



David V. Hall  
Code Administrator

CITY OF CONCORD  
New Hampshire's Main Street™  
Zoning Board of Adjustment

SEPTEMBER 4, 2024  
MEETING MINUTES

Attendees: Chairman Christopher Carley, Nicholas Wallner, James Monahan, Laura Spector-Morgan,  
Andrew Winters

Alternates: Brenda Perkins, Mark Davie

Absent: Tedd Evans

Staff: David Hall, Code Administrator  
Deborah Tuite, Board Secretary

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Meeting commenced at 6:00 pm.

- 1) Call meeting to order
- 2) Chairperson's comments
- 3) Public Meeting
- 4) Public Hearings
- 5) Review and acceptance of Findings of Fact
- 6) Review and acceptance of Minutes
- 7) Any other business that may legally come before the Board

PUBLIC MEETING

0217-2024 375 N State St, IN - Industrial District

Owner: SWENSON GRANITE COMPANY LLC

*Applicant is seeking a variance from Article 28-6-9 (a) to allow a freestanding 55sqft sign where 40sqft is allowed.*

Ray Corriveau testified, stating that Swenson has a sign at 369 N. State Street, and they would like to place a similar sign at 375 N. State Street that is 55 sq. ft. in area. The new corporate sign is slightly bigger than what is allowed.

Chair Carley asked for clarification if this is a second sign.

Mr. Corriveau stated this was specific to 375 N State Street.

Mr. Winters asked if there are no signs at that location now.

Mr. Corriveau confirmed that there was no sign at 375 N. State Street.

Mr. Winters asked for the rationale as to why the sign needed to be larger than what is allowed.

Mr. Corriveau mentioned that that the corporate office has a new sign and they would like to have their signs match the signs on their other properties.

Ms. Spencer-Morgan mentioned that just because a corporation wants to have a sign a particular size is not a basis for a variance, and that there needs to be something unique about the property that justifies the variance. She asked for clarification as to what is unique about the property.

Mr. Corriveau stated that Swenson wanted to have all of the signs conform at each of their 10 locations.

Mr. Monahan mentioned that the application mentions that the sign is for wayfinding since there are two buildings.

Mr. Corriveau stated that the retail store is being moved over to the new building at 375 N. State Street, where all business will be done.

Ms. Spector-Morgan mentioned that this application is not asking for a second sign, but a bigger sign and she is not hearing any reason why it can't be compliant.

Mr. Winters asked if Swenson is having any problems with people not finding that location.

Mr. Corriveau was not sure that was the case, mentioning that they are hoping to have the sign conform to their other locations and they are asking for 15 square feet more than what is allowed.

Mr. Monahan asked if the property and the sign are elevated and if that makes it more difficult to see from the roadway.

Mr. Corriveau mentioned that could be the case especially if they are going at a good rate of speed, however the elevation is not too bad, but it is definitely elevated.

In Favor: None.

In Opposition: None.

Code: None.

DECISION:

Mr. Winters stated that it is a modest increase, however, the applicant did not provide enough of a rationale or record for the justification as to why it needed to be bigger.

Ms. Spector-Morgan stated that there is nothing unique about the property, and there is no reason why they can't comply with the sign. Their corporate office wants a bigger sign, but that is not a basis for a variance. She would vote no because there is no unnecessary hardship.

Mr. Monahan agreed with Ms. Spector-Morgan. He also stated that the application provided more detail than what was presented, however, it was not enough of a record to get to a yes.

Mr. Wallner mentioned that in the past the Board has heard cases with regard to corporate signs. He also mentioned that the applicant mentioned that people might miss it because of the speed on the road and maybe that could be construed as a hardship, so maybe size is important in this case. It is a heavily trafficked road, and he could be persuaded for safety reasons to approve it.

Chair Carley stated that he did not hear any convincing testimony that the 10 sq. ft would make the sign safer. He stated that, although there is a lot of traffic, it is an arterial street and not a super highway. He feels that a sign of the legal size could be made that would be clear for wayfinding. He did not hear a convincing argument for a hardship.

A **motion** to deny the variance was made by Ms. Spector-Morgan, on the basis that there is nothing unique or special about the property to justify an oversized sign, therefore they do not need to reach the remaining criteria, seconded by Mr. Winters; passing by a vote of 4-1, with Mr. Wallner in the minority.

**0218-2024 149 Portsmouth St, RS - Single-Family Residential District**

**Owner: CYR WILLIAM C 2023 TRUST**

*Applicant is requesting a variance from Article 28-4-1(h) Table of Dimensional Regulations to allow the placement of a 10' x 12' shed in the front yard with a setback from the front property line of 5' where 50' is required and side property line of 6' where 40' is required.*

Jeff Berberian testified. He explained that there is already a shed in place on the property and he is looking to replace it. The previous owners did not get a permit for the shed.

