

ZONING BOARD OF ADJUSTMENT	July 28, 2022 7:00 PM
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A. CALL TO ORDER

J. DeLeire, Chairman, called the meeting to order at 7:00 PM.

Chairman DeLeire explained that the June ZBA meeting had an applicant who requested a full five-member board for their hearing, when there were only four (4) members present, and the applicant requested a continuance to this July meeting as a result. The ZBA subsequently built the board, and presently have a total of five (5) ZBA Alternates upon which to draw so that there should never be an issue of less than five members present in the future.

Chairman DeLeire continued that there are four (4) Members present tonight, in addition to four (4) Alternates present, so the Board will be choosing one (1) Alternate as a voting member for the meeting. The sequence of the meeting is the applicant presents their application, along with their experts (if any), then the ZBA members and Alternates ask questions of the applicant. Then Public Comments are heard, to ask questions or comment on the application, after which the Public Hearing is closed for comments. The non-voting Alternates are then asked to sit in the public area of the meeting hall during deliberations and for the vote. This is to be clear for people watching the meeting, or in the meeting room, that there will only be five (5) people voting on the application.

B. ROLL CALL- ZONING BOARD OF ADJUSTMENT

4 MEMBERS and 4 ALTERNATES PRESENT: John DeLeire, Chairman; Steve Bryant, Vice-Chairman; Mark Call, Member; Alex Dittami, Member; James Hasenfus, Alternate;

3 NON-VOTING: Patricia Young, Alternate; Weezie Vance, Alternate; Jim Manna, Alternate.

1 ABSENT: Jude Augusta, Alternate

STAFF: Mark Sikorski, Building Inspector; Rachel D. Webb, Planning/Zoning/Town Secretary.

GUESTS: Iieana Keene (applicant); Attorney Justin Passay, DTC Lawyers; Matthew Steinel, Engineer, Millennium Engineering; and Charles Fusco (applicant)

C. PUBLIC HEARING

Case # 22-02: Application from **Iieana Keene & Patricia Deary, Trustees of the Iieana M. Keene Revocable Trust** for a Variance to the terms of Zoning Ordinance Article III, section 7.7 and asks that said terms be waived to permit construction of septic system with a 10' front setback and 20' side setback where 50' setback is required, in Zone A: Agricultural / Residential District, and Wetlands Conservation District, at property located at **13 Martha's Court, Map 5, Lot 82-9.**

Justin Pasay, Attorney with DTC Lawyers, introduced himself on behalf of the applicant, Linda Keene. He stated that also with him was Matthew Steinel, Septic Engineer, Millennium Engineering. He reviewed the materials presented to the Board in the application package, namely:

- A septic system design plan by Matt Steinel from Millennium Engineering;
- A tax card;
- A wetlands report by Sergio Bonilla from Mission Wetland and Ecological Services;
- Architectural Elevations of the project, for the proposed ADU (accessory dwelling unit);

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- Tax map 5

Atty Passay introduced the project to improve the property with an ADU (accessory dwelling unit) to facilitate multi-generational living for L. Keane and her family, which (ADUs) are encouraged by the State and Hampton Falls. Atty Passay continued that the local Zoning Ordinance defines sub-terranean septic infrastructure as a structure, which must comply with the zoning setbacks. Given the ordinance required fifty-foot (50') front and side-yard setback requirements, and the significant wetlands on the property, the only place to locate a new, state-of-the-art septic system to accommodate both the existing structure and the proposed ADU is in the front yard, within the front and side yard setbacks. The new septic system will replace the existing septic system and the new septic system will be farther away from the wetland resources on the property, which is good for the environment for the wetlands and for the public generally. In addition, the applicant is proposing a number of gratuitous wetlands enhancements to lead to a an improved function value of the wetland better than what exists currently. The applicant performed a wetlands report, that is gratuitous because the applicant is not proposing any improvements at all within the Town's Wetlands Conservation Overlay District nor Buffer. They wanted to flag the wetlands on the property to make sure that all proposed improvements for the project were outside the Conservation District, and outside of the Buffer. They are proposing additional plantings and nesting boxes, detailed in S. Bonilla's Wetland report, that will add value to the property.

In summary, he stated that the proposal will be a "win-win", as the applicant gets to enjoy multi-generational living on the property, the property is going to be safer from an environmental perspective because the septic will be further away from the wetlands, and the wetlands will be enhanced by the proposals in the wetland report.

