn’t about whether or not the frontage requirement makes sense here, it's factors one and two, which goes to both public interest and the spirit of the ordinance, and that's about the character of the neighborhood. He said there is a major difference and that is there aren’t developments in those back areas of lots there. The OC-1 isn't where the residential development is. The spirit of the ordinance actually tries to limit that. It says right there in the ordinance that OC-1 limits residential development. He said it is almost like you have to really have to need it to be able to go back there. All of the houses (in the neighborhood) maybe they do create the light problems because they are in the front of the road. That is the point that neighborhood has that great open space behind it. Whether or not you see a house sitting on a hill, or whether or not you know there's development back there. That changes the character of that neighborhood, and that's your neighborhood too, and that may not be an issue for you, but it's an issue for some of the other neighbors up there. That is important because that's what this board needs to decide is if it is affecting other people, do other people see the character of the neighborhood has changed. Attorney Harris said it's going to change.

The other point, Attorney Harris wanted to make was the fact that this property is somehow different. He said, no it is not different. There are a lot of properties out there and he alluded to earlier that possibly could be subdivided and need no variances. But there are others like the applicants that because of the acreage size because of frontage size area because of setback needs would also need a variance. So it's not necessarily unique. He said you would have to literally go down that tax map and determine how many of those other properties would need variances to be subdivided or not. He saw them, some are very small and they're certainly could just subdivide those. They may not run into a frontage problem, but they definitely would run into an acreage problem. So it's not unique.

Attorney Harris said the board’s counsel has probably talked with the board about this but this is just so much different than the situation with the property itself. He said what the property owner wants to do is subdivide it. The property owner doesn't want to just build a bigger house in the back, which he could do without a variance. Attorney Harris said to say it is not a self-inflicted would be a very difficult task for the board to be able to accomplish.

The Chair asked if Attorney Lick wanted to rebut those comments. Attorney Lick said he was fine.

The Chair opened the public comment part of the hearing starting with abutters and then the general public.

My name is Barbara Buck we live at 108 Bible Hill Road directly across from Pier's home (the property owner). She wasn't going to talk about it, but, her lights shine directly into his house. He has shades on that side of the house. So, everyone keeps talking about the character of neighborhood being very historic. There are some historic houses that are close to the road in that neighborhood. Her house is 400 feet back from the road and built in 2007. The abutter on the other side of Pier's is a very new house. Tom's houses are new, the (name?) houses are new down the road. There are plenty of newer houses on that road, so it's not necessarily an historic neighborhood. It has some historic houses.

Trish Mitchell who lives at 82 Collins Road said she didn't get initial notification of the variance request because they were away. She doesn't know Mr. D'Aprile or Mr. Gaffney, but the land was purchased knowing that there was only 80 feet of frontage and there wasn't room to build a house. So, to her the frontage is too narrow to be able to build a house back on that lot and that the rights of the existing neighbors should take precedence over the rights of someone who's going to build new.

Pier asked to comment when he purchased the property it had a pre-existing variance approved for 80 feet to put a subdivision in. His understanding was, it expired because the previous owners just didn't exercise that within 24 months. Therefore, his condition when he purchased the property was such that it could be approved again. The fact of the matter is, he went to the Planning Board in August. He then went to the zoning board in September. The board did a site visit. There were multiple meetings and the ZBA approved it for a second time.

The Chair said so when you bought the property you knew from the beginning you intended to build a different house on the property.

Pier said he knew that it was an option, yes. Also, that it would be a likely option because it had been approved before. He is not the first one, as everybody knows, who has proposed this. He had spoken with the previous owner Rob Nute and these are the exact proposed locations. There is no difference in terms of the location of the house, Nute was going to build. Pier is putting it, in the exact same place.

James Gaffney said there was no approved variance in effect when Pier bought the house. He said that is a statement of fact.

Board members clarified that the variance had expired.

James said he had appealed it. James said he and Rob (Nute previous owner) had multiple conversations about it. Rob came to James and said he was looking to appeal again. Are you going to object to it? James said, "absolutely" and I'll come with legal counsel this time, soon after he decided to move. Whether that was a factor or not, James didn't know.

James commented that to say that was a reason to buy a house or not, is not a matter of legal fact. There was no variance in effect at that the time of purchase. There was no necessary expectation that it would be granted again because you would have to go through the whole process again.

