

SOMERSWORTH ZONING BOARD OF ADJUSTMENTS
MINUTES OF MEETING
April 5, 2023

MEMBERS PRESENT: Richard Brooks, Keith Perkins, Anthony Jones-Alternate, Ken Hilton, Kenneth Vincent

EXCUSED MEMBERS: Matt Keiser – Chair, Brad Fredette

STAFF PRESENT: Michelle Mears, Director of Planning and Community Development, Dana Crossley, Planning Technician
Anna Stockman, Planning Secretary

The meeting was called to order at 7:00PM.

1) Approval of the minutes:

Hilton MOVED to approve the January 4, 2023 minutes.
Perkins SECONDED the MOTION.
The MOTION CARRIED 4-0, with Vincent in abstention.

2) OLD BUSINESS

A) Any old business that may come before the Board.

Mears introduced Anna Stockman, the City of Somersworth's new Planning Secretary and noted that Dana Crossley has been promoted to Planning Technician. Kenneth Vincent welcomed both and congratulated Dana Crossley.

3) NEW BUSINESS

A) **Jeff Wituszynski, Vincent Kulickowski, Donald Howde, Vsevolod Korogod, and Kristen Korogod are seeking an Appeal of an Administrative Decision made by the Planning Board for a property located at 35 Coles Pond Road in the Residential/Single Family (R1) District, Assessor's Map 49 Lot 14, ZBA#01-2023. PUBLIC HEARING**

Mears stated that the applicants are seeking an Appeal of an Administrative Decision made by the Planning Board on February 15th, 2023. The Planning Board granted a Conditional Use Permit for a property located at 35 Coles Pond Road to construct a new single family dwelling within the Riparian and Wetland Buffer District. Regarding zoning compliance, Section 15B, Nonconforming Structures was reviewed which was included in the Staff Memorandum. Mears stated she highlighted the section where "we" made the determination that "no such nonconforming structure may be enlarged in a way which increases its nonconformity but any structure or portion thereof may be altered to decrease its nonconformity. For the staff's information, included is an aerial of the parcel in relation to the abutting properties. We did pull a building permit for a single family dwelling that was issued in December 1974. The Conservation Commission did review the Conditional Use Permit at the January meeting. They had some recommended conditions of approval which included aggregate driveway as close to the south leach field as possible, no pesticide or herbicide use for lawn, and no lawn beyond existing tree line, and snow storage as far from the buffer line as possible. The Planning Board did grant the Conditional Use Permit for the new single family dwelling unit within the Riparian and Wetland Buffer District at the February 15th meeting with an additional condition of approval to install a drip edge and infiltration system around the perimeter of the house and add a note to the plan that any pesticide usage shall be in line with Chapter 19, Section 13, the Riparian and Wetland Buffer District.

Brooks stated that typically the Zoning Board's decision follows a two part process where they decide whether the appeal would be granted or not and then rehear it at the next meeting. He clarified that for this case, the Zoning Board will have a public hearing, hear from both sides, and then decide the Appeal that way. He stated that he wanted to be sure of the decision process because this case is not a typical appeal for the Zoning Board to hear.

Brooks stated the first thing the Zoning Board will do is listen to the applicants in this case that filed the Appeal. Brooks invited the applicants to speak on behalf of their appeal.

Jeff Wituszynski of 17 Coles Pond Road introduced himself as one of the applicants of the Appeal. Wituszynski noted that his Appeal is that a variance was not needed. He stated that in the Appeal, what he laid out was a number of different things that made the building lot nonconforming. That is the bottom line. The lot is not a buildable lot and rather, it is a lot that was created as a Camp Lot in 1962 on a private dirt road. He stated that he and the other applicants have been reviewing the minutes of the Conservation Commission meeting and the Planning Board meeting which approved the construction of a new dwelling in a nonconforming lot and he is trying to figure out why.

He stated that he did not want to waste the Zoning Board's time in reviewing information they may already have. He noted that he feels it is important that the Zoning Board understands where the applicants are coming from with regard to their Appeal. He stated he wants to challenge the initial understanding that the new dwelling would be nonconforming. The existing dwelling is a shed and the first thing that will happen to the shed is that it will be demolished and a new building erected. He stated that by that same paragraph, if that shed is demolished, the entirety of the new construction has to be conforming. He said that one could not say that the shed is grandfathered and that there will be construction on top of it when the shed is actually demolished. Once the shed is gone, it is a nonconforming lot. He stated that it was his understanding that the requirements for a conforming lot require 150 feet frontage or 50 feet frontage on a City maintained road. This is a private road and that lot is 19 feet from the telephone pole to the swamp. In clearance and distance, typically it's about 14 or 15 feet wide. That is how wide that road is and it services additional homes down the road. This is a small camp lot in a swamp. He stated that his Appeal is that the proposed project does not need a variance and this is a very unique piece of property. The lot is located on a private road, it is a jewel near Lily Pond that only has one outlet and the proposal is to add a third septic system within 180 feet of two other septic systems. Four years ago, another piece of property located at 31 Coles Pond Road was built upon. He stated that nobody in the neighborhood was aware that project was happening. After years of the previous resident at 31 Coles Pond Road seeking approval from the City to build, they were refused multiple times. The previous owner sold the property to a realtor and two years later, the realtor constructed a house on the lot. He stated that his own property spans 3 lots. He questioned how property owners are building one lot at a time now. He stated that the Appeal is not about not wanting more neighbors, but rather that the lot is not a buildable lot. He noted the lot is located in the swamp and the proposal does not meet any of the zoning requirements he laid out in paragraph 1 of the Appeal. Even after the house is built, he stated there would not be a proper setback. There would be 12 and a half feet of setback instead of a 20-foot setback. When the Conservation Commission made their decision, they said it was the best they could do. He stated he understands doing the best you can for a hardship case or an existing piece of property that is expanding, but this is a new home construction on Lily Pond and an additional family living on the road.

