Approved 2/28/2019

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

Minutes of January 10, 2019

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 that since the last meeting on January 3, 2019, a Board member received information on Case ZBA 2018-016. Major stated if the board votes to re-open the public hearing case 2018-016, it would be limited to the additional information and distributed to the parties on January 4, 2019.

MacMillan moves to re-open the public hearing for case 2018-016 for the purpose of discussing only the new evidence which was submitted during the January 3, 2019 meeting.
Seconded by Tsao
Motion unanimously approved.

Moseley recused himself from case 2016-016.

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.

MacMillan said during the past ZBA meeting he understood that the proposed lots were under a prescriptive easement, whereas the lots were across the street from each other the property lines met in the center of the road. Therefore, if it was not because of the prescriptive easement the lots would be contiguous. No evidence was presented that it was a prescriptive easement or was not and if the boundaries of the lots were located elsewhere. The issue was talked about but no basis of fact was presented at the time.

MacMillan said he went to town hall and received plot plans and deeds dated in the late 70's which show bounds on the edge of the road. Once MacMillan found this information he contacted New Hampshire DOT, Right-of-Way department and talked to Mr. Charles Smidt in Concord on December 31, 2017. Smidt said it was a prescriptive easement over an existing road of approximately 50 feet. Smidt also said the boundaries may be in the center of the road or not. Smidt was not sure. However, Smidt said if there were established bounds set, which are over 20 years old, the bounds would be "Boundary by Acquiescence" and the lots do not extend to the center of Route 122. (see file for deed, plot plans)

MacMillan said as far as the Witches Brook trout stream MacMillan wanted this information for himself. MacMillan reached out to Mr. John Magee, NH Fish & Game and Magee sent him a response. (see file)

MacMillan said he thought the lots contained a prescribed easement to the center and wanted to find out if the easement was a fact. McGhee said the issue is germane on the issue of contiguity. MacMillan agreed. Belanger said the State said in order to have properties owned to the center line of the road, as thought, the parties have to be adjoining land owners for 20 years.

Major asked Setaro for the record, was the information received sent to the applicants counsel and the counsel of the abutting property and was placed in the file at town hall. Setaro replied yes.

MacMillan said just to be clear, he does not feel he was miss-lead about anything. MacMillan felt the information concerning the prescriptive easement was not clear and MacMillan wanted clarity on the subject. Major agrees.

Patricia Panciocco, attorney for the applicants. Major asked if Panciocco had an opportunity to review the new evidence. Panciocco replied yes and handed out documents concerning public easement "What is a public Highway" (see file). Panciocco asked MacMillan if Smidt (NH DOT) agreed that NH Route 122 was a public easement. MacMillan replied yes. Panciocco said referring to her documentation submitted *"The underlying land is usually, though not always, owned by abutting landowners"* The concept is difficult to understand, Panciocco explains to her clients, consider you are in an empty room and you roll out a carpet runner on top of a floor. The runner itself is the easement, the floor is still owned by you. There are layers, one to private rights which is not applicable in this matter. When Hollis was first settled people traveled down which we now call NH Route 122, they traveled down the same pathway and public rights arose in case law and due to those rights within the width of the traveled way. That indeed is what we have is an easement as Smidt (NH Dot) said. You then need to say, who owns underneath, answer the people that own the land on either side own the fee interest of the dirt, the floor on which the runner was laid out, to the center line. The presumption is ownership to the center line. The law is called the center line doctrine. There has never been a deed conveyed by the property owners to the state for a fee interest to the right-of-way to the benefit of the public held by the state or the town. The confusion may have come up is where you are talking about the plans that show the bounds. MacMillan said Smidt said to look for a subdivision or plot plans which would show bounds. If the plans were done over 20 years ago, there were different rules which would apply such as "Boundary by Acquiescence". Panciocco asked if what was done over 20 years ago? MacMillan replied if the bounds were in place and recognized for over 20 years, they are the set bounds. Panciocco said those bounds would be the bounds of the lot, not the bounds of ownership. Those are the bounds of the lots which are free of encumbrances and are available to the lot owners. MacMillan asked what does the phrase within the submitted easement document "*though not always"* mean? Panciocco replied in the past where state or towns own land and roads have been driven through those particular properties, the state owns the underlying fee. MacMillan asked if Panciocco was looking at the submitted and was going to convey the property to someone. Would she tell the owners the bounds shown on the plans (to the edge of the road) were the property bounds? Panciocco replied yes.
However, the area to the center line of the lot road is not freely available the owner for them to park cars, build a house or any other structure. The bounds delineate the fee interest to the lot which are unencumbered. In addition, the typical title search done by a company does not go back to the origins of the road. When bounds are laid out for a subdivision plan, life is made easier because it is a dedication you usually find a deed of easement or a deed of fee to the town or state. When you are talking about a prescriptive easement back to the 1800's no one searches titles back that far. MacMillan asked can the present day owners make claim to the center of the road. Panciocco replied those rights have arising, the state has a prescriptive easement. The only way the owners can take those rights back is adversely processing those rights back, which would take a court order to achieve.

