Zoning Board of Adjustment
Town of Sandwich
PO Box 194
Center Sandwich, NH 03227

Minutes March 9, 2023

Members Present: Mary Cove, Jim Bullitt (late), Jim Gaisser, Jon Greenawalt, Kurt Olafsen, Geoff Tyson
Members Absent: Chris Grant w/notice; Tim Miner

Others Present: Applicant Frederick Surrette, Carla Miller, Agent Frank Marino
Abutters Susan Byrant Kimball and Chip Kimball; Julie Dolan

Call to Order:
Chair Cove called the meeting to order at 6:02 p.m.

Minutes of January 26, 2023: Mr. Greenawalt **Motioned** to accept the minutes as written. Mr. Tyson seconded. 5 in favor.

New Business:
There are two public hearings scheduled for applications from the same applicant, Frederick Surrette for the same property: Rehearing case 2022-03 for a Variance and case 2023-02 for a Special Exception. Agent Mr. Marino has requested that the Special Exception be heard first as the standards are easier to meet than with a Variance and if granted, the Variance would be moot. The applicant would withdraw the application. Given that, we will proceed with the Special Exception first. Board feedback:

Mr. Gaisser asked when it was determined that granting a Special Exception waives the issuance of a Variance?

Ms. Cove felt that if the Special Exception was granted, it would take the place of the need for a Variance in this case.

Mr. Gaisser responded no, that Mr. Surrette applied for a building permit which he has not received because he was issued a denial and the Compliance Officer must have a Variance. He still can't get his building permit.

Ms. Cove countered it is within the ZBA's power that with granting the Special Exception the Board indicates to the Town that the Variance is not required. It was argued that it may have been an error to request a Variance, but that will be determined now.

Mr. Gaisser had spoken against that reasoning at last meeting and has seen nothing to change his opinion.

Ms. Cove suggested to address the sequencing that the hearing begin first with the Special Exception. If granted, Board will have discussion on whether a Variance is also required.

Chair Cove read the summary: Case 2023-02 is an application for a Special Exception under Article III Section 150-10 B of the Zoning Ordinance for property owned by Frederick Surrette located at 827 Whittier Highway, Center Sandwich, NH, Tax Map R2 Lot 34 in the Rural/Residential Zoning District. The Applicant proposes to renovate an existing dwelling structure into two dwelling units. In addition, the Board received a write-up from Mr. Marino on March 7.

Mr. Greenawalt **Motioned to open the public hearing for case 2023-02**. Mr. Olafsen seconded. All in favor.

Chair Cove asked if anyone had a conflict of interest. There were none. Voting regular members are Ms. Cove and Mr. Gaisser [regular member Mr. Bullitt arrived later] and three alternates were

appointed as voting members – Mr. Greenawalt, Mr. Olafsen, and Mr. Tyson. Ms. Cove then briefly outlined procedure that speakers identify themselves after being acknowledged by the Chair, that all questions go through the Chair, that the agent will be asked to present the application, then abutters will speak, Board members may ask questions at any time, Chair will summarize with opportunity for clarifications from floor, then the public hearing will be closed, and the Board will deliberate and vote.

The same or similar information to be presented as heard on December 8, 2022, so the focus will be on the facts on which to base a decision.

Mr. Olafsen had a point of order as to whether to proceed with a hearing based on Town Counsel's advice that the Special Exception does not apply here and cannot be granted as a matter of law. Should a hearing be conducted?

Ms. Cove asked Mr. Marino if he still wanted to present the case. He requested to see Town Counsel's comments and possibly request a continuance to be able to find a rebuttal in case law. Felt it should have been provided to them.

LU Secretary MacLeod stated that it was a follow up to his email that had been received on March 7 at 4 pm and Counsel's response was received today at 4 pm.

Ms. Cove responded that it is a confidential legal communication between counsel and the ZBA as client. The advice addressed Section 150-10 B in question, "*Lots of record as of March 11, 1969, which do not meet the minimum lot size requirements and/or frontage requirement on a public or private way,* ***may not be built on*** *(emphasis by Ms. Cove) until given a special exception by the Board of Adjustment. See also § 150-105. The Board of Adjustment shall determine that all structures, septic systems, etc. will conform to current setback requirements and* ***that building on*** *the lot will not be detrimental to public health or in violation of the purpose of this ordinance as expressed in § 150-4*" has been interpreted previously and consistently as new construction and not renovation of an existing structure. Previously, the guidance the applicant was given by Town Office staff and the denial by Compliance Officer were based on this interpretation, as the common usage of the term building is literally building a structure on a lot of pre-1969 size. The previous hearing (Dec. 8) pointed out some problems with the common usage, and it appears that the applicant felt that the Board misunderstood the term. The applicant is requesting a conversion of an existing building to another use. And conversion is a different thing from building de novo. Again, the Town Office has consistently applied this interpretation of this section of the ordinance literally to new construction on nonconforming lots as opposed to a building being converted to a different use. Therefore, guidance was to apply for a Variance.

Mr. Greenawalt asked if the Board has the power to not follow Counsel's advice and hold the hearing and decide anyway.

Ms. Cove answered in the affirmative.

Mr. Marino requested to proceed to try to change the Board's mind. He introduced himself as a friend the of applicant who was asked to represent him. He serves on the Meredith ZBA and is familiar with these issues. He pointed out that Mr. Gaisser was also a bidder for the property, and he objected to Mr. Gaisser's participation as it could be perceived as a conflict of a financial nature as an incentive if the property would again be for sale and available to him. He acknowledged recusal is a personal decision unless there is a fiduciary interest that compels excusing oneself from participation. He just wanted his objection to be on the record.

