**Approved 10/25/18**

**BOARD of ADJUSTMENT**
**Town of Hollis**
Seven Monument Square
Hollis, New Hampshire 03049
Tel. 465-2209 FAX 465-3701

**Minutes of September 27, 2018**

Meeting was held in the Community Room, Hollis Town Hall, and was called to order by Chairman Brian Major at 7:00 pm.

**MEMBERS OF ZONING BOARD OF ADJUSTMENT:** Brian Major, Chairman; Jim Belanger, Vice Chairman; Regular Members – Cindy Robbins-Tsao, Rick MacMillan and Susan Durham; Alternate Members –Drew Mason, Kat McGhee, Bill Moseley and Meredith West.

Major stated the Zoning Board of Adjustment (ZBA) received a letter from Attorney Patricia Panciocco, dated September 18, 2018 requesting Case 2018-016 be heard at 8:30pm due to a scheduling conflict. Major suggested to the ZBA members that Case 2018-016 be moved to the end of the agenda and if the applicant for Case 2018-016 is not in attendance after all of the other cases are heard. The ZBA would go into deliberations on the prior cases and then reopen the public hearing for case 2018-016. The members agreed.

*Belanger moves to hear case 2018-016 out of order and hear case 2018-016 after case2018-019.*
*MacMillan seconded.*
*Motion unanimously approved.*

Major explained policies and procedures.

Major stated all regular members would be voting on the cases this evening.

**Case ZBA 2018-015**
The application of Leo Lorden, for a Special Exception to Section XXII, Home Based Business, Paragraph 4, Home Shop of the Zoning Ordinance to permit the operation of a landscape business. The business was previously approved by the ZBA on 8/23/2018. This application is requesting a modification to condition #2 the size of the trailers, property owned by Raymond Lorden, located at 15 Spaulding Lane (Map 008, Lot 056) in the Residential/Agricultural Zone.

Leo Lorden explained upon reviewing the conditions imposed on case 2018-011. Condition #2 states only 3-16 foot trailers were approved to be on site. He realized after the approval that one existing trailer was in fact 20 feet long. In light of the mistaken testimony, He is seeking approval for a 20 foot trailer.

Major asked would the 20 foot trailer be stored towards the back of the property out of public view. Lorden responded yes.

**No further questions from the Board and none from the floor - hearing portion of the case closed.**

**Case ZBA 2018-017**
The application of Robert & Patricia Markowich, property owners, for a Special Exception to Section IX, General Provisions, Paragraph K, Accessory Dwelling Unit of the Zoning Ordinance to permit the construction of a 800 square foot accessory dwelling unit (previously approved for 779 square feet) located at 39 Cameron Drive (Map 025, Lot 036) in the Residential/Agricultural Zone.

Robert Markowich stated he was seeking a re-approval of the accessory dwelling unit (ADU). The original approval (Case2018-012) was for a 779 square foot ADU. The floor change plan has changed since the approval, a cantilever window will be installed which will add 21 square feet to the ADU. The total square footage of the ADU would be 800 square feet which is allowed by ordinance.

Major asked if the window installation was the only change being made to the approved plan. Markowich replied yes. Belanger stated since ADU's are allowed by special exception and can be up to 800 square feet should the ZBA consider approving 800 square feet. This would eliminate the applicant from seeking re-approval. MacMillan

agreed, and added the Building Inspector could verify the total square footage. Major stated applications should be approved as submitted. If changes are made after the approval, those changes should be re-approved.

**No further questions from the Board and none from the floor - hearing portion of the case closed.**

**Case ZBA 2018-018**

The application of Craig & Kelly Weimer, property owners, for a Variance to Section XG, Zoning District, Paragraph 4.d, Minimum Side Yard Width of the Zoning Ordinance to permit the construction of a 18' x 26' Garage 16 feet from the side yard width (required 35 feet) located at 111 Wright Rd (Map 014, Lot 060-002) in the Residential/Agricultural Zone.

Craig Weimer explained he is seeking approval for the placement of an 18' x 26' garage 16 feet from the side property line. The proposed use of the garage is to provide storage for a 3rd vehicle that currently sits unprotected in the driveway. Secondary uses include storage for lawn and garden equipment.

Major asked if there was a current garage on the property. Weimer replied yes, a 2 car attached garage.

Weimer explained the variance will not be contrary to the public interest because Weimer believes that granting the variance will add both character and value to our home and the surrounding community. The garage will be custom designed to match the primary structure and landscaping. It will be located at the absolute top of our driveway in an open field, and a significant distance will remain between the neighboring structures. There will be no negative change in the character of the neighborhood and absolutely no threat to the public health, safety or welfare of Hollis.

To be contrary to the public interest or injurious to the public rights of others, the variance "must unduly" and in a marked degree, conflict with the ordinance such that the variance violates the ordinance's basic zoning objectives. The ordinance was set to enforce proper distance between neighboring structures. The garage once completed would be over 150 feet from the nearest neighboring structure, so plenty of distance will remain between structures. This is the only location that is available on our property for the garage, and our adjoining neighbors have provided verbal approval for the construction. If we were to adhere to the existing setback regulations, the garage will physically interfere with our existing primary structure, the human entry/exit to our side entrance and finally the vehicle entry/exit to our existing two car garage would be impacted. Also there is a potential to disrupt the drainage on the property if it was to be located elsewhere. The town has fixed the drainage issue which existed previously but he still gets a small puddle every once in a while towards the front of lot.

Major asked the applicant if he would consider reducing the size of the garage so that the structure would comply with the current setbacks. Weimer replied no.

After reviewing the applicant's lot. The ZBA discussed in length the possible alternative locations and even adding a 3rd bay to the existing garage with the applicant and Dave Hinricks, applicant's builder. The applicant stated the location and size of the garage is in a location which is aesthetically pleasing, completely usable without intensive modifications and he would not complete the project unless the application was approved as submitted.

Belanger stated since the application is for a variance the application must meet the 5 variance criteria. Hardship is met when the application proves without the granting of the variance, the property can't be used for its intended use. The construction of a third garage does not meet this criteria exceptional when the applicant stated if he has to change the plan he would not complete the project. In Belanger's opinion the hardship is not met.

