

**ZONING BOARD OF ADJUSTMENT
MEETING MINUTES
January 19, 2023**

PRESENT: Walker Farrey, Vice Chairman; David Lage; Danielle Sikkila; Susan Mallett, Secretary

Walker Farrey called the meeting to order at the Town Office at 7:00 p.m. and did roll call.

**Craig and Sharin Smeeth et al, regarding 99 River Road, Map 11, Lot 128, Appeal of BOS
Decision to allow Driveway Alteration**

Nancy Clark presented on behalf of the applicants. She passed out a handout that she then reviewed each item on the handout.

- 1) She claims that Jane Elwell submitted her application with false information. Item was not on the accepted application dated 11/02/2022. Board did not discuss.
- 2) Nancy stated multiple failures by the Town to enforce Section V(B) of the New Ipswich Driveway regulation requiring the applicant to comply with the provisions.
- 3) Nancy stated multiple failures by the Town to comply with Section VII (B) of the New Ipswich Driveway Regulations.
- 4) NH RSA 472:6 and NH RSA 231:139-156 which applies to scenic roads and removal of portions of stone wall which is a misdemeanor offense.
- 5) Which is not on the original letter, in the October 25, 2022 meeting, Select Chairman Talbot admitted to having and relying on ex-parte communications for the purpose of making the decision regarding the driveway permit. Item was not on the accepted application dated 11/02/2022. Board did not discuss.

David Lage noted that they don't have the recording referenced in number 5, and there are only 3 items on the application for appeal. Nancy noted she would give the updated list to ZBA after she speaks, David asked her to share before moving on. Meeting paused while Susan made copies for the Zoning Board members.

David noted that he has a quandary with adding 2 more items this evening, as the appeal of the decision was submitted and approved with the 3 items. Walker also noted it doesn't give the Board a chance to review before the meeting.

The Board decided to go through the items one by one. Walker confirmed that no abutters or public audience members wanted to comment on the driveway appeal. Nancy noted her clients will not be speaking on this appeal this evening.

David made a motion to close the public hearing of the appeal of the Selectmen's decision and to go into deliberations. Danielle seconded and all were in favor. Walker noted the audience is welcome to stay and listen to the deliberations if they choose.

David refers back to item 1 in the original application submitted in November, in the third paragraph that starts off with "Section V (B)" suggesting some items were not submitted. David noted that based on the information received by legal counsel and having reviewed the Selectmen's meeting minutes, and that they did a site visit the driveway was technically already in existence. Also Monadnock Conservancy was notified by applicant to be sure requirements were met and did not have an issue with it either. David feels for this item 1 the Board does not have reason to rescind the Selectmen's decision to uphold the permit. The board was in agreement.

The Board moved onto Item 2, which notes that "A driveway permit should not be issued for an illegal purpose and the Board of Selectmen may not uphold a driveway permit issued to support an illegal business." David doesn't see this as an illegal operation, the owner was issued a cease and desist notice to stop operation until they receive approval, which they did. David also noted from his personal knowledge he has driven by that back area many times over the years and seen vehicles in that area, he doesn't see how it can be considered illegal, also it's on a totally different road than the main driveway. All were in agreement.

Item 3 regards designated scenic roads, specifically Currier Road in this instance. David read the documentation from Chairman of Conservation Commission who oversees scenic roads in Town and based on the explanation of the RSA, the moving of wall and cutting trees doesn't apply to private owners. He also noted that Ms. Elwell also asked Monadnock Conservation for approval, and he doesn't see how it was violated. All were in agreement.

David made a motion that the ZBA confirms the decision not to reverse the driveway permit. Danielle seconded it, and all were in favor.

Craig and Sharin Smeeth et al, regarding 99 River Road, Map 11, Lot 128, Appeal of ZBA Decision from December 1, 2022 to allow Silver Scones business to operate.

Ms. Clark asked for clarification if the ZBA is granting the appeal and denying the motion for rehearing. David said they are not rehearing the Silver Scones, but will be hearing the items raised in her application. Nancy is representing her clients, and noted that count 14 she will dismiss as the Zoning Board scheduled a special meeting to accommodate this appeal.

A member of the audience placed a recording device in front of Ms. Clark, who was sitting at the Zoning Board table, she noted that she did not approve to be recorded by an audience member. She was reminded that recording is allowed by audience members per RSA 91A:2 as long as it is

done in a non-disruptive way. She continued to say she did not consent to being recorded and returned to her seat in the audience.

The meeting resumed with Nancy reviewing each count.

Count 1 – The Zoning Boards notice of decision is unlawful because it violates NH RSA 676:3, I by not including the findings and facts in the Decision.

Based on this RSA, Ms. Clark feels the variance should be reversed on this ground.

Walker noted that this is a new RSA and agrees we did not include the findings and facts in the initial decision letter and will revise, update and reissue the decision letter to correct that issue and include the facts and findings.

Nancy says that that is not allowed unless there is a rehearing of the case.

David says the RSA allows the Board to make the corrections to the document.

Count 2 – The Boards Notice of Decision is unlawful and unreasonable because it violates New Hampshire law by not providing findings in support of the Decision that affords the appellants the opportunity for meaningful review.

