

Town of Newport
Zoning Board of Adjustment
February 16, 2023 6:30 PM
Board of Selectmen's Room/Municipal Building
15 Sunapee Street/Newport, NH

PRESENT BOS ROOM: Tim Beard, Vice Chairman; Chris Whalen, Scott McCoy, alternate; Jeffrey Kessler, BOS Representative, Bert Spaulding, Sr.

ABSENT MEMBERS: Ben Nelson, Chairman

VIDEOGRAPHER: NCTV

STAFF PRESENT: Christina Donovan, Planning and Zoning Administrator

CALL TO ORDER: Acting Chairman Beard called the meeting to order at 6:32 p.m. followed by a roll call of members present.

ADMINISTRATION: none

MINUTES: November 17, 2022

After a brief discussion on the lack of a quorum of Board members in attendance from the November 17, 2023 meeting; Mr. McCoy made a motion *to table the minutes of the November 17, 2022 ZBA meeting to the March 16, 2023 ZBA meeting*. It was seconded by Mr. Whalen. *The motion passed 4-0-0.*

NEW BUSINESS:

Case #1141: 169 Sunapee Street, LLC (Owner) Jon Livadas (agent): Request a Variance from the terms of Article IV, Section 409.7 of the Zoning Ordinance to reduce the required off-street parking for residential. The property is identified as Map 112 Lot 032 and is located at 169 Sunapee Street in the Industrial (I) Zoning District.

Acting Chairman Beard opened Case #1141. He acknowledged Mr. Livadas (attending via zoom) and asked him to explain what he would like to do.

Mr. Livadas said his request was for the Board to grant him a variance to reduce the number of paved parking spaces in the Mill lot from 2.0 per unit to 1.25 parking spaces per unit.

The Board stopped Mr. Livadas after his statement. They said the documentation the Board had stated he was requesting a reduction from 2.0 to 1.7. Ms. Donovan addressed the Board, apologizing to the applicant.

Ms. Donovan told them she was asked by Town Manager Rieseberg if it was legal to submit a lower reduction request during a meeting. She had responded that legally Mr. Livadas could do it because the letter went out (to abutters) stating he was asking for a reduction; no number was given. Ms. Donovan had attached Mr. Livadas' additional information to Board packets; the original, and the new information with the lower number (1.5). The information in their paperwork is identical except for the lower parking space numbers. Ms. Donovan stated Mr. Livadas could ask for a lesser amount (than in their packets) because he is asking for a reduction. She repeated that she believed that legally it could be done because neither the mailing nor posting gave a specific amount of parking spaces in the reduction request.

Mr. Livadas addressed the Board and offered to go through the application and request. He would go through the files that the Board had. He asked if the Board had the request of 1.5 (they had both 1.7 and 1.5). He offered to talk the Board through the applicant's thought process for the reduction of spaces; preferably why they would like 1.25.

Mr. Livadas informed the Board that their original request was 1.7 because they did not know what they would be allowed and granted. The goal and reasoning for lowering the number of parking spaces was for:

1. The parking need is not two cars for each apartment

2. They will not create as much impermeable surface along the river (with a lower count)
3. Their goal is to preserve the natural landscape; the survey in the packets shows the current gravel parking lot.

Their ultimate goal is to only pave the areas that currently have gravel parking. They have gone through the site plan and survey and removed proposed parking spaces to meet that goal.

Mr. Livadas continued, saying that in previous meetings on the Mill, there have been concerns about traffic, and cars entering and exiting the lot. In addition to the natural landscaping, it (reducing parking) is a way to prohibit unregulated overnight parking. Ms. Donovan has been sent a study by the NH Housing Authority which states that only 15% (of people) in low income housing have two cars. Ms. Donovan stopped Mr. Livadas to inform him she did not have the study referenced. She asked when he sent the email and study. She was told approximately 6:15 pm (February 16, 2023).

Ms. Donovan left the meeting to get the study from her email.

Mr. Livadas told the Board the study states that only 15% of tenants in low income housing have two cars. 22% have no vehicles. He apologized starting off the meeting requesting 1.25 spaces; making it seem like something it wasn't ...Like Ms. Donovan said it wasn't submitted (a number) but he had been made to believe that he could ask for anything. He again apologized for starting with that number. Continuing, Mr. Livadas said that using the 15% of people that do not have vehicles; the ratio 1.15 would equal 81 cars (81 needed parking spaces).

There were technical difficulties with the zoom.