Mr. Gaisser responded that he will not recuse himself. He did bid on the property with $21,000 as he recalled and was told he had the lowest bid. He has bid on other properties in the past with a formula setting his bid at 10% of the assessed value. It was not a serious bid, and he has no special interest in the property. Mr. Greenawalt affirmed his belief in Mr. Gaisser's integrity. Mr. Marino stated that he felt the matter was settled.

Mr. Surrette asserted that a Town employee while inspecting the septic system plans stated that he had thought it was a Sears house when inside previously securing it. Mr. Surrette stated that this employee said he also bid on the property with the intent to make it a two-family building with a different configuration from what the applicant was doing. Interesting that a long-time employee felt he could do a two-family out of it.

Mr. Marino represented his case making the following points:

- This is an Appeal for a Special Exception by Mr. Frederick Surrette to have home at 827 Whittier Highway, Center Sandwich, Tax Map R2 Lot 34 in the Rural Residential district on 87,000+/- square feet when 175,000 square feet is required.
- Applicant believes previous appeal for a Variance was ill-advised and unnecessary.
- Section 150-07 multi-unit residences are allowed as a reasonable and permitted use in the Rural Residential district.
- Section 150-10 A requires 175,000 sq ft for multi-unit but also allows smaller lot sizes by Special Exception [paragraph B read again]. Question of what "built on" means. It does not say on a vacant lot. There was a building permit required which is an underlying issue for all of this. Contention is that to do any sort of building on this property requires that building permit and qualifies it to meet the criteria for a Special Exception. Putting aside the good for Town with housing and the good of the property, there is an opportunity to apply that section of the ordinance liberally or very strictly. This is entitled to consideration for relief.
- Section 150-105 Special Exceptions lists criteria.

It is easier than a Variance in that it has no hardship requirement. Addressing each of the criteria:

1. Letter of denial: No such letter or cease and desist order has been issued. [Note, one denial dated 11/17/22 was attached to the applications for the Variance and for the Rehearing]
2. The site is appropriate for the proposed use or structure: remotely located on south side of highway where there is no neighborhood, sidewalks, or pedestrians, and opposite side of roadway is zoned commercial and surrounding land owned by abutters who support this proposed use. Testimony given in December 8 Variance public hearing speculated that house had been a two-family in the past. House had been abandoned and boarded up for many years and foreclosed on. Testimonial evidence suggests conversion to two-family was prior to zoning and therefore the use a grandfathered nonconformity. No evidence exists that it was ever a problem.
3. The proposal is not injurious or detrimental to the neighborhood: No neighborhood exists. The addition of affordable housing is actually beneficial. Again, supported by abutters.
4. Undue nuisance or serious hazard to pedestrian or vehicular traffic: No evidence that previously existing two-family residence ever created such hazards or nuisance.
5. Adequate and appropriate facilities and utilities will be provided to ensure the proper operation of the structure: There is adequate off-street parking and previously nonconforming septic system has now been upgraded to support proposed use.

"Because the problem at hand lies in the fact that the lot is 87,000 square feet more or less when 175,000 square feet is required, and because the house already exists in the form of a non-conforming two-family structure on such a lot, it may be interpreted that the problem is one of a violation of a physical layout of dimensional requirement. In closing, it is without question that Sandwich is a Town already having many multi-family homes in the residential zone. Because Mr. Surrette's entire existing home has only 2500 +/- Sq. Ft. of finished living area which will not be expanded, two apartments there-in could obviously only demand affordable rent. It is well established that the Town is starving for affordable housing.

"Mr. Surrette's house has been vacated, foreclosed-upon, and boarded-up about two decades prior to his purchase. It had deteriorated into a dangerous eyesore and rodent haven. Testimony suggests that it has served as a drug house, teen flophouse, graffiti palette, and vandalism target. Mr. Surrette was only able and allowed to peek inside through missing boards and from what he could see it and from the existence of entrances directly to each floor it was reasonable for him to assume that it was a two-family structure that he was buying. Mr. Surrette should be given the benefit of the doubt in this regard when there is no opposition, such public need, and such abutter support. Forcing Mr. Surrette to the expense and burden of reconstructing the house into a one-family in the face of such questions and without opposition or harm seems almost vindictive and the very definition of "unnecessary". Please use your broadly-appointed discretion to grant either this Special Exception."

When asked about what he knew of the house since bidders were unable to inspect the interior, Mr. Surrette stated that from the outside walk around and looking through windows he assumed it was a two-family residence.

Mr. Gaisser asked about the interpretation of "to be built" on a lot as in the ordinance as already explained by the Chair.

Mr. Marino expressed that he was hearing this [interpretation] for the first time, and he has not been able to research case law or other situations where this issue has been advocated in the past. A casual reading of that clearly applied to this type of situation referring to denial of building permits. In his mind, that's building. To update and repair what is there not needing one and to gut and rebuild something that it wasn't needing a permit as building. A permit was denied in 11/22. The request here is to allow the applicant to continue. He felt that the use of this term in case law may not be limited to building anew. Asked to see Counsel's written advice.

Ms. Cove reiterated that it was a confidential legal client correspondence that restated the policy that has been applied in Town in the past. It is for the applicant to prove that this section of the ordinance is relevant and does apply and establish that it was not applied by the Town officials correctly.