Ms. Clark noted the decision is unlawful and unreasonable because it is inadequate for the Appellants to pursue meaningful judicial review of its merits. The variance should be reversed on this ground.

Walker notes this goes with Count 1 and will make the changes necessary to include the points discussed in the meetings. David noted the RSA was changed at the end of 2022 and we should have been aware and will make the correction.

Count 3 – The Board failed to properly consider the first prong of the variance criteria set forth in NH RSA 674:33 I(a)(2)(A).

Ms. Clark notes this requires the Zoning Board to make specific findings and articulate how granting the variance will not be contrary to the public interest. No discussion during deliberations about basic zoning objectives. She reviewed the Town of Chester case established that the Chester Zoning failed to consider the impacts raised by event participants. Ms. Clark stated that the applicant failed to satisfy her burden of proof. And referred to Gray V Seidel 143 N.H. 327 the NH Supreme Court clarified that NH RSA 674:33I(b) should not be read to imply an applicant must meet any burden higher than required by statute, but merely must show that there will be no harm to the public interest if granted. In this case she noted the applicant made no statement whatsoever addressing the public benefit in her Application or in subsequent

verbal remarks to the Board. As a result, the Applicant failed to satisfy the requisite burden of proof and the variance should have been denied.

David noted that the applicant on numerous occasions said that local people attended and she was drawing full crowds he feels this did address this. Ms. Clark said the applicant is required to use the words “public interest” specifically.

Ms. Clark also noted that in their verbal deliberations that a member noted “we always refer to the Master Plan and what it says even though it needs to be updated, probably 25 years old with updates, but I think they’re always saying that they want to promote the small business.” Ms. Clark feels this is an error as a matter of fact, and the master plan does not contain the term “small business” and she found nothing doing a search mentioning “small business”.

David noted that word searches of some types of documents will not find all types of text within, and in the Master Plan there is a section referring to Broadening the Tax Base it mentions the Town should allow small business if only to broaden the tax base. David read directly from the Master Plan, “...However the community is in agreement that the Town should make an effort to attract light industry and small business, if only to broaden the tax base...” and noted that there is more text before and after that text as well.

Walker said the Board did in fact did listen to input from abutters, and as a result created a list of conditions to address the concerns. Fifteen conditions were placed on the applicant, and the abutters statements were used to assist in the creation of these conditions.

Count 4 – The Board failed to properly consider the second prong of the variance criteria set forth in NH RSA 674:33, I(a)(2)(B).

Ms. Clark notes this RSA requires the Board to make specific findings and articulate how in granting the variance, the spirit of the ordinance is observed. She feels the Board undertook no meaningful discussion or analysis of the spirit of the ordinance. In addition there is an additional purpose articulated in Article IV(A) of the Ordinance which states “The purpose of this district is to retain the character of the long established villages in New Ipswich; to relieve the pressure of growth on the rural district by allowing a greater density in the village district in such a manner as to not cause water quality and water supply problems that would necessitate the Town providing means of public sewage disposal and a public water supply.”

The Appellants and Aggrieved parties commented extensively that the construction and operation of a parking lot intended for a minimum of 17 vehicles in a village of historic homes would scar the landscape forever.

In addition she notes, the Applicant failed to satisfy her burden of proof. She said the Applicant made no statement addressing the Ordinance in her application or in subsequent verbal remarks to the Board. She feels the Applicant failed to satisfy the requisite burden of proof and the variance should have been denied and the variance should be reversed on these grounds.

Walker responded that in regards to the parking that technically the Planning Board will determine the size and spaces. Also, regarding the abutter comment about headlights shining into their home, the Board did consider this and put a condition that Silver Scones cannot operate after 6:00 PM which should negate this issue.

Count 5 – The Board failed to properly consider the third prong of the variance criteria set forth in NH RSA 674:33, I(a)(2)(C).

Ms. Clark said this RSA requires the Board to make specific findings and articulate how in granting the variance, how substantial justice is done and she feels the Board failed to do so. She also notes the guiding rule on determining substantial justice is weighing the loss to the Applicant vs. the gain to the general public. In the case at hand the Board grossly misinterpreted this criteria as a matter of law. The individual or Applicant would suffer no loss from a denial of the Application. The Owner has operated the Property for more than eight years as a residence and denying the Application would have no impact on the residential nature of the Property. Also, the Applicant failed to satisfy her burden of proof because she failed to allege an actual injustice. The only injustice that the Applicant attempted to claim was the inability to operate a business. Ms. Clark says the variance should be reversed on these grounds.

Walker noted that this was previously discussed during the public hearing and the Board found this to meet the criteria.

Count 6 – The Board failed to properly consider the fourth prong of the variance criteria set forth in NH RSA 674:33, I (a)(2)(D).