Mr. Livadas continued, saying he has been very candid with the Board in the past and he believed 91 spaces are equally sufficient. He would like to have a conversation with the Board to understand how the Board ...involving parking changes over the years.

Mr. Livadas repeated their goals:

- 1) Preserve the natural landscape
- 2) All the costs saved (less paving) can be put into the building
- 3) By removing parking costs, the money can be used on the inside of the building.

Ms. Donovan returned to the meeting.

Ms. Donovan passed out a single sheet from the NH Housing Authority study. Mr. McCoy asked where he could get a copy of the whole study. Mr. Livadas offered to send the whole report; it was lengthy. Mr. McCoy and Ms. Donovan asked for the link to the website. Mr. Livadas said he only had one in pdf format. Ms. Donovan asked him to send the pdf and she would get the link to the members.

Acting Chairman Beard asked what kind of housing was proposed in the Mill. Many applicants have been before the Boards and its type and uses have changed several times. Mr. Livadas informed Acting Chairman Beard it is 70 units of workforce housing (studios, 1 bedroom and 2 bedrooms). Residents will be in the 60% AMI (area median income) which was an income between \$40,000 and \$60,000.

The Board members noted that the case had been to the Planning Board and had an approved site plan review (2017). Ms. Donovan said the applicant had been approved for 140 spaces, two per unit as is the Newport Zoning Ordinance.

Acting Chairman Beard asked if there is a rule that parking spaces needed to be paved. He was told no. Acting Chairman Beard said that technically the applicant could pave the number of spaces he wanted and the rest could be hard pack. Ms. Donovan agreed with him.

Mr. Livadas said he was not a civil engineer and there would be runoff, stormwater and other things that go into a site plan. He was not sure how that would affect the river in terms of partial pavement partial gravel. Mr. Livadas said if they lowered the parking count now and in the future their parking needs

change, there is space around the building to expand parking. There would be a paved lot that they could plow, maintain and landscape and offer the workforce housing tenants the same as market rate housing. Acting Chairman Beard repeated for clarification how many total parking spots (Mr. Livadas wanted) at 1.25. He was told 88 spaces. 1.3 equaled 91 spaces.

Mr. Whalen referred to an email with differing numbers provided by Mr. Livadas. It was briefly discussed. Mr. McCoy asked what the plans were for guest parking (number). Mr. Livadas gave information on the number of tenants.

Mr. McCoy asked if there would be a limit on the number of tenants per unit. He was told that the firm contracts with a property management company that manages workforce housing. Mr. Livadas reviewed the steps from being an applicant to tenant.

Mr. McCoy addressed Mr. Livadas and again asked if there was a limit of occupants per unit depending upon how many bedrooms there are? Studio is one bedroom; one person. Mr. Livadas stated two people could live in a studio.

Mr. McCoy stated there was no limit. He then asked what the procedure would be for snow removal. Mr. Livadas said the site plan was approved for snow removal and indicated the two new maps the Board had of the parking lot. One showed room for 1.7; or 119 spaces, the second showed the land area saved if they were approved for 1.5; or 105 parking spaces.

Acting Chairman Beard said that Shoreland Protection would be involved; Mr. McCoy said that would involve Planning Board. Board members addressed Mr. Livadas and asked where the Planning Board was with the site plan. Mr. Livadas said that the project had full site plan approval; everything is approved. What they are asking is a variance to lower the parking count.

Mr. McCoy repeated; the project had approval for 140 parking spots (2 per unit). Ms. Donovan said on the approved plans the applicant had a design for 140 parking spaces. Mr. McCoy stated (therefore) the variance was a cost reduction request.

Board members stated that was not a hardship (reason to grant a variance).

Mr. McCoy repeated the percentages in parking numbers that were being requested. Reasons were being given in accordance to what the (unseen) study said and assuming a given occupancy per room. Board members reviewed the approved parking plan (140 spaces) Ms. Donovan provided for the lot (from a previous ZBA hearing).

Mr. Livadas said that the project had changed since the approved plan. The applicants were not tearing down the silo or the berm on the property (which would limit the number of parking spaces available). The Board members confusion about the number of parking spaces might be because the approved plans showed the silo removed.

Mr. McCoy restated they (applicants) were leaving the silo. He was told that was correct.

Acting Chairman Beard asked if it (different plan) was approved; Mr. McCoy asked if the applicant stated he was going to do it (keep silo) when he got approval from the Planning Board. The Board members continued to review and compare the site plans. Ms. Donovan said that if the applicant started changing what was on the site plan, they may have to go before the Planning Board. Mr. McCoy asked for changing the number of units? Ms. Donovan said they had presented a specific make up; she will have to go to legal.

