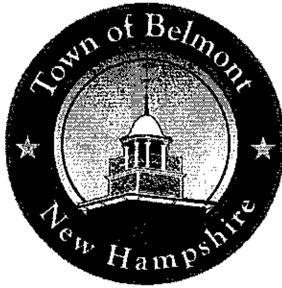

ZONING BOARD OF ADJUSTMENT
SPECIAL MEETING
BELMONT, NH

Thursday, February 2, 2023
Belmont Mill & Zoom
Belmont, NH 03220

Members Present: Chairman Peter Harris and Member David Dunham. Mark Mastenbrook Sharon Ciampi, and Norma Patten

Alternates present: John Froumy
Absent:
Staff: Susan Austin and Karen Santoro.

Zoom: Michelle and Dave Slock, Hillary Young, and Liz Stewart

6:00 Public Meeting

The Chairman opened the meeting at 6:00 pm and welcomed those in attendance and announced that as Chairman of the Belmont Zoning Board of Adjustment, this public body is authorized to meet using electronic means. He said that the Board gave notice to the public of the necessary information for accessing the meeting using Zoom or telephone, and he announced that any party experiencing any difficulty in accessing the meeting at any point, should call 603-267-8300 x 101, and the meeting will be recessed until access can be restored for all parties.

Chairman Harris stated that he wanted to remind everyone to be respectful to each other and the Board members, and to please direct all questions and comments to the Board. The public will be allowed the opportunity to address the Board during the public hearing.

Appeal of an Administrative Decision: Timothy Morgan: Appeal of an administrative decision of Article 5 Table 2 of the Zoning Ordinance to construct a single-family home closer (10') to an unrelated structure on the same lot than allowed (30') Property is located at 28 Wakeman Road in the "RS" Zone, Tax Lot 111-024-000-000. ZBA# 0223Z.

Tim Morgan, the applicant and his attorney, Daniel D. Muller, Jr., Esquire from Cronin, Bisson & Zalinsky, P.C., were present to discuss his application.

D. Muller stated that in September, there was an email exchange between the applicant, the previous Town Planner and the Assistant Fire Chief. In these emails, the former Planner, Ms. Whearty, stated

that the applicant would not need zoning relief from the 30-foot separation between unrelated structures. At that time, the Assistant Fire Chief indicated that no special action was needed at least as far as the Fire Department was concerned. Based on this information, the applicant has spent over $20,000 to get state permits, have plans done, and purchasing materials for construction on the lot. The applicant claims that in December of 2022, Ms. Whearty essentially did a 180 on her position when the applicant applied for a building permit, she informed the applicant that he needed relief from the separation between the two unrelated structures. He stated that he was there to tell the Board that her initial determination was the correct determination.

D. Muller informed the Board that as Ms. Whearty indicated, this is a non-conforming lot of record. The Town has a provision in their zoning ordinance in Article XI, Section C; a non-conforming lot is buildable if it has approved septic, it has an excess of frontage, and lastly, it meets the applicable setbacks. He then read the board the definition and stated that setbacks are specifically defined in Belmont's ordinances as the distance to the boundary line. Under the plain language of the Ordinance, this lot meets the criteria of a buildable lot. There has been some suggestion from an abutter's counsel that focuses on a particular provision, but he doesn't think this changes the fact that the initial determination was right under the non-conforming lot provision. He stated that he doesn't necessarily agree that the table is plain or unambiguous in it's meaning. A provision is ambiguous if it can be subject to one or more reasonable interpretations. Just reading the table and the reference to the 30-foot separation is a foot note that brings it to Article 8 that references manufactured housing parks. The table itself references Article 8, which again is referencing manufactured housing parks. There is a reasonable debate as to whether that provision applies beyond manufactured housing parks. He argues it's reasonable because when Ms. Whearty first looked at this in September, she came to the same conclusion. One of the statements made in the email exchange in September between the Town and the applicant noted that "Our restrictions, outside of manufactured home parks, are only about the distance from lot lines. That would not change with your neighbor's encroachment."

He stated that the applicant tried to see if the town had applied this provision outside the manufactured housing park, because there is a doctrine out there called the Doctrine of Administrative Loss that says if there is an administrative provision that is ambiguous, that has been interpreted a certain way for a period of time, that interpretation sticks and it can't be changed unless the Zoning Ordinance is amended.

