

ZONING BOARD OF ADJUSTMENT	September 28, 2023 7:00 PM
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A. CALL TO ORDER:

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

B. ROLL CALL:

3 MEMBERS and 2 ALTERNATES PRESENT: John DeLeire, Chairman; Steve Bryant, Vice-Chairman; Alex Dittami, Alternate; Weezie Vance, Alternate; James Manna, Member

4 ABSENT: Mark Call, Member; Jamie Hasenfus, Alternate; Patti Young, Alternate; Jude Augusta, Alternate

STAFF: Mark Sikorski, Building Inspector; Rachel D. Webb, Assistant Administrator.

GUESTS: Raymond Lawlor; Joe Nichols of Nichols Environmental; Attorney Justin Pasay, of DTC Attorneys; Al Fleury, of 3 Weare Road LLC.; Henry Boyd, of Millenium Engineering, Inc.; Mark West, of West Environmental.

Chairman DeLeire stated that there were five voting ZBA members present.

C. PUBLIC HEARING:

- 1) Case # 23-06:** Application from **Raymond Lawler**, for **Relief from Building Code Requirements** as provided for in the **Building Code, Section 7.1.1.1.b**, and asks that said terms be waived to permit seasonal high-water table less than 24", in Zone A/R: Agricultural / Residential at property located at **340 Exeter Road, Map 6, Lot 22-2**.

Raymond Lawler introduced himself as the owner of the property at 340 Exeter Road. He introduced his certified septic designer Joe Nichols of Nichols Environmental. R. Lawler explained that he is seeking relief from the Building Code section 7.1.1.1.b to waive the requirement to permit seasonal high-water table less than 24", that is in the Agricultural zoning district. He stated that he has completed several test pits on the property, and the ones that work are in the hay field that is pasture and grazing area. He stated that since he purchased the property, he has been actively cutting hay in that area, and if he is required to use that area for his leach field, then he can no longer use it for agricultural purposes, cannot drive a tractor over it, cannot cut the hay, nor graze cows on top. He stated that there are other areas on the property, where the septic designer located a proposed septic system (behind where he is currently building a house), that would meet all of the State requirements. He has already applied to the State and been denied due to the 24" seasonal high-water table requirement by the Town of Hampton Falls. He said that granting approval of his request would allow him to continue to use the property as agricultural, as it has been used for decades.

R. Lawler described that there was a previous house located on the property by Terry Bennett that burned in 1993, that had a pre-existing septic system for a four-bedroom home, that was abandoned. He said that given that there was a pre-existing septic that was in a general location near where he is building the house, and not part of the agricultural area of the parcel, it would

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better suit him to continue to use the property for agricultural purposes, and locate the septic system close to the house.

Chairman DeLeire asked for some general information about the parcel such as size, and R. Lawler responded there are 138 acres, with an adjoining parcel of 20 acres across "The Cove" wetland area, so in total it is 158 acres. Chairman DeLeire asked approximately how many acres are devoted to grazing, and R. Lawler responded approximately 30-35 acres. He said that he has six (6) cows on the property that he moved over from 310 Exeter Road, so he is actively using the property for agricultural purposes. Chairman DeLeire asked what else the property is used for, and the response was open space enjoyment and some hunting, but mainly open space.

Chairman DeLeire asked how far would the applicant have to move the proposed septic system if he was not granted relief from the ZBA? J. Nichols stated that the location of the current house is the location of the 1986 house. The original test pit had a 72" seasonal high-water table, and with construction of that septic system fill was brought in on top. Then the house burned in 1993 and the property was moved around as a result that changed the soil composition, so that test pits currently do not meet the Towns' definition of natural soil of 24", but it does meet the State definition. J. Nichols continued that the location of that former septic system would be 350-feet away from the house. He stated that the proposed house location is in the best location that accesses current existing underground utilities that come up the driveway from the road.

A. Dittami asked how long the existing fill has been in place from the former septic system, and the response was since 1986 since that septic system was installed. J. Nichols explained that if the proposed septic system were to be installed in the location of the former system, they would need to install a pump (which is problematic due to potential risks of mechanical failure and power outages), whereas the preferred system is a gravity system. A. Dittami asked if there was a technical difference in performance between older compacted fill and natural soil? J. Nichols responded that there was a natural top soil that was buried, and on top of that was a sand/fill mix, so he said that all that material would get stripped out and a new receiving septic sand soil would be brought in. A. Dittami asked if there would be any difference in the output from a septic system close to the house (25-ft) compared with one located 350-feet away from the house, and the answer was no because each would meet the required separation of soils distances, and have the same treatment.

Chairman DeLeire requested review of the depths of the soils testing, and J. Nichols described that there was forty-one inches (41") of fill, and the seasonal high-water table was located at fifty-three inches (53"), but back in 1986 there was originally a seventy-two-inch (72") seasonal high-water table with the original septic system in the same location. Chairman DeLeire follow-up asking what R. Lawler's future plans were for the property, did he have any intentions of subdividing the property or plans to develop it, and R. Lawler's response was that he has no plans to subdivide. R. Lawler continued that his previous property at 310 Exeter Road was comprised of 80-acres, and he researched developing that parcel but decided to keep and to restore the farm instead, and he has a history of not developing. He explained that if he moves the location of the leach field, that he would need to abandon and redrill a well in a new location,

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but he may keep the existing well for either geothermal heat pump or agricultural use for the barn. He said that the reason for his request for relief is not a cost issue, but rather to preserve the property as agricultural use.

Chairman DeLeire clarified for the ZBA that this application was not a Variance application, so there were not the standard five (5) criteria to address; that this was a request for relief from the Building Code. R. Lawler read into the record the specifics of his application as follows:

- Explain how enforcement of these regulations would do manifest injustice. *If I am required to place my leach field in my current hay field, I cannot use that area for agricultural purposes such as hay field or grazing as it is now. I have a suitable area that meets all State NHDES requirements that is not used for agriculture now.*
- Explain how enforcement of these regulations would be contrary to the spirit and intent of the building codes. *Zoning ordinance 3.1 for Agricultural / Residential districts states the intent is to “promote and provide for agricultural purposes.” Given a current (septic) system is on record in the same general location as my proposed system, I would remain in this same area for the new system.*
- Explain how enforcement of these regulations would be contrary to the public interest. *Open space and agriculture is promoted and encouraged in Hampton Falls, and if I am not allowed to place my leach field in the proposed location, open space and agriculture would be restricted in my case.*

A.Dittami asked why the applicant cannot grow anything (like hay) on top of the septic system, and J. Nichols explained that any mechanized equipment and/or cattle is not recommended to go over the top due to potential crush issues; additionally, cattle grazing over the top of a septic system could compromise the system, and those are standard notes they include on all their septic system plans.