He reviewed the property description, a two-acre lot within the A-district, it is a currently improved three-bedroom single-family dwelling with an attached garage. The building is currently pushed all of the way to the west or the front of the lot, which is because of the wetlands on the property. There is an "isolated wetland" identified on the plan, that is the shape of a circle, approximately 4,800-square-feet in size, composed of very poorly-drained, wet soils right in the middle of the property. The wet soils and the corresponding Buffer are the reason why there is nowhere to put the septic system other than in the front of the property. There is a distinct very-poorly-drained soils area in the southeast corner of the property. Otherwise, the property is currently conforming in terms of all zoning requirements.

The property is unique in terms of the Variance analysis, because of the way that it is encumbered by the wetlands, but it is also significantly smaller in size than the properties around it. It is also wetter than most of the properties in the area.

The applicant is proposing a multi-generational living scenario, with a new attached ADU and a new one-bay garage. The ADU is permitted by right, by Building Permit, in the Town's Zoning Ordinance, since it will be an attached Accessory Dwelling Unit.

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The septic proposal is for a new Presby Advanced Enviro-Septic system with a total design flow capacity of 675 GPD (gallons per day) and corresponding 5,000 square-foot septic reserve area to be located in the southwest corner (front yard area) of the property. They are asking for ten-feet (10') of front yard setback where fifty-feet (50') is required, and they are asking for twenty-feet (20') of side yard setback where fifty-feet (50') is required.

A.Dittami asked for the location of the current septic system on the property, and Atty Passay described the location on the plan, directly behind the house.

S. Bryant asked if the ADU will need any additional approvals, and the response was no more approvals are necessary because it will be an attached (not detached) ADU, and it is permitted by right.

Matt Steinel, Septic Engineer with Millennium Engineering presented the septic plan, and explained that the location of the current leach field is where the attached ADU is being proposed, so that is why they had to relocate the septic system. There is a proposed 700-square-foot leach field within the state required 5,000-square-foot septic reserve area. The system is designed for residential use with no disposal.

Atty Passay reviewed the application in terms of the five (5) criteria for granting a Variance. He stated that the Supreme Court has said that the first two criteria are analyzed together. The first criteria is that the Variance will not be contrary to the public interest, and the second criteria is that by granting the Variance that the spirit and intent of the ordinance is observed. Atty Passay said that the only way that an application could be contrary to these first two criteria would be if the application violates the purposes of the Zoning Ordinance basic objectives. He continued that case law says that the ZBA should also consider two specific questions, namely, (1) whether the Variance request violates the central character of a neighborhood, and (2) whether the Variance request is a threat to public health and safety.

Atty Passay stated that there is no provision in the Zoning Ordinance for the purpose of the setback, but generally the intent of the Zoning Ordinance is to promote the public health, safety, and prosperity, and to preserve the rural charm of Hampton Falls. Generally, the idea of setback provisions in zoning ordinances is to attain uniformity of the aesthetic of development and to facilitate reasonable development. Atty Passay stated that this application does not create conflict with the Zoning Ordinance because granting the Variance will accomplish the purpose of the Zoning Ordinance. Granting the Variance will advance the public health and welfare by:

- Creating a better property, with a new septic located further away from wetland resources;
- Will be a public benefit because the wetland value function will be higher than it is today;
- The proposed project will be facilitating the use of an ADU, which is encouraged by the State, and by the Town;
- The proposed project will protect the rural charm of Hampton Falls, as proved by the Architectural Renderings;

The proposal will accomplish the purpose of the Zoning Ordinance.

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The third criteria is whether there is substantial justice accomplished by the application. There is no gain to the public by denying the application, in fact, the opposite is true that the public will gain from approving the application. It is good for the public and good for the applicant.

The fourth criteria is that the proposal will not diminish the values of the surrounding properties. Atty Passay said that there is no evidence that that would be the case. Enhancing the septic, the wetlands, and the addition of an ADU will increase the value of the property.

The fifth criteria is the hardship test, specifically (a) are there special conditions of the property; yes, the lot is smaller, more wet, and there are no other places that are reasonable to locate the septic system on the property; (b) is the purpose of the underlying zoning ordinance being advanced by applying it to this property under the unique circumstances of this case; denying the variance will not accomplish the purpose of the zoning ordinance, and granting the variance will accomplish the purpose of the zoning ordinance; and (c) is the use reasonable; yes, Accessory Dwelling Units are encouraged by both the State and also by the local Zoning Ordinance.