Chair Carley asked Code if there was a record of the shed or a permit.

Code: Mr. Hall stated that there was nothing on record.

Mr. Berberian then reviewed the rationale for the variance through each of the required criteria. Lastly, he stated that the placement of the new shed would be consistent with structures in the neighborhood.

Chair Carley asked why they couldn't move the location of the shed.

Mr. Berberian stated that with the setbacks it would not be practical. He is on a corner lot and following the setbacks would leave him no place to put the shed.

Mr. Winters asked for clarification on the location.

Mr. Berberian stated that he considers the location of the shed the back corner. But according to the City it is considered the front.

Mr. Winters asked what street his front door was on.

Mr. Berberian considers Portsmouth Street to be his front yard, and the location of the shed to be in his backyard.

Mr. Monahan stated he essentially has two front yards.

Chair Carley asked Code for clarification.

Code: Mr. Hall stated that if it was a traditional lot, with a front, two sides, and a rear, the shed would need to be 50' from the front line, and then they could have a five-foot setback. He then pointed out where the shed is located, stating that Mr. Berberian technically has two front yards according to Zoning because he is on a corner lot.

Ms. Spector-Morgan asked Code if it would be legal if it were a side yard.

Code: Mr. Hall stated that more than likely as long as he was 50' off of the front property line, and then five feet from the side line, then it would be legal and he would not need a variance.

Mr. Winters asked for clarification that sheds are allowed in the side and back yards, but not the front yard.

Code: Mr. Hall stated that was correct, and because he is on a corner lot he needs a variance.

Mr. Monahan asked if the current shed is right on the property line.

Mr. Berberian stated that it is about five feet off of the property line.

Mr. Winters asked how it would be affixed to the ground.

Mr. Berberian stated that he is planning to put in a concrete pad.

Mr. Winters asked if the existing shed was not there, where would he place the shed.

Mr. Berberian stated that he would place it exactly where it is. They play on the other side with the kids, and they would prefer that it not take up that space. The property is fenced in.

Ms. Spector-Morgan asked what the structure is on the other side of the house.

Mr. Berberian stated that it was a box truck that is no longer there.

In Favor: None.

In Opposition: None.

Code: None.

DECISION:

Mr. Wallner mentioned that the Board has been open minded with corner lots. The hardship could be that he would be denied reasonable use due to setbacks that would not normally be there if Hampshire Drive had not been there.

Mr. Monahan agreed, stating the uniqueness is the two front yards.

Ms. Spector-Morgan stated that the convincing factor for her is that the lot is 77 feet wide, and the setbacks are 50' and 40', there is no conforming place to put it. The hardship is satisfied. It won't alter the essential character of the neighborhood, it won't affect surrounding property values, there would be no substantial justice in denying it. She would be inclined to grant the variance.

Mr. Winters agreed, stating that in the past, a corner lot is not considered a hardship, however, this particular lot's configuration leave's no place to put the shed. The fact that the shed is currently there, and the layout of the yard was designed around the placement of the shed, it would be unfair to have them change the layout. He agreed with his colleagues.

Chair Carley also agreed with his colleagues.

A **motion** to approve the variance was made by Mr. Wallner, seconded by Ms. Spector-Morgan; passing unanimously.

**0219-2024** 114 Garvins Falls Rd, RM - Medium Density Residential District

**Owner: DANZIGER PROPERTIES LLC**

*Applicant seeks a variance from Article 28-4-1 (h) Table of Dimensional Regulations for the replacement of an 8 x 12 porch with a 12 x 20 porch with a front setback of 7' where 25' is required.*

Dennis Dandawa testified, stating that Danziger properties just purchased the property. They have a situation where one of the porches is deteriorating and has become very dangerous.

Ms. Spector-Morgan asked for clarification as to which porch they are referring to.

Mr. Dandawa pointed out that it was the porch on the left side.

Code: Mr. Hall stated that the freestanding 25' x 25' deck does not need a variance, and has been approved by DES.

Mr. Dandawa continued, mentioning that they would like to replace the porch immediately as some of the boards are rotting and in very poor condition. People have fallen through some of the boards. The proposed structure is necessary for the safety and accessibility of the property for residents and visitors. It will not affect any public or private rights of others. It will allow residents, guests, and emergency personnel access to the property. The porch is the only access to unit two.

Chair Carley asked if it was a two-unit building.

Mr. Dandawa stated that the porch provides access to two units, and the entire structure has four units. He stated it will not have any negative affects on the surrounding property values, and that it will actually enhance the neighbor's properties.

Ms. Spector-Morgan asked if the porch would come any closer to the road.

Mr. Dandawa stated that it would not.

