

ATKINSON ZONING BOARD OF ADJUSTMENT

21 Academy Avenue

Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall

Wednesday, June 14, 2023

Members

Glenn Saba, Chair (present)
Bob Connors, Vice Chair not present
Arthur Leondires (present)
Kevin Wade (present)
Guy Wetherbee (Alternate) (present)
Scott Sullivan (present)

Others Present

Karen Wemmelmann, Recorder
David J. Holigan
Joshua Manning, Lewis Builders
Noreen Mercier

Workshop 7:00 PM

Approval of Minutes:

Member Leondires made a motion to approve the minutes of the May 10, 2023 meeting as amended. The motion was seconded by Member Sullivan. All members of the Atkinson Zoning Board of Adjustment present voted in favor. Vote: 5/0/0. The vote is unanimous.

Correspondence: none

Call to Order: Chair Glenn Saba called the meeting to order at 7:00 PM.

Public Hearing – 7:30 P.M.

Chair Saba opened the public hearings at 7:30 PM, June 14, 2023 and introduced the Board members. There will be three public hearings. Member Leondires will be keeper of the record for all three hearings.

- 1. Application by David Holigan for a Special Exception under Article VII Section 700:1a to allow the extension, expansion, enlargement or alteration of a nonconforming use on property located at 13 Chase Island Rd, Map 22 Lot 13, in the RR3 Zone. The alteration will be to convert an existing two-story deck to an enclosed porch. No expansion of footprint.**

Abutters:

David J. Holigan (present), Richard and Christine C. DeAngelis, Baker Living Trust, Blake and Donna Baker TTEs, S Fuller, L. Hodgman, K. Hajjar, M. Foley, Dillela A. J. King, J. Foley, Robert J. and Jennifer D. Waselchuck, Chase Island Assoc., Big Island Pond Corporation, Town of Atkinson (Conservation)

Discussion: Mr. Holigan explained that they built the house 30 years ago and a two story deck was included in the plans and built. Presently, the upper story deck has direct access from the second story and the lower story deck has direct access from the garage. Now, the deck is falling into disrepair and they would like to replace it. They would like to add a roof to the second story and enclose the lower deck with an external entrance.

Chair Saba reviewed the plan asked if he had checked with shoreline protection and with the Conservation Commission. Mr. Holigan stated that he plans to file with shoreline protection. Chair Saba stated that he is not encroaching but he is changing to an enclosed space.

Mr. Holigan explained the changes to the deck to the Board. The lower deck will be enclosed. The upper deck will be replaced with a roof and the sliders will be removed and replaced with windows. There will be a sloped roof. It will be insulated and heat may be added later. Mr. Sullivan informed the Board that the proposed footprint is smaller than the present deck. Mr. Holigan explained that one section will be cut off and the stairway will be removed so the space will be smaller.

Mr. Sullivan asked about the proposed shed roof. Mr. Holigan explained that he wanted a view from the existing house. He wants to eliminate the upper deck and build a roof over the lower deck. In order to have slope in the roof, he raised the roof line and got rid of the sliders. The proposed structure will be slightly above the existing roof. The right side of the existing deck lines up with the proposed plans. Mr. Sullivan asked if there are plans to mitigate water flow because this will be a change from permeable to nonpermeable. Mr. Holigan stated he believes runoff will be the same because the current deck has a two inch slope over two feet. There is very little runoff from the existing deck. He proposes to install a trench with stone for runoff. The area is also well vegetated.

Chair Saba opened the hearing to the public. There was no comment.

Chair Saba asked the Board if there were more questions.

Member Sullivan asked if the sliding glass doors on the upper deck would be removed. Mr. Holigan said yes, he explained that they are old and will be replaced with windows.

Findings of Fact: Member Leondires is keeper of records.

- There is no encroachment on the wetland.
- Approval of the final plan is contingent upon a shoreline protection permit.
- The lower deck will be enclosed with a roof.
- The square footage will be reduced because a set of stairs will be eliminated.
- There will be no deck on the second story.
- The applicant is proposing stormwater mitigation by a trench with crushed stone.