Chairman DeLeire asked for any public comments, and there were none, so the Public Comment portion of the meeting was closed, and the Public Hearing was still open.

A.Dittami asked a procedural question, whether the Board was going to go through each of the five (5) criteria, or if the Board was going to deliberate on the application as a whole.

M. Call said that it was a very detailed presentation and that he is ready to move forward, and S. Bryant agreed. Chairman DeLeire said that the applicant addressed and satisfied all five (5) of the Variance criteria. Additionally, Chairman DeLeire continued that the applicant outlined that it is a unique property, with many challenges, there are some improvements being made, this home can now accommodate extended family which is great for that family and for the Town. Challenges cause the applicant to apply for relief, and Chairman DeLeire said that it made sense to him to grant the relief because the five (5) criteria have been met. He said that in light of the fact that the meeting is recorded, and there was such a detailed presentation, that he would defer to the recording to capture the detail, and not go through each of the criteria a second time.

A.Dittami had questions addressing the drainage and effluent run-off from the septic system. In the past, A. Dittami continued, the ZBA has allowed variances, and because there was no adequate provision for drainage off the property, the neighbor's property was flooded and in some instances (example downtown) the well was contaminated because the septic system was located too close to the property line within the setbacks. He said that the ZBA needs to be sure that there will be no effluent going into the neighbor's yard.

A.Dittami's second question was regarding safety, and he stated that part of the reason that we have setbacks is to allow for heavy equipment, like fire trucks and ambulances especially, to be able to get around a piece of property without getting stuck. He said that it happened to him, personally, years ago he had a 5-ton construction truck collapse into his septic system and he had

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to rebuild it. He proposed that if the ZBA is going to allow a Variance for a septic system to be located within the setback areas, that the septic system should be reinforced with additional bracing to be able to support the weight of an emergency vehicle. It was A. Dittami's opinion that because that provision was not being made, and that drainage and effluent run-off have not been addressed, that the spirit and intent of the Ordinance was not being upheld.

A.Dittami said that one of the criteria are whether the property can be utilized without granting the Variance. He said that it appears that a new septic system could be accommodated by altering the design of the house and locating the septic in the backyard without the need for a Variance. He agreed with the applicant regarding the values being increased. Referencing the conditions of the lot, A. Dittami said that he contested the applicant's claim regarding the uniqueness of the lot because it is not a historical piece of property, in fact it was a subdivided lot with normal restrictions, and he argued that there is nothing unique about that piece of property, and it has been deemed a buildable lot because it meets all of the minimum requirements. He said that if there can be provisions for emergency vehicles in the setback area, he likes the idea of the ADU for extended family. He does not want to disregard the provisions of the subdivision, or the safety responsibility of the Ordinance, or obligation the ZBA has to the abutters to make sure that their property is not adversely affected.

Atty Passay addressed each of the three issues raised by A. Dittami. The first was the effluent and the potential of flow onto the abutter property. He said that the Engineer examined the topography, and Atty Passay pointed out the topo lines on the plan depicting sloping of the site to the rear of the property. Chairman DeLeire asked how close was the nearest house to the proposed septic system, and Atty Passay said that the Existing Conditions map did not pick-up that fact, but the neighboring house does observe the fifty-foot side yard setback, so the new septic system will be located at least that distance from the closest house. The second comment about the front yard and the trucks he would agree, to a certain extent, that the idea of setbacks is to prevent encumbrances from fire safety. The proposal by Atty Passay is regarding subterranean structures, so there is nothing about the project that would prevent an emergency vehicle from going onto the property. A.Dittami clarified his question to ask if the applicant would be averse to modifying the design of the septic system to add some stability so that a truck could drive over it. Atty Passay responded that at some point the question of engineering expense becomes an issue. He continued that there is not ample space to put the new septic system behind the house. He said that if the choice is whether to locate a new septic system in the back yard and impact the wetland versus locate the new septic system in the front yard and impact the front yard setback, then the front yard is the better choice.