Chair Carley asked if they are looking to expand the porch.

Mr. Dandawa explained that they are trying to make a different entrance. The current entrance comes in by the road, and they are trying to change that to be safer by coming in by the yard. The lower decking comes out further, coupled with the landscaping of the property which will not allow them to put the second entrance in without extending the deck, which is the reason they are looking to expand the porch.

Mr. Winters asked if the house itself is in the setback.

Code: Mr. Hall agreed.

In Favor: None.

In Opposition: None.

Code: None.

DECISION:

Mr. Monahan stated that he is inclined to support the variance, as there is some uniqueness to the property given that it is sloped. The property is already non-conforming in the setback, and he can appreciate the safety issues for extending the porch to allow for better access.

Ms. Spector-Morgan agreed with regard to the unnecessary hardship, also pointing out the existing layout of the house and the entranceway and its location in the setback. It will not alter the essential character of the neighborhood, it will not diminish the surrounding property values to make the porch slightly larger, there is no substantial justice in denying the variance as the porch is already in the setback.

Mr. Winters agreed.

Mr. Wallner agreed.

Chair Carley agreed.

A **motion** was made to approve the variance by Ms. Spector-Morgan, seconded by Mr. Monahan; passing unanimously.

0221-2024 13 Dover St, RM - Medium Density Residential District

Owner: MCALLISTER CHRISTOPHER

*Applicant is requesting a Special Exception for an Accessory Dwelling Unit.*

Christopher McAllister testified. He brought a letter from an abutter from 17 Dover Street. He explained that he does not have to change the house or the footprint. An addition was done in 2018, and the addition was built to allow for an ADU. His mother died a few months ago and he is looking for approval for the ADU.

Chair Carley mentioned that in Mr. McAllister's application that he felt that he met all of the criteria for a Special Exception, and asked if he could he expand on that.

Mr. McAllister stated that it will not diminish surrounding property values, it would fit in well, it would not add any nuisance to the public, or any additional need for public safety or public services. They are on city water and sewer. They are looking to add one bedroom and one bathroom.

Mr. Winters asked if he is aware of the requirement that one unit be owner occupied.

Mr. McAllister confirmed.

In Favor: Robert Silva testified, direct abutter from 11 Dover Street. He mentioned that he has been neighbors with Chris's family for over 40 years. They are in support of the Special Exception.

Chair Carley read a letter from Jeffrey Lewis, 17 Dover Street. His house has an ADU that was constructed in 2018 along the same common lot line. He fully supports the request.

In Opposition: None.

Code: None.

DECISION:

Mr. Wallner stated that it does meet all nine criteria for a Special Exception.

Mr. Monahan agreed.

Ms. Spector-Morgan mentioned that this is exactly what they would see with an ADU. She also felt all of the Special Exception criteria were met.

Mr. Winters agreed.

Chair Carley also agreed.

A **motion** was made to approve the Special Exception by Ms. Spector-Morgan, seconded by Mr. Wallner. Mr. Winters pointed out that it does not appear that it will cause any traffic congestion, or overload the current utilities, or make a demand on services. There is no reason to believe that the supplemental standards are not fulfilled, and it won't create any hazards to the general welfare, it is in an appropriate location and is consistent the neighborhood and the master plan. The variance passed unanimously.

0222-2024 Hutchins St, RM - Medium Density Residential District

Owner: L P MORGAN ASSOC LLC

*Applicant is requesting a variance from Article 28-8-3 (c) (2) (a) to permit the construction of a single-family dwelling on a non-conforming lot lacking the minimum 22' of frontage, and an exception to RSA 674:41 to allow construction on a lot lacking frontage on one of five enumerated categories of streets.*

Attorney John Arnold, and owner Allen Johns testified. Attorney Arnold explained that the first application is for a variance from the frontage requirements. The second application is for a waiver from RSA 674:41, which is a State statute that imposes a frontage requirement, separate than what is required by a municipalities zoning ordinance.

Mr. Winters asked which provision in the statute gives the ZBA the power to waive RSA 674:41.

Attorney Arnold stated that it was paragraph II.

Mr. Monahan mentioned that he has only one application.

Code: Mr. Hall explained that the memo only has the variance request, due to a lot of dialogue the past month. The notice was sent with both requests.

Attorney Arnold asked if the Board members have the narrative that went along with the RSA waiver request.

Code: Mr. Hall confirmed that the Board does have the narrative.

Mr. Winters asked if they are asking for one type of relief with two different arguments.

Attorney Arnold stated that they applied for two forms of relief. They had filed two separate applications, the variance application for the City's frontage requirements, and if that is approved, then they would address the RSA application for the State's requirement.

Code: Mr. Hall restated there has been a lot of dialogue, however, he is not sure that he agrees that the RSA request belongs with the ZBA, but will address that after the variance request is heard.