Mr. Livadas said they were not changing the number of units. He had verified that in his emails. Ms. Donovan agreed; she explained that part of the Planning Board approval was floor plans. They (floor plans) are significantly changing. Ms. Donovan and Mr. Kessler discussed floor plan protocol and who had purview over them.

Mr. McCoy asked Ms. Donovan about the recourse if they changed the number of units in the building. The amount of parking spaces was being based on a study of workforce housing. Acting Chairman Beard stated there were 70 units. If the applicant decided he wanted to have 71 he would have to go back to

Planning Board. Ms. Donovan stated he was correct; then corrected herself; Mr. Livadas would have to meet the burden of the two cars per unit. The argument of (needed) reduced parking would not bode well if he changed the makeup of the units (more one bedroom than studios). The Board said that there would be a different requirement of parking spaces if that happened.

Mr. Kessler stated that per the Newport Zoning Ordinance he would not be out of compliance. Mr. McCoy said the Board was being asked to accommodate 1.25 (81 spaces) instead of 2.0 (140 spaces). Acting Chairman Beard said that a two bedroom apartment was still considered a unit. Mr. McCoy asked for the requirement per unit that would drive the number of parking spaces (up/down).

Ms. Donovan stated that Mr. McCoy believed it was the unit makeup, not the number of units (that designated the number of parking spaces).

For clarification, Mr. Whalen asked Mr. Livadas if he had 88 parking spaces. Ms. Donovan stated that they have 140 approved and mapped out.

Mr. Whalen again asked if the new proposal was for 88 parking spaces. There was a different number given by a Board member.

Mr. Livadas answered that:

1.26 would give them 88 parking spaces.

1.3 ratio would give them 91 spaces.

1.5 ratio would give them 105 spaces.

Currently there are 90 bedrooms.

Mr. Whalen stated he would count 1 person per bedroom. He stated Newport was a rural/suburban area and people have to commute. They have to drive to go someplace. If there is a body in a bed they have to have a parking space; at a minimum they needed the 1.3 ratio.

Mr. Livadas said that was why he had sent the study to show that the carload would be less than a regular apartment building. After a brief explanation, Mr. Livadas said he was not disagreeing with the Board; having one space per bed would be a good count. There was discussion on the number of required parking spots.

Mr. Kessler stated the Board had to start with what the Newport Zoning Ordinance was: two parking spots per apartment. It didn't matter the size of the apartment (studio, one bedroom, two bedroom, etc.).

Mr. McCoy stated it meant 140 parking spaces; the applicant was asking for a reduction. Mr. Kessler agreed; saying the Board has done it before. Mr. McCoy said the Board has talked through the numbers, they haven't necessarily agreed with them. Continuing, he said one end (highest number) is 140; the lowest end (number) requested is 88 spaces. He was trying to understand where the applicant is coming from and getting the numbers for discussion. The applicant is asking for 1.25 (88 parking spaces) which is a 30% reduction in parking capacity. 1.5 is a 25% reduction in capacity. The Board has to decide and have a solution. He asked if he was wrong with his calculations. He was told no.

There was a lengthy discussion on the Spring Street workforce housing project. Ms. Donovan stated that a precedent had been set with the Spring Street development. They had requested and received a reduced number of parking spaces: 1.67 per unit or 66 total (with 8 overflow spaces provided).

Mr. Kessler reminded the Board that Newport did not have public transit like Manchester and other cities. The Board agreed they could not assume some (tenants) will not have a car.

Mr. Livadas said that some people were picked up for work. He argued that the Board could not assume everyone would have a car.

Acting Chairman Beard asked if the Board wanted to close the case for Deliberations or to continue to ask questions of the applicant. Mr. McCoy and Acting Chairman Beard made a motion *to go into Deliberations*.

Mr. Kessler had a question of the applicant before they went into Deliberations. He asked Mr. Livadas if he was granted a reduction in parking and found he did not have enough parking spaces; how much space did he have for expansion. Mr. Livadas said that the areas noted in red on the site plans the Board had been given would be available for expansion. The berm and silo would remain; there was expansion parking on the left side of the plan. If the Board was focused on the bedrooms (91 spaces equals 1.3 ratio)...

There were technical difficulties with zoom.

Of additional...

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Mr. McCoy asked why they were discussing decimal multipliers and dwellings and not parking places in particular. Why not call it 88; why include 1.25? He was told it was because the Board started with a ratio of 2.0 per unit (140 spaces).