He referenced a picture of the existing structure that was included as part of the Appeal. He stated that the existing structure is practically a shed with windows and the dwelling lacks services of any kind. He referenced an attachment included in the Appeal of the original development plan from 1962 called Oak Ridge Drive that regards the lot as a Camp Lot separate from all of the other building lots. He stated that he doesn't understand how any part of the grandfathered clauses can be used because the use of the property is being changed from a seasonal camp. He stated he has lived there for 28 years and he has observed that property being used four to five times. It is an empty lot. He said that every time a family is added to a neighborhood, they receive three deliveries a day from Amazon to UPS. The road is privately maintained and the neighborhood does their best.

In the spring time, road conditions can get pretty bad. Past this particular property are more properties that need to be serviced. This is about the narrowest part of the road. It can't get any wider due to the swamp on both sides. He stated that his initial appeal is seeking a fresh set of eyes to look at the property for what it is. It is a little camp lot in a swamp and there are more properties besides this one. This isn't the last one that has yet to be developed. He questioned whether there are going to be more developed lots on Lily Pond in the future.

He stated he was at the February 15th Planning Board meeting. He said there were comments at the Planning Board meeting regarding concerns about the proposal but ultimately the Conditional Use Permit was granted. He stated the proposed project doesn't meet five requirements that the Zoning Board requires. He compared the project to adding a duplex in an R1 Zone. He added that this is not a hardship case and the lot is not grandfathered. He noted the environmental impact of the project and how the lot is located in the Riparian Zone and approximately thirty-five to forty feet from Lily Pond. He said the neighborhood impact would be negative. He noted the additional traffic on this road and how residents have to maintain the road. This is not a seasonal property; it will be a single-family home and the perfect place for an Airbnb if somebody ever wanted to do that with the property in the future. He stated how Airbnbs are not permitted in the R1 Zone and how he felt he would need to police that. Another concern of Wituszynski's is public perception. He questioned whether this would encourage others to develop on lots surrounding Lily Pond. He stated that he didn't feel the Planning Board was the right forum for the project proposal because the Planning Board already felt the lot was buildable, when it is not. He stated the neighbors to the proposed project would like the Zoning Board to review further the proposal and to make the correct decision.

Brooks clarified that because there is more than one Applicant listed on the Appeal, the Zoning Board will allow others to speak if they wish to.

Vincent Kulickowski of 34 Coles Pond Road stated that he feels the proposed project should have gone to the Zoning Board first. He noted that the proposed project does not meet setback requirements and that it is a small, nonconforming lot. There are many challenges on the road that residents have observed, one of them being plowing. Sometimes, the road is not plowed for a couple of days following a snowstorm although the City does a great job when they are maintaining the road in the wintertime. The lot itself doesn't meet the setbacks. Recently, a house was built and residents on the road are unaware of how that project was approved to be built. He stated he is not against building or people owning property. He thinks the Zoning Board needs to take a closer look at the proposal and determine next steps. There is a camp there and from my understanding, you can't tear that down and build something bigger in the R1 District if you don't meet the proper setbacks. He stated he was taken to court by the City for two inches of a deck that extended onto the property of The Oaks golf course. He questioned the approval of the proposed project and noted that it does not meet regulations. He stated that if the proposed project ends up happening, that parking is prioritized. The road is tight and if a fire engine travels up the road, there's a swamp on both sides which makes that area impassable at times. He said those are some things for the Zoning Board to consider.

Brooks opened the Public Hearing.