Major said it would be the same type of issue if you had an easement through your property and decided to park a car within in a common easement to block the easement. You could not do anything with a private easement such as construct a building. The state does not need to own things in fee, they just need to use it. Mason asked Panciocco suppose the state decided to abandon the road. Would the property under the current easement automatically revert back to the current owners on either side? Panciocco replied there would be a formal discountenance process which would need to be followed. That hypothetical would never happen because you would be depriving people along the road access rights. However, if a road was discontinued, the property would be distributed to the abutters equally.

MacMillan asked was it Panciocco testimony that if she transferred the lots today, the bounds shown would have to be used. Panciocco yes. MacMillan asked what her opinion was concerning boundary by acquiescence. Panciocco replied acquiescence is a little like adverse possession. Adverse possession is you use your neighbor's property for 20 years and the owner tells to get off. After 20 years you own the occupied area, but to prefect that right you would need to obtain a court order and it would need to be recorded. MacMillan asked would that apply to all public roads. Panciocco replied she could not say because roads are created differently either by prescription or dedication, they

could have been laid out by the town fathers or by the state. MacMillan stated when Austin Parkhurst completed his plan would he have indicated that there some right to the center of the road. Panciocco replied the rules that govern land surveyors back then where not as strict as they use to be. The other side municipalities were not quite as particular on plans being created by people that were licensed and did not follow all of the rules pertaining to research prior to recording the plans. MacMillan asked if no legal gymnastics were done if he was to look at the plan would he say the bounds shown are the property lines. Panciocco replied yes. Those are the boundaries of the unencumbered areas available to you.

MacMillan said during previous testimony the prescriptive easement was not clear either by the opposing attorney or yourself. Panciocco's previous testimony even alluded at one time it may be prescriptive easement to the center of road but she was unsure. Panciocco agreed. MacMillan said we still do not know if it is a prescriptive easement or not. Panciocco replied the state confirmed the prescriptive easement. MacMillan agreed however, Smidt (NH DOT) did say if the lots had bounds set for over 20 years those are the bounds.

R. Baskerville, Bedford Design, addressed the issues pertaining to Witches Brook and the wild trout. Baskerville handed out a map from the NH Department of Environmental Services (NH DES) for the record. It was stated that Witches Brook was under jurisdiction of the Shore Line Protection Act. Witches brook is listed on the Fish and Games site for wild trout management. Behind the listing is says past the intersection of a stream in Amherst, Witches Brook flows towards Amherst. Witches Brook goes past the flea market across Ames Road and the red dot shown on the submitted map shows where the Shoreline Protection Act starts. (see file) MacMillan asked if it was mentioned that all the structures could be placed on one side of the road. Baskerville replied yes.

Baskerville said the Shoreline Protection Act setbacks due not apply to the proposed lot. Studies have been conducted showing if an area was completely paved and drained directly into a brook, the water entering the brook would be hotter than if it area was dirt and it could kill species including trout. The current lot is slightly sloped and the water runs directly into the brook. There are areas existing on the lot near the brook which are paved and a house is existing within the 100 foot wetlands setback.