Chair Saba requested to go through the criteria. He explained that this is a special exception and that if the applicant meets the standards, then it will be approved.

NONCONFORMING USES: 700:1 ANY NONCONFORMING USE, AS THAT TERM IS DEFINED IN ARTICLE III, MAY BE CONTINUED IN ITS PRESENT FORM EXCEPT AS PROVIDED HEREIN:

- a. No extension, expansion, enlargement, or alteration of a nonconforming use will be allowed without the granting of a Special Exception by the Board of Adjustment. This Special Exception shall be issued in the form of a special permit which shall expire within one (1) year unless acted upon by the permittee.

The Board has determined that the structure is being changed. The plans are in front of them.

- b. A nonconforming use of a building or premises which has been abandoned shall not thereafter be returned to such nonconforming use. When any nonconforming use of a structure is abandoned for a period in excess of one year, the structure shall not thereafter be used except in conformance with the regulations of the district in which it is located.

This does not apply.

- c. A nonconforming use may not be changed subsequently to another non-conforming use of the same premises.

This does not apply.

- d. Nothing in this ordinance shall prevent the reconstruction, repairing, rebuilding, and continued use of any nonconforming building or structure damaged by fire, collapse, explosion, or Acts of God, subsequent to the date of the ordinance, provided that the restoration activity commences within two (2) years of the damaged incident. Such restoration will not require a variance. (3/10/2009)

This does not apply.

- e. A Special Exception shall be granted by the Board of Adjustment provided the following conditions are met for the non-conforming use:

- 1) There is no diminution of the value of surrounding properties.

Discussion: All Atkinson Zoning Board members agree.

Vote: 5/0/0. All agree.

- 2) It would be of benefit to the public interest.

Discussion: Member Leondires stated that the current deck is in disrepair, not very attractive or safe. The proposed enclosed porch would look nicer and be safer. It would improve the value of surrounding properties. Removing it would be in the public interest. The other Board members agree.

Vote: 5/0/0. All agree.

- 3) It would result in substantial justice being done.

Discussion: There is no gain to the general public by denying this application.

Vote: 5/0/0. All agree.

- 4) It would comply with Sections WS300 of the Atkinson Water Supply and Sewage

Discussion: Chair Saba asked if a bathroom were being added. The applicant responded no. The current septic and well are adequate.

Vote: 5/0/0. All agree.

The four criteria are met.

Member Leondires made a motion to approve the Application by David Holigan for a Special Exception under Article VII Section 700:1a to allow the extension, expansion, enlargement or alteration of a nonconforming use on property located at 13 Chase Island Rd, Map 22 Lot 13, in the RR3 Zone. The alteration will be to convert an existing two-story deck to an enclosed porch. There will be no expansion of footprint. Approval is contingent upon discussions, shoreline protection approval, stormwater mitigation and that the proposed structure will be a one-story enclosed porch with a roof. Member Wade seconded the motion. Vote: 5/0/0. All in favor.

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. He also reminded the applicant to file for shoreline approval.

- 2. Application by Noreen Mercier for a Special Exception under Article VII Section 700:1a to allow the extension, expansion, enlargement or alteration of a nonconforming use on property located at 23 Hemlock Shore Rd, Map 22 Lot 76, in the RR3 Zone. Expansion and Alteration will be to convert an existing 2 car garage to a one-bedroom single family dwelling with deck.**

Abutters:

John J. and Michelle J. Bourque, Gill, Audrey F. Trust, Audrey F. Gill TTE, Robert P. and Sheila AB Schaefer, Raymond Fisher c/o Evelyn Fisher, Gary C. and Erika B. Escher, Noreen Mercier (present), Karen and Lacey Bluemel (present), Robert Anthony Kingsinger

Discussion:

Ms. Mercier purchased the property across the street from her present address. It has a two car garage. It is an accessory structure on a lot that does not have a primary structure. The present structure has a gambrel roof and an unfinished room upstairs. She wants to make the structure into a one bedroom house. There was an approved septic when she bought the property and she has installed it. There will be a deck added on one side. The applicant informed the Board that all setbacks have been met. Member Sullivan asked if there were a

survey plan. Chair Saba explained that the setbacks are not part of the application so it will not be discussed at this hearing.