Brett Allard of Shaughnessy Raiche representing the property owners of 35 Coles Pond Road, Peter and Christine Ransom stated the general theme of the Appeal has been that the Zoning Board should review the proposal again. He stated the Zoning Board is not a blanket place for people to appeal any decision of a Planning Board just to get a do-over. That is not how the procedure works in New Hampshire law or under the City of Somersworth's Zoning Ordinance. He stated he will provide a summary of the letter he submitted to the City on behalf of the property owner on March 21, 2023. He referenced RSA 676:5 Subsection 3 in New Hampshire law that says the ZBA only has jurisdiction to hear administrative appeals of Planning Board decisions when the Planning Board interprets the Zoning Ordinance in the context of subdivision approval or site plan review. The Planning Board's decision on a Conditional Use Permit is not subdivision or site plan review. Section 19.13.1B of the Zoning Ordinance delegates administration of Conditional Use Permits to the Planning Board under the innovative land use control statute. If one reads that statute verbatim, it says if in the

exercise of subdivision or site plan review, the Planning Board makes any decision or determination which is based upon the terms of the Zoning Ordinance or upon any construction, interpretation, or application of the Zoning Ordinance which would ordinarily then be appealable to the ZBA had it been made by the administrative officer, then that decision can be appealed to the ZBA. He stated that statute goes on to say, provided however that if the Zoning Ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration including the granting of Conditional Use Permits or Special Use Permits to the Planning Board, then the Planning Board's decision made pursuant to that delegation can not be appealed to the Zoning Board of Adjustment but may be appealed to the Superior Court as provided by RSA 677:15. He stated that the Zoning Board does not have jurisdiction to consider this Appeal, or to consider the merits, or to consider anything that it has heard so far tonight. He stated that this Appeal needed to be filed with the Superior Court under RSA 677:15 within 30 days of the Planning Board's decision. Alternatively, the case could have gone to a Housing Appeals Board as well. The Applicant had 30 days from the date of the Planning Board's decision conditionally granting the Conditional Use Permit to file the appeal with the Housing Appeals Board or the Superior Court. That did not happen and the Planning Board's decision has become final now and this Board does not have jurisdiction to consider the Appeal. In terms of the merits of the Appeal, just because a lot is preexisting and nonconforming, doesn't mean it is nonbuildable, just because a developer called it a Camp Lot on a plan in 1962 doesn't make it not a building lot, just because the lot was historically underutilized doesn't mean that it abandons its grandfathered status. Just because the shed is torn down, once all of the approvals are in place to build new infrastructure, doesn't mean it loses its grandfathered status. The Zoning Ordinance has provisions in place that were read by Mears at the beginning that the Planning Board based its decision on that provide landowners with constitutional protection when it comes to preexisting, nonconforming lots. In this case, the Planning Board made the right decision. You can alter a preexisting, nonconforming structure without having to get a variance as long as you are not making things more nonconforming. Even if the Zoning Board could consider this appeal, he said the Planning Board's decision was proper, that it was within the bounds of the Zoning Ordinance and properly interpreted. He asked that the Zoning Board deny the administrative appeal.

Jim Oschman of 37 Coles Pond Road introduced himself as an abutter to the proposed project. He stated he is in support of the proposed project. There are other camp lots on Coles Pond Road that have been built into very nice homes, the home located at 31 Coles Pond Road being one of them. He stated that sets a good example for making nice dwellings along the pond.

Brooks opened up discussion to questions from the Board. Vincent requested to speak further with Brett Allard. He stated he agrees that Allard has merit with regard to the Zoning Board and thinks the case will go beyond the Board in Court. He asked him if because a building permit was issued for the lot in 1974, whether the property owner should be permitted to construct a building. Vincent asked if the new building would have to meet setback requirements, and if so, how big could the building be?

Allard clarified Vincent's question. He stated that if one has a preexisting, nonconforming structure that's in a setback and it's grandfathered in its location and one would like to build a new house, it would not need to meet setback requirements under the City of Somersworth's Zoning Ordinance. The Zoning Ordinance is very clear that one can alter a preexisting, nonconforming structure as long as the nonconformity is not increasing. Allard stated if one's dwelling were six feet from the property line, and one is grandfathered six feet from the side property line, and one wants to build a new house five feet from the property line, that would be increasing the nonconformity and a variance would be needed from the Zoning Board to increase that nonconformity. He stated if one were six feet from the property line and one would like to build a new structure that's 8 feet from the property line, that nonconformity is decreased, and the action is more conforming with the Zoning Ordinance than before. Under the Somersworth Zoning Ordinance, a variance is not needed for that. He stated that is what the Planning Board determined.

Vincent asked Mears if following the date of the building permit's issuance in 1974, whether the shed that was constructed was what the permit was intended for.

Mears stated that the building permit was for a single-family dwelling and what the property owner constructed at the time was a camp.

Allard clarified that the dwelling had a kitchen and dwelling facilities.

Vincent asked if the structure had a kitchen, whether it would be considered a single-family dwelling.

Jones stated that he didn't think the Zoning Board should be using the word "camp" because if the permit that was originally granted was approved for a dwelling, it is considered a dwelling regardless of what is in the building.

Vincent asked if the building that is currently on the lot is what the permit was intended for. He reiterated that it is likely that this case will go beyond the Zoning Board and to the Superior Court.

Allard stated he thought it best to keep in mind the bigger picture that the Zoning Board does not have jurisdiction over the Appeal regardless of whether the Board agrees or disagrees.

