

TOWN OF BEDFORD
March 15, 2016
ZONING BOARD OF ADJUSTMENT
MINUTES

A regular meeting of the Bedford Zoning Board of Adjustment was held on Tuesday, March 15, 2016 at 7:00 p.m. in the Bedford Meeting Room, 10 Meetinghouse Road, Bedford, NH. Present were: John Morin (Chairman), Adrian Thomas (Vice Chairman), Bill Duschatko (Town Council Alternate), Sharon Stirling, Terry Radke (Alternate), Chris Swiniarski (Alternate), Gigi Georges (Alternate), and Karin Elmer (Planner I)

Chairman Morin called the meeting to order at 7:00 p.m. and introduced members of the Board. Councilor Domaingue was absent, and Councilor Duschatko was appointed to vote in her place.

Minutes – February 16, 2016

Amendments: Page 4, last line, “wet” should be “therefore wetlands”; Page 5, line 16 from top, “applicators” should be “applications” and on same line delete “upon”; and, Page 13, first full paragraph, line 2, “mere” should be “mirror.”

MOTION by Vice Chairman Thomas to approve the minutes of the February 16, 2016 meeting of the Zoning Board of Adjustment as amended. Mr. Swiniarski duly seconded the motion. Vote taken; motion carried, with Councilor Duschatko abstaining.

Chairman Morin reviewed the rules of procedure and swore in members of the public.

Applications:

- 1. Tamy Miller – Request for a variance from Article III, Section 275-22.A & Table 1 in order to construct a garage 8.4 feet from the side property line where 25 feet is required at 390 Wallace Road, Lot 14-77 and zoned R&A.**

Tamy Miller and Mark Dube were present to address this application for a variance.

Mr. Dube stated I would like to start by giving a brief description of the existing property as it might help you understand a little better why we want to go for the variance to do the proposed structure. The existing structure has been in my wife’s family for almost 100 years, it comes with the original stone foundation, it has post-and-beam

construction and an existing dug well. About 20 years ago we decided to renovate it. Because it was on a nonconforming lot we were required to keep part of the existing structure when we did the renovations, which was okay because we like the 100-year-old farmhouse look, and we like the character of the property. What we didn't like was the basement; the basement has a stone foundation, which kind of protrudes a little more than a regulation concrete foundation and it had a dirt floor. After doing the renovations, what we were left with after pouring the concrete in the floor, was a section of the left part of the house, the driveway side of the house, was a 16 foot x 24 foot area with a ceiling height of about 5 feet, and the main part of the house, which is to the right side, the north side, was left with about a 24 foot x 24 foot area that had just under 6 feet. In that 24 foot x 24 foot area we also house our furnace, our oil tank, our hot water tank, our water system, we have the cellar stairs that go down there, and 20 years' worth of stuff leaving us with very little storage. The whole upstairs has no attic area, it was cathedral throughout the whole upstairs, hence that is why we decided maybe it is time to put a garage on with a little bit of storage. That is our reason for being here.

Mr. Dube proceeded to review the criteria for this variance application. **1. Granting the variance would not be contrary to the public interest: (1) Whether granting the variance would alter the essential character of the locality:** The essential character would not be altered because most of the surrounding houses have 2-, or in some cases, 3-stall attached garages so it is within the character of the area. We are actually proposing a 1-stall garage, which kind of fits more with the size of the house and the character of the house. **(2) Whether granting the variance would threaten public health, safety and welfare:** I actually believe it would create a safer environment for the public because when we are entering our driveway off from Wallace Road, we either have to stop and back in to the driveway or pull in and then when we exit we have to back out into Wallace Road. Depending on the time of the day or whether it is Saturday when it is transfer day that decides whether we're going to pull in or back in. We have three vehicles and only three spots to park. By having a vehicle parked in the garage, it empties a spot that would allow us to pull in, back into that empty spot and then exit by driving into Wallace Road. **2. The spirit of the ordinance is observed:** We believe the improvement to the existing home would be more appealing to the neighborhood by being able to store a vehicle inside and out of plain view. A garage would allow for more storage, which also would add value to the property thus making surrounding homes more valuable. **3. Granting the variance would do substantial justice:** A garage is a reasonable use in a logical location to add onto the structure. The garage will give the property more curb appeal and added value, it also creates space that will safely allow us to store our snow blower and our generator, which is currently now being stored in our basement. It would also allow us to get some stuff that we normally keep outside year-round that we normally wouldn't, like our lawn furniture and things of that nature. **4. The values of the surrounding properties will not be diminished for the following reasons:** A garage is typical in the neighborhood, the enhancement to the home adds significant value to the property and it gives more curb appeal to potential buyers for resale. In addition, it would also add value to the surrounding properties. **5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Special conditions of the property distinguish it from**

other properties in the area: A. Denial of the variance would result in unnecessary hardship: i. 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: ii. The proposed use is a reasonable one: The proposed addition on the home is the most logical location due to the placement of the existing well, updated septic design, underground power, and existing wetlands. If you look at the plot plan, which I think you all have, you will see that on the front of the house towards the wetlands side it is all wetlands beyond the stonewall, and in front of the stonewall we have underground power that comes from Wallace Road right to the front, right side of the existing home. To the left side of the driveway as you are pulling in we have the leach field and directly in front of the front porch we have the septic tank, where the line actually goes right underneath the driveway. In the back of the house we have a 15-foot dug well that is existing, it has been there 100 years, so it really only leaves us that one spot, which is logically located at the end of the driveway. Anything else would probably be detached. It is pretty wet to the north side of it where the stonewall is, and in the springtime we have a bucket with a sump pump inside the basement that will occasionally kick on because the water table rises up enough. I think in looking at that the most logical and economical spot is to the left side of the house. What we have there now is a stonewall that is probably 6 feet wide and then the next door neighbors have a fence and we have a treeline in between that too. Our abutters are not quite as close to the property line as you would think. There is a good amount of distance between the property line and their garage is actually in between the property line and their house, so there is even more space there. I actually think that the addition would create a little bit more privacy too because we are eliminating part of our front porch, which directly looks across and we're elevated so we're looking over the fence a little bit and they have a deck in the back of their yard, which is kind of elevated, so you have a little more eye sight view, but with an addition there I think that would block out quite a bit of it and give more privacy to the neighbors.

Mr. Swiniarski asked did you clear cut this? It looks like there are no trees left on your property. Mr. Dube replied this property has been like that since I met my wife 20 years ago, and because this is a nonconforming lot, you had to keep an existing part of the house. She tried to sell it; it wasn't really any value to a builder or anything like that because they had to go off the existing house, so we decided to renovate it. At that time there were shrubs and sumac trees that had kind of overgrown the area, so we cleared that part out, but to say that that was clear cut by us, no. We have pictures from 100 years ago and that was all field.

Chairman Morin asked the public for those wishing to speak in favor, in opposition, or for those having comments neither for nor against this application. There were none.

MOTION by Ms. Stirling to move into deliberations on this variance application. Councilor Duschatko duly seconded the motion. Vote taken – all in favor. Motion carried.

