

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

**2022 TERM
JUNE SESSION**

CASE NO. 2021-0601

CANDICE K. HARVEY

V.

TOWN OF BARRINGTON

**BRIEF FILED BY PLAINTIFF/APPELLANT
CANDICE K. HARVEY**

**COUNSEL FOR THE
PLAINTIFF/APPELLANT
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**To be Argued by:
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NH Bar ID: 8792**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
QUESTIONS PRESENTED	iii
STATEMENT OF CASE	1
STATEMENT OF FACTS	3
SUMMARY OF ARGUMENT	6
ARGUMENT	
I. THE TRIAL COURT ERRED IN UPHOLDING THE PLANNING BOARD'S APPROVAL OF A TWO (2) LOT SUBDIVISION PLAN WHEN THE EASEMENT RELIED UPON FOR ACCESS WAS LIMITED TO ONE (1) LOT BASED ON A RESTRICTION IN THE PRIOR SUBDIVISION PLAN THAT WAS NOT RESTATED IN THE DEED BUT WAS PART OF THE CREATION OF THE EASEMENT	8
II. THE TRIAL COURT ERRED WHEN IT FOUND THAT A ZONING BOARD HAS THE POWER TO MODIFY AN EASEMENT CREATED FIFTEEN (15) YEARS EARLIER WHICH LIMITED ACCESS OVER AN EASEMENT TO ONE (1) LOT AND ONE (1) BUILDABLE LOCATION TO ALLOW ACCESS TO TWO (2) LOTS AND TWO (2) BUILDABLE LOCATIONS	13
CONCLUSION	17
REQUEST FOR ORAL ARGUMENT AND CERTIFICATION	17
APPENDIX	18

TABLE OF AUTHORITIES

PAGE

NEW HAMPSHIRE CASES

<u>Soukup v. Brooks</u> , 159 N.H. 9, 14 (2009)	8, 9, 12
<u>Close v. Fisette</u> , 146 N.H. 480, 483 (2001)	8, 10
<u>Mansur v. Muskopf</u> , 159 N.H. 216, 221 (2009)	8, 9, 10, 12, 15
<u>Bellak v. Franconia College</u> , 118 N.H. 313, 316 (1978)	10
<u>Trustees of Dartmouth College v. Town of Hanover</u> , 171 N.H. 497, 504 (2018)	10
<u>Girard v. Town of Plymouth</u> , 172 N.H. 576, 582 (2019)	11
<u>Pope v. Little Boar's Head Dist.</u> , 145 N.H. 531, 535 (2000)	14
<u>Dumont v. Town of Wolfeboro</u> , 137 N.H. 1, 5 (1993)	15

NEW HAMPSHIRE STATUTES

RSA 674:41	8, 11, 13
RSA 677:6; :15, V (2016)	11
RSA 477:26	6, 12

QUESTIONS PRESENTED

- I. WHETHER THE TRIAL COURT ERRED IN UPHOLDING THE PLANNING BOARD'S APPROVAL OF A TWO (2) LOT SUBDIVISION PLAN WHEN THE EASEMENT RELIED UPON FOR ACCESS WAS LIMITED TO ONE (1) LOT BASED ON A RESTRICTION IN THE PRIOR SUBDIVISION PLAN THAT WAS NOT RESTATED IN THE DEED BUT WAS PART OF THE CREATION OF THE EASEMENT

- II. WHETHER THE TRIAL COURT ERRED WHEN IT FOUND THAT A ZONING BOARD HAS THE POWER TO MODIFY AN EASEMENT CREATED FIFTEEN (15) YEARS EARLIER WHICH LIMITED ACCESS OVER AN EASEMENT TO ONE (1) LOT AND ONE (1) BUILDABLE LOCATION TO ALLOW ACCESS TO TWO (2) LOTS AND TWO (2) BUILDABLE LOCATIONS

STATEMENT OF THE CASE

This is an Appeal from the Strafford County Superior Court (Howard, J.) dated October 28, 2021 affirming a June 1, 2021 decision of the Barrington Planning Board approving the request for a two-lot Subdivision by David R. and Glenda J. Henderson. ("Applicants").

The Plaintiff Candice K. Harvey ("Harvey") is the owner of six (6) acres in Barrington that she uses for her personal residence as well as a commercial property for her hair salon. Harvey's property is known as Lot 1-0 on a Subdivision Plan by the same Applicants dated September 21, 2005 and approved in 2006, known as Plan 87-37. (hereinafter "The 2006 Plan").

The Applicants own Lot 1-1 on The 2006 Plan which is 28.99 acres of land. Both Properties have frontage on NH Route 9.

The 2006 Plan created Lot 1-0 and Lot 1-1. The 2006 Plan provides for access to Lot 1-1 through a forty foot easement over Lot 1-0 owned by Harvey. The easement is limited to one (1) lot at one (1) buildable location.

Garvey & Company, Ltd. ("Garvey") is the Buyer of Lot 1-1 under a Purchase and Sales Agreement with the Applicants and presented in Subdivision Plan to the Barrington Planning Board to Subdivide Lot 1-1 into two (2) lots using access over the easement burdening the land of Harvey.

At a meeting on June 1, 2021, the Barrington Planning Board conditionally approved the Applicants Subdivision Plan by a vote of 5-2.

On June 30, 2021 Harvey filed a Petition of Appeal of the Decision of the Town of Barrington Planning Board Pursuant to RSA 677:15. The Town of Barrington filed an Answer dated August 13, 2021.

A hearing was scheduled for September 10, 2021 by Webex. On August 20, 2021 Garvey filed an Assented to Motion to Intervene and adopted the Town of Barrington's Answer. The Town of Barrington filed a Motion to Excuse Attendance at the Hearing. Both Harvey and Garvey filed Assented to Motions to Supplement the Record. Harvey requested The 2006 Subdivision Plan and Deed into Harvey be added to the record. Garvey requested a Declaration of Intent to Convey Lots with Reciprocal Access & Utility Easements and with Common Maintenance Obligations be added to the record.

At the hearing on September 10, 2021 the Strafford County Superior Court (Howard, J.) granted the Motion to Excuse the Town of Barrington from participating in the hearing. The Court also granted the two Motions to enlarge the record.

By Order dated October 28, 2021 the Court affirmed the approval granted by the Barrington Planning Board for a two (2) lot Subdivision. The Clerk's Notice of Decision was dated November 2, 2021. Harvey filed a Motion to Reconsider on November 12, 2021. Garvey objected to the Motion to Reconsider on November 16, 2021. By Order dated November 22, 2021 the Motion to Reconsider was denied. This Appeal followed.

STATEMENT OF FACTS

The Plaintiff, Candice K. Harvey ("Harvey") is the owner of 643 Franklin Pierce Highway, Barrington, New Hampshire. Strafford County Superior Court Order dated October 21, 2021, *Appx* At 65. Harvey's Lot was designated as Lot 1-0 on Subdivision Plan for David R. and Glenda J. Henderson dated September 21, 2005 and approved in 2006, Plan Number 87-37. (Hereinafter "The 2006 Plan"). Strafford County Superior Court Order dated October 21, 2021, *Appx* At 65. Lot 1-0 is 6.03 acres. The 2006 Plan, *Appx* At 21. Harvey uses Lot 1-0 as a personal residence as well as a commercial property for her hair salon. Strafford County Superior Court Order dated October 21, 2021, *Appx* At 65. The deed conveying Lot 1-0 on The 2006 Plan states that the land is "Subject to a forty foot (40') wide access and utility easement to benefit Lot 1-1 as shown on the above referenced plan" (The 2006 Plan). Harvey Deed, *Appx* At 19. Note 12 to The 2006 Plan states:

"40 foot Wide Access & Utility Easement across Lot 1-0 to benefit Lot 1-1 is to be used for a single lot and one buildable location on Lot 1-1 only. When and if a road on the frontage of Lot 1-1 is ever constructed the access easement across Lot 1-0 will be eliminated and access to Lot 1-1 would be via the new road."

The 2006 Plan, *Appx* At 21.

The Deed to Harvey does not restate the restriction from Note 12 on The 2006 Plan but does state that the 40'-foot access and utility easement is as shown on The 2006 Plan. Harvey Deed, *Appx* At 19.

The Applicants requesting approval of the New Subdivision Plan are David and Glenda Harvey. ("Applicants"). The Applicants own Lot 1-1. Strafford County Superior Court Order dated October 21, 2021, *Appx At 65*. Lot 1-1 is 28.99 acres. The 2006 Plan, *Appx At 21*. The Applicants were also the ones who obtained approval for Plan 87-37 known herein as The 2006 Plan. Garvey & Company, Ltd ("Garvey") is the Buyer under a Purchase and Sale Agreement with Applicants who presented the Subdivision Plan at issue to the Barrington Planning Board. Garvey intervened in this case.

The 2006 Plan approved Lot 1-1 for one building lot. The Applicants filed for approval from the Town of Barrington Zoning Board of Adjustment for a Variance for two (2) lots on Lot 1-1. Strafford County Superior Court Order dated October 21, 2021, *Appx At 65*. Harvey had attended two meetings at the Zoning Board of Adjustment but was out of Town for a Third meeting when the Variance Request was approved on February 17, 2021. Certified Record, *Appx At 29*.

On March 21, 2021 the Applicants applied to the Planning Board for subdivision approval to further subdivide Lot 1-1 from one (1) lot into two (2) lots to be accessed by the Easement over Harvey's Lot 1-0. Strafford County Superior Court Order dated October 21, 2021, *Appx At 65*. A hearing was held on June 1, 2021 at the Barrington Planning Board. Certified Record, *Appx At 23*. Harvey attended the Hearing. The Chairman allowed her friend Raymond Estes to speak on her behalf. Certified Record, *Appx At 29*. He indicated that when the property was purchased, it was very clear to Harvey that the traffic through the easement on Harvey's land would only be for one (1) house. Certified Record, *Appx At 29*.

The Planning Board discussed that they could approve the plan on the basis that the easement could be used for two lots and if a legal action later said it could not be

used for two (2) lots, then the Applicants would need different access. Certified Record, Appx At 30. Raymond Estes then stated to the Board that his attorney determined it was clear in the deed to Harvey combined with the approved 2006 plan, what the intent for the easement was and it was not for two (2) house lots. Certified Record, Appx At 30. Ignoring Note 12 on The 2006 Plan, the Planning Board stated that they approved the Applicants Subdivision Plan and such approval was based on the easement being valid for two (2) lots by a vote of 5-2. Certified Record, Appx At 33.

SUMMARY OF THE ARGUMENT

The trial court erred when it upheld the planning board's approval of a two (2) lot Subdivision when the easement relied upon for access was limited to access for one (1) lot at one (1) buildable location. The easement over the Plaintiff's land was created by the original subdivision plan and the first deed out to the Plaintiff predecessor in title. The terms of the original subdivision plan and first deed out are unambiguous and the parties intent at the time the easement was created clearly to limit use of the easement to access one (1) lot at one (1) buildable location. The fact that the restriction of use by one (1) lot at one (1) buildable location was on the subdivision plan but not restated in the first deed out is irrelevant where the first deed out referenced the plan. Under RSA 477:26 and prior decisions of this Court, the benefits and burdens of an easement pass automatically to successors even if not referenced in a subsequent deed. It was unreasonable and erroneous for the planning board to approve a two (2) lot subdivision over an easement that limited access to one (1) lot at one (1) buildable location. Likewise, it was erroneous of the trial court to uphold the decision of the planning board where there was no right to access two (2) lots over the easement relied upon for access.

The trial court also erred when it found that a Zoning Board has the power to modify a restriction in a previously recorded subdivision plan which increases the burden on an easement over an abutters land from access to one (1) lot at one (1) buildable location to access to two (2) lots at two (2) buildable locations. While the zoning board has the authority to increase the number of lots in a further subdivision, it

cannot modify the terms of an easement over abutters land created fifteen (15) years earlier.

To grant the relief requested and modify a vested easement over abutters land would promote uncertainty in real estate and be contrary to the purpose of the New Hampshire "Race-Notice" recording Statute which is to protect both those who have already have interest in real estate and those who would like to acquire interest. The Plaintiff was aware of the limitation that the easement over her land was for one (1) lot at one (1) buildable location. If two (2) lots are allowed access over the easement, why not five (5) lots. The planning board even stated that the access easement would need to be upgraded to a road if the access easement was used to access more than three (3) lots.

ARGUMENT

- I. THE TRIAL COURT ERRED IN UPHOLDING THE PLANNING BOARD'S APPROVAL OF A TWO (2) LOT SUBDIVISION PLAN WHEN THE EASEMENT RELIED UPON FOR ACCESS WAS LIMITED TO ONE (1) LOT BASED ON A RESTRICTION IN THE PRIOR SUBDIVISION PLAN THAT WAS NOT RESTATED IN THE DEED BUT WAS PART OF THE CREATION OF THE EASEMENT

The trial court erred when it failed to find that the restriction in Note 12 on the original Subdivision Plan was not part of the Easement relied upon by the Applicants for Access to its two (2) lot Subdivision.

RSA 674:41 provides that no building shall be erected on nor building permit issued for any lots unless a street meeting certain criteria gives access to the lot. The Applicants rely upon a 40 foot wide Access and Utility Easement on a Subdivision Plan ("The 2006 Plan") over Lot 1-0 currently owned by Harvey for access to their proposed subdivided two (2) lots on Lot 1-1 even though said easement is limited for access only to one (1) lot at one (1) buildable location.

An easement may be created by a written conveyance and a plan together. Soukup v. Brooks, 159 N.H. 9, 14 (2009); Close v. Fissette, 146 N.H. 480, 483 (2001). The plan itself does not create the easement, it is not till the deed is signed and recorded that the easement is created. Soukup v. Brooks, 159 N.H. 9, 14 (2009). Even if the plan is not recorded, if the recorded deed clearly references the plan, it provides inquiry notice of the plans existence and the fact that the two documents created the easement. Id. The interpretation of a deeded right of way is determined by the intention of the parties at the time of the deed in light of the surrounding circumstances. Mansur v. Muskopf, 159 N.H. 216, 221 (2009). If the terms of the deed and plan are clear and unambiguous, those terms control how a Court should construe the parties' intent.

Mansur, 159 N.H. at 221.

In this case, the Easement relied upon by the Applicants for Access was created by the first deed out of the Subdivision from the Applicants to Peter R. Ward and Sarah M. Ward ("Ward") by Warranty Deed recorded in the Strafford County Registry of Deeds on April 26, 2007 and The 2006 Plan recorded in the Strafford County Registry of Deeds on August 18, 2006. See Soukup, 159 N.H. at 14; see also The 2006 Plan, *Appx At 21*.

The Deed from Ward to Harvey recorded in the Strafford County Registry of Deeds on November 22, 2019 at Book 4710, Page 1016 contains the identical Easement language as the Ward Deed. See, Harvey Deed *Appx At 19*. The Harvey Deed states:

"Subject to a forty foot (40') wide access and utility easement to benefit Lot 1-1 as shown on the above-reference plan" See The 2006 Plan *Appx At 21*; see also Harvey Deed, *Appx At 19*.

Note 12 on The 2006 Plan states as follows:

"The 40 foot Wide Access & Utility Easement across Lot 1-0 to benefit Lot 1-1 is to be used for a single lot and one buildable location on Lot 1-1 only. When and if a road on the frontage of Lot 1-1 is ever constructed the access easement across Lot 1-0 will be eliminated and access to Lot 1-1 would be via the new road."

As stated above, The 2006 Plan and the Ward Deed combined to create the Easement. The terms of the Ward Deed and The 2006 Plan are unambiguous and control how the Court should construe the parties' intent at the time the

easement was created. Mansur, 159 N.H. at 221. The unambiguous intent is that the Easement is forty feet (40') wide to benefit Lot 1-1 and is limited to be used for a single lot and one buildable location on Lot 1-1. Further, when and if a road on the frontage of Lot 1-1 is ever constructed, the easement across Lot 1-0 is eliminated and Lot 1-1 shall only have access via the new road.

This intent is supported by the rules regarding the interpretation of an easement which is that general rules of contract interpretation apply. Close, 146 N.H. at 484. Under the general rules of Contract interpretation, when various documents constitute the contract between the parties, the parties' intent must be ascertained from all the documents read together. Bellak v. Franconia College, 118 N.H. 313, 316 (1978). The Court should harmonize the documents and give effect to the provisions of the various documents so that none will be rendered meaningless. Id.

The 2006 Plan and the Ward Deed must be read together to create the easement and to ignore Note 12 on The 2006 Plan would make Note 12 meaningless. Note 12 not only sets forth the limitation of the easement to one (1) lot and one (1) buildable location but it also provides for the manner in which the overall easement is terminated. The manner in which an easement created by plan and deed is terminated is an essential provision and must be included in the scope of the easement.

