

FINAL MINUTES

**Zoning Board of Adjustment Public Hearing
Taylor Van Brocklin Building**

October 19, 2023

7:00 PM

Members Present

Tom Tague, Chairman
Antoinette Cincotta, Vice Chairman
Mark Beauregard
David Bryan
Robert Gow, Alternate

Members Absent

Lloyd Condon

Public: Timothy Newcombe, Lisa Traeger, Doug Bersaw, Jeff Taylor, and Arlene Crowell

1. Meeting called to order/roll call:

Chairman Tague called the meeting to order and took roll call.

2. Public Hearing Map 201 Lot 37:

Chairman Tague opened the hearing on the Matter of the Applications for a Variance by Newcombe Family Holdings LLC/Timothy Newcombe for the property located at 18 Winchester Road, Richmond, NH, identified as Map 201, Lot 37. Applicants seek a variance from Article 4, Residential District, Section 405, Lot Frontage and Yard Requirements, more specifically 405.2, to replace a failed septic system within 50 feet of a public right of way. Applicants also seek a variance from Article 6, Wetland Conservation District, under 601 to replace the failed septic system within the 75-foot Wetland Conservation District setback.

Mr. Newcombe read his applications to the Board.

Mr. Newcombe started with the Variance for Article 4: Residential District, section 405.2 Front Setback - From the edge of the public right-of-way.

Section 1106.1-Granting the variance would not be contrary to the public interest:

It is within the public interest for this existing dwelling unit to have the inoperable septic system replaced so that waste can be disposed of in a sanitary manner.

Section 1106.2-The use is not contrary to the spirit of the ordinance because:

The system has been designed to come as close as possible to meeting the town ordinance while complying with the state ordinance.

Section 1106.3-Granting the variance would do substantial justice because:

I have worked in good faith with the Town of Richmond to modify my state approved plan to satisfy the Zoning Compliance Officers requests.

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Section 1106.4-The proposed use would not diminish surrounding property values because:

The proposed use will not diminish the surrounding property values because the system will be built back in the same location as the original system.

Section 1106.5-Denial of the variance would result in unnecessary hardship to the owner because:

Section 1106.5.1.1- that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because:

This is an existing dwelling unit with few options to locate a new septic system. If this variance is denied it would cost significant financial harm to my business.

Section 1105.5.1.2- the proposed use is a reasonable one.

The proposed use is in full compliance with RSA 485-A:33 and a state approved septic permit has been issued.

Section 1106.5.1.3- the zoning restriction as applied to the property interferes with the reasonable use of the property considering the unique setting of the property in its environment such that: This zoning restriction if applied would render an existing dwelling unit uninhabitable.

Chairman Tague asked if there was any problem with Newcombe reading the proposed variances consecutively. No member of the Zoning Board had any objection.

Mr. Newcombe continued with the application for a variance under Article 6, Wetland Conservation District, section 601, concerning the 75-foot setback to Wetland Conservation District with poorly drained soils.

Section 1106.1-Granting the variance would not be contrary to the public interest:

It is in the public interest for this existing dwelling unit to have the inoperable septic system replaced so that that waste can be disposed of in a sanitary manner.

Section 1106.2-The use is not contrary to the spirit of the ordinance because:

The system has been designed to come as close as possible to meeting the ordinance. The existing lot and dwelling unit make it impossible to strictly comply with the ordinance.

Section 1106.3-Granting the variance would do substantial justice because:

I have worked in good faith with the town of Richmond to modify my state approved plan to satisfy the Zoning Compliance Officer officers requests.

Section 1106.4-The proposed use would not diminish surrounding property values because:

The proposed use would not diminish the surrounding property values because the system will be built back in the same footprint as the original system. Moreover, once the septic is installed the property will be sold increasing the property values of the surrounding properties.

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Section 1106.5-Denial of the variance would result in unnecessary hardship to the owner because:

Section 1106.5.1.1- that no fair and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because:

This is an existing dwelling with few options to locate a new septic. If this variance is denied it would cause significant financial harm to my business.

Section 1105.5.1.2- the proposed use is a reasonable one.

The proposed plan is in full compliance NH RSA 485-A:33 and an approved septic permit from the State of NH has been granted.