1. Granting the variance would not be contrary to the public interest: (1) Whether granting the variance would alter the essential character of the locality: Vice Chairman Thomas stated this is a residential use and I think they are building more residential in the sense that they are just putting a garage with storage, so I don't think it will alter the essential character of the locality. All agreed it meets this prong of this criterion. **(2) Whether granting the variance would threaten public health, safety and welfare:** Ms. Stirling stated I don't think it would threaten public health, safety or welfare. Chairman Morin stated we have heard no testimony on that. All agreed it meets this prong of this criterion. **2. The spirit of the ordinance is observed:** Ms. Stirling stated the spirit of the ordinance is to be able to use your property to the maximum use. A garage would be a fitting residential use, and given the small space that they are dealing with on this nonconforming lot, then I think it still meets the spirit of the ordinance to balance those two. Vice Chairman Thomas stated plus the fact that even though it is only 8 feet from the property line where it is supposed to be 25 feet, he has shown us the neighbor's house isn't that close either, so you really are still maintaining a good distance from property to property, which is one of the main things that the ordinance is looking to do. Mr. Swiniarski stated I would agree with what Vice Chairman Thomas is saying. When I think of the spirit of the ordinance, I think of the specific part of the ordinance from which we're seeking a variance and that would be the setback. And generally the spirit of a setback is to not have houses or uses or structures very close to each other; here because of the placement of the structures on the abutting parcels, we don't have them right next to each other. One is set back a significant distance from Wallace Road, where the other is not, so I think because of that setback from Wallace Road we are observing the spirit of the ordinance. All agreed it meets this criterion. **3. Granting the variance would do substantial justice:** Vice Chairman Thomas stated it will allow them to use their property in the way it was intended. Mr. Swiniarski stated as I always say in these instances, the most affected party being the abutter shown here, has not objected to this so far as we know. I assume that they have received notice, so if that party does not have a problem with it, I think it is just to allow the benefits to accrue to the applicants. All agreed it meets this criterion. **4. The values of the surrounding properties will not be diminished for the following reasons:** Councilor Duschatko stated no, and I think there may be some evidence that it may actually be enhanced by the addition of the garage/storage area in keeping with the neighborhood. All agreed it meets this criterion. **5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Special conditions of the property distinguish it from other properties in the area:** Mr. Swiniarski stated the width is the special condition. Literal enforcement essentially means no typical garage, it would have to be something extraordinary so you have that special circumstance, and you have that hardship that results from literal enforcement. Ms. Stirling stated when we looked at the plot plan; you have the well, the septic, and the leach field that would all make this the only acceptable placement. All agreed it meets this prong of this criterion. **A. Denial of the variance would result in unnecessary hardship: i. 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:** Mr. Swiniarski stated it is the same answer as the previous criteria. Chairman Morin stated with the size of the lot

and where everything is placed, there is not much choice for anything else. All agreed it meets this prong of this criterion. **ii. The proposed use is a reasonable one:** Vice Chairman Thomas stated garages are reasonable. All agreed it meets this prong of this criterion.

MOTION by Vice Chairman Thomas that the Zoning Board of Adjustment approve the variance request from Tamy Miller from Article III, Section 275-22.A and Table 1 in order to construct a garage 8.4 feet from the side property line where 25 feet is required at 390 Wallace Road, Lot 14-77, zoned R&A, for the reason that it has met the criteria for a variance per our deliberations. Ms. Stirling duly seconded the motion. Vote taken - all in favor. Motion carried.

MOTION by Councilor Duschatko to move out of deliberations on this application. Vice Chairman Thomas duly seconded the motion. Vote taken – all in favor. Motion carried.

2. Brian Driscoll – Appeal from Administrative Decision regarding allowing an infiltration basin as an accessory use in the R&A zone portion of an otherwise commercially zoned lot at 393 Route 101, Lot 31-15 and zoned CO.

Chairman Morin stated in going over this appeal from an administrative decision the first thing we are going to have to decide as a Board is if the application is timely. Once we decide that piece then we can go on from there.

Rick Sawyer, Bedford Zoning Administrator, stated I just wanted to caution the Board that you may want to take testimony on this piece. There are competing sides to this discussion and there may be opinions that differ from the staff report as well as probably differ from the applicants. There is also legal representation of the property owner here that may want to comment on that piece. To start I would be glad to answer any questions that came out of my staff report on the issue of timeliness.

Ms. Stirling stated I am confused by the January 25, 2016 date. Mr. Sawyer responded that is the Planning Board's decision on the site plan aspect of the project. Ms. Stirling asked so the appeal was filed when? Ms. Elmer stated it was filed on February 24, 2016. Mr. Sawyer stated that counts within the 30 days that I am recommending, and then obviously I cited the Derry court case where they had it seems like almost exactly the same conditions, but, again, you may take testimony from others tonight that feel differently about that. Ms. Stirling stated can you talk about the communication on November 2, 2015 and how it is relevant to the appeal. Mr. Sawyer replied you are going to hear a lot of testimony on that tonight I'm sure, but that is really the basis of how the project moved forward being able to put their drainage basin in the portion of the property that's in the residential site. Again, this is not so much on timeliness but more on the heart of the matter, which I think we should probably get into a little bit later after you make this decision on timeliness, but I definitely would like to expand on that.

Mr. Swiniarski stated I don't know how we can do this procedurally, but can we find out if there is anyone who is of the position that this appeal was not timely. Mr. Sawyer stated you can hear the whole case and then make your decisions at the end if you want. Chairman Morin stated we can bring the applicant up and get their testimony because they are the ones that filed the appeal. Mr. Swiniarski stated I think we know their position, but I think from what I am hearing there is no one opposed to that position, but if that is not correct, we should hear that. Mr. Sawyer responded I don't believe that is correct. Mr. Swiniarski stated so then we should definitely hear that. Mr. Sawyer stated but you can still hear all of the testimony and still give your decision on timeliness at the end before you decide on the case, if you would like to do that. You don't have to fully decide the timeliness; you could hear the whole thing and then make your decision at the end if you would like. I separated it and kind of recommended that you do that first, but you can do that at the end if you would like as well. Chairman Morin asked how does the Board want to proceed? Do you want to deal with each piece individually? Ms. Stirling replied I think we should hear everything and then it will become clearer. I think that is the cloudiness that I'm seeing, and I think that the testimony will bear it out. Mr. Radke stated from a legal perspective I agree with Mr. Sawyer's approach. If it is not a timely appeal, then we don't even have to consider the merits of the appeal, so we might as well get that part out of the way first to see if we're going to go forward and discuss the merits. Councilor Duschatko stated I have to agree with Mr. Radke's comment. I think the cases we are looking at, both that Mr. Sawyer cited and some of the cases that I have reviewed, the timeliness issue always seems to be taken up prior to the actual action issue. Mr. Swiniarski stated I think in doing that, because Ms. Stirling's concern is a valid one, we do have the opportunity to ask any questions at all about anything that is not clear that could maybe shed some light to help make the decision on timeliness issues, so I don't think we are limiting any information that can be presented if the Board finds it helpful.

Attorney Jason Reimers, BCM Environmental & Land Law, PLLC, and Brian Driscoll were present to address this appeal from an administrative decision.

Chairman Morin stated let's keep it to the timeliness portion for the most part so we can deal with that issue first.

Attorney Reimers stated as for timeliness, I agree with Mr. Sawyer in his recent staff report that he deemed the clock to start running on January 25, 2016 when the Planning Board approved the site plan application of the applicant. That was the time when the Planning Board adopted the administrative decision of Mr. Sawyer. Alternatively, your rules of procedure allow you to extend that period of time for good cause, and that is if there is good cause and if no party will be unduly prejudiced by your exercise of that authority. Mr. Sawyer's fallback secondary position of when the clock began to run was January 11, 2016 at which point his zoning decision was noted by the Planning Board when the Planning Board accepted the application, not when they approved it, but when they accepted the site plan application. After January 11, 2016 if the 30-day period did run then, there was an appeal that was filed by the Williams' on this very issue and it

was later withdrawn by the Williams'. Mr. Driscoll didn't know that it had been withdrawn until the 30-day period had already run from January 11, 2015. What I'm trying to say is that a timely appeal had been filed by a neighbor, by an abutter, and had been withdrawn, and there was no reason for any other abutter to file an appeal during that time because as far as they knew an appeal had already been filed and you would be hearing this issue. It wasn't until after the 30-day period then ran that they learned that the prior appeal had been withdrawn. If there is ever a case for good cause to extend the time period, if you think you do need to extend it, this would be it because there is clearly an issue that at least two parties have at one point or another identified to this Board as being in need of the Board's consideration, and frankly, I have spoken with other neighbors as well, this is an issue that I think many of the neighbors want you to determine, you are the Zoning Board, you have the final word in zoning matters. As for the second prong of when you can exercise your authority for good cause, when no party will be unduly prejudiced. We filed our application of the administrative appeal on the 30th day after the Planning Board approved site plan approval. That is not unreasonably long. That is the time period in which someone could have appealed the site plan approval to the Superior Court. So by the time we filed an appeal, they didn't yet have a final non-appealable site plan, they were simply at the end of an appeal period. So for that reason this appeal doesn't set them back, it doesn't unduly prejudice them, so we ask that you exercise good cause if in fact you determine that the time began to run on January 11, 2016.