Attorney Arnold pointed out the lot on the map which is off of Hutchins Street, referred to as tract number three. The lot is a preexisting non-conforming lot. It does not have any frontage as it does not abut Hutchins Street at all. Access is via an easement, and the driveway is about 50' wide by Hutchins Street, and then it narrows to 25'.

Ms. Spector-Morgan asked if it was created by a subdivision through the Planning Board or does it predate that.

Attorney Arnold stated it predates the subdivision approval, and is an older lot. He explained 64.5 Hutchins St., known as tract two, has a house that was built in the mid 1950's, and it also has no frontage on Hutchins Street and is accessed by the easement. 64 Hutchins does have frontage on Hutchins St., but its access is also on the easement. So, both property's access is through the easement.

Chair Carley asked if it is a dirt road.

Attorney Arnold agreed.

Ms. Spector-Morgan asked if it is a driveway.

Attorney Arnold stated that it is a driveway. He continued, stating that tract three is an undeveloped lot that is vacant and wooded, and they are asking for a variance so that they can build a single-family house without any frontage on a public street. On the public interest and the spirit and intent criteria, the variance won't alter the essential character of the locality, and it won't threaten public safety, health or welfare. The track record is that there has been a house there for over 60 years at 64.5 Hutchins, with no frontage, and no issues. There has also been a driveway in existence for the same amount of time, providing access to both 64 & 64.56 Hutchins with no safety issues over that time period that they are aware of. If they are allowed to build on tract three, they plan to widen the driveway to improve the access for all of the lots on the driveway.

Attorney Arnold continued, stating that the distance from tract three to Hutchins Street is a little under 400'. While that is a lengthy driveway by City standards, there are others that are longer, such as 56 Hutchins, which is 600' to the house and continues beyond that to a barn. 31 Parish has a driveway that is 800' in length. If this was considered a driveway, it is not detrimental for safety or access. As far as substantial justice, the variance would not pose any harm to the general public, by allowing a house with no frontage that is not visible and is set back from the street. A lot of times with reduced frontage requests, the houses end up being close together.

Attorney Arnold explained that the benefit of the variance is significant in that the property is not usable for any purpose without a variance. It has been a separate lot for a long time, and the owner has paid taxes as a buildable lot for a long time. This would allow it to be put to use. As far as property values, a lack of frontage won't cause any negative impacts. The lot meets all of the zoning requirements except for frontage, and it is large enough to build a house according to those requirements. The hardship is the uniqueness of the lot size. It is a relatively large lot on the block of properties that meets the requirements, except for frontage. It is the only lot that meets the ordinance for lot size, and it has a significant buildable area on it. By contrast, the lots on the other side of the easement have a lot of wetlands, and both of the lots are undersized for the zoning requirements. Tract three is the only viable lot in the area. On the other hand, it is a uniquely small lot in that it is only 1.5 acres, and is perfectly suited for a single-family home. If building is not allowed, there is really no other suitable use.

Attorney Arnold explained that the public purpose of the frontage requirement is to ensure safe and adequate access to a development, and to keep things spread out and limiting overcrowding of streetscapes. This driveway has a track record of over 60 years of providing access to the two properties, with no safety issues. The driveway would be extended modestly to tract three, however it is still shorter than other driveways in close proximity to this property. In terms of crowding the streetscape, the house is invisible to the street and won't create houses that are close together. The use is reasonable, and a single-family home is a permitted use in the zone. Attorney Arnold also argued under the alternative statutory criteria that they have satisfied the hardship standard because the property is not useable for any reasonable use without the variance.

Ms. Spector-Morgan asked about the right-of-way, which is part of a much bigger lot, if they know of any plans for that lot.

Attorney Arnold stated that his understanding was that it was undeveloped currently and he did not know of any future plans.

Chair Carley asked if it is under separate ownership, and if the lot is deeded as a right-of-way.

Attorney Arnold agreed to both questions.

Mr. Winters questioned if the owners of the adjacent lots on the easement could argue the same issue of use and function.

Attorney Arnold mentioned that aside from the frontage issue, tract three is a very developable lot as it is big enough to meet today's zoning requirements. The other lots have the frontage issue, but they also have lot size issues, as well as wetland issues, and may be very difficult to build on at all. Tract three is set apart as it is a prime lot that is suitable for development.

Mr. Winters stated that if they did try to develop, it would create an issue for the driveway, and it would make the driveway less viable.

Attorney Arnold mentioned that it is realistic that the three lots will be using the driveway. He did not feel it was realistic that the other lots would be developed. The driveway has a 25' easement, and even for commercial scale development, a driveway would need a 24' wide drive isle for a two-lane driveway.

Mr. Winters asked if two cars can pass.