S. Bryant asked about the well radius for the abutting property, as it did not show on the plan. M. Steinel responded that if the seventy-five-foot (75') protective radius for a well overlapped onto another property then that area of the property would have to be designated as non-developable. If the well radius extends into the abutting property in a developable area, then the abutting owner must sign a Well Release that acknowledges that they do not have the right to prevent the neighbor from doing (well maintenance) work on their property. The answer to S. Bryant's

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question was that the neighboring well is at least seventy-five-feet (75') away (or it would have been shown on the plan).

M. Call agreed with Atty Passay that the safety assessment for emergency vehicles that the risk is very small for driving on top of a septic system. He did not see that as an insurmountable issue for the ZBA to evaluate. Chairman DeLeire said that these are all good points to debate, discuss, and uncover, but there is nothing that steers his thinking away from his opinion that all five criteria of the Variance have been met.

MOTION: To approve Case # 22-02: Application from Ileana Keene & Patricia Deary, Trustees of the Ileana M. Keene Revocable Trust for a Variance to the terms of Zoning Ordinance Article III, section 7.7 and asks that said terms be waived to permit construction of septic system with a 10' front setback and 20' side setback where 50' setback is required, in Zone A: Agricultural / Residential District, and Wetlands Conservation District, at property located at 13 Martha's Court, Map 5, Lot 82-9. Motion is to incorporate all five (5) criteria as being deemed met to approve said variance.

MOTION: S. BRYANT

AMENDED MOTION: Incorporate herein by reference all of the representations of the Attorney, and the Engineer (who represents the applicant) made during the presentation.

MOTION: J. DELEIRE

SECOND: M. CALL

VOTE: 4-APPROVED, 1 OPPOSED; MOTION PASSED

A.Dittami asked for clarification about the new Findings of Fact, under the new rules, he asked how that should be addressed. Chairman DeLeire said that he knows that the new rules have not been implemented yet, and that it is on the ZBA's agenda later tonight. R. Webb stated that the date of implementation is August 23rd, and that the Planning Board also discussed the topic at their meeting two nights ago.

Chairman DeLeire stated that the Public Hearing for Case # 22-02 is officially closed, and he invited the ZBA Alternates to rejoin the Board around the table for the next Case # 22-03. He opened the Public Hearing for Case # 22-03.

Case # 22-03: Application from **Charles and Darlene Fusco** for an Equitable Waiver to the terms of Zoning Ordinance Article III, section 7.7.1 and asks that said terms be waived to permit a pool and deck as constructed within the side setback, located in Zone A/R: Agricultural / Residential zone, at property located at **10 Alexis Lane, Map 2, Lot 4-21.**

Charles Fusco (applicant) thanked the board for hearing his request for an Equitable Waiver of Dimensional Requirements for a pool and a deck that was built within the setback of his property. He explained that he and his wife purchased the home two-years ago and wanted to install a pool and deck for their children and grandchildren. He said that he and his wife planned

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to live in the home for the rest of their lives. Their previous home was smaller and the homes were very close together, so they were excited to come to Hampton Falls and have all of the space. They decided to put the pool and deck in the current location because of the proximity to the house. The back yard has a dramatic slope and there was no way that you could put a deck in that part of the back yard. The well is located in the back yard, and they wanted to stay a safe distance away from the well. The current location of the pool is the most level part of the yard and did not require much leveling. The deck was built to make it as aesthetically pleasing as possible because it was extending out from the house. The Fuscus planted flowers and evergreens to make it more appealing to their neighbors and to the neighborhood, to keep with the country setting of the neighborhood. Being new to the neighborhood, he said that his wife and he spend a lot of time outside trying to make the house look as nice as possible, to keep with the look of the neighborhood. C. Fusco said that they want to be good neighbors and good citizens and they will abide by the decision of the ZBA. He thanked the Board, again, for hearing their request for an Equitable Waiver.

Chairman DeLeire asked C. Fusco to please present the information submitted in his application for an Equitable Waiver of Dimensional Requirements, to specifically address the four (4) criteria needing to be met for that type of approval.

- (a) *That the violation was not noticed or discovered by any owner, former owner, owner's agent, or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bonafide purchaser for value;* C. Fusco presented that they were unaware that they were in violation of the setbacks because they were told by the real estate agents and the former owner that the property (boundary) was located much further behind the stone wall, marked by an orange stake in the woods. C. Fusco said that they just did not realize that they had made that mistake.
- (b) *That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent.* C. Fusco presented that it was a good faith error because they were honestly unaware of the setbacks.
- (c) *That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property.* C. Fusco said that the pool and deck are for private, recreational use only and are very un-noticeable from other properties, therefore should not be a private nor public nuisance to the surrounding neighborhood.
- (d) *That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction so far outweighs any public benefit to be gained, that it would be inequitable to require the violation to be corrected.* C. Fusco said that the cost to correct this would be tremendous as the pool would need to be drained and dismantled, possibly causing damage to the structure. The deck would also need to be dismantled causing a great loss financially and a large loss of building materials and plant life that they planted around it.