Brooks stated that the Zoning Board should discuss whether they are in the position to grant the appeal before they discuss the case further.

Brooks closed the Public Hearing for the Zoning Board to discuss whether the appeal should be granted or not. Brooks stated that in the case that the appeal is granted, the Zoning Board would hear more in order to make a decision.

Vincent asked Mears if she believes the case belongs here before the Zoning Board.

Mears stated if the Zoning Board thinks the case belongs before the Board, the case should be continued to get a legal opinion on granting the Appeal.

Jones stated he doesn't think the case belongs before the Zoning Board because no specific application of the Zoning Ordinance is being applied. He said in this circumstance, the Applicant who is trying to build this dwelling received all of the approvals that were needed through the City. He said other City jurisdictions made those determinations and the Department of Development Services made the determination a variance was not needed. He stated he feels it is moot to bring this case before the Zoning Board. As Allard pointed out, any appeals to the Planning Board decision should have gone before the Superior Court, not to the Zoning Board as they are not the forum for a case such as this.

Vincent clarified his understanding that if they got a permit to build a structure on the lot, that structure was probably conforming then. He stated that the legal opinion needs to tell the Zoning Board that if the structure is demolished and a different sized structure replaces it that makes it nonconforming, that should not be permitted. He stated the previous property owner obtained a building permit in 1974 intended for the existing structure on the lot, and nothing was ever done with it. He stated it is his impression that the legal opinion needs to tell the Zoning Board if they're going to build another building there, it has to meet whatever the standards are today.

Jones stated that would throw out the entire use of the Nonconforming Structures Clause in the City's Zoning Ordinance and also make almost any lake lot in New Hampshire unbuildable.

Brooks stated he agrees with the innovative land use controls. He said he understands that under the Conditional Use Permit, this case is something the Zoning Board shouldn't be granting an appeal on because it seems like it would go to the Superior Court according to the laws that he researched. He questioned whether

the Planning Board and Conservation Commission discussed the nonconforming lot and what both boards based their decisions on.

The Riparian and Wetland setback or did they base it on the nonconforming lot. He stated he considers there to be a nonconforming lot and a nonconforming structure. If they are basing their decision on that, that's not their realm to base it on. In that case, it would be a variance which this case falls into as well.

There has only been a Conditional Use Permit, there has not been any application for a variance.

Jones asked if the building permit has been granted yet.

Mears stated that they have not pulled a building permit at this point. At this point, the property owner has been granted a Conditional Use Permit by the Planning Board and received review by the Conservation Commission.

Hilton stated if the past approval was for a single-family dwelling and the Applicant has a similar plan and it's less nonconforming than it was before, then he thinks the Planning Board made the correct call. On top of that, if abutters felt that the Planning Board did something wrong, then the Appeal should've gone to the Superior Court, not to the Zoning Board. That's his understanding of the case.

Brooks stated he could understand Hilton's reasoning and he wonders if this process isn't done and if it would still need a variance. He said that maybe the property owner only has half of their approval to this point and the abutters are only appealing the first step of it.

Hilton stated that if there is an area for an appeal, it should have gone to the Superior Court, not to the Zoning Board.

Brooks agreed and stated because it was under the Conditional Use Permit and innovative land use as the law dictates.

Vincent suggested that if the Board has exhausted their discussion, the Board should table the case to get a legal opinion.

MOTION: Vincent made a MOTION to CONTINUE the case until the next ZBA meeting on Wednesday, May 3rd to get a legal opinion;
Perkins SECONDED;
Motion CARRIES 3-2, with Jones and Hilton in opposition.

B) Summa Humma Realty is seeking a variance from Section 19.20.D.4.b to allow store front signage, a pylon flag, and a pylon sign on a property located at 355 Route 108 in the Commercial/Industrial (CI) District, Assessor's Map 48 Lot 24A, 24G, and 24I, ZBA#02-2023

Vincent stated he will need to recuse himself from hearing and voting on this case due to the sale of his business to the Applicant.

Brooks stated that with Vincent recusing himself, that leaves the Zoning Board with four voting members on the case. He said whenever there are less than five voting members, the Board must ask the Applicant if they would like to continue because it would require 3 members to vote in favor for the request to be granted.

The Applicant stated he would like to move forward with their case at the meeting tonight.

Mears stated the Applicant is seeking to allow 253 square feet of signage on a lot where 206 square feet of signage is permitted. The freestanding sign is 76 square feet, this includes the pylon sign containing a Kubota sign. The wall sign is 46 square feet, that is the “MB” logo. The wall sign is 94 square feet, that is the letters “Tractors & Equipment.” There is another wall sign that is 36 square feet, that is “Kubota” for a total of 253 square feet. The Applicant has responded to all five variance criteria therefore the application is complete for the Board to take jurisdiction and to moving it to a public hearing. The Planning team did research on the file and found that this lot was approved for a site plan in 2022 and a Conditional Use Permit in 2022 for 12,000 square feet of automobile sales of new and used tractors, equipment, and trailers with infrastructure.