Chair Saba reviewed the plan. It will be a single bedroom dwelling. He believes the current structure would need to be up to code. The applicant agreed that it needs plumbing and electrical. It has egress in the back but she wants to add a front door.

Chair Saba opened the hearing to the public.

Mr. Holigan speaking as a member of the Fire Department, informed the applicant that if the proposed dwelling were close to other dwellings in the area, fire preventive siding would need to be added.

Chair Saba explained that the applicant is not adding anything and the applicant will need to go through code enforcement for their permit. The applicant will need to contact the Fire Department before final approval. The footprint is not changing at all so this issue is not before the Board at tonight's hearing.

Chair Saba closed the hearing to the public and asked the Board for more discussion.

Member Sullivan asked if it were a free standing lot or if it were connected to anything else. The applicant informed him that it is not connected to anything. Chair Saba informed the Board that he did a drive by, it was permitted by the inspector almost 20 years ago. It meets the setbacks and is a nice sized lot compared to others in the area.

Chair Saba requested to go through the criteria. He explained that this is a special exception and that if the applicant meets the criteria, then it will be approved. The applicant will have to go to the Building Inspector, Code Enforcement and Life Safety. The proposed dwelling will also have to be brought up to present codes to have a dwelling.

Findings of fact: Member Leondires is keeper of records.

- There is an approved septic system installed.
- There is an existing structure.
- The size of the structure will not change.
- A one bedroom dwelling is proposed
- A well has been installed and is shown on the septic design.
- There is a street address number, Number 23.

SECTION 700 NONCONFORMING USES: 700:1 ANY NONCONFORMING USE, AS THAT TERM IS DEFINED IN ARTICLE III, MAY BE CONTINUED IN ITS PRESENT FORM EXCEPT AS PROVIDED HEREIN:

- a. No extension, expansion, enlargement, or alteration of a nonconforming use will be allowed without the granting of a Special Exception by the Board of Adjustment. This Special Exception shall be

issued in the form of a special permit which shall expire within one (1) year unless acted upon by the permittee.

The applicant is doing an alteration.

- b. A nonconforming use of a building or premises which has been abandoned shall not thereafter be returned to such nonconforming use. When any nonconforming use of a structure is abandoned for a period in excess of one year, the structure shall not thereafter be used except in conformance with the regulations of the district in which it is located.

This does not apply.

- c. A nonconforming use may not be changed subsequently to another non-conforming use of the same premises.

This does not apply.

- d. Nothing in this ordinance shall prevent the reconstruction, repairing, rebuilding, and continued use of any nonconforming building or structure damaged by fire, collapse, explosion, or Acts of God, subsequent to the date of the ordinance, provided that the restoration activity commences within two (2) years of the damaged incident. Such restoration will not require a variance. (3/10/2009)

This does not apply.

- e. A Special Exception shall be granted by the Board of Adjustment provided the following conditions are met for the non-conforming use:

- 1) There is no diminution of the value of surrounding properties.

Discussion: Chair Saba remarked that the proposed dwelling can only be better than the existing garage. It's improved by adding a septic and well and she will bring it to code. If the applicant needs a variance for setbacks due to the addition of the deck, she will have to appear before the Board again for a setback variance.

Vote: 5/0/0. All in favor.

- 2) It would be of benefit to the public interest.

Discussion: The proposed structure will be brought to code and meet life safety standards.

Vote: 5/0/0. All in favor.

- 3) It would result in substantial justice being done.

Discussion: There is no benefit to public to deny the request for special exception.

Vote: 5/0/0. All in favor.

- 4) It would comply with Sections WS300 of the Atkinson Water Supply and Sewage Disposal Regulations

Discussion: A well has been installed and tested. A septic for a 2 bedroom dwelling has been installed and the applicant is proposing a one bedroom dwelling.

Vote: 5/0/0. All in favor.