This Court will reverse the trial court's decision on appeal arising from a decision of a planning or zoning board only if it is not supported by the evidence or is legally erroneous. Trustees of Dartmouth College v. Town of Hanover, 171 N.H. 497, 504 (2018). This Court will review the trial court's decision to determine

whether a reasonable person could have reached the same decision as the trial court based the evidence before it. Girard v. Town of Plymouth, 172 N.H. 576, 582 (2019). A trial court must uphold a decision of the planning board unless there is an error of law or the court is persuaded by the balance of probabilities that the decision was unreasonable. See RSA 677:6; :15, V (2016).

The decision of the Barrington Planning Board to grant approval to the Applicants two (2) lot Subdivision Plan was an error of law and unreasonable because the Easement relied upon for Access required by RSA 674:41 was limited to one (1) lot and one (1) buildable location. There is no legal access for two (2) lots. The Easement created by The 2006 Plan and the Ward Deed is only for one (1) lot.

The Order of the trial court to uphold the erroneous and unreasonable decision of the Barrington Planning Board was also erroneous because the trial court found that the restriction on Note 12 of The 2006 Plan was not part of the 40 foot wide access and utility easement. The trial court reasoned that:

“while Harvey’s deed referenced Lot 1-1 ‘as shown’ in The 2006 Plan, the deed itself did not include restrictive language ...”

Stafford County Superior Court Order dated October 21, 2021, *Appx* At 68.

It was plainly erroneous for the trial court to disregard Note 12 of The 2006 Plan as part of its interpretation of the easement on Harvey’s land.

The purpose of the New Hampshire recording statute is to provide Notice to the public of a conveyance or of encumbrances of real estate to protect both those who already have interests in land and for those who would like to acquire such interests.

Soukup, 159 N.H. at 20-21. Soukup cited the RESTATEMENT (THIRD) OF PROP.:
SERVITUDES Section 5.1:

“no instrument of transfer is necessary to pass
servitude benefits and burdens to successors to the
benefited or burdened property interests: they pass
automatically on transfer of the property to which they
are appurtenant the Statute of Frauds does not require
that an appurtenant servitude be mentioned in the
instrument of transfer”.

Soukup, 159 N.H. at 20. The Court in Soukup noted that reference to a recorded plan was sufficient Notice even through no reference was made in the chain of title to the restriction. Id. In this case the easement is noted in the deed in the chain of title and there is also reference in the deed to the plan containing the restriction. It is clear that the “benefit” property right of Harvey restricting the access of the Easement to one (1) lot and one (1) buildable location is part of the Easement and the fact relied upon as controlling by the trial court that the restriction was not expressly restated in the deed was irrelevant. RSA 477:26 codified the Restatement of Property, Servitudes Section 5.1. RSA 477:26 was cited by this Court in Mansur, 159 N.H. at 222 which found that an easement automatically passes with the transfer of a property even when the restriction is absent from the face of the deed.

It is plain that the 40' Access and Utility Easement relied upon by the Applicants for access to two (2) lots was created by The 2006 Plan and Deed included Note 12 on The 2006 Plan which limits access across the 40' Access and Utility Easement to one (1) lot and one (1) buildable location. It was an error of law for the planning board to

approve the Applicants Subdivision Plan and error of law for the trial court to uphold the planning board decision due to lack of access as required by RSA 674:41 to the two (2) subdivided lots.

II. THE TRIAL COURT ERRED WHEN IT FOUND THAT A ZONING BOARD HAS THE POWER TO MODIFY AN EASEMENT CREATED FIFTEEN (15) YEARS EARLIER WHICH LIMITED ACCESS OVER AN EASEMENT TO ONE (1) LOT AND ONE (1) BUILDABLE LOCATION TO ALLOW ACCESS TO TWO (2) LOTS AND TWO (2) BUILDABLE LOCATIONS

The trial court's determination that the Zoning Board of Adjustment ("ZBA") had the authority to modify an existing easement by modifying a restriction created fifteen (15) years earlier in a subdivision plan to increase the burden on the easement from access for one (1) lot at one (1) buildable locations to access for two (2) lots at two (2) buildable locations was an error of law.

In this case, before the planning board approved the Applicants' Subdivision Plan, the Zoning Board of Barrington granted a Variance for two (2) lots on Lot 1-1. The trial court found that since the ZBA had the power to modify conditions previously imposed with respect to a grant of Variance and since the Harvey Deed referenced as Lot 1-1 as shown in The 2006 Plan did not include the language of the restriction in the deed itself, ZBA had the ability to modify the Note 12 restriction on The 2006 Plan and it was binding upon Harvey.

Harvey does not claim that the ZBA could not modify the number of lots approved in a previously approved subdivision plan. (Transcript of Hearing on Appeal from September 10, 2021 at Page 21, hereinafter "Tr at ____"). In other words, Harvey does not contest that the ZBA can grant a Variance for additional lots on the 28.99

acres of Lot 1-1 of the Applicants. Harvey states that the ZBA has no authority to change the terms of the 40' foot access and utility easement which was created fifteen (15) years earlier by The 2006 Plan and the Ward Deed. There is no statutory authority granted to the ZBA to divest a lot created by an earlier Subdivision Plan of vested easement rights.

The trial court cited Pope v. Little Boar's Head Dist., 145 N.H. 531, 535 (2000) for authority for the ZBA to grant a variance to modify the Note 12 restriction on The 2006 Plan. In Pope, the Plaintiff applied for a special exemption for an ice cream stand called the Beach Plum to expand the menu to include coffee, tea, hot chocolate, hamburgers, cheeseburgers, muffins, doughnuts, pastries, and cold sandwiches. Id. at 533. The plaintiff was seeking to intensify a nonconforming use because a few hundred yards away the owners of Andrew-By-The-Sea, also a nonconforming use, were given permission to install a take-out window. The zoning board denied the request but was reversed by the Strafford County Superior Court due to the discriminatory enforcement of the rules. Id. at 534. The Superior Court decision was appealed and reversed. Id. at 535. This Court found that the Beach Plum operated under a Conditional Variance and was not a non conforming use. The case was remanded and the Court indicated that the zoning board had the authority "to modify conditions previously imposed with respect to the grant of a Variance" and the proper procedure for the Plaintiff may be to seek a modification of the Variance. Id. at 535.

Pope is not controlling in this case. In Pope, the Applicants was seeking permission to modify a Variance that only affected his property. No abutters' vested property rights could be modified by the Variance. In this case, the Applicants are requesting to have a more intense use of an established and vested easement through

an abutter's land that is contrary to the express language of such easement. For reasons stated earlier in the Brief, the easement created by The 2006 Plan and the Ward Deed fifteen (15) years earlier vested the easements rights of the parties at the time it was created. Mansur, 159 N.H. at 221. The easement burdening Ward then Harvey's land was expressly limited to be used to access one (1) lot in one (1) buildable location on Lot 1-1. The action of the ZBA to increase Lot 1-1 from one (1) lot to two (2) lots could not be used to modify the parties' rights in the 40' foot access and utility easement which vested as property rights at the time the easement was created. Id.; Dumont v. Town of Wolfeboro, 137 N.H. 1, 5 (1993).

The relief requested by the Applicants is contrary to the purpose of the recording statute, and will promote uncertainty in real estate. New Hampshire is a "Race-Notice Jurisdiction". Mansur, 159 N.H. at 223. The requirement of providing Notice to the Public of a conveyance of or encumbrance of real estate is to serve and protect both those who already have interests in real estate and those who would like to acquire interests. Id. What information that can be revealed in a title search is often controlling in disputes. Id. at 225. Harvey was aware of The 2006 Plan and Ward Deed and the language in both documents that created the easement burdening the land that she purchased. She reasonably relied upon the fact that the 40 foot access and utility easement was limited in use for one (1) lot and one (1) building location. To allow, fifteen (15) years after the easement was created, it to be burdened by traffic to additional lots defeats the certainty of property rights afforded by a search of the registry records and will promote uncertainty in real estate. If Harvey's unambiguous easement rights can be disregarded, what can further modifications of Subdivision Plans lead to. Already at the Barrington Planning Board hearing, Board Member J. Braun stated if in

the future the two (2) lots are increased to more than three lots, the Access and Utility Easement will be needed to be upgraded to a road. Certified Record, Appx. At 33. If this Court determines that two (2) lots are acceptable, it is not unreasonable for the easement on Harvey's land to be upgraded to a road and used for five or more lots. Lot 1-1 is fairly large with 28.99 acres.

For the reasons stated in this Brief, the easement burdening Harvey's land was created by The 2006 Plan and the Ward Deed and its term were unambiguous that the 40 foot access and utility easement created by The 2006 Plan and the Ward Deed was limited to use for one (1) lot at one (1) buildable location. To find that the easement is valid for use by more than one (1) lot at one (1) buildable location is unreasonable. Every subdivision requires lawful access. There is no legal access to more than one (1) lot and one (1) buildable location over the easement burdening Harvey's land. The planning board's approval of the subdivision plan was in error. The trial court's order upholding said decision of the planning board was also in error. There is no lawful access over Harvey's land under the 40 foot access and utility easement for access to anything more than one (1) lot at one (1) buildable location.


CONCLUSION

For all the foregoing reasons the Strafford County Superior Court Order dated October 28, 2021 which affirmed the decision of the Barrington Planning Board approval in the Applicant's Request for a Two Lot Subdivision based on access over an easement on Harvey's land limited to one (1) lot at one (1) buildable location should be reversed and the Applicant's Request for Approval of its Two Lot Subdivision should be denied.

Respectfully submitted,
CANDICE K. HARVEY
By Her Attorneys
CASASSA LAW OFFICE

Dated: June 2, 2022

By:



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REQUEST FOR ORAL ARGUMENT AND CERTIFICATION

The Plaintiff Candice K. Harvey hereby requests that Daniel R. Hartley, Esquire of Casassa Law Office, be allowed fifteen (15) minutes for oral argument.

I, Daniel R. Hartley, Esquire, attorney for Plaintiff Candice K. Harvey, hereby certify that I sent a copy of this Brief as required by the rules of the Supreme Court.

Dated: June 2, 2022



Daniel R. Hartley, Esquire

APPENDIX

	<u>PAGE</u>
1. Warranty Deed from Peter R. Ward and Sarah M. Ward to Candice K. Harvey dated November 22, 2019 for Lot 1-0 on Plan 87-37 recorded in the Strafford County Registry of Deeds at Book 4710, Page 1016	19
2. Subdivision Plan for David R. and Glenda J. Henderson dated September 21, 2005, and recorded in the Strafford County Registry of Deeds as Plan 87-37	21
3. Agenda and Minutes of Planning Board Meeting on June 1, 2021 from Certified Record of Procedures before Barrington Planning Board being document L at pages CR081 to CR097	23
4. Planning Board Notice of Decision – Conditional Approval dated June 7, 2021 from Certified Record of Proceedings before Barrington Planning Board being document M at Pages CR098 to CR100	40
5. Petition of Appeal of the Decision of the Town of Barrington Planning Board Pursuant to RSA 677:15 dated June 30, 2021	43
6. Town of Barrington's Answer dated August 13, 2021	48
7. Plaintiff's Memorandum of Law dated September 10, 2021	52
8. Intervenor's Memorandum in Support of Upholding Barrington Planning Board Decision dated September 10, 2021	61
9. Order of Strafford County Superior Court dated October 28, 2021	65
10. Plaintiff's Motion to Reconsider dated November 12, 2021	69
11. Intervenor's Objection to Plaintiff's Motion to Reconsider dated November 16, 2021	75
12. Order of Strafford County Superior Court on Motion to Reconsider dated November 22, 2021	79

Doc # 190016744 11/22/2019 10:38:24 AM
Book 4710 Page 1016 Page 1 of 2
Catherine A. Berube
Register of Deeds, Strafford County
LCHIP STA150829 25.00
TRANS TAX ST849628 8,100.00

Warranty Deed

We, **Peter R. Ward and Sarah M. Ward**, husband and wife of 643 Franklin Pierce Highway, Barrington, New Hampshire 03825 for consideration paid, grant to **Candice K. Harvey** of PO Box 452, Barrington, New Hampshire 03825, with **WARRANTY**

COVENANTS,

A certain tract or parcel of land, with the buildings thereon, if any, situate on the northerly side of New Hampshire Route 9 in Barrington, County of Strafford and State of New Hampshire, shown as Lot 1-0 on a plan entitled "Subdivision Plan Prepared for David R. & Glenda J. Henderson of Tax Map 239/Lot 1 Located at NH Route 9 County of Strafford Barrington, NH" dated September 21, 2005 and recorded in the Strafford County (New Hampshire) Registry of Deeds as plan 87-37, and being more particularly bounded and described as follows:

Beginning at a point at the southeasterly corner of the within described premises, said point being southwesterly corner of certain premises now or formerly of Russell and Rodney Hayes; thence running North 74° 42' 45" West a distance of one hundred thirty nine and eighty hundredths (139.80) feet, more less, to a point; thence turning and running north 71° 48' 14" West a distance of ninety three and seven hundredths (93.07) feet, more or less, to a point; thence turning and running North 67° 53' 42" West a distance of eighty two and ninety seven hundredths (82.97) feet, more or less, to a point; thence turning and running North 59° 08' 30" West a distance of eighty one and forty hundredths (81.40) feet, more or less, to a point; thence turning and running North 54° 06' 05" West a distance of fifty four and eighty three hundredths (54.83) feet, more or less, to a point; thence turning and running North 48° 10' 47" West a distance of one hundred six and thirty eight hundredths (106.38) feet, more or less, to a point; thence turning and running North 43° 01' 59" West a distance of one hundred fifty three and forty four hundredths (153.44) feet, more or less, to a point at the southeasterly corner of Lot 1-1 as shown on the above-referenced plan; thence turning and running North 57° 48' 57" East a distance of six hundred eighty eight and seventeen hundredths (688.17) feet, more or less, to an iron pipe found; thence turning and running South 08° 22' 41" East a distance of four hundred forty three and eighty one hundredths (443.81) feet, more or less, to a point; thence turning and running South 09° 48' 19" West a distance of two hundred eighty five and seventy nine hundredths (285.79) feet, more or less, to a point, said point being the point of beginning.

Containing 6.03 acres, more or less.

Subject to a forty foot (40') wide access and utility easement to benefit Lot 1-1 as shown on the above-referenced plan.

Subject also to a driveway easement to John P. and Linda C. Svenson (successors in interest to Russell D. Hayes and Rodney G. Hayes, see Warranty Deed from Russell D. Hayes and Rodney G. Hayes to John P. Svenson and Linda C. Svenson dated September 18, 2006 and recorded October 2, 2006 in the Strafford County (New Hampshire) Registry of Deeds at Book 3441, Page 0194), their heirs, executors, administrators, successors and assigns, as shown on the above-referenced plan. Also see Permanent Easement Deed recorded herewith.

Meaning and intending to convey the same premises conveyed to Peter R. Ward and Sarah M. Ward, by deed from David R. Henderson, Trustee of the David R. Henderson Living and Glenda J. Henderson, Trustee of the Glenda J. Henderson Living Revocable Trust dated April 26, 2007 and recorded with the Strafford Registry of Deeds at Book 3521, Page 922.

Witness my/our hand(s) this 22nd day of November, 2019

Peter R. Ward
Peter R. Ward

Sarah M. Ward
Sarah M. Ward

State of New Hampshire
County of Rockingham

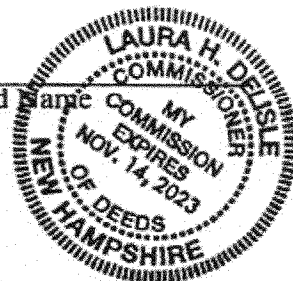
On the 22nd day of November, 2019, before me, personally appeared, Peter R. Ward and Sarah M. Ward, to me known or proven to be the parties executing the foregoing instrument, and they acknowledged said instrument, by them executed, to be their free act and deed.