Ms. Clark read NH RSA 674:33 I(a)(2)(D) which requires the Board to make specific findings and articulate how in granting the variance, the values of surrounding proper are not diminished. She said, in this case, the Boards reasoning in determining whether the value of surrounding properties would be diminished is unreasonable and unsupportable as a matter of fact. The sole rationale declared by the Board during its December 1, 2022 deliberations was that the care and appearance of the property would not negatively impact surrounding properties. This statement has no relevance to the Application as the Application is not related to the care and appearance of the property. The Application is for a business and the Board failed to consider the presence of a business on surrounding property values. Furthermore, the Appellants and Aggrieved Parties submitted a letter as part of the hearing record that directly addressed the issue of the presence of a business in a historic village and residential neighborhood. The letter stated in part that the businesses have a negative impact on the desirability of living nearby thereby reducing home prices. Yet the Board dismissed the letter as unpersuasive. In addition the Applicant failed to satisfy her burden of proof as her only submission on this element was an

unsupported and unsubstantiated claim that property values wouldn't be affected, Ms. Clark feels the variance should be reversed on these grounds.

Walker noted this was discussed in the public meeting and was listed in the findings and he was aware of the letter from the real estate agent, and also understands that same agent hasn't attended the meetings nor is he aware of the numerous terms and conditions being placed on the applicant to prevent negatively affecting the values in the neighborhood.

David also noted there have been previous businesses in the neighborhood that did not diminish property values.

Count 7 – The Board failed to properly consider the fifth prong of the variance criteria set forth in NH RSA 674:33 I(a)(2)(E).

NH RSA 674:33, I(a)(2)(E) requires the Board to make specific findings and articulate whether an unnecessary hardship results from literal enforcement of the Ordinance. In this case, the Board failed to do so.

NH RSA 674:33, I(b)(I) provides that:

"Unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area: (A) no fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (B) the proposed use is a reasonable one.

First, as to "special conditions of the property", there is no uniqueness in the character of the Property. It is a historic residence on three unrestricted residential acres in Village District I with approximately 29 acres of land attached thereto subject to a conservation easement. There is nothing about the conserved land that negatively impacts the residence or the three acres it sits on. In addition, the historic home and three acres is consistent with many other homes in Village District I that are historic homes that sit on similarly sized properties.

Second, there is precisely a fair and substantial relationship between the purpose of the Ordinance provisions and the application of those provisions to the Property. Specifically and as detailed previously herein, the Ordinance lays out in Articles II and IV(A), the specific general purposes of the Ordinance that are served by the specific application of them to this specific property. As cited previously herein, Appellants and Aggrieved Parties have cited extensive examples of how applying the Ordinance, as written, serves the general purposes set out in the Ordinance.

In their verbal deliberations, the Board said that an inn or bed and breakfast which are

allowed by special exception in Village District I could host and serve tea parties. The Board reasoned that if the Applicant had applied for an inn or bed and breakfast by special exception and then hosted tea parties instead, that the outcome would be the same. The Board failed to recognize that there is no automatic permission given to an inn or bed and breakfast to host tea parties in the Ordinance. In failing to recognize this, the Board made an error as a matter of fact.

The Applicant has also failed to satisfy her burden of proof. The Applicant cites that the hardship is related to not being able to use the Property for commercial purposes. This has nothing to do with "special conditions of the property". The Applicant also argues that the variance will provide her with sufficient income to pay the real estate taxes and maintain the property. Article XIV (D) (1) of the Ordinance states that "financial hardship does not constitute hardship in this case". Ms. Clark feels the variance should be reversed on these grounds.

David agreed with the last paragraph that financial hardship does not constitute hardship. But the property is unique, an old brick colonial home, would be a location that would be appropriate for that type of business.

Count 8 - The Board failed to allow all abutters to participate in a public meeting that occurred on August 25, 2022.

On August 22, 2022, the Town of New Ipswich posted a public meeting notice (attached hereto as Exhibit 3) to the Town website for a Zoning Board site visit to 99 River Road. The public notice announced that a site visit would take place on August 25, 2022 at 6 pm and "all interested parties or their representatives are invited to attend." The minutes from the site visit (attached hereto as Exhibit 4) reflect that three (3) representatives comprising a quorum of voting members from the Zoning Board attended some portion of the site visit along with six (6) abutters and one (1) interested party. The New Hampshire Zoning Board Handbook defines a quorum as, "three members, including alternates sitting in place of members". In this case, Susan Mallett was an alternate and the third member of the Board. At the September 1, 2022 Zoning Board Hearing, Ms. Mallett was asked to join the Board as a voting member for this matter.

Five of the abutters who attended the site visit on August 25, 2022 are Aggrieved Parties and identified as follows: Stan Zabierek, Louise DeI Papa, Chris Allen, Marilyn Stowe and R. Craig Smeeth (Appellant). The sixth abutter is identified in the minutes as Bentti Hoiska. The interested party is identified in the minutes as Ray Holmes.

The site visit was comprised of three major components: (1) a walk and conversation concerning a parking lot; (2) a walk on the grounds of the property where tea party guests would visit; and (3) a visit to the interior of the residence used for tea parties.

The five abutters and Aggrieved Parties identified above were only permitted to participate in the first portion of the site visit in the parking lot while the sixth abutter, Bentti Hoiska and the interested party, Ray Holmes were permitted to join the entire event.

