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A. CALL TO ORDER:

J. DeLeire, Chairman, called the meeting to order at 7:10 PM.

B. ROLL CALL:

4 MEMBERS and 4 ALTERNATES PRESENT: John DeLeire, Chairman; Steve Bryant, Vice-Chairman; James Manna, Member; Michael LaBarre, Member; Weezie Vance, Alternate; Patti Young, Alternate; Jude Augusta, Alternate; and Stephen MacLeod, Alternate.

2 ABSENT: Mark Call, Member; and Jamie Hasenfus, Alternate.

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

GUESTS: Attorney Justin Pasay, DTC Lawyers, for 3 Weare Rd LLC; and Attorney Cordell Johnston, Land Use Attorney for the ZBA.

Chairman DeLeire stated that there were four (4) ZBA Members and four (4) Alternates present. The five (5) voting Members for the meeting were: J. DeLeire, S. Bryant, J. Manna, M. LaBarre and W. Vance. Chairman DeLeire clarified that the additional three (3) Alternates could participate in the discussion of the meeting up to, but not including, the vote.

C. PUBLIC HEARING:

Chairman DeLeire opened the Public Hearing and read the legal ad description into the record, from the agenda.

- I. **Case #24-01:** Rehearing from Justin Pasay/Al Fleury regarding Case #23-08 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**.

Justin Pasay introduced himself as the attorney with DTC Lawyers in Portsmouth, NH, on behalf of the applicant, 3 Weare Road LLC, the owner of the property that is Al Fleury, of Fleury Development and Fleury Group based in Hampton, NH. J. Pasay recapped the timeline of the application back to September 2023 which was the last time the applicant was before the ZBA, with many of the same ZBA members tonight as were also present then. He noted that the process began before September, in May 2023, with a Notice of Violation letter from the Building Inspector that started an involved process from the applicant's behalf that included obtaining a Wetlands' Scientist, as this began as a complaint about fill in the wetland, that is a Prime Wetland. There were other use-related violations which needed to be addressed, and that were identified by the Building Inspector as part of his Notice of Violation letter. The applicant submitted an application at the end of August 2023 seeking a Variance to conduct Light Commercial Use with the Single-Family Use currently on the property. The case was heard in September by the ZBA and denied, so the applicant filed a request for a Rehearing, which was granted, and that is the hearing tonight. J. Pasay stated that he watched the ZBA meeting of the rehearing request, and commented that he appreciates the diligence and effort of review that is

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going into this case by the ZBA, and also by the abutters. J. Pasay stated that typically he would have more people with him, but the Engineer Henry Boyd of Millenium Engineering is urgently out of the country, and Al Fleury had a scheduling conflict.

J. Pasay stated that the original application is the one upon which the applicant is relying for their case, including all the named attachments:

- Existing Conditions plan (also distributed tonight);
- Tax Card;
- A real estate listing of the property prior to 2021, when A. Fleury purchased the property;
- Photographs of the property from March 2023;
- An aerial photograph;
- Tax maps of both Hampton Falls, and Seabrook (across street);
- Tax Cards on surrounding properties;
- Application for registration of a Trade Name for a business previously located on the property that was Rick’s Septic Tank Service;
- Historical aerial photographs back to 2011, that depict the status of the property over the last 13-14 years;
- Notice of Violation letter from M. Sikorski, Building Inspector in May 2023;
- NH DES letter regarding the wetlands issue;
- Various communications from J. Pasay and the Town of Hampton Falls on this matter;
- Wetlands Restoration Report prepared by Mark West, a Wetlands Scientist;
- Proposed Conditions plan from Millenium Engineering;
- 8-9 photographs provided this evening, that were taken Monday this week by J. Pasay.

J. Pasay reiterated, as he said he stated in September 2023, that the applicant wants to make this right. He stated that several things transpired between the time when A. Fleury bought the property in 2021 and now. He stated that the applicant recognizes, from the perspective of the abutters, that some of that activity was not appropriate. Foundationally, there was a miscommunication and a misunderstanding of what was allowed and not allowed on the property by A. Fleury. He said that there is a true commitment to utilize the property in a reduced way that is consistent with how the property is currently being utilized.

The applicant believes that the use of the property is consistent with the historical use of the property, when it was Rick’s Septic Tank Service, acknowledging the fact that in that situation the business was a Home Occupation, so the Merrills lived at the property while operating that business, and that is not the case with A. Fleury. A. Fleury does not live on the property. The single-family house is rented to a tenant but it is not a Home Occupation that is being proposed, it is a Light Commercial Storage Use that will be discussed.

To address the very legitimate concerns of the abutters and of the Town, the applicant proposed several robust Conditions on the use of the property, to make the proposal as benign as possible (perhaps even more benign than the historic use of the property), and give the Town the ability to

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enforce those Conditions to the extent that A. Fleury doesn't ever comply with the conditions, should the Variance be granted.

The overview of the property was provided by J. Pasay at 3 Weare Road, who stated that there is a boundary dispute currently with the neighbor at 1 Weare Road, but the size of the parcel is approximately 1.1 acres. It is an improved parcel with a single-family dwelling with an unfinished attached storage barn. There is a large garage with five (5) independent garage bays accessed from the rear, and there are two (2) sheds on the property. J. Pasay stated that numerous photos were provided as Exhibits 3 and 4 of the original application, in addition to the photos submitted this evening. J. Pasay stated that a unique aspect of the property is the large impervious surface area in the back, that has been used historically for the storage of equipment and trucks. J. Pasay reviewed the property's location in zoning district A, which is intended by the Zoning Ordinance *"to provide areas for single-family dwellings and appropriate accessory uses at rural densities and to promote and provide for agricultural uses."* (from the purpose section of the Zoning Ordinance for the A district).