Member Leondires made a motion to approve the Application by Noreen Mercier for a Special Exception under Article VII Section 700:1a to allow the extension, expansion, enlargement or alteration of a nonconforming use on property located at 23 Hemlock Shore Rd, Map 22 Lot 76, in the RR3 Zone. Expansion and Alteration will be to convert an existing 2 car garage to a one-bedroom single family dwelling with deck. Approval Contingent upon the applicant returning to the Zoning Board of Adjustment if the addition of the deck does not meet setback standards. Member Wade seconded the motion. Vote: 5/0/0. All in favor. The motion passes.

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.

- 3. Application by Lewis Builders for Christine Morse Revocable Trust for a Special Exception under Article VII Section 700:1a to allow the extension, expansion, enlargement or alteration of a nonconforming use on property located at 54 Sawyer Ave, Map 8 Lot 3-1, in the TR2 Zone. The expansion will be 30' x 30' addition to existing office building to be used as office space.**

Abutters:

C. L. Morse Revocable Family Trust (present), Robert J. Jackson, Dennis H. Hacker, Donna M. Campbell, Leo G. Prokopovich, Larry R. and Karen A. Wood, Town of Atkinson, Michael P. and Beth A. Huberdeau, Lewis B. Louise 2015 Trust, Lewis, Betty Louise TTE, Morse (Lewis) Christine Rev. Trust, Lewis-Morse, Christine TTE (present), David P. and Melissa J. Bowman, Hammond, Ellen E. Rev Trust, Ellen E. Hammond TTE, Priscilla A. Carver, Michael A. Maillette and Debra L. Steed, William and Patricia Bennett, Woodworth, D & N Realty Trust, Woodworth, Donald and Nancy, Bruce and Jean Desmarais, Gregory and Marcia Roy, Moore, Stephen and Meredith Trust, Stephen and Meredith Tebbetts, William Galinsky, Mark L. LaGasse, Sunset Kreidermacher Rev. Trust, Carol Kreidermacher TTEE, John J. Halchak and Marian P. Chaffe, Flaherty Claire W. 2017 Rev. Trust, Claire Flaherty TTEE

Discussion:

Mr. Joshua Manning, Lewis Builders came before the Board to present the application. The applicant is proposing a 30 by 30 foot addition to the existing office building. The existing office building was built in 1987 and received a special exception to replace an older office building. Then in 2004 a special exception and variance was granted to add an addition on the north side of the office. Mr. Manning explained that a special exception is needed because the

applicant is proposing a commercial use in a residential zone. The proposed addition is no closer to the lot line than the existing office building. The new corner for the proposed addition is 54 feet from the lot line and the setback requirement is 50 feet. It is not encroaching the setback any further. There is an existing State approved septic system. It is for 500 gallons a day and the existing office only uses 140 gallons a day based on metered water usage. There is reserve capacity in the system to accommodate the proposed addition based on State design flows required. The addition will match the character and style of the current building. A cape style building is proposed, residential in nature with a gable that will tie into the existing roof of the current building. The application is also subject to Planning Board approval.

Chair Saba requested questions from the Board.

Member Sullivan asked about the side setbacks, residential compared to commercial. Mr. Manning believes that 40 feet of setback is required for residential use. The proposed additional office space will provide more room for existing employees. There is already adequate parking. The building is sprinklered and the system will be continued into the proposed addition. There is an existing buffer of arborvitae running along the lot line and a few older trees that will be maintained. No bathrooms will be added but some existing bathrooms will be reconfigured.

Chair Saba opened the hearing to the public. There was no comment.

Chair Saba asked the Board members if they had any more questions.

Chair Saba asked if it were single story. Mr. Manning replied that it would be cape-style, so it would be a story and one half. The proposed addition ties into an existing storage area in the attic and would be a continuation. There is a knee wall on the lower level to fit the existing grade so there would be storage space in the basement as well. The plans show that in the elevations.

Mr. Sullivan asked if the use would be for administration. Mr. Manning replied that it would be office space only, there would be no production. It is a continuation of the existing building.

Findings of Fact: Member Leondires gave the findings of fact.