NH RSA 91-A:1 and A:2 require that all meetings shall be open to the public. A meeting is defined to include the convening of a quorum of the membership of a public body. As a result, the Town of New Ipswich violated the New Hampshire Right-To-Know law. Given the integral nature of the site visit to the Application and the Board hearings, this is grounds for reversing the issuance of the variance. Ms. Clark feels the variance should be reversed on this ground.

Walker noted that while Susan Mallett was approved as an alternate member on August 8th, she was not appointed to serve on anyone place on the evening of the site visit.

David also noted at the Zoning Board meeting after the site visit, the Board agreed the public should have been allowed to on the premises for the entire site visit. The Applicant offered to reconvene the meeting to allow the abutters to walk the site.

Bob Fasanella noted that at the meeting they offered to have Ms. Clark to serve as a representative and come into the house and do the site visit. He also notes that they had presented a Powerpoint presentation that showed the interior of the house.

Ms. Elwell also noted that all the attendees except for Mr. O'Leary have been in her house prior to this and are aware of the setup.

David noted we offered the site visit minutes to the general public as well. There was no quorum, although it was posted as a public meeting.

Ms. Clark presented Count 9 and 10 together because they are related to each other

Count 9 – The Board issuance of a variance to Article IV, Section C of the Ordinance resulted in an impermissible legislative change to the Ordinance.

The variance was issued to Article IV, Section C of the Ordinance. Article IV, Section C, as amended on March 18, 2018, is a list of permitted uses by special exception for Village District I. A variance from this Section is an addition to the list of special exceptions and therefore is a legislative change to the Ordinance. Zoning Board's cannot make legislative changes to a Zoning Ordinance via an application for variance. NH RSA 674 concerns the procedures required to make and adopt legislative changes to an Ordinance.

Count 10 – The Board issued a variance to the list of permitted uses by special exception and then failed to require the applicant to meet the requirements of the ordinance.

In this case, the variance was issued to Article IV, Section C of the Ordinance.

Article IV, Section C of the Ordinance, as amended on March 18, 2018, is a list of activities that can be permitted in Village District I if a special exception is obtained and if the activities also meet Article XIV, Section E of the Ordinance. These activities are specified as: (1) Inns; (2) Bed and Breakfast (3) Nursing and convalescent homes; (4) Day care, day nurseries and kindergartens; (5) Professional uses and customary home occupations⁶; and (6) Multi-family dwelling.

Article XIV, Section E of the Ordinance states:

"The Board of Adjustment may, in appropriate cases and subject to appropriate conditions and safeguards as determined by the Board, grant a permit for a special exception for those uses listed in Articles IV. V. VI, VII, VIII, IX, XII A footnote 3 as "Allowed by Special Exception." The Board, in acting on an application for a special exception, shall take into consideration the following conditions and criteria: 1. The specific site is an appropriate location for such use. 2. The use as developed will not adversely affect the adjacent area. 3. There will be no nuisance or serious hazard to vehicles or pedestrians. 4. Adequate and appropriate facilities will be provided for the proper operation of the proposed use. 5. Such approval would be consistent with the intent of the master plan, after having given due consideration to recommendations received from the Planning Board, Conservation Commission and the Selectmen, within thirty (30) days of receipt of the petition by the Board of Adjustment."

Even if it is determined that the Board permissibly granted the variance to Article IV Section C, the Board failed to require the Applicant to make an application and satisfy the requirements of a special exception and the requirements in Article **XIV**, Section E of the Ordinance. Ms. Clark notes the variance should be reversed on this ground and the Board should reopen the hearing for further proceedings.

David noted that he agrees we cited the wrong Article and Section in the Decision Letter and it will be corrected.

Bob Fasanella noted they started process by submitting both variance and special exception. They were told at the first meeting, they were told they should submit as variance.

David says the Board feels what was submitted is correct, the issue is with the decision letter where we cited, in the decision letter, the special exception paragraph when we should have been Village District I use section, the variance was not to the special exception section, and we will correct that.

Count 11 – Evidence was presented that a Board member made a public statement demonstrating that she did not have the requisite objective mindset to fairly adjudicate this matter, requiring recusal, and she failed to do so.

New Hampshire Superior Court Rule 2.11 which applies to judges and members of municipal boards acting in a quasi-judicial capacity states, "[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances: (1) The judge has a personal bias or prejudice concerning a party... " and "(4) [t]he judge, while a judge or judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy".

In this case, on August 16, 2022, which was approximately two and a half weeks before the first Board hearing on this matter, and approximately two weeks after the Board accepted the Applicant's variance application, Board member, Danielle Sikkila "liked" a post on Facebook that included the following endorsement of the Business on the Property:

*"why is one person that's proud of owning a property disrespectful for making it their own in a way? It wasn't Patty's house since it was built and it certainly wasn't the Taberman's either. You seem to forget it was built by and for one of the Barrett's. **No one is trying to desecrate any of the protected land by running a business out of the house not on the conservation land.** I've lived in other historic homes in town that weren't named for the original inhabitants. Why are you so emotional about this particular house?"*

As a result of the following Facebook activity, a motion was made for Danielle Sikkila to recuse herself pursuant to NH Superior Court Rule 2.11 and she failed to do so. Ms. Clark said the variance should be reversed on this ground.

