

**Town of Northwood**  
**Zoning Board of Adjustment**  
**September 23, 2013**

Chairman Roy Pender calls the meeting to order at 7:00 p.m.

**PRESENT:** Chairman Roy Pender, Vice-Chairman Tom Lavigne, Bruce Farr, Curtis Naleid, Doug Pollock, Board Administrator Linda Smith, and Board Secretary Lisa Fellows-Weaver.

**ABSENT:** Alternate Robert Bailey

**VOTING MEMBERS:** Roy Pender, Tom Lavigne, Bruce Farr, Curtis Naleid, and Doug Pollock.

**MINUTES:**

**Motion is made by Mr. Pollock, second by Mr. Farr, to approve the August 26, 2013, minutes, as written. Motion passes unanimously; 5/0.**

**Case #13:04: David Elliot, 8 Pleasant View Ave. Map 109, Lot 38.** Applicant seeks a special exception to Article VII, Section (B)(3)(a) for an upward expansion of an existing non-conforming structure located within the setbacks; Applicant seeks relief from RSA 674:41 II to allow an upward expansion of an existing structure, on a right of way.

Mr. Naleid recuses himself for this case.

**VOTING MEMBERS:** Roy Pender, Tom Lavigne, Bruce Farr, and Doug Pollock.

Mr. Pender states that the board will be a four member board.

Mr. Elliot states that he moved to this property in 2001. He states that the property was built in 1925, a seasonal cottage. He states that they have turned the cottage into a year round home; have installed a well, and added a foundation. He states that the basement is unfinished. He states they would like to increase the size of the home as there is limited living space.

Mr. Elliot notes that there have been personnel changes in the building department. He states that his contractor attempted numerous times to meet with the building department and he mentions vacations and staff hours. He states that Dave Copeland was given this project by Mr. Hickey. Mr. Copeland visited the site and gave a verbal agreement to begin construction. He states that the neighbor, Mr. Brown, came to town hall and requested that the construction be halted.

Mr. Elliot states that at this time he has a room that has been “buttoned up”, windows have been added, and the room is sealed in, based on the advice of Mr.

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Copeland. He states that there are tarps being used to cover the open areas of the room. He adds that this has been going on for two months with ongoing rain, which has gone into the porch and into the basement, creating mold.

Mr. Elliot continues to explain the property. He states that they share a septic system with Mr. Brown. He states that Mr. Brown purchased his cottage in 1996 and during the past 27 years, there have been 6 owners of his own house.

Mr. Elliot reads a letter from his attorney, Mark Hodgdon.

*Chairman Roy Pender  
Zoning Board of Adjustment  
Town of Northwood  
818 First N.H. Turnpike  
Northwood, NH 03261*

**Re: Building Permit Application of Mr. David Elliot**

*Dear Chairman Pender and Board Members,*

*This office represents Mr. Elliot in regards to the above referenced building permit application. Mr. Elliot is the owner of 8 Pleasant View Avenue. He has proposed enclosing his existing open porch and building an additional room above it. The additional room is intended to expand their living area and is not designated as a bedroom. The improvements are not designed to increase the occupancy of the building in any manner.*

*On July 9<sup>th</sup>, he received verbal approval from the Town for the work to proceed. Based on a meritless complaint from a neighbor, Mr. Charles Brown, with longstanding code and zoning violations of his own, the Town subsequently issued a cease and desist notice to my client. As I understand it, the basis of the order is the fact that Mr. Elliot has no recorded septic plan. This is not surprising since the property appears to predate the requirement for NHDES approval. The septic system, however, has been inspected and is functioning properly.*

*Mr. Elliot's building and septic system constitute a clear preexisting use under RSA 674:19. Their grandfathered status cannot be the basis for denial unless he proposes to expand the nonconformity or alter the building's purpose and manner of use in a substantial way. Those clearly are not the circumstances here.*

*The septic system in question was once shared in common with the abutting owner, Mr. Brown, but presently serves only the Elliot residence. There is ample evidence to support Mr. Elliot's right to continued use of the system since it has been in existence for far longer than the necessary 20 years to establish prescriptive rights. More importantly, there is no evidence that the system is failing or deficient in any way. Inspections indicate it is functioning well and as intended. Mr. Elliot intends to take the appropriate steps to meet NHDES requirements.*

