ATKINSON ZONING BOARD OF ADJUSTMENT
21 Academy Avenue
Atkinson, New Hampshire 03811
Public Hearing Meeting Town Hall
Wednesday, October 13, 2021

Members Present	**Others Present**
Glenn Saba, Chair	Karen Wemmelmann, Recorder
Bob Connors, Vice Chair	Sue Coppeta
Arthur Leondires	John Bourque
Kevin Wade	Thomas Hildreth, Atty., McLane Middleton
	William P. Reddington, Atty., Wadleigh Starr & Peters
	Paul & Leann Moccia
	Charlie Zilch, S.E.C. Associates
	Bianca Picariello
	Harry & Christine D'Souza
	Shawn O'Connell
	Colleen Sullivan

Workshop 7:00 PM

Approval of Minutes: June 9, 2021

Member Leondires made a motion to approve the minutes of the June 9, 2021 meeting as amended. The motion was seconded by Member Wade. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 4/0/0. The vote is unanimous.

Correspondence: none

Call to Order: Chair Glenn Saba called the meeting to order at 7:30 PM.

Roll Call Attendance: Vice Chair Connors, present; Member Art Leondires, present; Member Kevin Wade, present; and Chair Glenn Saba, present.

Public Hearing – 7:30 P.M.

Chair Saba opened the public hearings at 7:30 PM, October 13, 2021. There are four public hearings.

1. **Application by John Bourque for Special Exception under Article VII Section 700:2 to allow conversion of a seasonal home to year-round status on property located at 28 Hemlock Shore Dr. Map 22 Lot 64, in the RR3 Zone.**

Abutters:

John Bourque (present), Audrey Gill, TTE Audrey Gill Rev Trust, Noreen Mercier, Karen and Lacey Bluemel, Brent and Stephanie Dow, Big Island Pond Corporation, Hemlock Heights, c/o Diane Gorr

Discussion:

Chair Saba requested the applicant come before the Atkinson Zoning Board of Adjustment ("Board") to explain the application. The applicant informed the Board that he is proposing converting the seasonal home to year-round status.

Chair Saba informed the applicant that it is a special exception and under special exception, if the criteria are met then the application will be approved.

The applicant explained that the septic and well are approved and all wetlands approvals have been obtained. The septic was originally approved for a 4 bedroom home but will be redone to be a three bedroom septic.

Chair Saba read the regulations.

> **700:2** A change in the status of a dwelling from a seasonal, recreational, or secondary home to a home which is intended to be used as a primary or year-round dwelling shall be considered a change in the use of the existing building according to the building code of the Town of Atkinson and shall require upgrading to state and local water supply and sewage disposal regulations in effect at the time of such change in status. Before any permits for structural alteration or change in use are issued by the Building Inspector and the Health Officer, a special exception from the Board of Adjustment shall be obtained, the granting of which shall include, but not be limited to, compliance with the following requirements:
>
> a. A review by the Health Officer.
> b. Compliance with Sections WS300 of Atkinson's Water Supply and Sewage Disposal Regulations.
> c. Written consent by the New Hampshire Water Supply and Pollution Control Commission (NHWSPCC).

All three conditions have been met. The property has been inspected by the Health Officer, there is a drilled well already on the property, and a septic design approved by the New Hampshire Department of Environmental Services. Wetlands setbacks have also been approved.

Chair Saba explained to the applicant that if the conditions of Section 700:2 have been met, then approval must be granted. He informed the applicant that the applicant will also have to deal with fire safety, life safety and any other criteria from the building.

Chair Saba requested a vote.

Vote: Vice Chair Connors, yes; Member Leondires, yes; Member Wade, yes; and Chair Saba, yes; Vote: 4/0/0. All three criteria of Section 700:2 have been approved.

Vice Chair Connors made a motion to approve the Application by John Bourque for Special Exception under Article VII Section 700:2 to allow conversion of a seasonal home to year-round status on property located at 28 Hemlock Shore Dr. Map 22 Lot 64, in the RR3 Zone.. Member Leondires seconded the motion.

Vote: Vice Chair Connors, yes; Member Leondires, yes; Member Wade, yes; and Chair Saba, yes; Vote: 4/0/0. Unanimous.

Chair Saba reminded the applicant that there is a 30 day appeal period from the decision of the Board and any development during that period will be done at the applicant's risk.