The Chair said there might have been an expectation. James said there might have been but, legally speaking you would have to redo the process.

Pier said, he did and it was approved.

Trish Mitchell said her fear with this is that those of us who have large parcels of land could also apply for variances in the future to put very narrow driveways on different parts of our land to go to the back 40 acres to build on. A lot of us could do that. She thinks there are three different ways to approach that land. Her land abuts Mr. D'Aprile. She fears this is creating a precedent for other people to be able to do the same thing with a narrow piece of frontage.

The Chair asked what Trish meant by there are three ways to approach the land, does she mean a right-of-way?

Trish said, no. Her land abuts Mr. D'Aprile's in the back 40 (acres). So, there are people on Collins Road who could put variances in, as well as, from Bible Hill Road. She said maybe not three she thought maybe two ways to access the land. But, other properties in town could do it as well. People that have large parcels of land.

Thomas Dunne on Bible Hill Road said 25 years ago he built two houses and a barn on a 5-acre lot. He doesn't know why Pier has to go through all this to build a house.

James said that Tom's house is in Bradford which has different zoning ordinances. Also, Tom lives at the end of a Class VI road. So, there are a number of factors that play into that, as well.

David Kimble said he has a driveway directly across from Pier. He has 93 acres. Pier getting this variance is not going to result in David wanting to put in a development on his land. Pier is the kind of neighbor that would give you the shirt off his back. David said he has been a resident of New Hampshire all his life, he thinks neighbors should support each other. He thinks the objections that have been raised are just petty, and he was sorry Pier was being treated like this.

The Chair asked if there was anything else from the public? No response were heard. The Chair asked the attorneys if they would like to make closing statements before the board goes into deliberation. Neither Attorney Harris or Attorney Lick had any closing statements.

The Chair asked the board if they had questions before entering into deliberations. Beverley said she agreed with the statement Mr. Kimble made.

Harry asked Attorney Lick how he would answer the question that the non-conformity is a self-made non-conformity?

Attorney Lick said the non-conformity is the shape of the lot. It is nothing other than that. The real issue here is that you can't use the back 40 plus acres absence a variance unless he tears down the current house. It is the shape of the lot that causes the problem. If it weren't for that short frontage of the front part of the lot, you'd be able to build 10-to-15 homes in the same space.

The Chair said if he had enough frontage.

Attorney Lick said the point is if the board looks at the letter, any variance request that comes to the town, is going to vary from the ordinance in some way. The question is does it go to the core of the purpose of the ordinance. Is the application to this lot such an affront to the ordinance, to what it's trying to get at, that you just simply can't say yes and that's really

what it is. Does it defeat the core purpose? Again, the purpose of the frontage requirement is to avoid cluttered houses along the roadway. There is no reason that the application of this frontage provision to this lot given its unique shape should apply and that's the bottom line. Another way to look at it is to take it to its extreme. If that back portion was 1000 acres, he couldn't do anything with it because of the frontage. Even if all he wanted to do was build a driveway to get to it under the ordinance without the variance, he can't do it. The lot is completely useless and I think it's for those types of unique settings and the flag-pole shaped lot that is why you have a variance for relief. So, the shape of the lot is why they are there.

The Chair checked with both Attorney's, the public and the board for further comment or questions. Hearing none the Chair closed the public hearing and went into deliberations.

Jan G said whoever said it is the best way to make enemies of your neighbors by joining the ZBA. She wished her neighbors and colleagues and friends don't take offense to her statements. She thought the variance and the ordinance itself when taken on face value and not given any wiggle room is a self-defeating. The fact that it's attempting to stop high density subdivisions and yet, it induces them. If you have 200 feet frontage or whatever it is for the district you can put in 50 tacky houses then you can see the neighborhood go down the tubes in a hurry. Well, that's one way to do it. She thought the spirit of the ordinance is not disturbed by a 10-foot driveway with 80-feet of frontage. The driveway goes 1000 feet down-and-up and down-and-up to the top of the hill where the house will be built. From what she saw (placed on the property during the site walk) was an excavator which was almost the size of a house. She said you really can't see the house with or without foliage on the trees. In terms of harm, she thought the second criteria, the injury to the abutters and the inconvenience of two or three times a night versus one or two times a night having headlights coming down into their windows. If that even happens, which hasn't been established as a fact. She thought it really does not come even within the galaxy of outweighing, allowing this gentleman to build the house that he had expected to build when he bought the property. Yes, she knows the (previous) variance was no longer legal but it doesn't sound like he was shooting himself in the foot by expecting that he could get that variance again. Because it had been granted before. So that was her belief, and she hopes we're all friends after this.