Acting Chairman Beard asked if the spots were the legal size. They (applicant) would not be returning (for approval) with reduced dimensions for spots?

Mr. Livadas said the parking spaces were to the Newport Zoning Ordinance. Ms. Donovan stated she would have to sit down with the Mill applicant to ensure that their dimensions were 10' x 20'.

There was a discussion between Ms. Donovan and the Board on the number of parking spaces and how to calculate an appropriate amount and size. Acting Chairman Beard said that the Planning Board had approved the incorrect dimensions for Spring Street (project). That applicant had returned to Zoning Board and the ZBA had to allow it. Ms. Donovan said that the site plan could be approved but the applicant still had to follow the Zoning Code. The Boards assume they will build to code. If they don't, they have to come to request a variance.

Mr. Kessler stated the Zoning Board looks at the use of the property; the Planning Board looks at the building.

Acting Chairman Beard told Mr. Livadas of a discrepancy in the size of parking spaces for another case: the Zoning Ordinance stated 10' x 20'; (Spring Street Development's spaces for approval were stated as "following the Newport Ordinance" they actually measured 9' x 18'). That applicant returned to the Board to request the smaller dimensions. Mr. Livadas said that he could not speak for others; he followed the Town's Codes.

Acting Chairman Beard repeated ***he made a motion to go into Deliberations.*** It was seconded by Mr. Whalen. ***The motion passed 4-0-0.***

Mr. Whalen stated they have heard two cases requesting a reduction in parking spaces. Both had been granted; one for 1.67 and one for 1.5. He understood the applicant's request and he was leaning toward the 1.3 (91 spaces) by using the number of beds instead of units.

Acting Chairman Beard said that Spring Street was the most comparable project; Sunapee Street isn't; it was for 8 units versus 42 (Spring Street) and 70 (Mill). The ZBA granted Spring Street 1.69. He was not willing to drop below 1.69. It is not a hardship. It is not a hardship if pavement is expensive; that is not the Zoning Board's or the Town of Newport's issue. It is the construction company's issue. Because precedence has been set with Spring Street (project), the Zoning Board needs to give some (reduction). But he was not willing to give that much of a reduction. He also did not believe the studies; if they (tenants) are working one or two cars are needed. In the Newport area there is no mass transit; no way to get around.

Acting Chairman Beard did not mind lowering the number less than two; (based on previous decisions), but 1.25 is extremely low, and it will set precedent for the next applicant who comes before the Board. The Zoning Board is not here to make it easier for contractors, we are here to follow and interpret the zoning laws. Some are old and we (Board) make decisions based on that.

Mr. Kessler said that the ordinance was to keep order and prevent overflow parking onto the street. He doubted it would happen on Sunapee Street; Newport may get it on Spring Street. He said 1.4 would be 98 spots, 1.5 would give 105. There were those ratios.

Mr. Livadas asked if he was allowed to speak. He was told no by the Board and Ms. Donovan.

Mr. McCoy said that precedent was 1.7. That was Mr. Livadas' original request; it seemed to be adequate at the time (of submission). The request has been reduced twice since then. He did not feel comfortable about the numbers for the exact number of people with cars or without cars. To Mr. Kessler's point of overflow parking; people are parking in the lot that shouldn't be there. Mr. Kessler clarified it was overflow from tenants with too many cars. Mr. McCoy said the applicant had a management company for that. He expressed concern about latitude. 1.7 is a reduction of 15% of what zoning stipulates. It gives more than the aggregate of "per bedroom" and ZBA already has precedence.

There was a discussion on the Spring Street project, the reasoning behind its reduction and the fact that there was an overflow area stipulated in their approval.

Mr. Livadas said they could also have one.

Mr. Beard said there was no rule that the spaces had to be paved; gravel can be plowed. Looking at the plan (2017), he noted the large area to be paved and the cost it would incur. The Board members discussed the plans for the parking areas and its adequacy for the tenants. They were ready to go through the five prongs. One member asked if Mr. Livadas was allowed to speak.

Mr. Livadas said he would like to address the cost (of paving). He was told (by members) that is not the ZBA concern. Mr. Livadas said the Board was making comments about it and the concerns. Mr. McCoy stated he hadn't said anything about cost. Acting Chairman Beard said pertaining to hardship, their stance is it costs more to do that (pave), but it is not a hardship that passes for a variance. He explained the example of hardship if there wasn't room for two cars per unit.

Mr. Livadas argued his case of not having the room for the two spaces per unit. The tax credit deals have budgets and costs are very important. They only have so much money to spend because they are limited in federal fund dollars. If the budgets go over; the project doesn't happen.