2. **Application of an Appeal of Administrative Decision submitted by Charles Cleary, Esq and Wadleigh, Starr & Peters, P.L.L.C. for Charles Kinney & Jeanine Kinney Living Trust, Charles Kinney Trustee related to a parcel of land at Map 17 Lot 62 in the RR2 Zone. This is a remand hearing directed by the Housing Appeals Board related to the denial of a Building Permit on a parcel of land without frontage.**

Abutters:

Centerview Hollow Land, Catherine and Lonnie Goodwin, Charles and Jeanine Kinney, S.E.C. Associates (Charlie Zilch, present), SCC, Charles Kinney, Huoth Pech (present), Barry and Diane Matkin, Starr and Peter Wadleigh Attorney William Reddington (present), Diane Kinney, Paul and Leann Moccia (present)

Discussion:

Chair Saba explained that the applicant was in front of this Board on a request for hearing of RSA 674:41 II. The Atkinson Zoning Board of Adjustment ("Board") Board took the hearing (on January 13, 2021 and request for rehearing March 10, 2021) but did not review it by the applicants request but instead reviewed it according to their criteria and denied the application based on the criteria and letter from the Building Inspector. The Housing Appeals Board ("HAB") has remanded the application back to the Board to hear it under RSA 674:41 II, remand order dated August 4, 2021. The application is the same.

Attorney Reddington explained that the applicant is in front of the Board to seek an exception under RSA 674:41 II. The RSA prohibits towns from issuing building permits for lots that do not have direct frontage on a class V or better road. The reason for the statute and frontage requirement is public safety. In this case, the lot has access to a public street, it is about 35 feet from Huckleberry Lane. There is access via private easement, but there is no direct frontage on the road. Therefore, the applicant falls under the statute and is here to seek exception under RSA 674:41 II.

Attorney Reddington requested Charlie Zilch, engineer for S.E.C. Corporation, to review the parcel.

In December, Mr. Zilch reviewed the property. It is a landlocked parcel off Huckleberry Lane that was created in 1971 by a subdivision plan approved by the Planning Board. This lot was not specifically approved but it was left with a 30 foot access easement access off Huckleberry

Lane. He was approached by the potential builder and he informed the potential builder that there was no frontage and the site would require a variance. Mr. Zilch took a site walk of the lot and discovered that there is a substantial buildable area. He also discovered a wetlands area. Bruce Gilday, wetlands scientist, was hired to map the wetland. Surveyors pulled a boundary survey and pick up the wetlands flags and did a site topography. It was established that the boundaries were clean. The applicant looked at the buildable envelope. The wetlands setbacks and the setbacks allowable for an older lot of record were applied, and it was found that there was a generous building envelope. A test pit was applied. The soils are upper wetland soils and very well drained. There is a viable area for a septic system. A septic design for a 4 bedroom dwelling was designed. This lot will support 4 bedrooms by State standards. At the time, the builder wanted a larger home and that septic design was in the original application.

Now, based on discussions with the ZBA, the applicant is proposing a three bedroom home with a garage under. A new, three bedroom, septic design will be submitted. The lot is 1.7 acres and it is a two acre zone. Most of the homes in the area are three bedrooms. Also, the lot is slightly smaller because the Building Inspector has requested the applicant maintain current setbacks. The front setback is 70 feet as opposed to 30 feet in earlier requirements. The current side set back is 30 feet as opposed to15 feet. The applicant showed the Board the setbacks. It creates a much smaller building envelope. Realizing that there are wetlands on the lot, stormwater runoff can be mitigated by placing trenches along the driveway and/or a rain garden in the back. It is a decent lot, there is no ledge and the soils are good.

Chair Saba explained that the HAB has decided that it is a lot. Vice Chair Connors informed the applicant that despite them saying the frontage requirement is only for safety purposes, there are in fact three reasons for the frontage requirement. First, safe access to the property as noted by the applicant, second is to protect the capacity of the roads and third is spacing of the houses. The first two are not a concern. The spacing of housing is. The Board is concerned about the cumulative effect of building lots that do not meet the frontage requirements. This should be put on the record that this is a special exception. Attorney Reddington stated that this is a unique circumstance. Under today's zoning, 200 feet of frontage is required. He does not believe the Zoning Board will see this issue again. The lot was approved by the Planning Board in 1971.

Chair Saba stated that the order from the Housing Appeals Board refers to the lots on the plan, the lot is on the plan, the plan was approved, therefore the lot is a lot and the Planning Board at that time must have known what it was doing. Previously, he has had plans approved with what is called excess land. It was done many times in the past. Attorney Reddington stated that the HAB has decided that it is a lot of record. Chair Saba stated that even if the HAB has decided it is a lot of record, it does not mean the lot is buildable.

Attorney Reddington stated that now the frontage issue most be solved and a building permit obtained for it to become a buildable lot.