Beverley said she agreed with Jan G., and we are the Zoning Board of Adjustment and it is a variance and that is what the board does. If everyone had to follow the law exactly, what would we be doing here, nothing.

Harry asked the Chair if she wanted to go through all the criteria, or not. The Chair responded, yes, we do need to go through all the criteria. I'm just looking for general comments from board members before we jump into that.

Harry said the way he approaches this is to look at the purpose of the ordinance. Look at the purpose of the ordinance and he really thinks the frontage requirement, it's accurate to say that requirement from the Planning Board to put that in is to try to prevent density of development, to prevent cluttered development. So, if somebody is trying to put a house on a certain amount of frontage, you need to have a minimum. In this case, that's not the intent. The owner has 40 plus acres and just wants to build one house on 40 acres. He thinks that no matter what the district is, that's allowed in Warner. You could build a house in the OC-1 district. Certainly 80 feet of frontage for a driveway, not for a house, but for a driveway is

reasonable in his opinion, to allow someone to be able to build in an area where there is sufficient space. He doesn't really think that a driveway is going to change the character of the neighborhood in this case. He knows the original house is a classic historical cape and it is very special. But, it has limitations and Harry could understand why two owners would not want to invest more into that particular house. But, it is beautiful and wonderful and will serve a lot of people, just fine.

Harry said Warner has a situation with a lack of housing. So, in his view, it does substantial justice to allow someone to build on 40 acres of land, which now gives us another house in Warner. Harry said, we don't lose the historic traditional house, somebody will have that and we have another resident living in Warner. It's just another one but that's all that this gentleman wants to do and he thinks that it makes a difference that we are preserving a historical house and allowing somebody to build on 40 acres. He thinks it's in the spirit of the ordinance.

Beverley added and a new house to pay taxes.

Sam said in regards to a precedence and utilizing the same methods to assess each of the criteria. He is pretty sure that the board did discuss a lot of the criteria. He thought the lack of minutes (from the November meeting) kind of hampers that they can't point to that discussion. But he recalls that the board discussed all these points and he thinks the criteria was evaluated. It was a process that was done. Because there is no set way to say that you have to meet this criteria as in a numerical analysis or a number of the abutters that approved or disapproved. There is no result that we have to achieve. He thinks they did the process of discussion. But the lack of minutes has put us in a position where the appeal is a necessity and justified to make sure that there is a record of that.

Derek said he was going to hold off commenting until they started going through the criteria.

Lucinda said she doesn't think this addresses housing in Warner. She thinks the housing issue in Warner is affordable housing. So, this is putting a house on the lot that she doubts will be classified as affordable housing. She takes what the Chair said seriously. Just because granting this 80-foot variance for a driveway doesn't mean that the little antique house will be saved. So, she doesn't think they can use that as a good thing that house (antique cape) will be there while allowing for a wildly, extravagantly non-conforming lot to happen in the back land. She still prioritizes back land, wild land and she doesn't think land has to have 40 houses on it.

The Chair said even though it's flag shaped, the use of this lot, this could be a nine-acre lot. They're not going into the large portion of the land. The house is going to be 1,000 feet off the road, not that far. That conforms to a lot of the other lots around there as one of the neighbors pointed out. There are very similar lots you know all along Collins Road. How do they say no to somebody else in a similar situation. So, she thinks the board is setting a precedence. She thinks it is fair to compare it to the variance that the board gave and argued over a 10-foot difference. The Chair said here the board is granting this frontage and it wouldn't even have a third of the required area to create this access.

Lucinda said this board is being asked to create an extravagantly non-complying lot for the benefit of Mr. D'Aprile. We are the ZBA, when there's an issue that can be addressed by granting a variance that makes sense such as the one given to Peter Smith where he

needed 15 feet more frontage to proceed with his desire to form a lot. That's something that she thinks giving a variance is fine. To create a lot with only 80 feet of frontage is giving Mr. D'Aprile relief of 170 feet of frontage. Also, we're not here to protect people's property rights, we're here to protect the town of Warner and its zoning regulations. I believe that a respect for backland should be a part of our objective and enforcing zoning regulations.