Mr. Driscoll stated the notice for the January 11, 2016 meeting, I don't know if you were aware, but the neighborhood, as well as all of the abutters, were kind of caught unaware of this major-scale project and then appeared on January 11, 2016 and there were quite a number of us that were here. There was an awful lot to digest at that meeting because they were looking for final approval that night. To us it was the first that we had even heard of any such thing and that is why in the course of the discussion that night they delayed for a couple of weeks any decisions on that. It gave us a little bit of time, and obviously somebody filed an appeal, but we were not aware, quite a few neighbors, until after that January 25, 2016 meeting that anything had been withdrawn. That is kind of where we stood. Since that time obviously although there were quite a few people in the neighborhood the application has to be submitted by a direct abutter and because one of the other abutters had already withdrawn, then I kind of stepped in. But there are many other people behind this. Councilor Duschatko asked are you saying you did not get proper notice of the January 11, 2016 meeting? Mr. Driscoll replied no, I'm not saying that. It was that we were not aware that it was looking for final approval that night. We were just blindsided by the scale of the project, and that particular night there was an awful lot to digest and go through and say this is an issue for us, this other issue, there were quite a few issues on the table and we just needed some time, so one of the neighbors did file an appeal immediately.

Mr. Swiniarski asked is January 11, 2016 the first time that you became aware of the administrative decision as far as the interpretation of the accessory use? Mr. Driscoll replied right. That was amongst many other things. Mr. Swiniarski stated that part I understand. I don't have a record of the proceedings from the site plan review, but was

that interpretation actually discussed at that meeting? Do you know? Mr. Driscoll replied no. It was on January 25, 2016 that the Planning Board did question Mr. Sawyer as to this basin being located in a residential/agricultural buffer zone, and based off from what he said that night historically they have used that type of thing, and then the Planning Board went ahead with their decision because it was permitted, that type of thing. Mr. Swiniarski asked and as far as you remember, the first time that came up was on January 25, 2016? Mr. Driscoll replied right, because there was an awful lot at that first meeting, and I don't remember 100 percent, but I don't remember any discussion of the accessory use being the cornerstone. Councilor Duschatko stated I'm also not aware of the proceedings, but if the Williams' filed an appeal after the meeting on January 11, 2016, there must have been some type of discussion regarding the retention zone or they would have nothing to appeal against. Mr. Swiniarski asked was it an appeal of this issue? Mr. Driscoll replied I'm not 100 percent sure, but I believe it was more in relation to the fact of just allowing it to be located in a buffer zone, not why. Councilor Duschatko asked okay, so you aren't aware of their appeal? Mr. Driscoll replied it was appealing the fact that suddenly this infiltration basin appears in a buffer zone. That was it. Attorney Reimers stated the fact of Mr. Sawyer's decision was noted in the documentation of the January 11, 2016 hearing, but I think what Mr. Driscoll is saying is that there wasn't really a substantive discussion of it at that hearing, although the Williams' picked up on it for reasons of their own.

Vice Chairman Thomas stated to square away my own personal timeline: The decision that you are appealing here was a decision that was made November 2, 2015? Attorney Reimers replied correct, via an email to a representative of the applicant. Vice Chairman Thomas asked when was the first time that this decision was made in a public forum? That was something I don't remember seeing. I'm trying to figure that out. Some people are saying it is January 11, 2016 and some are saying January 25, 2016. Attorney Reimers responded according to Mr. Sawyer January 11, 2016, I believe, was when it was first made public in any way and Mr. Driscoll is saying that it wasn't until January 25, 2016 that there was really a robust discussion of it in public. Vice Chairman Thomas stated I am trying to quantify the difference between robust discussion because it seems like a robust discussion comes about because people know about it but that doesn't mean it wasn't known about. I'm trying to figure out if it was known about on January 11, 2016 or if it was going to be published in the agenda for January 11, 2016, that is what I'm trying to wrap my head around right now is when people knew about it versus the discussion because it seems to me that if it was known about by a certain time point and someone was able to submit some sort of an appeal for that, then there must have been some discussion at least within that party about that specific thing. And then if the appeal was withdrawn, then of course people may not have known that it wasn't, but to say that it wasn't being discussed before that time period doesn't seem to make sense if someone was able to file an appeal at that point in time. Mr. Driscoll responded that particular night of January 11, 2016 there were discussions about so many topics that related to the structure, the size of the structure, you go back and kind of look at it. I don't know if there was ever a discussion pertaining to this accessory use. The only time I remember any discussion that night, and I wouldn't even say it was robust, it was just a question from the Planning Board to Mr.

Sawyer about where is this allowed (to put a infiltration basin into a residential/agricultural district), and that is when that brief mention of historically we have allowed this, but I don't remember any discussion in the first meeting. Councilor Duschatko asked do we know when the Williams' appeal was withdrawn? Mr. Driscoll replied I know it was after January 11, 2016. Mr. Radke stated if you read the Supreme Court decision, this is the old case, if you look at Page 7, it says "By merely accepting jurisdiction of the site plan application the Planning Board made no decision regarding zoning compliance the Planning Board rendered its zoning determination." When the Planning Board approved the plan, that was where the appeal started from, and this case seems like almost on all fours with ours. The Planning Board made its final decision on January 25, 2016; their appeal is timely if we consider that, so I would say their appeal is timely. Mr. Swinarski stated I see what you're saying. Essentially regardless of when it was made public, no party and interest would know that it should be something appealed until they know it was approved by the Planning Board. Mr. Radke stated that is when in essence they determine whatever decision was made by the Zoning Administrator was what they were adopting, so until that point you don't really know. Councilor Duschatko stated I agree with that, but we were informed that there are some people here that might have a different opinion on that.

Ms. Stirling asked do you know why the Williams' withdrew the appeal? Mr. Driscoll replied I don't specifically. Attorney Reimers replied I do not. Ms. Stirling stated it just seems unusual.

Chairman Morin asked for any comments from the public on the timeliness matter.

Attorney Thomas Quarles, Jr., Devine, Millimet & Branch, stated I submitted before the meeting began a 3-page letter dated today that should have been distributed to all of you; I hope it was. Chairman Morin replied we just received it. Attorney Quarles stated that gives you a summary of our position on both the issue of timeliness as well as the merits issue challenging the drainage basin as a valid accessory use. Chairman Morin stated you can give us a synopsis of what you have here.

Attorney Quarles stated the standard is not when Mr. Driscoll learned about the decision of the Zoning Administrator, it is when it became public knowledge and he is on notice that he should have learned about it and that is unquestionably on January 11, 2016. I'm reading from the staff report, which is dated for the January 11, 2016 Planning Board meeting, which from our records was emailed to us on January 8, 2016, and on this topic says as follows under heading Stormwater, Utilities and Environmental; "Portions of the infiltration basin are located within the residential district. The Zoning Administrator has determined that the drainage system is an accessory use and permitted within the district." Our position is, and again, we're not taking a position that Mr. Driscoll needed to start reviewing Town records on or after November 2, 2015 to see that the Town Administrator made the decision back then, but our position very much is that when it becomes public, the public is on notice and this is the decision of the Zoning Administrator made on that date. They had 30 days to appeal; there is no question they didn't appeal within 30 days. As to the Williams', there was a question

about why did they withdraw their appeal. They met with my client, as did some other members of the Grey Rock Road community, and on Tuesday, January 26, 2016 they emailed my client saying I am happy to tell you we are withdrawing our appeal and then there is some more detail. Again, Mr. Driscoll can't bootstrap his neighbor, presumably they were in touch or could have been in touch, you can't have a loose standard of subjectivity as to when somebody thinks they knew or should have known about something like this. It has to be objective, it has to be a date certain, and that date certain is January 11, 2016. Mr. Driscoll's attorney is correct that you can apply a good cause; otherwise if you don't feel like they have met the 30 days and we certainly feel that they haven't. But as to the case that has been discussed here and was cited by the Zoning Administrator, we believe that is distinguishable and we have discussed that in our letter on *Accurate Transport, Inc. v. Town of Derry* Supreme Court decision from last August. What distinguishes that case factually from this case is that that had a similar fact pattern but in their case the decision and I'm not going to call it a decision, it was a recommendation from a technical review committee of the Planning Board, that was how the zoning decision came out of that case. It was a recommendation, it wasn't a decision. In contrast, the November 2, 2015 email from your Zoning Administrator, Mr. Sawyer, says right in it, "My decision is that the infiltration basin is a valid accessory use." I think I have hit the points that have been raised both by the members and Mr. Driscoll. I'm happy to address any questions, and I am also happy if you would like to go onto the merits of the matter as well.