Section 1106.5.1.3- the zoning restriction as applied to the property interferes with the reasonable use of the property considering the unique setting of the property in its environment such that: The zoning restrictions if applied would render an existing dwelling unit uninhabitable.

Alternate Robert Gow was seated for Lloyd Condon.

Chairman Tague opened the hearing up for any questions.

Vice Chairman Cincotta noted that the Applicant mentioned that the Zoning Compliance Officer made some requests of him and asked the Applicant if those requests were in his application packet. Mr. Newcombe responded that there were two versions of the septic plan; the original plan and the plan based on the Zoning Compliance Officer's requests. The second plan laid out the changes that the Zoning Compliance Officer made. The Applicant stated that he had the original plan, which was state approved, and then the Zoning Compliance Officer wanted to change that plan to make it more in compliance with the current zoning regulations, so they moved the leach field in the second plan so it would be further away from the poorly drained soils and closer to the right of way. The house has not been occupied since November of 2022.

Chairman Tague asked how the Zoning Compliance Officer contacted the applicant. Mr. Newcombe stated that they had to rebuild the back part of the foundation and had dug irrigation to drain the water from it. The Zoning Compliance Office came out to the property because someone complained that there was poorly drained soil there. Mr. Newcombe said he told the the Zoning Compliance Officer that they have to put the septic system back in, and asked him, "Is this going to be ok?" The Zoning Compliance Officer asked to see Mr. Newcombe's state approved septic plan for the property. Mr. Newcombe explained that that was how their contact with the Zoning Compliance Officer started, and they reached out to him directly after he made contact with them. The question was asked if the Zoning Compliance Officer received compensation for the meeting. The Applicant answered no.

Chairman Tague asked if there were any other questions for the Applicant. Vice Chairman Cincotta asked for the floor. She noted that the first request from Article 405 is asking if it could be within 50 feet of the public right-of-way, and asked whether it's impossible to place the septic field anywhere else. Applicant responded that the back part of the lot is poorly drained soil, and the right-of-way is in the front creating two conflicting issues. There is also the well on the opposite side of the house, so all of these things are in tension. Mr. Newcombe

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explained that his initial intention was to put the system back exactly where it was. He said, “Dick Drew wanted to move the system closer to the road and further away from the poorly drained soils.” Vice Chairman Cincotta asked if the system was put back in the same spot would it be functioning. Applicant responded yes, that was the original proposal, but the Zoning Compliance Officer wanted it moved closer to the right-of-way and further away from the poorly drained soils. Either way it would be functional since they have to build a raised system to get the proper drainage so it would be functional regardless of where it’s located.

Chairman Tague asked if in the position it’s in when it was first received you would still need a variance? The applicant answered that the plan they had designed was to put the septic system back “exactly where it was.” He explained that neither the original plan or the revised plan would satisfy the town’s road or Wetland Conservation District setbacks.

Vice Chairman Cincotta asked if there was any reason why the application doesn’t cite to the Richmond Zoning Ordinances Article 10, Section 1001, Nonconforming Use? The Applicant responded that he had never done a variance before. Vice Chairman Cincotta directed the board to Article 10, Sections 1003, and 1003.1, Nonconforming Uses which states: “Any use made nonconforming by the provisions of this Ordinance may continue in existence. Natural but limited expansions to the use are allowed. In judging whether the proposed change reflects a natural but limited expansion, the following shall be taken into consideration.”

Vice Chairman Cincotta read each ordinance from Article 10 starting at 1003 Nonconforming Uses including 1003.1, 1003.2 and 1003.4 asking for the applicant to respond to each section.

Section 1003.1.1 To what extent does the use reflect the nature and purpose of the existing use? Vice Chairman Cincotta asked what his response would be? The Applicant responded that the footprint of the house hasn’t changed so the proposed septic system is the same use that the original system was designed for.

Section 1003.1.2 Is the proposed use merely a different manner of utilizing the same use, or is it a

Section 1003.1.3 use that is different in character, nature, and kind? Applicant responded that it is the same use. It is not different in character, nature, or kind.

Section 1103.1.4 Would this use have a substantially different impact on the neighborhood? Applicant’s answer was none.

Section 1103.2 No nonconforming use may be changed to another nonconforming use. Applicant said he didn’t think so.

