

ATKINSON ZONING BOARD OF ADJUSTMENT

21 Academy Avenue

Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall

Wednesday, February 8, 2023

Members Present

Glenn Saba, Chair

Bob Connors, Vice Chair

Arthur Leondires

Kevin Wade

Scott Sullivan

Others Present

Karen Wemmelmann, Recorder

Sue Coppeta, ZBA Administrator

Tim Lavelle, Lavelle Associates

William P. Reddington, Atty., Wadleigh, Starr
and Peters, PLLC

Sabrina Beavins, Atty., McLane Middleton

Charles Zilch, SEC Associates

Workshop 7:00 PM

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

Approval of Minutes:

Member Leondires made a motion to approve the minutes of the January 11, 2023 meeting as amended. The motion was seconded by Member Wade. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 5/0/0. The vote is unanimous.

Correspondence: none

Rules of Procedure

Vice Chair Connors made a motion to approve the Zoning Board of Adjustment ("ZBA") Rules of Procedure as amended. Member Wade seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 5/0/0.

Vice Chair Connors made an amended motion to approve the ZBA Rules of Procedure as further amended. Member Wade seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 5/0/0.

Public Hearing – 7:30 P.M.

Chair Saba opened the public hearings at 7:30 PM, February 8, 2023 and introduced the Board.

1. Application for Variance from Article IV Section 410:8 b submitted by Kevin and Bettyann Finnegan to allow construction of a detached garage (50'x30') 55.8' from the wetland (44.2' variance) where 100' is required on property located at 7 Noyes Lane, Map 5 Lot 61 in the TR2 Zone. (**Cont'd from 1/11/23**)

Abutters:

Felix and Toni L. Blouin, Justin C. and Roasly V. Ulrich, Mikel and Helena Papoutsy, Robert and Stacy Preston, James N. and Sandra J. Mittica, Michael N. and Beth M. Perras, Kevin and Bettyann Finnegan

Discussion:

There was a question on the location of the ridgeline on the plan shown at the January 11, 2023 meeting. Mr. Lavelle revised the plan to correctly show where the ridgeline is proposed. Mr. Lavelle is proposing to mitigate the stormwater by installing gutters and drains to make a mini leach field. The proposed leach field would be nine plastic chambers. The detail for the plastic chambers is on the left hand side of the plan. The detail shows the calculations for the runoff.

First, Mr. Lavelle calculated the roof area. Then, five inches of rain in twenty-four hours, a 25 year storm event is calculated. The gallons and so on are calculated and that gives the required area for the leach field. The required area would be 98 square feet, with the nine chambers, 102 square feet would be needed. The drip line trench calculations would be different.

Chair Saba asked if that were the capacity or if that is what the ground can take. Mr. Lavelle replied that it is what the ground is supposed to take, by the rules. It would not be filling the chambers to capacity. The system is supposed to be able to handle 102 gallons a day, every day.

Chair Saba asked about a test pit. Mr. Lavelle explained that since the last hearing the lot was perk tested. There is a 36 inch water table and the perk rate is 4 minutes an inch in that area. It is really good soil. There is sand around the chambers.

There were no more questions from the Board.

Chair Saba stated that he read a letter from the Conservation Commission at the previous hearing. There is another letter from the Conservation Commission dated February 7, 2023 confirming that a stamp from a wetlands scientist is needed. The delineation is accurate. The Conservation Commission agreed to the limit of clearing.

Chair Saba asked if the land would be staked and flagged. Mr. Lavelle replied that the wetlands will be staked and flagged when the garage is staked. He also stated that the current plan is different than the one in the file. There is just a line at the end of the wetlands on the old plan. It was corrected on this plan to accurately show where the wetlands go into the 24 inch culvert. The wetlands were reflagged today.

Everything that was needed on the plan has been added including the notes regarding no further removal of vegetation so there will be a good vegetative buffer.

Vice Chair Connors stated that the Conservation Commission agreed to everything but requested a note section on the plan. Mr. Lavelle stated that a note section was not added. He did not see the email until late this afternoon.

Chair Saba read the letter dated February 7, 2023 from the Conservation Commission to the Zoning Board of Adjustment into the record.

This letter is a follow up to my previous letter of January 2, 2023 concerning the above referenced application in which the Conservation Commission made a recommendation that the Zoning Board of Adjustment grant conditional approval to this wetlands setback variance application. During your hearing on January 11, 2023, there were some questions that came up about our recommending conditions for this approval and the hearing was continued to February 8, 2023 to allow us to address your concerns. The purpose of this letter is to clarify the conditions that we recommend your Board place on your approval of the variance.

About a week ago the Commission received a revised plan from Mr. Lavelle, which is attached. This revised plan was reviewed at the Conservation Commission regular meeting on January 26, 2023 and we came to a consensus on the following recommendations:

One of our technical concerns was about Mr. Lavelle's wetlands delineations since his authority to flag wetlands is limited to cases in which he is designing a septic. This is not the case here. The revised plan shows that certified wetlands scientist Bruce Gilday will be confirming the delineation and sign the plan so this matter has been resolved and is no longer a concern.

As far as stormwater management for the roof runoff, we are not stormwater management engineers but we are asking for some provisions for capturing the runoff during a 100 year storm.

We are quite pleased with the limit of clearing shown on the revised plan that is intended to establish a permanent vegetative buffer. We would like to recommend that the ZBA make this a condition of their granting wetlands setback variance. We would like to recommend that the ZBA require the following note in the notes section of the plan:

The intent of the limit of clearing as shown on this plan is to create a permanent buffer of undisturbed natural vegetation between the disturbed area and the wetland and in perpetuity to run with the land. Since this was a condition of granting the wetlands setback variance needed for construction of this structure. Any further clearing of natural vegetation in this area except for the removal of individual trees that pose a hazard to people shall require relief from the Zoning Board of Adjustment.

Mr. Lavelle remarked that adding a statement of dangerous trees protects his client.

Chair Saba opened the hearing to the public. There were no comments. Chair Saba asked the ZBA for more questions. There were none.

Member Leondires read the findings of fact.