Acting Chairman Beard interrupted and stated he understood that aspect (of the project).

Mr. Livadas understood costs were not their problem; he just wanted to explain why the costs were so important. Costs saved will go into the actual building, not retaining walls. Mr. Livadas again expressed the importance of the study provided to the ZBA. Addressing Ms. Donovan, he asked for a clarification on the Spring Street variance, ratio and the gravel spaces on the property. He debated with Ms. Donovan about the number of parking spaces and ratio in the Spring Street project. Ms. Donovan stated she had sent emails stating the number of parking spaces as well as the requests that had not been approved.

Mr. Whalen said it was not the ZBA's responsibility to look at their expenses; it was their responsibility to look out for the future of Newport. He has seen plans come to ZBA and there has not been ground breaking yet. Everyone is in a hurry to develop, and nothing happens. He understands both sides: the request and the job of the ZBA.

There was a discussion among the Board on the need and introduction of workforce housing in the state. Mr. Whalen continued, saying the problem (in Newport) is there is no public transportation. He said the reality is if Newport gets low income housing; what is stopping a couple splitting the cost of the rent; Mr. Kessler said that two people working might not qualify for workforce housing (earn too much).

Mr. Livadas stated that 1.5 would be great. He heard all the Board's points, they are valid. He hoped the Board could see his as well (105). He expressed a desire to work with the Board; there was a lot of space in the lot. Mr. Whalen asked what the 60% average median income was. Mr. Kessler asked Mr. Livadas to explain workforce housing. He complied with the request.

Acting Chairman Beard explained it further in terms of ZBA approval or denial. He said if the Board kept on lowering the needed amount of parking spaces, it would spiral down due to precedence that the Board sets. Mr. Kessler stated Spring Street is a new project; the Mill is using an existing facility with an existing area for parking. Acting Chairman Beard agreed, stating the Mill project will be much better for parking than Spring Street because of its location. Mr. McCoy said it had much greater square footage. Mr. McCoy asked a procedural question. What were they (Board) asked to grant a variance from 2.0 per unit to ...does the Board decide what to grant? Or is there something specific? Acting Chairman Beard said they had to go through the variance questions first in order to make a decision. The hardship question (what ratio: 1.25? 1.5?). Mr. Kessler said past precedence has stated that the applicant has had a condition for an overflow parking area. That was part of granting the Spring Street request. There was a discussion between the Board and Ms. Donovan on the overflow parking condition for Spring Street and the number of parking spaces to grant for the Mill project. Mr. McCoy asked if there were a number of parking spaces specified in the Spring Street condition. He was told yes. Mr. McCoy did not believe 1.5 was enough. Mr. Whalen spoke in favor of the development.

There was a discussion on the number of parking spaces for 1.7 (119 spaces or 122?). Mr. Livadas spoke to the unit ratio and the number of spaces. During Board discussion Mr. Livadas again spoke and stated he was not changing the number of units. They were three months away from closing and starting construction. He understood the cost from their perspective. He commented on the world of construction at this time. He stated there is a reason the Mill has been sitting and not being constructed. He told them of his group's accomplishments at the mill and how far they have gotten to actual construction. He said that a potential 14 parking spaces were holding them up. He went on and talked about the three year tax abatement granted by Newport and compared it to Claremont. Mr. Kessler said he was leaning to the 1.5. Mr. Whalen concurred. Mr. Kessler said if they needed more parking spots they could go to Planning Board and have the slot dimensions reduced. Mr. McCoy said if they needed more parking spaces they had undeveloped land. He suggested 1.7. There was discussion concerning the 1.7 and hardship. Mr. McCoy said he did not like the precedence; it was a big issue. There was further discussion on the number of spaces.

Mr. Livadas said they would have to build a site plan for the new number of spaces.

Mr. McCoy reviewed the original request of 1.7 (122) from the Board packet. It was doable when submitted, now it is not doable? It is just less an issue with 1.5 (105).

Mr. Livadas said there was a paper in the packet of 1.5 as well.

The applicant and Board members tried to talk at the same time.

Mr. McCoy asked why not go for 119 parking spaces. Mr. Livadas said the property did not need 119 spaces. He said the Board was getting off track with what is needed. He (Livadas) originally submitted 1.7 and 1.5. He asked the Board if they believed 105 spaces was enough for the property. He continued, saying

- he has provided a market study and other information
- The feedback (from Board) is that you do not believe the market study.
- Then you say we need enough (spaces) for the bedrooms and there are enough.

