TOWN OF GILMANTON
ZONING BOARD OF ADJUSTMENT
THURSDAY, NOVEMBER 16, 2023 – 7 PM
TOWN OFFICES AT
THE ACADEMY BUILDING
503 PROVINCE ROAD, GILMANTON, NH
603-267-6700 ext. 122
www.gilmantonnh.org

MEETING MINUTES APPROVED

Members present include Chair Betty Hackett, Vice Chair Nate Abbott, Members Perry Onion, Leslie Smith, and Alt. Member Zannah Richards. Member Mike Teunessen had an excused absence.
Chair Hackett called on Zannah Richards to act as a full voting member.

Chair Hackett stated the engineer for the first case has been delayed in arriving. She would call the second case of the evening.

NEW BUSINESS

Chair Hackett explained the procedures for a motion for rehearing. The Board will review the information submitted and will not take any input from the property owners or the public.

MOTION FOR REHEARING Case #2023-15: Property owners James Virgin & Melanie Maheux, represented by their attorneys Cleveland, Waters & Bass, are requesting a Motion for Rehearing of the September 21, 2023 ZBA decision denying the applicants' Appeal of Administrative Decision.
Chair Hackett explained the criteria for a rehearing is to see if there was additional information presented that was not available at the original hearing or if the Board erred in their decision making. Member Richards stated there were many points brought up (by the owner's attorney), but wondered if there was any validity to any of the points. Chair Hackett felt that is what needs to be determined. Based on the assertions (in the request for rehearing), VC Abbott asked of members if they felt any of his comments at the original hearing influenced the way members voted. Member Richards felt a lot of the information that was brought up was part of the discussion. She stated that his interpretation may differ from her interpretation. She did not find VC Abbott's discussion as an influence, but as an informative part of the conversation, which is part of their job. Chair Hackett inquired of the same- if any of the information she gave would have swayed members decisions. She clearly remembers asking for members' opinions before giving her own, minus that of seeing the backhoe at the property. Member Richards had seen the backhoe as well. Members all went to the property and did their jobs. VC Abbott stated the attorney felt VC Abbott's remarks prejudiced the board. VC Abbott did not feel Chair Hackett made any false statements. VC Abbott has never heard that a turn-around is equivalent to a class V road. It's the layout and its approval at town meeting that makes a class V road. Member Onion, as a general statement, wondered why a member would speak if they didn't feel it would influence someone else. Chair Hackett felt what one person sees is not always what the other person sees. The attorney stated what she read from the road agent was illegal as it was not presented to him ahead of time. This was not a court of law; evidence did not need to be presented ahead of time. Chair Hackett read the request for rehearing three times and did not find

any new information presented. Member Smith felt that in discussions over the years of many meetings, there are going to be times when board members insert what they feel. It is part of the deliberating process. It may not be what makes the board's decision. Member Onion referenced to the applicant not having the road agent's letter, it is the applicant's job to find the information they need to present their case. Chair Hackett stated the tax card is a Town document and it clearly states it is a class VI road.
VC Abbott made the motion to deny the motion for rehearing. VC Abbott stated it is true the applicant filed the request within 30 days of the initial written decision. It is true the minutes and written decision were filed within 5 business days of the vote. He did not find valid claim of technical error on the part of the board. VC Abbott stated the letter submitted to the board (requesting the rehearing) did not present new evidence that was not previously available. There was no new evidence submitted. In reference to finding of facts, VC Abbot requested the summary of the facts of the case in the original Notice of Decision shall be included by reference. Member Onion seconded. **Motion to deny passed 5-0**

OLD BUSINESS

CONTINUED: Public Hearing Case # 2023-13: Property owners James Virgin & Melanie Maheux, represented by their attorneys Cleveland, Waters & Bass, are requesting a variance from Article IV, Table 2 to construct a single-family home on a parcel having no frontage on a class V road or better. The property is located on Canaan Rd, known as map and lot 411-015 located in the Rural Zone.
Chair Hackett stated they had received a letter from the applicant's lawyers, dated Nov. 14, 2023, in which they are respectfully withdrawing the application for variance without prejudice.

Chair Hackett inquired if the final case was ready to proceed. Mr. Georges stated they are still waiting for their engineer. However, he was ready to start the case.