The proposed development would include the removal of an existing house and the pavement close to the brook and wetlands. That area would be replaced with grass and grown back into a wooded area. The vegetation would slow down drainage into the brook. The property would not require any deep cuts or fills since it is primarily flat. The houses would go in at just about at natural grade. The road would be lowered by about 1 foot and any runoff coming from the houses or the road would be brought down to a low spot and be infiltrated. Instead of the flow running towards the brook as it is currently. The runoff would be directed away from the brook. Major asked if the Planning Board (PB) would deal with the site runoff during the site plan. Baskerville replied yes, not only the PB there are also new regulations concerning alteration of terrain (AOT) permitting which would need to be followed as well. An alteration of terrain permit is required when you disturb more than 2 ½ acres. A state DOT permit is also required for the entrances. McGhee asked how much area would be reclaimed. Baskerville replied a lot of the roads are currently paved, the owner stated each year he brought in more gravel. Those areas we be considered impervious already since they have been driven on for many years. Baskerville would be making an argument to the PB with the drainage calculation that the area would have less imperious areas than existing. The exact number is not known at this time since the plan may be changing. Tsao asked if the new green area near the brook would that be wooded or loamed with grass. Baskerville replied the area would remain wooded and we would not be able to build within the 100 foot setback. Baskerville said a new survey was completed but left the plan is his car. The plan shows the bounds up to the easement or the edge of the road are the same as the old plan which was submitted as evidence. The acreage submitted is the traditional acreage and does not included under the road since that area is encumbered. Our surveyors agree that the usable property is up to the state right-of-way which is an easement. If the state wanted to take land they would not use acquiescence, they would use eminent domain to acquire land.

Spoke in opposition of the application

Brett Allard, representing Leo Cormier, 451 Silver Lake Road, LLC

Allard handed out material obtained from the state DES web site and John Magee, NH Fish and Game. Major asked if Allard received and reviewed the new information. Allard replied yes.

Allard said he had received a response from John Magee, NH Fish and Game, concerning the wild trout stream (Witches Brook). Magee said the brook is in a very high value wild trout population in fact, one of the most productive wild brook trout streams in NH. One thing the applicant has not addressed is road salt. The information submit to the board (Environmental, Health and Economic Impacts to aquatic life (pg.3)) states chloride in surface waters can be toxic to many forms of aquatic species including fish, macroinvertebrates, insects and amphibians. Elevated levels can threaten the health of food sources and pose a risk to special species survival, growth and/or reproductions. Chloride toxicity increases when it is associated with other cations, such as potassium or magnesium, which may occur once the ions of road salt have dissolved and migrated at potentially different rates. The presence of salt also releases toxic metals from sediment and when released into the water can inhibit nutrients and dissolve oxygen within the water that aquatic species rely on.

Allard said at first he did not have any concerns however, when he received the email from Magee who is very concerned about the impact to the wild brook trout and conservation especially this brook. Allard said his major concern is the application is for a variance. The variance must meet the 5 criteria and in Allard's opinion this application does not meet the public interest criteria. The courts have said a variance in contrary to the public interest when granting the variance violates basic zoning objectives. One method in ascertaining weather granting a variance violates the zoning objectives is to examine weather granting variance would threaten the public health, safety or welfare. An application within a protected high valued resource area for the benefit of a single applicant is adverse to the public health, safety and welfare.