**No further questions from the Board and none from the floor - hearing portion of the case closed.**

**Case ZBA 2018-019**

The application of Bruce Hardy, for a Special Exception to Section XII, Nonconforming Uses, Structures and Lots, Paragraph C, Nonconforming Structure of the Zoning Ordinance to permit the construction of a 23' x 8' Addition 1 ½ feet from the side yard width (required 35 feet) located at 123-1 Silver Lake Rd. (Map 062, Lot 022) property owned by Bryan & Amanda Fontaine in the Recreational Zone.

Bruce Hardy presented case 2018-019 on behalf of the property owner. Hardy explained the property owner is seeking a special exception to construct a 23' x 8' addition to the existing porch. The existing porch currently sits 1.1 feet from the side property line. The addition would parallel the existing setback with no further encroachment. The addition is not visible from the roadway and would not change the use of the residential property. The new

construction will include finishing the existing enclosed porch and create a larger living room area and a dedicated area for home schooling of their 4 children.

Major asked what the total square footage was of the home. Hardy replied the home is approximately 700 square feet with the addition the total square footage would be 900. Major asked was the driveway part of the applicant's lot. Hardy replied no the driveway is a right-of-way. Major asked was there any other homes in the area which have a similar lot. Hardy replied yes the area has many homes situated on small lots. Major asked what impact, if any would the addition have on the neighbors. Hardy replied none; the closest neighbor gave him a letter of support. Hardy handed Setaro the letter. Mason asked how far from the setback was the addition from the east side. Hardy responded a few hundred feet. West asked if the Brulotte home was the most affected by the addition and he actually submitted a letter in favor. Hardy replied yes. Mason asked should the ZBA consider impervious surface coverage. MacMillan replied the addition would be a pillars and does not think impervious surface coverage applied in this case. The ZBA members agreed.

**Letter received in favor of the application**

Major read into the record a letter received from Joseph Brulotte, 123-2 Silver Lake Rd. The letter satted in part "*..I have no issue with the said addition as this will encompass most of the width of the existing porch and only extend another 2 feet. It will help expand their living space for their growing family."*

**No further questions from the Board and none from the floor - hearing portion of the case closed.**

**DELBERATION AND DECISION**

**Case ZBA 2018-015**

The discussion of the application of Leo Lorden, for a Special Exception to Section XXII, Home Based Business, Paragraph 4, Home Shop of the Zoning Ordinance to permit the operation of a landscape business. The business was previously approved by the ZBA on 8/23/2018. This application is requesting a modification to condition #2 the size of the trailers, property owned by Raymond Lorden, located at 15 Spaulding Lane (Map 008, Lot 056) in the Residential/Agricultural Zone.

Robbins-Tsao and MacMillan recused themselves from voting on case 2018-015.
Major appointed Mason and McGhee voting members for case 2018-015.

The ZBA members had no problems with modifying condition #2.

*Belanger move to modify condition # 2 as follows: The applicant shall be limited to three (3) one (1) ton or lower rated commercial trucks and three (3) 20 foot trailers.*

*Mason seconded.*
*Motion unanimously approved.*

*Belanger moves to impose all other previous conditions (1 and 3-8) set forth on Case 2018-011.*
*McGhee seconded.*
*Motion unanimously approved.*

**No further discussion.**

Questions/Special Exception
Question 1. Is the Exception specified in the Ordinance?
Question 2. Are the specified conditions under which the Exception may be granted present?
Question 3. Should the Exception be granted?

| Board Member | Question #1 | Question #2 | Question #3 | Total-Yes | Total-No |
|---|---|---|---|---|---|
| Brain Major | Yes | Yes | Yes | 3 | 0 |
| Jim Belanger | Yes | Yes | Yes | 3 | 0 |
| Susan Durham | Yes | Yes | Yes | 3 | 0 |
| Drew Mason | Yes | Yes | Yes | 3 | 0 |

| | | | | | |
|---|---|---|---|---|---|
| Kat McGhee | Yes | Yes | Yes | 3 | 0 |

**THEREFORE THE SPECIAL EXCEPTION WAS APPROVED WITH THE FOLLOWING CONDITIONS:**

2. **The applicant shall be limited to three (3) one (1) ton or lower rated commercial trucks and three (3) 20 foot trailers.**

**Conditions imposed on Case 2018-011:**

1. **The vegetative buffer along Pepperell Rd (Rte. 122) and the applicant's property shall be maintained and replaced as necessary.**
3. **No storage of hazardous materials shall be permitted, and the applicant is limited to 20 gallons of gas outside the capacity of the vehicles.**
4. **There shall be no outside storage of landscape materials.**
5. **The applicant shall park all commercial vehicles out of public view.**
6. **No business related vehicle repairs shall be conducted on site.**
7. **The applicant shall not install a business sign.**
8. **The landscaping business is limited to 7:00 am to 7:00 pm, Monday – Saturday. The snow plowing and snow removal portion of the business has no such restriction.**

**Case ZBA 2018-017**

The discussion of the application of Robert & Patricia Markowich, property owners, for a Special Exception to Section IX, General Provisions, Paragraph K, Accessory Dwelling Unit of the Zoning Ordinance to permit the construction of a 800 square foot accessory dwelling unit (previously approved for 779 square feet) located at 39 Cameron Drive (Map 025, Lot 036) in the Residential/Agricultural Zone.

MacMillan recused himself from voting on case 2018-017.
Major appointed Mosely as a voting member for case 2018-017.

The ZBA had no issues with approving the additional square footage for the ADU.

The ZBA discussed whether or not to grant special exceptions for ADU's at the allowable 800 square feet regardless of the square footage requested by the applicant. Major stated the applications need to be reviewed and assessed per the submitted plans for verification of the common heated wall and how the ADU would be re-incorporated back into the primary residence. If the applicant changes the plans adding additional area they should have to return for re-approval. No decision was made at this time concerning approving future ADU's up to 800 square feet.