J. Pasay stated that the applicant believes the property to be unique for two (2) categorical reasons, namely: 1) its built conditions (as referenced by a court case Harborside in Portsmouth, NH, and a second case in Keene, NH), and 2) its surrounding area. J. Pasay stated that the property is proximate to routes 97 and to 95. He continued that the property appears as a single-family house from the front view, and the property is surrounded by a mix of uses, namely: a) the property across the street is a Seabrook property that may eventually be used for well water for the community and some recreational use; b) the Windjammer Apartments across the street that is a large multi-family use; c) surrounded on two (2) sides by 37 Mill Lane which is a very large 110-acre parcel with a single-family use, and the owner of that property is here tonight. J. Pasay stated that the applicant's parcel is "insulated" on two sides by a very large parcel that is encumbered by a Prime Wetland; d) 1 Weare Road, the direct abutter is very similar to 3 Weare Road with a single-family residence and similar lot size. He summarized saying that 3 Weare Road is unique because of the built conditions of the property, and it is also unique because of where it is sited on Weare Road and the types of uses that are around it.

Chairman DeLeire asked for clarification, if J. Pasay was suggesting that the types of uses around the property are Commercial, and J. Pasay responded no. J. Pasay continued by describing the Windjammer Apartments site as having a lot of traffic coming and going in contrast to the "sleepy" Weare Road. He also referenced a discussion from the first hearing that talked about the potential eventual development of the large adjacent parcel for housing, so there was consideration of potential future development of surrounding properties that factored into the decision, and the applicant stated that their perspective on that argument was that it was not an appropriate argument in the context of the uniqueness of the property.

S. Bryant asked M. Sikorski if asphalt counts in lot coverage calculations, and he responded that it does. S. Bryant followed up asking what the lot coverage was for the property, and J. Pasay referenced a number from the Existing Conditions Plan, calculated by Henry Boyd, of the sealed surface area at 52% or 26,035 square feet on a lot size total of 49,880 square feet. S. Bryant

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asked M. Sikorski what the allowed maximum lot coverage was, and the response was 30%. J. Pasay responded that the applicant's use was a pre-existing non-conforming use which has not been made worse.

J. Pasay described the applicant's approach when initially in receipt of the Notice of Violation letter was to hire a Wetlands Scientist to evaluate the pressing issue of the fill of the Prime Wetlands, and an Engineer was hired to survey the property to draw a plan of Existing Conditions, and to eventually make a plan of proposed remediation J. Pasay stated that he went through all available public records to see how the commercial use (Rick's Septic Tank Service) was permitted, and he stated that he did not find a lot of information but said that there was a Home Occupation by Rick Merrill for a septic business. He continued, that what he gleaned from the Assessor's data was that Rick Merrill bought the property in 1987 and began living there. Rick Merrill owned trucks and snowplows and other vehicles that were associated with the septic tank company, and equipment was stored and maintained at the property. J. Pasay cited Exhibit 4 photos of the property showing lifts in the garages and lots of equipment. He continued that in 2006 Rick Merrill became the Town's Road Agent until 2009 and stated that he understands anecdotally that some of the Town's road equipment was stored at the property during that time, as can be seen in aerial photos from 2006 in Exhibits 4 and 5.

Chairman DeLeire asked if Rick Merrill lived at the property during that time, and J. Pasay confirmed. J. Pasay continued about the historic use of the property as a Home Occupation with the owner operating the business living at the property. The commercial use of the property at the time involved the storage of equipment and the treatment of trucks, etc.

A. Fleury purchased the property in 2021, and part of the attraction was the nature of the built condition of the property, the large (6,000-SF) of unfinished storage area in an attached barn, and a large detached garage with industrial-sized bays and lifts, depicted in the photos. J. Pasay stated that A. Fleury immediately made some renovations to the property that included: new garage doors, siding, roofing, gutters, some HVAC and electrical. In Fall 2021 he re-paved the existing surface area, which was the precipitating factor that led to some Conex boxes being placed to the rear of the property on some fill located proximate to the Prime Wetlands.

M. LaBarre asked if the wetlands violation has been cleaned up yet. J. Pasay referenced a Mitigation Plan that was proposed by the applicant's Wetlands Scientist with their original filing, that has not yet been reviewed by NH DES on how to mitigate the 1,496-SF of fill. (Prime Wetlands are a State jurisdiction.) The Mitigation Plan involved removing the fill, grading and planting it. The update that J. Pasay provided was that the State has since approved the Mitigation Plan by Mark West, with a timeline for compliance by April 2024. He explained that the applicant had wanted to begin the mitigation work immediately; however, their Wetlands Scientist advised against doing the work in the Fall because many of the plantings would not survive. The plan is to complete the mitigation work in the Spring, and part of the plan is a requirement that the State will do annual reviews to check on compliance with the Mitigation Plan.

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M. LaBarre stated that he was surprised about the original statement that it was “*inadvertently covered with some fill*”, and 1,400 square feet is larger than this room (1,200 SF) that is a very substantial amount of area, and that was his concern about it. He said that it did not seem like a mistake nor that it was inadvertent, as it was not one truckload nor one wheelbarrow, and that was his concern. J. Pasay acknowledged that as a valid concern, and offered the presentation of the findings of the Wetlands Scientist to diagnose the problem. M. LaBarre stated that the average individual knows better than to encroach upon wetlands nor waterways. J. Pasay responded that hopefully with the execution of the Mitigation Plan which has now been approved by the State, the damage will be remedied.

S. Bryant asked if when the area was repaved, did the applicant pave more area, and J. Pasay responded that his understanding was that they paved over existing impervious surface, and additionally stated that he was not involved in the project at the time.

J. Pasay proceeded to describe how A. Fleury put the property to use after he bought the property. The large, unfinished storage space of approximately 6,100 SF is used to accommodate personal property of A. Fleury’s hospitality businesses to do with restaurants and a hotel, and their seasonal furniture and décor demands.

Chairman DeLeire stated that A. Fleury owns several businesses, and asked J. Pasay if A. Fleury knew when he purchased 3 Weare Road that it was a residential property? J. Pasay responded that he could not speak to the analysis done at the time. He stated that foundationally the front of the property looks like a single-family residence, and the back of it looks like a commercial garage, and historically the understanding was that the property had been used as a business. He stated that from the aerial photographs can be seen the massive impervious surface area behind the building that has been there a very long time, at least back to 2011, and potentially decades before that to facilitate and to accommodate the business that was there at the time. The property is zoned in the “A” zoning district, but the understanding was that this is a novel property for its built condition. J. Pasay stated that there are few single-family residences with that massive area of parking and five industrial garage bays. S. Bryant challenged J. Pasay stating that he could think of a couple similar properties in town, and named them as: the Governor’s mansion on Brown Road, and another property on Toppan Lane that are residential properties with lots of storage.