Allard said the center line principal, weather that means the lots are contiguous or not. The term legal gymnastics was used previously and is a great term for the past discussions. The center line principal is not as complex as the ZBA might think it is. The center line principal is irrelevant for two reasons; the variance is a request from the definition of contiguity contained within the zoning ordinance that says it's a parcel of land or any combination of several contiguous lots of record. A lot of record is also defined as a parcel of land described according to a specific plan, survey or deed. Presented as additional information are deeds for lots 45-41, 436 SLR, LLC the legal description beginning at a stone bound set on the westerly side of said NH Route 122, running sternly and northerly by the northwesterly side of Route 122, to the point of beginning. Silver Lake Flea Market lots 46-8, 46-9 and 46-10 shown plan number 12899 dated 1979 the plan clearly shows iron pins set along the eastern boundary of Route 122. The ZBA has the reasonability to interpret the terms of ordinance and the definition of lots of record comes into play as well. The deeds do not show the property lines or describe the property lines coming to the center of the road. The deeds clearly describe the lines running along the edge and bounding on the easterly or westerly side of route 122. If the center line principal is, in fact, true it is irrelevant to whether or not the lots can be considered contiguous or not under the zoning ordinance for development purposes. The definition of lots of record clearly establishes that the boundaries of lots for zoning purposes are set forth in the deeded legal description. So, the lots are not contiguous and a variance is required. If a variance is required you need to prove a hardship and a hardship has not been established and there are no uniqueness which distinguishes it from other lots in the area.

In closing, even if the applicants do own to the center line and the ZBA agrees would that line be used for setback requirements or area calculations. The line would not be used for any zoning purposes other than the legal gymnastics requested. Mason said he is sensitive to the wild trout issue and asked if Allard has any evidence to say the submitted plan would make the situation worse in respects to salt and drainage. Allard replied the use of salt is minimal since no one is living on the majority of the land. If you build the development where salt would be used the additional amount of salt would be increased which would run down to the brook. Based on the information submitted from DES and the past testimony concerning the amount of salt that would potentially be used it would have a significant effect.

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

Spoke in opposition of the application

Joe Garruba, 28 Winchester Drive

Garruba handed out a report from Pennichuck Water Works which specifically indicates that storm water management, which the development would be using, would reduce the water flow into the brook. Although, the report doesn't say that in would increase the water temperate the reduced water flow would damage the trout fishery.

If the lots do extend to the center of the road, as testified. If that was the case, who has been paying the taxes on the property to the center line? Garruba asked is it typical to see easement drawn on plot plans? He has seen many plans with easements included. The submitted plans show the lot lines as described in the deeds. Garruba disagreed with the statement made that the property is not within the shoreline protection act. The way a protected stream is defined is a list located on the NH DES site. The list specifically says Witches Brook from a point in Amherst but it does define a flow direction. Since the listing is not clear on the flow direction it would include all of the stream located in Hollis.

Garruba asked what plan is the ZBA going to deliberate. The discussion has been we might move the structures to one side of Route 122 or we may not. Are you discussing the plan submitted tonight or not?

Garruba stated during the December meeting the board imposed a finding of fact that there was no reginal impact. The new information received concerning the trout stream of very high value to the southern half of NH is clearly a regional impact, in Garruba's opinion. Garruba said adding more impervious surface even though, it is not in the lower portion of the lot still poses a significant hazard to the brook. Mason asked did Garruba feel there would be more or less impervious surfaces. Garruba replied more in his opinion.

Garruba said in his opinion there is nothing unusual about this property and no hardship exists. The board should deny the application since the criteria are not met. Major explained the case is limited to the new information received only. Garruba felt the criteria which enables the ZBA to grant a variance should be discussed and the simplex standards. Major stated the ZBA is aware of the criteria and ensured Garruba the process and finding would be discussed in deliberation. Garruba added the ZBA should deny the application on the grounds it is contrary to the public interest, contrary to the spirit of the ordinance and there is no basis of hardship.

Leo Cormier, 451 Silver Lake Road

Cormier said his tax bill reflects from the front bounds back to the end. The town should consider adjusting the tax bills for all of the properties located on a state highway. The property owners owe the town money if it is a fact the property owners own to the center of the road.

Cormier said Baskerville failed to discuss the use of salt and when the infiltration system fails. Any run-off from the site if the system fails will go directly into the aquifer. A condition was discussed at the last meeting to restrict salt use and use sand. The town can restrict salt use on town roads however, the town will not be doing snow removal at the site outside contractors would be. When it comes down to the safety of elderly people they will be using salt so no one get hurts. The use of salt will be detrimental to the brook and the aquifer.

