

1 **TOWN OF SUNAPEE**

2 **ZONING BOARD**

3 **JUNE 3, 2021**

4 Chairman Simpson called the meeting to order at 6:01 pm

5 Chairman Simpson read the Governor's Executive Order "Due to the COVID-19 situation and in
6 accordance with Governor Sununu's Emergency Order #12, pursuant to Executive Order 2020-04 and
7 extensions of Executive Order 2020-04, this Board is authorized to meet electronically. The public has
8 access to contemporaneously listen and participate in this meeting through electronic online video
9 conferencing at <https://zoom.us/> with Meeting ID 979 9537 1537 and Passcode 705609, or by telephone
10 by calling (929) 205 6099."

11 A roll call of members present was taken.

12 **MEMBERS PRESENT BY VIDEO:** Jeffrey Claus, Vice Chair; David Munn; Jim Lyons; Clayton Platt; Jamie
13 Silverstein, Alternate; Carol Wallace, Alternate; Michael Marquise, Planning & Zoning Director

14 **PRESENT IN THE MEETING ROOM:** Aaron Simpson, Chair; Melissa Pollari

15 **ALSO PRESENT BY VIDEO:** Anthony DiPadova; Chris Eldredge; Laura McCrillis Kessler; Norman Skantze;
16 Brad Weiss; Paul Larocque; Barry Schuster; Susan Chiarella; Michael Chiarella; Janice Bernardi; Duane
17 Delfosse

18 **Vice Chair Claus made a motion to appoint the two alternates to sit on the case. Mr. Munn seconded**
19 **the motion. The motion passed unanimously.**

20 **CASE ZBA: 21-13: PARCEL ID: 0140-0026-0000, PARCEL ID: 0140-0029-0000 & PARCEL ID: 0140-0025-**
21 **0000: SEEKING A VARIANCE FROM ARTICLE III, SECTION 3.10 TO PERMIT A REDUCTION OF LOT SIZE**
22 **FOR PARCEL ID: 0140-0026-0000 FROM 1.80 ACRES TO 1.10 ACRES WHERE 1.50 ACRES IS REQUIRED.**
23 **SALLY M ELDREDGE 1997 REVOC TRUST & JOHN C. MCCRILLIS REVOC LIVING TRUST; 10, 12, & 18**
24 **BURKEHAVEN LN; RURAL RESIDENTIAL ZONE**

25 Chairman Simpson asked if the applicant or any interested parties had anything that they think the
26 Board should hear.

27 Attorney DiPadova said that this is an area variance and not a use variance. The area variance is
28 necessary to accomplish the owners' goals and that is a hardship criteria for an area variance. The
29 Board may disagree that this area variance is the best one, but the test is if an area variance is required
30 and it is in order to meet the use.

31 Chairman Simpson closed the meeting to public comments.

32 Vice Chair Claus said that he fails to see the hardship as the applicants stated they are using the property
33 as it stands now. He does not see the hardship for them not to use the property. Chairman Simpson

asked and Vice Chair Claus said that everything else but the spirit of the Ordinance might not be met with the creation of the lot by the lake but he struggles with the hardship.

Ms. Silverstein said that on a personal level she can appreciate the intention but as a Zoning Board they are challenged to provide relief based on certain criteria. As Vice Chair Claus stated, she does not think the burden of hardship has been met because it is not a situation that would prohibit the owners from using the property.

Ms. Wallace said that on Variance 21-13 they are proposing going from a conforming lot to a non-conforming lot; on 21-14 they are going from slightly non-conforming to more non-conforming; on 21-15 they are going from non-conforming to more non-conforming; and on 21-16 it is expressly forbidden. She also agrees that the hardship aspect has not been proven.

Mr. Munn said that he thinks the Board members have expressed the point that the Board agrees that this is the correct way to do it but that the law forbids the Board from evaluating it with a hardship. As the applicants have stated, there is not a hardship in its existing condition.

Chairman Simpson said that he does not think there is anything that prevents the lots from being used currently that would justify the adjustments to the properties; however, if the lots were vacant, he might have a different opinion. He thinks that this should be brought to the Planning Board's attention and suggest they consider an amendment for what appears to be a reasonable adjustment to property boundaries. However, on its face it does not meet the hardship criteria.

Vice Chair Claus made a motion to approve Case ZBA 21-13: Parcel ID: 0140-0026-0000, Parcel ID: 0140-0029-0000 and Parcel ID: 0140-0025-0000, seeking a Variance from Article III, Section 3.10 to permit a reduction of a lot size for Parcel ID: 0140-0026-0000 from 1.80 acres to 1.10 acres where 1.50 acres is required. Mr. Munn seconded the motion. Chairman Simpson said that the motion was made in an affirmative and wants to remind the Board that they all talked about hardship being a reason not to approve the application though they can change their mind if they would like. **A roll call vote was taken: Mr. Munn voted no; Vice Chair Claus voted no; Ms. Wallace voted no; Ms. Silverstein voted no; Chairman Simpson voted no. The motion failed unanimously.**

Chairman Simpson asked if the applicants would like to continue with the remaining cases in light of the decision on the first application. Attorney DiPadova withdrew the remaining applications.

Chairman Simpson said that he encourages the applicant or Attorney DiPadova to propose a way to rewrite the Zoning Ordinance and if it can be rewritten to reapply.