Mr. Marino stated it was common with language in an ordinance to be questioned as to the intent when it was written. The drafters made the language broad but adequate enough, but maybe only new building was envisioned and reviving older existing structures had not been considered.

Ms. Cove pointed that the name of the section is "Lot area". It doesn't say permit issuance. In thinking through this, the need is to make clear what is under discussion.

Mr. Marino addressed the burden of proof question by saying there is not much proof to present, so they are here to convince the Board to use common sense and its complete discretion, so the appeal is to use that discretion on the interpretation of that section. Is there really such a difference if he had bought an empty lot and was coming before the Board for a Special Exception to build; he would be in a more favorable position than if he bought this house as a two-family structure to remodel, rebuild it. The criteria for a Special Exception have been met, so up to Board to interpret whether Section 150-10 B applies in this case. This is good for the Town, good for the property and reasonable.

Mr. Gaisser said there was a time when he agreed to that statement, but no longer. A decision made in the affirmative with that thinking ended up in court in May of 2012 and the ZBA decision was overturned. "Because of the conditions of the rules of statutory construction on how they're governed or used, the words and phrases should be construed according to how the common and approved use of the language. Courts will not look beyond the ordinance for indications of legislative intent for the words are plain and unambiguous nor will they (guess what the drafters of the ordinance might have intended or any of the words they saw fit to include). Courts must determine that the construction as a whole not by constructing or explaining the words and phrases."

What it indicates is that that the court will not guess on the original intent, it is the plain and simple meaning of the words. Here it does not say build or renovate, it says be built on.

Mr. Marino maintains they [applicant and agent] are adhering to the language and that the applicant does want to build on the property.

Mr. Gaisser felt that was a real stretch.

Ms. Cove felt that this ground has been covered and Board may be ready to move on.

There was an exchange between Mr. Gaisser and Mr. Kimball on the details of the 2012 case whether it was the wording or the intent that was the problem. Mr. Gaisser referred to the decision because it clarified that it is what is written that must be followed. Mr. Kimball said the original decision to grant approval conflicted with the wording, but to follow ordinance as written, court outcome was a complete opposite of the statement Mr. Gaisser read.

Mr. Kimball stated that it appears the Town attorney and the Board assumes the wording refers to a vacant lot, but it doesn't say vacant. It says lot. Mr. Surrette is asking for a building permit; he's renovating, not building something new out there. Is there a separate renovation permit?

Ms. Cove, rereading the section, stated that this provision does address building, so renovation of existing may not apply. If there's a house already there, does an owner need to be concerned if they're not built new, about the lot area and setbacks to be met? It's irrelevant to them.

Mr. Kimball then said that would be irrelevant to Mr. Surrette. He's not adding onto it, he's renovating a two-family house, something that's already there.

Ms. Cove stated that there is a solution and it's whether a Special Exception or a Variance is needed to have a multi-unit on this lot area.

Ms. Cove felt the assertions that it was a two-family has no legal documentation. [attachment to application was property card with house identified as single-family].

Mr. Marino started to speak, and Ms. Cove stated that first the Board members will be asked if there were further questions about the Special Exception application. Mr. Marino will be given the opportunity to close out this discussion.

Mr. Marino pointed out an additional option aside from a Special Exception or Variance. In Meredith when the Board can find no conflicting evidence from testimony, it can declare it "grandfathered". Since it was a two-family since before the ordinance was passed raises question of whether it's grandfathered. That's certainly within the Board's authority to declare that use grandfathered. Then there's no need for a Special Exception. Other issue is that if this is not covered by the Special Exception and it's existed as a two-family and what's being done is simply repair work, is a building permit required at all?

Ms. Cove cited that in the ordinance there is a reference to grandfathered nonconforming use [Section 150-08] that negates that possibility. The other question refers to the suggestions that it has been two-family. The ordinance allows attached dwelling units, and there have been in-law apartments and not necessarily two-families. There have been assertions about this property having been a legal two-family, but it may not be the purpose to determine whether or not this was a legal two-family. It is not relevant to the Special Exception application.

Mr. Marino said it might be relevant to the issue of grandfathering if not the Special Exception. Have had testimony from the Building Inspector [sic, Sandwich only has Compliance Officer] that it's existed as a two-family, not as an accessory apartment.

Ms. Cove responded sorry, but that's not accurate. If you look at the December minutes, it was stated by the applicant that the Building Inspector said it was a possibility but did not confirm it as historical fact.

Mr. Gaisser stated that the issue of grandfathering is moot for the nonconforming use was abandoned long ago. Ms. Cove added that in the Sandwich ordinance (may differ from Meredith) the time period is short (one year) for use to expire. Is Board ready to close this part of the hearing?

Mrs. Kimball asked if the plain language "built on" referred to footprint. This is an existing footprint that's not changing. Just trying to understand what the Board thinks built on means at this point in this context. If the Town Attorney has given this advice, then the audience should be able to see that definition as it relates to the provision.

Ms. Cove again stated that it is attorney client confidential correspondence. Again, to restate the advice is that this part of the ordinance is focused on allowing building on nonconforming lots in area of record prior to 1969 with a Special Exception from the ZBA that also determines that all structures, septic, etc. will conform to all current setbacks.

Mr. Greenawalt **Motioned to close the public hearing**. Mr. Gaisser seconded. All in favor.

There has been a presentation by Mr. Marino on the Special Exception criteria and testimony regarding the conversion of this property. Ms. Cove suggested to begin with looking at the application and focus deliberation on the ordinance section and its application based on Town Counsel's interpretation.