John Garruba, 30 Meadow Drive

Garruba stated a prior finding of fact was the board stated because the lot was across the street it could be considered part of the same lot. MacMillan said the previous findings of fact are void since this is a new hearing. Garruba said if the ZBA grants this variance, a legal precedent would set for other lots with acreage on both sides of the road. The decision would therefore, increase the number of lots in Hollis which could be developed.

Janine Byron, 5 Ames Road

Byron said in regards to the email sent by Magee, NH Fish & Game. Magee said there are several rare, threatened or endangered species in the area which may be at the site. We are aware that Hollis has Blanding's turtles and other endangered amphibians which may be in the wetland areas not just the brook species.

James Bristol, 60 Witches Spring Road

Bristol said when the town closed Mooar Hill Road the road was reverted back to the abutters deed from the town. Belanger agreed. Bristol said if that is the case.

Rebuttals

R. Baskerville said there were discussion concerning salt, magnesium and phosphorus. These items are concerns with all developments. The town and state regulations are put in place and guidelines established that developers need to follow to protect the environment. All necessary permits would be obtained from the town and/or state which will meet or exceed the requirements set forth. Baskerville agreed there are issues with the site and that is why plans are submitted to mitigate them. In regards, to storm water management reducing the flow of a brook that is not allowed. In this case, there are paved and/or gravel areas with no engineering design. The water will be captured in an infiltration basin since the location is within the aquifer protection zone. Test pits have been completed and the soil is like beach sand. The water will go down through the soil into the ground water table then into the stream.

As part of the state Alteration of Terrain (AOT) permit we have to seek a National Heritage Bureau (NHB) review. The bureau will check for endangered species, plants and animals. The NHB review has been completed and the review came back clear. NH Fish and Game will also have the opportunity to make recommendations.

Leo Cormier, 451 Silver Lake Road

Cormier said not all project are in the APOZ. This project is and when you have 10 tons of salt being used, that 10 tons all salt will go into the water table.

Patricia Panciocco

Panciocco said the deeds McMillan provided are warranty deeds. The seller warrants the title to what they described within the deed which is up to the limits of the bounds. The sellers don't warrant the piece under the road, the state has taken possession of the piece. So why would you tell a potential buyer the bounds go to the center of the road if they could not use that property.

It was asked who pays the taxes. When a piece of your land is encumbered like this are, that area is carved out by the accessor and is taxed separately. That is why you do not pay taxes on the right-of-way, if the land is owned by a private individual they pay the taxes. In this case, the government is tax exempt.

As to, the storm water system failing and the home owners association not fixing it. If the property had individual homes constructed, would there be any governing documents like there will be in an elderly housing development obligating the association to do repairs. For that reason Panciocco feels the development is a great improvement for the area. McMillan asked if Panciocco if she had spoken to Mr. Smidt (NH DOT) Panciocco replied no. MacMillan said Smidt stated the properties on each side of the road have no rights to the road. Panciocco agreed. MacMillan said Smidt told him that the lots were separate. Panciocco replied that state easement is very cumbersome if the area is taken out within the right-of-way and you are not taxed. A seller could not warrant that area to a buyer. The deeds submitted are warranty deeds, the seller needs to defend the title they convey. McMillan said Smidt said the owners have no rights and they are separate lots. Panciocco disagrees the center line doctrine still applies.

Brett Allard

Allard said you can convey encumbered properties by warrant deed. The warranty deeds are to warrant title for the purposes of title defect and has nothing to with the center line principal.

Leo Cormier, 451 Silver Lake Road

Cormier said house lots do not have roads they have driveways. Most likely they could only have 4 houses there.

R. Baskerville

Baskerville said the application is for one thing. The zoning ordinance requires 20 acres for the development. We never claimed that we owned the road or that the properties touched. Major agreed the application is for the definition of contiguity.