CASE ZBA: 21-14: PARCEL ID: 0140-0026-0000; SEEKING A VARIANCE FROM ARTICLE III, SECTION 3.10 TO CREATE A LOT OF 0.08 ACRES WHICH IS LESS THAN THE REQUIRED LOT SIZE OF 1.50 ACRES FOR A NEW SHORE LAND LOT (PARCEL 0140-0029-000A). SALLY M ELDREDGE 1997 REVOC TRUST & JOHN C. MCCRILLIS REVOC LIVING TRUST; 10 BURKEHAVEN LN; RURAL RESIDENTIAL ZONE

CASE ZBA: 21-15: PARCEL ID: 0140-0029-000A & PARCEL ID: 0140-0029-0000: SEEKING A VARIANCE FROM ARTICLE IV, SECTION 4.33(B)(7)(A)(I) TO PERMIT A LOT TO HAVE LESS THAN THE 200 FT OF

70 **SHORE FRONTAGE REQUIRED (LOT WILL HAVE 130 FT OF SHORE FRONTAGE). SALLY M ELDREDGE 1997**
71 **REVOC TRUST & JOHN C. MCCRILLIS REVOC LIVING TRUST; BURKEHAVEN LN; RURAL RESIDENTIAL**
72 **ZONE**

73 **CASE ZBA: 21-16: PARCEL ID: 0140-0029-0000 & PARCEL ID: 0140-0026-0000: SEEKING A VARIANCE**
74 **FROM ARTICLE IV, SECTION 4.33(B)(6) TO PERMIT PARCEL ID: 0140-0029-0000 TO ACCESS LAKE**
75 **SUNAPEE VIA A SHORE LAND LOT. SALLY M ELDREDGE 1997 REVOC TRUST & JOHN C. MCCRILLIS**
76 **REVOC LIVING TRUST; BURKEHAVEN LN; RURAL RESIDENTIAL ZONE**

77 **Ms. Wallace made a motion to permit the applicants to withdraw Cases ZBA 21-14, 21-15, and 21-16.**
78 **Mr. Munn seconded the motion. A roll call vote was taken: Mr. Munn voted yes; Vice Chair Claus**
79 **voted yes; Ms. Wallace voted yes; Ms. Silverstein voted yes; Chairman Simpson voted yes. The**
80 **motion passed unanimously.**

81 **CASE ZBA: 21-08; PARCEL ID: 0125-0011-0000 SEEKING A VARIANCE FROM ARTICLE III, SECTION 3.10**
82 **TO PERMIT A 6 FT EAST SIDE SETBACK WHERE 15 FT IS PERMITTED FOR A PRE-EXISTING NON-**
83 **CONFORMING LOT (THE EXISTING EAST SETBACK IS 3FT). CATHLEEN SHEA & BRADLEY WEISS; 38 JOBS**
84 **CREEK RD; RURAL RESIDENTIAL**

85 Chairman Simpson said that the Board received a 38-page packet of information mid-day before the
86 meeting and asked if any of the Board members had a chance to review the packet.

87 Mr. Lyons said that he has not had a chance to review the packet; he glanced at it but given the
88 complexity of this case, he has not had a chance to digest it.

89 Chairman Simpson said that someone on the Board can motion to continue the case or the Board can go
90 ahead.

91 **Mr. Lyons made a motion to continue to the case. Ms. Wallace seconded the motion.** Ms. Silverstein
92 said that she would like to propose that if the Board is going to get at a package, which is appreciated as
93 she likes the background information, that they be given at least five business days to review it and give
94 the applicant the time that is deserved. Chairman Simpson said that the Board may need to amend the
95 Rules and Procedures as he does not know what it specifically says. Mr. Lyons said that there is a
96 problem as it seems to him that that for initiating certain appeals, the applicant has a fixed period of
97 time and if the Board drafts a new Rule, they obviously cannot contradict whatever that fixed period of
98 time is. He does not think that would pertain in this case since it is a continuation of a continuation,
99 however, he does not know the rules well enough to be able to say. Chairman Simpson said that the
100 Rules and Procedures say, "completed applications with the accompanying plans and exhibits shall be
101 made available to Board members, not less than five days prior to the scheduled meeting".

102 Attorney Schuster said that he apologizes for submitting the package late; however, the package
103 includes: the Zoning Board of Adjustment Handbook, which is a letter the Board already has; a letter
104 from Steve and Jen McCalmont, which he thinks that the Board had; the Shoreland Permit, which the
105 Board had; and the letter and resume from Norm Skantze, which the Board had as part of the motion for

rehearing. Other than his cover letter they did not intend to provide any new factual matter that would change anything. Chairman Simpson said that there also looks to be other new information as well. Mr. Lyons said that there does look to be new information or that things are phrased differently. Chairman Simpson said that the majority of the information may be new but there are some things different and asked the Board if they think the case should be continued. The applicants have been before the Board before and he does hate to see cases linger as it makes things more difficult later. Ms. Silverstein said that she would like to ask the applicant as the Board did not have a chance to go through to differentiate between old information as well as new information in the 38-page document. Chairman Simpson said that there is a motion on the floor and that the Board may be remiss to not be able to absorb any new information in the packet. Vice Chair Claus said that he sympathizes and does not want to delay this anymore and asked what new information is in the packet. Chairman Simpson said that the representation from Attorney Schuster is that there was just a couple of new letters in the packet but he is not sure that is entirely accurate. The Board also has to consider the original packet as part of the presentation. Ms. Wallace said that she does not feel comfortable discussing something that the Board has not had the chance to review. It has been submitted into the record so ostensibly the Board would have had time to review it and the Board's decision would be based on what had been submitted. She is not comfortable making a decision without having the benefit of looking at what has been submitted. Attorney Schuster said that he has not spoken to the owners but he would prefer the Board have time to review the materials, they are anxious to proceed but do not want to be in a position where the Board is not familiar with the materials. Mr. Weiss said that he agrees with Attorney Schuster that they want the Board to be able to look at all the materials. Chairman Simpson explained that if the Governor's Executive Order expires there will need to be a quorum to meet at the Town Office but everyone else can participate via Zoom still. **A roll call vote was taken: Mr. Munn voted yes; Mr. Claus voted yes; Vice Chair Claus voted yes; Chairman Simpson voted yes. The motion passed with four in favor.**

There was a discussion regarding holding another June meeting.

CASE ZBA: 21-17; PARCEL ID: 0136-0051-0000; SEEKING A VARIANCE FROM ARTICLE III, SECTION 3.10 TO PERMIT A 6 FT SIDE SETBACK WHERE 10 FT IS ALLOWED FOR A PRE-EXISTING, NON-CONFORMING LOT (THE CURRENT SETBACK IS 4 FT 8 INCHES); CHARLES S. MORRISON II REVOC TRUST; 68 BIRCH POINT RD; RESIDENTIAL ZONE

CASE ZBA: 21-18; PARCEL ID: 0136-0051-0000; SEEKING A VARIANCE FROM ARTICLE III, SECTION 3.10 TO PERMIT A NEW STRUCTURE TO BE BUILT WITHIN THE 50 FT FRONT SETBACK BEYOND THE ENVELOPE OF THE PRE-EXISTING, NON-CONFORMING STRUCTURE (CURRENT STRUCTURE IS 18 FT 7 INCHES FROM CENTERLINE, PROPOSED STRUCTURE IS 27 FT 11 INCHES FROM CENTERLINE) CHARLES S. MORRISON II REVOC TRUST; 68 BIRCH POINT RD; RESIDENTIAL ZONE

Chairman Simpson asked and Mr. Platt was not present on the Zoom call.