PUBLIC HEARING Case # 2023-19: Property owner Georges Realty, LLC is requesting an equitable waiver of dimensional requirement for the single-family dwelling constructed within the side setback. The property is located at 38 Fox Dr, known as map & lot 121-035, located in the Residential Lake Zone.
Jonathan McPhee, Mr. Georges' attorney, stated he would summarize for the engineer. They have a case of an actual mistake that was not discovered until after the construction was completed. There was a preexisting location of a structure on the property located into the easterly setback. It was decided the new structure would be centered within the lot, still within the setbacks, but evened out. There was a subsurface plan submitted to DES that showed the building in its previous location. The contractor doing the sitework, Mr. Clifford, was working off the subsurface plan. Atty. McPhee stated the contractor had never seen a contrary plan and typically he sees construction approved to be in the area of the previously location of the building. Atty. McPhee feels this is an honest mistake and the structure is in the same spot the previous building had been in for the past 30 years. McPhee felt the location had maintained the status quo of the property, in fact improving the property with a new structure. The owner and contractor could speak to what it would be to redo this mistake. It would be the possibility of demolishing

the structure and foundation. Chair Hackett stated they had actually made the structure smaller than what was ZBA approved. Member Richards noticed the pins on the property and inquired at what point they were added. Mr. Georges stated they more recently had the surveyors out to complete an as-built. He stated some of the property stakes had been removed. His surveyor had returned to replace the stakes.

Chair Hackett opened the case to public hearing.

Steve Chmielecki stated it (the placement of the building) was noticed last year prior to construction being substantially implemented. He came in just after Christmas and spoke to the Community Development Director. Mr. Chmielecki presented photos of that time showing the encroachment into the setbacks. He stated that at first the contractor had a string designating the correct property lines. After construction had started, Mr. Chmielecki noticed they had encroached around 20' onto his property. He put up a fence along the boundary. He then posted a notice of encroachment on his fence. Later that same day the fence had been taken down and the encroachment signs were removed. Mr. Chmielecki put up deer cameras to catch the trespassing on his property. The topography of his property has been altered. He stated he spoke with the Community Development Director regarding the alteration of terrain and was told there was no control over erosion. Staff Daigneault clarified it did not fall under the steep slope ordinance. Mr. Chmielecki stated that after the walls were up, he stopped and spoke with the contractor. They established a line of agreement (between the properties). The contractor still continued to work within the encroachment. Mr. Chmielecki was happy the old house was being ripped down and a new house would be going up, but it is not in the same spot, close, but not exact. Mr. Chmielecki felt this was done in bad faith. He continued to put up a fence, which the contractor continued to ruin until there was nothing left. He showed the board the remnants of his orange, plastic fence.

Atty. McPhee responded that Mr. Chmielecki may have some valid points regarding trespass or damages in arguendo; however, that does not speak to the tests that are applied for an equitable waiver. VC Abbott asked if he could speak to the honesty of the mistake. The resident has claimed that notice was given (to Town Office). Staff Daigneault commented that she had spoken to Mr. Chmielecki but could not remember specific time frames. She would say that the time frame Mr. Chmielecki gave would probably be accurate. Property owner Wil Georges, of Georges Realty, LLC, along with contractor Robert Clifford, stated he had not heard from the abutter until after the house was pretty much built. He was told Mr. Chmielecki had changed the property lines. By the time Mr. Chmielecki had called him and discussed the problem, the house was already built. Mr. Georges stated he had the surveyors come back to double check and verify the property boundaries. The surveyors found the stakes had been moved and reset. After that, the stakes had been moved again. He (Mr. Chmielecki) had moved the stakes and they are no longer in the right spot. Mr. Chmielecki had not hired a surveyor of his own. Mr. Georges stated that to this day, where he is putting the fence line is still not in the right spot. Mr. Clifford agrees there is some dirt on his side. He stated it is a tight lot and admitted to putting dirt on Mr. Chmielecki's lot, but maybe a couple feet, not 20 feet as suggested. Mr. Clifford stated there were no trees removed from the abutting property. Mr. Georges added there were old trees that were down on the abutters' property. Mr. Clifford stated he did nothing in ill regard. David Eckman, from the property owner's engineering firm, stated the property lines are pretty straight forward. The property is perfectly 60' x 100'. The only pin they set was the one noted as "TBS" on the plan; the other three were found. He explained the plans set where the original approval was and where the house was built. Chair Hackett verified that what they had agreed to was for the house to be centered. The house when being built was placed based by the placement on the environmental plan (septic design). Mr. Eckman stated the septic was completed first, then a