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*The proposed work will not alter the building's purpose or manner of use in any substantial way. Adding the additional living area above the enclosed porch will not meaningfully impact the building's nonconforming septic system. Although the existing septic system was initially built to serve two residences and presently only serves one, Mr. Elliot is not increasing the occupancy of the structure anyways. Thus, the building permit request will not increase the septic load or flow.*

*It is most troubling that the Town has chosen to act upon Mr. Brown's complaints without analysis. Mr. Brown has a longstanding track record of ignoring the Town's zoning ordinances and code enforcement. He presently has numerous code violations on his properties that are a clear detriment to the neighborhood. It is not surprising that the rest of the neighbors universally support Mr. Elliot's proposed construction. The other three abutting property owners have provided letters expressing no concerns regarding the work.*

*Mr. Elliot's existing septic system is not impacted in any way by his request. Accordingly, the fact he has a preexisting septic system located on the adjacent land is not an appropriate basis upon which to deny his approval. We urge you to join the rest of Mr. Elliot's neighbors by approving his building permit.*

*Sincerely,  
Mark P. Hodgdon*

Mr. Farr states that he understood that Mr. Elliot's application for tonight is relative to a non-conforming structure, setback issues, and not for a septic system issue. Mr. Pender reads a letter from the town's new building inspector, Charles Smart, which states that as of today an updated septic design has not been received for the proposed expansion, which is required, in order to issue a building permit.

Ms. Smith explains that in speaking with the former building inspector, the building/roof expansion was noticed by the code enforcement officer and the reason why a cease and desist order was issued is because there was not a valid permit issued. She adds that she spoke to Mr. Donald Gardiner, in the presence of Mr. Elliot, who stated clearly he instructed Mr. Elliot not to begin work, and the work did began at the site, which is why the town became involved with the cease and desist. Ms. Smith states that the town could not issue a permit based on an upward expansion within the setback and RSA 674:41. Ms. Smith indicates that she was also aware that Mr. Brown also came in to speak to the building department.

Mr. Farr states that the testimony provided tonight should be relevant to a special exception. There really does not need to be any testimony as to whether the septic system is adequate for a building permit. Ms. Smith states that the building inspector felt, that based on the regulations, it is a requirement in order to

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expand the structure. She adds that the board's application checklist requires a valid septic system to be included.

Ms. Smith states that Mr. Elliot has been working diligently to get this application processed. She explains that he did not make last month's deadline. Mr. Elliot states that he was told that he had plenty of time to file the permits and should have been on the last meeting's agenda, but it did not happen. Ms. Smith continues, and explains that Mr. Elliot filed in the interim for this meeting. She indicates that there was a shift with staff leaving from the town hall and the applicant stated that he would provide evidence of the septic system for this meeting, with his attorney, which is why she continued to process this application. She states this is why there is an application in front of the board without the septic plan.

Mr. Farr states that the board can continue this case without the septic design provided.

Mr. Lavigne asks if a conditional special exception can be granted so that the applicant would not need to come back. Ms. Smith explains that the board may grant a conditional variance; however, they should not approve a conditional special exception. She adds that the building inspector has called NHDES; he feels that the information needs to come from someone from NHDES.

Mr. Pender asks about the current septic system. Mr. Elliot states that the system is on the Brown's property, 5 ft. from his own basement. Discussion is held regarding an easement. Mr. Elliot explains that he has not been able to locate anything in deeds or through NHDES. He adds that NHDES began keeping records in 1976. He states that no permit was issued for this property for a septic system. Mr. Farr states that he feels that he would like to hear from NHDES relative to if the property will qualify for a septic design.

Abutter Victoria Parmele, states that she has prepared a letter noting comments and concerns regarding the proposal. She explains that she feels that this application has been submitted prematurely due to the septic system issue. She states that the septic system is crucial to the non-conformance issue as it is needed to meet the criteria required. She states that the issue with the septic system should be addressed and cleared up first.

Ms. Parmele reads her letter.