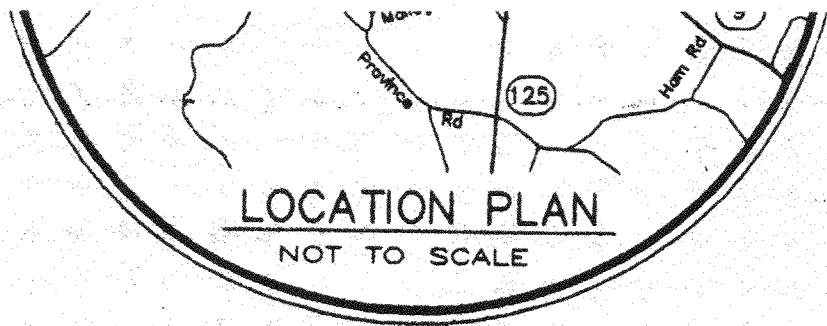
My Commission Expires: 11/14/23

Laura H. Delsie
Justice of the Peace:

Printed/Typed Name

SEAL



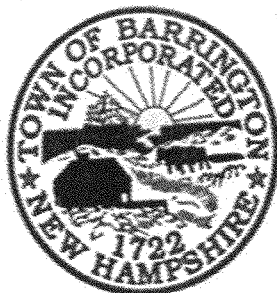


NOTES:

- 1.) Parcel is shown as Lot 1 on the Town of Barrington Assessor's Map 239.
- 2.) Parcel is located in the Town of Barrington Village District, Highway Commercial District Overlay and Groundwater Protection District Overlay.
- 3.) Owner of Record: David R. & Glenda J. Henderson
174 Route 9
Barrington, NH 03825
SCRD Bk 897, Pg 121
- 4.) This plan does not show any unrecorded or unwritten easements which may exist. A reasonable and diligent attempt has been made to observe any apparent, visible uses of the land; however this does not constitute that no such easements exist.
- 5.) Parcel is not located in a Flood Hazard Zone as depicted on Flood Insurance Rate Map Sheets 11 & 12, Town of Barrington, No. 330178A, map date: 09/01/1989.

There are no Prime Wetlands located on the subject parcel as depicted on the Town of Barrington Prime Wetlands Map, dated Jan. 1991, prepared by IEP, Inc. of Portsmouth, NH.
- 6.) Total Lot Area: 1,525,498, Sq. Ft. or 35.02 Acres
- 7.) The wetland boundaries shown hereon were field delineated by NH Soil Consultants, Inc. of Newmarket, NH, and completed on September 1, 2005, in accordance with the 1987 Corps of Engineers Wetlands Manual.
- 8.) Zoning Requirements:

Min. Lot Area:	80,000 SF
Min. Upland Soils:	80,000 SF
Min. Frontage:	200' (25' Back Lot)
Structure Setbacks	
Min. Front Yard:	40'
Min. Side & Rear Yard:	30'
Min. Wetlands Buffer:	
Min. Building Setback:	50'
- 9.) NHDOT Driveway Permit No.: 06-027-461, 08/04/2006.
- 10.) NHDES Wetlands Permit No.: 2005-03054, 07/12/2006.
- 11.) The Barrington Zoning Board of Adjustment granted a Special Exception to allow access to Lot 1-1 via the 40' Wide Access & Utility Easement located on Lot 1-0, where Article 4 Section 4.1(2) of the Barrington Zoning Regulations requires access to a lot must be located on the side of the lot providing lot frontage. Case #ZB 06/605 dated June 21, 2006.
- 12.) The 40' Wide Access & Utility Easement across Lot 1-0 to benefit Lot 1-1 is to be used for a single lot and one buildable location on Lot 1-1 only. When and if a road on the frontage of Lot 1-1 is ever constructed the access easement across Lot 1-0 will be eliminated and access to Lot 1-1 would be via the new road.
- 13.) Prior to any construction on Lot 1-1 and the access driveway, all erosion control measures shall be in place, during construction and until the site has stabilized.



BARRINGTON PLANNING BOARD MEETING

As Chair of the Barrington Planning Board, due to the COVID-19/Coronavirus crisis and in accordance with Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, this Board is authorized to meet electronically. Please note that there is no physical location to observe and listen contemporaneously to the meeting, which was authorized pursuant to the Governor's Emergency Order. However, in accordance with the Emergency Order, this is to confirm that we are: We are utilizing the Microsoft Team for this electronic meeting. All members of the Board have the ability to communicate contemporaneously during this meeting through the Microsoft Team, and the public has access to contemporaneously listen and, if necessary, participate in the meeting through dialing the following phone #603-664-0240 and Conference ID: 41991571#

OR

Call 603-664-0182 or email: birvine@barrington.nh.gov

bit.ly/BarrPB210601

Tuesday, June 1, 2021

6:30 p.m.

Please note that all votes that are taken during this meeting shall be done by Roll Call vote.

ROLL CALL

Members

James Jennison, Chair
Jeff Brann, Vice Chair
Steve Diamond
Andy Knapp ex- officio
Ron Allard
Candice Krans
Buddy Hackett

Alternate Member

Donna Massucci
Andrew Melnikas

Town Planner: Marcia Gasses
Staff: Barbara Irvine

MINUTES REVIEW AND APPROVAL

1. Approval of May 18, 2021 meeting minutes.

ACTION ITEM FOR AN EXTENSION

2. 223-24&26-RC-20-AmendSub (Owner: Route 125 Development, LLC) On November 3, 2020 the applicant

received Conditionally Approval that expired on May 3, 2021 they would like a 6-month extension SEE CASE BELOW:

223-24&26-RC-20-AmendSub (Owner: Route 125 Development, LLC) Request by applicant to amend the previous conditional approval from 55 residential lot and 5 commercial lots to 58 residential lots and 4 commercial, lots adjacent to Route 125 (Calef Highway) in the Regional Commercial Zoning District. BY: Scott D. Cole, Beals Associates, PLLC; 70 Portsmouth Avenue, 3rd Floor, Unit 2; Stratham, NH 03885.

ACTION ITEM CONTINUED FROM MARCH 2, 2021

3. **236-4-GR-20-SR (Owner: Sunset Rock LLC)** Request by applicant for Site Review to increase their operation in Barrington from 83.3 acres to a total of 88.8 acres (Map 236, Lot 4) (Map 222, Lot 13) and for a 3.4 Conditional Use Permit located backland off Tolend Road in the General Residential Zoning District. BY: Michael Wright, RESPEC; 67 Water Street, STE 109, Laconia, NH 03246.

Applicant is requesting a continuance.

ACTION ITEM CONTINUED FROM May 4, 2021

4. **263-28-RC-21-SR (Owner: Jon Chinburg)** Request by applicant for a Site Review to allow a business on the first floor and residential use above on Calef Highway/Pierce (Map 263, Lot 28) on a 1.89-acre lot in the Regional Commercial (RC) Zoning District. * Eric C. Mitchell & Assoc. Inc; PO Box 10298; 38 So. River Road; Bedford, NH 03110-0298

Applicant is requesting a continuance until July 20, 2021

*Indicates that if the application is accepted as complete, the public hearing will be held the same evening, at which time any interested party may offer comment to the Planning Board.

ACTION ITEM CONTINUED FROM May 18, 2021

5. **239-1.1-TC-21-2Sub (Owners: David & Glenda Henderson)** Request by applicant for a 2-Lot subdivision Lot 1.1 would be 11.81 and Lot 1.2 would be 17.19 acres (Map 239, Lot 1.1) located off Franklin Pierce Highway in the Town Center (TC) Zoning District. BY: Dave Garvey, Garvey & Co Ltd; PO Box 935; Durham, NH 03824

ACTION ITEM

6. **220-29-RC-21-SRAmendGarage (Owners: Anderson Properties, LLC)** Request by applicant for Site Review to construct a 1,200 s.f. garage on an approved site with waivers located at 10 Colonial Way on a 4.076-acre lot in the Regional Commercial (RC) Zoning District. BY: Scott Lawler, PE, Norway Plains Associates; PO Box 249; Rochester, NH 03866.

REPORTS FROM OTHER COMMITTEES
UNFINISHED BUSINESS

OTHER BUSINESS THAT MAY PROPERLY COME BEFORE THE BOARD

7. Review of a request for a building permit at 350 Mica Point, a Private Road, for Alicia & James Beaulieu (Map 118, Lot 90).

SETTING OF DATE, TIME AND PLACE OF NEXT MEETING AND ADJOURNMENT

Other information. a) Files on the applications and items, above, including the full text of any proposed ordinances, regulations, or other initiatives are available for inspection in the Planning & Land Use Office, from 8:00 a.m. to 3:00 p.m., Monday through Thursday; b) If you are looking at this agenda on the Town's website, you can click on any underlined projects and other items to access additional information; c) This agenda, these applications, and other items are subject to errors, omissions, and change prior to final action; d) Some agendas are marked as "Preliminary Agenda". These are subject to change. The final agenda will be prepared on the Thursday evening prior to the meeting and will be posted on the Town's website; e) Contact the Planning & Land Use Department if you have questions or comments about these or any related matters or if you have a disability requiring special provision.



BARRINGTON PLANNING BOARD MEETING

As Chair of the Barrington Planning Board, due to the COVID-19 Coronavirus crisis and in accordance with Governor Sununu's Emergency Order #12 pursuant to Executive Order 2020-04, this Board is authorized to meet electronically. Please note that there is no physical location to observe and listen contemporaneously to the meeting, which was authorized pursuant to the Governor's Emergency Order. However, in accordance with the Emergency Order, this is to confirm that we are: We are utilizing the Microsoft Teams for this electronic meeting. All members of the Board have the ability to communicate contemporaneously during this meeting through the Microsoft Teams, and the public has access to contemporaneously listen and, if necessary, participate in the meeting through dialing the following phone #603-664-0240 and Conference ID: 41991571#

(Approved June 15, 2021)
Tuesday, June 1, 2021
6:30 p.m.

Please note that all votes that are taken during this meeting shall be done by Roll Call vote.

ROLL CALL

ROLL CALL

James Jennison, Chair-aye
Jeff Brann, Vice Chair-aye
Steve Diamond-aye
Andy Knapp ex- officio-aye
Candice Krans-aye
Buddy Hackett-aye
Donna Massucci-filled in for R. Allard-aye
Andrew Melnikas-Alternate-aye

Members Absent

Ron Allard

Town Planner: Marcia Gasses
Staff: Barbara Irvine

MINUTES REVIEW AND APPROVAL

1. Approval of May 18, 2021, meeting minutes.

Barrington Planning Board Meeting Minutes/bi
June 1, 2021/pg 1 of 15

A motion was made by A. Knapp and seconded by J. Brann to approve the minutes as written.

Roll Call:

D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-aye
S. Diamond-aye
J. Brann-aye
J. Jennison-aye

ACTION ITEM FOR AN EXTENSION

2. 223-24&26-RC-20-AmendSub (Owner: Route 125 Development, LLC) On November 3, 2020, the applicant received Conditionally Approval that expired on May 3, 2021, they would like a 6-month extension SEE CASE BELOW:

223-24&26-RC-20-AmendSub (Owner: Route 125 Development, LLC) Request by applicant to amend the previous conditional approval from 55 residential lot and 5 commercial lots to 58 residential lots and 4 commercial lots adjacent to Route 125 (Calef Highway) in the Regional Commercial Zoning District. BY: Scott D. Cole, Beals Associates, PLLC; 70 Portsmouth Avenue, 3rd Floor, Unit 2; Stratham, NH 03885.

J. Jennison gave a brief description of the application.

Joseph Falzone from Route 125 Development, LLC explained that they are asking the Board for a 6-month extension. Joe explained that the State was 75% done with the NHDOT permit, final plans when in last Friday, and is expecting that by mid-summer to have this permit. Joe explained that they can't file for the AoT permit until they receive the NHDOT permit. After the AoT permit they would file for State Subdivision approval.

J. Brann asked M. Gasses if, although the applicant was asking for 6-month extension, the extension could go up to a year.

M. Gasses expressed that the Board could go up to a year if they wanted to.

Joe expressed that he would prefer a year.

A motion was made by J. Brann and seconded by D. Massucci to extend the approval for one-year until May 3, 2022.

Roll Call:

B. Hackett-aye
C. Krans-aye
S. Diamond-aye
A. Knapp-abstain
D. Massucci-aye
J. Brann-aye
J. Jennison-aye

ACTION ITEM CONTINUED FROM MARCH 2, 2021

3. 236-4-GR-20-SR (Owner: Sunset Rock LLC) Request by applicant for Site Review to increase their operation in Barrington from 83.3 acres to a total of 88.8 acres (Map 236, Lot 4) (Map 222, Lot 13) and for a 3.4 Conditional Use Permit located backland off Tolend Road in the General Residential Zoning District. BY: Michael Wright, RESPEC; 67 Water Street, STE 109, Laconia, NH 03246.

J. Jennison gave a brief description of the application.

Michael Wright from RESPEC represented Sunset Rock LLC and gave an update that they have been working with Dover's Engineer Emery and Garrett on alternate designs. Michael explained that two of them affect the drawings that have been supplied to the Town and two of them do not. Michael explained that Emery & Garrett was investigating the two that do not affect any of their drawings. Michael explained that Emery & Garrett need to review their files for the last couple of years and hope to get an answer in the next couple of weeks and resubmit revised drawings to the Town if they need to be updated. Michael explained that then they would get the AoT permit in, and they would like to have a continuance for about two months.

A motion was made by J. Brann and seconded by A. Knapp to continue the application until September 7, 2021.

Roll Call:

D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-aye
S. Diamond-aye
J. Brann-aye
J. Jennison-aye

ACTION ITEM CONTINUED FROM May 4, 2021

4. **263-28-RC-21-SR (Owner: Jon Chinburg)** Request by applicant for a Site Review to allow a business on the first floor and residential use above on Calef Highway/Pierce (Map 263, Lot 28) on a 1.89-acre lot in the Regional Commercial (RC) Zoning District. * Eric C. Mitchell & Assoc. Inc; PO Box 10298; 38 So. River Road; Bedford, NH 03110-0298

J. Jennison gave a brief description of the application.

M. Gasses explained to the Board that the applicant has withdrawn their application and the applicant would like to know if any of the fees could be refunded. M. Gasses explained that they thought they would go through the Site Review process and not need a variance.

J. Jennison asked how much the fees were.

M. Gasses explained that the Town could not refund money spent for certified mail and posting in the paper and explained that the only amount that could be refundable would be the \$150.00 application fee.

J. Brann asked why the applicant felt that they were misled.

M. Gasses explained that John Huckins, Code Enforcement Officer, realized that the 75' setback applied to both Route 125 and Pierce Road, and that would require a variance. M. Gasses explained that they had only filed for Site Review and had not filed for the variance.

The Board disagreed on returning any funds.

Roll Call:

D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-aye
S. Diamond-aye
J. Brann-aye
J. Jennison-aye

Barrington Planning Board Meeting Minutes/bi
June 1, 2021/pg. 3 of 15

ACTION ITEM CONTINUED FROM May 18, 2021

5. 239-1.1-TC-21-2Sub (Owners: David & Glenda Henderson) Request by applicant for a 2-Lot subdivision Lot 1.1 would be 11.81 and Lot 1.2 would be 17.19 acres (Map 239, Lot 1.1) located off Franklin Pierce Highway in the Town Center (TC) Zoning District. BY: Dave Garvey, Garvey & Co Ltd, PO Box 935, Durham, NH 03824

J. Jennison gave a brief description of the application.

Dave Garvey from Garvey & Co Ltd for the Henderson property and gave a review of the application as follows:

- a. Original Subdivision was approved in 2006 (ROD File 87-37) with access easement to Lot 1-1.
- b. NHDOT permit was approved in 2006.
- c. Wetland crossings in 2006
- d. On February 17, 2021 the Zoning Board approved the right to subdivide into two lots for homes instead of businesses.
- e. March 21, 2021, application was submitted to the Planning Board.
- f. They were asking for a subdivision according to Back Lot Subdivision and meets all the regulations for a subdivision.
- g. The Conservation Commission had no issues.
- h. Surveyor has revised the plans.
- i. NHDOT-Should receive revised permit this week.
- j. Easement language was in the package for the Board to review which was asked for by NHDOT as well. This would replace the previous driveway agreement.
- k. Driveway easement was there to serve the backlot.
- l. Deed shows that they are allowed to use as a driveway for access to the backlot.
- m. The use would go to the overburden of the easement.
- n. According to Mr. Henderson who did the subdivision in 2006, the intent was to allow for a driveway but not allow for a road and they are constructing a driveway for two homes.
- o. They would be meeting with the Fire Chief for the specifications for the driveway.
- p. The action from the Zoning Board and the Planning Board would replace the note on the plan for the single home.
- q. The grantor can also record a motivation as well.
- r. The abutters Candice Harvey and Raymond Estes have concerns of excess traffic. Candice's concern is of 4-5 cars per household racing up and down the driveway. Dave explained an average house has 2 cars with 4-5 trips a day. Two homes on 30 acres were not make a lot of trips.
- s. Dave stated that he knows that Candice runs a business. He counted cars in the driveway and there were 16 cars when there were usually 12-15 cars. Dave stated that his two lots would be nowhere near this amount of traffic.
- t. Dave explained that the plan meets the Zoning regulations.

S. Diamond expressed that a backlot subdivision allows you to have one additional lot and said it looks like several lots.

Dave explained that there was one additional lot when subdivided it would be 2-Lots.

S. Diamond stated looking at the plan looks like 3-Lots.

J. Jennison explained that looking at the backlot, the narrow strip left [west] of Lot 1 gave the frontage to create the lot and there was an easement for the right side of the property to access the lot. J. Jennison explained that it has the frontage necessary on the left side that was wetlands and an easement on the right side to access the lot. J. Jennison explained that there was only one lot then Zoning Board approved for them to have the second lot.