Chair Saba stated he has seen approved plan 2379. A 30 foot easement is labeled. Attorney Reddington has called it easement, a right of way and access. The HAB has done it as well. Chair Saba stated he found the definitions at NH.gov and they are not the same. If it is called

an easement, then it doesn't mean it can be accessed. If it is a right of way, then it can be accessed. It depends on how it is described in a deed.

Attorney Reddington agreed that the term is subject to interpretation but stated that there is ample evidence on the record the purpose for this easement. He stated the Planning Board drew what amounts to a driveway for this easement; the easement was given over the abutting parcel to access Huckleberry Lane; the easement was recorded in the applicant's deed and the deed for the abutting property; it specifies what the easement is for throughout the order; and the Housing Appeals Board calls it an access easement.

Chair Saba asked Attorney Reddington how the Housing Appeals Board decided it was an access easement.

Mr. Zilch explained that the HAB made an interpretation. His experience in creating easements has been that the layout must be looked at. It is 30 feet wide, which is a driveway easement. Chair Saba asked if that were the case then why was not a 30 foot driveway to the back parcel cut in.

Chair Saba stated that he had to rely on the statements of Mr. Kinney, the attorney and his own judgment to interpret the order. He stated that the HAB keeps changing the terminology and he does not understand how to interpret the order. He also does not understand RSA 674:41.

Attorney Reddington agreed it is unique. The RSA serves a purpose and it does give applicants relief. The applicant has a unique lot and is coming before the Board to seek relief.

Chair Saba believes that the easement should be described in the parcels deeds. The other two lots should show on their deeds that they are burdened by the easement for access to the back lot. The Board has asked for this definitive clarity and has not received it.

Attorney Reddington stated he forwarded the deeds. He read from the applicants' deed. It states that there is an easement from Lot 10 to Huckleberry Lane. Chair Saba stated that he does not doubt there is an easement, he questions what the easement is for and why it is 30 feet. It might have been for utilities.

Mr. Zilch stated there is no other access to the lot.

Chair Saba replied that he discovered that there is a paper street called Teddy Bear Lane that was owned and still is owned by the Kinney family. It is possible that the paper street was going to be used for access and the easement was for utilities. Chair Saba still does not understand the 30 foot easement. The deed refers to an easement, not a right of way and not an access easement.

Vice Chair Connors stated that the golf course had an easement on property that he owned previously. It was for the golf course maintenance to go back and forth. He never interpreted that as allowing them to have a driveway or anything solely for their use.

Vice Chair Connors stated that looking at the original plan, there is an empty parcel and they had an agreement for an easement to allow them to go back and forth. He also does not understand the original intent, but does not believe it allows someone to put a driveway over an abutters property without their agreement. The proposed driveway would be on someone else's property. The abutters need to have input.

Chair Saba read from RSA 641:41 paragraph 3 which states that the code will supersede any less stringent local regulation, it does not include a street from which the sole access to the lot is via a private easement or right of way unless such easement or right of way also meets the criteria of paragraphs 1a, 1b, 1c, 1d, and 1e. The applicant needs to show that the easement is for the applicants benefit to access the lot.

Attorney Reddington disagrees. He stated that the intention of the easement and the language and what the Housing Appeals Board order found, is that this is an access easement. It is clear from the plan, it is 30 feet wide, the size of a driveway; and it is in both deeds. It is on the applicant deed and the servient's deed referencing the plan.

Chair Saba responded that the HAB stated that it is only acting on 674:41 II for a determination, and remands it back to the Board solely for review on 674:41 II. In my opinion the HAB is not making a determination on the easement and read from the order.

Attorney Reddington informed Chair Saba that the Board had missed the opportunity to appeal the order. Chair Saba agreed and stated that he is simply following the court order which is to hear the applicant under 674:41 II.

Mr. Kinney feels that there is no other access. There was no right of access to Teddy Bear Lane. He stated that he was informed that Teddy Bear Lane was for the purpose of accessing a sawmill. Successive plans do not call it out as a separate lane.

Chair Saba stated that this was once all Kinney land. Teddy Bear Lane has always been a pathway and has always been on the tax maps. He feels that if the easement was for access, it should have been called a right of way or an access easement. Or language should be written and recorded stating what the easement is for.

Chair Saba asked if there were questions from the Board. There were none. Chair Saba opened the meeting to the public.

Ms. Sue Coppetta pointed out that Teddy Bear Lane is on plan 2379 and is shown as a private road.

Attorney Thomas Hildreth came before the Board to speak for the Moccias.