Findings of Fact:

- Continuance from January 11, 2023
- New plan submitted
- Proposed gutters and drainage (no drip lines)

- Perk rate per leach field is four minutes per inch.
- The water table is 36 inches
- This is a 25 year storm rate
- A follow letter from the Atkinson Conservation Commission requiring a note on the plan.

Chair Saba requested to go through the criteria.

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

The proposal would not interfere with public travel or wetlands in any way. It would have no negative effect from abutting properties. It would not interfere with light, air flow, views or drainage. In addition, the nearest point of the structure will be 55 feet away from the nearest poorly drained soil as delineated.

Discussion:

Chair Saba remarked that the applicant went in front of the Conservation Commission regarding a setback to wetlands and the Conservation Commission has given their consent. With the mitigation proposed, the wetlands will be protected. Vice Chair Connors agreed.

Vote: 5/0/0. Unanimous. Criteria 1 is approved.

2. The spirit of the ordinance is observed because:

Due to the topography of the lot and the placement of the garage, it is a flat area, there will not be as much water running off, it will be the least amount of impact on tree removal and soil disturbance. That, with the roof drainage and so forth, the wetlands are still protected and the spirit of the ordinance is observed.

Discussion:

Vice Chair Connors stated that the applicant has a buffer to protect the wetlands and they have a drainage system to make sure the water goes in the right place.

Chair Saba agreed that there is a buffer and it will be staked.

Vote: 5/0/0. Unanimous. Criteria 2 is approved.

3. Granting the variance would do substantial justice because:

It would allow for the reasonable use of the property; it will not be injurious to the neighborhood or detrimental to the public welfare. It will allow for a reasonable upgrade of the property.

Discussion:

Chair Saba stated that he does not see any gain to the general welfare by denying this because of the care that is being taken to protect the wetland.

Vote: 5/0/0. Unanimous. Criteria 3 is approved.

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

The proposed garage will not impact views, airflow, sunlight or drainage to surrounding properties. The proposed garage will increase the value of this property thereby increasing the value of the neighboring properties when comps are done.

Discussion:

Chair Saba stated he did a drive by and it is very spacious and does not impact any surrounding properties. Improvement to a property will always increase the value in his opinion.

Vote: 5/0/0. Unanimous. Criteria 4 is approved.

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:

Due to the topography of the lot, this is the least intrusive site for both the abutters and for the general environment at the proposed site submitted. Wetlands and waters will be shielded and protected from increased runoff.

Discussion:

The wetlands on the property make it unique such that if the proposed garage were pushed towards the back, it would be nearer to the wetland.

Mr. Lavelle stated that the other side of the property is very steep so if the garage were put there, it would be more of an affect. Vice Chair Connors stated the purpose is to protect the wetlands and the Conservation Commission has said that the wetlands are okay.

Vote: 5/0/0. Unanimous. Criteria 5a is approved.

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

It will allow applicants to store vehicles out of the view of the neighbors, out of the elements and as well, if any vehicles are leaking oil, it will be contained in the garage rather than if vehicles were parked in the driveway.

Discussion:

It has always been the policy of the Conservation Commission to have vehicles enclosed and contained.

Vote: 5/0/0. Unanimous. Criteria 5b is approved.

Vice Chair Connors made a motion to approve the Application for Variance from Article IV Section 410:8b submitted by Kevin and Bettyann Finnegan to allow construction of a detached garage (50'x30') 55.8' from the wetland (44.2' variance) where 100' is required on property located at 7 Noyes Lane, Map 5 Lot 61 in the TR2 Zone with the conditions that: the plan is updated with Note 4 as requested by the Conservation Commission; construction of a leach field to be inspected by a local inspector; and that the buffer line be staked by a surveyor. Member Sullivan seconded the motion. All in favor. Vote: 5/0/0. 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.

2. 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 the denial of an Application for Building Permit on property located at Map 17 Lot 62 in the RR2 Zone. Article V, Section 530b.

Additionally, this same parcel has also submitted an application for Frontage Variance to allow construction of a single family dwelling on a parcel without frontage where 200' is required (200' variance) - on property located at Map 17 Lot 62 in the RR2 Zone. Article 5 Section 530b.

Abutters:

Centerview Hollow Land, Katherine and Lonnie Goodwin (present), Kinney, Charles & Jeannine, TTE, Charles and Jeannine Living Trust, Huoth Pech, Mackin Barry A. Rev. Trust, Mackin Diane Rev. Trust, Barry and Diane Mackin TTEs,(present) Wadleigh Starr & Petters PLLC, (Attorney Reddington) (present) SEC & Associates, Inc.(Charles Zilch)(present) Paul and Leann Moccia (present)

Discussion:

Chair Saba read a timeline of the application.

"Off Huckleberry Map 17 Lot 62 Timeline:

- 12/9/20 Application for Appeal to ZBA for Administrative Decision, cont'd to 1/13/21
- 12/23/20 Application of Building Permit submit to Building Inspector
- 12/29/20 Application for Permit to Build denied for 5 reasons including:
#3 – "This parcel does not comply with Atkinson Zoning Article IV Section 530 for the RR2 Zone. This parcel does not meet minimum lot size (2 acres), 200' Frontage, 30' side setback minimum."
#4 - "This parcel does not comply with NH RSA 674:41 which requires frontage for Building lots."
- 1/13/21 Amended Application for Appeal of Administrative Decision – seeking exception for NH RSA 674.:41. This appeal was DENIED by Atkinson Zoning Board
- 3/10/21 Motion for Rehearing Appeal of Administrative Decision DENIED by Atkinson Zoning Board. The ZBA denial was based on their conclusion that the parcel was not a "lot" and therefore they could not consider it for the exception sought under RSA 674:41.
- 4/7/21 Application for Appeal submit to the NH Housing Appeals Board which was assigned Case No: ZBA-2021-07.
- 6/23/21 NH HAB Hearing
- 8/4/21 NH HAB Decision Order. This decision stated the parcel was a lot of record and Remanded the matter back to the Atkinson ZBA.
- 10/13/21 Amended Application for Appeal of Administrative Decision seeking exception for NH RSA 674.:41. This appeal was DENIED by Atkinson Zoning Board. The ZBA stated "that The purpose of the easement was not clearly documented and it would not be Appropriate for the Atkinson Zoning Board to make any clarification. Additionally, the Board discussed and concluded that burden or harm to the public far outweighs the Benefit to the applicant. The Board determined that the applicant did NOT satisfy their criteria for an exception under RSA 674:41."
- 12/8/21 Motion for Rehearing of the 10/13/21 Appeal of Administrative Decision. The Atkinson ZBA discussed each of the 6 Grounds for Rehearing submitted. At the conclusion of these discussion the Board DENIED the motion for rehearing stating their deliberation and process had not been unlawful or unreasonable.
- 1/7/22 Application for Appeal submit to NH Housing Appeals Board which was assigned Case No: ZBA-2022-02
- 5/3/22 NH HAB Hearing
- 7/18/22 NH HAB Decision Order -
1. Reverses the Atkinson ZBA denial of request for exception under RSA 674:41
2. "Approves the Applicant's requests for findings and rulings which are consistent with This Order; the balance are DENIED."