J. Pasay stated that the garages were utilized, upon purchase in 2021, to service full-time (by a mechanic) A. Fleury’s trucks and equipment. He stated that across A. Fleury’s businesses there are approximately fifty (50) pieces of equipment, including trucks, trailers, skid steers, a lull, a boom, dumpster cans, etc. and thirty (30) of those are stored off-site. J. Pasay reported that what was being stored on-site Monday this week, when he, himself, took pictures was a lull, a box truck, and a pick-up truck. The remaining twenty (20) pieces of equipment have been stored since 2021, both inside and outside, on-site at 3 Weare Road. In 2021 the outside area started being used for storage by four (4) large Conex boxes, which contained various pieces of equipment, with two (2) located where the fill happened, and two located on the east near the 1 Weare Road boundary. J. Pasay reported that the traffic associated with that storage was that

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employees would come and drop off and retrieve stored property. The busiest times were the transitions in the seasons, for chairs and tables for outdoor dining and decorations, for example.

May of 2023 was when the applicant received the Notice of Violation from the Building Inspector, and when the process began, discussed earlier.

The proposed use going forward is that of Light Commercial Storage, Vehicle Maintenance use and the continuation of the Single-Family residence. J. Pasay stated that the applicant is trying to address the legitimate concerns of the ZBA and of the neighbors about the use, and toward that end the applicant proposed the following eight (8) Conditions of Approval that would be attached to the permit, and would be enforceable by the Board of Selectmen if the conditions were not in compliance:

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 Conex storage containers depicted on **Enclosure 1**. 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.⁴
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.
8. The Applicant will prepare a Site Plan Review Application and file same with the Town's Planning Board.

Note that the third (3) Condition of Approval has already been met, as all Conex boxes have been removed from the site. The fifth (5) Condition of Approval regarding the lighting has had some of the issues addressed. J. Pasay stated that his understanding was that the one light facing the neighbor at 1 Weare Road has been removed, and he is not certain that the other lighting on

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the property has been addressed yet. He continued that if the applicant was fortunate enough to obtain ZBA approval, that they would next pursue approval of a Site Plan from the Planning Board. He stated that it does not appear that there was Site Plan approval previously for the Home Occupation or otherwise; however, the applicant acknowledges that this is a Commercial use and should go to the Planning Board to review, noise, operation of business hours, and lighting, etc. The sixth (6) Condition of Approval has been addressed by the removal of the gate apparatus, and he suspects that A. Fleury may replace the gate with something that does not encroach on the neighbor’s property. Regarding the seventh (7) Condition of Approval J. Pasay stated that NHDES did not amend nor alter the Wetlands Restoration Report, they accepted it.

S. Bryant asked for clarification about the proposed one (1) trip per day proposed Condition of Approval, and whether that meant one vehicle trip per eight-hour (8-hr) day. J. Pasay clarified that the one full-time employee is already on-site, so the one trip per day would be the drop off or retrieval of equipment from the storage areas. S. Bryant asked if that meant to go once per day to pick-up, for example, a tri-axle plow, and what hours of operation are being proposed. J. Pasay stated that the applicant is open to any requests of the ZBA, and the proposed hours of operation as listed in the first Condition of Approval would be from 8am to 5pm.

S. MacLeod asked for elaboration on the proposed vehicle maintenance, and particularly in terms of potentially hazardous waste generation. J. Pasay stated that it was a legitimate question, and that his understanding is that routine maintenance of vehicles will be performed in the garage bays, like fluid changes, brakes, and servicing other equipment like plows. S. MacLeod stated that several solvents would be needed for those tasks and hazardous waste generation from vehicle maintenance is an assumed position. S. MacLeod continued that one of the elements of the Variance test is to not “threaten the public safety, health or welfare”, and he pointed out how close the property is to the Prime Wetland, so there would need to be a containment issue of hazardous waste that would need to be addressed by the Planning Board following ZBA approval. J. Pasay responded that the comments made by S. MacLeod are twofold, namely if the ZBA decides that there is/are additional Variance requests needed that he would need to speak with M. Sikorski about those specifically, and secondly, he stated that S. MacLeod’s comments are germane to the Planning Board. He continued that with the huge area of impervious surface that the issue in proximity to the wetlands is runoff, drainage and stormwater, that are issues considered by the Planning Board. J. Pasay stated that the containment issues raised by S. MacLeod would need to be specified by the uses allowed and that would have to be an analysis done by the applicant for the Planning Board, and he agreed that it was a fair point.

S. MacLeod stated that any commercial vehicle maintenance shop will have facilities such as oil traps, fuel traps, and lateral drains that will need to be contained in case of spillage to not runoff into the adjacent wetlands, and he perceived that as a “threat” as noted in one of the Variance criteria, needing to be addressed. J. Pasay stated that many of those concerns would need to be addressed at the Planning Board level in terms of runoff.

Chairman DeLeire asked if this is the only maintenance facility used by the owner, and J. Pasay responded that he did not know, but that he understood that this is not a full-service operation

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and that there are other vendors involved for certain tasks. S. Bryant responded that he recalled the prior hearing where it was stated that 3 Weare Road is not the only location. Chairman DeLeire stated that if a plow needs service after 5:00pm that he thought it would be unlikely that the plow driver would wait until 8am the following morning to get the plow serviced. S. Bryant responded that it was addressed at the prior meeting that if that scenario occurred that the plow would go to an alternate location, and W. Vance agreed. J. Pasay said that the majority of the equipment does not come onto this site and is stored elsewhere in their numerous real estate holdings across the Seacoast area. He continued that his understanding was that if a service or repair can be addressed by the repair person onsite that does not require more substantial servicing then it goes to 3 Weare Road, otherwise it would get serviced commercially off-site. He said that he discussed the proposed hours of operation with the applicant who agreed to adhere to the proposed timeframe. Chairman DeLeire followed up asking about the one trip per day, and J. Pasay said that the applicant is open to any desired language in the proposed Conditions of Approval. He re-read condition (1) and stated that it addresses the coming and going of the personal property located in the 6,100 SF of storage. S. Bryant said that one person may not stay the entire 8-hour day, so one person could arrive at 8am and leave at noon, and then a second person could come for the afternoon, so there would only be one vehicle at the site in that scenario at any one time, even though two people had come and gone by the end of the day.