He stated first that when the Kinneys bought the property in 1993, they paid $8,000 and the deed stated that the lot was not approved for building. They have paid next to nothing in taxes since.

Attorney Hildreth agrees with the Chair that the HAB was sloppy in its description of the easement. They did not make a finding on the subject. There was no evidence for them to

make a decision. He also agrees that the HAB found that it is a lot, but it was not found to be a lot of record. Under Atkinson Zoning Ordinances, a lot of record is one that complies with zoning at the time it was shown on a plan. This lot did not comply with zoning in 1971. It had no frontage. It has always been a non-conforming lot. It has never conformed with any version of Atkinson Zoning Ordinances.

Chair Saba stated the HAB does address it in its order and read from Page 6, Paragraph 3 of the order which states in part that:

> "an examination of the plan clearly shows that this is a separate lot of record regardless of any designation contained thereon, and the Town never complained about the separate conveyance of the parcel in 1993 or took any action under RSA 673:16"

Attorney Hildreth replied that the HAB is dealing with the separate ownership issue and is looking at the statutory definition, not the Atkinson Zoning Ordinance definition. This term was defined in the ordinance in 1968 and is still defined there today. They did not say it is a lot of record, they stated that it is a lot. It does not comply and never complied with Atkinson Zoning. He maintains on behalf of the Moccias, that it is not a lot of record and should not get the benefit of treatment in Atkinson Zoning Ordinance to allow it to get treatment as a substandard lot. Also, 100 feet of frontage was required in 1971 and 200 feet of frontage is required now.

Chair Saba stated the applicant is stating that this is a lot, using 674:41.

Attorney Hildreth read footnote 9 which states that

> "The issue of whether this lot in the first instance required frontage was not raised by the parties and will not be decided by the Housing Appeals Board in the case before it".

This is the essence of the Moccias' argument and why the Moccias oppose granting relief.

It agrees with the third point raised by Vice Chair Connors. This would clearly be an invasion of privacy.

He passed around copies of 674:41 and discussed 674:41 II, the operative section of the statute here. His point is that just because a hearing is needed, it doesn't mean the request of relief must be granted. The Board is complying with the remand by holding the hearing.

There are four sentences in 674:41 II. Section 2 does not apply to this hearing. Section I has two predicates. The first discusses when the enforcement of the provisions of the statute as a whole would entail practical difficulty or unnecessary hardship. The Board could determine that this predicate does not exist because the enforcement of this statute is not what is causing the difficulty or hardship. The difficulty and hardship are the nonconforming lot. The applicant bought the lot knowing the hardship. He referred to NH Supreme Court 2001 case, *Hill v. New Hampshire,* where an applicant bought property knowing the limitations of the property. The Board could decide here that the first predicate does not exist, therefore the appeal is not proper.

The second part states that when the circumstances of the case do not require the proposed building to be related to existing or proposed street. The Zoning Board could decide that the

circumstances require that the proposed house be related to a street, for example by stating that it requires frontage.

Sentence 3 deals with the Zoning Board. There are two predicates. If the predicates exist, the Zoning Board may make a reasonable exception and grant the relief and shall have the power to authorize the exception.

The first predicate states that the issuance of the permit or erection of the building would not distort the official map or increase the difficulty of carrying out the master plan. The official map includes the 1971 subdivision plan. Referring to 674:38, it states that every approved platt is deemed to be an amendment to or an addition of the official map. The official plan states it approved Lots 9, 10 and 11. It does not approve the lot in question. It is there, but it is not a lot of record, it does have an easement. To grant this relief, the map would be distorted by giving an exception to the frontage and use it in a way that was not contemplated in 1971 or in 1993. It has never been a conforming lot. The Board does not have to authorize the exception. The hardship to the applicant is self-created and the applicant could apply for several variances.

The second predicate states that if the erection of the building or issuance of the permit will not cause hardship to future purchasers or undue financial impact on the municipality.

The last is 674:41 III which states that this section shall supersede any less stringent local ordinance, code or regulation. Atkinson code is more stringent and the Board could state that it is applying Atkinson regulations.

The Moccias object to the proposed access.

Attorney Hildreth stated he agreed that there is nothing relevant in the record regarding the easement. There is no hard finding. The Board is not bound by the choice of the Appeals Board. There is no adequate evidence. All the surrounding land is owned by the Kinneys. He believes the proposed lot could be accessed by other means. He also believes that there are other ways the applicant could achieve its access issues without burdening his client. He believes the Board has ample ground to deny the appeal.