- 8/16/22 The Town of Atkinson submit a Motion for Rehearing to the NH HAB which resulted in an Interim Order dated 8/19/22 which suspended the 7/18/22 HAB Order
- 10/4/22 The NH HAB Decision Order – Granted in Part and Denied in Part the Town’s Motion for Rehearing and unsuspended and reinstated it’s 7/18/22 Order with the clarifications as Noted in the 10/4/22 Order. **Specifically “The Board (HAB) takes no position on if, or How, the Town’s Zoning Ordinance or other development regulations otherwise apply to The subject property.”**
- 11/20/22 Application of Building Permit submit to Building Inspector
- 12/7/22 Application for Permit to Build – DENIED –
1. This parcel does not comply with Atkinson Zoning Article IV Section 530b, Requiring 200’ frontage minimum. The applicant needs to obtain a variance from the Atkinson Zoning Board of Adjustment
 2. The application, as submitted, did not include a full set of construction plans.
- 1/6/23 Application to Zoning Board received (within the 30 day appeal window of denial). Application is for February 8, 2023 Public Hearing- **Legal Notice** was posted:
- 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 the denial of an Application for Building Permit on property located at Map 17 Lot 62 in the RR2 Zone.**
- Additionally this same parcel has also submitted an application for Frontage Variance to allow construction a single family dwelling on a parcel without frontage where 200’ is required (200’ variance) - on property located at Map 17 Lot 62 in the RR2 Zone.**
- 2/7/23 Email request from Attorney Reddington to the ZBA Chair “to present the variance application first, then address the appeal of administrative decision, if necessary.”

Chair Saba stated that this summarizes the history and it is a long one. To summarize the summary, this is a lot of record and we can’t not call it that.

Attorney Reddington appeared before the ZBA for Charles Kinney. He stated he appreciated the background.

He stated that as Chair Saba mentioned, the applicant applied recently for a building permit to construct a single family home. The applicant got a denial from the Building Inspector stating that they needed a variance, or that they needed to comply with a 200 foot requirement for the RR2 zone. In response, the applicant filed two applications, one, a variance and two, an appeal from an administrative decision.

We believe that under either one, they will receive the relief that they need to construct a single family home. It is his understanding that it is the Town’s preference that the applicant apply for a variance so they would like to pursue that one first. For further clarification, the property is off Huckleberry Lane in Atkinson. It is in the RR2 or Rural Residential 2 Zone. It is identified

as Tax Map 17, Lot 62. The property is over an acre in size. It has access to Huckleberry Lane, which is a lane ending in a cul de sac, and it has access to that by a 30 foot wide easement. The property was plotted on a Planning Board approved subdivision plan in 1971 which was recorded in the Registry of Deeds as Plan D 2379. This is in the application packet the attorney submitted. As this Board is aware, the applicant is looking for a building permit and the goal is to construct a single family residence in an already established subdivision on a cul de sac.

The applicant has access via an easement as recorded in the Deed and which is shown in subdivision plan D 2379, but the issue is the applicant does not have direct frontage on Huckleberry Lane which is why the applicant is seeking a variance.

Attorney Reddington requested Charles Zilch, SEC Associates ("SEC") discuss the house and the property.

Mr. Zilch appeared before the ZBA. He explained that SEC got involved with the application about two years ago. In the initial review of the lot it was determined that it does not have frontage and that access was through the 30 foot easement. SEC Associates recommended to the client that they look at the capability of the lot to support a single family home with septic and well. The first task was to survey the property. It is 1.17 acres, there are no encroachments, there are no issues with boundary, it is a clean boundary.

The next task was to determine if there were a buildable envelope on a 1.17 acre lot. Bruce Gilday was contracted by the property owner and flagged the wetlands. As can be seen on the plan, there is a wetland complex on the westerly side of the property. After adding the 100 foot required setback or buffer from wetlands, there is still a sizable portion for a buildable envelope on the property.

The third step was to do a site topography and a test pit to see if there is a viable area for a septic. As can be seen, the soils come up from the wetland about 8-12 feet to where the buildable area is, good sandy, well drained soils where the test pit was done, so there is a viable area for a septic.

Then, once the boundary, wetlands, topography and soils were determined, a septic system design was put together. The initial design was not this plan, it was a plan for a much larger home which would have needed relief from the wetlands setbacks. The applicant decided not to bring that plan before the ZBA and to propose something that would fit in the buildable envelope. The applicant decided on an 1800 square foot home with attached garage and a septic system in front. It is a four bedroom setup with the driveway coming in through the access easement. That plan is State approved. The lot loading is on the plan and exceeds the State lot loading requirements for soils for a 4 bedroom home. Because the applicant acknowledges that it is a somewhat smaller lot, some infiltration was incorporated with the design to address some of the stormwater as with a smaller lot, there will be additional stormwater flow. With this design, they have the option to put in either drywells or infiltration trenches around the house to address stormwater issues.