*My husband Charles Brown is an abutter concerning Dave Elliot's Special Exception application, which is on the Agenda for Monday's ZBA meeting. It turns out I'm an abutter (Charlie is as well) concerning Dave's Appeal for relief from RSA 674:41 II to*

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*allow an upward expansion of an existing structure on a right of way. We own a house on the other side of the right of way.*

*I've looked at what Dave Elliot is/has been doing, from as many angles as I can think of, - and it looks to me like his Special Exception application and the other Appeal are premature, inappropriate, or both, for the following reasons:*

*- He has already illegally built a portion of the planned expansion of his living area by closing in his porch and then starting to put the framing in for the second story. He had his crew working on the second story a week and a half ago. Amazingly, this was after Charlie had told Dave Hickey over two months ago about the construction going on, and even after Dave Copeland could not find a building permit and stopped the continuing construction back in July. It would appear that Dave Elliot has been taking advantage of the fact that the Code Department has been going through a transition.*

*- Dave Elliot has very little land, and his septic system is on Charlie's land. Yet he was putting in the building expansion, and thus was planning to increase the load on the septic system, without informing Charlie or the Town of Northwood. This septic "system" is at least 35 years old and is essentially a tank with no leach field.*

*- We've spoken with DES several times about this situation, and as of yesterday Dave Elliot has not provided a septic design to them. DES has told us that the proposed expansion of the building means that Dave would have to put a septic system on his own land.*

*- There will need to be a a very innovative and well maintained septic system for such a small lot, which also is only about 100 ft from Northwood Lake. DES has told us that it's very possible that Dave Elliot will not only have to get an approved septic design (which might be difficult to get) but will also have to install the system, and not simply wait until Charlie's system fails.*

*Note that I haven't even mentioned the nonconforming structure issue that is the reason for the Special Exception application, and haven't spoken about the appeal concerning the right of way. All of these issues, - the lack of a septic system, the non-conforming structure, and a building expansion on what is essentially a driveway are issues Charlie and I will argue before the ZBA if needed.*

*But it sure seems to me that Dave Elliot has some important details to work out before he comes before the ZBA. I believe that he should have an approved septic system design, a plan to install it before using the additional living space, and a guaranteed septic maintenance plan. Then the non-conformance issues and right of way issue can be discussed - which won't be an easy discussion in itself.*

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*The fact that Dave Elliot has already violated the Ordinance in doing part of the expansion would I think make the Town reluctant to quickly accommodate his schedule. And that same fact also makes it unfair for Charlie and I to have to hustle to come up with an articulate response by Monday.*

*Victoria Parmele*

Mr. Elliot states that he has come in to the town at least 3 times asking what can be done regarding the water draining into the basement. He states that all three times Mr. Copeland told him to do what he had to do to “tighten up” the building. He states that the windows were already on order. He asked Ms. Smith today if Mr. Copeland would be attending the meeting tonight and he was told that Mr. Copeland is no longer employed by the town. He states that nothing has been done to the top of the building other than trying to keep the water out.

Mr. Elliot notes that he has additional letters from abutters; Mr. Vega, Mr. & Mrs. Lance Barton, and Mr. Schwartzberg and Ms. Kufftinec. He reads all of the abutters’ letters. All indicate support of construction of the project.

Mr. Elliot states that his attorney has contacted Dick DeSave from NHDES who has indicated that there are no issues with the current septic system being operated.

Copies of the abutter’s letters are provided for the file.

Mr. Pender asks the applicant if he would like the board to postpone making a decision on this case pending additional information from NHDES. Mr. Elliot requests that the board follows what NHDES has outlined in this situation. He explains that he is in the process of getting a septic design. He has contacted Sunset Hill Designs to do the work. He states that he would like to avoid coming back before the board and asks that the board follow what NHDES has outlined, put a septic plan in place, and bring a copy of the plan to the town when it is available. He states that he would be responsible should the system fail and need to replace the system, in which the submitted design would come into action.

Mr. Pender states that this board will proceed to decide the case without information from NHDES. He adds that the applicant can also request the board postpone until the information from NHDES has been obtained or to next month’s meeting. Mr. Elliot requests a waiver, and asks to present a copy of the septic design when available, and move forward with the project before more bad weather. He notes that there is nothing else that can be done to his home to prevent any additional water from coming in.

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Mr. Pender asks for public comments.

Charles Brown explains that the current septic system is a single system that went to Mr. Elliot's cottage. He states that there is another system that goes to his cottage. He states that when Mr. Elliot purchased the property, Mr. Elliot's realtor contacted him regarding an easement for the system. Mr. Brown states that he said no to an easement. Mr. Elliot states that it was not him or his realtor.

