ATKINSON ZONING BOARD OF ADJUSTMENT
21 Academy Avenue
Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall
Wednesday April 11, 2012

Present: Hank Riehl; Glenn Saba; Sam Zannini

<u>Approval of Minutes of March 14, 2012</u>

Motion to approve the minutes as amended was made my Mr. Zannini, seconded by Mr. Saba and approved.

Correspondence:

Incoming:

Outgoing: Letters

Public Hearings– 7:30 P.M.

Motion for Rehearing, Attorney Morgan for Mr. Saviano.

Mr. Riehl cautioned Mr. Saviano that there were only three members present on the Board and a decision to grant a rehearing would have to be unanimous. Mr. Riehl offered Mr. Saviano the option of waiting until the following month's meeting to see if there would be more members in attendance that could enhance his chances of getting the rehearing granted. Mr. Saviano elected to proceed with the hearing anyway because he had a jury trial scheduled on this matter and wanted to have this decision first. Mr. Saviano stated he did not believe the March denial came from a fair hearing and did not think the Board reviewed everything presented. He asked that everything be reviewed that has been submitted tonight.

Mr. Riehl said that tonight's hearing would be to review what was submitted in this application but not to get into the merits. The goal tonight is to review the application to decide if a full rehearing is warranted. Mr. Riehl reminded the audience that this was not a public hearing and would not be taking any testimony or having exchanges. This is a matter for the Board to discuss.

Mr. Riehl reviewed the reasons why a rehearing could be granted by the Board according to the Statutes. Did the Board make an error of law; or was new information submitted that was not available at the last hearing; or did the record not accurately reflect the hearing that had taken place last month? Any of those conditions would warrant granting a rehearing. A rehearing may not change the outcome, but one could be granted on any of those conditions. The Board members were clear.

Mr. Riehl said that he would go quickly through each of the points that Attorney Morgan had raised in the rehearing application to see if the Board felt there should be new consideration. Mr. Riehl synopsized the reasons in the application. Mr. Saba believed the issues regarding the dwellings/buildings/structures were thoroughly discussed at the last hearing and the Board agreed that there were no errors in law or new information submitted. Mr. Riehl took exception to the fact that the applicant claimed the Board did not listen to the arguments presented in March and the applicant's claim that they met the criteria for both the Special Exception and the Variance requests. Mr. Riehl said the applicant presented their arguments and the Board did not agree that they met the criteria, the board did not buy what the applicant was selling.

Mr. Zannini stated that the applicants were heard and there was a lot of consideration taken by the Board, they just didn't reach the decision that the applicant wanted. The applicant claimed that the Board listened to evidence as to

the criteria and gave no reference or consideration to the evidence presented and instead deliberated based on the information as it was contained in the application variance. Mr. Saba took offense and said the Board had considerable discussions, reviewed all of the evidence and took it all into consideration but reiterated that the Board did not agree that the criteria was met.

The Board did not agree that Mr. Saviano was entitled to a Special Exception as a matter of right. Mr. Saviano's application for rehearing went over all of the criteria for a special exception. Mr. Zannini stated the assumption by the applicant and the whole basis of their argument is that they are entitled to four dwelling units on one parcel of lot when the Town only recognizes one dwelling per lot. Mr. Riehl thought Attorney Morgan believed the Board relied too much on that theory and that times have changed, attitudes have changed and Board members have changed and past decisions of the Board should not be part of any consideration. Mr. Saba said the Mr. Riehl made a great point when he asked the applicant several times when has a Board ever granted reduction of the 3 acre zoning or granted multiple dwellings on a single lot and the applicant had no response.

Mr. Riehl stated the Board would start precedent and go down a slippery slope if they overturned long-standing town practice and granted multiple dwellings on a single lot when no compelling rationale for such a decision was presented. Every 2 and 3 acre lot homeowner would be in there next. Mr. Riehl acknowledged that there are many undersized lots in the immediate area, and a few with multiple dwellings, but they all pre-dated zoning. No undersized lots or multiple-dwelling lots have been granted after zoning was enacted which is the operative consideration in this case.