Danielle noted that she did 'like' a post, she was not aware that she could not do that. The reason she liked the post was because the poster said a person can call their house whatever they want. It had nothing to do with the business, she doesn't have a personal relationship with the applicant, has not been to her home or her tea parties. She noted that she looks at every case and asks herself should she recuse herself. In this case she saw no reason she could not be fair and therefore did not recuse herself.

Count 12 (a) – The Board engaged in systematic and chronic mistreatment of several Aggrieved Parties even resorting to intimidation tactics to limit their participation in the proceedings.

On December 1, 2002, at the third and final hearing in this matter, Board members attempted to silence all of the remaining Aggrieved Parties who had not yet had a chance to present their verbal comments. In an announcement that was made near the beginning of the hearing, the Board attempted to require counsel for the Aggrieved Parties to read any and all statements into the record on the individual party's behalf. Counsel vehemently objected that this was inappropriate because the Aggrieved Parties had each experienced unique circumstances on their own property. The Board responded that if counsel would not read any and all statements that each Aggrieved Party would be limited to three minutes. Counsel again vehemently objected that this was fundamentally unfair because the three minute limit was not being proposed to apply to other abutters and interested parties. While the Board relented on the three minute rule, it announced that it would not allow for repetitive or irrelevant comments. Counsel assured the Board that no comments from the Aggrieved Parties were repetitive and represented uniquely individual experiences on their own properties. Yet, the Board interrupted Elizabeth Freeman, Aggrieved Party, during her remarks, thereby preventing her from giving her verbal comments in full. The Board also made aggressive comments amounting to intimidation to prevent Robert Fournier, and Abutter and Aggrieved Party, from giving almost all of his prepared statement.

The Board did not engage in similar behavior toward other abutters or interested parties. In fact, a member of the public who attended in support of the Applicant, was permitted to interrupt the proceedings by yelling at the Board about the fact that the hearing was not moving along fast enough and he had football to watch. The Board's response was to allow him to "jump the line" and provide his verbal comments next which included incoherent statements and outbursts directed at the Aggrieved Parties sitting in the audience. Ms. Clark noted that the variance should be reversed on this ground.

David asked who felt their remarks not heard. At each meeting the Board asked if there were comments. Liz Freeman and Mr. Fournier felt they were not allowed to speak. Liz said David told her to not give any more examples. Liz said was stating a bunch of “what ifs” and examples if the business was allowed in the village, and David said he had heard enough of the examples and to continue on.

David asked if she was denied her ability to continue on with the rest of her points, beyond the “what ifs” and examples and she agreed she could have continued on.

Walker asked Robert Fournier why he felt he wasn’t heard. He said after his wife spoke he was asked if he had anything new to add beyond what his wife said and he felt intimidated and dismissed.

David said Board was going down the sign in list and asking if each person had anything else to add.

Mr. Fournier said they were cut off, while others were allowed to comment. There was one person who was allowed to continue when he interrupted.

Walker said they did shut him down so that Liz could finish before letting him speak.

(note on Ms. Clarks form there were two number 12’s so we will refer to them as (a) and (b))

Count 12 (b) – During the hearings, the Board requested documentation from the Applicant and in two cases failed to require their submission.

During the first hearing on this matter held on September 1, 2022, the Board asked the Applicant to submit a Plan showing all wetlands delineated on her property. Abutters raised concerns at the August 25, 2022 site visit about the parking lot the Applicant cleared being located within the wetlands setback. The Board failed to require a formal submission of this Plan.

During the first and second hearings on this matter held on September 1, 2022 and October 6, 2022, the Board asked the Applicant to submit documentation that Monadnock Conservancy had granted her permission to make improvements to: (1) the driveway accessing the parking lot; and (2) portions of the parking lot that were both subject to a conservation easement. The Board failed to require the Applicant to submit this documentation. Ms. Clark asks that the variance should be reversed on this ground.

The Board did require a wetlands scientist get involved and delineate, and David says the Board received both letters from Conservancy, including the one granting permission to remove the boulder.

Bob noted there were two letters from Conservancy, he was as the site visit, with Selectmen and one of the letters was handed to all attendees. Ms. Clark was not in attendance but Mr. Fasanella feels one of her client should have shared with her.

Walker noted we didn't grant variance for wetlands infringement. Planning Board will be handling the layout.

Count 13 – The Board engaged in ex parte communications and impermissibly relied on these communications in its decision without disclosure.

Counsel for the Aggrieved Parties repeatedly made requests, via email, for documents that had been submitted in advance of all hearings. At the December 1, 2022 hearing, the Board referenced receiving several letters from interested parties and a letter from Monadnock Conservancy that were not shared with counsel for the Aggrieved Parties. This is a violation of NH RSA 91-A. She feels the variance should be reversed on this ground.

Susan asked what was not shared, Nancy said there were letters in support of Silver Scones and she didn't get a letter from Monadnock Conservancy.

David notes that they need to be requested if she wants them provided. She said she was not aware of documents she saw sitting between Susan and Danielle. David said if she asked to see them she would have been allowed to. David said if there is documentation Ms. Clark should email and ask for it.