Mr. Brown states that he is not certain about the setbacks and suggests that a certified plot plan should be done. He adds that the reason the project was stopped was because he went to DES; you cannot enclose or expand, raise, or increase a size of a building without a new septic plan if the current system has not been updated within the past 20 years. Mr. Brown states that he spoke to Mr. Copeland at this time regarding the need for a septic and then Mr. Copeland stopped the activity. He adds that the septic plan needs to be approved not just created and on file.

Ms. Parmele refers to the special exception criteria. She states that there will be adverse impacts. She states that the septic system is an impact. She states that there needs to be a new system and that system needs to be added to Mr. Elliot's land. She adds that the current system can be allowed to fail and we will just have to wait until it fails, which is an environmental impact to neighboring properties and Northwood Lake. In addition, Ms. Parmele states that there is an economic impact as it was mentioned that their cottage is in need of improvement. She states that this is not a fire hazard but realizes that it is close to the property line; it is more for a recreational usage. She states that the area is one of the few areas on Lakeshore Dr. with trees. She adds that the proposal will block sunlight as it will tower over the existing building and will affect the use of their property. She states that the location of the septic is really the only location where it can be on the lot; there are limited options.

Mr. Pollock states that the building department is the department to see regarding any water issues within the house. He states that there are many hurdles to overcome and suggests the applicant rethink the request to base a decision on the materials in front of the board.

**Mr. Farr makes a motion, second by Mr. Pollock, to continue the case to Oct. 28, pending the need for the following information:**

**Septic design from NHDES**

**Provide a scaled sketch showing greater detail of the location of the right of way,**

**Information showing the boundary lines/pins.**

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Mr. Elliot requests that the board grant a waiver to him allowing him to move forward so that there will be no wait time until the next meeting.

Abutter Sandie Barton speaks to fairness. She states that Mr. Elliot is trying to improve the property and he is now put off another month when he may receive the information sooner. Mr. Pender explains the legal notifications required for cases and a decision needs to be made tonight as additional notice may be required.

Ms. Parmele notes that there are other criteria that need to be met with a special exception. She also notes that there is the road issue that has not been addressed.

**Vote on motion to continue:**

**Mr. Farr – in favor**

**Mr. Pollock – in favor**

**M. Lavigne – in favor**

**Mr. Pender – in favor.**

**Motion passes unanimously; 4/0.**

**Case #13:05: Peter Johnson & Thomas Johnson, First NH Turnpike. Map 110, Lot 29.** Applicant seeks a variance to Article VI, Section (C)(3) and Article IX, to allow a minor subdivision of a lot that contains more than 20 acres and a sum of 25% or greater of designated agricultural soils without compliance with the Agricultural Soil Overlay District requirements, including open space design.

Mr. Naleid returns to the board as a voting member.

Mr. Farr recuses himself for this case.

**VOTING MEMBERS:** Roy Pender, Tom Lavigne, Curtis Naleid, and Doug Pollock.

Mr. Pender notes that this is a four member board for this case.

Atty. Jason Craven is present representing Peter and Thomas Johnson.

Atty. Craven states that the purpose of the variance is to resolve a dispute between abutting land owners, Johnsons and the owners of Johnson's Dairy Bar. Atty. Craven explains that the proposal is to subdivide 12.3 acres from a 40 acre parcel, owned by the Johnsons, and transfer to the owners of the restaurant parcel. Atty. Craven states that the 12.3 acres includes a septic easement, which benefits the restaurant, as well as a well radius easement, also benefiting the restaurant and a burden to the Johnsons. He adds that there is no development plan in place or intention to develop the property any time soon. He states that this proposal is a way to solve problems.

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Atty. Craven states that in order to move forward and meet with the planning board on Thursday, the zoning board must address the agricultural soils overlay district, which requires open space design criteria to be met. Atty. Craven states that there is nothing to design at this time as there are no definitive plans.

In addition, Atty. Craven states that they are not seeking a blanket waiver from the Ag soils or open space design concept. He states that if they are successful with the planning board and zoning board, and within a few years there is something that needs to be done, they will need to meet the open space requirements and propose a site plan to the planning board.