Attorney Arnold stated for 25' they could, but it will need to be expanded and widened, and that 25' in width makes it accessible for safety issues like fire trucks etc.

Ms. Perkins asked for clarification if the driveway for the house will be off of that.

Attorney Arnold agreed.

Mr. Winters asked if the current driveway supports two-way traffic.

Attorney Arnold confirmed that it does.

Mr. Monahan asked about the alternative option of converting the driveway to a private road.

Attorney Arnold mentioned that it all depends on what they consider a private road, and technically speaking, they are one in the same, private driveway versus a private road.

Mr. Monahan asked if it was an official private road, would the frontage issue be resolved.

Code: Mr. Hall stated that quite possibly it could, if it was a City accepted private road. However, this is a driveway easement which will be part of the second portion of the argument. Right now, he is saying he has a non-conforming lot without the required frontage on a City accepted street, which is why he is asking for the variance.

Attorney Arnold stated that the City has designated some certain private roads that it allows construction on, but that really applies to the second application (RSA). The frontage requirement would still apply. The RSA 674:41 application deals with the State requirement.

Mr. Monahan asked if Concord has any private roads.

Code: Mr. Hall confirmed that the City does have private roads, class five and six, accepted by City Council.

Mr. Monahan asked if frontage requirements are the same on a city street compared to a private street. He also asked if it was a private road compared to a driveway, would they need to be there.

Code: Mr. Hall stated that the frontage requirement would be the same. If the City Council accepted it as a private accepted street, quite possibly they might not have to be here.

Attorney Arnold was not sure if that was correct. He mentioned that if the City Council had designated this as a private road, and allowed construction on it, his belief is that it resolves the 674 application, however it does not resolve the frontage issues. He mentioned that he has been before the Board for frontage relief on lots on private roads in the past.

Chair Carley asked if he could address the RSA 674:41 issue.

Attorney Arnold asked if the Board would like him to do that, as they are two different applications.

Mr. Winters stated that he felt the Board should resolve the case for the variance first, and let any abutters testify.

Ms. Spector-Morgan agreed.

Mr. Monahan agreed, but expressed that he has concerns and he is not convinced that the private road approach wouldn't resolve the issue, and has concerns about what is going on with the giant lot that abuts the property.

Code: Mr. Hall stated that once the Board decides on the 22' of frontage, and if the Board grants that variance, it does not impact the next discussion other than does the ZBA give approval or does the City Council give approval.

Ms. Spector-Morgan stated that RSA-674:41 allows applicants to either go to the City Council or the Zoning Board.

Mr. Monahan asked even if it was a private road.

Ms. Spector-Morgan explained that with 674:41, that if it is a private road and it satisfies even one criterion under paragraph one, they do not have to go anywhere, and they can get a building permit. In this case they did not satisfy any criteria under paragraph one.

Mr. Monahan asked if it is a City Council approved private road, is that a public way.

Code: Mr. Hall read through the ordinance around public ways and accepted streets.

Ms. Spector-Morgan stated that because the right-of-way narrows closer than 50', her guess was that it would not be accepted as a private street because they will want a 50' right-of-way.

Mr. Monahan expressed that although it may be unfair to this applicant, he has concerns around the abutting lots and that there could potentially be the situation where there is a driveway that services dozens of houses.

Ms. Perkins asked if all of the downtown roads are 50' wide.

Ms. Spector-Morgan mentioned that the streets are older and probably not 50' wide.

Code: Mr. Hall went on to say, after reading through the ordinance, that his interpretation is that if it was a City accepted street in the RM Zone, and they had City sewer, they would need 100' of frontage. Without sewer they would need 200' of frontage, and if it was a City accepted street, as a class VI street he would be able to issue a building permit if it met that minimum frontage.

Chair Carley stated that it was the consensus of the Board that they would address the variance first.

In Favor: None.

In Opposition: None.

Code: None.

DECISION:

Ms. Spector-Morgan articulated that frontage variances are hard because the property cannot be used without the frontage variance, however, the frontage requirements are among the more important zoning requirements. She went on to say that, more than that, the Board needs to look at the cumulative impact for granting many such variances. Once you bring the road up to this lot, maybe the adjacent lots don't get developed because of wetlands, but that does not mean that there won't be further subdivision. She is concerned about the impact on the character of the neighborhood from this one house because there are not a lot of developed properties there. Also concerned about the cumulative impacts to public safety and welfare, because this would be a long driveway that potentially fire trucks and ambulances would need access to. It won't diminish surrounding property values. On the substantial justice prong, there is a benefit to the public for denying the variance due to the impact on services, and she understands the loss to the applicant is great. However, he did purchase it knowing that there was no frontage and knowing that he could not build on it without the frontage. Then with the unnecessary hardship, is there anything unique about the property that makes it burdened by its lack of frontage in the way that other lots would not be, she stated that she does not feel that there is. She would not be inclined to grant it.