The Chair said the OC-1 is designated for very sparse open conservation. Also a point she made the last time that this open land in the master plan, it says, the open land is meant to discourage the fragmentation and subdivision of large, undeveloped parcels, which provide important tracts of undisturbed wildlife habitat and travel corridors. The Chair said like Lucinda she puts a high value on backland to remain undeveloped. She thinks this is a big ask. She thinks it was kind of presumptuous to buy the property thinking that there would be a variance, granted again. She said she could tell she was going to get outvoted on whether to grant it or not, but she thinks creating this kind of a lot should be avoided and should only be granted if there are really extraordinary circumstances. She just doesn't think that this variance meets that threshold. It was self-created because there was an assumption that the variance would be given. You know, it sounds like the landowner never really intended to do anything but build on the back part of this property.

The Chair directed the board to go through the criteria.

#1 granting the various variants will not be contrary to the public interest because.

Jan G. said the public's view of land from Bible Hill Road, and Collins Road, will not be disturbed. Also, the density factor will not come into play and it certainly would lower the risk of having it turned into 15 houses.

The Chair said she could pretty much guarantee it would never be turned into 15 houses.

The Chair said your first point was that the house wouldn't be viewable from Bible Hill Road.

Jan G. said it would not be visible from Bible Hill Road.

The Chair said she doesn't know if the board knows that?

Jan G. said the board walked the property and they could not see the excavator (placed on the house site) until you were almost on top of it. So, if you were on the road or in a house you couldn't see it, unless someone builds a four-story house. Jan G. said she had to report what she saw or didn't see, and she could not see the excavator until they were just about at the top of the hill.

Derek said he would expand on what Jan G. said about seeing the house and when the board had a public discussion. There are historic houses there and it's a semi-historic neighborhood, but there are newer houses there as well. So, we're not really changing an area that's all historic and dropping an abomination in the middle of it. There are other new houses in the neighborhood, as well.

Jan G. said she has 112 acres on the top of Waldron Hill Road and she believes so much in conservation that they are giving away half the value to put it into conservation easements. So, she cares about conservation. But she didn't have any qualms about building the house that they built, which is maybe 1,000 feet from Waldron Hill. It was conforming, but it

certainly has not slowed down the parade of everything from bobcats and moose to beavers and porcupines that kind of wander by the house every day.

Beverley said the neighbors did not complain, did they?

Jan G. said no the neighbors did not complain.

The Chair said but it was conforming.

Jan G. said well no, it wasn't they only have 50 feet of road frontage. She said that her lived experiences was they did almost the same thing and it didn't seem to make a difference. Then when they close on it, it will be a conserved land forever.

Harry said 80 feet of frontage for one driveway, not a house, but a driveway is not contrary to the public interest.

The Chair said so you would go to the question of the density.

Harry said because that's not going to create density or a cluttered development, because it's just a driveway.

Jan G. said the driveway replaces a dirt road (logging road) with a paved or stone road.

Harry said the point he was making was granting a driveway, is not contrary to the public interest. It's a residential driveway. It's not contrary to the public interest. They are not talking about the residence being close to the road we are talking about the driveway and 80 feet of frontage.

#2 Graining the variance will not be contrary to the spirit of the ordinance.

Derek said one way to examine the spirit of the ordinance is to look at the essential character of the neighborhood. Looking at everything he would say it probably won't impact the essential character of the neighborhood.

The Chair asked if his finding of fact on that is observation of the existing character being mix of historical and some recent development.

Derek concurred. Also, to look at whether the granting of the variance would threaten public health, safety or welfare of the neighborhood. Derek didn’t think that was really an issue.

The Chair said the board has already heard her argument that it does go against the spirit of the ordinance in that it's going to fragment open land. It will go into the OC-1 which is intended for low density.

Derek said he didn’t know if you get any lower in density than one house.

The Chair asked if anyone else wanted to make a comment on the spirit of the ordinance.

Harry said, it was within the spirit of the ordinance to allow someone to build on 40 acres of land. He thinks it is a right of property ownership to be able to build on it. If someone has 40 acres of land and in this case, yes, it's the OC-1 district. But building a residence in the OC-1 district is permitted. If the board looks at this map and where the house is. He drew a star on the map as to roughly where the house will be located commenting that board members have been up there. So, the outback land, which is the big rectangle in the back, that's

wilderness and will remain wilderness. It is mostly mixed forest back there and it is rugged and it's full of wildlife. But, the star where the house is going to be is not getting into that sensitive wildlife areas. So, he thinks it is really within the spirit of the ordinance to allow someone to build on 40 acres of land when they are not actually going to be causing a detriment.