Mr. Riehl said the notion of pre-existing buildings on that lot that had at one time been dwellings under different lot definitions and boundaries was not persuasive under today's conditions. E also pointed out there were a lot of items labeling them as structures, not dwellings. They were at other times referred to as pre-existing non-conforming dwellings and buildings, etc. The Board never challenged the rights of the structures to exist; they challenged their rights to exist as dwellings. Mr. Zannini agreed. Mr. Saba disagreed with the terminology of the applicants rehearing request, labeling the structures as dwellings.

Mr. Riehl said that woven through the application was the notion of the Spirit of the Zoning and he believed the spirit of zoning is most in play in this particular district because it is an RR3 Zone. It is the furthest from Town services and that is why the lot requirement is larger. The Town wanted less density for health, safety and protection of the lake. The Town wanted to correct pre-existing overcrowding issues in that zone when they instituted the 3 acre zone. Mr. Riehl stated that he believed no error in law or procedure was made, there was no new information presented. The Board agreed. Mr. Riehl reviewed all of the criteria in the applicants rehearing request and the Board agreed they had heard and considered all of this information in reaching their original decision. The Board looked at the plan showing the many undersized lots in the immediate area, and 2 or 3 with multiple dwellings, all of which pre-dated zoning. Mr. Saviano concurred that was the same plan that had been presented at the March hearing.

Mr. Zannini made a motion to deny the request for a rehearing based on the discussions and the fact that the Board considered all of the evidence presented and listened to all of the arguments of the applicant at the original hearing. They believed there were no errors in law or procedure, there was no new information presented, the record accurately reflected the proceedings and there are no other reasons for a rehearing. Mr. Saba seconded the motion and it was passed unanimously.

PUBLIC HEARING:

Henry Corey submission of an Application for a Variance from Article IV Section 400:4 to allow the construction of a garage 10 feet (5 foot variance) from the side lot line, on property located at 13 Hemlock Heights Road, Map 22 Lot 8 in the RR3 Zone.

Abutters List was read with the following present:
Mr. Corey; Mr. Foley of J & J Realty Trust

Mr. Corey said there had been a garage that is no longer there. There is still a foundation, which is 14' x 20'. He is looking to rebuild a garage and extend the existing foundation two feet closer to the lot line, for a total 5 foot variance within the 15' sideline buffer. If he went in the other direction, 2 feet closer to the house, there would only

be about 2 or 3 feet between the structures making it a safety concern. He wants to make the new garage larger than the existing remaining footprint because one really cannot put a car in it. Mr. Saba asked what the zone was and what the setbacks were. Mr. Riehl reviewed Section 400:4 and the required sideline minimum was no less than 15'.

Mr. Corey explained that he bought the property in December of 2011. The house had been abandoned for about two years and was wrecked. He is renovating the property but there was only a foundation for the garage. Mr. Riehl questioned if they might have an issue with a non-conforming structure because it had not been used for two years. Mr. Riehl asked Mr. Kirsch if he knew anything about the property. Mr. Kirsch had a picture of the property with an existing garage foundation. Mr. Zannini asked if an application was ever made for the existing foundation. Mr. Corey said he could not find any application on file. Mr. Kirsch stated he did not know how old it was. Mr. Saba stated that the applicant was not trying to rebuild on that anyways.

Mr. Foley of J&J Realty Trust said he had a few issues with this application that he needed to discuss with the Board. He had met Mr. Corey and Mr. Corey had told him he had a bunch of plans in mind and that he had planned on doing work on the property. Mr. Foley had to call the Building Inspector, Mr. Jones, in December because Mr. Corey never pulled a permit for work he was performing. When he did get the permit it was for roofing and siding yet he changed the decks, the footprint on the house, never called DES and he filled in back next to wetlands. Mr. Foley gave the Board pictures that he had taken on Sunday. Mr. Foley claimed there was never a garage on the property. He claimed there was a shed that Mr. Corey knocked down and burned the wood in the back yard.