- This is an expansion of nonconforming use in a residential area.
- Existing water and septic will be utilized.
- The proposed addition meets all setbacks.
- It maintains the existing building style, it will be a cape with one and one half stories.
- The upstairs will be an attic.
- The basement will be storage.
- There is adequate capacity for the existing septic.
- There will be adequate parking.
- The building is presently sprinklered and will be extended to the addition.

Chair Saba requested to go through the criteria. He explained that this is a special exception and that if the applicant meets the criteria, the exception will be approved.

NONCONFORMING USES: 700:1 ANY NONCONFORMING USE, AS THAT TERM IS DEFINED IN ARTICLE III, MAY BE CONTINUED IN ITS PRESENT FORM EXCEPT AS PROVIDED HEREIN:

- a. No extension, expansion, enlargement, or alteration of a nonconforming use will be allowed without the granting of a Special Exception by the Board of Adjustment. This Special Exception shall be issued in the form of a special permit which shall expire within one (1) year unless acted upon by the permittee.

The applicant is expanding and enlarging.

- b. A nonconforming use may not be changed subsequently to another non-conforming use of the same premises.

This does not apply.

- c. Nothing in this ordinance shall prevent the reconstruction, repairing, rebuilding, and continued use of any nonconforming building or structure damaged by fire, collapse, explosion, or Acts of God, subsequent to the date of the ordinance, provided that the restoration activity commences within two (2) years of the damaged incident. Such restoration will not require a variance. (3/10/2009)

This does not apply.

- d. Nothing in this ordinance shall prevent the reconstruction, repairing, rebuilding, and continued use of any nonconforming building or structure damaged by fire, collapse, explosion, or Acts of God, subsequent to the date of the ordinance, provided that the restoration activity commences within two (2) years of the damaged incident. Such restoration will not require a variance. (3/10/2009)

This does not apply.

- e. A Special Exception shall be granted by the Board of Adjustment provided the following conditions are met for the non-conforming use:
 - 1) There is no diminution of the value of surrounding properties.

Discussion: Mr. Manning explained that everything will be brought up to modern codes in that portion of the construction. It is new construction.

Vote: 5/0/0. All in favor.

- 2) It would be of benefit to the public interest.

Discussion: They are improving a business and the property on it. They will have to go to the Planning Board for site plan approval.

Vote: 5/0/0. All in favor.

- 3) It would result in substantial justice being done.

Discussion: There would be no gain to the general public if the application is denied.

Vote: 5/0/0. All in favor.

- 4) It would comply with Sections WS300 of the Atkinson Water Supply and Sewage Disposal Regulations

There is an existing septic system that is adequate and currently functioning and there is an off-site water supply.

Vote: 5/0/0. All in favor.

Member Leondires made a motion to approve the Application by Lewis Builders for Christine Morse Revocable Trust for a Special Exception under Article VII Section 700:1a to allow the extension, expansion, enlargement or alteration of a nonconforming use on property located at 54 Sawyer Ave, Map 8 Lot 3-1, in the TR2 Zone. The expansion will be a 30' x 30' addition to existing office building to be used as office space. The proposed addition will consist of a main floor and unfinished attic space. Member Wade seconded the motion. Vote: 5/0/0. All in favor.

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.

Chair Saba stated that this concludes the public hearings.

Other Business:

Request for Extension: Charlie Zilch, SEC & Assoc on behalf of Paul Schena is asking for a 2 year extension of Frontage Variance granted June 9, 2021 for property located on Maple Ave at Map 14 Lot 37.

Chair Saba explained that relief was granted for frontage at the June 9, 2021 hearing so the property could be marketed. The new owner has been before the Board on May 10, 2023. The project is ongoing. Chair Saba would like to extend the relief for one year rather than the two years requested. The deadline to request a continuance is Monday. If the continuance is approved it would extend one year from the expiration date. Once a permit is pulled, the extension ends. There is also case law that if the applicant is working towards permitting, then it could be counted as being worked on. He would like to grant the extension for one year and if the applicant needs more time, they can request another extension.

The Board agreed that if the applicant needs more time, it can ask for another extension and the Board would have to address it then.