Mr. Radke stated I severely disagree with your interpretation. I don't see anything in Mr. Sawyer's staff report. He's making an interpretation; that's all he did, and the Planning Board accepted the proposal for consideration on January 11, 2016, and to me that is on all fours with the Supreme Court case. I don't see where you come off with that. Until I render a decision as to what a permitted use is, there is no appealable decision through that Town of Derry decision. Attorney Quarles stated 30 days from January 11, 2016 is out of time. They didn't file within 30 days of January 11, 2016; they filed within 30 days of January 25, 2016, which was the subsequent meeting at which the Planning Board approved the site plan. Mr. Radke stated there is a hard sentence in the case that says by merely accepting jurisdiction, and that is all they did on January 11, 2016, they made no decision regarding zoning compliance. That is what the Derry case says. "Accepting a case for consideration is not rendering a decision on it." Attorney Quarles responded and my point is that is when Mr. Driscoll knew about it.

Mr. Swinarski stated this is a hard decision we're going to have to make, and I understand the distinction you make. There is a recommendation from a review committee versus what we have characterized as an interpretation by our zoning enforcement officer. The problem that I have a hard time reconciling with that interpretation as a whole is that if you are to take that position, you are saying that that decision has to be appealed even though there is a very good chance there is no reason to appeal it. Why would these folks have appealed that decision without knowing that the Planning Board had approved it? Attorney Quarles replied they were still within that 30-day window. They could have appealed by February 11, 2016 roughly, the final approval took place on January 25, 2016, and so the timing is such

that they knew. Mr. Swiniarski stated so we have cut that 30 days down to two weeks and that is not the intent. This is difficult, this is not cut and dry, but I understand your distinction and it is one for sure, but it would be a very difficult result to say that anyone would have to file an appeal the instant they became aware of any decision while knowing that ultimate approval was still pending. It costs money to do that; it is a lot to ask somebody to appeal every single minor decision along the way before the ultimate approval is granted. If anyone exercised any degree of common sense, you would wait until the ultimate approval is granted. That is what I think, so I think by doing that, as I just said, with your interpretation, we reduced it from 30 days to approximately two weeks. I don't think that is the legislative intent here.

MOTION by Ms. Stirling to move into deliberations on the timeliness of the filing of the appeal of an administrative decision. Councilor Duschatko duly seconded the motion. Vote taken – all in favor. Motion carried.

Ms. Stirling stated I think Mr. Swiniarski's and Mr. Radke's arguments are solid. I agree. Chairman Morin asked that it has met the timeline? Ms. Stirling stated but also with the dissection of what he is saying, I think that enhances the legal opinion we have in front of us through this case. Mr. Swiniarski stated I think it is important to recognize the factual distinction with *Accurate Transport, Inc. v. Town of Derry*. I don't see the distinction in the legal interpretation and the application of the law to the facts. I think when you get right down to the intent of what this decision, *Accurate Transport, Inc. v. Town of Derry*, tries to accomplish; I don't really see a distinction in the application. I see the distinction in that little fact. Chairman Morin stated I agree with you.

Vice Chairman Thomas stated I just think that at some point we may end up needing to fine tune Section 8.2 of the Rules of Procedure because it doesn't really distinguish between when the 30 days is because it is saying 30 days of a decision, and technically there was a zoning decision that was made, it just happened to made within the application going to the Planning Board. Some of the parties are saying the decision was already made and technically that zoning decision was made by the Zoning Administrator and that zoning decision was made public, so technically that is the start point. But if it is within the part of a bigger plan that hasn't been approved, then what you can say is like what Mr. Radke's point is, it is in the purview of a bigger plan and that bigger plan hasn't been approved yet, so really how can you go after. I think at some point the Board may need to look at that, or the Town Administrator, to make that a little clearer because that is the debate we are having here. Mr. Swiniarski stated I think we certainly do, and an important point of clarifying is that that is not the date of the decision but it has to be when a party becomes aware of that decision. That has to be clearer as well because there is no way the law intends the time to start running when the decision is made. Let's say it was a secret decision; that is certainly something that is probably wrong and could be appealed. Certainly if we were to literally interpret it just as written now, all we have to do is keep it secret for 31 days and it is done. That is not the legislative intent, so I agree. There is certainly a lot of rewriting that needs to happen there, but we won't do that tonight.

Councilor Duschatko stated even if we accepted January 11, 2016, we basically can waive our 30-day period for purposes of equity and justice. Mr. Swinarski stated I agree with that also. Councilor Duschatko stated as a matter of fact, it was right into the same framework saying accepting it on January 25, 2016, and I think that covers both bases without having it get into undue interpretation of precedent cases. Chairman Morin stated I agree with that.

Chairman Morin asked Ms. Elmer, do we have to do a motion on this or just a vote? Ms. Elmer replied I would do a motion. Vice Chairman Thomas stated we may all come to the decision that we're going to be okay with the timeliness or not be okay with the timeliness but waive it. Do we all have to have the same opinion? Ms. Elmer replied whatever everyone decides. If you decide that it is timely but you don't get a majority vote in the positive, then that motion fails. If you want to just say you want to go into full deliberations and decide at the end, you have to make that motion. Mr. Swinarski asked you are saying do we need to state the reasons for determining whether it is timely or not? Vice Chairman Thomas replied yes. Ms. Elmer responded I would. As long as the motion is clear.

MOTION by Councilor Duschatko that the Zoning Board of Adjustment waive the 30-day rule on the timeliness of filing the appeal of an administrative decision by Brian Driscoll, and after discussion the Zoning Board of Adjustment does so in the interest of substantial justice to the applicant as the Board feels he is entitled to be heard. Ms. Stirling duly seconded the motion. Vote taken - all in favor. Motion carried.

MOTION by Ms. Stirling to move out of deliberations on this application. Vice Chairman Thomas duly seconded the motion. Vote taken – all in favor. Motion carried.

Attorney Reimers stated as you know I represent Brian Driscoll, an abutter to the proposed use. The property of the proposed use is partly in the commercial zone and partly in the rural and agricultural zone, and I will refer to that zone as the R/A district. The applicant proposes to build a 22,265 square foot banquet center and place the commensurately sized infiltration basin in the residential portion of the property. At its closest, according to my measurements of the map, the infiltration basin will be less than 30 feet from one abutting property line and approximately 50 feet from another abutting line. The infiltration basin includes, this is according to the plans that were submitted, an embankment, a berm, a rip-rap apron, an inflow section, a sediment forebay, the infiltration basin itself, rip-rap infiltration, and a rip-rap spillway. It appears on the plan to be about 130 feet long and about 70 feet wide, which would put it at about 8,500 square feet. Mr. Sawyer made the determination that the Zoning Ordinance allows this commercial grade infiltration basin to be built on the residential portion of the lot. In his recent staff report Mr. Sawyer stated, "I do not personally believe that commercial accessory uses should be allowed in the residential portion of a lot that is split-zoned, however, I am bound to follow a defined term in the ordinance." I appreciate Mr. Sawyer's candor, and I agree with his assessment of the infiltration basin