Vice Chair Claus made a motion to appoint Jamie Silverstein as a voting member for the hearing. Mr. Munn seconded the motion. A roll call vote was taken: Mr. Munn voted yes; Vice Chair Claus voted yes; Mr. Lyons voted yes; and Chairman Simpson voted yes. The motion passed unanimously.

Jeremy Bonin and Paul Larocque of Bonin Architects presented the cases on behalf of the applicant.

Mr. Bonin said that there are two plans, the existing conditions plan and the proposed conditions plan. Both plans show the existing garage that is over the property line on the front setback and within the Town's right of way for Birch Point Rd. The existing conditions plan also indicates that the garage is within the defined side setback, which is what the second variance is for. The pre-existing impervious area is 35.7% and the unaltered state calculation area of 940 square feet. The proposed conditions plan shows there is a net reduction of slightly over 1% in impervious area, going to 34.5% and the unaltered area remains the same at 940 square feet. The front setback is being corrected so the proposed building will be entirely within the Morrison's property and no longer in the Town's right of way. It will also be moving 2 ft further away from the shared property line between the Chiarella's and the Morrisons. The garage is being proposed to be 6 ft approximately away as opposed to the current 4 ft. The variance is because it would still be non-conforming.

Mr. Bonin said that for the hardship, the site is encumbered by having a building that is not on the applicant's property is quite a hardship. Secondly, the property is pre-existing and non-conforming and it has less than the prescribed road frontage. Between the garage itself, property setbacks, and the driveway to access the house, the hardship is there is not a lot of room for all those things to coexist and meet the side setbacks. The third hardship is that the Town's property in the center of the Birch Point Circle has a culvert going under Birch Point Lane that is dumping pretty much right on to the pin line between the Chiarella's and the Morrison's property and then immediately heads towards the center of the Morrison's property, then underneath their driveway and continues its flow downhill into an open culvert. The proposed design maintains that culvert from the Town standpoint; continues it along the side of the garage in a 12-inch pipe, then opens into an open ditch with an appropriate centerline and then dumps it back into a 12-inch culvert under their driveway. This has been approved by the Town and the Town has presented the applicants with a maintenance proposal that would basically stay with the property that those culverts and culvert heads inlets and outlets be maintained by the property owner, which the Morrisons are already doing. The intent with the design was to pull the garage as far away as they could reasonably from the property line shared with the Chiarella's and still allow room for a plow to go by the garage and to address the drainage coming from across the street.

Mr. Bonin said that for public interest there is no further hardships done by moving the garage further into the property in both directions. For the spirit of the Ordinance, the setbacks were set to be appropriate distances from abutters and they are seeking the two variances because they cannot quite meet but they are bettering both. For substantial justice, there is a balance as there is no hardship imposed to abutters or Sunapee; if anything, they are correcting a couple of deficiencies between the property and the Town as they are moving the garage off Town property and are bettering the drainage coming off the Town's property. The surrounding property values would not be diminished because they are bettering the drainage situation and making both setbacks more conforming. The correction of

181 the outlet effects the Chiarella's as well and Horizon's Engineering has worked with them and submitted
182 a PBN for the impact to their property where they need to regrade for the culvert and would be
183 impacting their property with the excavation.

184 Mr. Bonin said that they submitted the Shoreland application three weeks ago and it is currently under
185 review so they are expecting it within the next week. Chairman Simpson asked and Mr. Bonin said that
186 it is Application Number: 2021-01468 dated May 12, 2021 and is currently listed as "under technical
187 review".

188 Chairman Simpson asked and Mr. Bonin confirmed that the existing building is a garage and that they
189 have submitted photos of the existing garage. Chairman Simpson asked and Mr. Bonin said that they
190 are putting in a two-bay garage with one door and they are requesting living space above the garage
191 which is why they need a special exception.

192 Chairman Simpson asked if there is a survey on file with the Town. Mr. Bonin said that there is a site
193 plan per the Horizon Engineering plan. Chairman Simpson said that under NH law that is not a survey, it
194 could be based on a survey but it is not a survey. The Board does not require a survey but they do
195 recommend one, especially if the property is on the lake as the concerns on lakefront lots are that there
196 could be latent rights of way and things like that. Mr. Bonin said that the only thing the plan is missing is
197 the stamp, there is a note that the plan is based on a field survey. He is sure that if the Board requires a
198 survey Horizon Engineering could submit one. Chairman Simpson asked and Mr. Bonin confirmed that
199 the site plan is based on a survey that was completed in November 2020.

200 Chairman Simpson asked if there is anything else that Mr. Bonin or Mr. Larocque would like to present.

201 Mr. Bonin said that they reviewed that the pre-construction impervious area is getting better and the
202 unaltered area is remaining the same; the work is outside the 50 ft setback; Horizons has provided a
203 Shoreland Impact Exhibit that is blown up on Sheet C-2.1 that shows the erosion controls and where the
204 extent of work will be. He believes that everything required is presented.

205 Susan Chiarella, 62 Birch Point Rd, asked what is planned for the upstairs of the building as they are
206 getting a special exception for height and there are some rooms planned above the garage. Mr. Bonin
207 said that it is overflow bedroom space; it will be a guest suite and there will not be a kitchen.

208 Mr. Lyons asked and Mr. Bonin said that they will have plumbing for a bathroom. Mr. Lyons asked and
209 Mr. Bonin said that there is not a bathroom in the existing structure but there is a waste line plumbed
210 into the current garage but it is not used. Mr. Lyons said that the application refers to living space and
211 there is already a residence on the property and it looks as though they are establishing a second
212 residence or a potential for one. Mr. Bonin said that a residence is defined as having cooking facilities,
213 sanitary facilities, and a bedroom and they will not have a kitchen.