Attorney Reddington disagrees. Attorney Hildreth stated the predicates correctly. However, regarding Predicate A, this is a lower standard than a common variance, only practical difficulty is needed. If the applicant cannot meet practical difficulty then it cannot obtain a variance. He agrees Predicate B is somewhat confusing.

For 674:41 III, he disagrees that the Town map would not be distorted. The lot was created by the Town and has been a taxable lot for 50 years.

Mr. Zilch stated that the master plan is about zoning. The proposed plan is for a residential home in a residential zone and does not see how it could distort the official map.

Chair Saba stated that the Board usually is in favor of the landowner rights. He asked if the benefit to the applicant outweighed the detriment to the public. In this case, the public are the two abutters. Those are his reservations. He agreed with everything except the criteria in 3

which clearly states that it cannot be accessed by an easement unless… It does say it is relieving the applicant of frontage issues…

Vice Chair Connors stated that this sounds similar to an eminent domain issue. The applicant wants to put a driveway on someone else's land. It would deny the abutters access to part of their land.

Chair Saba stated that if it were a passive easement, then he would be more comfortable in granting it. He is not comfortable with granting the easement under 674:41 because he does not believe it is met.

Attorney Reddington stated that Section III was added later by the Legislature due to a Supreme Court Case decided that an easement could be considered frontage. The Supreme Court wanted to define access to the lot and differentiate with access and frontage. 674:41 II allows the applicant to apply for relief. He believes the applicant has access, but not frontage which is the reason for the hearing.

Chair Saba informed him that under the Statute, the applicant is required to have frontage.

Attorney Reddington replied that 674:41 II states that the applicant can apply to the ZBA for relief from the frontage requirement under the statute. It is similar to a variance but has different criteria.

Chair Saba quoted 674:41 II "It does not include a street from which the sole access to a lot is via a private easement or right of way".

Attorney Reddington stated that it is further defined in Paragraph I. The statute is referring to frontage.

Chair Saba asked if there were more questions.

Vice Chair Connors stated that the applicant is proposing a driveway across the abutters land. In that case, that part of the abutters lot would for all intents and purposes belong to the applicant. Attorney Reddington stated that the abutter still owns the land in fee, but the applicant has the right to pass to and from over it to access Huckleberry Lane. Vice Chair Connors stated that the abutter should be able to say if the driveway is allowed.

Attorney Reddington stated that the abutters took ownership of their property with knowledge of the easement as it was referenced in the deed.

Chair Saba informed the Attorney that the 1993 warranty deed states that the lot is unbuildable.

Attorney Reddington requested to continue with the criteria. Chair Saba agreed.

1. Enforcement of the frontage requirement would "entail practical difficulty" for the applicant:

Discussion: As Attorney Reddington mentioned before, this is actually a lower standard or threshold than would be seen in a typical variance for unnecessary hardship. This lot came into existence via the subdivision plan approved by the Town of Atkinson. Besides lack of direct frontage, the lot is similar to the surrounding residential lots. If you look at the plan, it looks like a classic residential lot, it is on a cul de sac.

Chair Saba asked the size of the three approved lots. Attorney Reddington replied that they are 2 acre, 1 plus acre and 1 acre. Mr. Zilch stated that the applicants' lot is 1.7 acres and the lot that would be crossed over is 1.04 acres. The lot across the way is 2 acres. Attorney Reddington stated that besides the lack of direct frontage, the lot is similar to the surrounding lots which all access the Huckleberry Lane cul de sac via driveways. If this plan is allowed to continue, it will also access it the same way, via driveway. This lot is well suited for a single family residential dwelling and meets New Hampshire DES requirements with respect to lot loading, siting, septic system and dwelling. There was approval for a 4 bedroom septic but it was backed down to a 3 bedroom system. Without an exception for this frontage requirement, this lot will go undeveloped.

Vice Chair Connors suggested the applicant could sell the land to the abutters or simply buy the piece of land where the easement is.

Attorney Reddington stated that the applicant does not need to show hardship, just practical difficulty so it is a lower standard. Without doing a lot line adjustment or buying land, or changing the configuration of the lot, it would be unusable. In this instance the applicant has a good building lot, it has been approved for septic, a residential home can be fitted on it.

2. The circumstances of the case do not require the building, structure or part thereof to be related to existing or proposed streets:

The applicant meets this requirement because there is access via recorded easement shown in the subdivision plan and on both properties deeds. The purpose of the statute is to prevent remote buildings on class six or private roads that rely on such roads for access. However, this proposed access is via recorded easement and there is no question or concern as to access by emergency vehicles reaching the property because it will be identical to the surrounding lots.

Discussion: Vice Chair Connors stated that Attorney Reddington is stating that there is an access easement but there is no record that this is an access easement, and requested the attorney just call it an easement.