We are not talking consistently; there are different sides. Mr. Livadas was confused about where the discussion was going.

Mr. Livadas was told that studies can be skewed according to what is wanted. He agreed.

Acting Chairman Beard said he was ending the Deliberations.

Ms. Donovan asked for clarification that Acting Chairman Beard wanted no further conversation. Acting Chairman Beard said she was correct (no comment).

On the direction of Acting Chairman Beard, Ms. Donovan muted the applicant.

The Board members asked if he was ending Deliberations. Mr. Whalen made mentioned the 1.5 ratio.

Mr. Livadas unmuted himself.

The Board continued; they expressed 105 parking spaces. Ms. Donovan asked about splitting the number between the two ratios. Mr. Kessler said he was thinking 110; going by spaces not ratio. There was a discussion on granting 110 spaces. They discussed various numbers and their reasoning.

Mr. Livadas stated 1.7.

Acting Chairman Beard asked for a motion on prongs one through five.

Variance Statement of Reasons and Discussion

Mr. Kessler made a motion that: *Granting the Variance would not be contrary to the public interest because it allows adequate parking and maintains the existing landscape of the property.* It was seconded by Mr. Whalen. Acting Chairman Beard called for a vote. *The motion passed 4-0-0.*

Mr. McCoy made a motion that: *The spirit of the ordinance would be observed because the number of places is comparable to similar projects.* It was seconded by Mr. Kessler. Acting Chairman Beard called for a vote. *The motion passed 4-0-0.*

Mr. Kessler made a motion that: *Granting the Variance would do substantial justice because it allows the developer to develop the property and provide sufficient parking and maintain the landscape.* It was seconded by Mr. McCoy. Acting Chairman Beard called for a vote. *The motion passed 4-0-0.*

Mr. McCoy made a motion that: *The values of the surrounding properties would not be diminished because an occupied building generating revenue that is done in a way that is attractive.* It was seconded by Mr. Whalen. Acting Chairman Beard called for a vote. *The motion passed 4-0-0.*

Unnecessary hardship

Mr. Kessler made a motion: 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:

A.i. There is not a fair and substantial relationship between the general public purpose of the ordinance provision and the specific application of that provision to the property because the developer will provide sufficient parking for the expected number of tenants.

AND:

A.ii. that the proposed use is a reasonable one because there will be ample parking for all tenants on the property.

It was seconded by Mr. McCoy. There was no discussion. Acting Chairman Beard called for a vote. *The motion passed 4-0-0.*

Mr. Spaulding, Sr. entered the room at 8:12 p.m.

Mr. Spaulding, Sr. addressed Acting Chairman Beard and asked if he could join the Board. Mr. Kessler said no. Acting Chairman Beard did not know if procedurally he could. Mr. Kessler said no, Mr. McCoy told Mr. Spaulding, Sr. the Board was done (with questions).

Mr. Spaulding, Sr. spoke as a citizen (of Newport). He stated the Board went into Deliberations. The law says the Board does not take any more input (from applicant). He sat and watched the hearing (from

home). If the rules are not going to be followed, the Board has a problem. He had previously been told many times not to speak during deliberations by a citizen in this room. He watched the hearing (Case 1141). The decision the Board is about to make; they have to tell him why. The hearing has not been procedurally correct. At the beginning it was, and then deteriorated. There were at least six interventions (by the applicant). A Board member agreed; Mr. Kessler said they have done it before. Mr. Spaulding, Sr. addressed Mr. Kessler and asked if breaking the law was okay; other cases have come to the ZBA and been done correctly. He said that he has sat as an applicant for his business, etc. and not been able to speak. He asked if the law book will be thrown out. He reminded Mr. Kessler he was the Chairman of the BOS and knew what the rules were.

Mr. McCoy said that he did not believe that what happened influenced his decision. Mr. Kessler began stating the Board allowed...Mr. McCoy said that Mr. Spaulding, Sr.'s point was that the Board shouldn't have allowed it. It was not procedurally correct.

Mr. Spaulding, Sr. said that courts have ruled that when you (Board) go into Deliberative Session, it (participation by applicant) is done. Why? It is so someone cannot come into the room and change things. It all has to be during the hearing. Mr. Spaulding, Sr. explained how the procedure should have taken place. Mr. McCoy said that in two other instances it was clarification and not influences given. He did not think that happened at the current hearing. Mr. Whalen stated they had to ask for clarification. Mr. McCoy agreed.

Mr. Spaulding, Sr. stated they could not have comments from outside (the Board).