as “a commercial accessory use.” Mr. Sawyer’s decision is apparently based solely on Article 275-6, Definition of Accessory Use, and it actually appears to be based really on one word in that definition. An accessory use is defined as “A use which exists on the same lot in which is customarily incident and subordinate to the principal use.” This though is just a definition; it is not a zoning provision per se. It defines what an accessory use is but it does not override the remainder of the Zoning Ordinance. Basing the decision that a commercial use is permitted as of right in the R/A district, only the definition of accessory use is letting the tail wag the dog. The Zoning Ordinance is fundamentally based on zones/districts in which particular uses are allowed and disallowed; basically a separation of incompatible uses. This principal is clearly stated in what may be the most important provision of your Zoning Ordinance, which is Article III, Section 275-10 General Provisions. The first line says “Except as herein provided, no building or land shall be used except for the purposes permitted in the district as described in this article.” This should be the starting point for tonight’s inquiry. “Except as herein provided, no building or land shall be used except for the purposes permitted in the district as described in this article.” So applying this to the applicant’s property: “no land shall be used except for purposes permitted in the district.” This means that the portion of the property, land, in the R/A district can only be used for purposes permitted in the R/A district. A commercial infiltration basin sized to accommodate a 22,265 square foot banquet facility is not a permitted use in the district. Going back to Article III, Section 275-10, “Except as herein provided, no building or land shall be used except for the purposes permitted in this district.” So the phrase “except as herein provided” this requires us to look at other portions of the Zoning Ordinance to see if there is any language affirmatively permitting this type of infiltration in the R/A district because otherwise Section 275-10 does not allow it. I think that Mr. Sawyer’s position is that the accessory use definition is the “except as herein provided” provision. But like I said, the accessory use definition is simply a definition, not a provision altering what is allowed or not allowed in districts. The phrase “except as otherwise provided” refers to preexisting, nonconforming uses, special exceptions, maybe variances, things of that sort. The use of the word “lot” in the definition of accessory use does not alter what is permitted in a particular district; it just describes what an accessory use is. The definition clearly did not take split lots into account, but even if there was a better word than “lot” that could have been used, the use of the word “lot” does not create permitted rights of use where otherwise there are none. Using the word “lot” this way would be inconsistent with how the word “lot” is used throughout the Zoning Ordinance. For example: In the table of uses certain uses are permitted in certain districts subject to certain conditions listed in the footnotes. There is something like 37 footnotes and many of them refer to “lot.” The footnotes repeatedly refer to a use being allowed if the lot is of a certain size. For example: A nursing home is allowed in the R/A district if the lot is at least 5 acres. The repeated use of the word “lot” in conjunction with allowed uses in particular districts shows that there is an embedded presumption in the Zoning Ordinance that a lot is in one particular district. I believe the Zoning Ordinance does not address split lots. Also, the definition of minimum lot size, actually called “Lot Size, Minimum” in Section 275-6, defines it as “the smallest lot area established by the Zoning Ordinance on which a principal use or structure may be located in a particular zoning district.” So minimum lot size is clearly tied to the district, which is consistent

with the use of the word “lot” in the table of uses footnotes that I mentioned. Going back to Article III, Section 275-10, “Except as herein provided, no building or land shall be used except for the purposes permitted in the district as described in this article.” The word “lot” in the accessory use definition should not be interpreted inconsistently with the rest of the Zoning Ordinance and is not the place in the Zoning Ordinance providing an exception that Section 275-10 holds open the possibility for and it is not the place where split lots are treated.

Attorney Reimers continued the definition of accessory use does shed additional light on the issue. The definition of accessory use is “A use which exists on the same lot and which is customarily incident and subordinate to the principal use.” The Table of Uses at attachment 2.5 permits, as of right, customary accessory uses in every district.” And it goes without saying that the customary accessory uses permitted in the R/A district are different than the customary accessory uses allowed in the office district, or in the Service Industrial district. Of course the Table of Uses permits customary accessory uses in each district that are customary to the uses allowed in that particular district. There is not a master list of customary accessory uses that are allowed in every district because that wouldn’t make any sense. You can’t mix and match principal and accessory uses, which is what this decision allows. A close reading of the Zoning Ordinance requires that in a district the customary accessory uses that are allowed are the uses customarily accessory to the primary uses allowed in that district. Deciding that a commercial accessory use is permitted as of right, which is what this decision does in the R/A district, just because this is a split district lot goes against the Table of Uses. In his November 2, 2015 email Mr. Sawyer stated that “His typical expectation is that an accessory use would only be permitted in a zone in which the principal use is permitted” and this is the position I am arguing for tonight. This is a reasonable expectation because it is consistent with the Table of Uses, consistent with the separation of uses into districts, consistent with Article III, Section 275-10, and consistent with how the word “lot” is used throughout the ordinance. Looking too narrowly just at the definition of accessory use led to a decision that is not consistent with the Zoning Ordinance. In his November 2, 2015 email Mr. Sawyer also explained that the Bedford Zoning Ordinance is a “permissive ordinance” because “unless something is specifically called out and allowed in the Zoning Ordinance, then it is not permitted.” I respectfully suggest that Mr. Sawyer did not follow this principle that he quoted. Allowing a commercial accessory use to be placed in the R/A district is not specifically called out and allowed. The word “lot” certainly doesn’t do this; in fact, the Table of Uses allowing customary accessory uses in each district specifically prohibits this as it limits each district to the accessory uses that have been customarily accessory to the uses permitted in the district, not uses that are customarily accessory to the uses of other districts. Even if there is some conflict between the accessory use definition and the Table of Uses section about customary accessory uses, which I do not think there is a conflict, Article 275-5 requires the Board to make the most restrictive interpretation when making a decision. Mr. Sawyer’s decision, however, is the most permissive as it would allow in a district as of right the accessory uses relating to prohibited uses just because you are dealing with a split-zoned lot. For example: a drive-thru ATM may be accessory to a bank and this decision would not only allow but

permit as of right such an accessory use in the R/A district if a bank owned a split lot. This decision allows the commercial part of a split lot to overtake the residential portion. If Bedford intended that a lot split between the R/A zone and the commercial zone would be permitted as of right, to treat the residential portion of the lot for commercial purposes, why would there be split lots at all. Rather than extending the commercial district X number of feet along each side of Route 101, regardless of the depth of the lots, the planners could have made the commercial district encompass the entirety of the lots fronting Route 101; that would have obviated the existence of split lots. Instead they intentionally created split lots and the reasonable deduction from this is that they intended that the area within the commercial designation of the split lot be available for commercial uses and the area outside of the commercial designation on that split lot not be available for commercial uses. In his staff report Mr. Sawyer states that his decision was consistent with what has occurred when the Weathervane owned the site and with Route 101 Plaza. These examples, I argue, do not compel the Board to agree with Mr. Sawyer's decision. That the Weathervane septic was partly in the R/A district does not mean that it was a good idea or allowed by the Zoning Ordinance. The issue of what the Zoning Ordinance allows in these split-zone cases apparently was never brought to the Board's attention. Here we are tonight talking about it maybe for the first time, and the installation of septic systems decades ago should not drive the Board's interpretation of the statute. The residential neighborhood, I understand, did not even exist when the Weathervane went in. Also, the applicant's infiltration pond will be closer to and be more visible by the abutting residences than the Weathervane's septic systems were. With regard to Route 101 Plaza; the septic systems of the Route 101 Plaza are also different than the infiltration pond. The Route 101 Plaza's septic systems abut a wetland and Wallace Road, and I got this information from the attachments from Mr. Sawyer's staff report showing the plans of Route 101 Plaza, Weathervane and the current applicant. Route 101 Plaza's septic systems don't abut residential abutters as in this case. Route 101 Plaza and its septic systems are not in the middle of a residential neighborhood like this proposed development is. They do not affect actual residences like this infiltration pond will. Again, there was nobody who brought the issue before the Board but the existence of those septic systems does not compel the Board to uphold Mr. Sawyer's decision today. The applicant's situation is also different from the Route 101 Plaza situation because this property is part of the open space committee's designated green infrastructure and upholding this decision will have implications such as this wherever split lots exist.

Attorney Reimers stated reversing Mr. Sawyer's decision would give owners and purchasers of split-zoned lots an easy to follow guideline. Each portion of the property can be used in accordance with what is allowed in each district, this would result in appropriately sized businesses adjacent to a different district, and this would prevent an oversized commercial facility from being introduced into a largely residential neighborhood such as the one at issue here. The business won't be stopped, but it must conform with the language and the principles of the Zoning Ordinance, and if particular circumstances of a lot create a hardship for the owner, the owner can request a variance, but as the decision now lies, these commercial uses would be in the residential district as of right with no oversight by the Zoning Board of Adjustment.

Reversing Mr. Sawyer's decision would resolve any ambiguity that split lots now have. It would also remove the vulnerabilities of abutting residential owners and they would know what is allowed and what isn't in their neighborhood. Thank you.

Vice Chairman Thomas stated you said it would affect the abutters. In what way? Attorney Reimers replied the closest points seem to be 30 feet to 50 feet from the abutting lots; I believe it will be visible from those lots. As you know, there is already an existing buffer required for residential neighborhoods, which just underscores the Zoning Ordinance's acknowledgement that residential areas need to be buffered. Mr. Swinarski asked what is that buffer? Attorney Reimers replied I'm not sure. I thought it was 50 feet, but I'm not sure. The affect that it will have also is on property value, and anyone thinking about buying one of these homes, they are going to look at the property, look at its proximity to a parking lot adjacent to an 8,500 square foot infiltration basin with rip-rap, which is not customarily associated with being near residential homes. It is a commercial infrastructure that is just visibly incompatible with the abutting residential lots.