Mr. Pender asks if there are any abutters present. Abutter Tony Matras is present.

Mr. Farr, affected party, states that he has an agricultural interest with this property and has had a lease on the parcel for the past 6-7 years with a few more left. He explains that he is in favor of the agricultural districts in Northwood and the district of this property. He states that he is well aware of the history of the property and realizes that there does need to be something done to protect the land to continue to use the land as an agricultural use. He does not believe that the proposal will make any significant changes to this property and the hay field with still be productive. He states that he does not believe that the proposal is against the ordinance.

Mr. Pender asks about the intent. Atty. Craven replies that there is no plan to build at this time. He states that the intent could change and at that time there would be a need to appear before the planning board.

Mr. Pollock notes that there is an "Under Agreement" sign. Atty. Vachon replies that the entire parcel is not on the market, only the 12.3 acres.

Mr. Pollock asks how much of the acreage or the percentage of land is the actual septic system. Discussion ensues. Mr. Wormell, LLS, explains the area required for a sewer to support the restaurant would be approximate 7 acres. He states that there is an easement on file for the septic area that was filed about one year ago; it is not a design plan though, just the easement plan. Atty. Vachon mentions that there is additional area on the other side for the well radius.

Additional discussion is held regarding the percentage required for open space and septic plans. Atty. Craven states that the plan would need to be modified. Ms. Smith states that there is a regulation that states that if the parent lot is 20 acres or greater that contains 25% or greater of agricultural soils, it must be open space design. She states that the applicants are requesting relief from having to

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do an open space subdivision, which would require the applicant to have an open space common area as a part of the design. She states that if granted relief, there will be a standard subdivision with just two lots.

Atty. Craven states that at any time of development, the applicant would need to come before the ZBA and/or go before the planning board relative to the septic encumbering more than 50% of the property and at that time would not qualify for an open space design. He states that they have not looked into that at this time as they are in no position to be developing the area. Ms. Smith states that it is her understanding that once the board grants relief for this parcel, the smaller piece that has developed area existing, would be exempt because it would be under 20 acres. If there were 20+ acres remaining with 25% or greater soils, then the other parcel may be subject to open space issues, not the smaller lot.

Mr. Naleid asks if there will still be two separate lots with the new 12.3 acre lot and the restaurant lot. Mr. Fenerty replies yes, and notes that the restaurant lot is approximately 2.25 acres.

***5 Variance Criteria***

***1. The variance would not be contrary to the public interest because:*** Atty. Craven states that the intended subdivision is to solely create a new 12.3 acre lot to be associated with tax map 110; lot 28, commercial uses. There is no intention of creating or establishing more than the one (1) new lot (tax map 110; lot 29-1) and there is no intention of creating lots for residential uses or development. The town's Master Plan recognizes that a goal is to encourage commercial uses within the town and the restaurant parcel has been a long standing commercial operation within Northwood and is famous as being a Northwood attraction. Allowing for this minor subdivision without requiring compliance with the open space design criteria will serve to allow a long standing fixture to continue to thrive and grow. The public has an interest in retaining good, growing businesses within the Town and granting this variance will not violate the zoning ordinances basic objective. The variance would not alter the essential character of the neighborhood, nor would it threaten public health, safety or welfare. Moreover, by allowing the Johnsons to subdivide off the land that is encumbered by the septic and well radius easements, the remainder of the existing parcel (28 acres) will remain as agricultural uses as it currently is today.

***2. The spirit of the ordinance is observed because:***

Atty. Craven states that the Agricultural Soils Overlay District is intended to preserve areas of Prime Farmland or Farmland of Statewide Importance by promoting their continued agricultural use, an important goal in the Town's Master Plan. Moreover, the resulting Open Space Design requirements predominantly address subdivision and associated residential development of

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lands. He states that is not the case here. This is a minor subdivision that will create a 12.3 acre parcel to be associated with the commercial uses in the town. He adds that by granting this minimal variance, the Johnsons will be in a better position to maintain and own their remaining farmland properties in Northwood, which have extensive frontage along First NH Turnpike. He states that granting this variance will not violate the ordinance's basic zoning objective. The variance would not alter the essential character of the neighborhood, nor would it threaten public health, safety or welfare.