214 Ms. Silverstein asked if the variance is related to the height and Chairman Simpson said that they have
215 applied for that under the special exception criteria and the Board will discuss it separately as there is
216 little overlap between the variance and special exception analysis.

Chairman Simpson asked and Mr. Bonin said that he defined a residence by the State's definition. Chairman Simpson asked and Mr. Bonin said that it is the same as a dwelling unit. Chairman Simpson read part of the definition of dwelling unit from the Town's Ordinance that says, "for the purpose of this definition, an independent housekeeping establishment includes the following minimum attributes: space devoted to kitchen facilities for the storage, preparation and consumption of food (including counters, cabinets, appliances, and a sink for washing dishes), space for one or more bedrooms for sleeping, and a bathroom with a tub and/or shower". Chairman Simpson asked Mr. Marquise if he believes that this space will effectively be a second dwelling unit. Mr. Marquise said that this question was asked with the applicant and it is his understanding that without a kitchen facility it would be considered a bunkhouse or extra living space like people have over garages. He did not feel as though it was a dwelling unit and they can ask for floor plans to go into the file to verify this. Chairman Simpson asked and Mr. Bonin said that the conversation that he had was that a kitchen has a stove and some way to prepare food; they will have an undercounter refrigerator and a sink but nothing to prepare food. Chairman Simpson said that people cook with microwaves and hotplates and it would be easy to turn this into a second dwelling unit. Mr. Bonin said that the argument could be made even without the cabinetry; this is not being used as a seconded dwelling unit nor it is proposed as an accessory dwelling unit. The applicants will not be renting the space out; it will basically be used for overflow and the refrigerator for convenience.

Chairman Simpson asked and Mr. Bonin confirmed that the space will be four-season as it will be insulated. Chairman Simpson asked and Mr. Bonin confirmed that the space will have heat and air conditioning.

Mr. Lyons asked if the applicant would consider a restriction that the space solely be used as a bunkhouse. Mr. Bonin asked if Mr. Lyons means that if the variance is approved that it is made conditional on the space never to be used as an accessory dwelling unit. Mr. Lyons said that an accessory dwelling unit is defined as being attached to the primary structure. This looks like the garage is being replaced with a second home or an apartment and he gets concerned when he is told there is plumbing but is not suitable to be lived in 365 days per year because there is not a kitchen and not a lot is needed for kitchen facilities. His concern is that this could become a separate dwelling unit in a district that is supposed to be single family dwelling units. The living space does not help in the application.

Mr. Bonin said that he does not necessarily see the difference if this was attached to the house and called an accessory dwelling unit or not because of the separate entrance; however, having another family on the property would entail renting. The Morrison's would not be opposed to a condition as the space is intended for overflow guests. Mr. Lyons asked and Mr. Bonin confirmed that it could be conditioned to be sleeping quarters for overflow guests.

Chairman Simpson said that there are conditions that he would like to see: compliance with a Shoreline Permit, the production of a stamped survey, a submission of as-built plans, establishing that there is not a dwelling unit and conditioned maintenance of that condition, and no rental of the unit. Mr. Bonin said that they would not have a problem with any of those conditions. Mr. Bonin asked if they would have to

256 come back before the Board as a building permit would not be able to be issued without the conditions
257 being met. Chairman Simpson confirmed that those are not conditions that have to be met before
258 coming back to the Board, they would be conditions of approval.

259 Mr. Lyons said that he does not want to grant a variance for a second dwelling unit. Chairman Simpson
260 said that they would have to comply with those conditions or the variance is not granted. Mr. Lyons said
261 that he wants the space to solely be used for overnight guests. Chairman Simpson said that could be an
262 additional condition. Mr. Lyons said that there is not currently plumbing and he does not want
263 plumbing added and there is not currently a kitchen and he does not want a kitchen in there; it is
264 reasonable to put a couple of bunks in but that is it. Chairman Simpson asked and Mr. Lyons confirmed
265 that he does not think plumbing should be allowed to be put into the building. Mr. Bonin said that the
266 conditions would be fine but the Morrisons would like the restroom as it does not make sense for
267 overnight guests to have to travel over 100 ft to the main house to use the restroom.

268 Mr. Bonin said that the signed waiver for the maintenance of the culvert must be supplied to the Town
269 so there is already that condition.

270 Ms. Silverstein asked if the conditions would be tied to the deed. Chairman Simpson said that they
271 would not, they would be tied to the property. Ms. Silverstein asked if the fact that the unit cannot be
272 rented could be in the deed. Chairman Simpson said that Mr. Lyons brought up enforcement and
273 making it conditioned to be part of the deed is one thing because it is a slippery slope; however, he is
274 not sure if it is favored or not. He has seen this done in the past but has been told that it is not an
275 appropriate remedy though the Board can ask the Town's attorney. Mr. Marquise said that there have
276 been conditions placed in deeds in the past and he would favor it because there have been times where
277 someone bought a property and thought they could convert the bunkhouse to a dwelling unit and could
278 not; if it had been in the deed, they could not have made the excuse that they did not know it could not
279 be done. Ms. Silverstein said that the applicant's intentions have been disclosed and they are willing to
280 meet the conditions but she does not know how they can be enforced. Chairman Simpson said that this
281 would become a restriction on the use that would prevent them from using the building on anything
282 other than what is approved.

283 Mr. Lyons said that they are unwilling to not have a bathroom. Chairman Simpson said that they would
284 prefer to have a bathroom and for a bathroom they would have to file for an attachment to Water &
285 Sewer so there are fees. Mr. Lyons said that is not the question, the question is if there could ever be a
286 second residence on the property and he thinks the Board must be careful not to create a possible
287 situation either in this case or in future cases.

288 Chairman Simpson asked, if the Town's council agrees, if the applicant would entertain an easement or
289 restrictive covenant to record at the Registry of Deeds to prohibit something that is a concern. Mr.
290 Bonin said that he believes variances go with the land, not the owner. Chairman Simpson said that they
291 do. Mr. Bonin said that it does not matter if the Morrison's sell to someone else as the variance is
292 granted and the conditions remain intact; if the Board puts a condition of approval that the space is not
293 rented then it goes with the property.