Chair Saba asked if any of the infiltration systems were shown on the plan. Mr. Zilch explained that there is a note on the plan and the second sheet shows the different methods where a dry well to capture the roof drainage could be done, either a precast dry well or smaller chambers. The soils are supportive of a dry well. A precast drywell could be installed or chambers as shown on the plan. Drip line trenches could also be done. A rain garden can also be done. Mr. Zilch prefers direct infiltration around the home.

Chair Saba asked about setbacks. Mr. Zilch stated that the side setback on the plan is 15 feet, the setback allowed for existing lots of record. Chair Saba asked about the rear setback and if it is 15 feet and the front is 30. Mr. Zilch responded that he is aware that the applicant does not have frontage, but there is 30 feet on the area that faces Huckleberry Lane.

Chair Saba asked if there were questions from the ZBA members.

Vice Chair Connors stated that it is an undersized lot and asked if the applicant would ask for relief from the 2 acre requirement. Chair Saba stated that it is a lot of record, the ZBA has been through it, and there is no discussing it. The ZBA had an opportunity to dispute it.

Vice Chair Connors confirmed that there is no frontage and asked if the applicant is proposing to pave the driveway and take control of the easement solely for the purpose of the new lot. Chair Saba stated that Vice Chair Connors had a good point. He informed Vice Chair Connors that the Housing Appeals Board ("HAB") also ruled on that easement, and the ZBA never disputed that. It was taken out of the Atkinson Zoning Board of Adjustment hands and called a civil matter by the HAB.

Vice Chair Connors returned to his original concerns and stated it is a cumulative effect and reiterated that the HAB has advised that the frontage requirement be waived and the easement be treated as something the ZBA does not believe it is. Now, the ZBA is going to allow somebody to pave over an easement and make it their driveway for their sole purpose. Again, it is a cumulative effect. Now, anyone who wants to build on a lot and carve up their lot with no frontage, can use this ruling. If they have an easement, they can slap a driveway down and take control over someone else's piece of property.

Mr. Zilch stated that the applicant is not proposing that the driveway be paved, they are not saying it will not be paved, but they are not requesting it. Vice Chair Connors asked if there will be any lamps or any electric to light up the driveway or anything else. Mr. Zilch replied that this is just a septic design and the applicant is just showing an access and a driveway. No plan has been created as to what the driveway will be. It can be discussed.

Attorney Reddington asked if lighting were a concern. Vice Chair Connors stated that his concern is that it is someone's piece of property that the easement is on. The applicant is taking control of that lot and that piece of property. As an example, there was an easement for the golf course at his old house. They could not do anything on that easement without his permission. They could not take control of the easement because it was his property.

Attorney Reddington again informed Vice Chair Connors that the HAB addressed the issue

and decided it was a private matter between the property owner and the neighbor to dispute, if there is a dispute. It is not a consideration for the ZBA at this time. What has been shown is that there is a recorded easement, it is an easement of record, it is on a Planning Board approved plan, recorded at the Registry. It is on the applicant's deed and the abutters' deed. It is a matter of record, both property owners are aware of it. It provides access to applicant's lot. It can be decided later if it can be paved, gravel or if there is nothing there and the applicant will comply with whatever Town requirements there are for driveways. The easement is not an issue at this point.

Mr. Zilch stated that he spoke to Mr. Kinney who reiterated that he has been in and out of the property several times and has been using that access easement since he purchased the property.

Vice Chair Connors stated that is understandable, for example, the golf course was allowed to come and go through the easement on his property with his as they pleased, but could not take control without his permission. He believes the easement on his property was originally for utilities, not to provide full time access.

Member Leondires asked if the applicant proposed to get utilities to the house through the easement and Mr. Zilch stated yes.

Chair Saba stopped the discussion and stated that the ZBA made that fight and the Town had the opportunity to make the fight, but the ZBA were the only ones making that fight, there was no legal support, possibly because there was no legal standing. The HAB has ruled on the easement, overruling the ZBA, and stated that it is an access easement. Member Sullivan agreed that it is not a matter for the Atkinson ZBA.

Chair Saba understands what Vice Chair Connors is saying, but he has had experience with easements and believes that no easement is the same. The ZBA agreed that at present the easement is a civil issue.

Chair Saba requested that the ZBA look at the lot as a lot of record; discuss whether it is suitable; and if it meets the character of the neighborhood. That is what the ZBA needs to address at this point in time.

Vice Chair Connors stated he wanted to clarify the findings of fact and asked if relief for setbacks is needed. Chair Saba confirmed that no relief for setbacks is needed. Vice Chair Connors asked if relief for wetlands is needed and if the proposed structure is 100 feet from the wetlands. Chair Saba replied that he is correct. Vice Chair Connors repeated that the only current issue is the frontage and asked if that is the only variance required. Attorney Reddington agreed and stated that since it is a lot of record and meets the setbacks as shown on the plan, the applicant is seeking a frontage variance. Member Sullivan asked to confirm that a 100% frontage variance or 200 feet is being sought. Chair Saba informed him that 100% relief for frontage had been given in other cases.

Chair Saba stated he is opening the hearing to the public and asked if there was anyone who

would like to speak for the application. No one spoke. Chair Saba asked if there was anyone who would like to speak against the application.

Attorney Sabrina Beavins spoke representing Mr. and Mrs. Moccia, the abutters with the easement. She stated that to address the easement matter, and the comments that have been made, she agrees it is a civil matter. The Moccias were not parties to the HAB matter in any way.

Chair Saba stopped Attorney Beavins and asked Ms. Coppeta if the Town gave the abutters the opportunity to join the Town case at the Housing Appeals Board. Ms. Coppeta replied that she was not aware of that happening. Attorney Reddington replied that anyone with an interest in the case can intervene.

Attorney Beavins stated that she did not think that the easement was an issue in that matter, such that her client was given notice that the HAB would be ruling on the scope of that easement which they ultimately included in their order, which they would have briefed and opposed any ruling as to the scope, including access, including rights to pave, including anything that they applicant intends to do with the easement. So far as that order is concerned, the applicant does not think it has any precedent as to going forward; whether it is in this plan; as to any future planning; and as to any development of the property. It will be an issue going forward in any forum in which it is addressed.