Brooks invited the Applicant to speak on their case.

Chris Swiniarski of Devine Millimet introduced himself as representing Summa Humma Realty-Somersworth, LLC, an affiliate of MB Tractor. Swiniarski stated the Applicant is seeking a variance for signage in excess of what is permitted – 206 square feet is the calculation of what is permitted under the Somersworth Zoning Ordinance. Their total is 253 square feet.

He provided a background of the property to help demonstrate what the Applicant is asking for and the reasons they are asking. He pointed out the location of the property on a map and explained the property is comprised of three separate lots that will be combined if they’re not already. He stated the location of services on the property including where deliveries are received. He said the storefront is set back 185 feet from Route 108 and that is the leading reason for the Applicant’s request for a variance.

He introduced **Brett Kay**, the Project Engineer from Nobis Engineering to answer any technical questions the Board may have. He stated he would provide the Board with the five variance criteria. The first criteria they have is the variance will not be contrary to public interest. He stated New Hampshire courts have found that the first criteria and the second criteria require the same analysis because they are, in essence, very similar criteria, with the second being that the spirit of the Ordinance is observed. When the Board is evaluating those two criteria, the questions the Board has to ask itself is whether or not the essential character of the locality is changed and whether or not the proposed variance threatens the public health, safety and welfare. In terms of the essential character of the locality, he referenced Tab 5 in the application which are pictures of other businesses with similar signs and orientations in the area. He stated what they are proposing which is described in Tab 3, their proposal fits in with other signage that is already in the neighborhood.

He stated with respect to the third criteria, whether or not substantial justice is done, the guidance from New Hampshire courts on that criteria is that the Board should be weighing the detriment to the applicant in denying the variance versus the benefit to the general public in strictly enforcing the Zoning Ordinance. He stated that it is hard to imagine the benefit for the general public in eliminating 53 square feet of signage. It is not a substantial square footage of signage. He stated that in comparing that to the detriment to the Applicant, that detriment becomes significant. The setback of the building being approximately 185 feet does make the business a bit difficult to see from different vantage points, specifically vehicular traffic on Route 108. He referenced the Site Plan in Tab 4 of the Board’s materials to make the point that there are other existing buildings closer to the street that would create an obstruction of the signage on their building. He stated for that reason, they would like to make the sign bigger and also have a substantial flag sign at the front near the street. Part of the reasoning for that is the business added a lot of landscape buffers for the benefit of the abutters and those buffers will be an obstruction to the visibility of the business.

He stated with regard to the fourth criteria, which is whether or not granting this variance would diminish property values of the surrounding area, it’s hard to imagine it could. They are seeking this proposal because much of the landscape buffers that are part of their project will create an obstruction for the business. He stated however, those buffers are there to enhance the value of abutting properties, they are not there for their property. He said there is no way this proposal will have a negative impact on the values of surrounding properties.

He stated turning to the fifth criteria, which is whether or not literal enforcement of the provisions of the Ordinance would result from unnecessary hardship. He noted that MB Tractor & Equipment is a unique property, it is L-shaped and something of a corner lot with other lots that are on the corner. That creates the situation where it becomes difficult to see this business and the signage associated with it because those other businesses do create that obstruction. Additionally, the signage that they're proposing, the details of which he referenced are on Tab 3, the flag sign is a prefabricated sign that is available from Kubota, which MB Tractor is a franchisee of and it is their standard sign. It's something they have spent quite a bit of resources on in marketing to determine that that is an effective sign. He stated the other signage that's on the building which the Board has a picture of in their packets, is an actual picture from another location in South Windsor, Connecticut. The Somersworth location has tried to use existing signage they have because it's a much more efficient process when things don't need to be custom designed from scratch. He stated they did take that existing signage from the South Windsor, Connecticut store and eliminated parts of it to reduce its size significantly. For example, there was a large Parts, Services and Repairs part of the sign that was taken out. They have done everything they could to shrink it down to get as close as possible to what is permitted. He noted they are pretty close being 53 square feet off. He stated the last thing he would point out in terms of the hardship is the interpretation. Under the Somersworth Zoning Ordinance, the pylon that supports the sign is not considered part of the square footage of the sign. The determination was made that the pylon would be part of the square footage. On one hand, it is the supporting pylon, and on the other hand, it does have a visual effect. It is a plain black panel; it doesn't have any logos or graphics. He stated the idea is it looks better than what he thinks would just be a steel post. Overall, he said he thinks they met the variance criteria well.

He referenced Tab 8 of the application where he has provided some proposed findings of fact for the Zoning Board. He invited the Board to ask him any questions they may have about the proposal.

Brooks opened the Public Hearing.
There were no comments.

Swiniarski clarified the square footage of the sign. The variance they are seeking is actually 47.25 square feet so smaller than the number he was referencing previously.