Mr. Greenawalt felt it would be more effective to have a motion to act upon and made the Motion to grant the Special Exception. There was not a second and the motion failed.

Mr. Marino asked as a point of order if it was too late to request the case be continued.

Ms. Cove stated that the public hearing was closed for further input.

Mr. Marino said he had tried earlier but was not recognized. Ms. Cove apologized and continued to ask the members to weigh in on Section 150-10 B in regard to its applicability to the making a change to the property.

Mr. Gaisser started by stating that Section 150-10 B does not apply here.

Ms. Cove agreed, saying she expressed that at the January 26 meeting. Do other members have a different interpretation?

Mr. Greenawalt stated he does have a different opinion. He asked if a vacant lot could be built on with approval, why not allow this?

Mr. Gaisser replied that new building might be approved as the situation applies. This situation is that there is an existing building that the owner wants to renovate. That's not what it says. If the word renovate was in there, we wouldn't be having this conversation.

Mr. Olafsen felt that the Board was given a very clear legal opinion from Town Counsel on how this section has been applied. It is our responsibility to follow it.

Mr. Tyson concurred. If there is a clear definition of to build, he does not have it other than what legal has determined.

It was asked where there would be a definition of "build" or "may be built on". [aside, Dictionary?]

Mr. Greenawalt asked if the legal advice could be put aside -- that the Board has that power to do so if deemed appropriate.

Ms. Cove responded that it is true, but this has been the legal interpretation the Town Office (Compliance Officer and Selectmen's administrative staff) has been given and has applied in the past. It has been a consistent policy in this Town. It makes sense to remain consistent. The applicant still has the option to seek a remedy from this Board -- a Variance that's on the table tonight. Seeing the Board is coming to a general consensus that there's no need to evaluate the Special Exception criteria since they don't apply, are members ready for a motion?

Mr. Gaisser **Motioned to deny the Special Exception** under Article III Section 150-10 B of the Zoning Ordinance for property owned by Frederick Surrette located at 827 Whittier Highway, Center Sandwich, NH, Tax Map R2 Lot 34 in the Rural/Residential Zoning District. Mr. Olafsen seconded.

Roll call vote: Mr. Greenawalt, No; Mr. Gaisser, Aye; Mr. Olafsen, Aye; Mr. Tyson, Aye; Ms. Cove, Aye. Motion carried.

Ms. Cove read the statement: "The Notice of Decision will be available for inspection within five business days. Any person affected has a right to appeal this decision. If you wish to appeal, you must act within thirty days of the date of the decision, the day following the decision being day one. The necessary first step, before any appeal may be taken to the courts, is to apply to the Board of Adjustment for a rehearing. The motion for rehearing must set forth all the grounds on which you will base your appeal. See New Hampshire Revised Statutes Annotated, Chapter 677 for details. Pursuant to RSA 674:33 I-a and 674:33 IV, Variances and Special Exceptions approved by the Board shall be valid if exercised within two (2) years of the date of final approval."

Mrs. Kimball stated for the record that she witnessed Mr. Marino attempt to be recognized prior to the close of the public hearing.

Mr. Marino said that he had wanted to ask for a continuance to research case law to rebut. He thought that he has 30 days to look for case law in which he may find something where this terminology had been adjudicated which then would be grounds for rehearing the Special Exception.

Mr. Kimball then brought up building permits and their issuance with the difference between building and renovation. Ms. Cove suggested he ask the Town Office or go to the Planning Board to discuss the process. This Board is not the one to deal with the issue.

Mr. Olafsen added that it may be that if a renovation is for a change of use, a permit would be required.

7: 05 pm Ms. Cove **announced that the second hearing for case 2023-01** is a rehearing of case 2022-03, an application for a Variance concerning Article III Section 150-10 A (minimum lot size for Multiple-Unit Structures) of the Zoning Ordinance for property owned by Frederick Surrette located at 827 Whittier Highway, Center Sandwich, NH, Tax Map R2 Lot 34 in the Rural Residential Zoning District. The Applicant proposes to renovate an existing dwelling structure into two dwelling units. There will be same or similar information presented as in December, and although the denial was based on criterion 5, the other four should be presented and reviewed. It is best to rehear the set of facts to ensure that it is not assumed all is remembered with the same perception.

Mr. Gaisser **Motioned to open the public hearing**. Mr. Tyson seconded. All in favor.

Mr. Marino stated that he had not prepared to present the other four but could do so from December 8, 2022 minutes. Mr. Gaisser gave him a copy.

Mr. Marino read the applicant's presentation for the criteria from the minutes:

1. The variance will not be contrary to public interest:

Not contrary to the public interest as it is to provide needed housing and it is restoring a historic building that people have given positive comments of support for saving it.

2. The spirit of the ordinance is observed:

In this location on a highway at the edge of Town, the lot size to have a two-family house is not critical with no close by surrounding homes as it would be if in a suburban cul de sac. House is setback about 75 feet and now visible from the roadway.

3. Substantial justice is done:

Saving a house formerly occupied by squatters and critters and creating affordable housing for someone who needs it does not harm the public.

4. The values of the surrounding properties are not diminished:

The building would be improved and there are no surrounding homes in sight nearby to be impacted. It does have the appearance of a single-family neighborhood and the house would look basically the same. Sandwich is a very desirable place to live, and this provides the affordable opportunity for people working in Town businesses.