PUBLIC COMMENT:

Robert DuFour, 9 Exeter Falls Drive, Exeter, NH said that he is an abutter. He said that he has been a resident at his address for 33-years, and that he appreciates the view of the property. He said that he really could not hear the applicant’s description of his proposal and asked him to please clarify the proposal and the 24” issue. R. Lawler explained that he wants to move the proposed leach field from the current location closer to his house. R. DuFour asked what was being built on the property, and the applicant responded that he is building a barn for his six cattle, and a residential house, and that he will continue to hay the property. He further elaborated that when he bought the property that one of the reasons the seller chose his offer was because he has cattle, and that he was not going to develop the property. R. DuFour asked if there were any plans to install fencing and R. Lawler responded no. The abutter said that he was satisfied with the proposal, and that his curiosity has been addressed after seeing all the building activity all Summer.

Chairman DeLeire closed the Public Comment section of the meeting.

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He stated that he thinks the proposal is reasonable and that he has no problem with it. He said that the applicant's proposal is preferable to development because it retains open space and returns cows to graze on the property that was historically used for cows.

A.Dittami compared this case to a similar one the ZBA reviewed for the same dimension of relief (24"). That case was denied because the applicant could not show that there was no additional adverse effect. That case was different from this one because it did not have the additional soil, it was a straight relief to reduce the area.

MOTION: To approve Case # 23-06: Application from Raymond Lawler, for Relief from Building Code Requirements as provided for in the Building Code, Section 7.1.1.1.b, and asks that said terms be waived to permit seasonal high-water table less than 24", in Zone A/R: Agricultural / Residential at property located at 340 Exeter Road, Map 6, Lot 22-2.

MOTION: S. BRYANT

MOTION: To amend the approval to incorporate herein by reference the applicant's three (3) reasons justifying his request for relief from the building code requirements as stated in his application.

MOTION: J. DELEIRE

SECOND: A. DITTAMI

UNANIMOUS

- 2) Case # 23-07: Application from Frank Perry, for a Variance to the terms of Article III, Section 7.7.1 from the required fifty-foot (50') setback from all lot lines, and Article III, Section 8.5.1 from the one-hundred-foot (100') prime wetland buffer setback (RSA 482-A), and asks that said terms be waived to permit the construction of a 2,233 sq. ft home. Existing horse barn to remain as detached structure, in Zone A/R, Agricultural Residential, at property located at 63 Drinkwater Road, Map 4, Lot 70-2.**

Chairman DeLeire noted that the Case #23-07 application from Frank Perry has been **Withdrawn** from the meeting schedule tonight. The applicant has refiled their application for the ZBA meeting October 26, 2023.

- 3) Case # 23-08: Application from 3 Weare Road LLC, for a Variance to the terms of Article III, Section 1, to permit a light commercial storage and vehicle maintenance use at the Property in addition to the existing single-family residential use, in Zone A/R, Agricultural Residential, at property located at 3 Weare Road, Map 1, Lot 21.**

Attorney Justin Passay, of DTC Lawyers of Portsmouth introduced himself representing the applicant Al Fleury, of 3 Weare Road LLC,; Henry Boyd, of Millenium Engineering, Inc. who did the survey work and plans filed with the application; and Mark West, of West Environmental, who is a wetlands scientist engaged by the applicant. J. Pasay distributed, to the ZBA, a copy of a letter from the abutter at 1 Weare Road, David Raymond, who is located to the east of the property. J. Pasay explained that someone who works with A. Fleury is friendly with the owner of 1 Weare Road and A. Fleury has been engaging with the abutter to talk about the

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use and his proposal and what he is hoping to accomplish. Chairman DeLeire asked J. Pasay to please read the letter into the record, as follows:

Dated today 09/28/2023, from David Raymond of 1 Weare Road, Hampton Falls, NH regarding 3 Weare Road. To whom it may concern, I am the owner and occupant of 1 Weare Road, Hampton Falls, NH located directly next door to 3 Weare Road, Hampton Falls, NH. I am writing as an abutter to express my opinion regarding the variance appeal for 3 Weare Road. In July of 2021 when my wife and I attended the open house of our property, at the same time 3 Weare Road was also on the market, we were drawn to the feeling of serenity while standing on the deck on the rear of our home. In an instant we knew we wanted to live in this peaceful neighborhood. Having also read the listing for 3 Weare Road, we expected the property would be purchased and maintained by someone needing the storage space, and possibly something of an agricultural related business or hobby, it being zoned for residential and agricultural use. Personally, I hoped the owner of a gorgeous car collection would obtain the property so I could have the opportunity to see nice cars, trucks, and motorcycles on a regular basis.

Over the past two years there have been a number of improvements made to the property, some of which made the property more appealing, and some that had the opposite effect. Unnecessary, extremely bright lighting shining from side porch into our bedroom, whereas before there wasn't even a need for shades, we had to put up room darkening drapes. After that, a floodlight was installed at the rear of the property that lights up the woods behind our properties that casts shadows from the trees. More especially the addition of bright orange storage containers placed just inside the property line of 3 Weare Road and left an appalling view from our deck to the beautiful natural surroundings that we fell in love with at our showing. Shortly thereafter, the property was back-filled to the river's edge and more bright orange containers appeared. There have been many mornings with trucks running early, once with back-up alarms at 5:00AM. There was a bon-fire pit constructed about 8-ft in diameter and teenage boys burning leftover construction wood and bales of hay in an inferno, I literally thought one of our houses was on fire when I drove up the street. There were embers landing on my roof and driveway on opposite side of the house from 3 Weare Road.

Nothing of these things strike me as being a great neighbor, who cares about his neighbors' feelings and the environment around the property. Nonetheless, since Al Fleury and I have started communicating beginning in May 2023 he has kept his word to me and moved the unsightly storage containers off the property, and noise has been minimal.