S. Diamond asked about so many driveways and would not it be better to have one driveway.

Dave explained that there would only be one driveway where the 40' easement was.

J. Jennison explained that the driveway in the middle was for Dellaviso Salon & Spa that was an existing business.

J. Bram explained that the only driveway to be added was the one to the right [east] side where the easement was.

S. Diamond asked if the little bit of frontage on Route 9 was needed for each lot.

J. Bram explained that because of the wetlands they got an easement on the other side of Lot 1 so that they can build a driveway that did not impact the wetlands on the narrow strip to the west.

Dave explained that the impact using the easement was about 1,000 s.f. and this was subdivided in 2006. The owner at that time created this easement so no impact through the wetlands and the Conservation Commission was pleased with where it [driveway] was going to go.

J. Jennison opened public comment.

Candice Harvey from 643 Franklin Pierce Highway asked if Raymond Estes could speak for her. The Chairman granted the request. Raymond explained to the Board that when they purchased the property it was very clear that there would only be one lot behind them and traffic would be for only one home. Raymond explained that this was what was approved by the Town in 2006 and was listed on the plan. Raymond explained that they are against what Dave wants to do with more than one lot and anything other than the original intent of the subdivision done in 2006.

J. Jennison asked Raymond if they were able to go to the Zoning Board meeting when the Henderson's were going for the variance.

Raymond explained that they were at two meetings, but they were out of town for the last meeting, and they could not access the information for the meeting that this was approved at.

A. Knapp had questions and if Zoning Board made a mistake, he would not uphold their mistake for them issuing it and felt that it was not reasonable to try and follow the letter of the law. A. Knapp expressed that this could cause a legal action if someone would come back and sue the Town.

J. Bram explained that there was a process that when the Zoning Board made a decision it could be appealed.

J. Bram asked Candice if they appealed the decision of the Zoning Board.

Candice explained that they were not aware of the decision until after they received a notice for the Planning Board meeting which wasn't in time to appeal it.

J. Jennison asked if there was a time frame to appeal a decision.

M. Gasses explained that they have 30 days to appeal the decision.

J. Jennison asked if abutters are notified that this was approved.

M. Gasses explained not to each individual abutter.

J. Jennison stated so no abutters were notified.

M. Gasses explained that the public hearing was held, the decision was made at the hearing, and explained that the notices are uploaded to the website. M. Gasses explained that there was an opinion from the Town attorney on this and she would not say or disagree that the Zoning Board made a mistake. M. Gasses explained that there was a process for an appeal by an abutter.

J. Jennison explained that his questions were to avoid a costly lawsuit and appeal process would be less cost if there was time.

J. Brann explained that it would be the same for this Board. If the Planning Board made a decision, they would have 30 days to appeal the decision. J. Brann explained that the Board is bound the rules when making decisions.

S. Diamond asked what the Town Attorney had to say about this.

M. Gasses explained that it comes down to property rights and would be between the two property owners, not up to the Planning Board.

J. Brann stated that the easement issue was not the Town or the Planning Board decision. J. Brann expressed that the Board could approve this on the basis that the easement can be used for both back lots. J. Brann expressed if there was legal action, and the easement was unable to be utilized for both lots, that would mean that they would need a different access to the property though the wetlands. J. Brann asked what would happen then.

M. Gasses explained that they would need to come back to the Planning Board.

A. Knapp expressed that now they have taken a property through the Zoning Board process for a nonconforming lot by making it whole by making it more nonconforming.

M. Gasses explained that the Planning Board was bound by the Zoning Board approval.

S. Diamond asked if the Board had a responsibility to assess whether easements are held and used for the propose that they are there for.

M. Gasses explained that the Board members are not attorneys. The Town attorney was consulted, and the attorney came back with the same answer. M. Gasses explained that these are private property issues.

J. Brann responded to S. Diamond's comment that he does not recall anything in the regulations that says the Board was supposed to access the liability.

Dave expressed that the Town Attorney has an opinion, his Attorney has an opinion, and the opinion of his attorney was a little different from the Town Attorney. Dave explained that they felt they were processing things correctly with respect to private property rights.

Raymond Estes explained that his attorney has looked at it and stated that it was very clear in the deed with the approved plans what the intent of the easement was, and this was not meant for two house lots. Raymond explained that he understood the Board's role and they would take further action. They were hoping not to have to do that, and they were not aware that they could appeal the Zoning Board decision. Raymond explained that, if needed, they would appeal any decision made tonight.

J. Jennison explained that they are bound by the regulations and not by private property issues.

J. Brann also expressed that they are bound by the regulations and if they were to make any decision on a basis other the approved regulations that decision would be overturned. J. Brann explained that if an applicant meets all the regulations the Board was bound to approve an application.

J. Jennison closed public comments.

J. Jennison read Conditions Precedent:



Planning & Land Use Department
Town of Barrington
PO Box 660
333 Calef Highway
Barrington, NH 03825
603.664.0195
mgassas@barrington.nh.gov

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DRAFT
NOTICE OF DECISION

<i>Office use only</i>	<i>Date certified:</i>	<i>As built received:</i> <i>Driveway</i>	<i>n/a</i>
<i>"Applicant", herein, refers to the property owner, business owner, individual(s), or organization submitting this application and to his/her/its agents, successors, and assigns.</i>			
Proposal Identification:			

Owner: David & Glenda Henderson 1273 Winged Foot Lane Denver, NC 28037 Garvey & Co Ltd. David Garvey PO Box 935 Durham, NC 03824 Atlas Survey C. LLC Adam Fogg 25 Nute Rd. Dover, 03824	Dated: XXXXX/2021
--	--------------------------

Dear applicant:

This is to inform you that the Barrington Planning Board at its June 1, 2021, meeting **CONDITIONALLY APPROVED** your application referenced above.

All of the precedent conditions below must be met by the applicant, at the expense of the applicant, prior to the plans being certified by the Planning Board. Certification of the plans is required prior to commencement of any site work or

Barrington Planning Board Meeting Minutes/bi
June 1, 2021/pg 7 of 15

recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

Please Note* If all of the precedent conditions are not met within 6 calendar months to the day, by December 1, 2021, the Board's approval will be considered to have lapsed, unless a mutually agreeable extension has been granted by the Board. Reference 8.2.3 of the Town of Barrington Subdivision Regulations

Conditions Precedent

- 1)
 - a) Add the owner's signature to the final plan
 - b) Add the wetland scientist stamp & signature to the final plan
 - c) Add note on which plans are to be recorded and which on file with the town
 - d) Add at least one benchmark per sheet
 - e) Add the following "Required erosion control measures shall be installed prior to any disturbance of the sites surface and shall be maintained through the completion of construction activities. If, during construction, it becomes apparent that additional erosion control measures are required to stop erosion on the construction site due to actual site conditions, the Owner shall be required to install the necessary protection at no cost to the Town.
 - f) List FEMA sheet used to identify 100-year flood elevation
 - g) Add purpose of plan
 - h) Revise spacing of monumentation to no greater than 300'
 - i) Add location of proposed wells
 - j) Show proposed access easements by metes and bounds
 - k) Add the NHDOT updated driveway permit # to the plan
 - l) Add proposed lot #'s assigned by Assessor
 - m) Add wetland scientist stamp and signature to the final plan
 - n) Add the NHDES Permit # to the plan
 - o) Add purpose of Plan
- 2)
 - a) An as built for the driveway must be provided by an engineer that shows that driveway meets the 10% grade the entire distance for lot 239-1.2 prior to a certification of occupancy.
- 3) Add the following plan revisions
 - a) Correct the Zoning Designation to Town Center
 - b) 4.1.3 Neck must be owned equally (ZO)
- 4) A common driveway maintenance agreement must be recorded at Strafford County Registry of Deeds prior to the sale of any lots.
- 5)# Proper and complete survey monumentation shall be installed on the properties as a condition to final approval of the application. Granite bounds shall be set at the intersection of existing or proposed lot sidelines with existing proposed streets. Iron pins (pipe or rod) are to be placed at all property line corners and angles, and all points of curvature and points of tangency. Monuments for the lot being developed shall be placed not more than 300 feet apart in any straight line. The applicant's surveyor shall certify in writing that the bounds and pins have been installed according to the submitted plan. (Reference 8.8 of the Town of Barrington Subdivision Regulations)
- 6) Any outstanding fees shall be paid to the Town
- 7) Final Drawings (a) five sets of black line (b) plus one set of 11"x17" final approved plans must be on file with the Town. Each individual sheet in every set of drawings must be stamped and signed by the land surveyor, engineer,

or architect responsible for the plans. Note. If there are significant changes to be made to the plans, as specified above, one full size check print must be sent to the Land Use Office for review prior to producing these final drawings.

General and Subsequent Conditions

- 1) In accordance with RSA 674:39 active and substantial development shall mean the expenditure of at twenty-five percent (25%) of the infrastructure costs required for a development, as indicated by a subdivision approved by the Planning Board, within (24) months of said approval, where approved plans have been properly recorded at the Registry of Deeds. Infrastructure shall mean in this instance, the construction of roads, storm drains, water and sewer facilities, or parking lots. Compliance with this definition shall also necessitate that a bond or other security to cover costs of said infrastructure requirements has been posted with the Town prior to the beginning of construction, if required as a condition of approval.
- 2) Current Use subject property or a portion of it is presently in Current Use. The applicant must provide the Town of Barrington Assessing Department current use map and/or other items needed to assure requirements of RSA-79A and the New Hampshire Department of Revenue Administrations Rules are satisfied.

(Note: in both sections above, the numbered condition marked with a # and all conditions below the # are standard conditions on all or most applications of this type).

I wish you the best of luck with your project. If you have any questions or concerns, please feel free to contact me.

Sincerely,

Marcia J. Gasses
Town Planner
cc: File

M. Gasses explained to Dave Garvey that before the plan was recorded at the Registry of Deeds that there were a lot of excess lines on the plans, and they do not usually take the ones with topography all over them.

J. Brann explained that he was looking through the regulations and stated that approval would be based on the easement use for both lots. J. Brann explained that if this does not get resolved in the favor of the applicant and they must come back before the Board to establish driveways through the extensions to the road, there would be no guarantee that would get approved.

S. Diamond stated based on the size of these lots, they could subdivide and asked at what point would the driveway need to be different.

J. Brann explained that they would need to build the road to Town standards if more than three lots used the access.

A motion was made by J. Brann and seconded by J. Jennison to approve the two Lot subdivision. Vote 3/2

Roll Call:
D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-Nay
S. Diamond-Nay
J. Brann-aye
J. Jennison-aye

ACTION ITEM

6. 220-29-RC-21-SRAMendGarage (Owners: Anderson Properties, LLC) Request by applicant for Site Review to construct a 1,200 s.f. garage on an approved site with waivers located at 10 Colonial Way on a 4.076-acre lot in the Regional Commercial (RC) Zoning District. BY: Scott Lawler, PE, Norway Plains Associates; PO Box 249; Rochester, NH 03866.

J. Jennison gave a brief description of the application.

Scott Lawler from Norway Plains Associates represented Anderson Properties. Scott explained that they are before the Board for Site Review approval to add a 1,200 s.f. garage to an approved Site Plan. Scott gave a brief review of the previous application approval to which they want to add the garage. Scott explained that after constructing the building they needed additional storage outside the main building with two additional parking spaces in the hard packed gravel area. Scott explained that there would be no changes to the site. The garage would be in a previously approved area to be impervious with no changes to the storm water management system and there was no increase in impervious coverage. Scott explained that the garage would not be connected to the water or septic system. Scott explained that there would be underground conduits running to it for power and this would be cold storage. There would be no changes to the lighting on the site plan; all the lights as previously designed will maintain their locations with no other site changes. Scott explained that he had waivers to existing features because the building was still under construction and also a waiver for a full drainage analysis because he was the engineer that designed the site and could stipulate that there's no increase in the stormwater management runoff changes to the impervious coverage that would warrant an amended stormwater analysis. Scott explained that the 50' buffer for a residential buffer. This lot had a lot line revision after the site plan was approved and showed on the plan when the property line was.

M. Gasses explained that she was talking about the 50' wetland buffer after the lot line was done and wanted to make sure that the structure fits outside the 50' wetland buffer.

Scott explained that he shifted the plan back to what was presented in the application to the Planning Board.

M. Gasses asked if it was outside the 50' wetland buffer.

Scott stated that was correct.

S. Diamond asked what the inverted triangle was just to the right of the proposed garage.

Scott explained that was a contour line funneling the storm water from impervious surfaces to the low point and then it funnels down into the treatment swale.

S. Diamond asked that is a topography that you have or would be changing to create.

Scott stated that was correct.

A. Knapp asked about the location of the garage looking at the original plan; this would be right in the proposed snow storage area so now what was the plan to address this was part of the original plan.

Scott explained that they reduced the area and still have considerable amount of area for snow storage. They do not see a problem maintaining that snow storage.

A. Knapp explained looking at the original plan, it was assessed at 50% site coverage, and they are asking from relief from existing landscape and natural features but the original site was looking at 50% coverage prior to the Lot Line Adjustment. A. Knapp asked what the new site coverage with the Lot Line Adjustment.

Scott explained that he didn't have that information but looking at the page he could estimate with confidence that it

would still be less than 50% of the 4.1-acre parcel. Scott explained the other large areas on the plan.

A. Knapp expressed that it was hard looking the plans.

Scott explained that the chart that A. Knapp was looking at wasn't what was existing or what was being proposed but just that the ordinance says the maximum lot coverage was 50%. Scott explained that they are still less than 50%.

J. Jennison asked how would the Board know with no calculation.

Scott explained that he could supply one.

J. Brann asked, after looking at the plans on Sheet A1, about the lighting that was in the narrative but not on the plans and showing where the shine on the elevation view. J. Brann also asked about the walk-in door shown on the east side on Sheet C-3 but shown on the west side elevation on Sheet A-1.

Scott explained that there was an issue with the plan describing the east and west entry. This was an error they would correct. Scott explained that there are no proposed lights on this building that is why none are shown on the building.

J. Jennison questioned that it does state that there are lights proposed on the garage.

Scott stated no lights on garage.

J. Brann explained that the dumpster pad would be located the parking lot between the garage and the detention basin, but this was the same area where the snow would be piled. J. Brann asked if would still leave sufficient room with the dumpster in that location.

Scott stated that there would be.

J. Jennison expressed that they say no lighting; do they need lighting to meet illumination requirements for site plan.

Scott explained that there was lighting on the southern end of the existing building that should provide ample illumination for the paved area that is in between two structures. Scott explained that there is an existing light pole to the east of the proposed garage by the two new parking spaces, so that would continue to illuminate that portion of the parking lot.

A. Knapp asked if it was the east or the west; he thought there was a proposed light on the corner close to the left-hand corner of that garage.

Scott explained that would be east of the proposed garage and Scott showed the light on the existing building and the light pole.

M. Gasses expressed in reviewing the original approval for the Site Plan it appeared that it did meet the requirements for illumination.

S. Diamond asked about the roof. It looks like it has little pitch and there is always some concern around snow loading with very slightly pitched roofs.

Scott expressed that he would let the applicant know when they go for the building permit. They would check on that.

B. Hackett asked, looking at the proposed garage and where the dumpster was going to be, if there was any challenge to moving the dumpster up to where the p203.20 mark was so that it would not be in the snow storage area. B. Hackett expressed that he felt the dumpster would be in the way in the wintertime.

Scott explained that the storm water management directs all the storm water down to the V to the 3-0 2036 and into the swale to 2032, then it curls around to the detention basin so placing the dumpster in this location would be counterproductive to the storm water management system.

Requested Waivers:

1. Article 3, Section 3.3. (16) existing manmade features, (17) Existing Landscape and Natural Features (21) Building & Structures

A motion was made by J. Brann and seconded by S. Diamond to waive Article 3, Section 3.3. (16) existing manmade features, (17) Existing Landscape and Natural Features, and (21) Building & Structures as specific circumstances relative to the site plan, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations. The motion carried unanimously.

Roll Call:

D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-aye
S. Diamond-aye
J. Brann-aye
J. Jennison-aye

2. Article 4, Section 7 An in depth analysis of the proposed drainage system on the parcel

A motion was made by J. Brann and seconded by D. Massucci to waive Article 4, Section 7 as specific circumstances relative to the site plan, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations. The motion carried unanimously.

Roll Call:

D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-aye
S. Diamond-aye
J. Brann-aye
J. Jennison-aye

A motion was made by S. Diamond and seconded by J. Brann to accept the application as complete. The motion carried unanimously.