M. LaBarre asked if what the applicant is proposing regarding the one trip per employee per day is the current practice occurring onsite, and J. Pasay said that when he was there on Monday taking photos there was only the lone mechanic onsite. M. LaBarre stated that this afternoon before 3:00pm there were four (4) vehicles parked in the driveway of the back parking lot, with two vehicles on each side. M. LaBarre discussed the photos provided by J. Pasay at the meeting tonight as depicting (on the one hand) a rustic, undeveloped area surrounding the property, and (on the other hand) there were other photos provided by J. Pasay that show the neighbor's property, and the view the neighbor has of the vehicles and dumpsters parked in the back that destroyed his vision of complete tranquility and a rural aspect of the town. He continued that one photo shows the neighbor located less than 100-feet away, and he cited another neighbor who may be 100-150 yards but who is in relative proximity. He made the point that even though there is undeveloped land around some of 3 Weare Rd, there are some neighbors in close proximity. He said that especially this time of year those neighbors can all see through the forest to the back yard of 3 Weare Rd. He stated that he is trying to put himself in the shoes of the neighbor to decide if he would like to see all that when he walks out on his back porch.

J. Pasay responded that some of the Fleury Development vehicles are pick-up trucks and look like personal vehicles. He called attention to the applicant's original filing of Exhibit 9 that depicts the historic aerial photos of the area. He continued that the point the applicant is making with the aerial photos is that historically the view from 1 Weare Rd into 3 Weare Rd is better now than what it has been for decades when it formerly was Rick's Septic Tank Service. J. Pasay stated that in 2011 the aerial photos show the site as being encumbered with many more trucks, equipment and storage facilities than are presently located onsite.

M. LaBarre stated that 2011 is a decade ago, and he doubted that any of the current ZBA members were on the board then, and that it did not really matter because the current neighbor

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moved in recently in 2021 approximately the same time as when the applicant purchased 3 Weare Rd. J. Pasay responded that discussing the “*essential character of the neighborhood*”, as dictated by the Supreme Court is what needs to be considered for a Variance, under the public interest and spirit of the ordinance criteria, asks if the character of the neighborhood is going to be altered. He said that the applicant’s perspective is that based on the data that Rick’s Septic Tank Service was registered to the site in the 1990s, that historically this is what the property has looked like, and the built improvements on the property were built to accommodate that type of use. J. Pasay stated that the use the applicant is proposing is more benign and better looking than what has been there and is improving the property. M. LaBarre said that J. Pasay has his opinion, and M. LaBarre said that he has his own opinion, but the only one who can really tell the difference is going to be the neighbors, and J. Pasay agreed.

M. Sikorski asked J. Pasay to give a synopsis of how the business has reduced its impact since May 2023 and what has been happening at the property within the past eight (8) months since the Notice of Violation Letter. M. Sikorski said that he knows from J. Pasay’s presentation that things have been removed from the property to go back to a baseline and then rebuild to whatever the ZBA approval specifies, but what has been occurring onsite recently? J. Pasay said that he could not speak specifically other than to say that of the fifty (50) pieces of equipment, that twenty (20) are coming and going, and various portions are being stored onsite and can be different any day. M. Sikorski asked what has been happening routinely at the property over the past eight (8) months? J. Pasay responded that of the twenty (20) pieces of equipment stored there, some are in use elsewhere in the state, and if they need to be serviced, they are being serviced at 3 Weare Rd. M. Sikorski reviewed that there has been vehicle maintenance by the one mechanic onsite, which is the business level the applicant is seeking, and asked if there was anything else happening onsite regarding any other business operation? J. Pasay responded not to his knowledge. M. Sikorski asked about any mechanical work or other businesses owned by Fleury Enterprises working out of 3 Weare Rd? J. Pasay stated that A. Fleury owns many businesses, one of which is an HVAC business, so those vehicles may be serviced at 3 Weare Rd. M. Sikorski asked if that HVAC business is carrying out their business activities at 3 Weare Rd, and J. Pasay responded not to his knowledge, and stated that he can get clarification on these questions for the ZBA, especially if the ZBA requests a Continuance to get to a decision at another meeting.

S. Bryant stated that if there is another business going in and out of the property, that changes everything. M. Sikorski clarified his question to say, “*is any of the HVAC business happening at 3 Weare Rd?*” J. Pasay said that he would seek responses to those questions.

J. Pasay reviewed and discussed the five variance criteria, saying that the Supreme Court has stated that the first two Variance criteria can be considered together, namely, (1) whether the Variance will be contrary to public interest, and (2) whether the spirit and intent of the ordinance has been observed by the proposal. He stated that the test for these two are whether the variance is contrary to the public interest if it unduly and in a marked degree conflicts with the ordinance such that it violates the ordinances basic zoning objectives. He continued saying that the Supreme Court has said it is prudent to analyze whether those criteria are met by asking two

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questions, namely: (1) whether the proposal of the Variance will alter the essential character of the neighborhood, and (2) whether it will threaten the public health safety or welfare. J. Pasay reviewed the general purpose and the preamble to the Zoning Ordinance in Article III, Section 3.1 regarding the Agricultural/Residential District (A-District), and read: *“the intent of this district is to provide areas for single-family dwellings and appropriate accessory uses at rural densities and to promote and to provide for agricultural uses.”* He went on to state that the implied purpose of the ordinance is to facilitate reasonable and consistent uses, and the general purpose of the zoning ordinance is to *“promote health, safety, morals, general welfare, etc.”*