Mr. Riehl asked Mr. Foley how long he had lived there. He said 8 years. He said Mr. Corey never saw a garage there, only the foundation that is currently there. Mr. Foley went on to state that Mr. Corey has already started to put cinder blocks on the foundation. Mr. Corey stated that he already was issued a permit to build a 14 x 20 garage. He is before the Board because he wants to build it bigger than what the permit is for. Mr. Corey did not deny that there may have never been a garage there, but there is a slab.

Mr. Riehl said he wanted to keep the discussion to the garage. Enforcement issues and other things are not under the purview of the Board and if Mr. Foley is not happy with Mr. Jones' oversight then he could go to the Selectmen. The Board reviewed some pictures that Mr. Foley took showing what he claimed to be wetlands and other violations. He also presented the Board with pictures showing the slab and again claimed Mr. Corey has started to build a garage for which he does not have a permit. Mr. Corey reiterated he has already been issued a permit to build a garage.

Mr. Riehl wanted to clarify Mr. Foley's position, whether he felt Mr. Corey got a permit to build a garage under false pretenses. He asked if it were his contention that there was no garage there in the first place. Mr. Foley stated the tax map did not show one. Mr. Riehl said that he had only been on their property for 8 years and asked how he could claim there had never been a garage prior to them being there? Ms. Killam suggested the Board stick to the issue at hand. Mr. Riehl agreed and said the Board was getting outside of their domain. Ms. Killam said that when this kind of issue comes up, either her or someone else in the office can research old records and just because the current tax card does not show a garage does not mean there was never one there. Ms. Killam didn't believe the issue of whether the garage was ever there or not is pertinent because this hearing is for a variance request to construct a garage. Mr. Saba concurred and said the application is very clear in that it requests a variance to construct a one car garage 16' x 24', 10 feet from sideline to replace an existing 14' x 24' slab.

Mr. Saba asked Mr. Foley if he was against a garage being built. Mr. Foley said they were. Mr. Saba asked exactly what Mr. Foley was against because when he looks at the pictures and sees what was there compared to what is there now, it is evident Mr. Corey has enhanced his property and the neighborhood. Mr. Foley said he liked the beautiful view from his property which will be blocked by a garage. Mr. Saba said that by Mr. Foley's own account there was a shed already there so the view was already obstructed. Mr. Foley claimed the garage will take up almost the whole lot and be built practically on Mr. Pomer's property. Mr. Corey stated that he had already spoken to Mr. Pomer and that Mr. Pomer gave him permission and had no problem with the proposal and he could get a letter from him if necessary. Since Mr. Pomer did not attend the hearing to oppose the application, the Board felt it could fairly conclude Mr. Pomer did not have an issue with the proposal.

The Board agreed that the request is clean as far as what the applicant is asking for. The Board agreed this was a five foot variance request and whether there was a garage there in the past or not had no bearing on this application. This

was a start from scratch proposal. Mr. Corey stated that if Mr. Pomer had not wanted him to build this garage, he would not be before the Board requesting the variance. Mr. Corey stated Mr. Pomer is the direct abutter and the only one that this proposal impacts, and Mr. Pomer's house is not next to this proposed garage.

Mr. Zannini made a point that if Mr. Corey moved this garage two feet closer to his house he could build this without needing a variance at all. The Board agreed that if Mr. Corey were 15 feet from the lot line he would have every right to build this garage. This would impact Mr. Foley's view anyway.

Mr. Corey stated if he built the garage closer to the house where no variance would be needed, there would only be 1 foot of space between the buildings. This would be a nightmare for snow and water buildup. He would not be able to access that side of the building where the electrical services are located. With a half foot overhang on each building they would be touching which would create a safety issue if one needed to get to the front of the dwelling for fire, etc. Mr. Corey felt there needs to be at least 4 feet between the buildings.