**No further discussion.**

Questions/Special Exception
Question 1. Is the Exception specified in the Ordinance?
Question 2. Are the specified conditions under which the Exception may be granted present?
Question 3. Should the Exception be granted?

| Board Member | Question #1 | Question #2 | Question #3 | Total-Yes | Total-No |
|---|---|---|---|---|---|
| Brain Major | Yes | Yes | Yes | 3 | 0 |
| Jim Belanger | Yes | Yes | Yes | 3 | 0 |
| Robbins-Tsao | Yes | Yes | Yes | 3 | 0 |
| Durham | Yes | Yes | Yes | 3 | 0 |
| Mosely | Yes | Yes | Yes | 3 | 0 |

**THEREFORE THE SPECIAL EXCEPTION WAS APPROVED.**

**Case ZBA 2018-018**

The application of Craig & Kelly Weimer, property owners, for a Variance to Section XG, Zoning District, Paragraph 4.d, Minimum Side Yard Width of the Zoning Ordinance to permit the construction of a 18' x 26' Garage 16 feet from the side yard width (required 35 feet) located at 111 Wright Rd (Map 014, Lot 060-002) in the Residential/Agricultural Zone.

In Belanger's opinion the hardship criteria was not met. The structure could be placed in a different location. McGhee asked what the burden of prove is to determine if a hardship exists and what the definition of hardship is. Belanger replied the definition is, the property can't be used for its intended use without granting the variance. MacMillan stated it also determined on whether or not the structure can be placed in other locations which do meet the ordinance if so, a hardship does not exist. Major stated the proposed use is dealing with a 3 car garage and in the previous applications with less of a setback intrusion, the ZBA has denied.

Questions - Variance

Question 1. The variance will not be contrary to the public interest
Question 2. The spirit of the ordinance is observed
Question 3. Substantial justice is done
Question 4. The values of surrounding properties are not diminished
Question 5a(1). No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property
Question 5a(2). And, the proposed use is a reasonable one.

| Board Member | Question #1 | Question #2 | Question #3 | Question #4 | Question #5a(1) | Question #5a(2) | Total Yes | Total No |
|---|---|---|---|---|---|---|---|---|
| Major | No | No | No | Yes | No | No | 1 | 5 |
| Belanger | No | No | Yes | Yes | Yes | No | 3 | 3 |
| Robbins-Tsao | No | No | No | Yes | No | No | 1 | 5 |
| MacMillan | No | No | Yes | Yes | Yes | No | 3 | 3 |
| Durham | No | No | No | Yes | No | No | 1 | 5 |

**THEREFORE THE VARIANCE WAS DENIED.**

**Case ZBA 2018-019**
The discussion of the application of Bruce Hardy, for a Special Exception to Section XII, Nonconforming Uses, Structures and Lots, Paragraph C, Nonconforming Structure of the Zoning Ordinance to permit the construction of a 23' x 8' Addition 1 ½ feet from the side yard width (required 35 feet) located at 123-1 Silver Lake Rd. (Map 062, Lot 022) property owned by Bryan & Amanda Fontaine in the Recreational Zone.

West stated the neighbor that would be impacted had submitted a letter stating he was in favor of the application. Major stated the addition is only 8 feet and will follow the existing setback. Massing in the immediate area is similar due to the lot sizes. The ZBA members agreed and found no issue with the application.

*Belanger moves for the following finding of fact;*
*1. No conditions imposed on this application.*
*Tsao seconded.*
*Motion unanimously approved.*

**No further discussion.**

Questions/Special Exception
Question 1. Is the Exception specified in the Ordinance?
Question 2. Are the specified conditions under which the Exception may be granted present?
Question 3. Should the Exception be granted?

| Board Member | Question #1 | Question #2 | Question #3 | Total-Yes | Total-No |
|---|---|---|---|---|---|
| Brain Major | Yes | Yes | Yes | 3 | 0 |
| Jim Belanger | Yes | Yes | Yes | 3 | 0 |
| Robbins-Tsao | Yes | Yes | Yes | 3 | 0 |
| MacMillan | Yes | Yes | Yes | 3 | 0 |
| Durham | Yes | Yes | Yes | 3 | 0 |

**THEREFORE THE SPECIAL EXCEPTION WAS APPROVEDWITH THE FOLLOWING FINDING OF FACT:**

1. **No conditions imposed on this application.**

ZBA recessed at 8:10 pm.
ZBA resumed at 8:20pm.

*MacMillan moved to reconvene the public hearing for ZBA2018-016.*
*Belanger seconded.*
*Motion unanimously approved.*

**Case ZBA 2018-016**
The application of Patricia Panciocco, for a Variance to Section XXI.1, Housing for Older Persons, Paragraph e, Minimum lot area & Section VIII Lot Definition of the Zoning Ordinance to permit the construction of a Housing for Older Persons Development on a noncontiguous 20 acre lot (contiguous lot required), property owned by James Prieto, located at 436, 441, 443, 445 and 447 Silver Lake Rd. (Map 045, Lot 041 and Map 046, Lots 007-010) and property owned by James Seely, located at 449 Silver Lake Rd. (Map 046, Lot 006) in the Agricultural Business Zone and Residential Agricultural Zone.

Patricia Panciocco presented case 2018-016 on behalf of the property owners. Major suggested to the ZBA that the first issue that needs to be determined is whether or not the present application under Fisher v. Dover is different than the prior application which was denied. (case 2016-002) The ZBA members agreed.

Major asked Panciocco what makes the present application different than the previous application. The 2016 application requested relief from 2 sections of the elderly housing zoning ordinance. The relief requested included: allowing an elderly development on an 18 acre parcel instead of the required 30 acre parcel. Second relief was allowing residents who were over 55 years old when the ordinance required they be older than 60. Those requested were denied.

In 2017, the town amended the ordinance to reduce the required tract size to 20 acres and lowering the resident age to 55 or older. The current application no longer requires relief from the age requirement. As to the size of the tract tax map 045-041 has been included to increase its size to more than 20 acres to comply with the ordinance. Notwithstanding, since the parcels are not contiguous the applicant is seeking relief from the contiguity requirement found in the definition of the term "lot". We believe this application is materially different than the 2016 application.