J. Pasay stated that the applicant does not see a marked conflict with the proposal and the surrounding property and the property itself because in their view the proposal:

- incorporates the existing single-family use, which the use that is most apparent from Weare Rd.;
- the use is the substantially similar to the use that has existed on the property for decades;
- the property is well-insulated by a largely unimproved parcel (over 100-acres) at 37 Mill Lane on two sides;
- the commercial components of the proposed use, which are the storage and the maintenance use, will occur inside

Chairman DeLeire asked for clarification, when J. Pasay, earlier stated that the proposed use would not alter the essential character of the neighborhood, or not threaten the health, safety, welfare of the public. Chairman DeLeire said that the word “or” meant that it could be one or the other and did not have to be both. He stated that for him, the “essential character of the neighborhood” was that no one else in the neighborhood has trucks, lifts, big parking lots, deliveries, and pick-ups happening on a regular basis (as proposed by the applicant); and, he stated that the essential character of the neighborhood is that the whole neighborhood is residential, whereas the applicant is asking for commercial.

J. Pasay responded to Chairman DeLeire’s characterization of the essential character of the neighborhood, as addressed in the applicant’s filing, that since the 1990s has involved a commercial business at the property and stated that the question is whether this proposed use is going to change the character of the neighborhood. The applicant’s position is that the proposed use is substantially similar, if not more benign (by virtue of the evidence of the historic aerial photos), than prior use of the property. Chairman DeLeire said that the question is about the character of the neighborhood, and not the proposed character of the property as J. Pasay described it. J. Pasay said that that gets to what the correspondence and discussion was about at the last hearing in September 2023, and what was discussed in their Rehearing Request that said that it is a residential district and the proposed use is commercial, so how can you put a commercial use in a residential district? Chairman DeLeire stated that across the street, and down the street the uses are residential and not commercial, and J. Pasay referenced part of the decision from September that stated that this was spot zoning being one little property that was commercial, surrounded by properties that are residential. J. Pasay referenced the Supreme Court that said that it cannot be the case that mere conflict with the zoning ordinance alone is a basis to say no to a Variance request because if that were the case then no Variances could ever be

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permitted because every Variance is a request to do that which is expressly prohibited. J. Pasay stated that what he perceives the essential character of the neighborhood to be is: whether what the applicant is proposing to do to the property is going to change the neighborhood. He continued that what the applicant is proposing is less intense of a commercial use than what the essential character of the neighborhood already involves. He said that the essential character of the neighborhood already involves this property that is a little unique and wonky. It already involves a property which has been used historically for decades with septic trucks coming and going. He stated that that neighborhood has been inclusive of that use since the 1990s, so is the essential character of the neighborhood changing, and the applicant stated that it is not, in their view. He stated that the commercial use of this property is becoming less intense.

Chairman DeLeire asked how long Rick Merrill operated the septic business, and J. Pasay stated that his understanding was that Rick Merrill sold the property to A. Feury in 2021, and that it was operating up to that date. M. Sikorski stated that the articles of incorporation were signed in 1982, for 3 Weare Road, for the installation and service of septic systems, that noted there was one employee, but there was no termination date on the document. Chairman DeLeire asked when the Home Occupation ordinance was adopted, and M. Sikorski said that he would look up the date of adoption.

J. Pasay reviewed and read into the record excerpts of the original filing for the September 2023 hearing under the “introduction, factual context, property description, existing and historic use” section at the top of page 3, to do with *the Town’s records regarding the property being scarce, except for the Building Department records provided in Enclosure 7*. He reviewed a few building permits that were issued for the property over the years for the foundation for the barn (1988), construction of storage and shop space (1996), garage plus shed addition (1997). R. Merrill began living in the property in 1987. In 1982 he established Rick’s Septic Tank Service which was a business, according to state records, ...that appears to have been operated out of the property. Enclosure 8 was the registration of a trade name from 2012. Dick Merrill passed away in 2006. J. Pasay stated that his understanding was that the property was in use as that business until a close proximity of when the property was purchased by A. Fleury in 2021. J. Pasay reviewed the historical aerial photos from 2011 and 2015 that are similar and showed the equipment in the back and on the sides of the property, and then there was another photo from 2023 that showed the property after A. Fleury purchased it.

M. Sikorski informed Chairman DeLeire that the Home Occupation ordinance was adopted in 2004.

J. Pasay returned to his presentation:

- the commercial components of the proposed use which are the storage and the maintenance use will, by virtue of the conditions proposed by the applicant, occur inside. J. Pasay stated that when the Town adopted the Agricultural Uses part of the zoning ordinance, the Town adopted the State definition of Agricultural which is very broad and would include a lot more activity than what is being proposed. He stated that the proposed use is somewhat akin to the level of activity of agricultural use, (with

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equipment coming and going) which would be allowed by right, without the proposed constraints being proposed as Conditions of Approval.

- The front of the property will continue to look like a Single-Family residence.

J. Pasay stated that the applicant has satisfied the case law test regarding the essential character of the neighborhood and views the proposed use as being either consistent with, or more benign than, historic use of the property. He stated that the property will be used in a manner consistent with how it has been used for decades.

J. Pasay stated that the issue of public health that S. MacLeod raised is an issue to be followed up with at a later date, if successful with the ZBA, through Planning Board in terms of stormwater drainage and run-off, etc. to make sure that nothing is making its way down into the Prime Wetland. Additionally, he stated that if it is determined to need additional Variance relief, then he would be willing to discuss that. S. MacLeod paraphrased the zoning ordinance Article III, Section 13.3.15 regarding Hazardous Waste: *“...waste generation by the following commercial activities are presumed to be toxic or hazardous unless and except to the extent that anyone engaging in such activity can demonstrate to the contrary, to the satisfaction of the Planning Board: Vehicle maintenance”*

S. MacLeod continued that he understands that this is a Planning Board issue, ultimately, if approved by the ZBA for use first, but he stated that the applicant will need to provide to the Planning Board proof that they are either not generating hazardous waste or proving that they have mitigation measures in place to handle the hazardous waste generated. J. Pasay stated that he could not articulate a good response to this concern at the moment and stated that he would appreciate the opportunity to address this concern and get back to the ZBA with a response.