For criterion 5, Mr. Marino read his statement:

"In the findings of fact of the Board's December 8 decision, it is stated that the appeal failed because the only hardship presented was financial; the property could be reasonably used in conformance to the zoning ordinance without the variance. Since the existence of possible conforming uses as a reason for denial relies on a failure to meet criterion 5 (A), the Appellant needs only to satisfy 5 (a)'s requirements to overcome denial.

"Despite any burden of proof on the Appellant, one cannot prove a negative, so the Appellant cannot prove that "No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provisions to the property, but since no evidence or suggestion exists of such a relationship, subparagraph (5)(B)(i), will be considered satisfied and not further discussed. And since it is reasonable without question to use a house as a multifamily home in a Town already having many multi-family homes in residential zones, in a Town starving for housing, where no injury to the public is evident or possible, and where public benefit is obvious, sub-paragraph (5)(B)(ii), will be considered satisfied and not further discussed.

Focus will therefore turn to paragraph (5)(A) (special conditions). One can only surmise that the Board felt that no unnecessary hardship was owed to "special conditions of the property that distinguished it from other properties in the area", as such was never discussed. We can therefor only refer to the Board's questions and statements to ascertain its possible justification for a finding that (5)(A) was not met.

The Board appears to have interpretated the word "property" in (5)(A) to mean that only the use of the land should be considered and not of the property as a whole including the pre-existing home. While the Findings of Fact do not state that the denial was based only in consideration of the land, the discussion at Page 2 Lines 27, 40-41 and 46-47, and at Page 4 Lines 15-16, 19-21, 27, and 38-40 make clear that the Board's interpretation of "property" was limited to the land and ignored the pre-existing condition of the house. The State's Revised statues are replete with evidence that the State recognizes real property as land "and any buildings appurtenant thereto".

Indeed, there is no claim made that the conditions of the land are special and distinguish it from other parcels of land in the area. The claim is made that it is the **conditions of the existing house** which are special and distinguish it from other houses in the area. And an unnecessary hardship surely exists that owes to the special conditions of Mr. Surrette's house which distinguish it from other properties in the area… namely that has pre-existed in a two-domicile state, possibly since prior to the ordinance. Any requirement that Mr. Mr. Surrette expend great effort and expense to return the property to a single-family state would be improper.

Mr. Surrette's house is unique in that it had been vacated, foreclosed-upon, and boarded-up maybe two decades prior to his purchase. At some point prior to that it had been converted into two domiciles. No other house in the area can be compared. Uncontested testimony stated that the house was "probably a two-family at one time (Page 2 Line 10), that "there seems to have been two sets of people living there in the past" (Page 3 Lines 41-42), that the Compliance Officer "thought it possible that it was once a two-family house" (Page 3 Lines 23-24). The existence of a full-sized kitchen on each floor and independent entrances directly to each floor (Page 3 Lines 24-29) surely suggest two distinct domiciles rather than an in-law arrangement.

And as the house had been abandoned for so many years, it seems at least more probable than not that such alterations were made prior to the ordinance and may very well be a grandfathered non-conformity that would remove the need for a variance at all, but at the very least these conditions and questions cause strict enforcement of the ordinance to create an unnecessary hardship. At least Mr. Surrette should be given the benefit of the doubt in this regard when there is no opposition, such public benefit, and such abutter support. Forcing Mr. Surrette to the expense and burden of reconstructing the house into a one-family in the face of such questions and without opposition or harm seems the definition of "unnecessary".

I sit on the Meredith Zoning Board of Appeal. We are charged with the difficult task of balancing the public good against the potential harm to property owners. In no case is this task more difficult than in determining the existence of an unnecessary hardship. While many of our tasks are more black and white (like

determining the diminishment of surrounding property values or determining the lack of need for a setback encroachment), the determination of an unnecessary hardship could not be more subjective. Where this is no public opposition and great public benefit, the Board may and should use its discretion and is justified to err on the side of the property owner in this "pro property rights" State.
In Simplex, the NH Supreme Court adopted an approach to unnecessary hardship more considerate of the constitutional right to enjoy one's property. It defined the three-part standard by which owners can demonstrate unnecessary hardship:
1) A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment;
2) No fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property; and
3) The variance would not injure the public or private rights of others."

These conditions have clearly been satisfied in the present case and the Appellant begs the Board to reverse its decision of the 8-DEC-22 meeting.

Ms. Cove then proposed the most productive way to address this is to identify the specific facts in respect to this property. This rehearing is also to review the findings of fact from the December decision to make sure they are comprehensive for all the criteria tests. Any members should have specific questions regarding the house and its special circumstances. The story of the house has been presented as how it is unique, and it has to be determined what special circumstances exist for the record. A Variance is issued to allow an ongoing permanent violation of the zoning ordinance. Therefore, in this process it is important that the tests must be applied on the specific facts and not granted for good ideas.

Mr. Tyson acknowledged that it is a difficult situation with having to decide what you would want done and what the laws and regulations say you must abide by with the criteria. Even with the history of the house and the need for housing as presented, the special condition must be defined.

Mr. Surrette questioned why the Board was so hung up on being afraid to grant this when there is discretion to say yes.

Mr. Tyson referred to the plea given several times to please give the Board something as the challenge of the property that is in the criterion to base the decision on. He acknowledged the intention of the proposed use is a good one.