294 Mrs. Chiarella said that Michael Chiarella is an attorney and is sitting next to her; the variance does go
295 with the land and Mr. Chiarella cannot see why they would need to have the condition as part of the
296 deed. Chairman Simpson said that this is something that Mr. Marquise said had been done in the past
297 and it sounds like it is criteria the Board is looking for due to the potential creep in use to prevent the
298 next property owner to come forward and say that there has been a kitchen in the space for a number
299 of years and then a new Board approving it. He appreciates why putting it into a deed would help avoid
300 a future owner from coming forward.

301 Mr. Lyons said that it is easy to add a kitchen after there is already a bathroom.

302 Ms. Silverstein asked how wide the driveway will be. Mr. Bonin said that it is the existing driveway
303 width that is just 10 ft; part of the driveway will be resurfaced with pervious pavers but the driveway will
304 be the same width and location as the existing driveway.

305 Chairman Simpson asked the size of the existing garage. Mr. Larocque said that the existing garage is
306 640 sq ft. Chairman Simpson asked and Mr. Larocque said that the footprint of the proposed garage is
307 724 sq ft so the total square footage it is close to 1,100 square feet. Chairman Simpson asked and Mr.
308 Bonin said that FFE means finished floor elevation and is for grading.

309 Ms. Silverstein asked if emergency equipment can get down the 10 ft driveway past the new garage.
310 Mr. Bonin said that the driveway is the same width as it currently is and there is shoulder space to either
311 side. The only large tree is right at the corner of the driveway and garage and it will remain there so it is
312 the only pinch point. Mr. Lyons said that there is little area on the left; the other problem would be ice
313 build up but the culverts look to be in good condition.

314 Mr. Lyons said that the garage is up on a plateau and it looks like the plan is to extend it to the bend so
315 there will be fill added which may increase the flow into the culvert as there will not be any absorption
316 in the corner. Mr. Bonin said that there will be a net reduction because they are replacing a bunch of
317 impermeable surfaces with permeable in the area of construction and are stopping a lot of what is
318 washing down the driveway currently by putting the permeable pavers and swale in. The other side of
319 the building towards the Chiarella's has an existing swale and the area is being regraded a little to
320 correct the steepness of the lot. Mr. Lyons asked if they think that they may inadvertently create a flow
321 into the Chiarella's property with the higher structure. Mr. Bonin said that the height of the structure
322 does not necessarily increase the flow and they are controlling the roof runoff and are bettering the
323 situation as the current garage does not have any gutters; they will be taking care of the water that is
324 not being taken care of now. Mr. Lyons asked and Mr. Bonin confirmed that all the water on the
325 property will be taken care of on the property. There was further discussion regarding this matter.

326 Mrs. Chiarella asked and Mr. Bonin explained where the windows will be placed in the proposed
327 structure.

328 Chairman Simpson said that Mr. Bonin said that the access to the driveway will not change but by
329 moving the building back they are narrowing it to exactly 10 ft for vehicles. There is a maple tree that is
330 directly opposite the building from the driveway and it seems like they are narrowing the ability for

331 vehicles to maneuver. Mr. Bonin said that they turned the building so it does not get closer to the
332 driveway.

333 Chairman Simpson asked and Mr. Bonin said that the distance for the setbacks is stated in the
334 application but are not on the plan as it was for the Shoreland Permit application. Mr. Bonin said that if
335 the Board is requiring the survey be stamped and submitted, they can include the distances on the
336 survey.

337 Chairman Simpson asked and there were no additional questions or comments regarding the case so he
338 closed the meeting to public comments.

339 Mr. Munn said that Mr. Lyon's concerns are valid but after getting the explanation from the Town's
340 attorney that the Board has to read the law the way that it says. While it could be turned into a kitchen,
341 that is trying to read something into the law and is not a kitchen. He has no issue with the input that
342 Chairman Simpson said about having a condition that the space never be rented but the variance goes
343 with the property so he does not know why the Board would be concerned about it becoming a kitchen.

344 Vice Chair Claus said that he shares Mr. Munn's concern that per the letter of the Ordinance, this would
345 be acceptable. He also share's Mr. Lyon's concern that this is a slippery slope and he knows in other
346 structures where the owners get the Certificate of Occupancy and then change it to be a dwelling unit
347 but he does not think this is something that can be solved at this meeting it should go to the Planning
348 Board to amend the Ordinance to protect against this. The other aspect is the concerns about the
349 Airbnb's in the area and this is a situation where someone in the future could turn it into rentable space.
350 However, he does not think the Board is going to solve this today; the Ordinance is going to have to be
351 rewritten.

352 Ms. Silverstein said that focusing on the hardship, she thinks it has been expressed as the current garage
353 is not on the Morrison's property.

354 Vice Chair Claus said that he agrees with Ms. Silverstein regarding the hardship.

355 Ms. Silverstein said that the applicant has been willing to have a condition either placed in the deed or
356 just staying with the variance so that it is preserved. The applicants have maintained that it will not be a
357 rental unit and they are going to maintain the drainage through the waiver with the Town. They are also
358 willing to provide an as-built plan showing that there is no kitchen. She could not sleep anywhere where
359 there was not a bathroom and that condition does not make sense to her as there is already a waste
360 drain in the building that could have been used at some point in the past.

361 Chairman Simpson said that Ms. Wallace is allowed to participate in the discussion, she just cannot vote.

362 Ms. Wallace asked if dwelling units are addressed in the Ordinance.

363 Chairman Simpson said that in the Ordinance there is a definition of a dwelling unit and there is also a
364 table that explains how many dwelling units are permitted.

365 Ms. Wallace said that is her concern and she would propose getting the Planning Board to add some
366 language in to cover that because the concern about renting and Airbnb is real and that needs to be
367 addressed. Regarding the hardship, she thinks that it has been proven as the building is not on the
368 Morrison's property and encroaches onto another property; moving it back and making it less non-
369 conforming is a good thing.