Major asked if the request was for the same number of units previously requested. Panciocco replied this application is requesting 30 units. Bob Baskerville, Bedford Design, approached the ZBA and stated he presented the prior application in 2016. Major asked how is the application changed since the previous application as it pertains to the number of units and size of the property. Baskerville replied originally the ordnance was for 62 and older, we requested 55 and older. The Planning Board (PB) changed the ordnance as it pertains to the age requirement. At the time the property had 18 + acres, the ordnance required 30 acres. The PB changed the ordnance to require 20 acres. At the time of the original application the parcel located across the street was not included. This application includes that parcel. After revisiting the ordnance the PB changed the density requirements as well, to encourage elderly housing developments. Originally the request showed approximately 13 buildable acres, this application shows at least 15 developable acres. The total units for this application is 30, 24 units on the east side of the road and 6 units on the west side of the road.

Major asked the applicant is requesting the ZBA hear this application as new one based on the plan changes and the ordinance changed which took effect. Baskerville agreed.

**No one spoke in favor of the application**

**Spoke in opposition of the application**

Brett Allard, Bernstein, Shur, representing Leo Cormier property owner of 451 Silver Lake Road. In regards to the Fisher v. Dover analysis it is pretty much settled law that applicants can't return to the ZBA with applications over and over with similar requests. The standard of Fisher v. Dover is and I quote "*When a material change of circumstances affecting the merits of the application has not occurred or the application is not for a use that materially differs in nature and degree from its predecessor, the ZBA may not lawfully reach the merits of the petition. If it was otherwise, there would be no finality to proceedings before the ZBA, the integrity of the zoning*

*plan would be threatened, and an undue burden would be placed on the property owners seeking to uphold the* zoning ordinance." The standards for reaching the merits tonight is that, as the applicant stated the burden is on them to show either; (one) the purposed use is different or; (two) not just to show there are material changes, that the ordinance changed or that things in town have changed. The changes must affect the merits of the application. If the changes do not affect the merits of the application then there has not been a material change.

Both applications are requesting the same use a 55+ elderly housing development. In 2016 they requested the development on an 18 acres parcel were 30 acres where required. The present application is requesting 18 acres because the property across the street is not contiguous, were 20 acres are required. The changes to the zoning ordinance have not affected the merits of the application because the proposed lot size still is lower than what is required. The request is the same and the proposed use is the same. The applicant is basically requesting the same use.

Belanger stated if the town had an ordinance within the historic center in town which there was to be no swimming pools installed within the district. An applicant came in and wanted to install a public pool on the town common which the ZBA denied. After a while the PB changed the ordinance to allow swimming pools. Belanger questioned could the applicant come back to the ZBA for approval since the ordinance changed. Allard responded most certainly the change affected the merits of the application, the applicant would not even be required to submit an additional ZBA application since the use is allowed. Belanger stated the ordinance changed as it pertains to this current application. Allard replied the merits of the application are ineffective since the applicant still requires the same relief as the previous application. The swimming pool ordinance change affected the merits of the application because no relief is required.

MacMillan stated since there were many changes to the ordinance, age and lot size common sense would be the application is different. Allard understand the application are difference, changes were made to the ordinance however, under Fisher v Dover the changes must affect the merits of the application. In Allard's opinion the present application is asking for the same relief. Major noted the PB responded to the community concerns on elderly housing and reduced acreage and age limitations. The application is requesting relief from a different section of the ordinance which was not requested on the original application. Allard responded the land area is the same due to the fact the land across the street does not count in the calculations for lot area since they are not contiguous. Belanger stated if the ZBA granted a variance to build 24 units on the single 18 acres lot Belanger asked if Allard's argument that the application was the same would thank argument still have merit. Allard replied yes because the same relief would be required concerning lot area.

**No further questions from the Board and none from the floor - hearing portion of the case closed.**

**DELBERATION AND DECISION**

The board determined that the submitted application was in fact different from the previous application.

*Major moves to hear case 2018-016 because the application was a substantially different from application brought forth in 2016 and under Fisher v Dover the board is considering this as a new application due to the changes made in the March 2017 zoning ordinance.*

*Belanger seconded.*
*Motion unanimously approved.*

*Major moved to reconvene the public hearing for ZBA2018-016.*
*MacMillan seconded.*
*Motion unanimously approved.*

**Case ZBA 2018-016**
The application of Patricia Panciocco, for a Variance to Section XXI.1, Housing for Older Persons, Paragraph e, Minimum lot area & Section VIII Lot Definition of the Zoning Ordinance to permit the construction of a Housing for Older Persons Development on a noncontiguous 20 acre lot (contiguous lot required), property owned by James Prieto, located at 436, 441, 443, 445 and 447 Silver Lake Rd. (Map 045, Lot 041 and Map 046, Lots 007-010) and property owned by James Seely, located at 449 Silver Lake Rd. (Map 046, Lot 006) in the Agricultural Business Zone and Residential Agricultural Zone.

Patricia Panciocco presented case 2018-016 on behalf of the 4 property owners which own 6 parcels of land. 5 parcels are contiguous and 1 parcel across the street at approximately 3.45 acres. The relief being requested for the word "contiguity" contained in the ordinance under the definition of a lot. The ordinance requires a 20 acre lot or a combination of lots which are contiguous. The proposal will be submitted to the PB for a 30 unit development if the variance request is granted. The use is permitted in the A&B zone and R&A zone. The proposal meets the 50 foot frontage requirement on Rte. 122 and collectively have 21.8 acres where 20 acres is required.

The variance will not be contrary to the public interest. Any portion or word in the ordinance must serve the public interest. To be contrary to the public interest it must conflict with public purpose served by the restriction. In this case the restriction is the frontage of the 20 acres must be contiguous. In this case the frontage is not contiguous, the board needs to ask themselves what purpose does contiguity serve. The obvious reason which comes to mind is that the town does not fragmented lots a piece here and a piece there. This application is different since the properties are across from each other. Each lot can stand on its own they are not fragmented pieces of land. The 3.45 acres as proposed supports a septic system and a well to serve all 6 units. The parcels across the street will also meet all of the public health requirements. In this context for a senior development why does the frontage have to be contiguous? It is Panciocco feeling that senior are older enough to cross the road if they desire. The setbacks are met on both parcels. There is no health, safety or welfare nor other public purpose is harmed in granting the variance.