Count 14 – The Board is required by NH RSA 676:1 to adopt procedures to govern its review of matters before it. The Town of New Ipswich has failed to do this and is impermissibly failing to hold a February meeting which will unfairly delay consideration of this appeal and motion for rehearing.

Ms. Clark noted at the beginning of the meeting, that because the Board scheduled a special meeting January 19th, 2023 to accommodate that she will dismiss this Count.

Walker asked if any other comments. Mr. Fasanella said they submitted a detailed 15 page response to the appeal. He wanted to be sure both Nancy Clark and the Board had a copy of the response and also to speak to the appeal by Ms. Clark et al.

Mr. Fasanella noted in their response he provided a chronology of the various permit requests, hearings on both driveway and variance requests. He also noted that they submitted both Variance and Special Exception because they were not clear on which one to submit. They

were told the Variance was the route to go, and it has been granted with 14 conditions. The first point made by the Appellant was that the decision lacked a specific written finding to support the decision. David explained that the RSA changed recently, and boards now need to list findings and advised that we are going to reissue decision letter including the facts and findings to comply with the RSA. Mr. Fasanella, noted that the decision letter alone isn't all the Superior Court considers, they also consider the entire record, including deliberations, applications, submissions, comments, minutes, recordings including made for community TV, etc.

Count 2 is essentially duplicative of Count 1 allegations.

Count 3 There is reasonable basis to support that the variance is not contrary to public interest under the statute. The application itself provided a basis for supporting that the variance is not contrary to public because it noted many of the tenants of the Zoning Ordinance, for example one of the tenants is to preserve the natural resources. This is done through the Conservation of property and preservation of open areas. The building will not change from what it is now. Since most of the activity takes place inside the only noticeable activity outside will be parking area and that will be buffered. The lot has been used for years. There was some mumbling in crowd. Bob continued to note the photographs showing lot for 70 years. Because it was a prior existing lot he feels it is grandfathered in and doesn't need to follow the guidance developed in 2021. This will be reviewed in the Planning Board meeting and they will ask for a variance because it was in use. There was a disruption from the audience asking if conducting a rehearing.

David pointed out that the two options the Board has authority to do 1) hold a complete rehearing or 2) address the points noted in the Appellants submission. As part of any public hearing, people are allowed to comment.

Bob continued, in response to Count 3, the case against Chester Rod and Gun club, the court said essentially they would have to alter the character of the neighborhood. He doesn't know how the granting of variance would change the neighborhood when most activity is within the house and gardens, on a limited basis (4 times a month), and the amount of cars that will be generated would be about 19 cars. Multiply by 4 times a month, at most you would come up with if there were events all year, 500 cars, not the 5000 that was presented by the appellants. Given the low intensity of the activity and the parking behind the residence there will not be an essential alteration of neighborhood.

Bob then moved onto Count 4, the applicant articulated numerous reasons why the proposed use of her property will not be contrary to the spirit of the Ordinance. Not only citing to the other special exceptions that could be granted, but looking at what others special exceptions like Bed & Breakfast, Day Cares, etc. would generate far more traffic and take place 7 days a week.

Moving onto Count 5) The applicant provided several articulate reasons why granting the Variance will do substantial justice in her Application as stated. The Applicant has no other employment currently and would lose her ability to make a living holding tea parties. Ms. Elwell has invested substantial assets into her tea party business including permitting and application fees. The denial of the Variance would eliminate this source of revenue. Compared with the minor impact the Applicant has a much greater loss than the rest of the neighborhood.

Count 6) The proposed use would not diminish property values. The Applicant had many people support her application, including Bentti Hoiska, who is not only a neighbor, but has one of the larger properties in the neighborhood. Again noting Day Care and Bed & Breakfast would substantially have more impact.

He cited 4 business that were in that neighborhood:

- 1) an antique business in the Clarke / Carroll residence before the purchased the home
- 2) an art gallery in the Smeeth residence before they purchased the home
- 3) a photography studio in the Allen / Stowe residence during their present ownership
- 4) a retail ski shop and metal fabrication business operated by Bill Currier in the current Fournier residence (now a junk car yard / hobby business in the back yard)

A look on Google Maps will show other unpermitted commercial businesses currently existing, some on Old Country Road. The Appellants have not pointed out any of these as an issue.

Count 7) Literal enforcement of the ordinance would result in unnecessary hardship to the owner because the following special conditions of the property distinguish it from other properties in the area. The Appellants claim there is nothing different about the 3 acres, but he notes you have to take into consideration of the whole parcel. The vast majority is in conservation agreement, many types of commercial business would be allowed on a lot this size, but the conservation changes the restrictions.

Also look at two other factors,

(a) is there a fair relationship between the general public purposes of the ordinance provision and the specific application of that provision to the property because:

- Most residents of Bank Village will not even see or hear any activities which take place mostly inside the residence other than parking.
- Use of the rear of the property for parking and events, will be screened from the public view.