Jones stated it is a good looking sign, he thinks it is better than a steel post and he sees the hardship in that the pylon was included in that. If the pylon were removed, the 6-foot by 6-foot sign is 37.2 square feet. Do you have anything to say about that discrepancy for the remaining square footage that's over the minimum – that extra 10 square feet? You're asking for 43 square feet but 37 square feet is the actual substantive Kubota sign if we exclude the pylon.

Swiniarski stated he believes the signage on the storefront is a little bit over what is permitted for square footage and that's where the discrepancy comes from. If one were to take out the flag and the pylon altogether, they would be slightly over the permitted 206 square feet.

Brooks question for Jones. If the pylon section were taken out, the calculation is still over what is permitted for square footage.

Jones stated he was unaware of who made the decision – either the Planning Board or the Department of Development Services, but the pylon was included in the square footage area which is part of what they are saying their hardship was, which I agree, that is a bit of a hardship, because I understand the aesthetic of the pylon and as a City, we definitely prefer that over a steel post. I took the pylon out and we still have 10 square footage of substantive sign space that is over that 203 square foot minimum. The site plan is interesting, the lot is L-shaped, there is a wetland in the back, and you can't really set the building any further back to get that extra 10 square feet they need since we base that off of the distance from the road.

Brooks stated he thinks in terms of hardship, usually the hardship has some relation to the situation. If the Board were considering the height of a sign, he could see an applicant asking for a taller sign if they were located in a valley where one couldn't see it. He said he doesn't see how the L-shaped piece of the property makes it harder to see the sign. The sign will still be out by the side of the road similar to other businesses along that road do.

Swiniarski stated the reason for the size of the signage on the building is the setback. For that sign that is on the road, what we consider a "flag sign" that is a standard that is issued to us from the franchisor. It is very difficult for us to change it. If you take these things separately, it is a minimal variance if you're looking at just the storefront signage or just the flag signage. When they are combined, it is a more significant variance but still rather small. The hardship that you're referencing with respect to that flag sign is that we would have to do a completely new custom sign and go through an approval process with the franchisor for what is a minor change. It's a lot of work for a minor change just to meet the signage requirement.

Brooks clarified whether all of MB Tractor & Equipment's locations have the same signage with regard to size and appearance.

Swiniarski stated that new business locations will have the same signage. Similar to Dunkin', all new locations will phase in the new signage. Older locations that have different programs will not have the same signage.

Brooks stated he can understand the logo but he can also see with modern technology, it's not difficult to modify the size of a sign especially to fit criteria for every municipality. He said many different municipalities have sign regulations to create an appearance. He stated that a purpose of the Zoning Board is to uphold the Ordinance that Somersworth presents them, unlike ordinances of other towns and cities. He said in his opinion, he doesn't see the hardship because the Applicant could shrink down the sign while keeping the same logo and meet the criteria.

Swiniarski stated that would be true if one were starting from scratch. He said with respect to the flag sign located near the street, the Applicant does not have that flexibility. It is a very difficult process and it's much more expensive. He stated the sign that they have provided the details on in Tab 3 is ready to go. Similarly, the signage that is on the building, that signage was already built and installed at a different location so it wouldn't require any redesign. He said it is significantly easier both in terms of time and cost to create that and that size is something MB Tractor & Equipment spent a lot of time determining what was appropriate for stores that are set back significantly from the street.

Brooks asked whether the sign on the building is a lit sign and if the letters within the sign light up.

Swiniarski referenced the information provided to the Zoning Board and stated one could view the day view and night view of the sign on the building. "MB Tractor & Equipment" is lit up and the gear icon is halo lit, meaning the outline is lit. He clarified that the sign is more than a hard surface that is painted and confirmed that there is wiring for the lights within the sign.

Brooks questioned whether the Kubota flag sign that would be located out front is a panel that is backlit.

Kay stated the sign would be a twin panel.

Brooks closed the public hearing and opened up discussion to the Board.

Jones stated if the Applicant excludes the pylon, what the Applicant is asking a variance for is 10 square feet which he doesn't think is drastic considering the building would have been able to be placed further back if not for a wetland. He noted that was a constraint for the Applicant when coming up with the site design. He said he doesn't think what the Applicant is asking for is too extreme. He noted "MB Tractor & Equipment" is a

substantial title to put on the face of the building and it will be lit but that is the brand. Whether the sign were the size the Applicant is requesting a variance for or the size that meets the City's criteria, he doesn't think one would be able to tell the difference in size by looking at both side by side. He stated if he were to workshop this case, he would suggest denying the "Kubota" sign under the "MB Tractor & Equipment" sign because there is already a "Kubota" sign close to the street, however, this is the proposal before the Board so that is not possible.

Brooks stated he finds it interesting the pylon portion is considered part of the sign. He said if one had a four-inch pole and a 12-foot by 12-foot pole, whether the 12-foot by 12-foot pole would become part of the sign. He stated he sees and understands the reasoning and mentality behind that, however, when he looks at this case, he sees a square sign on a thick black post. He said he sees Jones' reasoning, at the same time, he doesn't see the hardship part of it.