The spirit of the ordinance is observed because the stated purpose of the ordinance is to encourage the construction of housing for older persons by waiving the certain requirements found in the ordinance. Waiving this requirements will not impact the proposal. Therefore, relieving the applicant of the definitional "contiguity" requirement is consistent with the intended purpose of the ordinance. In 2017 the voters spoke and the ordinance was changed the Density was greatly increased and the total acreage was reduce from 30 down to 20 acres, and the age is more broadly encompassing. A survey was taken within the town for the ages between 45 – 65 and result were that over 40% of people were not pleased with the housing opportunities within the town.

Substantial justice is done by granting the variance. Substantial justice requires the loss to applicant be out weight by a benefit to the public. Since it appears there is no public benefit with requiring frontage on a single lot, and in fact requiring a single lot may discourage the development of senior housing. Allowing the applicant to submit a proposal with lots directly across from each other along Rte. 122 will be substantially just. It would be substantially unjust to deny the application, the public has spoken and would like to see some elderly housing.

Surrounding properties are not diminished because currently the property is a flea market with a number of empty building, signs, older homes and parking lots. The estimated value of the units to be constructed on the site will be approximately $400,000 per unit and will not harm the surrounding property values. In addition the development would elevate the area.

Literal enforcement of the ordinance would create an unnecessary hardship because requiring the lots to have contiguous frontage creates the hardship. If the lots need to be contiguous the development for senior housing could not be done. The lots have development concerns. The southeasterly 1/3 of the larger parcel is located in the flood plain and bounded by a steep drop down to Witches Brook. Collectively, these combined factors present a number of aesthetic concerns to a new development if only on one side of Rte. 122 is developed. A development spanning both sides will fare much better and overcome this objection to revitalize this area in town.

No fair and substantial relationship exists between the general public purposes of the ordinance. Presumably, the public purpose of contiguity is to avoid smaller undersized parcels being cobbled together to meet the ordinance requirements. That concern is not present here and also there is no public purpose served by requiring the lots be contiguous for this particular use. Allowing these 2 lots to be developed as a senior housing project will unify the area and increase values. Development on one side will not fare as well because the underdeveloped side will likely detract from new development on the opposite side. The ZBA probably has seen large developments on a single lot with wetlands or a pond separating the development. This development will have Rte 121 going through the development which is no different than the property with a pond separating the lot. The proposed use is reasonable since the use is permitted in both zones. The special conditions to the property is that they are in two parcels. This does interfere with the reasonable use for elderly housing.

Major stated if a person had a 1 acre lot on one side of the road and another 1 acre directly across those two lots couldn't be combined to make a buildable lot. Major asked how the proposal use was any different. The request is still dealing with the 20 acre requirement and if the issue is contiguity is not resolved the development does not meet

the 20 acres required by the ordinance. The voters of the town did vote to allow elderly housing on a 20 acre contiguous parcel. In Major's opinion the proposal is no different than 1 acre on each side of the road.

MacMillan stated his property is divided by Worcester Rd. and is taxed as one lot. Major replied MacMillan's situation is different because the town after the property was subdivide came in and installed the road. This proposal is dealing with two individual lots not in common ownership.

Belanger asked who will own the land is the development is approved. Panciocco replied if the property is developed for senior housing the property would be in one owner's name. Belanger asked if the people live in the development would they own the building but not the land is that correct. Panciocco replied yes. Major inquired has the ZBA granted variances for a use with noncontiguous lots. These are separate lots which could be developed in other ways without requiring any variances. Robert Baskerville replied the ordinance is more complex than just a single family use, you could come up with separate lots individual septic and drainage. This proposal requires a 20 acre minimum and what is the reason for the minimum acreage. No one would want to 2 unit development, the proposal deals with the bulk of the project. Once the minimum size is met you can construct 2- 2 bedroom houses per net developable area meaning a ½ per unit. Does it matter that the ½ tracts are on both sides of the road. The proposal is a condominium association with all the required open space under one ownership, full maintenance package and complete landscaping for each unit. Each unit will have a very small common area approximately 10' x 20' for gardening etc. Major stated the reason for 20 acre zoning is to insure an elderly housing development is constructed of sufficient size, to make it so we do not have scattershot elderly housing developments. Baskerville agreed but a separate ordinance dealing with density, we need a ½ of good land per unit. Wetland mapping and test pits have been completed the proposed plan looks great. Belanger stated the development is somewhat like a Planned Unit Development (PUD)

West stated "in all her experience a parcel of land or" a contiguous set of parcels, are parcels of land that will be joined together becoming one parcel. Putting the noncontiguous lot across the street in common ownership is only a legal construct for the sake of this application. West stated she is a firm supporter of senior housing but the lots are not contiguous as required by the ordinance and there is a huge precedent issue to consider. West stated she would rather see 30 units on 18 acres which would require a 2 acre variance rather than the application before us. MacMillan asked was the road going through the parcel the main issue as it pertains to contiguity. Major stated the issue should be brought up during deliberations.

Panciocco stated in land use permitting there is no precedence. Each application is decided individually with a set a different circumstances. Major stated there is administrative gloss to consider the ZBA needs to be consistent when applying the ordinance to a particular application. Panciocco responded administrative gloss only applies when the ordinance is ambiguous and is subject to interpretation by an administrative official and is consistently applied in that way. The Hollis zoning ordinance is very clear it has a definition of a lot including the parcels need to be contiguous. The word "contiguous:" is why the application was submitted. If developed as senior housing development the land will be dead in that way permanently. There is a clear nixes all of the land is part of the flea market.

Mosely asked if there would be accommodations for the residents to cross street since the roadway is a heavily traffic highway. Panciocco replied safety issues would be brought up during the PB application if the proposal is approved.

Belanger stated the ZBA felt the 30 acre requirement was too restrictive after the first Silver Lake Road application was denied in 2016 and suggested the PB review the ordinance. The PB reviewed the ordinance and changed it acreage to 20 acres, it was mentioned at the PB hearing the applicant could always ask for a 2 acre variance. After the change passed town meeting. Belanger contacted the applicant and suggested that they apply again. Belanger expressed he wished the application was only dealing with the larger lot, a variance request for 18 acres instead of the required 20 acres would have been a better situation. West, Tsao and Durham agreed. Panciocco stated her client decided to come before the ZBA to comply with the ordinance for the acreage.