If the proposed use of the property stays consistent with the guidelines outlines (only used for company vehicle maintenance – indoors only, dimmed outdoor lighting, daytime operation hours only, one employee working in property, etc.); and the wetlands restoration is completed, I would support Mr. Fleury's request, since he has proven to be a man of his word to me, and followed through with covering the storage containers with camouflage netting until they were removed.

Unfortunately, I cannot attend tonight's hearing on this matter due to a previously scheduled conflict. It is my hope that all involved end up with results that are satisfactory to them.

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*Respectfully,
Dave Raymond*

J. Pasay said that the executive summary of his presentation tonight is that the applicant wants to make this situation right, and remedy what the applicant believes is a fundamental misunderstanding. He continued that once the applicant was aware of the issue and understood the ramifications of what was happening, there have been consistent efforts to address, (and even more consistent efforts through their application which proposes several constraints and conditions of approval) and to narrowly define what is happening on the property. J. Pasay listed the attachments included in their variance application as follows:

- 1) NHDES Wetland Restoration Plan.
- 2) The Assessor's tax card for 3 Weare Road.
- 3) The NEREN real estate property listing that A. Fleury utilized when he purchased the property, Fall 2021.
- 4) Photographs of the property from an appraisal report, March 2023.
- 5) An aerial photograph provided by Google maps, 2023.
- 6) Assessor Tax Map 1, Hampton Falls, NH and Assessor Tax Map 1, Seabrook, NH.
- 7) Copies of all Town records regarding 3 Weare Road, from Building Dept files.
- 8) An application with the State for registration of a trade name "Rick's Septic Tank Service", date business organized May 1982.
- 9) Historic aerial photos of the property in 2011, 2015, and 2023.
- 10) Notice of Code Violations letter from M. Sikorski Building Inspector, May 25, 2023.
- 11) NH DES letter acknowledging receipt of a complaint of possible violations on the property, which notices the Prime Wetland impact May 31, 2023.
- 12) DTC Lawyers 3 letters of response to M. Sikorski: June 15, 2023; July 07, 2023; and July 28, 2023.
- 13) A wetlands impact assessment and restoration report by M. West, August 30, 2023.

J. Pasay explained that the relief the applicant is seeking tonight does not include anything regarding the wetland's violation, at the direction of the Building Inspector, as that is being handled through NHDES. He added that the applicant filed their restoration plan with NHDES and they have not yet heard a response nor received an update from the State (and he checked today).

14) A proposed conditions plan that depicts what the applicant is hoping to get approved tonight, and thereafter by the Planning Board. J. Pasay stated that the applicant is requesting a Use Variance, and they are acknowledging that the commercial component of the proposal, and that site plan approval by the Planning Board would be appropriate.

J. Pasay said that the applicant is present to make things right. He continued that the applicant is sensitive to the underlying zoning, they are sensitive to the comments from the abutters, and they are happy to continue the conversations with abutters to make right what they can. They see the property as uniquely settled among the area, as it is surrounded by largely unimproved land on

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two sides, and across the street there is unimproved land owned by the Town of Seabrook, and then property next to that the Windjammer apartment property. J. Pasay stated that most importantly, the applicant believes that the list of conditions of approval, that they have proposed, will meet the concerns that have been expressed by the abutters, as was evidenced by the letter just read into the record from Mr. Raymond.

J. Pasay provided an overview of the property, that 3 Weare Road is 49,800 sqft or approximately 1.1 acres in size, and is improved with: a single-family dwelling, an unfinished attached storage barn, a large, attached garage with five (5) independent garage bays, and two (2) sheds. He stated that the applicant provided several photos in the application for the ZBA. The site is in the Town's A/R District, that is the Agricultural / Residential district. J. Pasay continued that the zoning district was established to *"provide areas for single-family dwellings and appropriate accessory uses at rural densities and to promote and provide for agricultural uses."*

He reiterated that the applicant sees the property as unique both because of its built condition with the structures as they are located on the property, but also because of the surrounding areas. J. Pasay continued with the overview of the property, that it contains a modest 1,300 sqft single-family dwelling. He stated that the property, as seen from Weare Road, appears to be single-family in nature, as consistent with other properties along Weare Road, which are largely single-family. He stated that there is a very large garage (and corresponding storage space) that is approximately 6,100 sqft. The garage itself is two-levels, with one door on the front of the property, that can be seen from the street, and then there are five (5) very large garage bays facing the northern side of the property.

J. Pasay described the proximity of the site being less than a mile from Route 107, and approximately 1.5 miles from Interstate I-95. He continued that the property is surrounded by large swaths of unimproved land on two sides that is 110 acres owned by 37 Mill Lane. He stated that across the street there is an apartment building with a higher density of development. And also, across the street is the unimproved land owned by the Town of Seabrook. He characterized the neighbor's property at 1 Weare Road as being a similar size lot with a single-family house, and other than that, there are much larger properties in the neighborhood that are unimproved land, and then there is the higher density apartment building across the street.

Regarding the historic ownership and use of the property, J. Pasay stated that the applicant reviewed the Town's records and spoke to the Realtor who sold the property to A. Fleury in 2021.

He said that as of 1987 Rick Merrill purchased the property, and that Rick was Dick Merrill's son. Dick was a long-time Road Agent for the Town of Hampton Falls. Rick supported his father's Road Agent activities and in 1987 purchased the property and began living there. Before that, in 1982 Rick started a Septic Tank business that was registered at the 3 Weare Road property for as long as Rick lived there. Rick lived at the site from 1987 to 2021 until the site was purchased by A. Fleury. J. Pasay stated that the important facts to emphasize are that the property (including the five garage bays) was used to support the Road Agent activities and the maintenance of the vehicles, trucks, and snowplows. The property was also used for storage, as

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can be seen in the photos provided. J. Pasay summarized that the historical use of the property was commercial storage, and vehicle maintenance.

J. Pasay pointed out that one of the main differences between the use of the property by R. Merrill as compared with the use of the property by A. Fleury is that R. Merrill lived at the property, whereas A. Fleury does not reside on site, and one of his employees occupies the single-family residence on site.