second plan was submitted to ZBA. The location of the original structure was 8.26' from the property line, where the new placement is 6.3'. Mr. Clifford felt the 2' difference could have been lost with the concrete person squaring off the foundation. Chair Hackett inquired which plan the contractor had reviewed. Mr. Clifford stated the only plan he saw was the septic plan, placing the structure in the original location. Atty. McPhee stated that Mr. Clifford had talked about how tight it was on Mr. Chmielecki's side. Going to the honesty of the mistake, part of the test, it would have been a lot easier for Mr. Clifford to place the house in the approved location. He would have had a lot more room to work if he had centered the house. Member Richards stated the last page shows the septic design and inquired if this was the original design or a secondary design. Mr. Eckman stated the State does not care about the location of the house, just the EDA (Effluent Disposal System). They applied for the septic first because if they couldn't place a septic, they wouldn't need ZBA approval. They tried to place the structure in a better place for the variance. Mr. Chmielecki, looking at the prints, stated he did measure the property earlier in the day and felt the measurements were not what was depicted on the plans. Mr. Eckman explained that DES first issues the approval for construction, then will go out to the property and verify what was installed and that it is in the right spot, before issuing the approval for operation. Mr. Georges stated they are fully approved. He feels there are nonprofessionals coming on his property, and trying to give professional opinions.

Steve Hall has property on Shellcamp. He feels for this kind of workmanship, the board should be ashamed for allowing this to happen. He feels the surveys being turned into the board are not real surveys. Trees have been cut down that were 100 years old. They have made nothing but a mess. He felt the contractor got lost on a small lot. He has been a septic installer and would consider himself a professional. The abutters know where their property lines are. He has owned property for 40 years. They are using as-built plans to put in front of the board. He is mad at this board for approving this stuff. He stated this building was all built. His property, just the footings are in and the board will not listen to him. This building needs to be stopped on Shellcamp. The guy has cut his trees and is over his property line, the same that has happened to this guy (Mr. Chmielecki). There is no need for him (Mr. Georges) to state he is not a professional. Mr. Hall stated he has quite a bit more knowledge than he thinks. The State does not do boundary line surveys. When they put the septic system in the wrong spot, that is on them. They're wrong with State. "They bullsh*tted you and they bullsh*tted the State." He wants the board to keep this in mind when they look at Tamarack Trail. Chair Hackett stated this is not a forum for someone to voice their opinion and to raise voices. This board tries to make an informed decision based on the paperwork they have in front of them. Mr. Hall stated this is not legitimate paperwork. Chair Hackett stated Mr. Eckman is from an engineering firm and it is his license. It is not the responsibility of the board. Mr. Hall stated he (Mr. Eckman) is not a surveyor. Chair Hackett asked if he was an abutter to this property. Mr. Hall stated he was a tax payer in this Town and they are doing the same thing to his property. Chair Hackett requested those that are not abutters to refrain from speaking. The board is talking about this property and this property alone. Breyer Hall demanded he had a right to speak as a tax payer in this town. Mr. S. Hall stated they have a right to speak. Chair Hackett stated that when they have a case before them , the board has the ability to talk to abutters first and only. Mr. S. Hall stated it was time for her to retire. VC Abbott called for a time out. Chair Hackett requested a call to police. Chrystal Paetzold stated she is an abutter and this is showing a track record. VC Abbott stated this board needs to maintain order. "There are things that are out of order." [inaudible] VC Abbott directed to Mr. Hall, that there should be no personal accusations. If you have facts, state your facts. If you have facts in writing, the board would love to see them backed up in documents. Chair Hackett called on abutters Peter & Chrystal Paetzold, who are abutters at 277