McGhee asked was the proposal for 25 units as shown on the plan and would there be a recreational building as well. Baskerville replied that the plan was redone on the east side. There will be 24 units and it is undecided if a community building will be built. West asked how many units were proposed in the 2016 application. It was stated without this variance the property can't be developed. If the prior proposal was for 30 units, there is a difference between 30 units and 24 and would be considered economical. Baskerville replied the first proposal did not include the second lot across the street. The application was for one lot in it was thought we had 13 developable acres. At

the time the ordinance allowed 1-2 bedroom unit per acre. In March of 2017 the density was doubled to 2- 2 bedroom units. The first application was requesting 13 units on one parcel, currently 30 units are allowed.

Mason asked where the design stands pertaining to open space and wetlands. Baskerville replied the wetlands were mapped by a certified wetland scientist. There are no wetlands on the western parcel. On the eastern parcel the wetlands are in the area of Witches Brook, the flood plain and Witches Brook follow around the bottom and are noted on the plan. The requirement for open space is 40% and our calculations are 58%. Then open space does not include any wetlands or flood plain. The proposal includes 1 septic system for each two units and will be maintained by the association. Currently, we have one well on the west side and 2 wells on the east side. We have had conversations with Pennichuck water to extend public water to the development. Pennichuck would have to have an agreement from the town to supply water. One other consideration is that the buildings and pavement currently within the wetlands would come down and the development would be outside of the wetlands.

West asked if the open space was distributed evenly across the east and west side of the project. Baskerville replied bath side meet the open space requirements. The impervious surface would also be reduced from its current state.

**No one spoke in favor of the application.**

**Spoke in opposition of the application.**

**Brett Allard, representing Leo Cormier approached the ZBA.**

Allard agrees with some of the board members concerns about the lot across the street.

First, granting the variance would be contrary to the public interest. The issue is not whether each lot will have its own septic system and water supply. Rather, the harm to the public will occur in the nature of impact to traffic safety because the applicants propose to construct the development on both sides of Route 122 very close to the intersection of Route 122 and Ames Road. Indeed, in connection with the 2016 variance denial, a concerned individual noted that "the new entrance will create additional sight issues coming off Ames Road." At that time, the applicants' representative "agreed with the sight distance concern and noted the entrance can be moved away from Ames Road." This Board then determined that the variance would be contrary to the public interest.

Now, the applicants have returned with a second proposal that would negatively impact traffic safety even more severely than before. Not only do the applicants propose to construct the first entrance to the development in the same location as before, but now also propose to add a second entrance across Route 122 even closer to the intersection of Ames Road to serve the second portion of the development. This new proposed entrance is also situated upon a sharp corner as one approaches the intersection northbound on Route 122. The Board previously determined that the applicants' proposal was contrary to the public interest where they proposed one dangerous entrance. The applicants certainly cannot demonstrate that their current proposal is not contrary to the public interest by proposing the same first entrance and adding an even more dangerous second entrance. Thus, just as this Board found in 2016, the Board should find that the variance would be contrary to the public interest and deny the application.

In regards to the spirit of the ordinance. The purpose of the Ordinance relative to housing for older persons is to provide "a waiver from the otherwise applicable *density requirements* while . . . ensuring compliance with local planning standards, land use policies, good building design, and the requirements for the health, safety, and general welfare of all the inhabitants of the Town." As such, the purpose of the Ordinance is to relieve density requirements, not lot size requirements. The applicants do not seek relief from any density requirements; rather, they seek relief from the minimum lot size requirement.

Furthermore, the Doyle v. Town of Gilmanton case our Supreme Court has held that requiring "a certain minimum contiguous area for building purposes" serves "a legitimate land use purpose", including that "lots will have proper areas for drainage, will conform with the ordinances and will have sufficient areas for sanitary facilities. This Board found in 2016, the spirit of the ordinance is not observed and the Board should deny the application. This application is also for a substandard lot relative to the 20 acre requirement and that is without accounting for about 5 acres or a third of the property being within the flood plain.

Substantial justice is not done by granting the variance. The courts have held that there is substantial justice is done when there is no harm to the public that outweighs the benefit to the applicant. Certainly, the ordinance favors in some circumstances these sorts of housing developments. The PB did amend the ordinance with voter initiative. Substantial justice does not mean just rubber stamping all 55+ housing communities that come in after March 2017ammendment. The Doyle v. Town of Gilmanton case established there is a genuine purpose to requiring contiguous land area. More importantly the applicants can continue to use the lots in compliance with the Ordinance, and could further develop same for other permitted uses in compliance with the Ordinance. Just as this Board found in 2016, substantial justice would not be done by granting the variance, and the Board should deny the application.

MacMillan asked in the case of Doyle did the case state what contiguous land meant, or was it up to each board to decide. Allard replied he believes the definition of contiguous is touching or adjoining. Since, the proposal deals with Rte. 122 the application is pretty far from any meaningful definition of the word contiguous. Major asked why the purpose of the ordinance wouldn't be observed by having the development on both sides of the road. Allard replied it could be proved there are no issues with health, safety and traffic. The present application has been compounded with adding a second entrance. If the board can find all the other criteria are met and the only thing to determine is that the parcel are across the street from each other. Macmillan asked if you can say one entity owned both parcels and they are taxed as one lot would that meet the definition of contiguous. Allard replied if the board was tasked to determine the definition of what is contiguous, we would not be hear here tonight for a variance. The appeal should have been from an administrative decision. Meaning that the definition does not mean we need a variance. Belanger stated the concerns of traffic is not what the ZBA is here to decide this evening those issue would be taken up by the PB. Allard replied the courts have held the ZBA can consider threats to the general public, welfare, health and safety. Belanger stated there is a big difference between can and must. Allard disagrees. MacMillan stated the flea market has operated for years and some Sundays are very busy. MacMillan would like to find out how many accidents have occurred. McGhee stated there is a police detail on the site to slow down traffic which that has occurred for the past 40 years. Allard is bringing up the driveway because it was brought up during the previous application. Allard stated in 2016 this board found that the entrance was adverse to the public interest. That same entrance is before the board and includes a second more dangerous entrance across the street. If the board does find tonight that the two entrances, as proposed are not contrary to the public interest. There would have to be something that changed since 2016 understanding that this is a new application.