Joe Garruba, 28 Winchester Road

Garruba said allowing the development just because storm water management will be used is not as good as not allowing the development. The damage to Witches Brook would be greater even if storm water management is used. The comparison made between 6 house lots with uncontrolled septic systems and a 30 unit development can't be made. The volume of a 30 unit development is so much higher. Garruba handed out the Supreme Court decision for the Community Resources or Justice v. City of Manchester.

No Further Questions from the Board and none from the floor – hearing portion closed

The ZBA Recessed at 8:20pm.
The ZBA Reconvened at 8:25

DELIBERATIONS AND DECISION

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.

Mason stated for the audience we are the ZBA and the issues we can focus on are very limited and controlled. During the process the public has raised some very important concerns that are beyond the authority of the ZBA to address. If the proposal is granted the applicant would be required to submit to the PB. At that time the public will have another opportunity to voice concerns.

Major stated we had deliberated the case prior and the board could decide if the additional testimony would influence the prior decision. We did in fact reopen the public hearing and the prior decision could be changed. It may be helpful to find out from each of the voting members was there something the board heard that would change the way the board fundamentally thought about the case.

Belanger said the problem is that the board agreed to re hear the case de novo. The prior decision is null and void at this point. Major agreed.

Belanger stated in his opinion, the ordinance is very clear the housing for elderly people is wanted. The ordnance was adjusted to allow 20 acre lots instead of the 30 acres. It was obvious, when the residents voted they were willing to make concessions to get housing for older people into the community. Belanger wants the project and personally feels that town needs the development and we should allow for it. However, his personal feelings can't negate the previsions or the ordinance and the state laws. Belanger stated he has reviewed the variance questions and has already decided how he would vote. His vote will not be the same, in some cases the application meets the requirements in others it does not.

It was Belanger's opinion the master plan and the ordinance was written with the intent of contiguity meaning abutting properties with a common boundary, not properties with a road in the middle. Whether the owners own to the center of the road or not or if it is a prescriptive easement that was not the intent of the ordinance. If the application was submitted with 24 houses on one side of the road his vote would have been different. If the application is approved, Belanger would move for conditions being no salt use and only driveway could be paved.

Belanger voiced his opinion, since the applicant has 18 acres on one side of the road he feels a variance could be obtained. He does have a density issue with 24 houses on the lot however, that would be a PB concern. Based on the limited issues the ZBA can decide on, the intent of the ordinance must be considered not the exact wording. The issue concerning regional impact was addressed and the board received input from NRPC. The property can be used in accordance to the ordinance and no hardship exists.

Major said the sole issue of variance in his opinion is whether the applicant can obtain a variance based on lumping the two parcels together and ignoring the contiguity requirement. The variance is a definitional variance of contiguity and contiguity is not defined in the ordinance. Although, you can define it with common sense. West said she saw no hardship with the application until the words prescriptive easement came in to play. West sees clear hardship currently, what the lots look like and what they are. Someone needs to write a zoning opinion and what they would see is warranty deeds that show little dots not going to the center of the road. The applicant needs a backup from what it looks like to what is it. That is the hardship.

MacMillan said he is an advocate for senior housing. However, the lots are not contiguous. The ordinance has already changed from 30 acres to 20 acres to accommodate people. MacMillan agrees with Tsao and Durham that the lots are not contiguous and do not meet the zoning ordinance. As far as hardship common ownership of individual deeded lots, separated by a public road, is not unusual or remarkable and does not represent a hardship when the combination of non-contiguous lots is denied for the purpose of meeting minimal lot size requirements. MacMillan said he could not support the application on those grounds. There are a number of permitted uses for these lots and no hardship can be found because you just don't have enough land. Tsao stated the ZBA denied an application recently on Broad Street because they did not have enough property to build. Durham said if the ZBA approves this application a precedent would be set. MacMillan said precedent should not be a concern, each case needs to be decided on an individual basis. MacMillan felt very strongly that the lots are not contiguous. Belanger said if approved it would redefine the statement and meaning of contiguity in the ordinance. Most of the ZBA members agreed.

McGhee asked how the concept of the prescriptive easement plays in. MacMillan stated sorry to say he disagrees with Panciocco. The conversation he had with the Department of right-of-ways (Smidt) said they have no rights to the road, it is the state's road and the bound are set.