She agrees to most of the factors, this is a lot, they are building a single family home in a residential neighborhood, and it matches the homes in the neighborhood. What is not being addressed is the history of the purchase of the lot by the applicant. In 1971 it, was part of the subdivision as a remnant property. It was not developed as a lot; it was not given...

Chair Saba stopped Attorney Beavins again and informed her that the application has gone on for over two years. He read the summary. The ZBA has done all it could to deny it and asked where representation was when they needed the information. The application has gone to the New Hampshire Housing Appeals Board three times and the HAB overruled the ZBA three times. The ZBA has heard the application and denied it. There was a public hearing. There was an attorney at one time, then there was no representation. Now, Attorney Beavins is here making a case of the history of the lot. This is not the time or place.

Attorney Beavins replied that she is talking about the history as it is relevant to the variance application. She thinks that the abutters and the ZBA would want to hear it.

Chair Saba stopped Attorney Beavins and asked if she was against the development of the lot.

Attorney Beavins agreed that she is against the variance. These are the matters she is addressing when she talks about the history of the lot. One of the criteria is that this lot is special and as a result of that they should be given a variance because there is a hardship to the applicant as a result of this land. She stated that there is no hardship. The applicant bought the lot knowing at the time it was purchased. Since 1971 it has never met the setback criteria.

Chair Saba asked Attorney Beavins if she knows what NH RSA 674 Section 41:2 is. He informed the attorney that the applicant has spent a lot of resources to get the Housing Appeals Board to say yes. This RSA applies to this lot and that frontage has been waived. As a municipality, they still must come before the Atkinson Board of Adjustment as a formality. Now Attorney Beavins is coming before the ZBA trying to make a case that would have been helpful and pertinent two years ago.

Vice Chair Connors stated that the ZBA made those points.

Chair Saba asked her if she had read the file and the records. She stated that she has read the file, the plan and the orders. What the Housing Appeals Board said is that they have no jurisdiction over the zoning ordinance. They cannot make the ZBA waive the zoning ordinance requirements which is why the variance is required. If the frontage requirements did not apply, the applicant would not have to be here, he would not have had to file for a variance.

Chair Saba stated that is why there is a Zoning Board. Speaking of hardship, there is a lot of record, they have access to it, they meet all setbacks, the character is the same as the neighborhood, the lot size is as big as every other lot in the neighborhood. Chair Saba asked how the variance can be denied. Attorney Beavins stated that they do not have the frontage under the zoning ordinance.

Chair Saba replied that they achieved it under NH RSA 674 Section 41:2. Vice Chair Connors informed Attorney Beavins that this ordinance is what the ZBA has to apply to this particular variance.

Attorney Beavins stated that if that is the case and the ZBA's interpretation, she disagrees. She still believes that if you can apply the zoning ordinance, then the frontage requirements are not being met. It has never met building requirements, but if that is the ZBA interpretation, she is pleased to disagree.

Chair Saba stated that he agrees with her, he made the biggest argument against it and was told to move on. He wishes the attorney had come before the ZBA two years ago. It will open the Town up to litigation if they do not comply with the HAB decision.

Attorney Beavins stated that the additional points for Mr. and Mrs. Moccia is that the applicant purchased the lot that was a non-buildable lot. The applicant has known that since they purchased it. It has always been a non-buildable lot; the applicant bought it at a discount.

Chair Saba stated that the ZBA made that argument in court and lost. Because it is on a subdivision plan, the HAB ruled that it is on recorded plan, in a subdivision, and therefore it is a lot of record. The ZBA fought the fight and lost it. The Town attorney made that argument at the HAB and lost.

Attorney Beavins stated she has nothing further. Chair Saba has nothing either. Chair Saba asked if anyone else would like to speak.

Ms. Kathy Goodwin asked why she had no information about the applicant going to the HAB. Ms. Coppeta stated that does not have the answer. Ms. Goodwin has been following the case. When she bought her property from Mr. Kinney in 2016, Mr. Kinney made it clear to her that he knew it was a non-buildable lot and that Gordon Brown gave to him. She has come to the hearings, but was not informed of the HAB hearings at all except from Mr. Kinney.

Chair Saba asked Attorney Reddington if he is required to notify the parties when he goes before the HAB. Attorney Reddington replied no, it is between the applicant and the town. He informed Chair Saba that the information is available to the public and that anyone can go on the HAB website.

Chair Saba stated he saw a flaw. He spoke to the Zoning Administrator when the case went to the HAB to see if the first attorney for the abutters was on board. He is aware that she reached out, but the abutters were not interested. The abutters were notified of all the hearings before the Zoning Board. Ms. Goodwin stated again that she was never notified of an appeal to the HAB. Chair Saba stated that they were not notified because it is a court case. Ms. Goodwin stated that as an abutter she did not expect it to go further.

Chair Saba stated that it is a procedure of law. If the appeal was denied by the ZBA, the next step for the applicant was an appeal to the court.

The Board and the abutters further discussed why they were not notified of the appeal to the HAB and the decision.

Chair Saba that anyone who requests a variance and is denied can appeal and come before the ZBA again. If they are denied again, their next appeal is to the court. The abutters would have to follow through to see if the application went to the court. It is public notice. When it is something affecting a party, and it is denied, they need to check.

Ms. Moccia objected stating that she cannot understand why the abutters were not notified of the appeals to the court.

Chair Saba stated the next course of action would be to fight for the easement, but as far as the ZBA is concerned, the court has ruled on the easement.

Chair Saba suggested that although he is not a lawyer and should not be giving legal advice, if the applicant gets their approval, there is a 30 day appeal and the abutter can put an injunction on the use of the easement. Attorney Beavins stated he was doing good.

Mr. Mackin spoke asking whether he can skirt the regulations and subdivide his two acre lot.

Vice Chair Connors explained the process. A permit will be requested. There will be an inspection and if a variance is required, the applicant can request a hearing before the ZBA. If the ZBA denies the variance, it can be appealed. If the variance is denied again, the applicant can go to the Housing Appeals Board. It will hear any appeal from an applicant that they feel

is unlawful or unjust. There is one court above that.