Ms. Cove acknowledged that his agent had summarized the issue of the hardship based on the conditions of the property and had referred to the December minutes that contain what was previously presented. The hardship test is the focus here and it specifically addresses the special conditions of the property. To summarize:

What has been presented as the facts: Mr. Surrette had a history with the property having spoken with owner 24 years ago in an attempt to purchase it after seeing a for sale sign; it was already vacant at the time and he spoke by phone conversation; Mr. Surrette bought the property in 2022 with the winning sealed bid in the Town auction that had multiple other bidders; there had been no opportunity for bidders to do due diligence to inspect the interior of the house; Mr. Surrette viewed exterior and looked through windows; the house was in extremely poor condition having been abandoned and boarded up for years; it has proven to be more expensive to repair and renovate than anticipated; it is located on a busy highway with no nearby houses; there are multiple entrances and he discovered that two kitchens existed after gaining access; no legal or formal documentation for two-family use has been presented.

Mr. Marino stated that there was testimony to the effect it was two-family. [Note that attachment to application is property card with "single-family" checked for use].

Ms. Cove responded that the Board speaks for the zoning ordinance and must determine if a Variance can be granted. The Lot Area section has the requirements for a multi-unit structure set lot

size [175,000 Sq ft] for the purpose of addressing density, maintaining open space, and adequate setbacks for likely septic system and wells. In this situation the lot is less than half the required area which is what this is based on.

Mr. Kimball first challenged that it is a public hearing he hasn't been able to speak.

Ms. Cove responded that first the Board discusses and asks questions and establishes the facts.

Mr. Kimball then continued by referring to the purpose statement of the ordinance in Section 150-04 that he didn't feel was talked about. The hardship criterion 5 A refers back to that purpose. He read them all aloud and some definitely are met. He opined that the Board should go through those purposes to determine whether this Variance is consistent with those purposes.

Ms. Cove acknowledged that some of the listed purposes apply, but the heart of the matter is what are the special conditions of the property that warrant this Variance.

Mr. Gaisser stated that the Board has yet to hear the special conditions of the property.

Mr. Marino answered that the only testimony is that the house is structured with two kitchens and multiple entrances. It was bought after it had been converted to two-family at some point in time. It's a very awkward layout.

Ms. Cove responded that that is a claim, and no factual evidence has been shown.

Mr. Surrette restated his recollection that the "Building Inspector" spoke at length with him about how he would have done the two units.

Mr. Marino then continued that the only testimony before you is that the house is structured with multiple entrances and multiple kitchens. In Meredith, the ZBA conducts site walks and not aware if any Board members here have done that. Maybe there should have been photographs supplied. He has been to the house and the interior had been converted, rebuilt inside to two-family and the layout is awkward for a single-family, and it would be a great expense to reconfigure back to a one-family residence. There is no reason to force Mr. Surrette to restore it to a 1928 condition. It would be a great burden and expense to still create nonoptimal living conditions for a single-family house. That, in his opinion is a hardship.

Ms. Cove clarified that the floorplan of the house as it exists would be extremely expensive to restore it as a single-family house conveniently.

Mr. Marino felt it would make it impractical to use as a single-family now. It's two apartments now. When it was built as a Sears house it was probably a three or four bedroom house with kitchen on the first floor. Now has two small apartments, each with a kitchen and awkward stairways. So, whether it's the floorplan or the structure itself there is a very awkward configuration to work with and a major undertaking. That is the special condition that exists in that building that justifies the applicant proceeding to use this house as it is.

Mr. Olafsen said it is his understanding that this house is about hundred years old and originally built and lived in for many years, at least well into the 1950s, as a single-family home (Hambrooks). Then at some point afterwards it was converted to two units.

Mr. Marino acknowledged this. He said that it is a structural issue and it would be a major renovation to restore to one-family. He doesn't believe that this is only a financial issue.

Mr. Surrette then stated again that the Town employee, Russ Johnson who is surely a building expert and had been in the building to board it up, told him that he had bid on the property with the intent to make it a two-unit dwelling. Shouldn't the Board agree with this experienced employee, and allow it to be multi-unit?

Mr. Olafsen responded that other Town employees' jobs and opinions do not influence the Board which has a specific role that is independent by statute. Mr. Surrette interrupted to challenge that, but Mr. Olafsen continued by mentioning other old farmhouses in Town probably as old or older -- what special conditions of this house distinguish it from any other of those houses that require a Variance which shows an unnecessary hardship?

Mr. Marino reiterated that it is the existing internal structure issue that makes it impractical as one family without major renovations.

Mr. Olafsen asked, is that a financial issue as the cost to do?

Mr. Marino replied no, it's physical, it's structural with a myriad of burdens with converting back to a single-family home. His opinion that it is unreasonable to force that especially because of what's been done already with the septic system. He vehemently opposes the suggestion that it is financial. It would be a lot of work and a lot of burden.

Ms. Cove asked about the burden. An old saying is that you can do anything, you just have to pay for it. And the work and the burden in effect is what you are saying is the hardship. It is a burden and hardship because it costs something. What other burden are you seeing?

Mr. Kimball stated that it would be a financial component to anyone who bought it to renovate. It's not specific Mr. Surrette.

Ms. Cove said that it gets you to price of purchase because anyone buying would have to consider the expense of follow up work needed to be done. Maybe Mr. Gaisser's low bid would have been economically better. Some people might have looked at the house with a different idea for the rate of return.

Mr. Marino said that everything has a financial component if seen in those terms – the burden is financial, emotional, physical, and stressful. Where to set the limit that it becomes a hardship.

Ms. Dolan, a member of the Planning Board, observed that the only task at hand is to look at the lot size. No lot can have two dwellings without the size in the regulations for a multi-unit. That could be the hardship owing to the special conditions of the property. Mr. Marino brought up the three criteria [Simplex test] for establishing hardship, so really drill down on that to answer the question of the special conditions. There could be a way this is a hardship, that he bought it sight unseen and had no recourse to look at condition. I agree it all comes down to financial at the end of the day but go back and review those three criteria one by one, something may appear to qualify.