J. Pasay asserted that the evidence provided to the ZBA suggests that the current use of the property is less intense than the historic use of the property. He stated that A. Fleury's interests in the seacoast area are varied and include ownership of several businesses including: Bernie's, Wally's, The Goat, and the Surf House among others and these businesses/restaurants own quite a bit of property requiring off season storage. In addition to the businesses, J. Pasay stated that the applicant owns several vehicles, so that was an attraction of the property because of the five-bay garage. The applicant provided a list of approximately twenty (20) vehicles that would be in rotation at the property, and there is one primary employee to maintain those vehicles inside the garage bays. At any point in time there are 5-10 pieces of equipment being stored on the grounds. J. Pasay listed the improvements the applicant has made to the property, including paving over the existing aged pavement on the property. He stated that pursuant to the paving, that contractors employed by the applicant installed the fill located to the northern edge of the property.

J. Pasay read into the record the proposed Conditions of Approval, as proposed by the applicant as part of their Variance request as follows:

1. Only a single employee with the primary responsibility of maintaining the Applicant's vehicles and other equipment on the inside of the Garage, will work at the Property per business day during normal working hours (i.e. 8:00 AM to 5:00 PM).
2. No outside maintenance of any machines, equipment or vehicles will be allowed.
3. The Applicant will permanently remove from the site all four (4) Conex storage containers depicted on Enclosure 1 of their application. See also Enclosure 14 (depicting proposed conditions).
4. No more than one trip per day, by the Applicant or its employees, will be permitted to accommodate the dropping off or retrieval of personal or business-related property stored at the Property.
5. The Applicant will replace all outdoor lighting on the rear (northern) side of the Garage with night-sky compliant (or equivalent) lighting.
6. The Applicant will replace the existing gate on the west side of the Property to ensure there is no temporary encroachment onto the abutting property when the gate is open unless the Applicant secures a license or easement from the abutting property owner and provides proof of same to the Town.
7. The Applicant will comply fully with the recommendations of West Environmental's Wetland Restoration Report, as potentially amended or altered by DES upon DES's review.

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8. The Applicant will prepare a Site Plan Review Application and file same with the Town's Planning Board.

J. Pasay stated that the Applicant believes that with these concessions, the Property will be operated in a reasonable manner that is substantially consistent with the historic use of the Property.

J. Pasay reported that as a result of the applicant receiving M. Sikorski's original Notice of Violation letter, and subsequent letter from NHDES saying that there may be a wetlands violation subject to further investigation, the applicant secured the services of himself (as attorney), M. West who is a wetlands scientist, and H. Boyd who is an engineer and surveyor. M. West examined the site, inventoried and flagged the wetlands, and H. Boyd surveyed the parcel to make the plans showing existing conditions, in addition to proposed conditions. There is an area of impact depicted on the plans, in the northern area of the site, that contains approximately 1,496 sqft of fill, that was inadvertently placed in the area. J. Pasay stated that M. West's wetlands restoration plan details how that fill will be removed this Fall and replaced with plantings to comply with State specifications.

J. Pasay summarized that the applicant is trying to be proactive and to make things right. The applicant feels that particularly in light of the proposed Conditions of Approval that the use they are proposing will be, not only consistent with the historic use, but less intense than the historic use, and look better than the historic use.

Chairman DeLeire stated that it was a very well-prepared application, and is very comprehensive. He said that he thought it may be difficult to overcome all five (5) of the variance criteria, with this particular kind of use, based on what he has heard so far, but he invited J. Pasay to continue his presentation to specifically address the five variance criteria. J. Pasay requested H. Boyd to present anything that he may have omitted.

H. Boyd stated that A. Fleury never knew where the property lines were. H. Boyd continued that in the process of completing the survey he identified an encroachment of gravel onto the abutter's property (Neal Pond), and noted that on the plan. Additionally, the security gate was sliding open onto that same abutter's property. The title was traced back to 1846 and a result is that the eastern property line is labeled as "Agreement Recommended" on the Proposed Conditions Plan.

S. Bryant interrupted and asked if this was what the ZBA is concerned with, because the State is handling the wetlands violation, and the ZBA is concerned with the five (5) criteria of the variance request. H. Boyd said that his information was for the benefit of the abutters, to show the encroachment on the plans, and to show the proposed plan how the site was going to be cleaned up once the plan is approved by the NHDES. H. Boyd stated that the gravel will be removed, and the grade will be restored to what it was previously, with the edge of pavement reduced farther back and away from the wetland resource. J. Pasay stated that once A. Fleury

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was made aware of the violation and it was made apparent that there was a zoning issue with the property, he has made every effort to address the concerns of the abutters.

J. Pasay discussed the “hardship criteria” as the essence of what a variance is all about. Essentially whether a variance makes sense, based on the unique circumstances of this property, to apply this portion of the zoning ordinance to it, and is that use reasonable. He cited and discussed some caselaw regarding Harborside in Portsmouth, NH where a large downtown hotel wanted a bigger sign than the sign that was allowed by the zoning ordinance. He said that the hotel said to the Portsmouth ZBA that the board should consider the improved conditions of the property (the massive building) as part of the unique circumstances of the property. He said that previously, the hardship test was based on the land, but in the Portsmouth case the Supreme Court said that the ZBA can consider the built conditions of the property. J. Pasay said that where that case ties into this case is that the built conditions of this property are totally unique to the surrounding area. The property is unique because it is insulated on two sides by 110 acres of undeveloped property. There is a massive storage area, that has historically been used for storage similar to the nature of what is proposed, and which is improved by a massive 6,100 sqft storage area and garage. It is not a typical residential property, and it does not look like any other residential property. J. Pasay stated that typically, the hardship criteria is the toughest to meet, but in this case, it is his opinion that this is the best criteria to meet in a variance context, because it is totally unique, and there is not another property like it in the neighborhood, nor in Hampton Falls, of which he is aware.

J. Pasay stated that the first two Variance criteria are considered together, namely, “*the variance will not be contrary to the public interest*”, and, that “*the spirit of the ordinance is observed.*” He stated that a variance is only contrary to the public interest if it unduly, and in a marked degree conflicts with the ordinance such that it violates the ordinance’s basic zoning objectives. The following two questions need to be answered in the negative. Does the proposal alter the essential character of the neighborhood? Does the proposal threaten the public safety and welfare? J. Pasay said that if those questions about the proposal are responded in the negative, then the statutory criteria are met.