Section 1003.3 If any nonconforming use ceases to operate or is abandoned by the owner owner/operator for one (1) year, any subsequent use of the property shall be in conformance with this Ordinance.

Applicant said it was essentially a failing system and the applicant purchased it in November 2022 the system was failed, and it became inoperable in December of 2022. Vice Chairman Cincotta mentioned we are in October, so it’s been less than a year.

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Chairman Tague asked for additional questions from the board with no response. He asked for questions from the public.

Mr. Bersaw asked how close it was to the road? Looking at the plans, Mr. Bryan estimated that the proposed septic system was about 30 feet from the existing right-of-way. Mr. Bersaw asked about the distance from the Wetland Conservation District. Chairman Tague estimated that the septic system appeared to be 40 feet within the Wetland Conservation District. Mr. Bryan estimated that the proposed septic system would be roughly 20 - 25 feet within the 75 foot setback to the Wetland Conservation District.

Ms. Traeger asked whether there were 3 separate designs: one in the original place using the nonconforming use, but with the exact same use and the exact same footprint. A second one to move it back away from the road setback. And a third one, to move it closer to the road. She asked if it's grandfathered in as a nonconforming use, and if it's been under a year and it stays at that footprint, why is a variance needed? Mr. Bryan explained that the proposed septic system before the board was not the same footprint. Ms. Traeger explained that by changing the septic system to conform, it would no longer be grandfathered. Several board members agreed with her.

Vice Chairman Cincotta clarified that it could potentially be considered grandfathered to the extent that it's considered a natural limited expansion of the use that is already allowed. She stated that when the Zoning Compliance Officer changed the location of the septic system from the preexisting location, he triggered this hearing.

Chairman Tague asked the Applicant if there was a preferred location? The Zoning Compliance Officer seemed like he leveraged you to move the system out of being grandfathered in and creating the need to request two variances. The Applicant responded that he didn't care which location was approved for the septic system that he wanted it to be installed 3 months ago. The cost of the install is not going to be any different. His goal was to try to make everyone happy with the location of it. He said it makes no difference. He did have to revise his plans and did have to pay the expense of having to revise the plans, and all those costs have now been paid. He stated that he just wanted to put it in a place that everyone is happy with.

Mr. Taylor spoke to the board in place of Richard Drew who couldn't make it to the meeting. The concern of the Conservation Commission is when construction is done in the Wetland Conservation District to protect the wetland from construction debris, siltation, erosion, and that sort of thing. The Conservation Commission normally does a site review for the Zoning Board of Adjustment for these kinds of projects. This usually goes under a special exception and not a variance. Mr. Taylor wanted to know why is this going under the variance. Vice Chairman Cincotta responded that had the Applicant proceeded with replacing the septic as it was, the Applicant would not have needed a variance or a special exception. What has happened is that our Zoning Compliance Officer in good faith believed that to protect the wetlands, it would be beneficial to move it forward into the right-of-way and away from our Wetland Conservation District. That is the reason why the Applicant needed two variances. Jeff Taylor tended to agree with what the Zoning Compliance Office had to say in respect to the Wetlands.

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Ms. Crowell, an abutter to the property, added that the house has been there since 1771. The septic system that just failed has been there for a long time, for as long as there have been septic systems. She advocated for putting in the septic system. If the Applicant just puts it back - either way - would be OK. It hasn't harmed anything all this time. The new system will be much better than the one that failed.

The Applicant added that according to the inspection report on the septic system, the whole leach field had failed and there was a pipe that was running out into the wetlands. Whatever goes back in there will be a massive improvement.

Chairman Tague asked if there were any other questions. There was not a response from the board or the public. Chairman Tague continued that there are at least two options to vote on. First would be to grant both variances. One won't mean anything without the other. Or we would move forward with declining the variance and he utilizes grandfathering the system and put it right back where it was. Chairman Tague asked if there were any more options.

Beauregard suggested going with the recommendations that the Zoning Compliance Officer suggested being that you want to save the wetlands by moving it closer to the right-of-way. Chairman Tague asked if there were any issues with moving it closer to the right-of-way? Bryan added that the State was OK with it.