3. The erection of the building will not tend to distort the official map or increase the difficulty of the master plan:

Discussion: This has been discussed at length. It is a residential community; it has been part of the town for 50 years.

4. Erection of the building will not cause hardship to future purchasers or undue financial impact on the municipality :

As Attorney Reddington mentioned, his clients do not see an issue. It would be a good thing for future purchasers because there would be a house on a vacant lot. It would not be an undue impact on the municipality because they are turning a vacant lot into a residential lot. Chair Saba stated that Attorney Reddington did not state which future purchasers he was referring to, they could be the abutting homes.

Attorney Reddington believes the intention of the statute is the future purchasers of the subject parcel and it will be a benefit because there will be a home on the vacant lot. It will not cause undue financial impact on the municipality because it will increase the tax base. It is one home on a cul de sac, it is a good building lot. The benefit to the applicant far outweighs any detriment to the public because it will increase the tax base. Mr. Zilch mentioned that because the applicant is adding stormwater management devices to the site, it will mitigate any impact to the adjacent wetlands.

Chair Saba requested comments from the Board. Chair Saba asked who determines if it is just an easement or an access easement. The Attorney is stating it is an access easement and asked if the abutters agreed that it is an access easement.

Attorney Reddington stated that he believes it would be the burden of the abutters to establish that it is for something other than to pass over their land to access the street.

The Board agreed that there is an appeal period. Chair Saba informed Attorney Reddington that the decision of the Board must be unanimous. The Board can vote on the criteria separately or decide on them all in one vote.

Chair Saba believes that the burden or harm to the abutters far outweighs the benefit to the applicant. Because there is no clarity on access under 674:41. Vice Chair Connors agreed that there could be a hardship for future buyers because there could be a lawsuit about the easement.

Chair Saba stated that under 674:41, it specifically states that it does not include a street from which sole access to the lot is via private easement or right of way unless such easement or right of way also meets the requirements of Subparagraphs A, B, C, D and E. The easement is not constructed. E is definitely not met; D is not met. To that point, this section shall supersede any less stringent regulations…He would rather have the Court decide.

Chair Saba asked if anyone else had comments.

Member Wade stated that the Board had to consider the owners of the abutting land. Vice Chair Connors agreed that it is part of their job to protect the abutters.

Chair Saba stated that the Board must interpret what is in front of them to the best of their ability and to make a decision based on the general publics' well-being as well as the landowners rights.

Member Leondires stated that the Board does not know what the term easement means as it applies to this appeal.

The Board is not a court of law so they should not interpret it. He is not convinced that the easement grants a right to pass.

Chair Saba asked for all those who believe that the application meets the criteria for an exception under 674:41 to say aye. There were no ayes.

Chair Saba asked for all those who do not believe that the application meets the criteria for an exception under 674:41 to say aye. All four members of the Atkinson Zoning Board of Adjustment voted aye. Vote: 4/0/0.

Chair Saba requested a motion.

Member Leondires made a motion to deny the Application for Appeal of Administrative Decision submitted by Charles Cleary, Esq and Wadleigh, Starr & Peters, P.L.L.C. for Charles Kinney & Jeanine Kinney Living Trust, Charles Kinney Trustee related to a parcel of land at Map 17 Lot 62 in the RR2 Zone. This is a remand hearing directed by the Housing Appeals Board related to the denial of a Building Permit on a parcel of land without frontage. Member Wade seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 4/0/0.

3. **Application submitted by Bianca Picariello for Harry & Christine D'Souza for Special Exception/Home Business, specified in the Zoning Ordinance, Article IV, Section 450 to operate "Harmony Salon & Spa" at property located at 6 Linebrook Rd, Map 15 Lot 19, TR2 Zone.**

<u>Abutters</u>:

Thomas Geary and Jeanne Reyes, Harry and Cristine D'Souza (present), Erica Burnes and Jamie Eulie, Nathaniel and Brittany Weber, Timberlane Regional School District, Tyson Lias

The applicant came before the Board. Chair Saba stated that the request is for a Special Exception and if the applicant meets the criteria set forth in Atkinson regulations, then it will be approved.

The applicant explained that she is a licensed cosmetologist. There was a salon in the home before she purchased it. She will be living in the home. There will be no employees.

Chair Saba asked if there were any questions from the Board.

Chair Saba informed the applicant that all home occupations except those exempted under Section 450:5 shall be required to apply for a home application permit. The applicant replied that it was submitted.

Chair Saba asked the applicant to go through the criteria.