Member Leondires made a motion to approve the Request for Extension presented by Charlie Zilch, SEC & Assoc on behalf of Paul Schena for an additional year. Frontage Variance granted June 9, 2021 for property located on Maple Ave at Map 14 Lot 37. Seconded by Member Wade. Vote: 5/0/0. All in favor.

Motion for Rehearing: Patrick Lorman, Esq, Amann Burnett Attorneys at law on behalf of Matt & Paula Fetty asking for a rehearing on the removal of the condition on the June 9, 2021 Frontage Variance for property located on Maple Ave at Map 14 Lot 37.

This motion is on behalf of Matt & Paula Fetty, 78 Maple Avenue. This is one of two identical motions for rehearing. Chair Saba added the motion to the record.

Motion for Rehearing: Patrick Lorman, Esq, Amann Burnett Attorneys at law on behalf of Scott Foley and Meghan Duffy asking for a rehearing on the removal of the condition on the June 9, 2021 Frontage Variance for property located on Maple Ave at Map 14 Lot 37.

This motion is for residents at 76 Maple Avenue and is the second of two identical motions.

Chair Saba submitted the motion into the record. He explained that the abutters are requesting a rehearing based on the fact that the Board removed the condition which the Board imposed on June 9, 2021 when the Board granted a variance for frontage. On that date, the request was for relief of frontage. The hearing was continued from the month prior. The Board did not get the information requested from the applicant's representative that was pertinent to what the Board requested. The Board determined that the frontage variance was not the issue. It was granted. The issue was a condition to use one access as opposed to another. The decision was based on the information available to them at the time. The application by the new owner had all required information. The applicant surveyed the site, did wetlands delineation and located the wetlands on the plan. The proposed location of the dwelling makes more sense with the size of the parcel. The Board looked at that information. It has nothing to do with the frontage variance. The frontage variance was approved by motion of Vice Chair Connors at the June 9, 2021 hearing. The issue is a condition placed on that variance regarding the access point. The condition was imposed because of the information in front of the Board. There was more detailed information at the hearing May 10, 2023 on the application by the new owner.

Chair Saba requested that the Board review the minutes from the June 9, 2021 meeting.

Chair Saba summarized that the applicant's representative stated that an engineer was hired only for the septic design, which was not done at the time. They did not locate the actual frontage and they did not do a frontage survey. They also did not survey the wetlands. Vice Chair Connors pointed out to the Board that the exact frontage was not given to them and the applicant is requesting a frontage variance. There was concern about the abutters' well. The concern was noted. It was noted that the wetlands were not delineated on the plan given at the May 12, 2021 hearing. The applicants' representative came back on June 9, 2021 with a registered plan that showed 52.6 feet relief for the frontage variance was needed. The

wetlands again were not delineated on the plan. The Board made a point of informing the representative that the wetlands were not delineated, that there was a southerly access point and the new plan does not show that the wetlands encompass that area. The Board did not know the wetlands existed by a plan. The Board informed the applicant that, because the house was directly behind the abutters house, if the driveway went through the southern access point, it would make more sense. It would have less impact to the abutters and it would be much shorter. Vice Chair Connors asked why a shorter driveway would not be put in. The representative did not have an answer. The Board kept asking the applicants' representative why a southern access was not used during the entire June 9, 2021 hearing.

Chair Saba continued to review the minutes of the June 9, 2021 hearing and summarize as follows:

- The plan submitted at that hearing did not show the south side to have any wetlands.
- The Board saw an impact to the abutters and an alternative access on the south side and believed the access point could be changed.
- If there is reason why it could not be, then the applicant should have brought in an engineer. The southern access for that proposed plan would have been half the distance for a driveway. The septic is on the other side.
- Rearrange the house.
- They did not need wetlands setback relief.

It just made sense at the time. Chair Saba stated that he agreed with Vice Chair Connors that based on the information in front of the Board at the June 9, 2021 hearing, an entrance on the south side made more sense. Chair Saba stated that the applicant's representative informed the Board at the May 9, 2021 that the southern access is wet. However the plan submitted by the applicants' representative did not show the southern access was wet and the applicant did not pay for a wetlands survey, so the Board could not verify her testimony.