D. Muller commented that there are other arguments that he has, but he doesn't think the majority of them are for this Board, but to avoid any claim down the road that he didn't raise them, he will just raise them in passing. One is obviously one that he referenced to the representation made by a Town Official, relative to Zoning Ordinance that caused his client to expend funds in the reliance upon the same. Again, this is an ambiguous provision, and therefore his reliance was justified. There is a Doctrine called estoppel that he feels would apply in this situation, but there is also a legal case called Dembiec v. Town of Holderness (2013) which at least on the surface suggests that it's not an issue for this Board.

He stated that his main two points in front of this Board are the ambiguity and the Administrative Loss Doctrine, and the Non-Conforming Lot provision, because those are interpretations of the

Zoning Ordinances, and that is what this Board does. He stated that the Board should rule in the initial position of the former Planner that no relief is required.

D. Dunham stated that in Table 5 Article 2, there is a provision that requires a minimum of 30 feet between unrelated structure on the same lot. He stated that he would think it would apply in this situation. D. Muller stated that if you look at that same provision, that 30-foot separation requirement initially did arise in the context of manufactured housing parks. Looking at the language of that table, there are also references to Article 8. In Article 8 it talks about manufactured housing parks. If you look at the references to Article 8, both in the footnote and the table itself, it should say to a reasonable person that it applies to manufactured housing parks, whereas there also may be an argument that it applies to other structures. That is why he says there is an ambiguity and therefore he would look at what the practice has been, and as he stated, the applicant did try to find anything that suggested that it was applied to structures other than manufactured houses.

D. Dunham asked if there was a well on the applicant's lot that serviced the abutters lot. D. Muller stated that in the deed there was a reference to a private well easement pertaining to the existing house next door to the extent that it encroaches on the applicant's property. He stated that he has not done the title work to see if the easement goes with the land or goes with the person. It is also his understanding that both properties had common ownership at one point in time which could lead to the termination of an easement. He noted the deeds to the property do reference an easement pertaining to the abutter's house.

M. Mastenbrook stated that D. Muller pointed out that the Zoning Board's job is to ensure safety and prevent overcrowding, and he is correct in that statement. One of the things this Board is serious about is safety. M. Mastenbrook said that looking back through the minutes of our meetings, you will find that our decisions revolve around safety. Ten feet between structures is not a lot. If one of those structures catches fire, that flame can easily jump those ten feet to the next structure. He feels that the applicant should go through the Variance process and meet the criteria that goes with that process, rather than overturn an administrative decision, because the person who made that decision isn't there to defend why she made that decision.

T. Morgan stated that on September 27th, the Board will notice that there were 3 attachments with the email. In those attachments, the surveyor noticed a piece of language about the 30-foot setback and they brought it to Mr. Morgan's attention, as well as asking the Town for clarification on it. At that time, Ms. Whearty stated that it only applied to manufactured housing. After speaking with her, he brought her a hard copy of the site plan that was attached to the email, and followed up after that with another email. Meanwhile, Ms. Whearty had a conversation with the Town Attorney after receiving several calls from two abutters questioning zoning and building codes in reference to his plan to build a house on this lot. For that reason, Ms. Whearty let him know that in order to be safe, he needed to apply for a variance or appeal the decision.

J. Froumy stated that he feels that they can all agree that there was an error in determination insofar that there was a contradiction later. He asked if the applicant was suggesting in any way that the error should influence how the ordinance is applied? The ordinance is saying that it's 30 feet, and the applicant stated that the definition of setback is to the lot line, rather structures. But the ordinance

reads "Setbacks between unrelated structures defined by this ordinance require 30 feet between unrelated manufactured houses." it's found under the section of manufactured housing. It doesn't mention stick-built houses. He asked if the applicant believes that because Ms. Whearty made an error in the beginning that that he should get relief?

D. Muller stated that is essentially the Estoppel question. The problem that comes up from his perspective is that is there is a challenge down the road, the general way it goes if there is a challenge is that the Law expects him to go to this Board first. There is a statutory ability to consider what they call an Appeal of an Administrative Decision. He stated that because of that, he has to come in front of this Board if there is a question of interpretation. With respect to the setback, he stated is actually referring to Article 15, where the general definitions are. He is not referring to Article 8 or Article 5. Referring to the non-conforming lot provision of the Zoning Ordinance, Article 11, Section C, if the applicant meets those three criteria, he has a buildable lot. One of those criteria is setbacks, and since setbacks is a defined term that definition controls. If you want to expand the definition then that is something that they can take to the voters.