A permit for a home occupation shall be allowed in residential zones by special exception from the Board of Adjustment if the occupation complies with the following:

1. The proposed occupation shall be incidental and secondary to the use of the property as a dwelling and shall not consume more than 20% of the building space.

   It will use18-20%.

2. Unless exempted by Section 450:5A, no home occupation shall take place in a multifamily dwelling.

   This is a single family residence.

3. The occupation may be carried on by the occupants immediate family residing at the location and by one or more additional employees whose aggregate hours of work at the location do not exceed 80 hours per week. The foregoing limitations on the aggregate hours of work per week shall not apply to medical dental or veterinary home occupations.

   The applicant agreed.

4. There shall be no physical evidence of equipment of materials outside the dwelling.

   This is true.

5. Adequate off street parking areas must be provided. Parking areas must be in excess of those necessary for the home and residential purposes.

   There is adequate parking.

6. When necessary further restrictions shall be placed on the occupation in order to comply fully with Article 4 Section 400:2 of this ordinance.

   Chair Saba asked if there would be any obnoxious or crazy noises.

   The applicant replied no.

7. A permit to operate a home occupation shall be issued to the owner occupant only and is not transferrable to a subsequent owner.

   The applicant agreed.

8. A permit to operate a home occupation shall be issued to the owner occupant only and is transferable to a subsequent owner who will certify to the Zoning Board of Adjustment in writing that he or she will continue the home occupation on the same terms and conditions as the previous owner.

   The applicant agreed.

9. The applicant shall complete and sign a form that sets forth the nature of the home occupation.

   The form has been filed with the Town.

10. No home occupation shall result in heavy truck use.

    There will be no big deliveries.

11. Vehicles that are registered to a business or home occupation must comply.

    There are no vehicles registered to the business.

Chair Saba asked all members of the Board present if they believe that all criteria have been met. All agreed.

Vice Chair Connors made a motion to allow the Application submitted by Bianca Picariello for Harry & Christine D'Souza for Special Exception/Home Business, specified in the Zoning Ordinance, Article IV, Section 450 to operate "Harmony Salon & Spa" at property located at 6 Linebrook Rd, Map 15 Lot 19, TR2 Zone. Member Leondires seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 4/0/0.

4. Application for Variances submitted by Colleen Sullivan for Shawn O'Connell from Article VI Section 410:8b to allow a proposed deck 60' feet from the Wetland instead of the required 100 feet (40' variance) and from Article VI Section 400:4 to allow same proposed deck 11'3" from the sideline where 15' is required (3'9" variance) on property at 26 Lakeside Dr, Map 23 Lot 52 in the RR3 zone.

Abutters:

Town of Atkinson, John and Brittany DeVito, Sean O'Connell, Town of Atkinson, Big Island Pond Corporation, Dube Construction (present) and Sean O'Connell (present)

Discussion:

Chair Saba stated that the wetland for which the setback is requested is Big Island Pond. The State has approved it. The applicant also has State approval for the setback of 60 feet from the Lake. There are two requests. The side variance requests 11' 3" where 15 feet is required. The garage was done first. The second part is to take down the deteriorating ranch style home that was behind the garage. It is the same footprint, the location of the foundation is the same, but the applicant is proposing to add a deck. The applicant has a letter from the DeVitos, the abutters next door.

The applicant informed the Board that they have a letter from the DeVitos who abut the property. Member Leondires read the letter from the DeVitos into the record. The letter states that it will encroach the right side lot line setback by 4 feet on their side. The DeVitos state that they do not have a problem because it will not affect their lot in any way or diminish the property value.

Chair Saba asked about the State permit, it does not state how close to the water's edge they are allowing. Ms. Sullivan explained that the State only requires a 100 foot setback. There is no construction within 50 feet.

Chair Saba stated the Board would go through the requirements for the setback to the lake first. They are requesting a 40 foot variance.

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

It does not obstruct the line of sight to the lake for any abutters. The proposed deck is farther from the wetlands than other structures around the lake. It will enhance the value of the home, the look of the home and the neighborhood. The deck is in a secluded and not highly trafficked part of the lake.

Discussion: Chair Saba stated the applicant stated her case well.

Chair Saba asked if all members of the Board agreed that Criteria 1 had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

2. The spirit of the ordinance is observed because:

Shoreland approval for the deck has already been granted and is in this application. The ordinance is intended that structures will not be too close to the wetlands but the majority of decks in the surrounding area are much closer than the required setback.

Discussion: The Board agreed.

Chair Saba asked if all members of the Board agreed that Criteria 2 had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

3. Granting the variance would do substantial justice because:

None of the abutters are affected. It will allow the applicant to sit outside and enjoy the lake.