Perkins stated the packet notes that excluding the black portion of the sign brings the size down to 212 square feet where 206 square feet is allowed, so the Applicant is only 6 square feet or 3 percent over. He said he believes the hardship would be the shape of the lot where it is narrow and widens in the back. He said the Planning Board wanted to keep the trees separating the front, narrow part from the fireworks store. That makes the site line back to the Applicant's building very narrow. He stated he would be in support of a variance.

Hilton stated he agrees with Perkins with regard to the hardship with the lot and the distance the business is set back from the road, the visibility of the business from the road, and the narrow parts of the lot. He said that ultimately, the City would like to see businesses come to the City. He said believes it is a worthwhile variance.

MOTION: Jones MOVED that the signage variance request of Summa Humma Realty **DOES NOT HAVE POTENTIAL FOR REGIONAL IMPACT.**

Perkins SECONDED the motion;
Motion CARRIES 4-0.

Jones stated that because the additional request for the variance is really to create a distance of the building off the wetland which he thinks is important for environmental reasons and the extra 6 square feet, he doesn't see an adverse public impact there.

Brooks offered an amendment to the motion to limit the signage size to that number and not grant signage for any size larger.

Mears suggested the motion amendment could be to limit signage size to what was submitted in the application.

Brooks reiterated he does not believe the variance proposal qualifies as a hardship case. He likened Somersworth to Times Square if the Zoning Board begins to allow variances such as these. He doesn't see the shape of the property being that much of a factor to it. There is still a sign right out by the road where it can be seen. The speed limit is not high in that location, it is not easy to miss. If somebody were looking for it, they would see it as it is a large sign.

Jones stated that in regard to Brooks' parallel to Times Square, what he finds interesting is this is not specific signage for the company, it is signage for a product they are selling which is an advertisement just like Times Square.

MOTION: After review of the application, the file and all the information presented to the Board, I feel that all five criteria have been satisfied because there's no adverse public interest. Jones MOVED that the request of Summa Humma Realty for a variance from Section 19.20.D.4.b to allow store front signage, a pylon flag, and a pylon sign totaling in 253.25 SF in the application materials as stated on March 17th, 2023 **be GRANTED.** Hilton SECONDED the motion.

Motion CARRIES 3-1, with Brooks in opposition.

- C) **Reddy Infosys, Inc. are seeking an Appeal of an Administrative Decision made by the Department of Development Services for a building permit to allow the construction of a fenced-in cold storage area at a property located at 72-76 High Street in the Business with Historic Overlay (BH) District, Assessor's Map 11 Lot 216, ZBA#03-2023.**

Mears stated the Applicant is appealing the issuance of a building permit for a property located at 72-76 High Street for construction of 160 square feet of cold storage area. This does comply with the zoning of the form based codes Area 1. For the Board's information, the Historic District approved the application, which was case number #32-2022 to construct a cold storage, fenced-in, screened-in area at the December 15th, 2022 Historic District Commission meeting. In 2022, there was a building permit #B2022-388 that was issued on February 2nd, 2023 that complied with all zoning in the form-based code area. The applicant was amended for no dumpster enclosure. The Board should consider administrative appeal must be filed within a reasonable timeframe per RSA 676:05.

Brooks invited the Applicant, Reddy Infosys, Inc. to speak.

Christopher Burns representing Reddy Infosys, Inc. introduced himself. He stated in 2011, Jeff and Sherry Pratt purchased a property at 72-76 High Street in Somersworth, Map 11 Lot 216. In 2018, Burns' client purchased some abutting property identified as Map 11 Lot 215. He stated his client also purchased the parking lot near Citizen's Bank on Constitutional Way, Map 10 Lot 168-C. Initially, the Pratts had rented some parking spaces from his client but as time went on, the relationship deteriorated and there's a dispute as to whether or not the Pratts have the right to come across his client's property and park there. Ultimately, the case ended in litigation and it was filed in Superior Court, as number #219-2022-CV-57. The case started with injunctive relief and it went on where both sides requested quiet title and there was a cross petition to quiet title as well. He stated that this evening, the Applicant is seeking to rescind the building permit for a couple of different reasons. The first reason is, the strip of land on Map 11 Lot 216, there is a contested strip of property behind that building, that is the subject of litigation right now pending in the Strafford County Superior Court. He stated it is his client's contention that there are a variety of easements that strip of property, including a loading and unloading easement, a temporary maintenance easement for all of the other buildings that are back there, there are utility easements. At Map 11 Lot 215, there is at least one rental unit in that building lot. The entrance and exit comes out right in that strip of property. He stated for all of those reasons, he and his client would ask that the previously issued building permit be rescinded. He thanked the Board for their time.

Brooks invited the property owner to speak on the case.