370 Ms. Wallace said that she does question about the pervious versus impervious covering but thinks it has
371 been addressed. She asked if the square footage of the first floor, which is really what the Board is
372 concerned about, is slightly larger than or significantly larger and if there are some concessions on the
373 pervious surface aspect. Chairman Simpson said that he believes that the applicant said that it is slightly
374 more permissive than existing law. He would assume the Board would have had an application for a
375 variance if it did not meet the permeability calculations. Vice Chair Claus said that he thought Mr. Bonin
376 said that it was a reduction because they are installing impervious. Ms. Silverstein said that it is a 1%
377 reduction. Mr. Lyons said that it is to 34% where 40% is allowed. Ms. Silverstein said that coverage is
378 different from impervious and it looks like it 34.5% post construction and the current is 35.7%. Ms.
379 Wallace asked and Ms. Silverstein explained which plans the calculations are on. Chairman Simpson said
380 that Section 3.20 addresses the permeability requirements and if they are outside the Shoreline and are
381 less the 50%, they are all set. Vice Chair Claus said that they are not outside the Shoreline. Ms.
382 Silverstein said that it is currently non-conforming at 35.7% and they are mitigating it by 1%. Chairman
383 Simpson said that they have not asked for a variance for permeability.

384 Mr. Marquise asked to reopen the meeting and Chairman Simpson opened the meeting to public
385 comments.

386 Mr. Marquise said that when the plans were reviewed it appeared that the impervious area was getting
387 better so the total pervious and impervious is under the requirement; it is the impervious lot coverage
388 which is already over and is getting better. He has always felt that does not need to have another
389 variance, because it is pre-existing. Chairman Simpson said that the setbacks are getting better too so
390 under that logic they would not need to apply for a variance for the setbacks. Mr. Marquise said that is
391 not true as there are places where they are getting better but they are also covering new non-
392 conforming areas which is why the variances are being requested. It is how Section 6.12 was written
393 and the Board has gone through this in the past. In terms of coverage, that is strictly getting better,
394 nothing is being recreated unlike the side and front. Chairman Simpson said that in the past the Board
395 has addressed the permeability issue and it would be easier to grant a variance if it were getting better.
396 Mr. Bonin said that he agrees with Mr. Marquise as that was the discussion that they had as far as what
397 was required for variances. Chairman Simpson said that this could become a condition for approval.

398 Chairman Simpson said that Section 3.10 of the Ordinance gives the maximum residential density of
399 dwelling units and it is one dwelling unit per acre in a residential zone.

400 Vice Chair Claus said that the Town's GIS shows that the lot is less than one half an acre.

401 Chairman Simpson asked and there was no further questions or comments so he closed the hearing to
402 public comments.

Chairman Simpson said that the restriction is that you can only have one dwelling unit per one acre of land in this district. The applicants have not asked for variance and the Town's definition says food preparation area. Vice Chair Claus said that the definition includes something about cabinets and an under-counter fridge does not constitute a kitchen. Chairman Simpson said that the definition says, "space devoted to kitchen facilities for storage preparation and consumption food including counters, cabinets, appliances and a sink for washing dishes". Vice Chair Claus said that there was an amendment added in 2020. Chairman Simpson said that the amendment says, "a bar equipped with a bar-sink and an under-the-counter refrigerator shall not constitute kitchen facilities". Vice Chair Claus said that up to that point he felt that this was a dwelling unit but a bar equipped with a bar sink and under the counter refrigerator does not constitute kitchen facilities.

Mr. Lyons said that they have started with what looks like the garage and they are finishing with what looks like a house as there is a full second floor complete with a dormer. He thinks that if someone were looking at the adjoining properties, they would think this would be two dwelling units and he would adjust his bid for the property accordingly. One of the variance criteria is no diminution of value of surrounding properties and this concerns him as it would affect what he would bid. Also, he does not think that granting the variances would benefit the public interest as it may, in the future, allow somebody to establish a second dwelling where this is not allowed. He agrees that having a building on somebody else's land is a hardship. But he also does not see any substantial justice being done here and it is not within the spirit of the Ordinance to replace a garage with something that somebody might live in.

Mr. Munn said that he thinks that Mr. Lyons is trying to read into what he thinks might happen in the future. However, he thinks that they are clearly benefiting the public and the Town by removing the structure away from Town property. They are also improving the impervious area. The applicants have had no arguments about the conditions to clearly state what this project was designed to do. He looks at how they are presenting the proposal and thinks that is what the Board must vote on, not what they think it might become.

Ms. Silverstein said that she concurs with Mr. Munn as the Board is supposed to be addressing the variance and the variance is the setbacks and the fact that there is a hardship. Chairman Simpson said that the Board also must address the public interest, the spirit in the ordinance, substantial justice, and the value surrounding properties are not diminished; those are also the five criteria. Hardship often takes most of the discussion and he thinks the Board does a disservice by solely focusing on hardship, and oftentimes there are issues pertaining to the spirit of the Ordinance or substantial justice as well as property values and public interest.

Chairman Simpson asked and Mr. Lyons said that as a prospective buyer, this would bother him and would affect how much money he would be willing to pay for this particular property. Chairman Simpson asked and Mr. Lyons confirmed that he thinks that this would diminish the surrounding property values. Chairman Simpson asked if Mr. Lyons thinks that the benefit to the applicant outweighs the harm to the general public. Mr. Lyons said that he thinks the hardship has to do with the position of the current garage. Chairman Simpson said that one of the criteria is if substantial justice is

done. Mr. Lyons asked and Chairman Simpson said that he does not know how long the garage has been there. Mr. Lyons said that the Town has a certain amount of time to complain about it and if they do not then that is just the way it goes. Chairman Simpson said that there is no limit on how long the Town has until they require a building to move because it is the Town. Substantial justice is one of the criteria used to weigh a variance. Mr. Lyons said that all the Board must find is one criterion is not met and the variance cannot be granted.

Ms. Silverstein said that before the Board weighs in on the property values, she would need more market information. She can appreciate that Mr. Lyons said that it would affect his purchase price but without a licensed assessor and without knowing what the other properties have done she is challenged to rely on that commentary. Chairman Simpson said that the cheat sheet says that personal knowledge of the members themselves is something to be considered and that personal knowledge of the members themselves is evidence of anything considered. If Ms. Silverstein disagrees with Mr. Lyon's assessment that is fine but Mr. Lyons can personally say he thinks that this has an impact on property rights and that is his opinion.

Mr. Chiarella asked if he could speak.

Ms. Silverstein made a motion to reopen the hearing to public comments. Mr. Lyons seconded the motion. The motion passed unanimously.