J. Pasay said that the applicant has characterized their use as a light commercial use and as a vehicle maintenance use. Their approach is stating that the Hampton Falls Zoning ordinance does not capture their use, and because the zoning ordinance is a permissive zoning ordinance (so that if it is not a listed as an allowable use, it is prohibited), the applicant is seeking relief from that part of the zoning ordinance, Article III, Section 3.1.

J. Pasay stated that he discussed this application with M. Sikorski over the past several months, and it was suggested to consider getting relief from the Home Occupation ordinance, but that would take 6 or 7 variances from the Home Occupation criteria, so the applicant decided instead, to seek the single use variance for exactly what they are proposing where it is not permitted. The applicant stated that there is no marked conflict with the purposes of the zoning ordinance, to facilitate reasonable use on property. The proposal incorporates a single-family residence, it is substantially similar to the use which has existed on site (albeit less intense) for the last several

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decades, the property is very well-insulated by surrounding unimproved land to include the 37 Mill Lane property, and the unimproved Seabrook property across the street. The property is also unique due to the density of the Windjammer property across the street, so that the neighborhood is a mix of single-family, multi-family, and large swaths of unimproved lands.

Chairman DeLeire asked the applicant if he had known A. Fleury when he was considering purchasing the property, and analyzed the zoning, would he have advised him to purchase the property for the use that it is being used for now? J. Pasay said that he would do his due diligence; he did not know what was permitted and what was not permitted because he did know exactly what the nature of the zoning ordinance was in 1987, but they did find building permits, but no Planning Board files. Chairman DeLeire said that it is typical in a case such as this that someone would obtain any and all permits necessary for the use which was intended as standard protocol. He continued that there is an assumption of risk if you are buying a residential property and you are using it for commercial purposes, regardless of what it was used for previously, or what it looked like, it was his opinion that the purchaser would want to check off those (permit) boxes. Chairman DeLeire continued, that in terms of being contrary to the public interest, it is hard to say that the proposal is not when it is in a residential zoned area and the site is being used for commercial purposes. He said that he understands the argument made by J. Pasay, but he is having a hard time overcoming the fact that it is clear that it is a residential zoned property, and it is not supposed to be used for commercial use.

J. Pasay responded by pointing Chairman DeLeire back to what the law says about the first two variance criteria, by asking if the proposal significantly alters the character of the neighborhood, and is the proposal threatening the public health and safety. If the character of the neighborhood, since 1987, has been that of a large storage facility on this property, then this proposal which contemplates a reduction in the impact, a more benign use, more aesthetically appealing from the road, is not altering the essential character of the neighborhood. J. Pasay asserted that this was why, in the abutter letter received today from Mr. Raymond, a statement that he anticipated someone using the property for storage and for a business.

S. Bryant asked the applicant what was his definition of neighborhood? S. Bryant said the neighborhood is the entire community, and that J. Pasay was taking a narrow definition of neighborhood looking at the property. S. Bryant clarified that J. Pasay's assertion that the use of the property does not alter the neighborhood, and S. Bryant said that the proposal does alter the neighborhood, because it is different from the zoning of every other home in that neighborhood, so it is an altered use. S. Bryant said that J. Pasay's argument that because the use of the particular property has been used that way for some time it has not altered that particular property, but from the neighborhood's perspective, which is greater than this particular property, it is an altered use. J. Pasay agreed with S. Bryant that the applicant is asking for something that is not allowed in the zoning ordinance, and that is the nature of what a variance does, but he did not agree with the position that somehow it is altering the neighborhood. J. Pasay stated that the neighborhood has been like that for decades, and this proposal is going to be a less intense use.

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The difference between a home occupation that had a septic tank service that was operating on the property with all of the same features of the property present then and now, and what is proposed here is that the applicant is trying to narrowly define and constrain the use, with the proposed Conditions of Approval, so that the proposed use is less impactful than the prior use. He stated that the difference between a Home Occupation permit and this proposal would be indiscernible from the road, and indiscernible from the surrounding property values. J. Pasay posed the question: as driving up Weare Road, an abutter, is this proposal altering what already exists on the property, and he stated that his position was that it does not, and that it is improving and is consistent with what has been there for decades. He summarized that that is the question under the spirit of the ordinance and the public interest Does the proposal alter the essential character of the neighborhood?, with the second part asking if the proposal threatens the public safety and welfare?

J. Pasay reported that the applicant provided a traffic summary with a maximum frequency of one delivery per day during the busy season, but there may be weeks in between with no deliveries.

A.Dittami requested confirmation on the Portsmouth caselaw that J. Pasay cited earlier, whether the uniqueness was the consideration the fact that property was changing, or that it had changed that made it unique? J. Pasay said that the point of the Portsmouth case was that if there is a huge building on your property, is it reasonable to say that you can only have a tiny amount of signage? Is the use reasonable in light of the physical built condition of the property? In this scenario with a single-family house with a massive commercial garage in the back and 50% impervious surface coverage across the lot because it has been historically used for a business and for outdoor storage, so the unique built conditions of this property make the proposed use reasonable, which is what the whole variance analysis is about.

S. Bryant asked M. Sikorski if the Town had a similar scenario with a resident Jim Fitzgerald on Toppan Lane? S. Bryant stated that he believed that J. Fitzgerald had been working some of his equipment out of his location and he had to stop it and move it out. M. Sikorski asked what year that occurred, and S. Bryant thought perhaps ten (10) years ago.

A.Dittami stated that it was his understanding that the equipment that was used on this property was owned by the former Town Road Agent Dick Merrill. J. Pasay agreed and said that additionally, there was equipment and storage related to Rick's Septic Tank Service from 1982 until 2021 when A. Fleury purchased the property. A. Dittami asked if J. Pasay knew how much equipment Rick's Septic Tank Service used or stored at the property, and J. Pasay responded to examine the 3 historical aerial photos, provided in the application (exhibit 9), that show a decreasing over time of the number of materials stored onsite. A. Dittami confirmed that there was equipment stored on site used by Dick Merrill as Road Agent to maintain the roads of Hampton Falls.