The Chair asked to clarify that Harry thought it was in the spirit of the ordinance because of the size of the lot.

Harry said, yes, one house on 40 acres of land.

The Chair asked the board if there was anything else on spirit of the ordinance criteria before they go onto the granting of the variance criteria.

Derek said he didn't think either lawyer argued that the third criteria. They were pretty much in agreement on the third criteria not being a problem. Although, the board needs to discuss it.

#3. By granting the variance, substantial justice is done.

The Chair said this criterion has to do with loss to the individual not outweighed by a gain to the general public.

Attorney Harris interjected that it was addressed in the written submissions.

Derek said it was addressed at the board's last meeting as well. Derek said he didn't think there's actually a gain to the general public by not granting the variance. He personally doesn't think there's a big gain to the general public by not approving this variance. Jan G. interjected, or a great loss to the public if the board does grant it.

The Chair asked if the board had any other comments on substantial justice. No additional comments were made.

#4. By granting the variance the value of surrounding properties are not diminished.

Derek said he would think that probably would be the case if it was an all historic districts but, there is a mix between new and historic houses. He would say if it was 100% historic then we would want to preserve that. But there's already newer houses in the neighborhood.

Beverley said the frontage is not going to change the character of the area at all. Right?

The Chair said, right. The Chair asked about the property owners that are worried about the headlights?

Derek said they need to obviously put that condition in there that we had before and Mr. D'Aprile said that he'd be willing to curb that driveway. The board can actually put that condition in, as well. He said they can add to the conditions, not just relative to the vegetation, but to the curved driveway.

#5 Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship.
For purposes of this subparagraph, "unnecessary hardship" means that, owing to special

conditions of the property that distinguish it from other properties in the area:

i. No fair and substantial relationship exists between the general public purposes of the

ordinance provision and the specific application of that provision to the property; and

ii. The proposed use is a reasonable one [Explain what is unique about the property that makes the specific zoning restriction unfair and unrelated to the purpose of the provision, and that it is a reasonable use]

The Chair said both attorneys said under the hardship criteria both conditions would be met.

Derek said he is sure there would be absolutely no hardship at all if Mr. D'Aprile had a helicopter and could just fly into the property and then not have to worry about the driveway.

Harry said it is clear to him that there is no fair and reasonable or substantial effect on the public based on this case. The restriction as applied in this case is not going to substantially affect the public in any way that justifies not granting the variance. It is a reasonable use of the property. There really isn't a connection between the variance request and the use of this property it is not reasonable that somebody should not be allowed to have a driveway. Which is all that is really required. The restriction of not being able to have a driveway. Is there is no substantial relationship between that and the use of the property.

Jan G. said the board has seen this before. There was the Pletcher's place where they wanted to put a staircase in and it was the geometry of their property that was the issue. There was another person on Melvin Mills by the river where again they had a house that was a little bit too close to the road and they couldn't do what they wanted to do, so we granted them a variance. In all those cases, the hardship came from the geometry of the property. In those cases the board said, well, the geometry of the property is the hardship. She thinks this is the same thing. Blaming Mr. D'Aprile because he bought it without having it solidly in his pocket that the 80-foot variance was guaranteed, is just not right. It is a hardship that he has a geometrically difficult but beautiful parcel of land.

The Chair asked so does every lot that has enough total acreage but lacks some amount of frontage then qualify to have a variance to get to the back piece of land?

Jan G. said if it is not upsetting the density or the character of the neighborhood if it is not imposing on runoff if it is not somehow going to clog the road up lots of traffic and effect (the safety) of kids getting run over. Although, it depends on many factors. `

The Chair said in the abstract you can argue all of those things because the house doesn't exist. You don't know what the light pollution is going to be, what the effect is going to be on the waterway. The board is hoping that the Planning Board is going to take care of all of that.

Janice clarified with the Chair if the board was addressing 5.A., i. and ii., or B.

The Chair said they were addressing 5.A., i. but not ii., because they we are not talking about use. They have established it is an allowed use.

There was further discussion and Janice clarified with the Chair they were reviewing i., and ii., and the Chair concurred.