Chairman DeLeire said that this hearing may get to the point where the ZBA decides to Continue the hearing and puts together a list of questions for the applicant to address. J. Pasay stated that he understands that the public health query about the hazardous waste generation is part of the analysis that needs to occur, but he does not want to respond without researching the issue to determine if there are State implications or a definition in the zoning ordinance that he needs to understand and then go back to his client to ask if it is happening, and if it is to address it some other way. J. Augusta stated that there are ways to remediate the vehicle maintenance hazardous waste; he stated that there are numerous fluids and equipment required to operate a plow, and there are responsible ways to manage it professionally.

J. Pasay stated that the third Variance criteria (3) requires the ZBA to find that substantial justice is done, and the test is that any loss to the individual that is not outweighed by a gain to the general public is an injustice. In other words, there must be some gain to the general public from denying the proposed variance that outweighs the loss to the applicant. He stated that the applicant’s perspective is that the public does not appear to gain anything from the denial because, in essence, the property appears to have been used in a way consistent to what the applicant is proposing (for decades) as borne out by the historic aerial photos and other evidence provided. He continued stating that the property is largely insulated by an unimproved property that may not be improved because of the wetlands and other issues on that property. The applicant is proposing a robust list of Conditions of Approval which would be enforceable by the

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Town, to the extent that they were not complied with. He stated that, obviously, the applicant will gain if the Variance is approved, so the applicant sees it as a win-win, where the applicant can protect the basic purpose of the ordinance and the public, but also protect the real property interests of the applicant which are important.

J. Pasay stated that the fourth Variance Criteria requires that (4) the ZBA determine that the proposal will not diminish the surrounding property values. The applicant’s perspective is that the use is largely consistent with what has appeared to have been taking place on the property for decades.

Chairman DeLeire asked if there was any evidence of the value of the impact to the neighborhood, and J. Pasay responded that he provided, in the materials submitted, copies of the Tax Assessor property cards containing assessment values of the neighboring parcels at 1 Weare Rd., and at 37 Mill Lane, in addition to 3 Weare Rd. He stated that it is not an exact science, and it is not an appraisal, but the information shows that property values have historically been increasing and consistent with the use of the property. He concluded that if the evidence shows that property values have been going up then that shows, notwithstanding the historic use of the property, certain evidence that property values are not being damaged by the use of the property.

Chairman DeLeire discussed that an assessed value is not the same as a realtor opinion of value or fair market value. Furthermore, the Town of Hampton Falls in 2023 had a reassessment that raised values to 99% fair market value so that current assessed values cannot be compared to past assessed values.

J. Pasay stated that the original letter that was filed on the date of the last hearing from the abutter: *“having read the listing from 3 Weare, we expected that the property would be purchased by someone needing the storage space, and possibly something of an agriculturally related business or hobby, it being zoned for residential and agricultural use.”* J. Pasay stated that the property is totally unique, compared to the immediate surrounding areas, with the large garage in the back with the five bays, the huge area of parking, and the large storage of equipment and trucks. The applicant is proposing to pull that activity inside, and has otherwise beautified the property in recent years, so that it looks better than it has in decades, so the evidence tends to mitigate toward not demeaning property values because of how long the property has been used for a commercial purpose.

J. Pasay covered the fifth Variance Criteria (5) for Hardship is whether literal enforcement of the provisions of the ordinance would result in an unnecessary hardship, and the test is whether due and owing to special conditions of the property, that distinguish it from other properties in the area, no fair and substantial relationship exists between the general public purpose of the ordinance provision and the specific application of that provision to the property in question, and the proposed use has to be reasonable. J. Pasay stated that there are really three (3) independent subtests, as follows:

- (1) whether or not there are special conditions;

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- (2) whether or not applying the ordinance in question to this property advances the purpose of the ordinance; and the third, is
- (3) whether or not the proposed use is reasonable.

J. Pasay addressed each of the three subtests, saying that the special circumstances test has been met, for the reasons discussed previously. He stated that the property is unique in light of what it is surrounded by, that is largely unimproved property much of which (in the applicant's opinion) will not be developed, so it is insulated in that sense. It is also proximate to a more intense multi-family use across the street. The property is also unique because of its built condition, that it looks like a Single-Family residence from the front but has a commercial component and a facility that can accommodate the commercial use, which it has been put to historically, and which the applicant is proposing to utilize. J. Pasay stated that at the last hearing he referenced the Portsmouth Harborside case regarding a big building that wanted signs that were bigger than what the City of Portsmouth allowed, and the Supreme Court confirmed in that case that you can consider the massing of the building as an improvement of the property as part of the special conditions. He continued that there was another case from Keene regarding a large historic Single-Family residence and the applicant wanted to have a Use Variance to have two residences and a commercial business in that building and the court confirmed again that you can consider the big size of that house as a relevant consideration in this special conditions' context. J. Pasay stated that this application is a similar analysis with a unique building that can accommodate the use so the question is whether or not the proposed use is reasonable under the circumstances. The applicant believes that there are special conditions of the property.

The second subtest is whether applying the ordinance to this property will advance the purpose of the ordinance. He stated that the point of the underlying zoning district is to support Single-Family dwellings, appropriate accessory uses and agricultural activities, and otherwise facilitate reasonable uses and promote general health, welfare, and prosperity. The applicant does not see that denying the Variance would advance those purposes because the Single-Family use will continue, and the Single-Family residential use is what this property tends to look like from the street. The applicant is proposing to narrow and constrain as best they can the proposed commercial use of the property via the proposed Conditions of Approval. The applicant acknowledges that the commercial use of the property is not a Home Occupation and will be more benign in appearance and operation than historically, as borne out in the historic aerial photos.

J. Pasay stated that the third subtest is whether or not the proposed use is reasonable, and the applicant's position is that because of the constraints they, themselves, are proposing in the Conditions of Approval, the proposed use is reasonable.