J. Pasay stated that the third Variance criteria is that "substantial justice is done". J. Pasay stated that the test for this variance criteria is that any loss to the individual that is not outweighed by a

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gain to the general public is an injustice; in other words there has to be some gain to the general public by denying the variance request that outweighs the loss to the applicant from its denial. He continued that the applicant does not see a gain to the public or to the abutters from denying the variance request because the property is going to continue to be used as it has been used for years, albeit in a less impactful way. He referenced Enclosure 9 from the application materials that shows the historic aerial photos. The property is more aesthetically pleasing than it has been. And the property is totally unique. J. Pasay stated that it would be awkward and strange if the property were used for anything else. J. Pasay stated that the applicant has proposed a list of Conditions of Approval oriented towards very narrowly defining the use.

J. Pasay commented on M. Sikorski's memo to the board regarding the suggestion that the applicant get a Conditional Use Permit from the Planning Board for a Home Occupation so that when A. Fleury sold the property in the future then the Home Occupation approval would sunset. If a subsequent owner wanted to use the property for a Home Occupation, they would need to reapply to the Planning Board. Conversely a Variance approval runs with the land, unlike the Home Occupation permit whose approval is tied to the owner. J. Pasay stated that the use Variance the applicant is requesting is a very narrow use of the property, and A. Fleury's use of the property is unique to him, and that is part of the substantial justice component of the Variance criteria.

J. Pasay stated that the fourth Variance criteria is that "the values of surrounding properties are not diminished." J. Pasay stated that the applicant is improving the aesthetic of the property through the physical improvements that have been made. He quoted Dave Raymond's letter submitted to the ZBA tonight, "...nonetheless, since A. Fleury and I have started communicating, beginning in May 2023, he has kept his word to me and removed the unsightly storage containers off of the property and noise has been minimal." J. Pasay remarked that Dave Raymond, at 1 Weare Road is the closest abutter to 3 Weare Road. He continued that these improved conditions certainly would not hurt the surrounding property values. J. Pasay stated that the applicant looked at the assessed property values of the surrounding properties and the values all increased over time and did not decrease. He paraphrased another section from Dave Raymond's (abutter) letter that said that when he bought his property next door in 2021 that he anticipated the purchase of 3 Weare Road to be used for a commercial business because of the uniqueness of the building. From the applicant's perspective, the fourth variance criteria regarding property values not being diminished has been satisfied.

J. Pasay stated that the fifth Variance criteria is the hardship criteria that "literal enforcement of the provision of the ordinance would result in an unnecessary hardship, and unnecessary hardship means that owing to special conditions of the property that distinguish it from other properties in the area, that (1) no fair and substantial relationship exists between the general public purposes of the ordinance and the specific application of that provision to the ordinance, and (2) the proposed use is a reasonable one. An unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the

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*ordinance, and a Variance is therefore necessary to enable a **reasonable use of it** ” J. Pasay stated that this fifth Variance criteria is comprised of the following three tests:*

a) Are there special circumstances of the property, and his response was that yes, the property is unique. The surrounding property is unique; the large swath of unimproved property on two sides, the unimproved property across the street, the unimproved properties insulate the property, and then there is the Windjammer property across the street that is a high-intensity residential use with lots of people coming and going, which lends the applicant’s property a little more towards having a light commercial use on it. The applicant’s property is unique because of the built conditions on the property, that J. Pasay has described previously, namely, the large impervious surface area of the lot, the large 6,100 sqft storage area, the large garage, it is totally unique in its built condition. J. Pasay stated that the question of special circumstances of the property can be answered yes.

b) Is applying this zoning ordinance to this property under these circumstances accomplishing the point of the zoning ordinance? J. Pasay responded that in the applicant’s opinion, it does not, because of the historic nature of the property, and because of how the applicant is proposing to improve the operation of the property, and because of the uniqueness of the property and how it accommodates the proposal very well.

c) Is the use reasonable? J. Pasay stated that for all the reasons that he has described, the applicant feels that the proposed use is a very reasonable use of the property, consistent with the historic use of the property although the applicant is going through the process to get all of the approvals and permits necessary. He added that the Town, the ZBA, the Planning Board have the assurance that to the extent that Conditions of Approval are not complied with, that there are enforcement mechanisms in place to require compliance or to revoke approvals.

M. Sikorski said that he had a few questions and comments. He asked the applicant if they knew what the zoning was across the street in Seabrook? H. Boyd responded that the undeveloped parcel across the street is zoned Rural, as he just surveyed the property across the street. He stated further that it is the parcel on which the Town of Seabrook has applied for well permits with NHDES, and there additionally was a Disc Golf plan approved for the parcel because the Town received the parcel as a gift with the condition that the property be used for recreation purposes.

M. Sikorski asked how does the business use now compare with the use in May, is it less, is it more, or is it the same? J. Pasay responded that in light of the removal of the Conex boxes from the property that the outside storage use is decreasing. M. Sikorski said that he went to the property to get a visual update and saw that the Conex boxes were gone, and he said that the property looked great, with only one line of trucks. He congratulated A. Fleury on his effort and summarized that the business activity on site since May has been curtailed.

M. Sikorski noted that the Home Occupation ordinance has been in effect since 2004, so the Road Agent storage of vehicles on site, and the Septic Tank storage of equipment on site predates the Home Occupation ordinance.

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M. Sikorski asked A. Fleury if there was an associated company, that is not there anymore, that was also using the site for parking vehicles or a job storage site? A. Fleury responded that he owns a mechanical company, “603”, that is based out of Portsmouth, but if one of those vehicles needs repair or maintenance, the vehicle gets repaired at 3 Weare Road.

A. Dittami asked what types of vehicles would be stored or serviced at the property, and A. Fleury named the types of vehicles, including plow trucks, and trucks that off-load small dumpsters. A. Dittami asked A. Fleury as part of the mechanic set-up if there would be drums of oil and fuel pumps? A. Fleury responded no, that the type of work done there is just to keep the vehicle on the road, such as putting on or removing plow blades, that are stored on shelves in the storage area. A. Dittami asked if there were any road sander equipment, and A. Fleury responded no.

W. Vance asked if the company were to grow, would there be more vehicles on the property? A. Fleury responded not necessarily, unless all of his vehicles broke down simultaneously.