Vice Chairman Thomas asked when looking at the site plan, you said 8,500 square feet. How much of that is actually in the residential zone? The whole thing is 8,500 square feet but it doesn't look like half of it is even in there. You keep quoting that number so I'm just trying to get a general sense of what is actually in the residential zone versus what is the actual size of the infiltration basin. Attorney Reimers responded it looks to me like virtually the entire thing is if we are looking at Sheet 5 of 18. Vice Chairman Thomas asked you are just talking about this area in the top right on the posted plan? Attorney Reimers replied yes. Vice Chairman Thomas asked you are defining that area in the top right as 8,500 square feet? Attorney Reimers replied yes, that is what my calculations came out to be. It looked to be roughly 120 square feet x 70 square feet, which happened to be the approximate number my client quoted me as this being 8,500 square feet. I looked at the map and I came up with 8,400 square feet, and it looks to me like virtually the entire thing is in the residential zone, assuming that the dotted line delineates the residential zone. Mr. Swinarski asked what kind of buffer exists between your client's property and where the infiltration basin is designated to be? Mr. Driscoll replied primarily tree growth, a stonewall, things of that nature. Vice Chairman Thomas asked is that stuff going away? Mr. Driscoll replied portions of it either are going away or they need to have access to the infiltration basin for maintenance purposes. That would clear access into that. Councilor Duschatko asked where is that access coming from? Mr. Swinarski stated what I'm getting at here is if the problem is the appearance of this, that can be solved. But if this is a means to assert an objection to the project overall, that is a different story.

Mr. Swinarski stated I'm still having a hard time figuring out what the intent of split-zones is. I would like to ask Mr. Sawyer to come up and explain that, if it is even possible. I do understand your argument, but if there is a buffer zone and we are essentially saying that the reason for the split zone is to provide a buffer zone, then why do we have a buffer zone. There has to be some difference, it can't be that the split zone is there to say when we split it, we really meant the residential part of that lot to be

a residential lot only because we have a buffer zone to do that. We essentially have two things that are conflicting with each other. I don't know why we have split lots. I think in hearing this I don't think it is a good idea at all, I know it is something that happened a while ago, I don't know if we as the Town have any information as to what the intent was behind that and I think when Mr. Sawyer comes up, he might be able to tell us what he knows. Again, the way you are stating this, there is absolutely no type of commercial activity that can go on in the residential portion of a split lot. Is that essentially your argument? Attorney Reimers replied there cannot be a commercial accessory structure or use placed in the residential portion of a split lot. Vice Chairman Thomas stated you are essentially arguing that the residential portion of a split lot really should just be a buffer zone if you are using the commercial portion for just commercial, then there should be nothing that goes in between because that is what the residential area is for. Attorney Reimers responded your Zoning Ordinance appears to say that. Vice Chairman Thomas stated but it still does allow though that as long as things are on the same lot, you can still have an accessory use, which is what Mr. Sawyer's argument was. I guess the question being is when we do a lot of looking at things, we sort of say is the lot intended to be used as it was zoned and the ordinance kind of says there is an allotment for that. It is a semantic thing, but I'm just trying to get around that in my head. Attorney Reimers stated that lot could have easily been zoned as all commercial but it wasn't. Vice Chairman Thomas stated but we can't use that as an argument because it wasn't, so we have to deal with what we have. Attorney Reimers stated because it wasn't all zoned commercial, the intention was that the residential portion would be subject to the residential portions of the Zoning Ordinance. Councilor Duschatko asked then why were septic systems allowed there in the past if that was the case? Attorney Reimers responded I can't speak to that. Councilor Duschatko responded we can't speak to the reason why it was zoned either. Ms. Georges stated I worry about sort of presuming intentions on something that is not clearly laid out unless we have clarity on it. I think we have to be careful about that. Councilor Duschatko asked isn't it a requirement that this is going to be heavily treed and buffered along the berm by replacing the trees that are there now? Vice Chairman Thomas stated that is what is on the plan. Attorney Reimers responded I think they have trees 10 feet apart or something like that. Councilor Duschatko stated it seems like rather wide spacing. What is there now? Mr. Driscoll replied trees. Councilor Duschatko asked are they saplings, oak trees, evergreens? Mr. Driscoll replied I can't speak to the property side of the adjacent property, but to my side there are standing trees. We are not talking saplings. Councilor Duschatko asked is there a water flow there that is uncontrolled? Mr. Driscoll replied there is water flow definitely to my side. I can't speak necessarily to the other side, but certainly to my side I had an issue going way back with the Town with the Weathervane, and I addressed that with the Town. They came out and they inspected and agreed that I had some contamination, and that water flow exists still to this day, even in the winter, so there is still water flow. Councilor Duschatko asked how is the current contamination handled? Mr. Driscoll replied at the time they kind of washed themselves of it and the Town said you will have to deal with the Weathervane because at the time asked can you prove that it came from the Weathervane. I said not unless we do a dye study, and I talked to the Weathervane and they kind of shied away from that. Councilor Duschatko asked so wouldn't a retention basin actually help the

situation rather than make it worse? Mr. Driscoll replied I think we are talking about water flow here and yet what I'm kind of looking at is just that entire buffer zone rather than the specifics of the water. Councilor Duschatko stated I think the buffer zone is still maintained. The buffer zone is called for in the zoning. Just because the lot happens to be split because of a zoning line that was drawn 30 – 40 years ago, probably based on the location of Route 101 more than anything else, it doesn't mean that becomes an automatic buffer zone. Mr. Swiniarski stated one of the other things I think about is do we really think an infiltration basin is a commercial use. We have infiltration basins in residential subdivisions frequently in this Town and in a lot of places. This is very difficult. We are dealing with part of our by-law that doesn't make a lot of sense, and we're being faced with the task of interpreting something that I think is difficult.

Mr. Swiniarski stated one thing I would like to ask you, and this does not bear on the merits of your application, but will help me. Do you know of any other jurisdictions in New Hampshire that have split-zoned lots? Attorney Reimers replied there are other jurisdictions with split-zoned lots. Mr. Swiniarski asked are they fairly common? Attorney Reimers replied I can't say half of them, but yes, Bedford is not alone in this. Mr. Swiniarski stated where I'm going with this is I would like to see how other places have interpreted the intent of a split zone, and also we are going to hear from other parties here as to what they think, but to me that is the underlying question that we're faced with here. What is the intent of the split zone? Why do we have a split zone? Was it to prevent any sort of commercial activity in that split-off part, which was it effectively the intent to create a noncommercial buffer zone or was there some other intent. Then the second question is, is this commercial? That is a finding of fact that we can all make by looking at the details here. I certainly want to hear what everyone else has to say. Attorney Reimers replied it is commercial because it is serving and connected to a commercial use, and Mr. Sawyer described it as a commercial accessory use. If you had a home with a retention basin, perhaps that would be a customary accessory use for a residential lot. Mr. Swiniarski responded I don't buy that. Attorney Reimers continued the size is the distinguishing difference. Vice Chairman Thomas asked so if this was a residential lot and someone was building a 20,000 square foot mansion with that thing, if it was just the same distance to your place, would you still have an issue with it? So is it the distance of how close it is or is it just the fact that it is there? Attorney Reimers replied I'm not sure that would be customary. Vice Chairman Thomas stated I'm not saying what is customary and what is not customary, I'm just giving you a hypothetical; we have been stating hypotheticals all evening, so I'm just giving you that. Honestly, I'm just trying to get to the core of why we are here. We talked about appearances. In the Planning Board's decision they included that they had put additional trees in there and that had to be approved by the Planning Board, so it just seems like the visual aspect of it is addressed. So I'm trying to get to the core of exactly what it is you don't like about this being right there. Is it distance, is it the water contamination, which we have kind of looked at, and thought that a retention basin would be better than having the water flow, or is it just the fact that it is, and Mr. Swiniarski brought this up earlier, is this a way to have an objection to the project or is it just objection to that piece of it? Mr. Driscoll replied I think the overall issue was usage of that buffer zone period. If I'm not mistaken, as Attorney Reimers's mentioned, that