Chairman Tague read a letter from the Richmond Health Officer Carolann Rocheleau regarding the Newcombe Public Hearing, which was sent to Susan Harrington, Town Administrator, on October 18, 2023.

"Mr. Tim Newcombe who is developing this property, listed the property at 18 Winchester Road as a having an old, failed septic system in need of replacement. I needed to start a folder and gather all the info I could. I have that now- the receipt for draining of the old septic tank, by Bells Septic Company in December 2022, the new septic plan, designed by Stephen Pro of Keene, the NHDES installation approval of that plan, which is good until 11, December 2023 and the request for the variances necessary due to the location of the septic tank/ installation, near wetlands, and frontage on Route 119. I cannot be at the public hearing on Thursday night since I will be in Lebanon. I did tell Mr. Newcombe that, I believe that he has covered all the requirements and as health officer I have no objections to the variance plans as presented.

Thanks,
Carol Ann"

Chairman Tague told the applicant that it was his opinion that if he had grandfathered it in it would have been fine, it cost you more to do it this way but in the end with the approved variances it will be more environmentally friendly. Since you've gone that necessary step, which you didn't have to, as Vice Chairman Cincotta has pointed out you could have gone with the grandfather clause and just left it.

Vice Chairman Cincotta move that we grant the variances as requested. Second by Bryan. Chairman Tague asked for any discussion.

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Vice Cincotta spoke that the evidence has demonstrated that each and every one of the requirements for granting the variance. She noted the following: Both variances are not contrary to the public interest. The proposed use does not conflict with the explicit or the inexplicit purpose of the ordinance. It doesn't alter the essential character of the neighborhood. It doesn't threaten public health, safety and welfare otherwise or otherwise injure public rights. It is in the public's interest to uphold the spirit of the ordinance. Vice Chairman Cincotta thought that condition two has been found and the spirit of the ordinance has been observed. As we all noted this would have been grandfathered to the non-conforming use. The fact that this can be brought better into code. Substantial justice is done to benefit to the applicant and should not out weight the general public. The general public has actually benefited from the two variances. The value of the surrounding properties are not diminished by granting these two variances in fact the value will increase because now you have an upgraded property as opposed to a property that has a failed septic system. The Town benefits as the property value will increase and the tax base will increase. The literal enforcement of the ordinance would result in unnecessary hardship. Unnecessary hardship can be shown in two ways. First is to show that the special condition of the property that distinguished this from other properties in the area. There is no fair or substantial relationship between the public purpose of the ordinance provision and a specific application of that property, The proposed use is a reasonable one. Vice Chair Cincotta believes both of those two conditions have been satisfied by the two variances. This property is unusual it is a lot from the 1700's that has had a nonconforming use for a long time. Vice Chair Cincotta thinks that the ordinance as applied to this property would render it uninhabitable and that is not the purpose of the ordinance. This is clearly property that has a nonconforming use and will continue to have a nonconforming use but a better use that will be much more friendly to the Wetland Conservation District and more friendly to the people of the Town of Richmond.

Chairman Tague took exception to the end result is probably the same a safe and perfectly functioning septic system would have been installed. The only risk is that through the construction there is potential harm to the wetland district if it's not managed correctly. Vice Chairman Cincotta responded that it was a reasonable point.

Vice Chairman Cincotta finished by stating that in her opinion all the conditions have been satisfied and would open it up to any other board members.

Chairman Tague opened the floor up to any other discussion with no response from the Board or the public. Chairman Tague called for a vote.

All in favor. None opposed. Motion carries.

Chairman Tague told the Applicant that both variances were accepted. Chairman Tague asked the Applicant to provide feedback of his process working with the Planning Board and the Zoning Board and submit that to Susan Harrington confidentially if you'd like. Having feedback as to how well the Town entities serve the public is important.

The Applicant agreed and said that he would write about his experience with the Town. He works for the Town of Sullivan and expressed that the town has been very responsive with guidance and feedback throughout the whole entire process. The Applicant felt that it was a very fair and transparent process.

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Vice Chairman Cincotta mentioned the process of the Board to prepare a decision in detail and get the copy to him. Applicant asked if he should hold off on construction. Chairman Tague said he would wait until the Applicant received the official Decision of the board. The Applicant thanked the board.