After the Board concluded, Ms. Duffy informed them other abutters would not be happy with access on the southern side but she and other abutters would be. He pointed out that the Board attempted to assist the former applicant regarding access to the property based on the location of the proposed dwelling and the information in front of the Board. Then, the applicant agreed to use the southerly access. The Board went through the criteria and the variance was granted. The frontage variance was granted, there was no question on that, but there was a condition to use the southerly access.

This appeal is saying that one, the Board erred through procedure because it did not go through criteria. Chair Saba stated that the Board determined that the criteria did not apply because the Board was discussing a condition put on an approval. The original application request was for a variance for frontage relief and that is where the criteria would apply, not the location of the actual driveway. It had nothing to do with the granting of a variance for frontage relief. It was a condition. After looking at new evidence, a plan with wetland delineation, the Board determined that the southern access is extremely wet and the the construction of a driveway in the space would compromise the wetlands. Also, the house has been relocated. So, using the same arguments as the June 9, 2021 hearing for the new application, because a

driveway with the northern access is shorter and makes more sense, the Board will change the conditions. The Board took out the condition given at the June 9, 2021 hearing and imposed additional ones. A driveway could be put in the northern access with the following conditions as proposed by the applicant. Drainage mitigation must be added, fencing must be added, a culvert must be added, and the driveway must be tilted so to drain away from the nearby well. The new applicant agreed to these conditions. The condition for northern access on the present application has nothing to do with the frontage variance, it has to do with how the applicant is accessing the property.

Discussion: Member Wade read a statement into the record.

"I was present at the original frontage variance and public hearing on June 9, 2021. I can say that the inclusion of the condition to use the southern access point was not integral to granting the relief. There was no dependency on the location of the driveway as to granting the relief. The purpose of imposing the condition was based on the proposed location of the house and as a compromise with the parties that seemed reasonable at the time due to minimal information provided by the applicant.

I was also present at the May 10, 2023 public hearing. The Board's discussions were thorough and the public hearing allowed both abutters as well as others to express their concerns regarding the driveway location. The Board made its decision based on the new house location plan, using the same reasoning as the prior decision, that the north access is more direct, that there is an engineered driveway, mitigation plan and full wetlands mapping of the entire property. Now that it is known and documented the extent of the wetlands at the southern access point it would go against the spirit of the ordinance to fill wetlands in order to build a driveway after the Board determined that these wetlands are significant and worth protection."

Chair Saba thanked Member Wade and stated that at the May 10, 2023 hearing relief for a wetlands setback on the structure was denied. To allow a driveway on the southern side and filling wetlands is inconsistent with the spirit of the ordinance and is also inconsistent with the Boards' reason for denying the second part of the application for a wetlands variance for the proposed dwelling. Member Leondires agrees, it would be contradictory. The variance was denied on the dwelling because of the wetlands.

Chair Saba stated that the Board determined that the wetlands is high grade with significant value based on the information from the Conservation Commission and denied the applicant minimal relief for setback. It does not make sense to tell them to fill part of the wetland in to build a driveway through it when there is an alternate way. Member Leondires added that using the southern access would make the driveway 200 feet longer based on the new plan and location of the proposed dwelling.

Chair Saba explained that based on information from the Conservation Commission this is a significant wetland which is important to protect. Even if the location of the house did not change, but the applicant showed them the delineation of the wetland, the Board would still not approve filling the wetland in. The wetland connects 2 prime wetlands and there is open land of 100 contiguous acres which is wildlife habitat.

The Board removed the condition because:

- The location of the proposed dwelling for this application is different so the driveway is much more direct on the north side.
- The wetlands were delineated and it was determined that the impact to the wetlands would be too great with southern access.
- There is not enough room for a driveway with access on the southern side. A fire lane would have to be built.
- There would be too much excavation and fill involved.
- The proposed driveway would have been on the lot line of the southerly neighbor.