was also designated by the Town of Bedford as a green open space, which is designed to be left undisturbed. That was a secondary thing that has not necessarily been brought out, and it was kind of designed as a connection thing all the way down to Ash Bog. So that was kind of an issue that if a commercial development is allowed to overtake the designated open space by the Town of Bedford and kind of infringe on a regular R/A buffer zone, then where do residents stand. I think that is probably what needs some addressing, that as residents we feel where does it stop. Uses are allowed to take place in an area that we felt was protected, and then what is next. Vice Chairman Thomas stated but I feel like that is the Zoning Ordinance in the sense of things like setbacks and we have those things in place. So I feel like you have a buffer zone and a setback; it is almost as if you have two things, so which are you supposed to abide by. I see your argument, but I did a little thinking that any split-zone lot then you are going to say the commercial has to be even smaller because now not only do they have to abide by the buffer, now they have to abide by the setback within that buffer, so now you're talking about really restricting that commercial use even though it is one lot. Mr. Swiniarski stated under that interpretation, what you are saying is, if this is an accessory commercial use simply because it is accessory to a commercial use, then what you are saying is the residential land in a split-zone lot can't be used. It is essentially a non-buildable buffer zone, a no disturbance buffer zone. I don't know if that is the intent. That might be the intent of split-zoned lots. I don't know. Vice Chairman Thomas asked if it is residential, could they put an apartment there? Would it bother you? Because it is residential. Attorney Reimers replied if it is allowed by the Zoning Ordinance, they could use it in any residential way that was allowed by the Zoning Ordinance. Mr. Swiniarski stated I think our Zoning Ordinance does not answer the question here. Attorney Reimers stated I would suggest that a purchaser of that lot is going to know how much is commercial and how much is in a different district, so there is no surprise for them. Mr. Swiniarski replied yes, they do. Vice Chairman Thomas stated but they have also known that there has been commercial uses of that residential lot in the past. So what is to bear them to think that there were septic systems there already that were attached to a commercial project that was already there, which you have already said. So what is it to then say to them we shouldn't do this but it has already been done, the precedent has been set. And then along with that, the abutter on the other side, almost equal distance to Mr. Driscoll, seems to have no objections to the project. Attorney Reimers responded I can't speak for them. Vice Chairman Thomas responded but we can because that is the Williams'. They don't have an objection to it. That is what I'm looking at when I see this thing. Mr. Driscoll stated I'm not speaking for anyone else but I would kind of relate to the fact that there are a number of neighbors that have objections. I am just kind of coming forward as the applicant, but privately there have been many concerns that have been voiced throughout the neighborhood as well as direct abutters, not just myself. I just happen to be at the forefront.

Chairman Morin stated I'd like to bring Mr. Sawyer up so he could possibly answer some of the questions that have come out here or at least give his perspective of this. The existing conditions map was posted. Mr. Sawyer stated unfortunately I don't believe we have loaded a zoning map onto the computer but we could look at the

zoning map and try to explain it a little bit. Looking at the far right-hand side of the map you can see that the zoning boundary line coming across the back portion of the lot. This zone was established, I believe it goes all the way back to the original zoning in Bedford in 1953, and it is set 400 feet off from the right-of-way line. In this case it is not the centerline, in most communities you would see a zone offset being from a centerline of a road and in this case it is 400 feet from either side of Route 101 is the way that zone line gets established essentially to the north of the property. To the left it was a distance being offset, I believe, from a brook in this instance or it could have been the distance to the Hardy Road intersection, but those numbers are dimensions right on the zoning map and you can see those as defined distances and they correlate well to the zoning description for this district. And they have remained essentially unchanged since the original adoption of the zoning map. What you can fully see is the next commercial property or the next property to the east. Their property line does coexist with the zoned boundary line, so it has no impact where that 400 foot line ended up; it had nothing to do with where the property lines happened to be. I believe the property to the east was later subdivided, and they probably subdivided it based on the zone boundary line but this property existed prior to that. It had a commercial structure on it prior to zoning, it had a restaurant, and I'm sure the owner can give you much better details about all the uses that have been on the property prior to zoning. It is a different property and they are really independent of each other, the property lines and the zone boundary lines. We are a lucky community that we truly only have a couple of handfuls of properties, maybe a dozen properties, I haven't counted them all, and we have looked at all of them trying to prepare both the November decision and then preparing for your discussions tonight to try and identify those. We have very few and maybe that is why our ordinance doesn't address it in more detail than it does.

Mr. Sawyer continued I do want to very much caution the Zoning Board from going too much further into the discussion about whether it is the right basin, whether it is the right size, whether it has enough trees around it, any of those things. That is not before this Zoning Board tonight. You cannot talk about or decide that maybe it should have more trees and therefore it is okay. What is before you tonight is really just that definition of accessory uses, it is not whether the restaurant is the right use for this property or whether they have planted enough trees to satisfy you or if the basin is too deep or not deep enough. None of that is before this Board; it is really that definition of accessory use and whether you agree, again, with my interpretation that this is a customary and incidental accessory use. In this case it is to a restaurant and that that definition of accessory use comes into play, what has been quoted to you in Section 10. We absolutely do look at the Zoning Ordinance collectively in making these decisions and we did in November. I'm sure Ms. Elmer can confirm that we had plans out all over the Planning Department looking at different things and trying to analyze this. You can tell in my email this is not how I anticipated I would be making this decision for the owner of the property. I thought I would be coming out saying no, you can't do this, but it was the text of the ordinance, it is the text of this definition taken collectively with everything in the Zoning Ordinance, including the Table of Uses, which does say accessory uses are permitted in all zones, so therefore, an accessory use is permitted in a residential zone. Granted there is a great distinction between commercial accessory, residential

accessory, but I believe the Board has hit on that accurately. We have much larger detention basins on some of our residential projects in Town. We have a couple of acre detention basins, it is not the size, and you shouldn't really go down that discussion any further. It doesn't matter that it is 6,800 square feet. That is the heart of the matter. You are really focused on this, not any design features. Something that came up a lot in the text portion of the appeal is calling this a structure. I did not go into it in my staff report but there is also a defined term of a structure. I can certainly read that to the Board. "Structures: A combination of materials for occupancy or use such as a building, bridge, trestle, tower, framework, above-ground tank or group of tanks exceeding a total of 500 gallons, tunnel, tent, stadium, platform, pier, shelter, wharf, bin, sign, fences, retaining walls over 6 feet in height, swimming pools, sports courts, or the alike." So the other things that are in the staff report like light poles, septic systems, detention basins, those aren't in that definition and I wouldn't consider those to be of the like. The definition of structure is really talking to built, above-ground elements except for the definition of tanks. Maybe you would want to put that on the record as well because it does come out heavily in their written appeal to you. Mr. Swiniarski asked where in our ordinance is an accessory use allowed in all zones? Mr. Sawyer replied it is in the Table of Uses towards the very end of the table. Councilor Duschatko asked what is the definition of "lot" referring to? Is it the deeded lot, the surveyed lot as we would understand it, or is it a zoning lot? Mr. Sawyer replied I don't want you to be confused by thinking that "lot" means anything other than that rectangle that this property owns. It doesn't mean it is the district that you heard several times tonight. The simple reading of that, and I think that is the way your mentor interpreted it, the simplest understanding of reading of that definition is the property. It is not the portion of the lot in the district; none of that can be read into it. I think we have to stick with the definition.

Mr. Swiniarski stated I think where I come out on this is that I can't imagine anyone could argue this is anything but an accessory use. That is my personal feeling because if you told me that, you are going to have to tell me what it is then. What the appellant here is saying is that our statement of accessory use is allowed in all zones doesn't mean every accessory use. They are trying to say only an accessory use to a use allowed in that zone. I don't see that the ordinance addresses that squarely and I think it requires an interpretation. I don't think it is quite as simple as that. Mr. Sawyer stated if every Zoning Ordinance was clear, there wouldn't be a Zoning Administrator. There will always be relief to the ordinance but you wouldn't have somebody like me trying to interpret them and then obviously having that ultimately rest with you. Ms. Elmer stated Table 2 in the back of your Ordinance Table of Uses, going to the last page of that section, it says, "Customary Accessory Uses," and then you will see the letter "P" in every single zone that we have, and "P" means permitted. Mr. Swiniarski stated I think what the appellant is focusing on is the "customary accessory uses to what." Mr. Sawyer responded which is why we as a staff had to come back to this definition as you can read in my email. I didn't like it; I have worked in other communities where we had different opinions, but you raised a question that you would like to know what other communities do. It would be good education but it does not bear any inference on this decision that you have to make tonight. Mr. Swiniarski stated we do have to determine

what the ordinance means. We have to determine what our permission of accessory uses applies to. Is it accessory to what? Is it accessory to everything? Mr. Sawyer replied those 15 words in the definition is what you have to go by when read collectively with the rest of the ordinance. I agree that we need to do that and we did in this case.