Chair Saba stated Mr. Mackin wants to subdivide a two acre lot. In this case, in 1971 a subdivision plan was drawn and this lot was on the plan. The ZBA agreed it was a lot but stated it was listed as non-buildable. In Chair Saba's experience he has had excess land and it was made non-buildable. Now, excess land has to be attached to another, approved lot.

This is not the case. It is a unique case. Chair Saba explained that the applicant went to the HAB and the HAB found that this is a lot of record. The Town Attorney should have argued at that time that it might be a lot, but it is not a lot of record according to Atkinson regulations. The Town did not do that. Now it is a lot of record according to the HAB. The Town missed the appeal. The other issue the HAB found is the ZBA is looking at the easement incorrectly. The HAB ruled that the ZBA has no right to call this easement anything other than an access easement. Again, the Town should have appealed it, but it is not the Town's fight to appeal so Chair Saba can understand that. The abutters can still fight it. As far as everything else goes, the ZBA's hands are tied. That is his opinion. There still has been no vote and the presentation is not finished.

Chair Saba stated that the lot was labeled non-buildable in speculation.

Vice Chair Connors informed the audience that every point brought up by Attorney Beavins at this hearing has been brought up by the ZBA at prior hearings. Everything is in the minutes and denied. Chair Saba stated that the court reviewed the ZBA record and remanded it.

The abutters stated they were not notified of the HAB hearing.

Vice Chair Connors stated he understands the frustration of the abutters. The ZBA must represent the Town. His concern is setting a precedent for allowing zero frontage.

Attorney Beavins asked about Teddy Bear Lane. Ms. Mackin explained that Teddy Bear Lane is a road that cuts across the Kinney garage on 117 Main Street. It is a dirt lane that goes through the property to Diane Kinney's property.

Chair Saba requested to return to the applicant. Attorney Reddington stated that he would like to go through the variance criteria. Chair Saba asked if there were anything else Attorney Reddington would like to add to the record. The Board will go through the criteria one at a time and vote on it as they move along.

Attorney Reddington stated that as far as he is concerned, the whole point of a variance is to seek relief for unique and special lots where there is hardship. This is a very unique lot. He has a tax map in front of him and there is not a lot on a cul de sac that does not have some frontage. The access is by an easement. There are plenty of cul de sacs in Town where there is reduced frontage, some even 20 or 25 feet, which is typical for cul de sacs because all the lots are coming together at a point so you will have reduced frontage. You could argue that frontage is more important on a linear road where there a subsequent lots one after another. But it is not the same on a cul de sac where all the lots come together, there will always be

reduced frontage.

As for a cumulative effect, this is a very unique lot. This is not seen very often, so there will not be a rush of applicants without frontage because the Planning Board would not allow it because it is not allowed under Zoning Regulations. This is a lot of record. It is one of the more unique lots in the Town of Atkinson. There are lots with zero frontage that have houses on them in the Town of Atkinson. It is not unheard of; it is just very unique.

Regarding notice to the abutters, before the Housing Appeals Board was established, appeals would go to the Superior Court and in that process, the abutters were never notified. It was between the person appealing the decision and the Town. Any interested party could intervene, and abutters frequently intervened. There was no notice requirement to any abutters. The HAB has the same authority as the Superior Court, that is in their statute. There is no requirement in any of their by-laws or the statute for notice to abutters.

Attorney Reddington started to go through the criteria for the variance.

Chair Saba interrupted and stated that the ZBA is not ready to go through the criteria. The findings of fact must be read, but before that, he would like to ask the abutters if there is anything the ZBA can do to assist the abutters. The ZBA does have the power to do conditional approval, regarding the driveway, if that is a concern. Attorney Beavins stated that the abutters are not at that point.

Chair Saba stated that if there are no other questions, he requested that the findings of fact be read.

Member Sullivan asked if this is a lot with no frontage. There is a very careful drawing which connects to a cul de sac which is street access. And there is discussion about an easement or a right of way. The ZBA does not know what that is. He asked if there was continuous use or access or if there is a gap in this right of way, and if there is no street access.

Chair Saba stated that if the ZBA grants the variance, the applicant still needs to go full front. Meanwhile, the abutters action would be to dispute the right to use that easement. The first thing the abutters would need to do is file an injunction with the court so that easement cannot be developed, if the court deems it.

The stance of the ZBA is that the HAB ruled on it. Chair Saba believes that the HAB had no right to rule on it. The HAB ruled on it with no facts, they had no research, but they ruled on it. The Town did not dispute it. The thirty days went by and the Town did not appeal. Now it is a civil matter.

The ZBA tried to do the right thing, but at this point in time, the landowners need to step up and do what they find necessary to do.

Vice Chair Connors stated that the variance can be approved but there still has to be access to the lot. So if somehow, this easement is found to be unlawful, then the applicant cannot use it.

Member Leondires stated that as far as the ZBA is concerned, the HAB has approved the easement. The other ZBA members agreed.

Ms. Goodwin asked if the applicant were looking for frontage or just the easement and no frontage. Chair Saba informed her that there are locations in Atkinson that have no frontage. Member Leondires informed her that the easement is before the Board.

Attorney Reddington stated that the easement is a matter of record. It is on the applicant's deed, it is on the abutters deed, it is on the Planning Board approved plan, it is recorded, it is established. The applicant is simply trying to build a single family home. The applicant is not looking for frontage, they do not have frontage.

Chair Saba requested to close the public hearing.

Vice Chair Connors made a motion to close the public hearing. The motion was seconded by Member Wade. Vote: 5/0/0. Unanimous.

Findings of Fact:

- The Building permit was denied for several reasons which started the process
- The Board ruled that it is not a lot of record
- NH HAB ruled that it is a lot of record.
- The HAB reversed the Atkinson ZBA
- The HAB recognized the easement
- It is a civil matter
- The applicant is looking for 100% variance for 200 feet of frontage
- Has all setbacks
- It is a lot of record
- There is no requirement for the Court to notify abutters

Chair Saba asked if any Board members wanted to add to the findings of fact.