J. Froumy clarified for the record that the Applicant was not proposing a manufactured home, rather a stick built home? D. Muller stated that he was correct. J. Froumy asked if it was a single story. D. Muller stated that it was two story. J. Froumy stated that according to Article 5, Table 2, the foot note says that for single story structures refer to Article 8 Section B.9.f. D. Muller stated that in the table itself, there are minimum structure setbacks, followed by footnotes 2 through 14, when he is talking about setbacks, that is what he is referring to. That shows that setbacks from the boundary line, and setbacks from unrelated structures are two separate categories. If you look at the minimum setback between unrelated structures contained on one lot, in parentheses it says also Article 8.B, which is the manufactured housing. If you also look at footnote 11, that talks about a circumstance in which the 30-foot setback can be reduced. If you look at the general setback that is referenced in Article 8.B, it says 30 feet. That is the standard rule and the ability to reduce it. What his point is, is that this is not a manufactured house, it's not in a manufactured housing park, this is a single-family house. The references to Article 8 that deal with manufactured housing, at least there is a reasonable ability to read that as that it applies to manufactured houses. Because otherwise in this table refers to minimum structure setbacks.

Chairman Harris opened the public hearing.

Jason Reimers, attorney for the abutter Chad Young was present to speak. He stated that none of the arguments heard tonight are in the application, and many of them are not applicable. The former Town Planner's decision was based on, and supported by, the plain language of the Zoning Ordinance. He doesn't feel that this is confusing. He stated that they have heard a lot of legal arguments tonight, but many of them are not applicable. Article 5, Table 2 of the Ordinance requires a 30-foot setback between unrelated structures located on one lot. As for the definition of setback, he does not agree that the definition of setback in Article 15 in any way affects or modifies the wording of Table 5.2. The definition of setback is (a)side and rear setbacks are the distance from the extreme limit of a structure to a property line, and (b) Front setbacks are the distance from the extreme limit of a structure to the road. The definition is telling you where to measure from, it doesn't say it's only from the road or lot line. The language is very clear. Minimum setbacks between unrelated structures located on one lot. J. Reimers stated it is no secret that Mr. Youngs house encroaches on the

applicant's property. The chain of title shows that it has been allowed by easements in the deeds. J. Reimers stated the reasons given by the Applicant for why the Administrative Decision should be reversed are not compelling.

Motion: M. Mastenbrook moved to deny the request to overturn the decision of the Zoning Administrator for the following reasons:

1. Unrelated structures require 30' on the same property.
2. On Table 5.2, all districts include the setback of 30 feet. Not just manufactured homes.

S. Ciampi seconded
Vote: Motion carried (4-1) D. Dunham voted no

Recess was called at 7:10 PM
The Board returned at 7:28 PM

J. Froumy was appointed as a voting member; M. Mastenbrook will not be a voting member.

Abutters' Hearing – Timothy Morgan: Request for a variance of Article 5 Table 2 of the Zoning Ordinance to construct a single family home closer (10') to an unrelated structure on the same lot than allowed (30') Property is located at 28 Wakeman Road in the "RS" Zone, Tax Lot 111-024-000-000. ZBA# 0223Z.

Current Considerations:
Does the application meet the criteria for granting a Variance?
The property is within the Aquifer Protection District.
Is this a Development of Regional Impact?

The Chairman stated the following definition will be used to determine if the applications before the Board tonight have a regional impact. He explained that in order to provide timely notice, provide opportunities for input and consider the interests of other municipalities, the Board shall act to determine if the development has a potential regional impact as defined by RSA 36:55. Impacts may include, but are not limited to: relative size or number of dwelling units as compared with existing stock; proximity to the borders of a neighboring community; transportation networks; anticipated emissions such as light, noise, smoke, odors, or particles; proximity to aquifers or surface waters which transcend municipal boundaries; shared facilities such as schools and solid waste disposal facilities.

MOTION: N. Patten moved that the proposal does not have a potential regional impact.