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Chairman DeLeire said that he went and looked at the site and saw some of the challenges there. There is a property line angle that does not represent itself easily from the street. He asked if the company who installed the pool and the deck ever asked any questions about where the property line was located, prior to installation, and C. Fusco responded that he did the installation himself with help from family and friends.

S. Bryant asked if the applicant got a Building Permit, and C. Fusco responded that he did get a Building Permit, after the fact.

M. Call asked how the applicant was made aware that he had constructed the pool and deck within the setback, and C. Fusco responded that the Building Inspector notified him that he was in violation. W. Vance asked how did M. Sikorski find out, and C. Fusco responded either by a neighbor or someone driving by, he was not sure. M. Sikorski stated that the Building Permit is currently in Denied status. Chairman DeLeire asked M. Sikorski if there was anything questionable about the structure, or does it conform to what would be approved, and M. Sikorski responded that it is well constructed. M. Call asked how close is the existing pool and deck to the property line, and C. Fusco responded thirteen-feet (13') feet into the setback, so thirty-seven-feet (37') from the property line (as the side yard setback is a total distance of fifty-feet (50')). M. Sikorski directed everyone to consult the diagram in the application submittal, and there was discussion about the stone wall not representing the property line, and how that was part of the problem.

M. Call looked at the four criteria needing to be met, and he had the biggest problem with paragraph (b), or the second criteria. A. Dittami asked the applicant if he knew there were setback requirements that he had to comply with, and C. Fusco responded no. A. Dittami asked if the applicant took any measurements to see how far away from the property line the pool and deck would be, and C. Fusco responded that, as he stated earlier, he thought that the property line was farther into the woods at the orange stake, that had been represented by the Realtors and the former owner. Chairman DeLeire asked if the applicant ever found out what that orange stake represented and the response was that he thought it was something to do with the septic system.

Chairman DeLeire said that the questions that he would contemplate are: is the application something that would be permitted, if it had gone to the Building Inspector prior to being built? Is it something that the ZBA would have granted a Variance for, had the applicant been required to come to the ZBA prior to constructing the pool and deck? If the ZBA can overcome the fact that it is a mistake, and Chairman DeLeire said that criteria (b), that M. Call identified, is difficult to overcome, (that the applicant is not supposed to know, it is not supposed to be by ignorance or otherwise, misrepresentation, or bad faith), but the ZBA is hearing factors that have to do with outside forces that may have helped come to the decision by the applicant that the property line was somewhere else. Looking at the pictures it looks like the deck and the pool were probably expensive to install, even though the applicant did the work himself. The ZBA would have to overcome the fact that if they were to Deny the Equitable Waiver application that there would be a significant expense to the applicant to remove the improvements, then get a

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Variance and a Building permit to put it back on site. M. Call asked if the Board was sure that those steps would have to happen if the Equitable Waiver was Denied, and, afterwards, if the applicant wanted to proceed to reconstruct.

M. Sikorski asked the question, what would be the cost to locate the use somewhere else on the property where it would not need a Variance? The ZBA has discussed this with other applications in the example of needing to relocate something around a large tree or changing the grade of the property. He asked if the ZBA Members had gone to view the property, and all said that they had. He said that looking at the site to ascertain the logical location for a pool and deck, without needing to make major topography changes, the current location makes total sense. M. Sikorski said that in the Town Newsletter (posted six-times annually), he routinely includes a request for the public to always first discuss potential building/property changes, before building anything, to see if any permits are required.