Chair Saba requested to go through the criteria. Attorney Reddington responded that he submitted a narrative and will go through the essential points.

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

The issues are whether or not it will alter the essential character of the neighborhood or if it will threaten the public health, safety and welfare. It has been well documented, that this will not alter the essential character of the neighborhood. It is already an established subdivision. The applicant is adding one single family home that will fit in nicely in this cul de sac. As far as threatening the public health, safety and welfare, the property is setback 30 feet from Huckleberry Lane. Access will be by a recorded easement. In all practicality, it will look just like the other homes there. There will be a driveway whether it is gravel or paved has not been determined. It will look like all the other homes. It will have the same essential access. There

is no concern for emergency vehicles or congestion or overcrowding. There is sufficient buffering between the properties. The setbacks are met, there are no issues there. The residence will be serviced by an on-site well and septic system. No municipal resources will be drained. Again, it will not alter the character of the neighborhood or threaten the public health safety or welfare.

Discussion:

Vice Chair Connors stated that Attorney Reddington's note is a little misleading, it says that the property is a lot of record under the Atkinson Zoning Ordinance and is therefore exempt from 22-22 zoning requirements. It is exempt from the lot size. It is not exempt from setbacks and the frontage requirements. Just because it is a lot of record and the Appeal Board defined it as a lot of record, it does not mean all zoning requirements for the lot should be waived.

Attorney Reddington stated that two separate applications were submitted. He believes the note is from the appeal of the administrative decision. Chair Saba stated that two hearings were scheduled. One was for the need for a variance and the variance hearing is in front of the ZBA.

Vice Chair Connors stated that if this is going to the record, the note states that the lot is exempt from 22-22 zoning requirements.

Attorney Reddington informed Vice Chair Connors that this is an argument he is making in his application for an appeal from an administrative decision. He thought the ZBA was proceeding with the variance request first and then, if the ZBA will permit him, depending on the outcome of the variance appeal, the appeal of the administrative decision can be addressed, but he would prefer to continue it for 31 days. With respect to the variance application, the note can be disregarded.

Chair Saba said that the bottom line for granting the variance is if it alters the general character of the neighborhood. It is a single family home that meets setbacks; that has a septic design; that has a well with a radius that does not encroach anything; the lot size is the same as all the other lots; the front bigger in its area; and does it alter the character of the neighborhood.

Member Sullivan stated that some of the other lots on the cul de sac have a lot of open frontage but it could be wooded and what is open. It is in the neck of the funnel going through there and he believes that it is consistent with the rest of the neighborhood.

Vice Chair Connors agreed.

Vote: 5/0/0. Unanimous. Criteria 1 is approved.

2. The spirit of the ordinance is observed because:

In reviewing whether or not the spirit of the ordinance is observed, one of the guiding factors is whether or not it will violate the basic objectives of the zoning ordinance. This lot clearly does

not and what the applicant is looking for clearly does not. The property is located on a cul de sac. The proposed home will be setback from Huckleberry Lane which will provide adequate spacing from the abutting residences. The applicant has heard that the applicant meets the applicable setbacks. The property is the same size if not larger than several of the surrounding properties so there is no concern of overcrowding or congestion. The property and the surrounding parcels are sufficiently wooded. The proposed dwelling will be setback which will preserve the rural charm of the Town of Atkinson. The property will be accessed via a short driveway which will be identical to surrounding properties and will be no burden on emergency vehicles or a public nuisance. As he highlighted before about cul de sacs, it is very common that there is reduced frontage on cul de sacs. There are many cul de sacs in the Town of Atkinson, where you see 25 feet or a little bit more. Here there is 30 feet of access which is more than some of the other lots. Atkinson allows for reduced frontage. In cluster developments they require 25 feet of frontage. Therefore, the spirit of the ordinance is observed.

Discussion:

Chair Saba reviewed the following: the spirit of the ordinance and overcrowding for frontage. The lot exists, it's always been there. The house sets back. It has all the setbacks. The spirit of the ordinance is met. It does not alter the characteristics.

Vice Chair Connors stated that the Board cannot argue that the spirit of the ordinance is met if there is access. It has an easement, that is the access.

There was no more discussion.

Vote: 5/0/0. Criteria 2 is approved. Unanimous.

3. Granting the variance would do substantial justice because:

One of the factors is whether there will be a gain to the public by denying the variance that would not be outweighed by the loss to the applicant. There will be a substantial loss to the applicant by denying this. The applicant wants to build a single family home. It is consistent with the areas present use. Without this variance, the lot will remain vacant, it will remain unused. There are very few options for this, it is in the middle of a residential neighborhood. Clearcutting could be done but that would be an inappropriate use for a residential neighborhood. A single family home is ideal for this lot. By denying this variance, the lot will remain vacant and unproductive. Substantial justice would be done by granting it. He does not see a gain to the public by denying the variance. He understands the cumulative effect that Vice Chair Connors has brought up but he thinks this is a unique lot and a unique situation and he does not think the Board will see this again.

Chair Saba stated his argument against it was overruled by the HAB. Looking at it from another perspective, it is difficult to deny granting substantial justice and grant all the others, it doesn't make sense.

Vice Chair Connors stated that the lot has been vacant since 1971 so no one is losing anything. It's been sitting around with nothing happening so it is kind of hard to make an argument that somebody is losing anything.

Member Leondires stated that the Board does not have anything to stand on.

Vice Chair Connors brought up that it was not a buildable lot, the ZBA brought up all the arguments before to no avail.

Member Sullivan stated that whoever purchased the lot came into it knowing it would be a bit of a road to hoe. Chair Saba stated that it was 52 years ago.

Vote: 5/0/0. Criteria 3 is approved. Unanimous.

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

The applicant is looking to build a single family home on this property. One single family home on a well-established, built out subdivision is not going to adversely affect the property values of the surrounding neighborhood. It is in an existing subdivision which is substantially complete. Right now the property is vacant. By granting the variance it will enable suitable use of the property. It is an absolute win for the Town because the tax base will be increased. The value of this lot will increase substantially and if anything it will increase the property values.