Roll Call:

D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-aye
S. Diamond-aye
J. Brann-aye
J. Jennison-aye

J. Jennison opened public comment.

J. Jennison closed public comment.

J. Jennison read Conditions Precedent:



Planning & Land Use Department
Town of Barrington
PO Box 660
333 Calef Highway
Barrington, NH 03825
603.664.0195
mgasses@barrington.nh.gov

DRAFT NOTICE OF DECISION
NOTICE OF DECISION

[Office use only]	Date certified:	As built received:	Surety returned
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"Applicant", herein, refers to the property owner, business owner, individual(s), or organization submitting this application and to his/her/its agents, successors, and assigns.

Proposal Identification: 220-29-RC-21-SRAMendGarage (Owners: Anderson Properties, LLC)
Request by applicant for Site Review to construct a 1,200 s.f. garage on an approved site with waivers located at 10 Colonial Way on a 4.076-acre lot in the Regional Commercial (RC) Zoning District. BY: Scott Lawler, PE, Norway Plains Associates; PO Box 249; Rochester, NH 03866.

<p>Owner: Anderson Properties LLC 3 Dean Drive Dover, NH 03820</p> <p>Scott Lawler, PE Norway Plains Associates, Inc PO Box 249 Rochester, NH 03866</p>	<p>Dated: xxxxxx,</p>
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Dear applicant:

This is to inform you that the Barrington Planning Board at its June 1, 2021 meeting **CONDITIONALLY APPROVED** your application referenced above.

Barrington Planning Board Meeting Minutes/bi
June 1, 2021/03-13 of 15

All of the precedent conditions below must be met by the applicant, at the expense of the applicant, prior to the plans being certified by the Planning Board. Certification of the plans is required prior to commencement of any site work or recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

Please Note* If all of the precedent conditions are not met within 6 calendar months to the day, by XXXXX, 2021, the Boards approval will be considered to have lapsed, unless a mutually agreeable extension has been granted by the Board.

Conditions Precedent

- 1) Add the following plan notes
 - a) Applicant's Engineer will sign off that stormwater facilities were constructed as approved.
 - b) *Waivers were granted from Article 4, Section 7 An In-depth analysis of the proposed drainage on the parcel.*
 - c) *Article 3, Sections 3.3(16 existing manmade features, 17 Existing Landscape and Natural Features & Structures*
- 2) -Revise the following plan notes
 - a) Need to correct not west side change to be east side
 - b) Note number page
- #3) Any outstanding fees shall be paid to the Town
- 4) Prior to obtaining Board signature, the Applicant shall submit three (3) complete paper print plan sets and supporting documents as required in Article 3 with a letter explaining how the Applicant addressed the conditions of approval. This shall include final and complete reports for all items submitted during review for the Town of Barrington's file. The Chairman shall endorse three copies of the approved plan(s) meeting the conditions of approval upon receipt of an executed bond for all improvements, excluding buildings. The Town shall retain a signed and approved reproducible 11"x17", and PDF format with supporting documents for Town records.

General and Subsequent Conditions

#1) Where no active and substantial work, required under this approval has commenced upon the site within two years from the date the plan is signed, this approval shall expire. An extension, not to exceed one year, may be granted, by majority vote of the Board so long as it is applied for at least thirty days prior to the expiration date. The Board may grant only one such extension for any proposed site plan. All other plans must be submitted to the Board for review to ensure compliance with these and other Town ordinances. Active and substantial work is defined in this section as being the expenditure of at least 25% of the infrastructure improvements required under this approval. Infrastructure shall mean in this instance, the construction of roads, storm drains, and improvements indicated on the site plan. RSA 674:39

(Note: in both sections above, the numbered condition marked with a # and all conditions below the # are standard conditions on all or most applications of this type).

I wish you the best of luck with your project. If you have any questions or concerns, please feel free to contact me.

Sincerely,

Barrington Planning Board Meeting Minutes/bi
June 1, 2021/eg. 14 of 15

Marcia J. Gasses
Town Planner

cc: File

A motion was made by J. Brann and seconded by D. Massucci to approve the amended Site Plan to add a garage to a Approved Site Plan. The motion carried unanimously.

Roll Call:
D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-aye
S. Diamond-aye
J. Brann-aye
J. Jennison-aye

REPORTS FROM OTHER COMMITTEES
UNFINISHED BUSINESS

OTHER BUSINESS THAT MAY PROPERLY COME BEFORE THE BOARD

7. Review of a request for a building permit at 350 Mica Point, a Private Road, for Alicia & James Beaulieu (Map 118, Lot 90).

A motion was made by J. Jennison and seconded by J. Brann to send the letter to the Select Board.

Roll Call:
D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-Abstain
S. Diamond-Aye
J. Brann-aye
J. Jennison-aye

SETTING OF DATE, TIME AND PLACE OF NEXT MEETING AND ADJOURNMENT

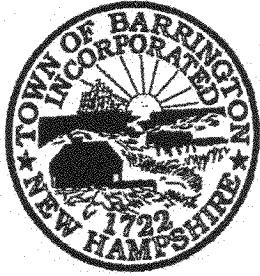
The next meeting will be on June 15, 2021, at 6:30 p.m. electronic meeting, no meeting place (pending Governor order this may change).

Without objection the meeting adjourned at 8:16 p.m.

A motion was made by J. Brann and seconded by A. Knapp to adjourn the meeting at 8:16 p.m.

Roll Call:
D. Massucci-aye
B. Hackett-aye
C. Krans-aye
A. Knapp-aye
S. Diamond-aye
J. Brann-aye
J. Jennison-aye

Barrington Planning Board Meeting Minutes/bi
June 1, 2021/pg. 15 of 15



Planning & Land Use Department

Town of Barrington

PO Box 660

333 Calef Highway

Barrington, NH 03825

603.664.0195

mgasses@barrington.nh.gov

NOTICE OF DECISION

[Office use only]	Date certified:	As built received: Driveway	n/a
"Applicant", herein, refers to the property owner, business owner, individual(s), or organization submitting this application and to his/her/its agents, successors, and assigns.			
Proposal Identification: 239-1.1-TC-21-2Sub (Owners: David & Glenda Henderson) Request by applicant for a 2-Lot subdivision Lot 1.1 would be 11.81 and Lot 1.2 would be 17.19 acres (Map 239, Lot 1.1) located off Franklin Pierce Highway in the Town Center (TC) Zoning District. BY: Dave Garvey, Garvey & Co Ltd; PO Box 935; Durham, NH 03824			

<p>Owner: David & Glenda Henderson 1273 Winged Foot Lane Denver, NC 28037</p> <p>Garvey & Co Ltd. David Garvey PO Box 935 Durham, NC 03824</p> <p>Atlas Survey C. LLC Adam Fogg 25 Nute Rd. Dover, 03824</p>	<p>Dated: June 7, 2021</p>
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Dear applicant:

This is to inform you that the Barrington Planning Board at its June 1, 2021, meeting **CONDITIONALLY APPROVED** your application referenced above.

All of the precedent conditions below must be met by the applicant, at the expense of the applicant, prior to the plans being certified by the Planning Board. Certification of the plans is required prior to commencement of any site work or recording of any plans. Once these precedent conditions are met and the plans are certified the approval is considered final.

Please Note* If all of the precedent conditions are not met within 6 calendar months to the day, by December 1, 2021, the Boards approval will be considered to have lapsed, unless a mutually agreeable extension has been granted by the Board. *Reference 8.2.3 of the Town of Barrington Subdivision Regulations*

Conditions Precedent

- 1)
 - a) Add the owner's signature to the final plan
 - b) Add the wetland scientist stamp & signature to the final plan
 - c) Add note on which plans are to be recorded and which on file with the town
 - d) Add at least on benchmark per sheet
 - e) Add the following "Required erosion control measures shall be installed prior to any disturbance of the sites surface and shall be maintained through the completion of construction activities. If, during construction, it becomes apparent that additional erosion control measures are required to stop erosion on the construction site due to actual site conditions, the Owner shall be required to install the necessary protection at no cost to the Town.
 - f) List FEMA sheet used to identify 100-year flood elevation
 - g) Add purpose of plan
 - h) Revise spacing of monumentation to no greater than 300'
 - i) Add location of proposed wells
 - j) Show proposed access easements by metes and bounds
 - k) Add the NHDOT updated driveway permit # to the plan
 - l) Add proposed lot #'s assigned by Assessor
 - m) Add wetland scientist stamp and signature to the final plan
 - n) Add the NHDES Permit # to the plan
- 2) a) An as built for the driveway must be provided by and engineer that shows that driveway meets the 10% grade the entire distance for lot 239-1.2 prior to a certification of occupancy.
- 3) Add the following plan revisions
 - a) Correct the Zoning Designation to Town Center
 - b) 4.1.3 Neck must be owned equally (ZO)
- 4) A common driveway maintenance agreement must be recorded at Strafford County Registry of Deeds prior to the sale of any lots.
- 5)# Proper and complete survey monumentation shall be installed on the properties as a condition to final approval of the application. Granite bounds shall be set at the intersection of existing or proposed lot sidelines with existing proposed streets. Iron pins (pipe or rod) are to be placed at all property line corners and angles, and all points of curvature and points of tangency. Monuments for the lot being developed shall be placed not more than 300 feet apart in any straight line. The applicant's surveyor shall certify in writing that the bounds and pins have been installed according to the submitted plan. *(Reference 8.8 of the Town of Barrington Subdivision Regulations)*
- 6) Any outstanding fees shall be paid to the Town

- 7) Final Drawings (a) five sets of black line (b) plus one set of 11"X17" final approved plans must be on file with the Town. Each individual sheet in every set of drawings must be stamped and signed by the land surveyor, engineer, or architect responsible for the plans. Note. If there are significant changes to be made to the plans, as specified above, one full size check print must be sent to the Land Use Office for review prior to producing these final drawings.

General and Subsequent Conditions

- 1)# In accordance with RSA 674:39 active and substantial development shall mean the expenditure of at twenty-five percent (25%) of the infrastructure costs required for a development, as indicated by a subdivision approved by the Planning Board, within (24) months of said approval, where approved plans have been properly recorded at the Registry of Deeds. Infrastructure shall mean in this instance, the construction of roads, storm drains, water and sewer facilities, or parking lots. Compliance with this definition shall also necessitate that a bond or other security to cover costs of said infrastructure requirements has been posted with the Town prior to the beginning of construction, if required as a condition of approval.
- 2) Current Use subject property or a portion of it is presently in Current Use. The applicant must provide the Town of Barrington Assessing Department current use map and/or other items needed to assure requirements of RSA-79A and the New Hampshire Department of Revenue Administrations Rules are satisfied.

(Note: in both sections above, the numbered condition marked with a # and all conditions below the # are standard conditions on all or most applications of this type).

I wish you the best of luck with your project. If you have any questions or concerns, please feel free to contact me.

Sincerely,

Marcia J. Gasses
Town Planner

cc: File

219-2021-CV-00202

THE STATE OF NEW HAMPSHIRE
STRAFFORD COUNTY, SS.

CANDICE K. HARVEY

V.

TOWN OF BARRINGTON PLANNING BOARD

**PETITION OF APPEAL OF THE DECISION OF THE TOWN OF
BARRINGTON PLANNING BOARD PURSUANT TO RSA 677:15**

NOW COMES, Candice K. Harvey of 643 Franklin Pierce Highway, Barrington, New Hampshire 03825 ("Harvey") who complains pursuant to RSA 677:15 against the Town of Barrington, PO Box 660, 333 Calef Highway (Rte. 125), Barrington, New Hampshire 03825, and respectfully states as follows:

1. Candice K. Harvey is the owner of 643 Franklin Pierce Highway, Barrington, New Hampshire.
2. The Town of Barrington is a municipality within the State of New Hampshire.
3. The property subject to the Subdivision Application is owned by David & Glenda Henderson ("Applicant") and is approximately 28 acres of land off Franklin Pierce Highway that abuts Harvey's property at 643 Franklin Pierce Highway, Barrington, New Hampshire.
4. On June 1, 2021 the Barrington Planning Board granted the Applicant's request for a 2 Lot Subdivision.
5. Harvey as direct abutter has approximately 6 acres at 643 Franklin Pierce Highway, Barrington, New Hampshire that she purchased on November 27, 2019 and uses as a personal residence and also has a commercial property on the premises which includes her hair salon.

6. Harvey purchased 643 Franklin Pierce Highway, Barrington, New Hampshire from Peter R. Ward and Sarah M. Ward ("Ward").

7. The property is known as Lot 1-0 on Subdivision Plan for David R. and Glenda J. Henderson dated September 21, 2005, Plan Number 87-37. (Hereinafter "2005 Henderson Subdivision Plan").

8. The 2005 Henderson Subdivision Plan states that there is a 40 foot wide Access & Utility Easement across Lot 1-0 to the benefit of Lot 1-1. The Applicant is requesting a two (2) Lot Subdivision on Lot 1-1 accessed solely by said Access and Utility Easement.

9. Note 12 on the 2005 Henderson Subdivision Plan states:

"The 40 foot Wide Access & Utility Easement across Lot 1-0 to benefit Lot 1-1 is to be used for a single lot and one buildable location on Lot 1-1 only. When and if a road on the frontage of Lot 1-1 is ever constructed the access easement across Lot 1-0 will be eliminated and access to Lot 1-1 would be via the new road."

10. The Warranty Deed from Ward to Harvey recorded the Strafford County Registry of Deeds on April 26, 2007 at Book 3521, Page 922, specifically states that the property is subject to a 40 foot wide access and utility easement to benefit Lot 1-1 shown on the 2005 Henderson Subdivision Plan.

11. Ward were conveyed said property from David R. Henderson, Trustee and Glenda J. Henderson, Trustee by Warranty Deed recorded on May 1, 2007 in the Registry of Deeds at Book 3521, Page 922. Said Warranty Deed contained the exact same reference to the easement as the Deed to Harvey which stated the following:

“Subject to a forty foot (40') wide access and utility easement to benefit Lot 1-1 as shown on the above-referenced Plan.” (Plan 87-37)

12. The Applicants are the same persons that had the 2005 Henderson Subdivision Plan approved and recorded at the Registry of Deeds as Plan 87-37.

13. The Applicants have now submitted a subsequent Subdivision Plan which calls for said Lot 1-1 on Plan 87-37 to be subdivided into two (2) lots to be accessed solely by the access and utility easement despite the fact that Note 12 on Plan 87-37 expressly restricts the access and utility easement to benefit only a single lot and only in one buildable location.

14. The Applicant has proposed two lots accessed by the access and utility easement which will necessarily result in two buildable locations.

15. The New Subdivision Plan of the Applicants is in direct violation of the restrictions that they themselves inserted on their 2005 Henderson Subdivision Plan.

16. When Harvey purchased 643 Franklin Pierce Highway, she was aware of the access and utility easement restriction on her Warranty Deed and was further aware that the access and utility easement was directly limited to a single lot and a single buildable location.

17. Harvey relied on the restrictions to the access and utility easement as set forth in 2005 Henderson Subdivision Plan.

18. After receiving Notice of the request for a 2 lot Subdivision where only one is allowed on the 2005 Henderson Subdivision Plan, Harvey has followed the Planning Board process and made her objections to the violation of the restriction on the 2005 Henderson Subdivision Plan known to the Barrington Planning Board.

19. Despite having knowledge that the proposal submitted by the Applicant for a 2 lot Subdivision is in direct Conflict with the Applicants earlier 2005 Henderson Subdivision Plan, on June 1, 2021 the Barrington Planning Board granted approval to the Applicant for

their New Plan which violates the terms of their own 2005 Henderson Subdivision Plan.

20. The decision of the Barrington Planning Board to allow a two (2) lot Subdivision Plan whose access is over an access and utility easement limited to one lot and one buildable location was illegal and/or unreasonable.

21. In addition, the Barrington Planning Board was unreasonable in finding that an Applicant can propose a Second Subdivision Plan which directly contradicts its own prior subdivision plan when the representations made in the 2005 Henderson Subdivision Plan were relied upon by subsequent Buyers including Harvey who had no reason to believe that the restriction would simply be ignored and overruled at a later date.

22. For all the above reasons, it is respectfully submitted that the allowance of a two lot subdivision whose sole access is through an access and utility easement limited to one lot and one buildable location is unreasonable and illegal.

WHEREFORE Defendant Candice K. Harvey respectfully requests that this Honorable Court grant the following relief:

A. Find that the granting of approval of a two (2) lot Subdivision whose sole access is through an access and utility easement limited to one (1) lot and one (1) buildable location is unreasonable and illegal and Reverse the decision of the Town of Barrington Planning Board and rule that the request for Subdivision Approval for the two (2) lots subdivision should be denied.

B. For such other and further relief as this Court deems just and necessary.

RESPECTFULLY SUBMITTED:

Dated: June 30, 2021

Candice K. Harvey
CANDICE K. HARVEY

THE STATE OF NEW HAMPSHIRE
Strafford COUNTY, SS.

Subscribed and sworn to before me by CANDICE K. HARVEY who affirms the facts contained therein are true to the best of her knowledge and belief this 30 day of June, 2021.