As far as the hardship we have not heard anything about the unique features of the property that distinguish them from the other properties in the area. The application states it is a busy road. All of the properties in the area are on a busy road. Their property is within the flood plain it not necessarily unique to the other properties that are also within the same or similar flood plain in the area. The property could in fact be developed with the parameters of permitted uses in the area. There needs to be special features that have to do with the land, that distinguish it specifically from other properties in the area. It was the opinion of Allard that criteria has not been satisfied.

**Peter Baker, Buttonwood Drive**

Baker opposes the proposal since the land is not contiguous. How many more developments will submit application if this is approved? There could be many more developments along Rte 122 with property if they could add up on both side of the road to meet the requirements. The lots are not contiguous and the development should not be allowed.

**Douglas Nye, Federal Hill Road**

Nye stated in his opinion the intent of the ordinance was to create a more community like feel. Discussion at Town Hall and the Town meeting were that internal roads flow through the developments. So that, traffic was slowed down so resident could walk from door to door visiting. Going across Rte 122 is not the best way to accomplish the intensions of the ordinance.

**Applicant Rebuttal**

Baskerville stated the current flea market on the east side of the road has 4 or 5 entrances with some of them close to Ames Rd. An application would have to be submit a driveway permit to DOT and obtain approval. The DOT would not approve a permit without making sure the driveway was in a safe location and has the correct amount of site distance. The remaining entrances on the east side would be closed off. The lot across the street is a flat lot. Granted it is on a curve, but on the inside of a curve which would be controlled. The house, other structures and all the trees would come down and the entrance would be placed at a safe location. Mason asked if the east side driveway

was located in the same place as the previous application. Baskerville replied yes or very close. However, the exact location would be determine by the DOT and the PB. Mailboxes would be placed on either side of the road so residents would not have to cross unless they wanted to. Another thing to consider, elderly persons have different schedules than younger people so if they were to cross the road it would be a times Rte. 121 would not be that busy.

Panciocco agrees with the reluctance the ZBA has on dealing with traffic issues. The ZBA can only deal with traffic if the use is directly connected to more intense traffic. The scenario brought up concerning 1 acre on one side and I acre on the other side of a road. Hollis has 2 acre zoning and that scenario could not happen since each individual lot could not meet the ordinance. In this instance both lots are stand along lots which meet the ordinance requirements. Another point is that the lots may be one lot Rte 122 was not laid out by the state which would mean it is an easement and the property owners would own to the center of the road.

**JR Bristol, Witches Spring Rd.**

Bristol stated he has a safety concern with the corner of Ames Rd and Rte 122. He has witness 2 cars on a bright summer day skid off the corner and crash. He would hate to see dead squirrels replaced by older people.

**No further questions from the Board and none from the floor - hearing portion of the case closed.**

**DELBERATION AND DECISION**

**Case ZBA 2018-016**
Discussion of the application of Patricia Panciocco, for a Variance to Section XXI.1, Housing for Older Persons, Paragraph e, Minimum lot area & Section VIII Lot Definition of the Zoning Ordinance to permit the construction of a Housing for Older Persons Development on a noncontiguous 20 acre lot (contiguous lot required), property owned by James Prieto, located at 436, 441, 443, 445 and 447 Silver Lake Rd. (Map 045, Lot 041 and Map 046, Lots 007-010) and property owned by James Seely, located at 449 Silver Lake Rd. (Map 046, Lot 006) in the Agricultural Business Zone and Residential Agricultural Zone.

Belanger states that the biggest issue is the definition of "Lot" (HZO pg. 9) "A parcel of land or any combination of several contiguous lots of record, occupied or intended to be occupied by a principal building or a building group, as permitted herein, together with their accessory buildings or uses and such access, yards, and open space required under this ordinance." Belanger states that he is favor of the variance because of the testimony presented and the ambiguity of the definition of "contiguous". If someone builds a road through a parcel of land it is still one lot, and is taxed accordingly, and considered to be one lot for current use purposes. Belanger then references a previous discussion regarding density and quotes testimony from the minutes of the 2016 case referencing 13 new homes. The difference between 13 vs. 33 new homes is significant, but that is a planning board issue. The question before the ZBA is whether this property can be used for senior housing.

MacMillan states that he concurs with most of Belanger's comments and that the ZBA must decide on lot structure on an individual basis. Senior housing will put less burden on the town than regular housing developments. People want to be able to retire and stay in Hollis, and they should be given that opportunity. Major states that most board members would qualify to move to this project; Belanger states in jest that he has put a deposit on a unit. Major questions if a lot can be considered to be one parcel when it is on two sides of a town road. MacMillan states that he owns 20 acres of land on one side of the road and 11 on the other and they are billed as one contiguous lot.

West states that she is strongly in favor of senior housing. She states that these lots are taxed separately, and there are no extraordinary circumstances that have happened to separate them. West states that in her opinion contiguous means "to touch". Major states that this is the provision of the ordinance from which the applicant is applying for a variance. MacMillan suggests a condition that it has to be one ownership. Belanger states that he has a parcel of land with 7 acres in Hollis and 10 acres in Brookline; is it one lot? West notes that there can be an assemblage of parcels under one ownership.

Major notes that the reason for the 20 acre requirement is to protect against piecemeal development of senior housing, and provide a feeling of unity. This is different from having two one acre lots across the street from each other. Tsao states that she agrees with West as to the definition of contiguous. Major states that it is possible to conclude that the contiguity requirement is one of the development and not of the physical land. Mason points out that this land is not contiguous and the applicant is asking for a variance from that requirement. Belanger reads the definition of "contiguous" as "sharing a common border; touching", and agrees that the applicant is asking for a

variance to this provision. Major notes that no one is arguing that this project is detrimental to the town or that there are safety or health issues. Belanger notes that "abutting" and "adjacent" is also contiguous per Wickipedia. Durham comments that the developer could seek a variance from the acreage requirement on one side of the road. She states that she is certainly in favor of this type of housing, but she questions where there is a hardship. West states that an assemblage of contiguous lots means it will become a "pretend parcel". Board agreed that a lot of real estate development is "pretend" initially. Mosley notes that West's concern is that this is a "slippery slope" and how far this could get drawn out. West agrees that this is a concern, as well as whether the voters intended for a parcel to be something that is not contiguous. Mosley expresses concern regarding the ramifications for future situations if this case is approved. He discusses a previous case regarding the "buildable area" and waiving the building envelope. Major notes that the board has never denied a one-foot intrusion on a setback and never granted a 1 inch one. Board members agree that each case is separate.