Discussion:

Vice Chair Connors stated the ZBA will always agree that upgrading or building a house will enhance and increase values. Chair Saba agreed that new construction will always enhance and increase values.

Member Sullivan stated that the property most affected is the one with the easement over the property so he cannot say that will add value. Chair Saba stated that the easement has always existed. Unfortunately, the court has taken that issue out of the ZBA's hands. The issue is the use of the easement. Vice Chair Connors stated that the abutters can make an argument that the use of the easement will reduce the value of their property.

Vote: 4/1/0. Member Sullivan voting no. Criteria 4 is approved.

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:

With the unnecessary hardship requirement, one thing that is looked for is that it has to be tied to the uniqueness of the property. As we discussed a lot, this property is unique. The Planning Board plotted this lot, gave it an easement, but no frontage. There is no other lot like this on a cul de sac that he can see or find in the Town of Atkinson. It is certainly unique. No fair and substantial relationship exists between the general public purpose of the ordinance and the specific application of that provision to the property. Frontage as applied to this property, as we have discussed, the purpose of frontage and the dimensional requirements is to ensure adequate access for emergency vehicles, prevent overcrowding and promote health and the general welfare. Here, the property and the proposed dwelling will be accessed by a short driveway. It is setback from Huckleberry Lane. It meets the appropriate setbacks. The applicant has access, they do not have frontage. The hardship is tied to the unique conditions and strict conformance with the ordinance creates the hardship. Also, the proposed use is reasonable....

Chair Saba stopped Attorney Reddington.

Discussion:

Chair Saba reiterated that no fair and substantial relationship exists between the general purpose of the ordinance. He stated that the lot has always existed, that land has always been there, and it is on a cul de sac. There are many lots with reduced frontage as the applicant has just said. The ZBA has just recently approved a lot behind a lot with zero frontage, and several of very, very reduced frontage that he can think of. With all those characteristics of the lot, he agrees.

Chair Saba asked for discussion from the ZBA members.

The ZBA discussed whether there were other cases. Vice Chair Connors stated he does not remember any other cases. Chair Saba reminded him of West Side Drive. The ZBA members agreed.

Vote: 5/0/0. Criteria 5a is approved. Unanimous.

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

The proposed use for this property is as a single family residence. The applicant thinks that is absolutely reasonable because it is in the Rural Residential II Zone where single family residences are permitted by right. As he mentioned again, it is in a well-established subdivision surrounded by residential properties. The property itself, the lot is well suited for a single family home. There is essentially no other practical purpose for this lot. The applicant absolutely thinks it is a reasonable use.

Discussion:

Chair Saba stated that it meets the general characteristics of the neighborhood. It will be used as a residence. It is new construction. It is a single family home. Chair Saba agrees.

The ZBA agreed.

Vote: 5/0/0. Criteria 5b is approved. Unanimous.

Chair Saba requested a motion.

Member Leondires made a motion to approve the application for Frontage Variance to allow construction of a single family dwelling on a parcel without frontage where 200' is required (200' variance) - on property located at Map 17 Lot 62 in the RR2 Zone.

Member Wade seconded the motion. All members of the Atkinson Zoning Board of Adjustment voted in favor. Vote: 5/0/0. Unanimous.

Chair Saba informed the applicant that the motion passes. Also there is a 30 day appeal period, so anything done prior to that is at the applicant's risk.

Chair Saba stated that the next hearing will be for the Appeal of Administrative Decision.

Attorney Reddington requested to continue the request for Application for Appeal of Administrative Decision for 31 days.

Chair Saba reiterated that the applicant is request to continue the first hearing on the application, an Application for Appeal of Administrative Decision for 31 days and requested a motion.

Discussion:

Vice Chair Connors asked if this was the original one or the latest one. Chair Saba stated that it is the original one that they are appealing because in the applicants' argument, they believe the court's ruling was that they should be allowed to pull a building permit. The Town's opinion was no, you still need a variance. The first one was no, the Court said they could pull a building permit. They want to hold that in case there is an appeal so they can make the argument that RSA 674 Section 41:2 gives them the right to build on the lot without frontage.

Vice Chair Connors stated that there were five points on the original decision by the building inspector. Frontage was only one of them, which he brought up several times.

Chair Saba stopped him and requested Sue Coppeta, Planning and Zoning Administrator speak.

Ms. Coppeta stated that on the original denial of the building permit in 2020, the building inspector listed five points. There was a new application for a building permit this past fall after the last HAB hearing. That application only had two things missing for the building inspector, the frontage variance and the construction zoning. The difference is that the house was changed, pulled it in and made the setbacks meet 400:4, 15 feet on the side and the rear. The original application in 2020 needed other variances.

Chair Saba stated that two variances were needed, one for construction zoning and one for frontage. The variance was just granted. The appeal is in case this application is appealed by the abutters. If the abutters appeal, and the order is reversed, the applicant will still have RSA 674 Section 41:2.

Attorney Reddington stated that the intention for asking for a 31 day extension is that the applicant anticipates an appeal and would like to preserve that.

Member Leondires made a motion to continue 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 the denial of an Application for Building Permit on property located at Map 17 Lot 62 in the RR2 Zone. Vice Chair Connors seconded the motion. All in favor. Vote: 5/0/0.

Discussion:

The recorder asked when the application would be continued to. Chair Saba requested to continue the Application for Appeal of Administrative Decision for 60 days rather than 31 days. Chair Saba stated that the application would be continued to April 12, 2023 and asked if that date would be ok. The applicant agreed.

Member Leondires made an amended motion to approve a continuance of an 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 the denial of an Application for Building Permit on property located at Map 17 Lot 62 in the RR2 Zone to April 12, 2023. Vice Chair Connors seconded the motion. All in favor. Vote: 5/0/0.

Chair Saba stated that the application is continued to the April 12, 2023 ZBA meeting and reminded the abutters that there will be no notice. 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 reminded the abutters that they can file an appeal from the decision made by the ZBA at this hearing within the 30 day period.

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

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

The meeting was adjourned at 9:09 PM.