S. Bryant said that the proposed Conditions of Approval address those concerns and control it.

A. Dittami asked if during Winter there would be plow trucks coming and going at night, and S. Bryant said that the Conditions of Approval specify the operating hours 8-5. J. Pasay offered the distinction that the former Road Agent was plowing roads around the clock, whereas A. Fleury’s plowing trucks are doing parking lots and working day-time hours.

Chairman DeLeire asked if any members of public wanted to speak, as he opened the meeting to Public Comment.

1) Ellen Pond, 37 Mill Lane: E. Pond stated that it was initially appalling when the applicant’s business installed industrial lighting that shone across the backyard, but it has since been removed and she is thankful for the removal because it was very intrusive. She said that she lived there when Dick Merrill was Road Agent. She said that he had trucks. E. Pond said since the new owner there have been loud noises from the garage bays, and if the proposed hours for business use will be 8-5, then she needs to know that as assurance that she can enjoy her residential property at other times. She said that the loud noises have stopped, but she needs to understand what will happen if loud noises from the business resume, such as who reports, and who enforces? She said that she is happy with the changes, and she added that she likes what she sees and has heard so far, and hope it stays that way.

W. Vance asked E. Pond how long ago were the loud noises, and the response was since the new owner purchased the property in 2022, and she has not heard them recently.

S. Bryant asked E. Pond if she was in support or opposed to the proposal, and she responded that she was surprised that rules have to be broken in order to find out about the type of activity that occurred on site. She said that she is not thrilled that it happened, but that the improvements are

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much better than it was previously. S. Bryant clarified that E. Pond had said that when the Merrills owned the property that it was not noisy, but since A. Fleury has owned the property, in 2022 it was noisy, although it has not been recently. E. Pond stated that she does not have peace of mind about this because she does not know if the business is going to operate as stated, she said that she hopes it does. She said that she never thought about Rick Merrill having a business next door because she never heard anything, and when she would drive by, she would only see a truck or two. She said by comparison, the current owner's business you can see is a business and is industrial-looking, so she is not thrilled about it.

Chairman DeLeire closed the Public Comments part of the meeting.

A.Dittami said that there was a letter submitted by a Chuck Huberdeau. Chairman DeLeire read the letter into the record as it was submitted after the packets were distributed.

Abutter letter from Chuck Huberdeau, 39 Mill Lane, Hampton Falls, NH:

As a listed abutter, I am voicing my concerns and objections to this variance request.

Primarily that our zoning is Agricultural-Rural. This proposed business would be better suited for Route 1. After reading the application letter from the attorneys, I would like to consider the following:

Prior use by previous owners: *Two wrongs do not make a right. Many abutters are new to the area and bought on this street due to its residential nature. I don't see that the previous owner obtained permissions for a business. Also, the current owner is not even a resident of the property.*

Setting precedent: *Any variance granted can lead to future variance requests by other property owners on the street. Having one variance in place would make it more likely that future requests would be granted.*

Zoning: *The argument that the agricultural zoning implies machine storage and repair is permissible would be more relevant to an owner who occupied the property and ran an agricultural business such as farming or grazing animals. It is a stretch to include non-property related machine repair and/or storage.*

Zoning: *See Table of Uses, pg 22. Section K, 3, 3.5*

Zoning: *See Zoning Ordinance; Special Exceptions pg 92. Section 3.3, 3.3.2.2 and 3.3.2.2 and 3.3.2.3*

Zoning: *See Section 4; pg 19. Block #8; Mixed Use Development*

Zoning: *See Section 7; pg 25. 7.1.2*

Wetlands: *? Hazardous waste/materials. See Section 8; pg 30 8.2a*

Real Estate Listing: *Correctly identified the zoning as Agricultural-Rural. The buyer(s) knew beforehand that this was not a commercial zone.*

Impact to Home Values: *This is subjective. This stretch of road is unique because of the waterway. We need to preserve that uniqueness.*

Finally, can the town trust an entity or person to observe the "spirit of the ordinance" who purchases a property and then proceeds to ignore wetland regulations, zoning

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ordinances and permitting processes? This especially relates to noise, lights and future growth.

J. Pasay requested to respond to E. Pond's comments, that when the applicant received the Notice of Violation from M. Sikorski and then subsequently reviewed the abutters letters, he stated that the conclusion across the applicant's "team" was that they (the abutter letters) were totally reasonable conclusions and concerns. He stated that there was no intention to disobey the zoning ordinance. J. Pasay continued that what he can glean from the testimony and Mr. Raymond's letter is that when this came to a tipping point, since that time, every effort has been made to comply with the concerns of the abutters, and to address every concern. He said that moving forward what the ZBA can expect from A. Fleury's operation is what it has been the last couple of months, and not what it was in 2022.

Chairman DeLeire stated that the applicant did an excellent presentation, made a lot of great points, and he learned a lot about the property. He said that he would start the ZBA's deliberation by stating that it was his opinion that the idea of transferring agricultural-residential properties to commercial is a bad look. Chairman DeLeire continued that the result is that it could open the door for future cases or future abuse. He said that the applicant made some excellent points but he did not believe that the applicant was able to overcome all five (5) of the Variance criteria. He said that the applicant bought the property with the assumption of risk, as it is zoned for agricultural-residential, and is now used for commercial. He said that he understands that corrections have been made, but in the end, he found it very hard to be able to condone the idea that if this particular use were approved, it would have to be policed, and would be an additional burden on those to enforce that the very detailed Conditions of Approval are adhered to on a regular basis. Should the property be sold, then the Variance transfers with it, and the next property owner may not have the greatest of intentions, as does the current property owner. He said that the (enforcement) onus would be put on the Building Inspector, Police and Fire and the neighbors. Chairman DeLeire stated that the Variance application is something that the ZBA can control today, but will not be able to control as well should the Variance be granted.