Chairman Tague move on to the next order of business.

1. Minutes of September 21, 2023:

One change page 2. Under 4. Draft Amendments to Rules of Procedure. Should be Draft Amendments to **Applicant's Instructions.**

Motion to approve the minutes of September 21, 2023, as modified. Gow seconded. All in favor. None opposed. Motion carries.

2. Proposed Draft Applications:

Proposed copies were sent out to the board to review on September 17, 2023.

Vice Chairman Cincotta explained that similar to the Applicants Instruction she took the current form and incorporated all the recommendations from Appendix A. from the Zoning Board of Adjustment Handbook for Officials (updated 2022).

She redlined anything that was a proposed by the state and corrected the formatting.

Application for Special Exception:

Page 1. Top of page heading add: **Application for Special Exception Commercial or Light Industrial Uses.**
Third section down capitalize the **A** in Name of Applicant.

Fourth section down Under location of Property add the word and. (street, number, sub-division, **and** Lot number).

Fifth section down, pull sentence starting with: **Please select the applicable Exception from the Zoning Ordinances**

Sixth section down, pull **1105.2 through Recreational Uses.**

Seventh section down, APPLICATION FOR SPECIAL EXCEPTION, add (**Commercial or Light Industrial Uses**)

Eight section down, second line should read: **Zoning Ordinance Article 11, Section 1005.4 for commercial or light industrial uses.**

Last section down pull: **1105.4 Commercial or Light Industrial Uses:**

Page 2. Add at the top of the page, **Explain how the proposal meets the special exception criteria as specified in Article 11, Section 1105.4 of the Zoning Ordinance**

Section 2, Add Criterion 1 (Section 1 1005.4.1). Second line down at end add, may not exceed **one third of the total acreage of the lot with a cap of 40,000 square feet.**

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Section three, add, **Criterion 2 (Section 1105.4.2) – No noise, airborne particles, vibrations, lights, or other activities associated with the business shall pose a nuisance to abutting properties.**

Section four, add, **Criterion 3 (Section 1105.4.3) Pull the word Explain.**

Section five, add, **Criterion 4 (Section 1105.4.4) – The use may have one advertising sign at the entrance to the property and one sign either on the building or free standing, in accordance with Article 3, Section 313. Pull the word Explain.**

Section six, add, **Criterion 5 (Section 1105.4.5) - . Pull the word Explain.**

Page 3. First section add, **Criterion 6 (Section 1105.4.6) - . Pull the word Explain.**

Second section add, **Criterion 7 (Section 1105.4.7) - . Pull the word Explain.**

Third section Pull the entire section starting with 1106.1.4 though 1105.1.4.

Page 4, add, **PLEASE NOTE: The Zoning Board of Adjustment may impose reasonable fees upon an applicant, including but not limited to the expertise of notice, consultant services or investigative studies under RSA 676:4,I(g) or RSA 676,IV, or the implementation of conditions lawfully imposed as part of a conditional approval, subject to the provisions of NH RSA 673:16.**

Last line, add the word procedures. Remove process. Should read: See RSA Chapter 677 for more detail on rehearing and appeal **procedures.**

Motion made by Bryan to accept this form with the modifications that were discussed. Seconded by Beaugard. All in favor. None opposed. Motion carries.

Application for Variance:

Page 1, third section down capitalize the word Applicant

Sixth section down remove the word USE. And add Article 11 section 1106, Variances. Should read,

APPLICATION FOR A VARIANCE (Zoning Ordinance, Article 11, Section 1106, Variances) Seventh section down capitalize the word **Ordinance.**

Eighth section down, Add 1.Section, Public interest in bold, and the word because at the end. Should read.