Mary O'Bryan

Notary Public
Print Name:

Mary O'Bryan

My Commission expires:

Mary O'Bryan

Seal

MARY O'BRYAN
Notary Public - New Hampshire
My Commission Expires October 17, 2023

Petitioner's Attorneys
CASASSA LAW OFFICE

[Signature]

By: Lisa J. Bellanti, Esquire NHBA: 13792
For: Daniel R. Hartley, Esquire
459 Lafayette Road
Hampton, NH 03842
Phone: (603) 926-6336 Ext. 324
Email: dhartley@casassalegal.com
NH Bar: 8792

THE STATE OF NEW HAMPSHIRE

STRAFFORD, S.S.

SUPERIOR COURT

Candice K. Harvey

v.

Town of Barrington

Docket No. 219-2021-CV-00202

TOWN OF BARRINGTON'S ANSWER

NOW COMES the Town of Barrington (hereinafter "Town"), by and through its attorneys, Mitchell Municipal Group, P.A., and in answering the *Petition of Appeal of the Decision of the Town of Barrington Planning Board Pursuant to RSA 677:15*, states as follows:

1. The allegations contained in paragraph 1 of the Petition are admitted.
2. The allegations contained in paragraph 2 of the Petition are admitted.
3. The allegations contained in paragraph 3 of the Petition are admitted.
4. The allegations contained in paragraph 4 of the Petition are partially-admitted.

By way of further answer, the Applicant's request was conditionally approved.

5. As to the allegations contained in paragraph 5 of the Petition, the Town denies that the Petitioner purchased the property at 643 Franklin Pierce Highway, Barrington, NH on November 27, 2019, as the Warranty Deed for this property was recorded on November 22, 2019. As to the remaining allegations, the Town lacks sufficient knowledge regarding said allegations and, therefore, denies same and puts the Petitioner to her proof.

6. The allegations contained in paragraph 6 of the Petition are admitted.
7. The allegations contained in paragraph 7 of the Petition are admitted.
8. The allegations contained in paragraph 8 of the Petition are denied as stated.

The Subdivision Plan and Application speak for themselves.

9. The allegations contained in paragraph 9 of the Petition are denied as stated.

The Subdivision Plan speaks for itself.

10. The allegations contained in paragraph 10 of the Petition are denied as stated. The Warranty Deed speaks for itself.

11. The allegations contained in paragraph 11 of the Petition are denied as stated. The Warranty Deed speaks for itself.

12. The allegations contained in paragraph 12 of the Petition are admitted.

13. The allegations contained in paragraph 13 of the Petition are denied as stated. The Subdivision Plan and Application speak for themselves.

14. The allegations contained in paragraph 14 of the Petition are denied as stated. The Application speaks for itself.

15. The allegations contained in paragraph 15 of the Petition are legal conclusions to which no response is required. To the extent that a response is deemed to be required, the Town denies the allegations and puts the Petitioner to her proof.

16. As to the allegations contained in paragraph 16 of the Petition, the Town lacks sufficient knowledge regarding said allegations and, therefore, denies same and puts the Petitioner to her proof.

17. As to the allegations contained in paragraph 17 of the Petition, the Town lacks sufficient knowledge regarding said allegations and, therefore, denies same and puts the Petitioner to her proof.

18. As to the allegations contained in paragraph 18 of the Petition, the Town lacks sufficient knowledge regarding said allegations and, therefore, denies same and puts the Petitioner to her proof. The Town also states that the Planning Board Minutes

and documents contained in the Certified Record speak for themselves.

19. The allegations contained in paragraph 19 of the Petition are legal conclusions to which no response is required. To the extent that a response is deemed to be required, the Town denies the allegations and puts the Petitioner to her proof.

20. The allegations contained in paragraph 20 of the Petition are legal conclusions to which no response is required. To the extent that a response is deemed to be required, the Town denies the allegations and puts the Petitioner to her proof.

21. The allegations contained in paragraph 21 of the Petition are legal conclusions to which no response is required. To the extent that a response is deemed to be required, the Town denies the allegations and puts the Petitioner to her proof.

22. The allegations contained in paragraph 22 of the Petition are legal conclusions to which no response is required. To the extent that a response is deemed to be required, the Town denies the allegations and puts the Petitioner to her proof.

WHEREFORE, the Town of Barrington respectfully request that this Honorable Court:

- A. Deny all relief sought by the Petitioner; and
- B. Dismiss the *Petition of Appeal of the Decision of the Town of Barrington Planning Board Pursuant to RSA 677:15*; and
- C. Affirm the decision of the Barrington Planning Board; and
- D. Grant such other and further relief as the Court deems just and necessary.

-4-

Respectfully submitted,

TOWN OF BARRINGTON

By Its Attorneys
MITCHELL MUNICIPAL GROUP, P.A.

Date: August 13, 2021

By: /s/ Laura Spector-Morgan
Laura Spector-Morgan, Bar No. 13790
25 Beacon Street East
Laconia, New Hampshire 03246
(603) 524-3885
laura@mitchellmunigroup.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served through the Court's electronic service system to Daniel R. Hartley, Esquire, counsel of record for the Petitioner.

Date: August 13, 2021

/s/ Laura Spector-Morgan
Laura Spector-Morgan

THE STATE OF NEW HAMPSHIRE
STRAFFORD, SS.
STRAFFORD COUNTY SUPERIOR COURT
CASE NO: 219-2021-CV-00202

CANDICE K. HARVEY

v.

TOWN OF BARRINGTON

PLAINTIFF'S MEMORANDUM OF LAW

NOW COMES Candice K. Harvey, the Plaintiff in the above-captioned matter, by and through her attorneys, Casassa Law Office, and submits the Memorandum of Law:

FACTS:

1. Candice K. Harvey ("Harvey") is the owner of 643 Franklin Pierce Highway, Barrington, New Hampshire. Harvey as direct abutter has approximately 6 acres at 643 Franklin Pierce Highway, Barrington, New Hampshire that she purchased on November 27, 2019 and uses as a personal residence and also has a commercial property on the premises which includes her hair salon.
2. The property subject to the Subdivision Application is owned by David & Glenda Henderson ("Applicant") and is approximately 28 acres of land off Franklin Pierce Highway that abuts Harvey's property at 643 Franklin Pierce Highway, Barrington, New Hampshire.
3. Harvey purchased 643 Franklin Pierce Highway, Barrington, New Hampshire from Peter R. Ward and Sarah M. Ward ("Ward").
4. The property is known as Lot 1-0 on Subdivision Plan for David R. and Glenda J. Henderson dated September 21, 2005, Plan Number 87-37. (Hereinafter "2005 Henderson Subdivision Plan"). The Plan is Plaintiff's Exhibit 2.

5. The 2005 Henderson Subdivision Plan states that there is a 40 foot wide Access & Utility Easement across Lot 1-0 to the benefit of Lot 1-1. The Applicant is requesting a two (2) Lot Subdivision on Lot 1-1 accessed solely by said Access and Utility Easement.

6. Note 12 on the 2005 Henderson Subdivision Plan states:

"The 40 foot Wide Access & Utility Easement across Lot 1-0 to benefit Lot 1-1 is to be used for a single lot and one buildable location on Lot 1-1 only. When and if a road on the frontage of Lot 1-1 is ever constructed the access easement across Lot 1-0 will be eliminated and access to Lot 1-1 would be via the new road."

(See Page 2 of Exhibit 2 for Note 12).

7. The Warranty Deed from Ward to Harvey recorded the Strafford County Registry of Deeds on April 26, 2007 at Book 3521, Page 922, specifically states that the property is subject to a 40 foot wide Access and Utility Easement to benefit Lot 1-1 shown on the 2005 Henderson Subdivision Plan. (The Deed is Plaintiff's Exhibit 1).

8. Ward were conveyed said property from David R. Henderson, Trustee and Glenda J. Henderson, Trustee by Warranty Deed recorded on May 1, 2007 in the Registry of Deeds at Book 3521, Page 922. Said Warranty Deed contained the exact same reference to the easement as the Deed to Harvey which stated the following:

"Subject to a forty foot (40') wide Access and Utility Easement to benefit Lot 1-1 as shown on the above-referenced Plan." (Plan 87-37)

9. The Applicants are the same persons that had the 2005 Henderson Subdivision Plan approved and recorded at the Strafford County Registry of Deeds as Plan 87-37.

10. The Applicants have now submitted a subsequent Subdivision Plan which calls for said Lot 1-1 on Plan 87-37 to be subdivided into two (2) lots to be accessed solely by the Access and Utility Easement despite the fact that Note 12 on Plan 87-37 expressly restricts the Access and Utility Easement to benefit only a single lot and only in one buildable location and despite the fact that the Harvey's Deed has the same restriction.

11. The Applicant has proposed two lots accessed by the Access and Utility Easement which will necessarily result in two buildable locations.

12. The New Subdivision Plan of the Applicants is in direct violation of the easement restrictions that they themselves inserted on their 2005 Henderson Subdivision Plan and also put into the Deed for Harvey's property.

13. When Harvey purchased 643 Franklin Pierce Highway, she was aware of the Access and Utility Easement restriction on her Warranty Deed and was further aware that the Access and Utility Easement was directly limited to a single lot and a single buildable location.

14. Harvey relied on the restrictions to the Access and Utility Easement as set forth in 2005 Henderson Subdivision Plan and in her Deed. After receiving Notice of the request for a 2 lot Subdivision where only one is allowed on the 2005 Henderson Subdivision Plan, Harvey has followed the Planning Board process and made her objections to the violation of the restriction on the 2005 Henderson Subdivision Plan and her Deed known to the Barrington Planning Board.

15. When the Applicant was in front of the Planning Board on April 6, 2021, Harvey objected stating that the original Subdivision Plan restricted use of the Access and Utility Easement to one lot and one buildable location. The Applicant claimed that this was a legal issue between the Applicant and Harvey. The matter was continued by the Board. CR 038 to 040.

16. On June 1, 2021 the Board took up the matter again. Harvey again appeared and objected to the Subdivision Plan based on the restrictions in the Access and Utility Easement to one lot and one buildable location as provided for in the 2005 Henderson Subdivision Plan. The Board decided that the issue of access was a dispute between two property owners which the Board did not have jurisdiction to decide. CR 086 to CR 088. Board Member J. Braun stated that:

“... J. Braun expressed that the Board could approve this on the basis that the easement can be used for both back lots.

J. Braun expressed if there was legal action and the easement was unable to be utilized for both lots, that would mean that they would need a different access to the property...” CR 088.

17. The Application was conditionally approved on a 5-2 vote. CR 091.

18. Just prior to the vote, J. Braun stated as follows:

“J. Braun explained that they would need to build a road to Town standards if more than three lots used the access.”

CR 091.

ISSUES:

- I. CAN AN UNAMBIGUOUS EASEMENT RESTRICTION ON AN OWNER'S DEED AND ON A SUBDIVISION PLAN BE VOIDED AT A LATER DATE BY AN APPLICANT AND OVERLOOKED BY A PLANNING BOARD
- II. WAS THE PLANNING BOARD'S FINDING OF ACCESS TO THE PROPERTY UNREASONABLE OR AN ERROR OF LAW

ARGUMENT:

- I. **An Unambiguous easement restriction on an owner's deed and on a Subdivision Plan cannot be voided at a later date by an Applicant and cannot be overlooked by a Planning Board.**

19. The easement restriction in the 2005 Henderson Subdivision Plan that is also referenced in Harvey's Deed restricted use of the 40 foot wide Access and Utility Easement to a single lot and one buildable location only is unambiguous and cannot be changed by the holder of the easement and cannot be ignored by the Planning Board to find access to the proposed Subdivision property.

20. The overriding purpose of Subdivision control is to regulate municipal development to protect prospective residents and neighborhood owners from problems resulting from poorly designed areas and to advance the recognized purposes of the police power. 15 New Hampshire Practice – Land Use Planning and Zoning, Third Edition, Section 29.02. Subdivision regulations are designed to control the division of land so that developments are designed to accommodate the needs of the occupants of the Subdivision. Id.

21. The 2005 Henderson Subdivision Plan dated September 21, 2005 was approved by the Town of Barrington. The 40 foot wide Access and Utility Easements location is specifically plotted on the Plan. Note 12 of the 2005 Henderson Subdivision Plan limits said Easement "across L 1-0 to benefit Lot 1-1 to be used for a single lot and one buildable location on Lot 1-1 only".

22. The Deed out for Lot 1-0 from the Applicant went to Ward which stated that Lot 1-0 was subject to said Easement to benefit Lot 1-1 as shown on the 2005 Henderson Subdivision Plan.

23. Defining the rights of the parties to an expressly deeded easement requires determining the parties' intent in light of circumstances at the time the easement was granted. Dumont v. Town of Wolfeboro, 137 N.H. 1, 5 (1993). Clear and unambiguous terms of a deed control how we construe the parties' intent. Id.

24. The Deeds for the Harvey's property unambiguously define the Easement as set forth in the 2005 Henderson Subdivision Plan. The 2005 Henderson Subdivision Plan clearly and unambiguously limits use of the Easement to a single lot and one buildable location on Lot 1-0 only. The rights of the parties as determined at the time the Easement was granted were clear and use of the Access and Utility Easement was limited to a single lot in one buildable location only. Id. There is no access for two lots at two buildable locations and it was unreasonable and in error for the Board to find access to the back land for two lots over said Access and Utility Easement.

25. The Board's determination that the easement provided access to two lots and two buildable locations and that this was a civil dispute beyond the Board's jurisdiction was in error. In order for the Board to overlook the restrictions in the

easement deed, there must be a genuine dispute regarding the easement restriction. In Short v. Town of Rye, 121 N.H. 415 (1981), the Court found that whether an access road called Mountain View Terrace had been dedicated as a public road and whether the developers had a right to use the certain portions of the road had to be resolved to determine if there was access. The Court found that this determination was a judicial function and not within the jurisdiction of the Planning Board. Id. at 416.

26. In this case, there is no dispute about the unambiguous restriction on the Access and Utility Easement on both the Subdivision Plan and Deed. The easement's use restriction on the Deed and Subdivision Plan are identical. The use of the Access and Utility Easement is limited to one lot at one buildable location. Nothing on the Subdivision Plan or Deed indicate that it is possible for the Access and Utility Easement to be used for two lots at two buildable locations. There is no dispute regarding the restriction in the use of Access and Utility Easement that requires a judicial function to determine. Acknowledging the use restriction on the Access and Utility Easement is within the jurisdiction of the Planning Board. Id.

27. In Smith v. Town of Wolfeboro, 136 N.H. 337 (1992). The Supreme Court upheld a Trial Court that overruled a Planning Board determination of an issue not within its jurisdiction because the Board was concerned with the possible existence of a right of way across the land to be subdivided. Id. at 341-342. In this case, there is no uncertainty as to the unambiguous restriction on the Access and Utility Easement for one lot at one buildable location in the Deed and Subdivision Plan and the Planning Board decision should be reversed.

II. The Planning Board's Finding of Access to the Property was unreasonable and an Error of Law

28. In order for the Applicant's Subdivision Plan for property to be approved, it must have access. See Short v. Town of Rye, 121 N.H. 415 (1981); See Smith v. Town of Wolfeboro, 136 N.H. 337 (1992); See Dumont v. Town of Wolfeboro, 137 N.H. 1 (1993). In this case, the Board found access for a two lot Subdivision from an easement encumbering Harvey's real estate which was expressly limited by Harvey's deed and the 2005 Henderson Subdivision Plan to one lot and one buildable area only. The easement restriction is unambiguous and binding on the parties to the easement. Dumont v. Town of Wolfeboro, 137 N.H. 1, 5 (1993). The Board's determination that the restriction on the Access and Utility Easement was somehow open to interpretation to allow more than one lot and one buildable area only was unreasonable and an error of law. The granting of a prior Variance does not change the rights of the parties in the Easement in Harvey's Deed. It does not invalidate the fact that the Access and Utility Easement's use is limited to one lot on one buildable location.

29. Having this Court uphold this Unambiguous Restriction becomes especially important when you see the last comment of a Board Member prior to the vote. J. Braun stated if more than three lots use the Access and Utility Easement, it needed to be upgraded to a road. CR 091. If this clear restriction on the Access and Utility Easement is found to allow 2 lots on 2 buildable areas, then why not 10 lots in 10 buildable locations over a road. If this Court allows a Planning Board to ignore an unambiguous use restriction on the Access and Utility Easement and finds access for two (2) lots and two (2) buildable locations where use of the Access and Utility Easement is clearly limited to one (1) lot in one (1) buildable location, it will undercut

the rule of law and promote uncertainty in real estate.

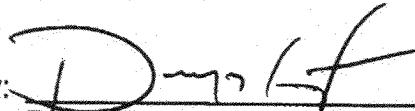
CONCLUSION:

For the foregoing reasons, Candice K. Harvey respectfully requests that this Honorable Court reverse the granting of approval to the two (2) lot Subdivision due to lack of access over an Access and Utility Easement restricted to one (1) lot and one (1) buildable area only.