Mr. Monahan stated that there is a lot going on with this case. He felt the Board needed to keep in mind that in fairness, it would not be fair to burden the applicant with what could happen beyond this. His probing around the private road was to find a more acceptable way to deal with this issue, and to ensure that all of the property owners and the City were aware of what was taking place with this deeded easement. He would be willing to listen to his colleagues.

Mr. Winters stated that there is a huge lot that owns the right-of-way, and then the other two adjacent lots, and if they all made a similar argument, then the driveway would be unfeasible. Without hearing from the abutters, he felt he would accept that the two lots are not developable. The larger lot in the back would require a lot of discussion, so it is hard to make that part of the discussion. The lot is otherwise a nicely shaped lot that meets all of the other requirements to fit a single-family house. The driveway will be expanded and would allow for better access which makes it a unique lot for this specific plan. He would be inclined to grant the request.

Mr. Wallner agreed with Mr. Winters in that the only reasonable use is to make it a buildable lot.

Ms. Perkins added that as a realtor, there are other properties in the city where they have to park on main roads and walk up some of the private driveways because they barely even have enough room for one or two car parking. Here there is such a viable lot that allows for parking and is reasonable.

Chair Carley stated that if, by the Board approving this variance, it opened the door to future development that the Board or the City had no control over, then the concern about future development should apply. But in this case, he does not see that. If someone were to try to develop the large abutting lot, they would have to answer the same questions, and it may not be unreasonable for the Board to say that they would need a real street. Granting this variance neither prohibits that nor makes it unlikely oversight of future development, so to him the future of the large lot is not a concern. He stated that he sees the lot as being a reasonable use. He mentioned that in his opinion, the lot cannot be used at all, which is a pretty strong recommendation for a hardship. This would be a single-family house and he does see a hardship for the lot. As far as the character of the neighborhood, it is already residential with houses on mostly rural wooded lots, so there would be no difference to the character of the neighborhood. The only issue is the access and he believes that, if necessary, they could get a firetruck back there. He would be inclined to agree with his colleagues who do see a hardship in this case, and do not see any change to the character of the neighborhood. He does not see the public benefit in denying the variance. He does see a downside for the appellant as he would not be able to develop the lot. He would be inclined to support the variance.

A **motion** to approve the variance was made by Mr. Winters, explaining that the hardship is that there is no other usable function of the lot, the spirit is observed, substantial justice is done essentially for the same reasons, there would be diminishment of value, there was no comment by a neighbor that it would change the neighborhood, and literal enforcement would result in a hardship, seconded by Mr. Wallner; passing with a vote of 4-1, with Ms. Spector-Morgan in the minority.

#### **RSA 674:41**

Chair Carley requested that Attorney Arnold explain his interpretation of the role of the ZBA in this case.

Attorney Arnold explained that RSA 674:41 is referred to as zoning at a State level. The statute states that in order for a building permit to be issued on a lot, it needs to have frontage on one of five different enumerated categories of streets. If you don't have frontage on one of those five enumerated categories of streets, you either can't build, or you can apply to the Zoning Board to ask for a waiver from those requirements. The statute sets forth criteria to get the waiver, with the theory being

similar to a variance in the sense that the ZBA has the authority to waive the frontage requirement imposed by the state statute.

Mr. Monahan pointed out that they should be reading RSA 674:41, Roman numeral II, where there needs to be an appeal by an Administrative Officer.

Attorney Arnold stated that he believes there has been one, although not a formal written opinion. Similar to an application for a zoning variance, there is usually not a formal written denial for a building permit by the Zoning Enforcement Officer or the Building Inspector. Attorney Arnold explained that he has had many conversations with City Staff and everyone agrees that they don't meet any of the criteria in section I. Formally speaking, this is appealing that decision.

Mr. Winters stated that it is an odd use of the word appeal, in that Mr. Hall has no authority to grant it.