(b) it is a reasonable proposed use because the house, grounds and landscaping are and will be well maintained and are consistent with the neighborhood. The signage and ground lighting around the residence will be discrete and not offensive in any way to the character

of the neighborhood. The use is less noticeable and more compatible than an Inn, Bed & Breakfast, Nursing home or Daycare which are all allowed by Special Exception. Also, the use will be no more than 4 times a month.

Count 8) regarding the Board failed to allow all Abutters to participate in a public meeting on August 25, 2022. The Site visit was attended by 2 voting Board members who voted on the Variance (David Lage and Walker Farrey). Mr. Lage showed up an hour late believing the inspection started at 7:00 pm. Susan was not appointed as an alternate, attended only one later meeting as an alternate, and did not vote, and later withdrew as an Alternate and did not participate further as an alternate member of the ZBA. Mr. Fasanella noted that he offered to do another site visit including Ms. Clark as representative. He also notes that they were allowed in the parking area. He also provided the public with a slide show that showed the inside of the house and parking areas. He notes there was not a quorum of Zoning members, and also not a quorum of voting members at the site visit, and also that David Lage was late so not at the majority of the site visit and saw the same as the neighbors.

Count 9) Appellants claim issuance of the Zoning Ordinance was an impermissible Legislative change of the Ordinance. Bob said the Zoning Board of Appeals has the authority under NH RSA 674:33 and the Ordinance Article XIV which authorizes ZBA's to grant "use" and "area" variances since RSA 674:33 was amended in 2009. The same 5 criteria are applied to both types of variances. The grant of a use variance is not "spot zoning" as maybe what the Appellants are suggesting.

Count 10) The Appellants claim the ZBA failed to require the Applicant to apply for a Special Exception and instead granted a Variance. Both were applied for in the beginning, and the Board determined which one would be accepted.

Count 11) The Appellants alleged that one Board member could not be impartial for a statement she made on a Facebook post and she should have recused herself. The Appellants alleged that because Danielle Sikkila "liked" a post on Facebook in which several people including the Applicant discuss the former owners' names, what the house had been called before, and the history of the Applicants house if far from creating a personal bias or prejudice. Her like was in reference to the naming of the home, not a preference for the business. This effort to disqualify this Board member for such baseless grounds is a desperate attempt to overturn or nullify the Decision. He noted the general rule of conflict of interest for NH municipal board members is that a conflict of interest requiring

disqualification will be found when an official or board member has “a direct personal or pecuniary (financial) interest in the outcome”. The interest must be “immediate, definitive and capable of demonstration: not remote, uncertain or speculative”.

Count 12) The Appellants allege that the ZBA engaged in systematic and chronic mistreatment of several Neighbors and alleged aggrieved parties. He said looking at the totality of the meetings was given more than two hours to speak at three hearings not including the Appellants she represented. Although the Zoning Board requested a 3 minute limit, they did not enforce it. He feels they had more time than the Applicant had, and in fact the Applicant was cut off and told to shorten her statement, and was interrupted by one of the Appellants who stood up and left, while making slanderous comments. He feels that was more disruptive than allowing the gentleman who made comment about football game speak. He feels the Board acted with tremendous restraint and he appreciates the Board.

Count 12b) The Appellants allege that the Applicant failed to submit documentation that the ZBA had requested. Bob feels we cleared up that Meridian submitted a stamped plan and he recalls Ms. Clark reviewing the plan and making comments on it at the Zoning Board table. Secondly, the Appellants claim they didn't get letter from Monadnock Conservancy permitting Ms. Elwell to use the driveway. There were in fact, two letters from Monadnock Conservancy and handed out to Appellants at the Selectmen's site visit.

Count 13) ZBA is alleged to have engaged in ex parte communications. He has not heard of specific correspondence that was not available or provided upon request.

He summarized and said the Appellants have present no grounds, factual or legal to reverse the Variance granted by the New Ipswich ZBA dated 12/19/22.

Walker asked if there were other comments. Mr. Fournier, said it was a grainy photo, and the clearing could be anything. David asked if the photo was submitted, he noted it was a Google street map.

Jane noted that the Monadnock conservancy told her it existed a long time, and they asked to clear it and also to remove the boulder. She noted the only reason she applied for the driveway alteration, was to cover her bases and the Monadnock Conservancy was in agreement.

The audience started to talk over Ms. Elwell, and it was hard to understand anyone, so the audience was asked to quiet down and speak one at a time.

David noted the parking lot is not under the ZBA purview, this will be reviewed by the Planning Board. There was never a 'parking lot', there may have been a clearing and cars parked.

David asked if there was anything else. Craig Smeeth, commented on the volume of cars, and that the volume has continuously changed and they need to be modified because of that. Walker said they know people were concerned about traffic and that the number of attendees was specifically addressed for that reason.

David made a Motion to close the public hearing and go into deliberations on the Applicants application for Administrative Appeal. Danielle seconded and all were in agreement.

Count 1) David noted the original decision letter did not follow the new RSA, and we will correct the previous decision letter and reissue new decision letter with the facts and findings. Variance should be to Article IV, Section B.

All were in agreement

Count 2) David same as count 1, the Board will reissue decision letter with the updates.

All were in agreement

Count 3) Walker noted that the abutters comments did help form the Boards decision.

The Board discussed the Small Business references.