Respectfully submitted,
CANDICE K. HARVEY
By Her Attorneys
CASASSA LAW OFFICE

Dated: September 10, 2021

By:

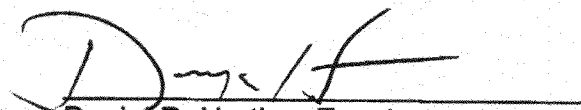


Daniel R. Hartley, Esquire
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Hampton, NH 03842
(603) 926-6336
NH Bar ID: 8792

CERTIFICATE OF SERVICE FOR E-FILED CASE

I state that on this date I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case. I am mailing or hand-delivering copies to all other interested parties.

Dated: September 10, 2021



Daniel R. Hartley, Esquire

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

Candice K. Harvey

v.

Town of Barrington

Docket No. 219-2021-CV-00202

**INTERVENOR'S MEMORANDUM IN SUPPORT OF
UPHOLDING BARRINGTON PLANNING BOARD DECISION**

NOW COMES Garvey & Company, Ltd. ("Intervenor"), by and through its undersigned attorneys, and submits this Memorandum to assist the Court with its Certified Record review.

Nothing about the Planning Board's conditional subdivision approval is illegal or unreasonable. It should be upheld. That the subject parcel was subdivided into two lots, with preliminary access being over a deeded easement right of way (See, Plaintiff's (supplemental) Exhibit 1) was fully authorized as a matter of zoning right by Barrington Zoning Board of Adjustment ("ZBA") Approval in Case No. 239-1-TC-21-ZBA Var. See, CR 004 and CR 008 and 009. See also, original Note 7 to subdivision plan as first submitted and first revised at CR 018 and CR 020. See, Note 7 as finally approved on the final conditionally approved subdivision plan. CR 079 and Intervenor's (supplemental) Exhibit 2.

Plaintiff asserts that the Planning Board acted unreasonably and illegally for considering a plan subject to the above 2021 ZBA approval because an earlier 2006 ZBA approval, and subsequent Planning Board subdivision approval based on the 2006 ZBA action, authorized use of the same easement access for only one buildable lot. See Plaintiff's Complaint paragraph 9 and Plaintiff's (supplemental) Exhibit 2. But there was nothing unreasonable or illegal about the

Barrington ZBA considering new facts and circumstances and granting the 2021 approvals. CR 008 and 009 and CR 079 plan Note 7 and Intervenor's (supplemental) Exhibit 2. The Planning Board's action based upon a legal 2021 ZBA approval is appropriate. The Planning Board was in fact bound by the ZBA ruling. CR 088 (see M. Gasses at middle of page). Town counsel supported Member Gasses's point. See CR 087 (at bottom of page).

Plaintiff acknowledged being noticed and participating in at least some of the 2021 ZBA hearings. CR 087. Their objections to the easement access being used for two buildable sites (two Planning Board approved lots) were raised then, and were adjudicated then, at least with respect to Town land use board actions. The ZBA's 2021 approval was not appealed by the Plaintiff. CR 087-088.

The Planning Board nevertheless considered Plaintiff's objections to the easement on her lot being used to access two new homes (two subdivided lots). See Record generally at CR 035-040, and CR 086. But to the extent the issue of overburdening the easement was already considered by the ZBA, the Planning Board was bound to that. *Id.* The Planning Board nevertheless addressed Plaintiff's concerns by clarifying how use of the easement for access for two new lots would go away if and when alternative access was provided. See final text of Note 7 on plan at CR 079 and Intervenor's (supplemental) Exhibits 1 and 2.

Plaintiff's (supplemental) Exhibit 1 is the deed by which Plaintiff acquired her property. One line of text near the top of the second page of the deed clarifies Plaintiff's lot being burdened by the 40 foot wide access and utility easement benefiting Lot 1-1 as shown on plan recorded at the Strafford Registry as Plan 87-37. That deed text does not limit the access to only one building site. Rather, the easement is to provide access to all the land known as Lot 1-1 on Strafford Registry Plan 87-37, which is the almost 29 acre parcel which is the subject matter of the two lot subdivision approval now appealed by Plaintiff. It was the 2006 ZBA approval that

limited said easement access to one buildable lot, not the deed. The easement reserved by the Hendersons in their deed to the Plaintiff could be used for any legal reason or use made of the full 29 acres.

The Barrington ZBA's 2021 ZBA approval authorized a legal use of the 29 acres as two lots. Access was over the easement. The Planning Board's approval placed conditions on the easement's use as access. Note 7 on plan at CR 079; see Intervenor's (supplemental) Exhibit 2. The ZBA and Planning Board's consideration of use of the easement by two building sites, two approved subdivision lots, was appropriate. The Planning Board included express language by requiring Note 7 on the final plan that would make use of the easement as access for the two lots go away if alternative access could be provided. The Planning Board further wanted reciprocal easements confirming these conditions; that was provided by the Intervenor by way of the proposed Declaration of Intent (see Intervenor's (supplemental) Exhibit 1) and proposed text to be included in deeds as set forth in and explained by letter of Applicant's counsel submitted to the Planning Board. See CR 077-078.

Neither the ZBA and Planning Board made findings that use of the 40 foot easement over Plaintiff's property by two lots pursuant to the new subdivision approval would be an overburdening of the easement right the Hendersons reserved by their deed to Plaintiff. Plaintiff would have liked the ZBA to have found otherwise, but did not appeal the ZBA's ruling. The Plaintiff would have liked the Planning Board to have found otherwise, but it did not. So Plaintiff appeals here. Plaintiff's appeal is misplaced, as there is no clear evidence such easement use by two lots would be an overburdening of the easement. Further, to the extent Plaintiff alleges that, any resolution of that issue is a civil matter to be resolved between the parties. See CR 038:

"M. Gasses had a conversation with the (Town) attorney about the easement, and she stated that was between the property owners."

"M. Gasses stated the Planning Board had no authority on this issue; it was up to the property owners."

See CR 039 :

J. Brann "... but this was a civil matter between the owners with a lawyer."

The appeal should be dismissed. The Planning Board's approval should be upheld.

Respectfully Submitted,

GARVEY & COMPANY, LTD.

By and through its Attorneys,
Wyskiel, Boc, Tillinghast & Bolduc, P. A.

Dated: September 10, 2021

By: /s/Christopher A. Wyskiel
Christopher A. Wyskiel, Esquire
NH Bar No.: 2804
561 Central Avenue
Dover, NH 03820
(603) 742-5222
E-mail: cwyskiel@wbtblaw.com

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Intervenor's Memorandum in Support of Upholding Barrington Planning Board Decision has been served through the Court's electronic service system to Daniel R. Hartley, Esquire, counsel of record for the Plaintiff, and to Laura Spector-Morgan, Esquire, counsel of record for the Defendant, Town of Barrington

Dated: September 10, 2021

/s/Christopher A. Wyskiel
Christopher A. Wyskiel, Esquire

STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

Candice K. Harvey

v.

Town of Barrington

Docket No. 219-2021-CV-00202

ORDER

The petitioner Candice K. Harvey appeals the June 1, 2021 decision of the Barrington Planning Board (“the Board”) approving a request for a two-lot subdivision. (Court index #1). The court held a hearing on September 10, 2021 at which it heard arguments from Harvey and the intervenor Garvey & Company, Ltd. (“Garvey”).¹ Based on the certified record, the parties’ arguments, the factual circumstances of the case, and the applicable law, the court finds and rules as follows.

Facts

David and Glenda Henderson (“the Applicants”) own Lot 1-1 within a subdivision they created and which the Board approved in 2006 (“the 2006 Plan”). The Board approved the 2006 Plan following the grant of a special exception by the Zoning Board of Adjustment (“ZBA”) allowing access to Lot 1-1 via an access and utility easement across Lot 1-0. (See Pl.’s Ex. 2 (referencing prior ZBA grant in Note 11)). Harvey owns Lot 1-0, abutting property within the same subdivision at 643 Franklin Pierce Highway in Barrington. Harvey uses Lot 1-0 as a personal residence as well as a commercial property for her hair salon. Harvey’s deed is

¹ The Town of Barrington (“the Town”), representing the Board, and Harvey assented to Garvey’s motion to intervene, as Garvey is the buyer under a Purchase & Sale Agreement with the Applicants. (Court index #9). Following Garvey’s appearance, Harvey assented to the Town’s request that the court allow the Town not to participate in the subsequent hearing, which the court granted on the date of the hearing. (Court index #11).

“[s]ubject to a forty foot (40’) wide access and utility easement to benefit Lot 1-1 as shown” on the 2006 Plan. (Pl.’s Ex. 1). Note 12 to the 2006 Plan states:

The 40 foot Wide Access & Utility Easement across Lot 1-0 to benefit Lot 1-1 is to be used for a single lot and one buildable location on Lot 1-1 only. When and if a road on the frontage of Lot 1-1 is ever constructed the access easement across Lot 1-0 will be eliminated and access to Lot 1-1 would be via the new road.

(Pl.’s Ex. 2). The deed itself does not limit the access to only one building site. (See Pl.’s Ex. 1).

The Applicants sought approval from the ZBA for a variance of two additional lots and the ZBA held a hearing on February 17, 2021. (C.R. 008).² The ZBA approved the creation of one additional lot. (*Id.*). Harvey did not appeal the ZBA decision. (C.R. 087). On March 21, 2021, the Applicants applied to the Board for Subdivision Plan Review under which they requested to subdivide Lot 1-1 into two lots accessed by the easement over Harvey’s lot. (C.R. 086). At a public hearing held on June 1, 2021, the Board considered Harvey’s objection to the easement being used to access two lots instead of one. (*Id.*). Neither the ZBA nor the Board made findings that the use of the forty-foot easement over Harvey’s property by two lots would constitute an overburdening of the easement. (See C.R. 086-091). The Board conditionally approved the application by a 5-2 vote. (C.R. 091). The Board’s approval placed the following conditions on easement use: “When and if a road on the frontage of said Lots [1-1] and/or [1-2] is ever constructed, the access easement across Lot 1-0 will be eliminated and access to Lots [1-1] and [1-2] would be via the new road.” (C.R. 079).

Legal Standard

Judicial review of planning board decisions is limited. Trustees of Dartmouth Coll. v. Town of Hanover, 171 N.H. 497, 504 (2018). The court must uphold a planning board decision

² C.R. is a reference to the Certified Record provided to the court by the parties.

absent an error of law or unless the court is persuaded by the balance of probabilities that the decision was unreasonable. See RSA 677:6 and :15, V. The court must treat factual findings of the planning board as prima facie lawful and reasonable. Trustees of Dartmouth Coll., 171 N.H. at 504; Prop. Portfolio Grp., LLC v. Town of Derry, 163 N.H. 754, 757 (2012). The court determines not whether it agrees with the findings of the planning board, but whether there is evidence upon which those findings could have been reasonably based. Id.

Analysis

Harvey argues that that the Board's approval of the new subdivision plan was unreasonable because the easement encumbering her property is subject to a limitation that it benefit one lot and one buildable area only, and because the Board erred in determining that Harvey's concerns over the existence of the limitation constituted a private property dispute beyond the Board's jurisdiction. (Pl.'s Mem. of Law ¶¶ 25, 28). Specifically, Harvey argues that the deed and 2006 Plan must be read together. For its part, Garvey argues the Board recognized that the ZBA already considered and decided the issue of overburdening the easement by approving the variance, and that the Board was bound to that approval. (See Intervenor's Mem. of Law 2).

In reviewing any application for subdivision approval, a planning board must determine if all terms of the zoning ordinance, as well as the requirements of the subdivision regulations, are met. See Hoffman v. Town of Gilford, 147 N.H. 85, 88 (2001). "No applicable law or regulation . . . require[s] a resubdivision of property to meet any standard or requirement different from an initial subdivision." Feins v. Town of Wilmot, 154 N.H. 715, 718 (2007) ("We conclude that a purported inconsistency with the intent of a prior subdivision was not a proper ground for denying the petitioners' new subdivision and site plan applications."). Before

applying for subdivision approval, an applicant may seek a variance to a zoning ordinance from the zoning board of adjustment. See RSA 674:33, I(b). Moreover, “[a] board of adjustment has the power to modify conditions previously imposed with respect to the grant of a variance.” Pope v. Little Boar’s Head Dist., 145 N.H. 531, 535 (2000).

Here, the 2006 Plan approved by the Board restricted the access and utility easement over Harvey’s lot pursuant to a special exception granted by the ZBA. While Harvey’s deed referenced Lot 1-1 “as shown” in the 2006 Plan, the deed itself did not include restrictive language and was subject to the conditions of the subdivision plan approval. Moreover, the subdivision plan itself was subject to modification under the authority granted to both the Board and the ZBA by statute. See RSA 674:35, II (municipalities may authorize planning board to approve or disapprove subdivisions); RSA 674:33, I(b) (granting ZBA authority to hear requests for variances). In approving the variance, the ZBA considered all evidence presented at the public hearing and did not find that the increased use of the access and utility easement constituted overburdening. Accordingly, in reviewing the subdivision application for compliance with the zoning ordinance, the Board properly considered the fact that the ZBA granted the relevant variance allowing for an additional lot. Therefore, the Board’s findings and subsequent approval were reasonable.

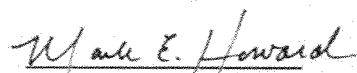
Conclusion

For the foregoing reasons, the June 1, 2021 decision of the Barrington Planning Board approving the Applicants’ request for a two-lot subdivision is AFFIRMED.

Date: October 28, 2021

Clerk's Notice of Decision
Document Sent to Parties
on 11/02/2021

SO ORDERED.


Mark E. Howard
Presiding Justice

THE STATE OF NEW HAMPSHIRE
STRAFFORD, SS.
STRAFFORD COUNTY SUPERIOR COURT
CASE NO: 219-2021-CV-00202

CANDICE K. HARVEY

v.

TOWN OF BARRINGTON

PLAINTIFF'S MOTION TO RECONSIDER

NOW COMES Candice K. Harvey, the Plaintiff in the above-captioned matter, by and through her attorneys, Casassa Law Office, and as follows:

1. Candice K. Harvey ("Harvey") is the owner of 643 Franklin Pierce Highway, Barrington, New Hampshire. Harvey has approximately 6 acres at 643 Franklin Pierce Highway, Barrington, New Hampshire that she purchased on November 27, 2019 and uses as a personal residence and also has a commercial property on the premises which includes her hair salon.
2. The property is known as Lot 1-0 on Subdivision Plan for David R. and Glenda J. Henderson dated September 21, 2005, Plan Number 87-37. (Hereinafter "2005 Henderson Subdivision Plan").
3. Lot 1-10 on the 2005 Henderson Subdivision was first conveyed to Peter R. Ward and Sarah M. Ward ("Ward") by Warranty Deed recorded on April 26, 2007 after the 2005 Henderson Subdivision Plan was recorded in the Strafford County Registry of Deeds on August 18, 2006.
4. The Warranty Deed from Ward to Harvey recorded the Strafford County Registry of Deeds on April 26, 2007 at Book 3521, Page 922, specifically states that the property is subject to a 40 foot wide Access and Utility Easement to benefit Lot 1-1 shown on the 2005 Henderson Subdivision Plan.

5. Note 12 on the 2005 Henderson Subdivision Plan states:

"The 40 foot Wide Access & Utility Easement across Lot 1-0 to benefit Lot 1-1 is to be used for a single lot and one buildable location on Lot 1-1 only. When and if a road on the frontage of Lot 1-1 is ever constructed the access easement across Lot 1-0 will be eliminated and access to Lot 1-1 would be via the new road."

6. The Applicants are the same persons that had the 2005 Henderson Subdivision Plan approved and recorded at the Strafford County Registry of Deeds as Plan 87-37.

7. The Applicants have now submitted a subsequent Subdivision Plan which calls for said Lot 1-1 on Plan 87-37 to be subdivided into two (2) lots to be accessed solely by the Access and Utility Easement despite the fact that Note 12 on Plan 87-37 expressly restricts the Access and Utility Easement to benefit only a single lot and only in one buildable location. The Applicant has proposed two lots accessed by the Access and Utility Easement which will necessarily result in two buildable locations.

8. The New Subdivision Plan of the Applicants is in direct violation of the easement restrictions that they themselves inserted on their 2005 Henderson Subdivision Plan.

9. When Harvey purchased 643 Franklin Pierce Highway, she was aware of the Access and Utility Easement restriction on the 2005 Henderson Subdivision Plan and was further aware that the Access and Utility Easement was directly limited to a single lot and a single buildable location.

10. The Order affirming the decision of the Barrington Planning Board states that 2005 Subdivision Plan was modifiable by the Zoning Board of Adjustment and that the restriction on Note 12 did not apply to Lot 1-0 owned by Harvey because the restriction was not included in her deed.