Attorney Arnold agreed that they don't meet the criteria, so in that sense, they are not appealing. They are asking for a waiver. He mentioned that the first criterion is that the denial of the building permit would entail practical difficulties and cause unnecessary hardship. Without a building permit, there is no construction on the property, thereby making no viable use of it. The hardship is that there is nothing there today and without the waiver there can't be anything. The second criterion is that the circumstances of the proposed building does not require that the building be related to the existing or proposed street. This is a preexisting lot without frontage. 64.5 Hutchins is another property that does not have any frontage. The easement already serves two other homes, so there is no reason a house on tract 3 requires anymore relation to Hutchins Street than a house that already exists on tract two. The third criterion is that construction will not distort the official map or increase the difficulty in carrying out the master plan. In this case, there is a 1.5-acre lot with a single-family home, they are not proposing a major development, and it won't really have any impact on the official map or the master plan. The fourth criterion is that there is no undue hardship to the future owners of the property. The distance to the property is 380 feet. He had mentioned earlier that there are a couple of other properties in the area with driveways over 600' and another over 800'. Having a driveway of that length does not create an undue hardship, and any financial expenses will be shared by multiple owners reducing the financial burden to the future owners. The fifth criterion is that there is no financial impact to the City. The City will not be asked to maintain it, so there would be no financial burden, other than city services. The sixth and final criteria is that there is suitable access for public safety and emergency equipment. There is a width of 25' that is acceptable, and they will be widening the driveway. So, there should not be any issues with safe access.

Attorney Arnold then mentioned the discussion of whether this belongs with City Council or the Planning Board to see if they would approve this as a private street. The statute provides two alternatives. They recognize that the statute says that they could go to the Planning Board or City Council, and if they said yes, they would not need this waiver. As a practical issue, they needed a variance, and since they were here and in the matter of efficiency as a tax payer of single-family home development that is not a major money maker, they thought it was appropriate to ask the Board for the waiver, which is related to the variance previously requested. If they went before the Planning Board or City Council to be accepted as a private road, it could create the situation where it took several more months, with several more hearings, and a larger expense for the applicant. The statute does not have a requirement that they go to the City Council or the Planning Board before going to the Zoning Board. The hardship is there either way.

Ms. Spector-Morgan asked if this is a case that says they can do either.

Attorney Arnold agreed, and stated that if the Board decided that the applicant needed to go to the City Council or the Planning Board before being willing to grant a waiver, he sees it as a lot of time and expense on the applicant without reaching a different endpoint. If he goes that route and they say yes, that is fine, then he can build. But if they say no, then presumably they are back here with the ZBA and asking for another argument on hardship, but again with several more months and thousands of dollars of legal expenses for the applicant.

Chair Carley mentioned that it seemed to him that the Board does not need to follow the usual procedure that they do with variances. He asked the Board their opinion of whether they should go through the procedure of providing comments.

Ms. Spector-Morgan thought the Board should hear testimony.

In Favor: None.

In Opposition: None.

Code: Mr. Hall mentioned that City Staff's interpretation was that the ZBA did not have authority over the RSA. They felt it belonged with the Planning Board and City Council, however, if the Board does lean towards approving the waiver, please condition the waiver that they sign the limits of municipal responsibility and liability which would exempt the City as far as who maintains the driveway, and it wouldn't be the City's concern if they can't get emergency personnel there. It is not a City accepted street, it is a driveway easement.

Mr. Winters articulated that he can understand that the City would prefer for this to go to the Planning Board or City Council, however, the language clearly states that application may go to the ZBA or the Planning Board or local legislative body or the body of appeals.

Code: Mr. Hall stated that while he understands that, this does not meet any of the six criteria. He mentioned that there are large concerns that this would allow a building on the lot, and there is no history as to the of the second house that was built in the 1950's. It does not mean that they have to extend the errors of the past. There is the ability to refer this to Planning.

Mr. Winters asked in this particular instance if there is enough access for emergency vehicles.

Code: Mr. Hall stated that he has never driven up the driveway.

Attorney Arnold respectfully disagreed with what Mr. Hall stated, and felt this Board could address the waiver. He mentioned that right now the driveway does not exist back to the third lot, as it needs to be cleared and cut. The intent is for it to be widened and graded in order to provide that access, however, a 25-foot-wide easement is sufficient to comply with a 24' wide drive isle.

DECISION:

Ms. Spector-Morgan mentioned that waivers for RSA 674:41 are harder than regular variances. The Board can go on practical difficulty and she feels that they have that here. This would not tend to distort the official map, or increase the difficulty of carrying out the master plan, it will not cause hardship to future purchasers, and there is no undue financial impact to the City. However, she

mentioned that someday the Supreme Court might say under what circumstances the building does not need to be related to the existing streets, but she cannot imagine a situation where the building does not need to be related to the existing street. She cannot grant a waiver because the building needs to be related to the streets.

Ms. Perkins asked how that affects other existing situations.

Ms. Spector-Morgan stated that she is not sure how they were approved. She mentioned that she explains this to her clients that this is how you have a hunting shed in which you take a four-wheeler to, and you don't need a truck, or firetruck out there. In this situation, it is accessible by a car, or fire truck, however, the building has to be related to the existing street.

Mr. Monahan asked if it is because there is no record of the applicant stating how it relates to Hutchins Street.

Ms. Spector-Morgan disagreed, stating that the applicant hasn't explained why it doesn't need to be related to Hutchins St.