The motion was seconded by J. Froumy
Vote: All in favor, motion carried. (5-0)

Department responses:

Fire Chief: After reviewing this the fire department has no control over zoning. With that our concern is building house with less than 10' apart could and can be an issue. If one house catches fire because they are close it could and can burn the 2nd and 3rd houses. This area is very tight for fire equipment and accessible water. I know we have places in town that this was allowed. I would caution the board on this because. Alton has this same congested type area and has an outside fire burn multiple homes in one of the larges fires in this area.

Building/Code Enforcement Officer: If abutters house did not encroach on this lot, it would be 15' between structures. More if Young (abutter) had a setback.

Staff Comments: Preexisting nonconforming. No driveway permit required – private road.
Existing encroaching structure on 30 Wakeman Rd was built in 1950; prior to the enactment of Zoning.

D. Muller stated that this is a pre-existing non-conforming lot that was created in the 1950's. It is currently unimproved, and Mr. Morgan would like to build a 16' X 36' structure on the property. An explanation as to why the house is proposed in the location that it is, looking at the plan, map 111-025 is the abutter's dwelling. Their bedroom is on that edge, and the topography slowly goes up hill. The proposal in part was an effort to offset the house from the neighbor's house. The idea was to not have the bedroom windows lining up. That was a consideration that went into the design. The problem that arose is that the corner of the abutters house encroaches on the Applicant's lot. That is where they are having an issue, because this creates a distance of 10 feet from each structure, which created the need for relief. If you look at the proposed house, it can really be pushed further towards 111-025, as it would create another zoning violation.

D. Muller asked with respect to the public interest aspect, the test is whether this will unduly conflict with the basic provisions of the relevant zoning provision, and there are a couple of ways that they can test that. Is it going to alter the essential character of the neighborhood? Or is it going to cause a threat to public health, safety and welfare? From their prospective, it is not going to alter the essential character of the neighborhood. According to an older plan for the area, that shows that these were a lot of smaller lots with instances where structures are relatively close to each other. In this case, there is a house that was built over the property line. The lot will be on public sewer, so there really is no issue in terms of the septic.

Based on the earlier conversations that brought up the issue of fire, would. D. Muller noted that the Applicant made an inquiry as to whether the town would require any special fire related materials for that section of the building that is close to the other house, and the answer was no. He also asked if there was a minimum separation between buildings that would be applicable here and was also told no.

The proposal here is for a single-family home, which is a permitted use on an existing lot. He would note that the encroachment of the abutters house onto this lot was a well-known fact. This is factored in in regards to the surrounding property values. The applicant is going to build a nice new home that will improve the value of his lot, and in turn will improve the value of the surrounding lots.

With respect to substantial justice, this is a section that focuses on the loss to the public, he will emphasize that because he often hears in these cases that people try to bring up the private property rights or the rights of the owner. This is an unimproved lot. The applicant is trying to make a reasonable use. This is a modest house; he's not trying to maximize the lot.

With respect to the hardship, in terms of a condition that distinguishes this property from any other, it is the encroaching house. There is an encroachment on a non-conforming lot which brings its own limitations.

D. Muller informed the board there was a question about the water line. Again, from his perspective, private property disputes are not for this Board to decide. But he realizes that practically speaking, there is a concern about this. They have tried to find out where this water line is with no luck. If the water line needs to be removed, meaning the line that goes from the well on lot 23 to lot 25, the Applicant will do it at his expense.

J. Froumy stated that he would like to state for the record that this is a two-story structure and allow that to be a consideration. He stated that only the corner of the abutters house is 10 feet away, and the house is set back 50 feet from Wakeman Road, so it meets setback requirement and there is a significant distance in the back. Addressing the Applicant, he asked if there a reason why they can't move the house back? D. Muller stated that practically speaking, the house can be moved. But for privacy purposes, for both parties, the effort was made to push it forward. T. Morgan stated that he put the house there in order to be respectful of the abutter's privacy. He stated that they would be willing to move it.

Chairman Harris opened the public hearing.

Jason Reimers was present to speak for the abutter Chad Young. He stated that obviously an applicant has to satisfy all five criteria in order to be granted a variance, and he outlined each criteria for the Board.