Chair Saba stated that based on the motion, he does not see any new information. He does not believe there were errors of procedure at the hearing of June 9, 2021.

Alternate Wetherbee stated that it reads to him that the abutters would like to have the driveway on the southern side due to impact to the well and other issues. The abutters have agreed that they would like to take that condition away. It would be a community decision. Now, the Board has new information. The abutters are asking for a rehearing on their motion.

Chair Saba stated that to grant a rehearing, or there is new evidence the Board must find that it erred in procedure and they should grant a rehearing, there is new evidence that was not available at the time that would change the decision or there must be a compelling reason to grant the rehearing. This is stated in the Zoning Ordinances. In his opinion a rehearing would only reverse the removal of the condition that the Board imposed and took off. Based on what was just discussed, it does not make sense to use the southern access point. Just like it didn't make sense to use the northern access with the application of June 9, 2021 based on what was presented to them. Alternate Wetherbee said a rehearing would give the abutters the opportunity to hear why the condition would not be lifted.

Chair Saba stated that the issues have already been discussed in detail. Member Wade's statement summarizes it. The relief for the variance was going to be granted and had nothing to do with the location of the driveway. Based on the information the Board had at the time, the southern access point would be better. It appeased the concerns of the neighbors. It is a more direct route. That is why the Board imposed the conditions for a northern access with mitigation to the abutters at the May 10, 2023 hearing.

Now, the Board has an application before them that has a complete plan with proper engineering, the topographies were taken and there is wetland delineation. The proposed house is set way back and will not be directly behind the abutter's house. Now, the driveway on the north side is more direct. Mitigation is being proposed to protect the abutters. Regarding the well, there is a history with this property. The Board does not have the authority to restrict a landowners use. The Board can only put conditions on the use. According to testimony, the well was once on the applicants property. There should be a well radius affidavit or release on the well. It is a civil matter.

Member Sullivan stated that if the June 9, 2021 application were before the Board again, in light of new information, it is possible that there would be a condition to put the driveway on the north side.

Chair Saba agreed that if the Board had the information at the June 9, 2021 hearing that it has now, they would not have allowed a driveway with southern access. The wetlands were not delineated on the plan presented at that hearing.

Findings of Fact:

- Initial variance on June 9, 2021 for approximately 50 feet of frontage relief with condition that driveway access is at the south.
- Conditions based on location of the house, length of driveway, wetlands, etc. on the plan provided to the Board at the June 9, 2021 hearing.
- Conditions were removed at the May 10, 2023 hearing based on new plans, location of house, length of driveway and new information on wetlands at the southern access point.
- The applicant has offered water runoff mitigation, privacy fencing and landscaping for a driveway with a northern access point.
- The application at the May 10, 2023 hearing failed for wetlands setback. It would be inconsistent to put a driveway through wetlands on the southern side of the property.
- The Board does not believe it erred in procedure.
- There is no compelling reason for a rehearing after review and discussion.

Chair Saba requested a motion.

Member Sullivan made a Motion to deny Motion for Rehearing: Patrick Lorman, Esq, Amann Burnett Attorneys at law on behalf of Matt & Paula Fetty asking for a rehearing on the removal of the condition on the June 9, 2021 Frontage Variance for property located on Maple Ave at Map 14 Lot 37. The motion was seconded by Member Wade. Vote: 5/0/0. All in favor.

Member Sullivan made a motion to deny the Motion for Rehearing: Patrick Lorman, Esq, Amann Burnett Attorneys at law on behalf of Scott Foley and Meghan Duffy asking for a rehearing on the removal of the condition on the June 9, 2021 Frontage Variance for property located on Maple Ave at Map 14 Lot 37. Seconded by Member Wade. Vote: 5/0/0. All in favor.

Member Leondires made a motion to close the public hearing. Member Sullivan seconded the motion Vote: 5/0/0. All in favor.

Member Sullivan made a motion to adjourn. Member Leondires seconded the motion Vote: 5/0/0. All in favor.

Adjournment:

The meeting was adjourned at 8:53 PM. The next meeting of the Atkinson Zoning Board of Adjustment is scheduled for July 12, 2023