Hemlock Dr. They are new property owners here. He feels there sounds like a lot of questions about property lines. He feels the septic is closer to 6' from their property line as well. He feels there is a history of "oops". VC Abbott inquired to Mr. Georges how he communicated with his contractors and all the people he needs to coordinate with. Mr. Georges stated there are a lot of people to coordinate with and they try to pass along the best information they have. He feels the biggest hang-up was the septic approval. VC Abbott inquired why it was more important to have a septic design prior to receiving board approval. Mr. Georges stated he was going by what the professionals were recommending. Mr. Eckman responded. They firstly started with a boundary survey, established by a licensed surveyor. He completed the septic design to ensure it would work. He does that first because if it is not viable, he would consider this a dead lot. They firstly went for a septic design to ensure the lot could sustain a septic. Further, if someone placed a well or septic close to the lot, then a septic on the lot wouldn't fit. Again, it would be considered a dead lot. The highest people at the State look at these small lots. Once determined to be a viable lot, they worked on how best to place the structure to receive a variance. VC Abbott inquired how the plan with the square location of the building came to be presented to the ZBA. Mr. Eckman stated he provided the best location for the building and brought the plan to the ZBA. VC Abbott inquired how it made sense to go to the State with one plan and the ZBA with a different plan? Is it somehow the ZBA approval is more expensive than the septic approval? Mr. Eckman stated this was the order of approvals. First is to see if it is a viable lot. The State does not care where the house is, just the septic system. VC Abbott continued with questioning the differences between the two plans. Mr. Eckman stated the State only cares about if the setback from the tank is 5' from the foundation. VC Abbott wondered if the engineer caused the problem by imposing an order of process that wasn't valid, in this case. He felt the contractor was just following the plan that he was given, which was the wrong plan. Mr. Eckman respectively disagreed as the owner was at the ZBA meeting and had copies of the approved plans. Mr. Eckman reiterated the septic design was an approved plan by the State, but the location of the structure was approved by the ZBA. He stated that normally they would do a certified foundation plan which would show if the foundation was not right. This step was not done; it went straight to a final house. Typically, a lender would not allow for a certified foundation plan. Mr. Georges felt this is a rare situation. Typically, the first plan that goes out to a site guy would be the DES approved plan to receive a quote. Mr. Georges agreed it would definitely be on him, as the property owner, to get the right plans to the contractors. He felt with the numerous emails and plans, accidents can happen. Mr. Eckman reiterated; the State approved the septic. If the bed had moved a foot, the State would not have approved it and a new plan would need to be submitted. What they (abutters) may have been measuring was from the vent or something that was not actually in the ground. He would trust the State approved it in the right spot. Secondly, they are only looking at the 5' setback, not where the building is. Atty. McPhee acknowledged this is an unusual situation. Apparently, there were problems with process. There was trespassing in both directions. Mr. Clifford was working off the wrong plan, which was first discussed. He would have loved to be working off the right plan. It would have made his job a lot easier with respect to putting the house centered on the lot. Atty. McPhee stated they need to focus on the test. Things had not been done perfectly, but it is clearly an honest mistake. Where the house ended up substantially where it was before, nothing has really changed with respect to the status quo. The fix to move it a few feet would be extremely expensive. Atty. McPhee feels if the board looks at the four prongs of the test, Mr. Georges pretty clearly meets the requirement for an equitable waiver. VC Abbott inquired of Mr. Chmielecki's property: has anything been built on his property. Mr. Chmielecki stated yes. It is a rental property. VC Abbott inquired what the distance of the closest dwelling on Mr. Chmielecki's lot would be to the subject property. Mr.