MOTION: Regarding Case # 23-08: Application from 3 Weare Road LLC, for a Variance to the terms of Article III, Section 1, to permit a light commercial storage and vehicle maintenance use at the Property in addition to the existing single-family residential use, in Zone A/R, Agricultural Residential, at property located at 3 Weare Road, Map 1, Lot 21; motion to deny. A. Dittami's reasons he framed within the context of the NH State's publication: *The Zoning Board of Adjustment in New Hampshire: A Handbook for Local Officials, updated 2022 (p. vi)*. A. Dittami said that he thought it important to remember these points when considering Variances. *"It has been said that the only reason zoning, as a comprehensive land use planning technique, has been upheld as constitutional in the courts is due to the existence of the ZBA as a 'constitutional safety valve'. The ZBA provides the necessary flexibility to ensure that the ordinance is applied equally to all property."* Or specifically, if a property is unique (as the applicant has said), that the property is not unduly burdened. He continued quoting from the Handbook, stating that *"Boards of Adjustment are established to provide for the satisfactory resolution of many of those*

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situations without burdening the courts.” (p.II-2) He said that “those situations” being when someone says that their property is unique, and has been somehow adversely affected by the zoning ordinance. He stated that if the property is not unique then the property is theoretically not entitled to a Variance. A. Dittami continued quoting from the Handbook, stating that “Variances are included in the zoning ordinance to prevent the ordinance from becoming confiscatory or unduly oppressive as applied to individual properties uniquely situated.” (p.II-11) He stated that in this case, if all things considered were to be accepted as true, and it was truly unique, and it could only be continued to be used as that storage facility, the ZBA would be duty-bound to make the exception (and grant the Variance). He continued saying that if it is not unique, then the ZBA is duty-bound to uphold the oaths that they took to uphold the zoning ordinance and not grant the Variance.

In terms of the applicant’s assertion that the property is unique, A. Dittami stated that there are many properties in Hampton Falls with large barns and storage areas that are almost identical to the subject property. He stated that where he lives (on Fieldstone Lane) there are two large barns with storage areas, one has two acres, and one has one acre. On Drinkwater Road there is a property owned by the Merrills that is almost identical to the size and the buildings as the subject property. He stated that in the late Fall and Winter months he can see (from his house) the array of trucks and equipment in the barns and sheds on the Merrills property, and it is almost identical to the applicant’s property.

A.Dittami commented on the Portsmouth caselaw cited by the applicant that when the character of a property has changed, that it outsteps the zoning ordinance. A. Dittami said that that law also applies to the abutting properties and what that abutting property is or is becoming. In this case the abutting property is becoming more and more residential, he stated that there are several new homes, (not at the rate of MA.), but properties are becoming residential. He referenced the applicant’s Exhibit 6 of the application; the aerial photo shows the subject property at the very edge is among several larger properties that can become residential properties in the residentially zoned area. A. Dittami said that when you take that one little spot out of the entire area and give it a use that is not authorized by the zoning ordinance, when it is not unique, the ZBA is effectively usurping the voters of the town by creating a spot zoning situation. One little piece of property in the middle of much larger pieces of property, that are all used for residential properties it does change the character. Any house that is now abutting it or will abut it (as in the Portsmouth case) is going to be adversely affected by the existence of a property that is used for the purposes of mechanical repair, vehicle storage, and equipment storage.

A.Dittami stated that the government use that was discussed earlier (Road Agent storing vehicles on site), has for many years in Town, been allowed in residential areas. Even in the 2014 regulations Table of Uses, the use of a property for a governmental purpose is allowed. So when there were vehicles stored on the property, that were used to service the government’s roads by the Town’s Road Agent, that is clearly a governmental purpose. He stated that that is not a non-conforming use, that is an allowed use, so that would be an allowed use today under the zoning ordinance.

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A.Dittami stated that his understanding of the former Septic Tank Service business on the property was that the owner only had one (1) truck and that was why it was hard to get him scheduled. He continued that the whole discussion of the former septic business on site is irrelevant because the Table of Uses were established in the zoning ordinance in 2014, and that business had ceased to exist by that date, so that it does not matter now.

If the ZBA allows, in the middle of a residential area, a commercial operation, unique to anything else in the area in Hampton Falls, (understanding that the Town of Seabrook may have different regulations across the street), he said that the tax maps show all parcels in the area as residential, so the applicant's parcel would be the only one that would be commercial, and it therefore does not make any sense to allow the Variance.

A.Dittami brought up the fact raised by an abutter that when the property was listed for sale that it was advertised as a residential-agricultural use. He continued that the applicant is very well-versed in business, with several restaurants throughout the Seacoast. A.Dittami said that when someone opens a restaurant that you have to be concerned with the rules of zoning to understand the number of allowed seating and the right number of parking spaces, etc. He said that he finds it hard to believe that a similar evaluation was not done prior to the purchase of 3 Weare Rd. He said that the purpose of the ZBA is not to cure the lack of due diligence, rather the purpose of the ZBA is to make sure that the Town's zoning ordinances are fulfilled and do not unjustly harm somebody whose property has been changed. A change in a wetland boundary is a perfect example, where hypothetically if someone owned a lot that contained wetlands on it, and the lot was established in 1910-1920, and then, subsequently, in 1980 the wetland setback dimensions change that make the lot unbuildable, then that is a unique circumstance.

A.Dittami finished his comments by reading the last line of the abutter's letter from Mr. Huberdeau: *"Can the Town trust an entity or person to observe the 'spirit of the ordinance' who purchases a property and then proceeds to ignore wetland regulations, zoning ordinances and permitting processes?"* A. Dittami stated that he sees no reason why the ZBA should take that risk.

MOTION: A. DITAMMI

SECOND: J. DELEIRE

UNANIMOUS

D. COMMUNICATIONS TO BOARD MEMBERS:

There were no communications to members.

E. REVIEW AND APPROVAL OF PREVIOUS MEETING MINUTES: 06/22/2023

MOTION: To approve the meeting minutes from 06/22/2023 as written.

MOTION: J. DELEIRE

SECOND: W. VANCE

UNANIMOUS

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F. OTHER BUSINESS: There was no Other Business.

H. ADJOURN:

MOTION: **To adjourn the Zoning Board of Adjustment at 9:00 PM.**

MOTION: **J. DELEIRE**

SECOND: **W. VANCE**

UNANIMOUS

The next meeting of the Hampton Falls Zoning Board of Adjustment is scheduled for Thursday, October 26, 2023, at 7:00 PM at Hampton Falls Town Hall.

Zoning Board of Adjustment Minutes prepared by Rachel D. Webb, Assistant Administrator.