***3. Substantial justice would be done because:***

Atty. Craven states that granting of this variance will serve to support an important long standing commercial enterprise in Northwood; provide resources to the Johnsons to assist in maintaining and operating their remaining farmland properties in Northwood; allow the remainder of the existing parcel (28 acres) to qualify for conservation opportunities and other protections; and help resolve disputes among otherwise good neighbors and town members. He adds that the Open Space Design criteria are primarily intended to control residential development in these areas and preserve the agricultural nature of the property. The variance requested for this minor subdivision to proceed will properly allow this subdivision to occur, which is in the best interest of the property owners and the town.

***4. The value of surrounding properties would not be diminished because:***

Atty. Craven states that allowing for this minor subdivision to occur without the application of the Open Space Design requirements will not in any way diminish surrounding property values. In fact, it is unlikely that there will be any real noticeable change. The new parcel will sit primarily behind the restaurant property with the vast majority of the existing parcel's frontage remaining under the ownership of the Johnsons and retaining its farmland appearance. He states that as there is no intention of employing the new parcel for residential development, the waiver of the Open Space Design requirements will not impact any surrounding property values. The owners of the properties most impacted by the minor subdivision sought are the Johnsons themselves, and the owner of tax map 110; Lot 28, all of whom support this variance request. Moreover, the existing commercial operations on the restaurant parcel have existed for many years and bring value to the surrounding community as a gathering place and a commercial tax base, as well as an opportunity to generate employment opportunities for the town.

***5. Literal enforcement of the provisions of the Ordinance would result in unnecessary hardship because: owing to special conditions of the property that distinguish it from other properties in the area, there is no fair or substantial relationship between the general public purpose of the***

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***Ordinance provision and the specific application to the property; and the proposed use is a reasonable one, because:***

Atty. Craven states that the existing parcel is encumbered by a septic easement and a well radius easement as well as several overlay districts. The subdivision is intended to separate the existing parcel so that the 12.3 acre parcel, which encompasses the septic and well radius easements, becomes a separate parcel while the remainder of the existing parcel (28 acres) is free of these encumbrances which have impacted the existing parcel's ability to qualify for federal conservation easements in the past. The location, existing uses and the existing encumbrances distinguish this property from others in the area.

In addition, Atty. Craven explains that the intent of the Agricultural Soil Overlay District Ordinance is to preserve farmland where appropriate and when residential development is intended in the district to require such development to occur pursuant to the Open Space Design criteria so as to provide minimal impact on the land and the environment. He adds that in the instant case, the minor subdivision is to create a 12.3 acre lot that is significantly encumbered by a septic easement and a well radius easement. As there is no intended development associated with this subdivision, requiring open space design makes no rational sense. The public purpose of the ordinance is to control the design of development in these specific overlay districts while preserving aspects of the land and its character. The variance sought is simply to waive the required application of the open space design criteria to this minor subdivision. At this time, no development is expected. Moreover, the remaining Johnson property, with significant frontage along First New Hampshire Turnpike will retain its farmland appearance and character and will become free of the septic and well radius easements that have impacted its opportunities for conservation.

In closing, Atty. Craven states that by allowing this variance to waive the application of the open space design criteria to this minor subdivision, preserves significant farmland frontage and encourages commercial use in the town; all pursuant to the town's master plan which is both reasonable and appropriate.

**Mr. Lavigne makes a motion, second by Mr. Pollock, to grant the variance for Article VI, Section (C)(3) and Article IX, based on the fact that all 5 criteria have been met, as provided in the written and oral testimony on the 2 lot subdivision including existing "on site" conditions/easements.**

Mr. Lavigne states that all appearances will be exactly the same except that the restaurant will own the land that the septic is on. Mr. Naleid notes that the lot could be subdivided into residential lots and would not meet the open space requirement. He asks if there should be some consideration or thought to maintain the property and if the property were to be developed. Ms. Smith states

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that in order for that to occur the septic systems would need to be gone. She adds that the remaining parcel will still be subject to the open space should it meet the threshold.

**Motion passes unanimously; 4/0.**

Mr. Farr returns to the board as a voting member.

**Mr. Lavigne makes a motion to adjourn. Mr. Naleid seconds. Motion passes unanimously at 8:22 p.m. 5/0.**

Respectfully submitted,

Lisa Fellows-Weaver  
Board Secretary