Major said he does not see anything that would change the way he voted last time and would vote the same way this evening. The contiguity requirement was put in the ordinance to prevent scattershot developments and what was the intent behind the elderly housing ordinance. The intent of the elderly housing ordinance is to have a community. Having a road between what is effectively more than 20 acres does that eliminate the contiguity of the project as a whole? In Majors view it does not. The prescriptive easement issue to Major was not an issue at all because it does not much matter. In some ways a development on each side of the road would have easier access for police and fire with the property bisected by a road.

Mason asked if any of the members would consider changing their vote if you imposed a condition that said all housing units must be on the east side. MacMillan replied no. Major stated he agrees there could be a density issue however, the ordinance was written with that density. McGhee said the density would be a PB issue. Belanger said the only way he would change his mind is if, the land on the west was not purchased and the entire development was placed on the east side. Mason stated the reason for placing a condition on this application was because the applicant could not return with another application seeking a variance lot area requirement when they only have 18 acres unless the ordinance changes again. MacMillan disagreed if the number of units were reduced and they ask for a variance for this many units with this density that would be considered a new proposal. Mason said an agreement would need to be made that it is not the same application. Major asked if the proposal came in for an elderly housing development on 18 acres, where 20 acres are required, would the ZBA consider it a new application.

MacMillan and Belanger replied yes. Major said a determination would have to be made if another application was received and this was not the proper time to discuss the possibility.

Major called for the variance questions.

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.
Questions 4.	The values of surrounding properties are not diminished.
Question 5 a (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 5 a (2).	And, the proposed use is a reasonable one.
Question 5 b	The property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

Board Member	Question #1	Question #2	Question #3	Question #4	Question #5a(1)	Question #5a(2)	Question #5b	Total Yes	Total No
Major	Yes	Yes	Yes	Yes	Yes	Yes	No	6	1
Belanger	Yes	No	Yes	Yes	No	Yes	No	4	3
Tsao	No	No	Yes	Yes	No	No	No	5	2
Durham	No	No	Yes	Yes	No	No	No	5	2
McMillian	No	No	Yes	Yes	No	No	No	5	2

THEREFORE THE VARIANCE WAS DENIED WITH THE FLOOWING FINDING OF FACT;

The ZBA discussed findings of fact resulting in the following findings of fact.

MacMillan moves for s finding of fact;

1. *The board finds that combing non-contiguous lots to meet minimal lot areas for the purpose of development is not in keeping with the spirit of the ordinance.*

Seconded by Tsao.
Motion approved 4 -1 with Major against.

MacMillan moves the following finding of fact;

2. *The board finds there is no hardship as there are a number of permitted uses for the properties which are the subject of the requested variance. Common ownership of individual deeded lots, separated by a public road, is not unusual or remarkable and does not represent a hardship when the combination of non-contiguous lots is denied for the purpose of meeting minimal lot size requirements.*

Seconded by Belanger.
Motion approved 4 -1 with Major against.

Mason moves for the following finding of fact;

3. *The board finds with the exception of the issues of contiguity the application meets all other requirements of the ordinance.*

Seconded by Tsao.
Motion unanimously approved.

Mason moves for the following finding of fact;

4. *The board finds based on the testimony and further based on the letter received from Nashua Regional Planning Commission, the board finds the application has no regional impact.*

Seconded by MacMillan.
Motion unanimously approved.

MacMillan moves the following finding of fact;

5. *The board finds allowing non-contiguous lots to be combined for the purpose of meeting the Zoning Ordinance requirements for minimal lot area is no in the public interest.*

Seconded by Tsao.
Motion approved 4 -1 with Major against.

Review of Minutes

MacMillan moves to approve the minutes of December 27, 2019 as written.
Seconded by McGhee
Motion unanimously approved.

Meeting Adjourned

The meeting adjourned at 9:15 pm.
Respectfully submitted, Donna L. Setaro, Building & Land Use Coordinator