Chmielecki said it would be about 100'. Chair Hackett clarified the lots are separated by trees with some terrain between. Mr. Chmielecki agreed, there were some trees between. He has two lots to the front with three lots to the back that are contiguous and form one lot. Member Richards inquired of the abutters on the back side of the location of their well. Mr. Paetzold stated it is to the front of their house. Mrs. Paetzold wanted to reiterate after listening to the case: they keep hearing "oops, we made that mistake." That's where it comes to a place of negligence in character. She understands mistakes happen. However, there seems to be a track record. Chair Hackett stated that is why the Zoning Board of Adjustment exists. By the nature of the word *adjustment,* when an owner cannot meet setbacks, they come before the board. If you meet all the requirements in the Town's Zoning, then the ZBA does not see you. VC Abbott commented that they hear statements from people that the ZBA is the *Town*. Though they are an important part of the Town, the enforcement is under the purview of the Selectmen. Members on the ZBA cannot enforce anything. They make rulings on what is presented to them. Mr. S. Hall said it looks good on paper but not in the real world. Mr. Eckman did clarify the septic plan shows the locations of abutter's wells. This ensures the 75' well radii are met. Chair Hackett inquired if there were any additional abutters to this case. Mr. B. Hall requested to speak to the case. Chair inquired if he was an abutter. He stated he was not. Chair Hackett stated she did not have to allow comments from the audience. Parker Hoffacker stated he is not an abutter but wondered if he could speak. Mr. Hoffacker stated he is on the Planning Board and he remembers seeing Mr. Georges on a couple of issues. He stated that at the end of Article VII of the Zoning Ordinance, it requires compliance with all State and local regulations. He does not feel much of this has been made. He further stated he did not feel the "professional" digger was able to read a map correctly. VC Abbott felt that Mr. Hoffacker's comments as a board member were out of order. Mr. Hoffacker had received complaints regarding the issue and felt compelled, as an elected official, to speak at the meeting. Member Richards inquired why only abutters have the opportunity to be heard. Chair Hackett stated that abutters have the right to any case before them to speak before the board. They do not have to listen to anybody who is a resident unless they have pertinent data. She does not appreciate anyone saying this board is incompetent when they are trying their level best to do their duty. They are all volunteers; not paid positions. They can only make decisions by what they have presented to them as testimony and information in front of them. Mr. Chmielecki inquired if the applicant needs to meet all the criteria as presented on the application, not just one of them. Chair Hackett confirmed, it would need to meet all criteria. Member Onion inquired of Chair Hackett if she would allow one more comment from a non-abutter as he was not the person disparaging the board. Chair Hackett allowed for Mr. B. Hall to speak. Mr. B. Hall read the 2020 Ordinance for the town of Gilmanton, Article VIII.B for non-conforming lots. This article did not allow for State septic designs to have waivers from encroachment, well setbacks, or slope requirements and the owner complies with all other requirements of all other Town and State laws and regulations. He felt there is a waiver on the property for the well. Mr. Eckman stated there was a well release. It is not a waiver. Mr. B. Hall reiterated the owner complies with all other requirements of all other Town and State laws and regulations. The State laws and regulations state the septic system has to be 10' from the property line and it is not. This is also required by federal regulations. Mr. Eckman stated that 10' was determined by DES. Mr. B. Hall feels the building permit should not have been issued based off the violations of the Zoning Ordinance. Chair Hackett reiterated, again, that is what this board is for. Meaning that when you can't meet all the criteria that the zoning requires, that is when you come before the ZBA to see if it will work. For example, the ordinances require building 75' from a waterway, where the State requires 50'. Regulations can be more restrictive

than the State, but cannot be less restrictive. Mr. Eckman reiterated they had followed all the dimensional environmental setbacks.
VC Abbott made the motion to close the public hearing. Member Onion seconded. **Motion passed 5-0**