David noted that "Small Business" is in fact noted in the Master Plan, one example is listed under Goals and Objectives, chapter III and reads as follows under "Broaden the tax base".

*"New Ipswich is not well-situated to attract large scale commercial and industrial complexes and members of the community are not in agreement as to how much or what kind of commercial and industrial development is desirable. However the community is in agreement that the town should make an effort to attract light industry and **small business** if only to broaden the tax base. The section on business development provides more direction."*

Also, in the section "New Ipswich in the Future" at the bottom of the page, it reads " Towns people will be served by municipal facilities and local commercial services consistent with the town's rural character and adequate for the needs of the community."

Also “The tax base will be supported by business and light industry which does not detract from the rural character of the town and which will help offset the burden of residential property taxes”.

In chapter IX on page IX-2, under commercial and industrial, paragraph 4 reads “The full extent of the development of home based business is not now known. The continuation and addition of home business in New Ipswich could be of significant economic benefit without compromising the rural character of the town. The expansion of broadband services throughout the state are creating more of these economic opportunities. Statewide efforts are currently underway to make this a reality for all communities. **Local support for home occupation should be a priority since it promotes economic growth** and reduces the dependence on motor vehicles/commuting to work.”

All were in agreement

Count 4) Walker notes they did discuss the second prong of the criteria at the meeting, and the finding of facts will be included in the decision letter.

David noted he had mentioned how the spirit of the ordinance and how the master plan and its objective for small business fit in. He said this should be in the decision letter for Silver Scones

Determined the parking lot size doesn't need to be addressed as it is not the Zoning purview.

All were in agreement

Count 5) Walker notes they did discuss how in granting the variance substantial justice is done. The findings and facts will be listed in the updated decision letter.

All were in agreement

Count 6) Walker mentions there were other businesses in that area, he also acknowledges the letter from real estate agent, but stands by the fact that they made adequate decisions and conditions so that the business won't affect property values.

All were in agreement

Count 7) Walker notes this will be addressed in the findings and facts section of the decision letter.

David wanted to mention the other businesses and that one of them were pre-ordinances, but the others were post-ordinance.

Walker noted they used their collective experiences to make their decision.

All were in agreement

Count 8) Regarding the site visit, David noted that we didn't have a quorum and because it was not a quorum it was not a meeting. Also that Susan was not appointed to fill a vacancy/act as alternate member. But we did have posted as a public hearing and they should have had a chance to participate. At the follow-up meeting, we shared the minutes from site visit and there was an offer to let them go.

All were in agreement

Count 9) Walker agrees we have an administrative error to correct, but it doesn't impact the intent of what they were hearing or try to circumvent the ordinance. The decision letter will be corrected to read Article 4 Section B.

All were in agreement

Count 10) Walker noted we were looking for variance not special ordinance. David said for this finding of facts it was a variance and the ZBA was clear it would not fall under a special exception.

All were in agreement.

Count 11) Walker notes that Danielle explained she had no bias. David also noted there was not benefit to Danielle as well.

All were in agreement.

Count 12 a) David noted when he asked who the aggrieved parties were it was noted Liz Freeman and Mr. Fournier. Liz had given a list of what if scenarios, and David asked her to move on, as the board got the point.

Danielle noted they were asked to not repeat the issues in order to save time as we were into multiple meetings.

Walker noted she sat down on her own volition, and she did have opportunity to speak.

David noted Mr. Fournier agreed he had the opportunity to speak and when asked if he had anything further than the speaker before (his wife) he had nothing more to add.

All were in agreement that there was no standing.

Count 12 b) Walker notes they did get 2 letters from Monadnock Conservancy, a septic plan, and there is no grounds on this count.

All were in agreement.

Count 13) The abutters spoke and then handed in their written documents to ZBA, which were put in a binder of other letters. David noted that they can't read the emails and letters couldn't be read the evening the binder was brought into the room. He notes Ms. Clark could have asked for a copy of what was in there or to see it. Previous requests were fulfilled.

All were in agreement

Count 14) this was withdrawn by Ms. Clark.

David made a motion to uphold the ZBA's December 1st variance approval based on a new decision letter with the findings of facts being incorporated and to deny application for appeal of the administrative decision.

Danielle seconded and all were in favor.

On both of the appeals of decision David doesn't know if we need to include findings and facts on that. The Board discussed and researched for the answer.

There was some back and forth what a rehearing was.

Ashley Saari, of the Monadnock Ledger, said a rehearing is if they heard the original case from scratch.

David says NHMA says there is a choice to start all over again or address the points that were appealed on.

On Driveway under findings of facts the decision letter will address the 3 points in the application, not the additional 2 submitted this evening.

On Janes Decision Letter:

- Eliminate #5 and renumber
- Section should be IV/B
- Make additions to Criteria 2

OLD/NEW BUSINESS:

March meeting will be a working meeting only to discuss changes in the reference books
Make 3 new handbooks for new members.

Reviewed minutes for January 2023. There were many changes/updates to be made.

A MOTION to adjourn was made by David Lage to adjourn, and Mr. Farrey SECONDED the motion, all were in favor.

Respectfully Submitted,
Susan Mallett