Mr. Chiarella gave some history of his property and the Morrison's property. He and Mrs. Chiarella have spoken about property values and they believe that the new structure will help their property value because they will be moving the garage and replacing it with something that looks more like the house. He has seen many old properties rebuilt and upgraded and believes that it is good for the neighborhood.

Mr. Bonin said that the Morrison's value will go up because the garage will be on their own property and usually when an abutter's property value increases your property value increases as well.

Chairman Simpson asked and there were no additional questions or comments so he closed the hearing to public comments.

Ms. Silverstein made a motion for ZBA 21-17 to permit a 6 ft side setback where 10 ft is allowed for a pre-existing, non-conforming lot where the current setback is 4 ft 8 inches with the following conditions: that the property owner will maintain the drainage pursuant to the Town's waiver for the culvert; there will be no rental of the unit; they will submit an as built plan that affirms that there is no kitchen; they will be compliant with the shoreline permit to be issued by the State; and they will provide a stamped survey will all the dimensions including the setbacks. Vice Chair Claus seconded the motion. Chairman Simpson asked Mr. Lyons if he wanted to add a condition to have a restriction to be by deed or on the plumbing. Mr. Lyons said that he does not need to amend the motion. **A roll call vote was taken: Mr. Munn voted yes; Ms. Silverstein voted yes; Vice Chair Claus voted yes; Mr. Lyons voted no and said that he does believe the proposal will diminish the values of the surrounding properties and that he believes this is setting a terrible precedent from the standpoint of the public**

478 **interest and that it is contrary to the spirit of the Ordinance; Chairman Simpson voted yes. The**
479 **motion passed with four in favor and one opposed.**

480 Chairman Simpson asked if there is any discussion on the second variance request and there was none.

481 **Vice Chair Claus made a motion to accept Case ZBA 21-18; Parcel ID: 0136-0051-0000, seeking a**
482 **variance from Article III, Section 3.10 to permit a new structure to be built within the 50 ft front**
483 **setback beyond the envelope of the pre-existing, non-conforming structure where the current**
484 **structure is 18 ft 7 inches from the centerline and the proposed structure is 27 ft 11 inches from the**
485 **centerline with the same conditions that were set forth for Case 21-17. Ms. Silverstein seconded the**
486 **motion. A roll call vote was taken: Mr. Munn voted yes; Ms. Silverstein voted yes; Vice Chair Claus**
487 **voted yes; Mr. Lyons voted no; Chairman Simpson voted yes. The motion passed with four in favor**
488 **and one opposed.**

489 **CASE ZBA: 21-19; PARCEL ID: 0136-0051-0000; SEEKING A SPECIAL EXCEPTION PER ARTICLE III,**
490 **SECTION 3.50(I) TO ALLOW A PRE-EXISTING NON-CONFORMING STRUCTURE TO BE REPLACED WITH A**
491 **HIGHER STRUCTURE (THE EXISTING STRUCTURE IS 12 FT 10 INCHES AND THE PROPOSED STRUCTURE**
492 **WILL BE 9 FT 10 INCHES HIGHER); CHARLES S. MORRISON II REVOC TRUST; 68 BIRCH POINT RD;**
493 **RESIDENTIAL ZONE**

494 Mr. Bonin said that he would like to propose that the special exception carry the same exact conditions
495 as the variances for simplicity and if there are others that are added, at least everything would be
496 consistent.

497 Mr. Bonin said that if the Board looks at the drawings, one thing to look at is that the height of the
498 structure is relative to the grade; they cannot push the garage down as they move it out of the right of
499 way because that creates a condition where they would be driving steeply downhill into a garage, which
500 is not safe. Realistically, the garage needs to stay at the same level as the apron from Birch Point. As
501 they push the garage onto the Morrison's property, its relative height from grade increases, not
502 necessarily entirely because of the second floor but in part because the grade is dropping away from the
503 building at almost a one to two rate as they pull the garage back. In theory, even if the same exact
504 garage were slid back, it would require a special exception because it is getting taller, but it is getting
505 taller by relative measurement to grade as it exists. In addition to that, they are creating enough height
506 on the second floor for occupancy. The shed dormers are at a 4-1-2 pitch, which is about the bare
507 minimum for asphalt shingles to function well and maintain their warranty. The relative height within
508 the setback is being driven by those two factors. The garage will be in the setback so they require the
509 special exception now that the variances have been approved.

510 Vice Chair Claus asked if Mr. Bonin is saying that the new proposed structure has a height of 21 ft as he
511 is saying that the existing structure is 12 feet tall and the proposed structure will be 9 ft 10 inches
512 higher. Mr. Bonin said that is measured within the setback, which is where they were advised to
513 measure it, and is along the Chiarella's property line as grade falls away and the building is pulled back
514 plus the additional height for the shed dormer on that side. The garage ends up being taller because

515 basically in both directions that the building is getting taller but it has to be measured from the lowest
516 point of grade.