1. Section 1106.1 – Granting the variance would not be contrary to the public interest because:

Ninth section down, Add, **2. Section 1106.2, if the variance was granted, the spirit of the ordinance would be observed because.** Remove, The use is not contrary to the spirit of the ordinance because:

Should read: **2. Section 1106.2 – If the variance were granted, the spirit of the ordinance would be observed because:**

Page 2, First paragraph, Add, **3. Section 1106.3 –** and add the words **substantial justice.** Sentence should read:

3. Section 1106.3 – Granting the variance would do substantial justice because:

Second paragraph, add, **4.Section 1106.4 – If the variance were granted the values of the surrounding properties would not be diminished because.** Pull, The proposed use would not diminish surrounding property values because:

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Third paragraph, add, **5. Section 1106.5 – Unnecessary Hardship. You must satisfy subsection A below OR B.**

a. Section 1106.5.1 – Owing to special conditions of the property that distinguish it from other properties in the area, denial of the variance would result in unnecessary hardship because:

i. Section 1106.5.1.1 – No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property because:

-and-

ii. Section 1106.5.1.2 - The proposed use is a reasonable one because:

b. Section 1106.5.1.3 – Explain how, if the criteria is subparagraph (a) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish if rom other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and the variance is therefore necessary to enable a reasonable use of it.

Add to the bottom of page add: **Applicant’s Phone number** _____
Applicant’s email _____

PLEASE NOTE: The Zoning Board of Adjustment may impose reasonable fees upon an applicant, including but not limited to the expertise of notice, consultant services or investigative studies under RSA 676:4,I(g) or REA 676,IV, or the implementation of conditions lawfully imposed as part of a conditional approval, subject to the provisions of NH RSA 673:16.

See **RSA Chapter 677** for more detail on rehearing and appeal **procedures.**

Motion made by Gow to accept the form with recommended changes. Seconded by Bryan. All in favor. None opposed. Motion carries.

Application for an Equitable Waiver of Dimensional Requirements.

Third section down capitalize Applicant.

Sixth section down, at end of sentence pull: (Zoning Ordinance 1107)

Eight section down, add, 1. Section and the words physical layout, mathematical or, and. Sentence should read:

1. Section 1107.6 – Does the request involve physical layout, mathematical or a dimensional requirements, and not use restrictions?

Ninth section add: If you answered “Yes” please complete the application. If you answered “No.” you cannot be granted and equitable waiver of dimensional requirements.

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Tenth section, add: **2. Section 1107.5 – Explain how the violation has existed for 10 years or more with no enforcement action, including written notice, being commenced by the town.**

-or-

Leave section 1107.1 as it was presented

-and_

Add the word **Section**, also add, **good faith error in measurement or calculation**. Sentence should read: **Section 1107.2 – How the violation was not an outcome of ignorance of the law or bad faith but resulted from a good faith error in measurement or calculation.**

Add the word **Section 1107.3** and **or adversely affect**. Sentence should read: **Section 1107.3 – How the nonconformity does not constitute a nuisance nor diminish the value or interfere with the or adversely affect future uses of other property in the area.**

Add the word **Section 1107.4**, Sentence should begin with **Section 1107.4 – How the cost of correction far outweighs any public benefit to be gained.**

Remove **Section 1107.5** as this was addressed in the beginning of the revised application.

Remove from Remit to down to See RSA Chapter 677 for more detail on rehearing and appeal procedures.

Add to bottom of last page:

PLEASE NOTE: The Zoning Board of Adjustment may impose reasonable fees upon an applicant, including but not limited to the expertise of notice, consultant services or investigative studies under RSA 676:4,I(g) or REA 676,IV, or the implementation of conditions lawfully imposed as part of a conditional approval, subject to the provisions of NH RSA 673:16.

See **RSA Chapter 677** for more detail on rehearing and appeal **procedures**.

Motion made by Bryan to approve the changes. Seconded by Beauregard. All in favor. None opposed. Motion carries.

3. Other:

1. Board Discussion Regarding Variance Process:

There was board discussion about the variance applications presented to the board that night. There was concern expressed that the Zoning Enforcement Officer gave instructions to the applicant that cost him money to draft new plans when he didn't need to. There were also prior incidents involving the Zoning Compliance

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Officer discussed by the board; one involving a culvert which the town ultimately replaced; another involving a bridge installed to log property that was not to code. There was concern expressed about town liability. One board member expressed that he thought the Zoning Compliance Officer should have directed the property owner move the septic system. There was board discussion concerning how to best address these issues with the Selectmen to avoid future problems.

Motion made by Beauregard to adjourn. Cincotta seconded the motion to adjourn. All in favor. None opposed. Motion carries. Meeting adjourned at 8:27 PM

Respectfully Submitted

Kandace Mattson