Deliberation:
Case #2023-19: Chair Hackett stated the application was for dimensional requirements. They were suppose to have 12' on either side for the setbacks. The house was built in the area of the old house location. Member Onion would like to address the 4 criteria. He feels that "B" may be the only issue- ignorance of the law. The cost of correction would outweigh public benefit. Does not cause a nuisance or decrease the values. Not noticed until after the structure had been completed. Focus on the ignorance of the law- allegations of tearing down trees and chopping up fence. He does not see the board has say over these. They could file suit and take it to court. Member Smith feels it is unfortunate, tearing up of signs, but this is not a case for them to decide. It would be a civil matter. The cost of undoing and redoing is exorbitant. She thinks it should stay based on the cost to move it. Member Richards does not feel there would be real gain to make them remove the structure. It is an improvement. You have to follow the plans. Every inch matters on these tiny lots. VC Abbott is wrestling with this. He voted for this largely based on the improvement. It seemed like a win-win. He remembers a foundation being denied for equitable waiver where the contractor had to remove the foundation. He feels it is a real shame. He thinks if they were to deny it the applicant would have some other choices. A deal could be worked out with the abutter, such as a boundary line adjustment. This puts the board in the position of forcing a civil case. It seems like there is a concern with the equitable waiver criteria question "A". Chair Hackett did hear the contractor was used to putting a structure on the same footprint and was given the wrong plan. It is always better to ask questions. The new house was built pretty much in the same footprint from the original house.
Chair Hackett asked if the house would need to be reconstructed. VC Abbott stated Member Onion felt the criteria "A", "C" , and "D" had been met. Member Onion confirmed. Chair Hackett did not feel the builder was not in ignorance of the law but following a plan. She also did not find bad faith as he was going off what he had. Member Onion agreed it would have been easier to build what the ZBA had decided. VC Abbott stated the Board had received many applications with only a septic plan, not a survey. When the applicant sent out the septic plan, after approval from ZBA, he should have given the contractor the new plan. Member Richards questioned where the disconnect was, why the building wasn't placed on the site as approved. All agree on "A", but the abutter stated at Christmas that the abutter notified the town when the foundation was just beginning. Chair Hackett read from the ZBA handbook on equitable waivers. VC Abbott stated the contractor is an agent of the applicant. The applicant did not consider that the information from the abutters was accurate. He feels a denial can be resolved without the reconstruction of a building. However, it would have a consequence. He feels the only solution is to not tear down the house. He has not seen significant evidence (to deny the equitable waiver). An agent for the property owner had been on site with abutters. After a public hearing they do not have the information they need. They could table to January and ask for further information from the abutters and the applicant. Member Onion inquired what additional information they would request. The Town had been contacted but it is not the town's place to verify the location. He feels the agent was notified but the agent did not pass the information on to the owner. Member Onion asked: does the notice to the Town constitute notice? Member Richards questioned if the town dropped the ball. Chair Hackett wondered if it was a case of owners in disagreement. Member Richards stated there is still a disagreement as to where the

property lines are. VC Abbott stated there should be an establishment of the foundation. On larger lots 6' would not be a lot. Chair Hackett said the owner and abutter need to come to some sort of agreement or go to court with a civil matter. Member Richards cannot see tearing the building down. It would be inequitable for the violation to be corrected. It does not constitute a public or private nuisance. She does not feel they intentionally built closer to the property line. Chair Hackett felt people do put signs up anywhere. It is still a conflict between the builder and the abutter. She does not see where pushing this out to January would give them any additional information. Member Richards agrees and doesn't feel it would be any easier. VC Abbott would not consider a contractor an agent of the owner. This is not ignorance of the law. If he had a choice to do it correctly, he would. It does not constitute a nuisance. One abutter did argue there are things he could not do. That is between he and owner. VC Abbott felt the cost to correct does outweigh any public benefit to be gained (by moving or demolishing the structure).

VC Abbott concluded some finding of facts:
1. The builder/applicant admitted that they made a mistake.
2. An abutter has confirmed their observation of the violation into the setbacks.
3. There is no official evidence of notice to the applicant.

VC Abbott made the motion to approve the equitable waiver. Member Onion seconded:
a. The violation was not noticed by the town until after the structure had been substantially completed.
b. The violation was not an outcome of ignorance of the law, misrepresentation, or in bad faith on the part of the owner.
c. The physical or dimensional violation does not constitute a public or private nuisance or diminish the value of properties in the area or adversely affect the current or future uses of any such properties.
d. The cost of correction would outweigh any public benefit to be gained and it would be inequitable to require the violation be corrected.

VC Abbott made the motion to approve the equitable waiver of dimensional requirements. That the findings of requirements are all found to be true and reached the following finding of facts: Including the following findings of facts:
1. The builder/applicant admitted that they made a mistake.
2. An abutter has confirmed their observations of the violation of his setbacks prior to completion of the project.
3. We have no evidence of official notice to the applicant.
4. No municipal official responded to or observed the violation.

Member Onion seconded. A show of hands of 4-1 was taken. Member Smith requested to change her vote to a nay. Chair Hackett accepted the change.
Motion passed 3-2

APPROVAL OF MINUTES – October 19, 2023
Onion made the motion to approve the minutes. Member Smith seconded. **Motion passed 4-0.**

Mike made the motion to adjourn. Member Smith seconded. **Motion passed 5-0**

Elizabeth Hackett, Chair