Ms. Cove replied that it always comes down to the special and unusual conditions of the property. What has been presented tonight is the internal structure of the property is a burden to reconvert to an optimal living condition for a one-family house.

Mr. Marino referred to his understanding of the Simplex court decision that laid out the three criteria and that you only revert back to the previous hardship criteria if these three fail.

Mr. Bullitt asked Mr. Surrette whether he was bidding on and buying it as a single-family house.

Mr. Surrette replied he didn't think the description for the auction mentioned it.

Mr. Bullitt asked whether he bought it as single-family with intent to make it two-units.

Mr. Surrette stated that from his exterior walk around it looked like a multi-family with four entrances. The house is huge and he didn't think it would be much of an issue – looked like two-family based on his past experiences in Waltham, MA.

Mr. Marino brought up the Simplex test case (as included in his presentation) in which the standards to demonstrate hardship is that (1) A zoning restriction as applied to their property interferes with their reasonable use of the property, considering the unique setting of the property in its environment; This is a reasonable use and strict enforcement should not be applied. In this case multi-unit is allowed therefore it is reasonable.

Mr. Gaisser disagreed with the interpretation. There's no reason it can't be a single-family house. It doesn't cost less money to renovate either way, it all ends up costing.

Mr. Marino interrupted to state that discussing that the reasonable use is the established two unit and that it is reasonable to keep instead of reconverting because two-family in the residential zone is allowed and a reasonable use. Not necessary to look at other possible uses but should look at this use as reasonable and that strict enforcement of the ordinance is interfering with the property owner's right to this reasonable use. It is an allowable use.

Ms. Cove added for a minimum four-acre lot.

Mr. Marino stated that Special Exceptions are an allowable use.

Mr. Gaisser remarked that a Variance is being discussed.

Mr. Marino continued that it is allowable under certain circumstances. A Special Exception is not a violation of the ordinance. In this case, as explained in previous presentation, "the site is appropriate for the purposed use… [looked through notes and started to quote again] "All structures and uses accept as provided elsewhere in this ordinance shall be permitted in the designated areas. Multi-unit structures are allowed in the Rural Residential zone." It is an allowed use under certain conditions in a residential district therefore it is a reasonable use. The lot size restriction can be overcome with a Special Exception but you already decided that it doesn't apply here because it's an existing property. That it is existing makes it relevant to needing a Special Exception and it exists as a two-family property right now. Number two, "fair and substantial relationship existing between the general purposes of the zoning ordinance and the specific restriction on the property." One cannot prove a negative but there is no fair and substantial relationship here and no evidence that there is. When Meredith ZBA can find no evidence, it is skipped over.

Ms. Cove responded that the case argument as presented for this rehearing was that this ZBA had skipped addressing fully the hardship criterion and that was not acceptable. As far as not proving a negative, it is something for the applicant to prove with addressing the (2) fair and substantial relationship existing between the general purposes of the zoning ordinance and the specific restriction on the property test.

Mr. Marino replied it is left to the deliberations of the Board to decide. He saw no relationship.

The third Simplex prong was that the variance would not injure the public or private rights of others. Again doesn't have evidence – has explained that location has no sidewalks or pedestrians, no neighborhood, across the street is undeveloped commercial land, so no situation for public injury to occur. No rights being violated. The Board would have to counter that there would be public injury. You have to decide on these criteria and have justification for it. So, to say burden of proof is on applicant to determine there is no fair and substantial relationship. How does one prove this?

Mr. Gaisser stated that the burden of proof is on the applicant to present evidence that addresses the criteria.

Mr. Marino expressed that it is up to the Board decide if the criteria has been met.

Mr. Kimball added that it was said that last time that they [he and Mrs. Kimball] are the abutters who show up and support this proposed use and there has been no opposition testimony presented. He said he still hasn't heard the criteria gone through.

Ms. Cove stated it will be in deliberations. The public hearing will be closed, and the criteria will be gone through looking at the facts presented. Asked if any more input from the Board.

Mrs. Kimball said that it is a pre-existing nonconforming lot of record, and it is the role of the ZBA to grant variances. She sees that there are financial components that play a role in both sides of the argument. The purpose of the ordinance is stated in Section 150-04, and the objectives are met. Requested that the Board go through the process of referring to those objectives.

7:58 pm Mr. Olafsen **Motioned to close the public hearing**. Mr. Tyson seconded. All in favor.

Referring to the Variance application (case 2022-03) that was submitted and what was presented this evening, Ms. Cove identified the facts presented: the large dwelling creates a financial hardship to renovate and the most effective layout is a two-family building; it would be a great burden to reconfigure back to one-family; there appears there was other interest in doing something with the property with other bids submitted; the applicant was winning bidder to purchase; in effect, this lot would be less than half the size required by the Town ordinance for the two-family dwelling; in the Rural Residential district that allows multi-unit buildings, but it is a big deal to ignore the ordinance on the lot area requirement and permit this Variance.

Mr. Greenawalt objected to the last statement about ignoring the ordinance.

Ms. Cove replied that maybe use of word ignore is incorrect, but it allows a permanent violation of the ordinance when a Variance is issued.

Mr. Greenawalt responded that it is permissible if the appropriate conditions are satisfied with what the ordinance says.