J. Pasay discussed a point that was raised during the prior hearing, that he also hears in other communities across the state, that the applicant did not prove that the property cannot be used for something else. He said that he understands why that analysis takes place during the hardship criteria, but he stated that it references a pivot in the law in the early 2000s (Simplex case). He stated that it used to be the standard that applicants had to prove that but for the granting of the

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Variance there is no other use of the property. The Supreme Court, in an intentional effort to pivot away from that hardship test that was very difficult to meet, and to bolster personal property rights to emphasize the ability for people to use property reasonably, changed that criteria. He stated that it still is the second hardship test in the State statute, with the first one being the one discussed here, but the other one is that there is no reasonable use of the property except for the one that is proposed with the Variance. He stated that his sense from the ZBA in September was that the ZBA thought that there were other uses that the property could be used for and that the applicant did not satisfy the criteria in that regard, but the applicant's suggestion is that they satisfied the first Variance criteria that came out of the Simplex case that talked about whether there are unique aspects of this property. Does denying the Variance advance the purpose of the ordinance? And is the use reasonable? J. Pasay summarized what Variance relief is, in a nutshell: does this proposal make sense for this property at this point in time, based on the circumstances, is it reasonable?

Chairman DeLeire opened the discussion to ZBA members with questions.

J. Manna referenced a photo distributed by J. Pasay at tonight's meeting and identified two (2) 250-gallon containers called IBC (Intermediate Bulk Containers) totes that are used to store and to move liquids, and asked J. Pasay if he knew why or what was being stored in them, and J. Pasay did not, and said that he would find out. J. Manna followed up asking about the five garage bays asking what percentage of the garage bays are used for storage versus vehicle maintenance? J. Pasay responded that the storage is behind the garages and can be accessed from the front of the building, and offered a walk-through if the ZBA was interested, as an option.

W. Vance asked if the Variance is not granted will the property owner have to sell the property, and J. Pasay stated that he did not know. He continued that the owner would need to come into compliance with what was needed, but he was not aware of any other ideas he may have for the property. W. Vance followed up asking if the sole purpose was to use the property as Light Commercial, and J. Pasay confirmed his assumption that that was the owner's attraction to the vehicle garage bays and the big storage area in the back. W. Vance asked if it was the owner's intention to seek a Variance upon purchase of the property, and J. Pasay could not comment because he, himself, was not involved with the purchase of the property. He said that he came onboard with the Notice of Violation letter last summer in May 2023. He stated that the property may have been presented as being formerly used by the Town for their trucks and this is how the property was used for 30 years, and the property appears to have the capability to accommodate that, and he stated that that may have been where the analysis stopped.

Chairman DeLeire opened up the Public Hearing for **Public Comment**.

- 1) David Raymond, 1 Weare Road. D. Raymond stated that he is the owner and resident at 1 Weare Rd. and stated that he is a direct abutter to 3 Weare Rd and has first-hand sight to everything that has happened there since 2021 when he purchased his home while 3 Weare Rd was listed. He stated that when he first read the listing for 3 Weare Rd he noticed the Residential/Agricultural zoning. He did not have a concern of a commercial use, as he was not there when the septic company was there. He stated that when he attended the Open House for 1 Weare Rd (before he bought it) there were no trucks, and

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there was no septic business going on at 3 Weare Rd. He stated that there was a beautiful view from his deck up the river that was very serene and beautiful and peaceful. He reported that he came home from work one day, some 6-7 months later, and there were two (2) bright orange storage containers on his property line [maybe ten-feet (10') from the property line]. D. Raymond continued, stating that within some months he came home from work one day and his mother-in-law informed him that the neighbor was dumping material from trucks. He could see from his deck the yards of fill that were dumped right up to the river's edge. He stated that he knew there was a buffer zone area next to the river because he had been exploring the idea of locating a shed on his property, so he knew immediately that there were violations, but what stuck out to him the most was the seeming lack of concern for the neighbor. He said that he lives by the golden rule to do unto others as you would like done unto yourself. He said that he would have talked to his neighbor before lighting up the backyard like Fenway Park. He said that he wakes up every day at 5:30am to a nightlight glowing through his bedroom drapes. He reported that there were tractor trailers 3-4 nights ago that he heard discharge their air brakes, as he sat in his living room around 5:30-6:00pm, making a delivery. He reported the 603 Mechanical HVAC company has 6-10 trucks that come and go every day, so he said that the property is being used in violation of the proposal already. He said that he did not know if equipment was being stored there, he said that he did not know if business was transacted there, but the trucks are coming and going, and it is much more than one employee per day. Chairman DeLeire asked if it was every day, and when do they start in the morning and end at night? D. Raymond confirmed that it is every day and the times vary. He said there are other trucks, both commercial and non-commercial, that also come and go throughout the day, and recently there was a tow-truck onsite that pushed a vehicle into one of the garages. D. Raymond mentioned the IBC containers and said that they are sometimes used for water storage but more often can be used for chemicals like waste oil. He said that there is a beautiful wetlands environment there that could be destroyed by someone's lack of concern for what they have done. In summary, the lack of care by the owner of the property already exhibits itself. Chairman DeLeire asked how early and how late the business activity is, and D. Raymond responded that one time there was the back-up alarm noise at 5:30am for ten minutes duration, so D. Raymond contacted the owner, and was assured it would not happen again. He continued that some trucks come back at 5-5:30-6:00pm, and it is not extremely noisy, but you cannot compare that to an apartment building with residential cars. D. Raymond stated that the apartment building across the street enters and exits on Weare Rd in Seabrook on the other side of the building so they are not creating a traffic flow issue like the trucks coming and going at 3 Weare Rd so it is not a fair comparison.

Chairman DeLeire asked D. Raymond how many vehicles park onsite, and the response was that it varies between 6-12. He said that there were 4-5 cars there today, and he has seen a Corvette coming and going a few times. He said most of the activity is the 603 Mechanical trucks that are stored there overnight and then the personal vehicles are stored there during the day, which he can see from many windows in his home.