Mr. McCoy asked if a fair verdict will be given, despite all the procedural errors. He didn't want to sit through the case again. Mr. Whalen agreed with him, saying that the things the applicant said did not influence him. Mr. McCoy said the only solution is that the Board has to hear it again. Mr. Kessler gave the alternative: render a verdict and it can be appealed. If the Board doesn't want to rehear it, the option can be to bring it to Superior Court. When asked, Ms. Donovan explained the appeal process and would double-check some things.

Mr. Spaulding, Sr. again stated that in Deliberations the Board is closed (to outside input). Members can ask, but he could prove that they did not ask for many answers. He stated the best thing (decision) was to table this (the hearing) because it is wrong (procedurally). Mr. Kessler knew it was wrong. Mr. Spaulding, Sr. said all of the Boards in the state have to do the same thing. Those that don't are breaking the (state) law.

Mr. McCoy said there were two options: 1. Drop it and hear it again (notify, etc.) or 2. Continue and have an appeal of the decision. Mr. Whalen questioned who would appeal. Mr. Spaulding, Sr. said he would.

Acting Chairman Beard questioned why if the ZBA approved it knowing they did it procedurally wrong, they decided to continue anyways and it will be appealed. Or rehear it because the Vice Chairman (as Acting Chairman) did not know the legality of the procedure; now know that it is not supposed to happen. It is not about rehearing; it is about doing it legally and correctly. We have been made aware that it has been done illegally. There was a discussion among the Board members about rehearing the case and if it had been heard illegally. Mr. McCoy said that they had been made aware it was done illegally; they table it and rehear it. Mr. Kessler said he was not aware of them doing anything illegal. They have had one opinion about it being illegal. Mr. Spaulding, Sr. asked Ms. Donovan if Deliberations were open for input. She said no; Ms. Donovan had looked at Acting Chairman Beard and after asking, she had muted the applicant on direction of the Acting Chairman. She had felt it had gotten argumentative by the applicant during deliberations. Mr. Livadas had unmuted himself and continued talking.

Ms. Donovan again stated she had requested muting the applicant because he was being argumentative about getting what he wanted. There was further discussion on the Deliberations, the input by the applicant and its correctness.

There was a brief discussion on the applicant's ability to unmute himself during the meeting.

After additional discussion, Mr. McCoy stated the case would be a contested verdict. Mr. McCoy asked that the Board rehear the Case and be more mindful of procedure in the future. Mr. Spaulding, Sr. stated

that he was in attendance to tell the Board members what they have done is wrong. The Board had two choices to make: 1. Continue the wrong or 2. Correct the wrong. Good people correct the wrong. Acting Chairman Beard stated that as Acting Chairman he was making a motion *to continue the Case to next month because proper procedure was not followed*. Now that he has been made aware of it he will not let it slide. Mr. McCoy asked if it would be continued or reheard. Mr. Whalen said it would be reheard; Acting Chairman Beard agreed. The motion then was: Vice Chairman Beard stated that as Acting Chairman he made a motion *to rehear the Case next month (March 16, 2023) because proper procedure was not followed*. Now that the ZBA has been made aware of it he will not let it slide. It was seconded by Mr. McCoy. *The motion passed 3-1-0 (Kessler voted no)*.

Acting Chairman Beard said that in the future he believed the Board needed to have applicants physically present in the room to present their cases. There was a discussion on presenting via zoom now and the rules of procedure of presenting during the Covid emergency (stipulations by the governor of NH). Ms. Donovan clarified that it was not illegal to do it via zoom; she believed that 'in person' is helpful for the Board members and the person (applicant). Acting Chairman Beard said he should have thrown out the case at the start; three things (requests) were given. If they were talking about procedural, that is not legal. Ms. Donovan clarified that Mr. Livadas was asking for a reduction. She then agreed, stating that as Chairman, Acting Chairman Beard could have looked at the multiple requests, stated it was inappropriate. Acting Chairman Beard said he just wanted total transparency and no confusion of the process. Ms. Donovan said that in the future she will be more attuned to that because she was lenient to the applicant's request for different numbers. She then explained that Mr. Livadas was asking for a lower number because he was asking for a reduction (no number was stated on the legal documents that were sent out to abutters). It would not be a false advertisement for residents (abutters). Acting Chairman Beard and Ms. Donovan briefly discussed the recertifying of the hearing.