Mr. Cove agreed but stated that to meet the high bar of evidence is on the applicant. To review what has been presented as to what is special about this property, is that at some point it was converted to some sort of two living unit configuration, and it remains that way and would be a burden to revert to a single-family use. That single-family use would not require a Variance.

It was also heard that the property is not in a neighborhood and testimony is that it is in the Rural Residential District without houses close by and on highway. The Town had decided not to change the zoning in that area to permit some different approach to multi-family. Other facts to add?

Mr. Greenawalt added that it has abutter support and no evidence of opposition on record. Can allow violation of ordinance with conditions met.

The Variance criteria:

1. The variance will not be contrary to public interest:

Testimony that it provides affordable housing in a town that needs it and that may be beneficial to the public to have. The size of structure lends itself to affordable units. it All agreed.

2. The spirit of the ordinance is observed:

Looking at the zoning ordinance is not just specifically at the statement of purpose, but in general at its entirety as the spirit is the specific intent in carrying out the will of the voters in Town. One concern identified by Ms. Cove is there is a focus on maintaining low density, open space, and natural features for quality of life and rural character. Even a single-family home currently requires a minimum of two and a quarter acres lot size. For multi-unit there is a four-acre minimum. The house is pre-zoning ordinance and still meets this intent. Mr. Gaisser expressed that the density issue is not a concern here. Mr. Olafsen concurred. All agreed criterion met.

3. Substantial justice is done:

Mr. Olafsen in looking at the NHOPD guidance reads, "substantial justice means that the benefit to the applicant should not be outweighed by harm to the general public". He felt standard is met. All agreed.

4. The values of the surrounding properties are not diminished:

There has not been testimony on that tonight, but as in previous testimony in December, the house would look basically the same in a much-improved condition and has no negative impact to its surroundings. Mr. Gaisser stated that the Kimballs, the abutters have endorsed this and no input from abutter across the road. All agreed criterion is met.

5. Literal enforcement of the provisions of the ordinance would result in unnecessary hardship:

"A. Owing to the special conditions of the property that distinguish it from other properties in the area, no fair or substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;"

Ms. Cove stated that this where it focuses on the special conditions of the property that must be established. Referring to resources for ZBAs, there is guidance to keep on track with meeting criteria rather than to want to base decisions on good ideas and in finding ways to make it work out. The warning is about "situational zoning" in which case, if everyone with similar circumstances as with houses in poor condition on small lots would become sufficient as a special condition for a Variance, it will undermine the integrity of the ordinance. To address the special conditions of this property, any comments?

Mr. Gaisser asked what special conditions exist here. The structural problems mentioned would be the same with other potential uses, including one-family.

Ms. Cove said it was presented that it would be more work to convert back to a single dwelling unit than to divide it into two separate apartments. Used the word work but that is also expense. Mr.

Greenawalt objected to that statement. Ms. Cove reminded members of the contents of the application for the Variance which focused virtually exclusively on the financial impact of the building's condition.

Mr. Olafsen wanted to address Mr. Marino's statement that the Board has complete discretion to grant a variance. The Board has taken an oath to follow the law and that must be followed in addressing the condition of the property.

Mr. Marino ~~(out of order)~~ stated he said broad.

Mr. Olafsen continued that he understands that the fair and substantial relationship is difficult to answer, but what was not focused on was that before those prongs are considered, was the special conditions of the property that distinguish it from other properties in the area. As case law has stated, there is not the discretion to grant based solely on financial hardship. Mr. Tyson concurred.

Mr. Greenawalt has heard the special conditions as the location, abutter support, and no concerns for public interest or injury involved. The situation is very unique and no other case like it has come to the ZBA or the Planning Board.

Mr. Gaisser felt the Board has tried very hard to draw out a clear hardship with the property and still it has not been forthcoming.

Ms. Cove expressed that it was not necessary to go to the second test (paragraph B) in that each of the test statements require special conditions of the property that distinguish it from other properties.

Mr. Gaisser made the **Motion denying the request for a Variance** concerning Article III Section 150-10 A (minimum lot size for Multiple-Unit Structures) of the Zoning Ordinance for property owned by Frederick Surrette located at 827 Whittier Highway, Center Sandwich, NH, Tax Map R2 Lot 34 in the Rural/Residential Zoning District. Mr. Olafsen seconded.

Discussion on wording of the findings of fact to add to the motion led to: The specific findings of fact: That the applicant has met the first four criteria; the applicant failed to satisfy the Board that the unnecessary hardship criterion was met due to special conditions of the property had not been established.

Roll Call: Mr. Greenawalt, Nay; Mr. Gaisser, Aye; Mr. Olafsen, Aye; Mr. Tyson, Aye; Ms. Cove, Aye. Motion passed.

Motion for the Findings of fact, that the Board heard that there would be great expense in the renovation into a single-family home and that the applicant conceded that the property was previously used as a single-family and could still be used again as such with the cost being prohibitive. The only issue presented by the applicant was that a hardship was the cost to use as a single-family residence would be a significant financial hardship, and that is not sufficient under the law for granting a variance.

Roll call: Mr. Gaisser, satisfied; Mr. Olafsen, agree; Mr. Tyson, agree; Ms. Cove, agree; Mr. Greenawalt, disagree, not all financial was argued, it was Board's interpretation.

Adjournment:
8:32 p.m. Mr. Gaisser motioned to adjourn. All in Favor.

Scheduled Meetings:
April 13, 2023, May at **6:00 pm until further notice**

Respectfully submitted,
Susan MacLeod, Land Use Secretary