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D. Raymond said that he would be happy to share the photos he took at 6:00am today to show how bright the lighting is in the backyard. He stated that the light shines across the river and it creates shadows in the trees similar to the Korean War Memorial in Washington DC, because of the bright, intense light. He stated that it is really unnecessary for residential parking. Chairman DeLeire asked D. Raymond if he has brought the lighting issue up with the owner, and he said that he may have texted him about it some months ago but he would have to review his text messages. D. Raymond said that he had asked if there was anything that could be done to dim the lights. He added that there had been a light on the residential entrance on the side of the house that really lit up his bedroom, and that light has not been on in some time, so that was corrected. He stated that the light that is in the back, located over the parking lot area is the one that is problematic. W. Vance asked if when D. Raymond texts the owner is he responsive, and he said that he has been. He explained that when he complained about the bright orange storage containers, he asked if they could be green or covered with camouflaged netting or something, and A. Fleury covered them with camouflaged netting, so he was cooperative, but the fact that he did not care leading up to that and how it affected anybody, he wonders if he had not said anything if he would have left them orange. D. Raymond explained that last spring he had posted something on Facebook about the situation, and a mutual friend put him in touch with A. Fleury so he has been able to reach him directly since then. D. Raymond said everyone's assessment has gone up, but if he had gone to the Open House and seen what he was living with for a year next door, he would have walked away and not purchased the house, and he is afraid about that in the future with a prospective home buyer.

Chairman DeLeire gave J. Pasay the opportunity to respond to D. Raymond's comments. J. Pasay stated that his perspective of D. Raymond's position was based on the letter he submitted previously (as part of the application) where in the last paragraph indicated: *"if the proposed use stays consistent with the guidelines outlined, only used for company vehicle maintenance, indoors only, dimmed outdoor lighting, daytime operations only, one employee working on the property, and the wetlands restoration is completed, then he (D. Raymond) would support A. Fleury's request as he has proven to be a man of his word to me and followed through with covering the storage containers."* J. Pasay said that if something has changed, he wants to figure out why and how to address it. D. Raymond responded that the criteria have not been adhered to. Additionally, he said that he understands planting the vegetation in the spring as being reasonable, but he does not understand why the fill has not begun to be removed, nor why the lights have not yet been adjusted. He said that leading up to tonight it did not appear that anything had been done except for the removal of the Conex boxes. He stated that that is why his feeling has changed since he wrote that letter.

- 2) Neal Pond, 37 Mill Lane, stated that he is the backyard abutter to 3 Weare Rd. N. Pond stated that the lighting is extremely bright. He said that it is particularly bright on the west side of 3 Weare that shines into the picture window located on the east side of 11 Weare Rd. across unoccupied land in between. He said that he cannot believe how bright

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the light is, that you could walk through the woods (at night) without any help. N. Pond stated that the property is much more active now than when Rick Merrill was there. He said that most of Rick’s machinery did not seem to be working or moving each day, as most of it was parked. He said that the biggest part of it was when he was plowing snow.

W. Vance asked N. Pond how long he had been at 37 Mill Lane and he responded forty (40) years. M. LaBarre asked how far away is N. Pond’s house from 3 Weare Rd and N. Pond estimated approximately 200 yards. N. Pond stated that he has a good view through the woods, at this time of year, to 3 Weare Rd. N. Pond thanked M. LaBarre for pointing out how big 1,400 square feet of fill looks, and M. LaBarre responded that it is larger than the size of this room. Chairman DeLeire asked N. Pond what his position is regarding the proposal, and N. Pond responded that he is opposed to where it is right now, going in a commercial direction, and he would expect the business to be growing and there would be more vehicles to maintain. He asked what company has hours that are 8 to 5 and only has workers showing up at those hours; he stated that there are often hours beyond the stated hours of work when workers are present. N. Pond stated that the owner of the property does not live there, like Dick Merrill did. He said that when there was a problem or a question you could approach him (D. Merrill) because he lived there. He said that now there is a renter there.

Chairman DeLeire stated that there were several questions that the ZBA had for the applicant to address. The ZBA needs to decide if they can formulate the questions tonight for the applicant, or make a decision tonight, or continue the hearing to the next meeting to give the applicant the opportunity to address the questions, and the ZBA may enlist the assistance of their Land Use Attorney (present) to formulate the list of questions for the applicant on behalf of the ZBA.

J. Augusta requested a list of remedies for fluids and maintenance, and the IBC tanks, and the lighting issues may go a long way toward addressing concerns. Chairman DeLeire said that perhaps the ZBA should make a list of written questions for the applicant. S. Bryant said that the ZBA should be methodical about making a list of questions and have the ability to capture all questions. J. Pasay was appreciative of the opportunity and thanked the ZBA if the board is willing to go in that direction.

Attorney Cordell Johnston stated that the ZBA would need to Continue the hearing to a specific date and time. J. Pasay said that Continuing the hearing to February would be fine, and then if more time was needed then the applicant would extend at that time to March. R. Webb suggested that the ZBA make a motion and a vote to Continue the hearing, and C. Johnston said that that would not be a bad idea.

MOTION: To Continue the hearing of Case #: 24-01 to the regularly scheduled ZBA meeting of February 22, 2024, at 7:00 PM in this meeting room.

MOTION: J. DELEIRE

SECOND: W. VANCE

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D. REVIEW AND APPROVAL OF PREVIOUS MEETING MINUTES: 11/16/2023

MOTION: To approve the meeting minutes from 11/16/2023 as written.

MOTION: S. BRYANT

SECOND: J. DELEIRE

UNANIMOUS

E. OTHER BUSINESS: There was no Other Business.

F. COMMUNICATIONS TO BOARD MEMBERS:

Materials distributed to the ZBA members at the meeting included a contact list of all ZBA members, with a request to notify R. Webb if any updates were needed.

G. ADJOURN:

MOTION: To adjourn the Zoning Board of Adjustment at 8:55 PM.

MOTION: J. DELEIRE

SECOND: S. BRYANT

UNANIMOUS

The next meeting of the Hampton Falls Zoning Board of Adjustment is scheduled for Thursday, February 22, 2024, at 7:00 PM at Hampton Falls Town Hall.

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