Granting this variance would not benefit the public interest. For a variance to be contrary to the public interest, it must be unduly and in a marked degree conflict with the ordinance such that it violates the basic zoning objectives. While judging whether granting a variance violates basic zoning objectives, the court considers, among other things, whether it would alter the essential character of the of the locality or threaten public health, safety or welfare. Here, having two homes 10 feet apart will threaten public health, safety and welfare.

The variance is contrary to the spirit of the ordinance. One important spirit of the Zoning Ordinance is the orderly development of the Town of Belmont. An important tool towards that end is the setback. The ordinance has many setback requirements, and the ordinance is forgiving for non-conforming lots. A variance request for modest setback reduction is often not contrary to the spirit of the ordinance, however, this variance application is deeply contrary to the spirit of the ordinance because of its magnitude, requesting a 20-foot reduction of a 30-foot setback. Ten feet between dwellings is not consistent with the spirit of the ordinance in any way, therefore the variance should be denied.

Granting this variance will not do substantial justice. "Perhaps the only guiding rule [on this standard] is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Malachy Glen Assocs. v. Town of Chichester, 155 N.H. 102, 109 (2007). While a denial of the variance would cause some loss to the Applicant, that loss is far outweighed by the gain to the public by the denial of this variance. The gains to the general public include (1) not having two abutting homes ten feet apart; (2) two homes ten feet apart causing undue congestion close to Lake Winnisquam; and (3) not setting a precedent that homes can be built ten feet apart, especially when the encroachment was open and easily discoverable by minimal due diligence. Denying this variance will not do substantial justice.

Diminution of Property Value. Here, there should be no doubt that having an unrelated house ten feet from Mr. Young's house will diminish the value of his property. The required setback for unrelated structures on a lot in the RS District is 30 feet, even on non-conforming lots. This is consistent with the Zoning Ordinance's goal of keeping at least 25 feet separation between dwellings (as the side setbacks for non-conforming lots is 12.5 feet, that would allow abutting houses to be a minimum of 25 feet apart). Here, the Applicant seeks to build his home 10 feet from Mr. Young's home. That is less than any setback in the Zoning Ordinance. This is no minor request to relax a setback by a few feet that would be inconsequential to the abutting property. Here, the occupants of the two homes will be able to hear conversations in each other's' homes. It's understood that the Applicant intends to rent his house out as a short-term rental. Towns are grappling with the noise and behavioral impact of short-term rentals. This variance would bring a short-term rental ten feet from Mr. Young's home. Even if the Applicant himself resides in the home, the ten-foot distance will diminish the value of Chad Young's property.

Denial of the Variance Would Not Result in an Unnecessary Hardship. Chad Young did not build his home. His home was built in or about 1946 in its present location. Unfortunately, it encroaches onto the Applicant's property. However, the critical fact is that the Applicant had, at the least, constructive notice of the encroachment when he purchased his property. Both constructive notice and actual notice are both legal notices. "Landowners are deemed to have constructive notice of the zoning restrictions applicable to their property." Harrington v. Town of Warner, 152 N.H. 74, 83 (2005) "person who purchases land with knowledge, actual or constructive, of the zoning restrictions which are in effect at the time of such purchase, is said to have created for himself whatever hardship such restrictions entail."

Chairman Harris closed public comment

D. Dunham stated that he had calculated that if the house was moved back 15 feet, the 10-foot setback would change to approximately 18 feet. The Applicant had stated that he was willing to amend his plan. J. Froumy pointed out that a revision of the applicant's plan to relocate the proposed structure would make it worthy of the Board's consideration, but would not constitute a guarantee of a granting the variance.

Motion: J. Froumy moved to table the request for a variance of Article 5 Table 2 of the

Zoning Ordinance to construct a single family home closer (10') to an unrelated structure on the same lot than allowed (30') Property is located at 28 Wakeman Road in the "RS" Zone, Tax Lot 111-024-000-000, until March 22, 2023, with a closing date for any new information of March 1, 2023. To allow the applicant to amend the site plan to show approximately where the water line and where the new line would be, as well as the new location for the proposed house.

N. Patten seconded
Vote: Motion carried, all in favor (6-0)

ADJOURNMENT:

MOTION: J. Froumy moved to adjourn at 8:41 pm. The motion was seconded by D. Dunham and carried (6-0)

Respectfully submitted,

Susan M. Austin
Land Use Administrative Assistant