Mr. Monahan asked if it was connected to water or sewer would it be related.

Ms. Spector-Morgan said that would not make it related.

Mr. Winters asked for clarification in that the house would need to be directly accessible from that street, however, by definition that seems a little circular because then how could the Board ever approve it because by definition it is not related because it doesn't have any frontage.

Ms. Spector-Morgan agreed, mentioning it is a bad statute.

Mr. Winters was concerned that without better guidance, the Board cannot interpret the statute to be purposeless. To give it broader language to be related to the street because it is near the street and somewhat accessible to the street. The driveway it is attached to is related to Hutchins St.

Ms. Spector-Morgan explained that the statute states on paragraph III that "the street giving access to the lot means a street or way abutting the lot and upon which the lot has frontage. It does not include a street from which the sole access to the lot is via a private easement or right-of-way, unless such easement or right-of-way also meets the criteria set forth in subparagraph I(a), (b), (c), (d), or (e)." She stated that the legislature looked at this and said that they recognize that there are situations where lots have private rights-of-ways, and that they are not intending to allow those to be frontage. She further explained that if there was going to be a waiver, it clearly is not intended for this situation in her opinion.

Mr. Winters articulated that he more or less followed what Ms. Spector-Morgan was saying, however, he was hard pressed to interpret that the Legislature would give the ZBA the power to appeal something when the Board could barely find a situation where it could be approved.

Ms. Perkins mentioned that it makes one question when it was written, how long ago it was written, and does it need to be re-written.

Ms. Spector-Morgan stated that it has been updated over the years.

Mr. Winters stated that he can only interpret that language as aspirational, and not having any clear-cut guidance as a specific criterion.

Ms. Spector-Morgan mentioned that there was a day when the Board could not grant a variance, which was a very long period of time.

Mr. Winters stated that he appreciates what Mr. Hall stated, but he feels they have the authority to make a decision. He mentioned that he feels all of the other criteria were met. He would interpret the legislature's intent broadly, and that he would tend to approve.

Mr. Wallner mentioned that he agreed with Mr. Winters that they do meet the criteria, and is inclined to support it. The Board approved the variance and in the same spirit, although it contains different language, he would approve it.

Mr. Monahan felt initially that this should be viewed as a private road, but was persuaded to look at it differently. He went on to say that what the Board heard from Code Enforcement is that Code Enforcement, Planning, and the City Solicitor feel that it should be handled as a private road situation. He mentioned that he is not blind to the fact that it puts more time and burden on the applicant. He would be interested in more insight from the other City departments.

Chair Carley articulated that the key aspect is whether the lot has to relate to a City street. He mentioned that appellant clearly meets the other criteria. He went on to say that since the Supreme Court has not pronounced, one way to resolve the matter is for the ZBA to determine the need for a connection to an existing street and the rationale for making that decision. Since the Board's judgement in the variance case is that the intent of the ordinance is to provide access for emergency equipment and that the requirement is met by the existence of the driveway to this lot alone, then the Board could be satisfied that they have met the criterion. The appellant has testified that they will have access to the lot sufficient for safety. He felt that the Board could make the argument to grant the waiver. As to whether the Planning Board or City Council ought to be the ones to determine the waiver, the State Legislature stated that it could be any of the three. He felt it was reasonable for the applicant to come to the Board for the waiver, and reasonable for the Board to consider it if they find that they have met the criteria to grant the waiver.

Code: Mr. Hall requested that the Board please consider the limits of liability in their decision.

Mr. Winters asked if they can condition the waiver for expanding the driveway as presented.

Chair Carley mentioned that the law stated that the Board can include any reasonable conditions.

A **motion** was made to grant the appeal by Mr. Winters, for the reasons previously stated that they meet all of the criteria, and relating to the existing street being particularly ambiguous, and interpreted broadly enough to qualify. Approval would include the condition that prior to the issuance of the building permit, the applicant shall produce evidence that the notice of the limits of municipal responsibility and liability has been recorded in the county registry of deeds, and also the condition that they widen and expand the existing driveway as presented. Seconded by Mr. Wallner, passing with a vote of 3-2, with Ms. Spector-Morgan and Mr. Monahan in the minority.

A **motion** was made to approve the August 7, 2024, Minutes, as amended by Mr. Davie, by Mr. Wallner, seconded by Mr. Winters; passing unanimously. Ms. Spector-Morgan abstained.

A **motion** was made to approve the August 7, 2024, Findings of Fact by Mr. Wallner, seconded by Mr. Winters; passing unanimously. Ms. Spector-Morgan abstained.

A **motion** to adjourn the meeting was made at 7:55 pm by Ms. Spector-Morgan, seconded by Mr. Monahan; passing unanimously.

*Respectfully Submitted by*  
*Deborah Tuite*