11. Harvey requests that the Court reconsider its Order affirming the Town of Barrington Planning Board because it was an error of law to conclude that the restriction in Note 12 on the 2005 Henderson Subdivision Plan was not part of the Easement on Harvey's Land known as Lot 1-0 when it was created.

12. An easement may be created by a written conveyance and a plan together. Soukup v. Brooks, 159 N.H. 9, 14 (2009); Close v. Fiset, 146 N.H. 480, 483 (2001). The plan itself does not create the easement, it is not till the deed is signed and recorded that the easement is created. Soukup, 159 N.H. at 14. Even if the plan is not recorded, if the recorded deed clearly references the plan, it provides inquiry notice of the plans existence and the fact that the two documents created the easement. Id.

13. The interpretation of a deeded right of way is determined by the intention of the parties at the time of the deed in light of the surrounding circumstances. Mansur v. Muskopf, 159 N.H. 216, 221 (2009).

14. If the terms of the deed and plan are clear and unambiguous, those terms control how a Court should construe the parties' intent. Mansur, 159 N.H. at 221.

15. In this case, the easement currently on Harvey's Land was created by the 2005 Henderson Subdivision Plan and the first Deed out to Ward which was recorded on April 26, 2007. Both the Plan and Deed combined to create the Easement. Soukup 159 N.H. at 14. The terms of the deed and plan are unambiguous and control how the

Court should construe the parties' intent at the time the easement was created. Mansur, 159 N.H. at 221. The terms of the Easement include Note 12 on the 2005 Henderson Subdivision Plan which reflects the parties' intent when the Easement was created. The first Deed out of 2005 Henderson Subdivision Plan for Lot 1-10 was sufficient to provide Notice inquiry of the 2005 Henderson Subdivision Plan and Note 12 by referencing said Plan. Close, 146 N.H. at 484.

16. In addition, the Court should apply the general rules of contract interpretation to the interpretation of the Deed and Plan which created the easement. Close, 146 N.H. at 484.

17. When multiple documents constitute the contract between the parties, the parties' intent must be ascertained from all these instruments read together as a whole. Bellak v. Franconia College, 118 N.H. 313, 315 (1978). The Court should harmonize the documents and give effect to the provisions of the various documents so that none will be rendered meaningless. Id.

18. Since, both the Deed and the 2005 Henderson Subdivision Plan created the Easement and control its terms, the restrictions in Note 12 of the Plan must be included in the determination of the easement. Id. To rule otherwise would make Note 12 meaningless, Id.

19. In Close, the Court determined that an easement agreement and plan created the Easement. The Court determined the dimension of Easement and location by reference to the Plan. Close, 146 at 484. Similarly the restriction in Note 12 on the Plan determines the limitation on use of the Easement on Lot 1-0 by reference to the Plan. Id.

20. The purpose of the New Hampshire recording statute is to provide Notice to the public of a conveyance of or encumbrances of real estate to protect both those who already have interests in land and for those who would like to acquire such interests. Soukup, 159 N.H. at 20-21.

21. The Easement was created by the Deed and 2005 Henderson Subdivision Plan and included the restriction of use in Note 12 of the 2005 Henderson Subdivision Plan. The rights of Harvey in the Easement as created could not be divested.

22. The Court's reliance upon Pope v. Little Boar's Head Dist., 145 N.H. 531, 535 (2000) for the proposition that a Zoning Board can modify conditions previously imposed with respect to the grant of a Variance is not applicable to the fact in this case. In Pope, the Court indicated that a Plaintiff who owned the land affected by the Variance could seek a modification of the use of its own land. Pope, 145 N.H. at 535. In this case, the Easement is over the land of Harvey and the purported modification of the limitation on this use of the Easement across her Land is directly affected. There were no third parties directly involved in Pope.

23. The Court's reliance on the fact that the language in Note 12 on the 2005 Henderson Subdivision Plan is not in the Deed chain for Lot 1-0 is also counter to RSA 477:26 which states any conveyance of real estate shall be deemed to include in the conveyance all easement rights even if not included or mentioned in the Deed, unless there is a contrary intent stated in the deed.

24. The Applicant's Easement is subject to the limitation in Note 12 on the 2005 Henderson Subdivision Plan under RSA 477:26 regardless of whether the explicit terms of Note 12 are included in the Deed.

25. Under the scope of Easement created both by Deed and the 2005 Henderson Subdivision Plan, the Easement at issue on Lot 1-0 is limited to a single lot and one buildable location and it was unreasonable and in error for the Barrington Planning Board to find access to the back land for two lots across the Easement.

WHEREFORE, the Plaintiff prays that this Honorable Court:

A. Grant the Motion to Reconsider and reverse the approval granted by the Barrington Planning Board for a two (2) lot Subdivision due to the lack of access from the Easement at issue which is restricted to one lot and one buildable location.

B. For such other and further relief as may be deemed just.

Respectfully submitted,
CANDICE K. HARVEY
By Her Attorneys
CASASSA LAW OFFICE

Dated: November 12, 2021

By: 

Daniel R. Hartley, Esquire
459 Lafayette Road
Hampton, NH 03842
(603) 926-6336
dhartley@casassalegal.com
NH Bar ID: 8792

CERTIFICATE OF SERVICE FOR E-FILED CASE

I state that on this date I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case. I am mailing or hand-delivering copies to all other interested parties.

Dated: November 12, 2021


Daniel R. Hartley, Esquire

THE STATE OF NEW HAMPSHIRE

STRAFFORD, SS.

SUPERIOR COURT

Candice K. Harvey

v.

Town of Barrington

Docket No. 219-2021-CV-00202

**INTERVENOR'S OBJECTION TO
PLAINTIFF'S MOTION TO RECONSIDER**

NOW COMES Garvey & Company, Ltd. ("Intervenor"), by and through its undersigned attorneys, and objects to Plaintiff's Motion to Reconsider, stating as follows:

1. Although Superior Court Rule 12(e)(1) does not require an objection to be filed to a Motion for Reconsideration (unless ordered by the Court), Intervenor objects to underscore its agreement with the Court's application of New Hampshire law to those facts evidenced in the Certified Record and highlighted by the Court.
2. The first two pages of Plaintiff's Motion repeat verbatim paragraphs 1, 4, 6, 7, and 10 through 13 of Plaintiff's September 10, 2021 Memorandum of Law.
3. Plaintiff's argument in subsequent pages is the same made previously in writing and during the Court's hearing.
4. Plaintiff now cites case law (different from her September 10 Memorandum of Law) in support of the same argument that the 2006 plan Note 12 text (see top of Court Order page 2) was somehow intended to be incorporated by reference in the deed to Plaintiff. The Plaintiff's deed (see Plaintiff's Exhibit 1) includes a metes and bounds description of the

Plaintiff's property drafted pursuant to the 2006 subdivision plan also referenced by its Strafford County Registry of Deed Plan 87-37 recording reference. This Court's October 28, 2021 Order correctly finds that Plaintiff's Exhibit 1 states only that Plaintiff's property is subject to a forty (40') foot wide access and utility easement to benefit Lot 1-1 as shown on Strafford County Registry of Deeds Plan 87-37. There is no limit as to its use; no specific reference in Plaintiff's deed is made to that plan's Note 12 or its text as a limitation on the right of way's use.

5. The 2006 Plan Note 12 text only confirms a prior Planning Board subdivision limitation as to use, which this Court's October 28 Order correctly characterizes as modifiable, citing Pope v Little Boars Head Dist., 145 N.H. 531, 535 (2000).

6. As the reserved right of way provides pedestrian, vehicle and utility access to the applicant's (Hendersons) land (under agreement for purchase by the Intervenor), it was logical for the Hendersons (who first conveyed the Plaintiff's land to Ward, which Ward then conveyed to Plaintiff) to not have placed a use limitation on the access by a Planning Board imposed condition, which condition was potentially modifiable by future ZBA or Planning Board action.

7. Plaintiff claims this Court's reliance upon Pope is misplaced, and not applicable to the facts of this case. See Motion to Reconsider paragraph 22.

8. To the contrary, the Court's reliance upon Pope goes to the very essence to why Plaintiff's appeal was properly denied.

9. Without any express language in the Deed from Ward to the Plaintiff (Plaintiff's Exhibit 1) expressly limiting the right of way in question to be limited to only one building lot, the Plaintiff took title to her land subject to the possibility of the Barrington Zoning Board of Adjustment's ("ZBA") and Planning Board's previously imposed limitation on use of the right of way being modified in the future.

10. The Barrington Planning Board's two lot subdivision which is the subject of this appeal, in fact, modified its previous use limitation condition. The Planning Board's modification was consistent with the Barrington ZBA's modification of its own previously granted variance limiting the subject right of way's use.

11. The Plaintiff was aware of and participated in the ZBA case by which the Hendersons and Intervenor sought to modify the 2006 Plan Note 12 condition limiting the use of the right of way in question. This Court's October 28 Order points out the "fact" that the Plaintiff did not appeal the ZBA decision (Court's Order at page 2). This Court's Order points out the "facts" that "neither the ZBA nor (Barrington Planning) Board made findings that the use of the forty foot easement over Harvey's property by two (2) lots would constitute an overburdening of the easement." (Order at page 2 citing Certified Record at pages 86-91).

12. New Hampshire law, as acknowledged by Pope, demonstrates that Plaintiff's interpretation of her own deed (Plaintiff's Exhibit 1) as characterized by her original Complaint, her September 10 Memorandum of Law, and Motion to Reconsider, is misplaced.

13. Plaintiff took title to her land, subject to the forty (40') foot wide right of way benefitting land of the Applicants, the Hendersons, (for which the Intervenor has a contract to purchase) unrestricted as to use by any intent expressed by the parties' deed language (Plaintiff's Exhibit 1). Any effort by the Plaintiff by her Motion to Reconsider, or any alternative civil litigation asserting anything to the contrary fails as a matter of found fact and correctly applied law.

WHEREFORE, the Intervenor prays that this Honorable Court:

- A. Deny Plaintiff's Motion to Reconsider; and
- B. Grant such further relief as the Court deems just and necessary.

Respectfully Submitted,

GARVEY & COMPANY, LTD.

By and through its Attorneys,
Wyskiel, Boc, Tillinghast & Bolduc, P. A.

Dated: November 16, 2021

By: /s/Christopher A. Wyskiel
Christopher A. Wyskiel, Esquire
NH Bar No.: 2804
561 Central Avenue
Dover, NH 03820
(603) 742-5222
E-mail: cwyskiel@wbtblaw.com

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Intervenor's Objection to Plaintiff's Motion to Reconsider has been served through the Court's electronic service system to Daniel R. Hartley, Esquire, counsel of record for the Plaintiff, and to Laura Spector-Morgan, Esquire, counsel of record for the Defendant, Town of Barrington

Dated: November 16, 2021

/s/Christopher A. Wyskiel
Christopher A. Wyskiel, Esquire

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THE STATE OF NEW HAMPSHIRE
STRAFFORD, SS.
STRAFFORD COUNTY SUPERIOR COURT
CASE NO: 219-2021-CV-00202

CANDICE K. HARVEY

v.

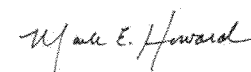
TOWN OF BARRINGTON

PLAINTIFF'S MOTION TO RECONSIDER

NOW COMES Candice K. Harvey, the Plaintiff in the above-captioned matter, by and through her attorneys, Casassa Law Office, and as follows:

1. Candice K. Harvey ("Harvey") is the owner of 643 Franklin Pierce Highway, Barrington, New Hampshire. Harvey has approximately 6 acres at 643 Franklin Pierce Highway, Barrington, New Hampshire that she purchased on November 27, 2019 and uses as a personal residence and also has a commercial property on the premises which includes her hair salon.
2. The property is known as Lot 1-0 on Subdivision Plan for David R. and Glenda J. Henderson dated September 21, 2005, Plan Number 87-37. (Hereinafter "2005 Henderson Subdivision Plan").
3. Lot 1-10 on the 2005 Henderson Subdivision was first conveyed to Peter R. Ward and Sarah M. Ward ("Ward") by Warranty Deed recorded on April 26, 2007 after the 2005 Henderson Subdivision Plan was recorded in the Strafford County Registry of Deeds on August 18, 2006. Clerk's Notice of Decision Document Sent to Parties on 11/24/2021
4. The Warranty Deed from Ward to Harvey recorded the Strafford County Registry of Deeds on April 26, 2007 at Book 3521, Page 922, specifically states that the property is subject to a 40 foot wide Access and Utility Easement to benefit Lot 1-1 shown on the 2005 Henderson Subdivision Plan.

Upon review, motion to reconsider denied.



Honorable Mark E. Howard

79

5. Note 12 on the 2005 Henderson Subdivision Plan states:

"The 40 foot Wide Access & Utility Easement across Lot 1-0 to benefit Lot 1-1 is to be used for a single lot and one buildable location on Lot 1-1 only. When and if a road on the frontage of Lot 1-1 is ever constructed the access easement across Lot 1-0 will be eliminated and access to Lot 1-1 would be via the new road."

6. The Applicants are the same persons that had the 2005 Henderson Subdivision Plan approved and recorded at the Strafford County Registry of Deeds as Plan 87-37.

7. The Applicants have now submitted a subsequent Subdivision Plan which calls for said Lot 1-1 on Plan 87-37 to be subdivided into two (2) lots to be accessed solely by the Access and Utility Easement despite the fact that Note 12 on Plan 87-37 expressly restricts the Access and Utility Easement to benefit only a single lot and only in one buildable location. The Applicant has proposed two lots accessed by the Access and Utility Easement which will necessarily result in two buildable locations.

8. The New Subdivision Plan of the Applicants is in direct violation of the easement restrictions that they themselves inserted on their 2005 Henderson Subdivision Plan.

9. When Harvey purchased 643 Franklin Pierce Highway, she was aware of the Access and Utility Easement restriction on the 2005 Henderson Subdivision Plan and was further aware that the Access and Utility Easement was directly limited to a single lot and a single buildable location.

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11. Harvey requests that the Court reconsider its Order affirming the Town of Barrington Planning Board because it was an error of law to conclude that the restriction in Note 12 on the 2005 Henderson Subdivision Plan was not part of the Easement on Harvey's Land known as Lot 1-0 when it was created.

12. An easement may be created by a written conveyance and a plan together. Soukup v. Brooks, 159 N.H. 9, 14 (2009); Close v. Fiset, 146 N.H. 480, 483 (2001). The plan itself does not create the easement, it is not till the deed is signed and recorded that the easement is created. Soukup, 159 N.H. at 14. Even if the plan is not recorded, if the recorded deed clearly references the plan, it provides inquiry notice of the plans existence and the fact that the two documents created the easement. Id.

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16. In addition, the Court should apply the general rules of contract interpretation to the interpretation of the Deed and Plan which created the easement. Close, 146 N.H. at 484.

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22. The Court's reliance upon Pope v. Little Boar's Head Dist., 145 N.H. 531, 535 (2000) for the proposition that a Zoning Board can modify conditions previously imposed with respect to the grant of a Variance is not applicable to the fact in this case. In Pope, the Court indicated that a Plaintiff who owned the land affected by the Variance could seek a modification of the use of its own land. Pope, 145 N.H. at 535. In this case, the Easement is over the land of Harvey and the purported modification of the limitation on this use of the Easement across her Land is directly affected. There were no third parties directly involved in Pope.

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24. The Applicant's Easement is subject to the limitation in Note 12 on the 2005 Henderson Subdivision Plan under RSA 477:26 regardless of whether the explicit terms of Note 12 are included in the Deed.

25. Under the scope of Easement created both by Deed and the 2005 Henderson Subdivision Plan, the Easement at issue on Lot 1-0 is limited to a single lot and one buildable location and it was unreasonable and in error for the Barrington Planning Board to find access to the back land for two lots across the Easement.

WHEREFORE, the Plaintiff prays that this Honorable Court:

- A. Grant the Motion to Reconsider and reverse the approval granted by the Barrington Planning Board for a two (2) lot Subdivision due to the lack of access from the Easement at issue which is restricted to one lot and one buildable location.
- B. For such other and further relief as may be deemed just.

Respectfully submitted,
CANDICE K. HARVEY
By Her Attorneys
CASASSA LAW OFFICE

Dated: November 12, 2021

By: 

Daniel R. Hartley, Esquire
459 Lafayette Road
Hampton, NH 03842
(603) 926-6336
dhartley@casassalegal.com
NH Bar ID: 8792

CERTIFICATE OF SERVICE FOR E-FILED CASE

I state that on this date I am sending a copy of this document as required by the rules of the court. I am electronically sending this document through the court's electronic filing system to all attorneys and to all other parties who have entered electronic service contacts (email addresses) in this case. I am mailing or hand-delivering copies to all other interested parties.

Dated: November 12, 2021


Daniel R. Hartley, Esquire