Attorney Quarles stated the owner of the lot, Keith Murphy, is with me tonight. Attorney Quarles stated I don't think I need to add a lot. I would like to make a few points, some of which have already been made. This is your definition in your ordinance up on the screen, and I think it adequately guides you in that it certainly has to be related to the principal use on this lot. The principal use on this lot has been for a restaurant, it is going to remain in that type of use and that is the determining factor of the restaurant use. The determining factor is that it is a commercial use, but as the point has already been made, a detention basin can be a customary use for either a residential or a commercial development, and I think your Zoning Administrator is telling you that a detention basin/drainage generally is a customary accessory use across at least a commercial and residential area. I don't think the appellant's arguments have any weight that somehow it is divisible between the commercial and the residential area. I would like to give a little more history. Our information is that, as you have heard, you have had a Zoning Ordinance since the early 1950's; from the beginning you have had this, in my experience it is an anomaly, I'm sure it might be out there in some other towns, none that I'm aware of in New Hampshire, this has been an issue for any and all owners of that property since 1953 and we don't go back beyond the Weathervane in terms of knowing the history of the property but we are aware, and if you want to look at the existing conditions plan, you can see that one of the Weathervane's septic systems is up in that residential area a little to the west. It is being indicated on the screen. You can see that that is in the general area of where our detention basin is going to be. It was a use that the residential owners of the Grey Rock Road area knew about, knew about when they purchased their properties, when those properties were developed, so what is there and the type of use in that residential strip is no different when it was under the Weathervane ownership and use than it is going to be under Mr. Murphy's ownership and use. And, again, I would agree that it is not your purview to get into a properly designed detention basin or issues of screening or anything like that. But we can tell you, because we told the Planning Board, this detention basin is going to improve the drainage on that residential strip. It is not going to make it any worse, and in fact, the idea behind a detention basin is as has been alluded to, to gather stormwater runoff for a temporary period so it doesn't flow during that runoff and slowly releases it into the groundwater. We have designed it to what we feel are state-of-the-art standards with a respected engineering firm, and also I would point out, and, again, it is not directly relevant to the issues, but when Mr. Sawyer first dealt with this issue back in November, looking at his email it says it would be nice if he could move this out of that residential strip and we were mindful of that. T. F. Moran looked at whether we could put on the other side of that boundary between the residential and commercial area, and the problem is that below that line is going to be our expanded parking and it is basically all ledge. Under a different set of soil circumstances, we might have been able to put an underground detention basin or in some way try to fit it in the commercial section but we weren't able for that reason. In summary, we would say we think that

Mr. Sawyer's staff report on this issue is the proper analysis, we have the precedent of the pre-existing use of this exact same area by the Weathervane as well, and as he points out, the similar situation for Route 101 Plaza relative to their septic system being in their residential piece of their lot. Obviously those folks had to get zoning approval and this may have been decades ago and there may be no records or institutional memory, but there was a Zoning Ordinance and presumably the same analysis was followed as to those properties and we had the result that we are seeking here and that your staff urges, which is this is a valid accessory use and the appeal by Mr. Driscoll claiming that it is not should be denied.

Mr. Sawyer stated I don't know if you still have the questions on buffers, but I can address that. Our buffer definition does not buffer it from the zone boundary line, it buffers from the property line or lot line, so we don't have it on any of the documents or in the staff report or on the computer, but there is a buffer, that is not under appeal to you tonight, that is not really germane because the only thing being appealed to you is this accessory use definition. I believe it is about a 110 foot buffer that would apply in this case. A buffer in our ordinance is variable depending on the height of the building and the height difference between the property lines. The minimum you can have is 50 feet, that was brought up earlier, but in this case it stretches all the way out to 110 feet also within that buffer, clearly we're allowing grading, drainage, landscaping, and some other activities to take place. That portion is not under appeal tonight but I did want to clarify that our buffers are not from the zone boundary lines, they are from the lot lines as well.

Chairman Morin asked for questions and comments from the audience on the appeal. There were none.

MOTION by Ms. Stirling to move into deliberations on this application. Vice Chairman Thomas duly seconded the motion. Vote taken – all in favor. Motion carried.

Mr. Swiniarski stated as I hear everything, and while certain of these matters as a couple of the people who have spoken before us are not immediately relevant to the decision before us, they are certainly helpful in getting into the context of what is going on here. The threshold issue I think the Board should think about is do we agree that this is an accessory use as defined in our by-law Ordinance. I know I do. It would be very hard to argue that this is not an accessory use, but I would like to hear everyone's thought on that. Chairman Morin stated I agree with you. I fully feel the same as you; it does meet that requirement by the definition. Councilor Duschatko stated I think it meets the requirement by the definition. It is also spelled out in the Table of Uses. Ms. Stirling stated I agree Mr. Swiniarski.

Mr. Swiniarski stated the next step would be Table of Uses, and we know that accessory uses are permitted everywhere. In my mind, I have heard both sides' arguments on this, does that mean in this anomaly of a split-zoned lot, which some folks tonight have said it is not an anomaly; it is very common, I don't know the answer to that

yet. I am trying to get to a decision here without having that answer. But does that mean that an accessory customary use to one zone is, in fact, automatically an accessory customary use to another zone. Councilor Duschatko stated I think we're back to the discussion on what the lot is, because that is where the accessory use is on the same lot. Mr. Swinarski stated we are all in agreement that it is an accessory use. Vice Chairman Thomas stated if you were to make it all residential or all commercial, you would say okay, it is an accessory use, it is on the same lot, and then we are done. So I feel like when we are looking at just the definition of accessory use for the principal use, I think we should look at it as the lot, not as how it was zoned, because that is really what the accessory use definition is based off from, which is the lot, not how it is zoned, and we have already defined that accessory uses are allowed in every zone. Mr. Swinarski stated I agree with all of that except when you do that, there is no reason to have this line, this split-zoned lot. Vice Chairman Thomas stated but that was already established; we can't undo the split-zoned lot. Now we are just dealing with then what do we do with this, and I think (just for this specific instance), that is all we are judging this on. When you have this situation, to me, it makes complete sense that if you break it down by every decision our accessory uses are allowed on a lot and then they are allowed in every zoned area. When you put those two things together, it almost makes sense to me that it kind of has to go. Mr. Swinarski stated I agree, but I like to look at this on both sides, so I would think how could this possibly not be what was intended by the ordinance, how could we find the other way, and I'm having a hard time figuring out any way to find the other way. I want to take into account both sides of this even if we were to arrive at the conclusion that accessory to commercial use is not allowed on the residential side of a split-zoned lot, and I know we're not saying that. I tend to agree with you but that is what the appellant is saying. I don't even think we can get there because how could we even say that this is some kind of specifically commercial accessory use. I don't see how this is. I'm trying to cover all of the bases here. Vice Chairman Thomas stated I understand where you are going with it because it is almost like let's try and see how many times we can kill it, but if you can't kill it, then it works, and I think it is one of those things that when you say it that way, it makes sense to say it that way, but then it goes back to the sense that the definition doesn't define it that way. It is not defining it as one versus the other, it is not an accessory use of something that is commercial in a residential, it is not defining it that way, and we are just basing it off from that definition. So you can't even put that sentence together to sort of make that definition.

MOTION by Councilor Duschatko that the Zoning Board of Adjustment deny the appeal of administrative decision filed by Brian Driscoll on February 24, 2016 with the finding that the email communication from Rick Sawyer to Nick Golon dated November 2, 2015 and relied on by the Planning Board in their decision of January 25, 2016 correctly applied the definition of Accessory Use in regards to the application of 393 Route 101 Associates, Lot 31-15. Vice Chairman Thomas duly seconded the motion. Vote taken - all in favor. Motion carried.

MOTION by Vice Chairman Thomas to move out of deliberations on this application. Mr. Swiniarski duly seconded the motion. Vote taken – all in favor. Motion carried.

Chairman Morin stated this is Mr. Radke's last meeting. On behalf of the Zoning Board, I would like to thank you for your years of service on the Board.

New Business: None

Adjournment:

Motion by Ms. Stirling to adjourn at 8:55 PM. Vice Chairman Thomas duly seconded the motion. Vote taken – all in favor. Motion carried.

Respectfully submitted by
Valerie J. Emmons