Harry said the restriction of the ordinance is creating the hardship for the owner. The requirement that he have 250 feet of frontage for a driveway. That is creating the hardship. The ordinance disallows this owner use of his property.

The Chair said she would argue he does have use of his property. He has full use of his property. It is a single house with 330 feet of frontage lot. The Chair asked Harry if he is saying the owner should be able to build a second house.

Harry said, yes, that is what he is saying. He has 40 plus acres and doesn't want to tear down an existing house. It is a wonderful house, but it does have limitations. His point is that the restriction in the ordinance is what's keeping him from being able to have reasonable use of his property. The fact that he needs a variance from the frontage. Which is 250 feet, but that would be if he was building a house there. He is building a house far away from the road where it is probably not visible from the road.

Lucinda said she was with the Chair.

Sam said he thought it comes back to the purpose of the ordinance and whether or not you know he has use of the land. It is usable to put a house on. There are many places on that land you could put houses. But you just can't put two and I think the other part about the ordinance requiring the frontage, I'm not sure that it's specifically worded in such a way that it says the frontage is required to allow a driveway or to prevent a house. And I think the set back requirements determine where the house would go and address that issue. So, he thinks that it does come back to is the hardship related to the frontage. It comes back to the issue of whether or not you can get a second house out of this. And he is kind of leaning towards the basic assessment that it is a self-imposed hardship because it's useful as a lot with one house on it. He would hate to see the antique house torn down, but he thinks that is the hardship which is the need to do that versus the need to enforce the ordinance.

Harry said the purpose of the ordinance really is to avoid cluttered development along the roadside and that is why we have a minimum frontage of different frontages in different districts. But 250 feet really is to prevent a density of homes. So that people have space and in this case the applicant has lots of land and he just needs to get to it. He also respects that he has a wonderful house there that is historical and doesn't want to create a non-conforming lot there. So he just needs the variance to be able to use the 40-plus acres that he owns. The hardship in the fifth criteria is the lot has its own characteristics, and the restriction at the driveway is really the issue and he is not building there (at the road front). So, the frontage of 250 doesn’t apply to that when he is not intending to build there at all. It is an obvious hardship. There is a lovely historical home there, which would be great to preserve.

Lucinda said she disagrees vehemently. She said we have our zoning regulations. Not just to keep houses along the front to have enough frontage on the lot. We actually do it to protect backland. To not respect that at all, she finds that to be faulty reasoning. This isn't just a driveway. We would be allowing a non-conforming lot.

Harry asked Lucinda a question. Is there a problem with somebody building away from the road? Is that an issue that you feel the Town of Warner would not allow. Lucinda said if they have 250’ of frontage they can go as far back as they want to. Harry said the OC-1 permits someone to build a house. This is one house and a permitted use in this district. Lucinda

said not if you don't have frontage. Harry said do you think in this particular case this individual should not be allowed simply because he doesn't meet the frontage at the roadside, where he doesn't intend to build?

Lucinda said it doesn't matter he still wants to build on that non-conforming lot. She fears that people who move into town and see a neighbor with a lot of backlands they are going to automatically expect that the Zoning Board will say "go for it build as many houses as you want."

Derek said, saying that is not fair to this particular applicant. Every case should be judged individually. Everyone has the right to have their constitutional right to use their property the way they wish.

The Chair said if they receive the variance, they will no longer be non-conforming, they will be saying it is a conforming use at that point. Derek said not for the rest of the town, that is why everyone else has to come before the board.

The Chair said they do have to consider precedents. She thinks the board does, as they are sitting here saying you know, what does this open up. What does this potentially open up, how will we handle the next case. What is coming down the road as lots become more and more valuable in this town. It used to be you could buy a three-acre lot for $30,000 and now a three acre lot is close to $200,000 depending on where it is. It's very tempting for people to want to subdivide their properties, which is why it should be, owing to special conditions of this property.

Beverley said isn't that what the board is doing? The Chair said that is what we are doing.

Jan G. said if someone was to come to the Zoning Board and they had 300 feet of frontage and they wanted to split it to 150-and-150 feet in order to build two houses side-by-side. She would be the first one to say, "heck no." The Chair asked why would she say "no" to that. Jan G. said because she sees some using the ordinance as a punishment. It is discriminatory, if you have the frontage you can do all sorts of horrible things. But if you don't and you're doing something that doesn't have an impact on the neighborhood, that doesn't have an impact on the wildness of the property then you're just using it as a punishment, and that is not fair.