Mr. Kessler stated if it was going to be reheard; it was like a new case. The case had to start from scratch. Mr. Spaulding, Sr. stated they should adjourn to a date certain. Mr. Spaulding, Sr. said the Board had to start over. Ms. Donovan said that to protect everyone involved, and not be at the expense of the applicant, she would recertify and mail everything. Mr. Spaulding, Sr. apologized to the Board for not being in attendance from the beginning (of the case).

The Board including Mr. Spaulding, Sr. discussed the procedural errors made; the Board could only do the best they could to be impartial. Mr. Whalen said that because he (now) knew what could happen, he wanted to avoid it. They needed to resubmit it and rehear it at no cost to the applicant.

Acting Chairman Beard addressed applicant Jon Livadas and apologized for not knowing the procedures as well as Chairman Ben Nelson. He stated that the ZBA would rehear his case next month to avoid appeals and to do it the legal way. Mr. Livadas said he would only have one application for the Board. He appreciated the Board's time; he knew he over spoke; he would see them next month.

Ms. Donovan asked a procedural question. Can a Chairman eliminate a Board member that comes late to the meeting. Mr. Spaulding, Sr. said that a Board member can come to a Board meeting late and be put on (i.e. Selectboard and School Board situation). In a situation where the case (ZBA) is being heard he was not sure of that. He believed it would not be right; because the late Board member has not heard all the information. Ms. Donovan thanked him. Mr. Kessler said it would be an opportunity for someone to dispute the result. There was general discussion about conducting a case by the Board.

Acting Chairman Beard invited Board member Mr. Spaulding, Sr. to sit for the new case. He agreed. **Case # 1142: North Newport Holdings (Owner), Avanru (agent) Avanru Development (Agent):** Request a Variance from the terms of Article VIII, Section 803 of the Zoning Ordinance to increase the height allowed of a structure in the Airport Zone. The property is identified as Map 218 Lot 004 and is located on North Main Street in the Rural (R) Zoning District.

Ms. Donovan stated that there was an official request to continue the case to the March 16, 2023 ZBA meeting at 6:30 pm at the Board of Selectmen Room if you approve of the continuance. Ms. Donovan said the applicants were lacking some information that she said could not be submitted late because the Board would not have time to review it and they felt they had a lesser stance. Mr. Whalen asked if he could recuse himself. Ms. Donovan stated the Board was only deferring the case. Mr. Whalen agreed to vote to defer.

Mr. Kessler made a motion *to continue Case 1142 until the March 16, 2023 meeting at 6:30 p.m.* It was seconded by Mr. McCoy and Mr. Spaulding, Sr. *The motion passed 5-0-0.*

Mr. Whalen said that when the case was heard he did not want to be a part of the Board; he was recusing himself from the case. He explained he would not be fair and impartial. Ms. Donovan said he could attend to sit for other cases (at the same meeting).

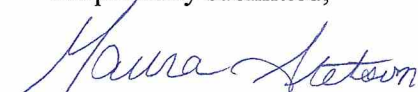
Mr. Spaulding, Sr. said he would not have sat on Case 1141 at the February 16, 2023 meeting. Acting Chairman Beard asked if he will sit on it on the March 16, 2023 ZBA meeting. Mr. Spaulding, Sr. replied yes.

Ms. Donovan and the Board again brought up the procedures that had happened during Case 1142 and anyone recusing for Case 1141. Mr. Kessler said they had to get as many Board members as possible for the March ZBA meeting. Ms. Donovan said that next month's agenda (March 16, 2023) will be exactly the same as the February 16, 2023 meeting's. They conversed about the Avanru case. Ms. Donovan said they would have an Administrative Review for the Case. Usually reviews are only for Planning Board; due to its complications, the Avanru case will have one. Mr. Kessler requested that Ms. Donovan not have any new cases wait a month to be heard (April 2023). He would prefer that any new cases that night be heard first or have a special meeting to hear and accommodate them. Ms. Donovan explained that legally she cannot force someone wait; she can suggest it. Mr. Kessler said that they could conduct an additional hearing within the month so people know what is going on (Ms. Donovan added that the applicants wouldn't be waiting until 11 pm). There was continued discussion on the logistics of any other case that night. Acting Chairman Beard again asked Ms. Donovan that applicants be present for their cases. Ms. Donovan said she will stress that request (it has not been mandated). She said that the zoom audio was exceptionally loud and

Acting Chairman Beard called for a motion to adjourn.

On a motion by Mr. Whalen, seconded by Mr. Kessler; *the Board voted to adjourn at 8:40 p.m. The motion passed 4-0-0.*

Respectfully submitted,



Maura Stetson

Scribe

Approved on: March 16, 2023