The Board discussed other options of placement on the lot that would not require a variance and all other options were encumbered or did not make any sense at all. Mr. Zannini stated that the reason the Zoning Board was there was to hear request for variances. The Board discussed the proposed garage's height and Mr. Corey stated that he will follow whatever the rules are regarding height. This proposal meets all of the other setbacks.

Mr. Riehl did inform the applicant that he had the option to postpone the hearing until next month because there were only three members present at this hearing and an approval decision would have to be unanimous. A 4 or 5 person Board would give some room for opposing votes while still gaining overall approval. Mr. Corey wanted to proceed with the current 3-member Board.

The Board reviewed the application and the criteria.

1. **Contrary to Public Interest.** Mr. Corey said that having the garage allowed storage for gas powered things to be stored inside as well as just acting as storage for all of the usual things that would be stored inside instead of outside. Mr. Saba believed this was very important especially around the lake area. ***The Board agreed this condition was met.***

2. **Spirit of the Ordinance**. Although the Board acknowledged that J&J Realty Trust's view would be affected the fact is that Mr. Corey had the right to construct a garage up to 15 feet from the lot line without needing a variance. If that were done his view would still be affected so the extra 5 feet did not really make a difference. Mr. Zannini said it was a permitted use and he believed the request was consistent with the ordinance. Mr. Riehl reiterated that he did not want to be insensitive to J&J Realty Trust, but what Mr. Corey could legally do and what he is asking to do with the variance were not hugely different. The Board made it clear that this was being treated as a new garage request and whether there was or was not a garage there previously it had no bearing on this request. ***The Board agreed this condition was met.***

3. **Substantial Justice**. Mr. Saba asked if the gain to the public would outweigh the loss to the individual. Mr. Riehl said the Board exists to hear these types of situations. Mr. Saba stated this garage could be built without a variance if it were made smaller, and asked if that extra five feet really make any difference. This request is a viable option and trying to fit it some other way is not feasible. ***The Board agreed this condition was met.***

4. **Diminishing Surrounding Property Values**. The surrounding values would not be diminished because the property has been improved and is consistent with others in the neighborhood**.** Mr. Riehl said the most persuasive argument is the abutter, Mr. Palmer, whose lot line is affected. Mr. Corey had indicated Mr. Palmer was in favor of the proposal. The fact that he did not come to contest the application would lead the Board to believe he is not against it. The complaint from J&J Realty regarding the view is not compelling enough because Mr. Corey could still legally construct a garage without a variance and the view would still be obstructed. ***The Board agreed this condition was met.***

5. **Unnecessary Hardship. A) Relationship Test:** Again, Mr. Palmer is the direct abutter and appears to be in favor of the proposal by virtue of his absence. Mr. Saba stated the purpose of the ordinance is to prevent congestion. Mr. Corey could still build this garage so it is really not contributing to congestion. ***The Board agreed this condition was met.*** **B) Reasonable Use Test:** This is a reasonable use and request. Mr. Riehl questioned if the storage could be resolved in another method other than a garage. Mr. Zannini said the applicant could build a garage without a variance if he went closer to the house. It is not oversized or for multi vehicles. Mr.

Saba stated that reasonable is definitely subjective and that the ZBA is there to grant relief. ***The Board agreed this condition was met.***

Mr. Saba made a motion to approve the Variance as requested based on discussions and on all of the criteria and conditions having been met. Mr. Zannini seconded the motion and it was unanimously approved.

Mr. Riehl cautioned Mr. Corey that anyone had the right to appeal within 30 days and he would be at risk for any work he began if an appeal and rehearing resulted in a different decision. Mr. Corey indicated he understood.

Motion was made and seconded to adjourn the hearing with a unanimous vote. Mr. Riehl adjourned the hearing at 9:15 p.m.

Respectfully Submitted _____

Minutes transcribed from tape ***Rebecca Russo***

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