The Chair said but it is the ordinance, and every ordinance is limiting in some way. The Chair said that when Jan G. is talking about people who have frontage and do horrible things she is not sure what that means. The Chair said that she has found that people in town love their property and want to usually treat it with respect.

Jan G. said she spent six months of her life driving around New Hampshire, testing cell phone equipment. She was heartbroken to see farms cut up into the big horseshoe property with cookie cutter houses all around it. It was perfectly legal, but, horrible. She would certainly not like to see that in Warner, but, this case is not like that. They are not putting in a horseshoe shaped property and filling it with the same houses with different paint colors.

Beverley said so you are saying every case will be different. Jan G. agreed.

The Chair asked Jan G. what in terms of the public purpose, trying to get to the hardship question and the provisions of the ordinance is relative to this property?

Jan G. said the property is unique based on the geometry of the property and it's non-applicability to the spirit of the ordinance. Janice clarified that what Jan G. is saying is the geometry of the property speaks to the special conditions of the property. Jan G. affirmed.

Harry said he was a little confused by the question of what is the public purpose? That we must find for allowing someone's use of their property to build a single residence. We're talking about the residents, the residential use, and there really isn't a public purpose.

The Chair said that public purpose is in number 5 of the ordinance.

Harry said in terms of the public purpose. Is there a value in allowing the public, fair and reasonable use of their land as long as it doesn't take away from the property rights of others or harm the public? In terms of safety or traffic, these are public ways that there could be a degradation. If there isn't that, isn't it a public service to allow someone to be able to develop their land that they own as long as that development does not cause a detriment to the neighborhood, the community, the public. I guess you could even make the argument that there is a public interest in conservation. There is a public purpose in conservation and allowing an individual to put one house of 43-to-44 acres of land effectively puts a conservation easement over all that land because it will never be ever subdivided.

Harry said by granting the variance, you do effectively ensure conservation of that land. Granting the variance does also allow him to allow property owner's use of his land without causing a negative to anyone trying. There actually is a public benefit in allowing him to build one residence and it's not the back part of the land.

The Chair said granting the variance does not conserve that land.

Harry said it is a dangerous direction for us to go in terms of people's property rights, to say that if we grant this particular variance for these specific conditions, that in the future, somebody else might want to do the same thing and potentially all the land will be divided up. This is a specific case that we have to focus on and it doesn't mean that granting this will mean that others will do it as well. They have their own cases and their own conditions for hardship. So yes, well, went in one, but I heard you say. To say that we are not going to allow a pr operty owner use of his land because we suspect or worry that somebody else might do the same thing. That is taking someone's property rights.

Lucinda said that is not what we are here for. We are here to protect the town of Warner and to follow the Zoning Ordinances.

Derek said property owners are the Town of Warner.

Harry asked, is it in the spirit, and to protect Town of Warner that we should not allow property owners to build on their land?

The Chair warned the board to not get into a philosophical discussion. She directed the board to address number five and the literal enforcement of the provision. She asked if anyone had more input on the unnecessary hardship question?

The Chair asked for any other discussion on the criteria? Hearing none the Chair asked if the Board was ready to make a motion?

Derek said they actually have everything that was discussed in that last hearing as well.

Jan Gugliotti made a motion for case number 2023-05, Map 12, Lot 5 at 115 Bible Hill Road to grant the variance to create a lot with 80 feet of frontage in a R3 District. The conditions are the owner will provide a natural evergreen screening to mitigate headlights potentially shining on the neighbor's homes while exiting the driveway. Also, to add a dog-leg angle to the driveway to further mitigate the risk of headlight pollution to abutter's properties. **Beverley Howe seconded the motion. Discussion:** None. **Roll Call Vote:** Derek Narducci – Yes, Beverley Howe – Yes, Lucinda McQueen – No, Jan Gugliotti – Yes, Barbara Marty – No. Vote Tally: 3 – 2 in favor of granting the variance.

The Chair said, because this is a rehearing, any appeals will be to Superior Court. She thanked everyone for attending.

III. Zoning Board of Adjustment Minutes of December 13, 2023

The board reviewed the minutes of December 13, 2023 and made edits.

IV. ADJOURNMENT

Jan Gugliotti made a motion to adjourn the meeting. Lucinda McQueen seconded the motion. The meeting was adjourned at 9:55 PM.

/jll