A.Dittami asked M. Sikorski if a permit is required to install a pool, and the response was yes. A. Dittami asked the clarifying question of whether a permit was obtained prior to the work being done by the applicant, and the response was no. A. Dittami said that he believes that the ZBA has broad discretion to grant a Variance. M. Call disagreed saying that the ZBA was present to hear an Equitable Waiver application, not a Variance. A. Dittami said that the ZBA has a range of discretion in what they could do from saying no, to granting a Variance, if they were to grant some sort of relief. M. Call disagreed saying that he does not agree that the ZBA has broad discretion. M. Call stated that the Equitable Waiver process is that the applicant must meet all four (4) criteria, to be granted approval; but it does not say that, after granting the Equitable Waiver that the ZBA can then also grant a Variance. A. Dittami said that the broad discretion of the ZBA is not written in the local Ordinance, but, is part of the State law enabling ZBAs. He added that it may not be appropriate, but the ZBA can do it.

S. Bryant said that he could not get over the Equitable Waiver criteria about the failure to inquire and asked if it would be easier for the ZBA to grant a Variance in this instance. Chairman DeLeire said that you can not get a Variance for something that is already built. He raised the question about whether the application would have needed a Variance, because it would be easier in his mind to get over the Equitable Waiver criteria, if, hypothetically, a Variance would have been needed and granted after having applied for a Building Permit before construction.

A.Dittami asked M. Sikorski if an applicant builds something without a permit is there a monetary penalty, and the response was that currently the Town does not exercise any penalty for doing work without a permit; although the Town is in the process of changing the fee structure to double the permit fee as a fine. A. Dittami asked M. Sikorski if this application had gone through the normal course of events and applied for a Pool Permit, would the Building Inspector have Denied it because of the location within the side setback, and the response was yes. A. Dittami continued that if the applicant came forward asking for relief, would M. Sikorski have supported that application for the reasons he stated earlier? M. Sikorski responded that any Variance application to the ZBA must formulate a response to the five criteria; so, the ZBA has seen many justifications and reasonings for those criteria. There are certainly factors of the

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property that would preclude the pool from being built farther behind the house, because of the well located in the back.

Chairman DeLeire clarified that there are really two separate things for consideration, namely, 1) if a building permit had been sought, then a plot plan would have been examined, and it would have been discovered that he needed relief from zoning. 2) the equitable waiver of a dimensional requirement within the setback needs to prove that the applicant did not know that he was in violation of the setback.

A.Dittami asked what is the appropriate remedy? Does the ZBA ask the applicant to apply, to make an application, is there a monetary penalty? What happens?

M. Call asked why is removal of the pool and deck the automatic reaction, or the only remedy, aren't there some degrees of variation? He asked if the ZBA is responsible for prescribing a penalty? Chairman DeLeire responded saying that his understanding was that the Equitable Waiver was very black or white, and that if the ZBA Denied it, that the applicant would have to remove the pool and deck. He said that in light of all of the factors, that he thinks you have to put a reasonableness standard on it, in terms of what is in the yard. He believes that the applicant made an honest error and mistake.

S. Bryant wondered if the ZBA should consider asking the applicant to Table this application to the August 25th meeting to allow some of these questions to be answered. He continued that he thinks it is hard to grant the Equitable Waiver given the facts and circumstances, but no one wants the applicant to be burdened with tearing down the pool and deck. Is there something the ZBA can do to accomplish both; to not set a precedent, but to also not provide an undue hardship to the applicant.

M. Sikorski said that granting an Equitable Waiver then essentially grants a non-conformity. Chairman DeLeire stated that if an undiscovered non-conformity exists for a period of ten-years, then it is grandfathered. Chairman DeLeire suggested that if the ZBA thought that the applicant could have gotten a Building Permit, and if the ZBA thought that there would have been a Variance because it is unique enough, and that it is something that if it exists for a period of time and it is OK, there is an argument to be made that if the ZBA feels strongly that this is such a burden for the applicant to have it taken down, and there is one sentence to overcome in the Equitable Waiver criteria, then that is what the ZBA has to decide, if they are willing to do that. Chairman DeLeire concluded his comments saying that he was tending toward Granting the Equitable Waiver than Denying it, because it feels like it is the right thing to do.

W. Vance said to put yourselves in the applicant's shoes, as if this was happening to you, and S. Bryant responded that it is tough to do that because the ZBA is the steward of the requirements. Additionally, he said that he could not put himself in the applicant's shoes because he would have gone to the Building Inspector first.

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A.Dittami proposed the ZBA Deny the request for an Equitable Waiver, and then Grant a Special Exception, and require a new plot plan be produced with restrictions. Chairman DeLeire disagreed, clarifying that a Special Exception can only be allowed where the use is allowed by Special Exception, and that is not the case with this application. He continued that he thought the only alternative the ZBA had was to make a decision on the Equitable Waiver; it is not a Variance, it is not a Special Exception.