Mason questions where there is a hardship that is a condition of the land. Major states that the applicant can argue that he complies with the ordinance completely except for the fact that Rt. 122 splits his acreage; the hardship is having 20 acres separated by the road. MacMillan questions if this lot is different from any other 20 acre lot in town. MacMillan states that contiguity is in the eye of the beholder and it is up to the board, and he is in favor of the application. Durham and West are not in favor due to concerns of setting precedent and the "slippery slope." Mason states his concern of "too much patchwork". Belanger states that he is in favor. Major states that he is leaning in favor. MacMillan states that he is thinking of the senior citizens of town and the ability to provide this type of housing at less expense to the town tax wise. West states that it is not an economic hardship to go on one side of the road and ask for a 2 acre variance and she would put double the number of units. McGhee adds that the reason they are stretching is that they are trying to make a 20 acre parcel. Major asks if the applicant proposed putting all the units on one side of the road and having the open space on the other side of the road, would that change anyone's assessment of the situation. Belanger responds that they would still be looking for the same variance, and it would not change his mind on the application. Other board members agree that it would not change the basic question, which is a waiver of contiguity and that the question of number of units and their location is up to the planning board. MacMillan states that the question before the ZBA is "Can they do it"; it is an up-and-down question. Belanger agrees with West that he would much prefer to see the 2 acre variance granted and only look at one side of the road, but that is not the question before the board. McGhee notes that it would not be "apples and apples" if someone came in with a different parcel to do a different type of project, and how likely is it that someone will come in with another senior housing application with these same parameters.

Major notes that the board needs to vote on the case and make very specific findings that support its decision. Durham cautions against rubber stamping the application just because it is older persons housing. Major (?) notes that the voters sent a message when they voted in favor of the reduced acreage requirements and changed the zoning. Major discusses the importance of having findings to support the board's decision and that logically make sense.

**Discussion of Findings:**

Belanger: The State highway does not violate the provisions of a contiguous lot.
Major: The board finds that for the purposes of the Housing for Older Persons Ordinance the two parcels consist of contiguous property.
MacMillan: Under one ownership, we find that these parcels are contiguous.
West: Conditions and findings should go directly towards "killing the slippery slope".
McGhee: The State highway does not prevent the lots from being used for a contiguous purpose in creating an elderly housing community. Major and West: "That works".
Major: With the exception of the requirement of contiguity the application otherwise complies with the requirements of the Housing for Older Persons Ordinance.
West: The need to diversify the housing stock in the Town of Hollis takes precedent over the need for contiguity.
Major: This is not a holy section of the ordinance and no different than a section that allows for other uses, e.g., tattoo parlors.
West: But we do not have a desire for more tattoo parlors.
McGhee: We did this because it is important to have affordable housing and this is what the developer proposed.
Major: How about a finding that the board finds that the intent of the ordinance is to provide for a community of a reasonable size, and the fact that the properties are separated by a highway does not diminish from that.
West: The variance supports the Town's desire for more affordable senior housing.
Belanger: (Referring back to Finding #1) What about this language for #1: "The board finds that a road crossing a single owner parcel meets the definition of "lot" as shown on pg. 9 of the Hollis Zoning Ordinance dated 3/17/18."

Durham, West, McGhee: No – that finding is too general and could be used for other things.
West: The fact that the parcels face each other is an important thing to consider, and weighs in its favor.
Belanger: Except for the State highway they are abutting lots.
MacMillan: They are adjacent lots.
McGhee: Still think we should put "proximity".
Major: The board finds that the contiguity argument is supported by the fact that lot lie directly across the street from each other and contribute to the development of the parcel as a senior community.
Mosley: It is not like you are splitting a lot with a house on one side and septic system on the other; there is enough property on each side to have a self sufficient structure.
MacMillan: That will be addressed at the planning board.
McGhee reads the findings:

1. The State highway (Rte 122) does not prevent the lots from being used for a contiguous purpose in creating a senior housing community.
2. With the exception of the issue of contiguity the variance meets all other requirements of the ordinance.
3. The variance supports the demonstrated desire for more senior housing in the Town of Hollis.
4. The zoning board of adjustment finds there is contiguity in the lots being directly across the street from each other.

*Belanger moves to approve the four findings of fact;*
*MacMillan seconded.*
*Motion unanimously approved.*

Questions - Variance

Question 1. The variance will not be contrary to the public interest
Question 2. The spirit of the ordinance is observed
Question 3. Substantial justice is done
Question 4. The values of surrounding properties are not diminished
Question 5a(1). No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property
Question 5a(2). And, the proposed use is a reasonable one.

| Board Member | Question #1 | Question #2 | Question #3 | Question #4 | Question #5a(1) | Question #5a(2) | Total Yes | Total No |
|---|---|---|---|---|---|---|---|---|
| Major | Yes | Yes | Yes | Yes | Yes | Yes | 6 | 0 |
| Belanger | Yes | Yes | Yes | Yes | Yes | Yes | 6 | 0 |
| Robbins-Tsao | No | No | No | Yes | No | No | 1 | 5 |
| MacMillan | Yes | Yes | Yes | Yes | Yes | Yes | 6 | 0 |
| Durham | No | No | No | Yes | No | No | 1 | 5 |

**THEREFORE THE VARIANCE WAS GRANTED WITH THE FOLLOWING FINDING OF FACT:**

1. **The State highway (Rte 122) does not prevent the lots from being used for a contiguous purpose in creating a senior housing community.**
2. **With the exception of the issue of contiguity the variance meets all other requirements of the ordinance.**
3. **The variance supports the demonstrated desire for more senior housing in the Town of Hollis.**
4. **The zoning board of adjustment finds there is contiguity in the lots being directly across the street from each other.**

**Review of Minutes**
*Belanger moved to approve the minutes of August 23, 2018.*
*Mason Seconded.*
*Motion unanimously approved with Robbins-Tsao and MacMillan abstaining.*

**Meeting Adjourned**
The ZBA meeting adjourned at10:40pm.
Respectfully submitted, Donna L. Setaro, Building & Land Use Coordinator