Christopher Mulligan representing Jeff and Sherry Pratt introduced himself. He stated he wasn't involved in the Historic District Commission process so if there are questions regarding that, **Jeff Pratt** is present and able to explain the project to the Board. He said that similar to the first case the Board heard earlier in the evening, appeals from administrative decisions are circumscribed by statutes and the City's Zoning Ordinance. Specifically, in the Zoning Ordinance in Section 19.22.A.1 provides that appeals of administrative decisions have to allege an error in the enforcement of any provision of the Zoning Ordinance. The statute,

RSA 674.33 says essentially the same thing. He stated that what Attorney Burns just went through doesn't have anything to do with a specific provision of the Zoning Ordinance that he maintains the City's building inspector made an error on. As Director Mears just noted, the application and the building permit complies with zoning. The HDC approved it. The appeal before you cites four different grounds for the Appeal. The first is lack of notice, which is not an appropriate reason to overturn a building permit. An application for a building permit such as this does not require abutter's notices. The application to the HDC did generate notice and Mr. Reddy decided not to participate. He stated the compliance with zoning should be the end of the Zoning Board's analysis in this case. There is no error in the interpretation or enforcement of the Zoning Ordinance that the Code Enforcement Officer made. The applicant, Mr. Reddy, has not identified any. All of the other things that are discussed are private property rights that are well beyond this forum's purview. Neither the building inspector nor this Zoning Board should be or should consider themselves as having to referee private property disputes between neighbors. He stated he provided a written summary of their position on this. He said that basically, anybody can come before a Planning Board or a Zoning Board and say they have an easement and try to restrict development. He stated it is simply not appropriate. If they have private property rights, they need to vindicate somewhere. There's a Superior Court right down the road. He said there are remedies if Mr. Burns believes his rights are being affected by this. He stated this is not the proper forum for those remedies to be granted. He said for the record, it is very curious that Mr. Reddy and his attorney have claimed that there are easements that burden the effected part of the property but they haven't identified any of them. They haven't produced copies of any of them. He stated as far as he and the Pratts know, they don't exist. Mr. Reddy's property is burdened with easements for loading and temporary maintenance but not the Pratt's property. He stated the application is defective because it doesn't identify a single provision of the Zoning Ordinance that the Applicant maintains your Code Enforcement Officer made an error on. Private property rights are not within this Board's purview.

Brooks opened the Public Hearing.
There were no comments from the public.

Brooks closed the Public Hearing.

Jones stated that the first thing he noticed in the application was the sections of the Zoning Ordinance in question was left blank. He said he feels the Zoning Board needs a section of the Ordinance to reference to apply their enforcement. He stated he thinks it may be prudent to give Mr. Prudent a chance to come up with a section to reference, although he feels the time to do that has passed.

Vincent stated he thinks Mulligan has a good point. He said he doesn't feel this Board is here to talk about land disputes or easements. He questioned whether the Board needs to make a decision tonight.

Brooks stated the Board needs to either grant or deny the appeal.
Vincent stated he would be in support of denying the appeal.

Brooks stated for clarification for the Board, if the Board grants the appeal, they are granting Reddy Infosys, Inc. the opportunity to appeal this. If the Board denies the appeal, Reddy Infosys, Inc. will not be able to appeal the Board's decision.

Brooks stated his interpretation is that this building permit was granted and the Mr. Pratt went through the course of actions to do so. The Historic District Commission had to grant a Certificate of Appropriateness before they could grant the building permit and then the building permit is presented once they have that. He

said he doesn't see a reason to say that anyone erred in that. He said he understands there may be ongoing litigation but that is not something the Zoning Board would be involved in. He doesn't believe the dispute over easements and access is in the Board's purview. He said the Board is simply there to grant an appeal or not whether there was a mistake made by City staff or boards related to the case. He stated that based on his understanding of the appeal, he is not in support of the appeal.

Jones stated he agrees with Brooks. He said the Zoning Board is not a judicial body, and rather, they enforce the Zoning Ordinance. He stated unless Mr. Reddy can provide an ordinance that has aggrieved him or that there was an error that was not picked up on under the Planning Board, the Historic District Commission, and the Building Inspector, he doesn't think the Board has anything else to consider.

Regional Impact: Per RSA 36:56 local land use board shall determine if the project has potential for regional impact. If determined there is potential regional impact the public hearing shall be continued in order to notify the Regional Planning Commission and potentially impacted communities.

MOTION: Hilton MOVED that the appeal of administrative decision by Reddy Infosys, Inc **DOES NOT HAVE POTENTIAL FOR REGIONAL IMPACT.**

Perkins SECONDED.

Motion CARRIES 5-0.

MOTION: For reasons of lack of jurisdiction, lack of completeness in the application given that no Zoning Ordinance in specificity was cited, and lack of error made by Staff or City Boards, Hilton MOVED that the request of Reddy Infosys, Inc. for an Appeal of an Administrative Decision made by the Department of Development Services for a building permit to allow the construction of a fenced-in cold storage area be DENIED.

Vincent SECONDED.

Motion CARRIES 5-0.

- D) Any other new business that may come before the Board.
There was none.

Vincent proposed a MOTION to adjourn;

Hilton SECONDED;

Motion CARRIES 5-0.

Brooks adjourned the meeting at 8:27pm.