M. Call asked why the ZBA could not give S. Bryant's proposal some more thought? Are there subject matter experts who know this law? He would like to know if there are more choices than Granting the Equitable Waiver or Denying it with the result of the applicant taking the pool and deck down. He said that he would like some guidance on that, and Chairman DeLeire deferred to the Building Inspector. M. Sikorski responded that the Town has a new Land Use Attorney, Mr. Cordell Johnston, who can be consulted on this topic. Additionally, M. Sikorski added that he also likes the idea of Tabling this application to accommodate seeking input from Attorney Johnston to address the answers to questions raised tonight.

A.Dittami asked what would be the questions for the Land Use Attorney to answer? Chairman DeLeire responded:

1) Is there statutory authority and/or case law in NH that allows the ZBA to overcome some of these issues and a way to allow the Equitable Waiver?

S. Bryant asked:

2) are there any other solutions/avenues at the ZBA's disposal for alternatives for relief/remedy to this application?

A. Dittami asked:

3) Is there authority for the imposition of penalties?

S. Bryant asked:

4) Are there alternative avenues of denial, such as Deny the Equitable Waiver, and then grant a Variance?

S. Bryant additionally made the point that he wants the ZBA's position/path to be defensible in the future.

Chairman DeLeire explained to the applicant C. Fusco that he could either ask the ZBA to make their decision tonight, or he could request a Continuance to the ZBA's August 25th meeting, to allow the ZBA to complete their due diligence and to get some of their questions answered by the Land Use Attorney. C. Fusco requested the Continuance to the August 25th ZBA meeting.

P. Young found a paper in her binder on the subject of a NHMA (NH Municipal Association) Court Update on the subject of Equitable Waivers on Dimensional Requirements. She read some of the article to the ZBA, and then M. Sikorski commented that he thought it was based on an applicant presenting data to a Building Official, and then a Permit was issued based on the data, and then afterwards it was discovered that the data was wrong, so that it was a mutual

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misunderstanding, and not the same circumstances as Case 22-03 tonight. M. Call identified a partial sentence crossed out on the application, under criteria (b) that was due to an *error in the ordinance interpretation or applicability made by a municipal official in the process of issuing a permit*. M. Sikorski said that he was the one who lined out that sentence because there had been no error made by him, and that portion of the criteria did not apply in Case 22-03.

MOTION: To continue Case 22-03 to the ZBA meeting of August 25, 2022.

MOTION: S. Bryant

SECOND: J. DELEIRE

UNANIMOUS

D. REVIEW AND APPROVAL OF PREVIOUS MEETING MINUTES: 06/28/2022

MOTION: To approve the meeting minutes from 06/28/2022, as written.

MOTION: J. DELEIRE

SECOND: M. CALL

3-YES; 2-ABSTAINED, MOTION PASSED

MOTION: To close the Public Hearing.

MOTION: J. DELEIRE

SECOND: M. CALL

UNANIMOUS

E. OTHER BUSINESS There was no Other Business.

F. COMMUNICATIONS TO BOARD MEMBERS

- 1) 07/13/2022 -Memo re Land Use Board Procedures, from Attorney Cordell Johnston regarding HB 1661/ Chapter 272 effective August 23, 2022
- 2) 07/15/2022 -Request for Attorney Johnston to review all Land Use Board Worksheets for compliance with the new HB 1661/Chap 272.
R. Webb said that she will be updating the Worksheets and adding the language recommended by Attorney Cordell for the ZBA's August meeting.
- 3) NHMA Riggins Rules: "Suggested Do's and Don'ts for the Conduct of Public Hearings and the Department of Chairmen and Members of Boards, Commissions and Other Bodies", by Fred Riggins; NH Town and City Magazine, May/June 2022.

G. ADJOURN

MOTION: To adjourn the Zoning Board of Adjustment at 8:40 PM.

MOTION: J. DELEIRE

SECOND: M. CALL

UNANIMOUS

The next meeting of the Hampton Falls Zoning Board of Adjustment is scheduled for Thursday, August 25, 2022, at 7:00 PM at Hampton Falls Town Hall.

Zoning Board of Adjustment Minutes prepared by Rachel D. Webb, Planning/Zoning/Town Secretary.