Discussion: none

Chair Saba asked if all members of the Board agreed that Criteria 3 had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

4. For the following reasons, the values of surrounding properties will not be diminished:

This will greatly improve the quality look of the existing property from the lake. It will increase the value of the house and thus increase the property values of the neighbors.

Discussion: none.

Chair Saba asked if all members of the Board agreed that Criteria 4 had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

5. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

5a. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of the provision to the property because:

The only affected abutters are the DeVitos located at 24 Lakeside Drive. The applicant has provided the attached letter regarding the side setback. The front setback would not affect them or the value of their property. The wetlands setback relief to the rear deck appears to be a reasonable request compared to many that are significantly closer to the water.

Discussion: Chair Saba stated the State has already granted the setback.

Chair Saba asked if all members of the Board agreed that Criteria 5a had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

5b. The proposed use is a reasonable one because:

It does not impact the public or abutters in a negative way and only adds value to the applicants home and properties both abutting and on the lake.

Discussion: none

Chair Saba asked if all members of the Board agreed that Criteria 5b had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

Member Leondires made a motion to approve Application for Variance submitted by Colleen Sullivan for Shawn O'Connell from Article Section 410:8b to allow a proposed deck 60' feet from the Wetland instead of the required 100 feet (40' variance)

All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0. Unanimous.

Chair Saba reminded the applicant that there is a 30 day period and any development during that period will be done at the applicant's risk.

The Board went through the criteria for the second part of the application.

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

It does not obstruct the line of sight to the lake for any abutters. The proposed deck is farther from the wetlands than other structures around the lake. It will enhance the value of the home, the look of the home and the neighborhood. The deck is in a secluded and not highly trafficked part of the lake.

Discussion: Chair Saba reiterated that it is encroaching into a side setback that would impact a neighbor but the neighbor has submitted a letter stating they are aware of it and have no issues. Most of the lots in the neighborhood have smaller setbacks, so he does not think it is more encroachment than could be expected. Vice Chair Connors stated that the only issue would be future purchasers, you shouldn't buy a lot if it has restrictions.

Chair Saba asked if all members of the Board agreed that Criteria 1 had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

2. The spirit of the ordinance is observed because:

Shoreland approval for the deck has already been granted and is in this application. The ordinance is intended that structures will not be too close to the wetlands but the majority of decks in the surrounding area are much closer than the required setback.

Discussion: The spirit of the ordinance in this case is congestion and separation between homes. A building permit will be needed. The fire inspector will inform the applicant if he has an issue.

Chair Saba asked if all members of the Board agreed that Criteria 2 had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

3. Granting the variance would do substantial justice because:

It will allow the applicant to sit outside and enjoy the lake.

Discussion: Chair Saba stated it is more than reasonable to want to sit outside by the lake.

Chair Saba asked if all members of the Board agreed that Criteria 3 had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

4. For the following reasons, the values of surrounding properties will not be diminished:

This will greatly improve the quality look of the existing property from the lake. It will increase the value of the house and thus increase the property values of the neighbors.

Discussion: Chair Saba did a drive by and he is relieved to know that the applicant is improving the front side.

Chair Saba asked if all members of the Board agreed that Criteria 4 had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

5. Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

    5a. No fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of the provision to the property because:

The only affected abutters are the DeVitos located at 24 Lakeside Drive. The applicant has provided the attached letter regarding the side setback. The front setback would not affect them or the value of their property negatively.

Discussion: Agree

Chair Saba asked if all members of the Board agreed that Criteria 5a had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

5b. The proposed use is a reasonable one because:

It does not impact the public or abutters in a negative way and only adds value to the applicants home and properties both abutting and on the lake.

Discussion: none.

Chair Saba asked if all members of the Board agreed that Criteria 5b had been met. All members of the Atkinson Zoning Board of Adjustment voted yes. Vote: 4/0/0.

Member Leondires made a motion to approve an application for variance from Article VI Section 400:4 to allow same proposed deck 11'3" from the sideline where 15' is required (3'9" variance) on property at 26 Lakeside Dr, Map 23 Lot 52 in the RR3 zone. Member Wade seconded the motion.

All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 4/0/0. Unanimous. The motion passes.

Chair Saba reminded the applicant that there is a 30 day appeal period.

Vice Chair Connors made a motion to close the public hearing. Member Leondires seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 4/0/0. Unanimous The motion passes.

Member Wade made a motion to adjourn. Vice Chair Connors seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 4/0/0. Unanimous. The motion passes.

The meeting was adjourned at 9:18 PM.