517 Ms. Silverstein said that the way that it is worded it seems to be 27 ft high. Mr. Bonin said that the
518 garage is 24 ft 10 inches where the height is above the grade in the setback on the Chiarella's side of the
519 property. It is impacted because the culvert is there and it is recessed from grade by necessity. Vice
520 Chair Claus said that he thinks the number Ms. Silverstein is looking at is calculated looking at the
521 highest point and the lowest point around it but that Mr. Bonin is saying that what is in the side setback
522 is 24 ft 10 inches. Mr. Bonin said that is the measurement provided because that is what is being asked
523 for in the special exception; it is at the point where the garage crosses the setback line. Vice Chair Claus
524 asked how the proposed structure is only 9 ft 10 inches higher than the existing as it is more like 12 ft.
525 Mr. Bonin said that they are measuring the old building in the location where it is not going to be
526 anymore and that is hard to do. Going back to the Horizon's plan, where the existing garage is
527 measured, its height is different because they are not going to be in that location anymore. Vice Chair
528 Claus said that he does not know if the Ordinance addresses what Mr. Bonin is trying to identify, it
529 simply states the height difference from the existing to the proposed. Chairman Simpson said that he is
530 not sure that this would be a pre-existing non-conforming structure to undergo a vertical expansion or
531 be replaced with a higher structure because he does not think they are building on the same footprint or
532 same location. Therefore, he is not sure they even qualify for a special exception. Mr. Bonin said that he
533 and Mr. Marquise had this discussion and the emails are included in the packet. The 24 ft 10 inches was
534 pointed out as a dimension that is applicable to the special exception. Chairman Simpson said that they
535 are talking about vertical expansion, and this is not a vertical expansion of in the same place, nor is it a
536 vertical expansion of an existing building so he is struggling with how this will qualify as a special
537 exception. Mr. Marquise said that some of this has been discussed with the Town's attorney but it is up
538 to the Board and how they feel they would want to put this special exception with the previous
539 variances. The fact that the Board has approved the variances to recreate where this building is and he
540 does not know if that allows them to move that towards the special exception because now, they are
541 vertically expanding something that has a variance. Chairman Simpson said that they are not expanding
542 the garage, they are building a new building in a new space. Mr. Marquise said that the Ordinance also
543 talks about a replacement and the garage will be replaced and it is either to vertically expand it "as is" or
544 to replace it. Chairman Simpson said that it is a non-conforming structure, it is a new structure; the
545 Ordinance does talk about replacement with a higher structure, but it has got to be in the same location.
546 Mr. Marquise said that he reads it as an either / or, not and as it says it "is to either undergo vertical
547 expansion or be replaced with a higher structure" and it is being replaced with a higher structure. He
548 agrees that if they were moving it horizontally they would not be allowed to raise it, however, by
549 granting the variances the Board has addressed the horizontal issue. Chairman Simpson said that
550 criteria eight says "such enlargement or replacement, in the ZBA, is consistent with the intent of the
551 Ordinance". He is not sure that this is consistent with the intent of Section 3.50. He appreciates Mr.
552 Marquise's interpretation but it is the Board's decision to make.

553 Vice Chair Claus asked Mr. Marquise how the Board is to apply number four of the special exception
554 criteria as it looks as though the garage is 12 ft higher and not 10 ft higher. Mr. Marquise said that he

555 thinks that this is something that needs to be addressed by the applicant as when he sees that it is 9 ft
556 higher, he is assuming that is 9 ft within the non-conforming area. He thinks that is what the applicant is
557 saying but may be wrong; he thinks that the 12 ft is occurring in a conforming area and the 9 ft in a
558 conforming area. Mr. Bonin said that is the issue they struggled with because they are measuring from
559 something where it is to somewhere it is proposed to go and the special exception is not really
560 addressing that. The difference is that if they are in the same footprint the measurements remain the
561 same but when they move the footprint on the ground is falling away, the measurements are not
562 actually relative to one another which is difficult. The dimension that they kept in there is what the
563 actual height is along the Chiarella property line so that when the Board discusses the actual height, it
564 would be best not to reference the differential height but what they have defined as the height so it is
565 held to that height.

566 Ms. Silverstein asked the height of the garage from the lowest point to the peak. Mr. Bonin said that he
567 can give the Board that height but that is not the height the special exception asks for as it is for the
568 height within the setback.

569 Vice Chair Claus said that he disagrees with Mr. Marquise as it seems as though this is using the special
570 exception criteria which clearly states that a structure cannot be higher than 10 ft from the existing
571 structure. But then looking at the table, it says that structures are allowed a reduced side or rear
572 setback due to lot size, a portion of the structure in the area of reduced setback shall have a maximum
573 height of 25 ft so it looks as though they have fulfilled that requirement as it is less than 25 ft. However,
574 he does not see where the special exception says they must measure within just that that side setback.
575 To him they are applying the maximum height measurement to this. Mr. Marquise said that is why the
576 Zoning Board has an opportunity to decide. However, Section 3.10 is a whole separate requirement that
577 does not have anything to do with this as this is only the requirement where without an exception, there
578 is an allowance of a reduction in the setback so if there is a small lot size, instead of the setback being 25
579 ft, it can go to 15 ft and that is where you must meet the 25 ft. This does not apply here to this
580 exception. Vice Chair Claus said that it sounds like is Mr. Bonin is applying Section 3.10 to this as he is
581 only taking the measurement in that that setback when in fact the maximum height should be applied to
582 this special exception. Mr. Marquise said that is a determination but he does not think that the
583 exception addresses that directly. He thinks that what they have tried to do is to have the 10 ft is
584 occurring in the non-conforming area, which is where the exception is being asked for. Mr. Bonin said
585 that what Mr. Marquise is saying is correct as they are addressing the extension of the height within the
586 setback to be under that 25 ft. However, outside of the setback, it falls back to normal height
587 restrictions which was their understanding. He started the process with a conversation with Mr.
588 Marquise and moved on from there but the Board could see it differently.

589 Ms. Silverstein asked if the height can be within the 25 ft height restriction instead of 25 ft 10 inches.
590 She said that she is still trying to determine if the height is 27 ft or 24 ft and asked what the height is
591 from the lowest point to the highest point. Mr. Bonin said that on the street side it is 22 ft 8 inches at
592 the highest point. On the low side, they do not have it measured to highest point, only to where it is
593 intersecting the setback; however, it is probably around 27 ft. Ms. Silverstein said that it was written on
594 one of the papers to be about 27.5 ft and asked if it could be reduced to 25 ft. Mr. Bonin said that if that

were a condition of approval, they would have to meet it. Chairman Simpson said that if they do not meet all the criteria of the special exception then the Board cannot grant it. Vice Chair Claus agreed and said that he thinks this should be a variance request due to the measurements on the plans submitted and it is more than 10 ft above the existing structure, which does not meet the fourth criteria of the special exception.

Mr. Bonin said that he went through the proper procedure with the Town and discussed what was needed for variances and special exceptions and was directed towards what they did. He asked that in order to not create an onerous situation for the clients if it is possible that the special exception be considered with a condition of an adjusted height as opposed to a resubmittal and rehearing which would probably be over a month in time. He asked if the Board feels differently than what was submitted based on the information they were given by the Town if the height is kept to 10 ft and adjusted to 25 ft total if they would meet the requirements and have it as a condition of approval.

Vice Chair Claus said that he reads the special exception requirement it says that the ZBA may allow a pre-existing non-conforming structure to undergo vertical expansion or be replaced with a higher structure provided that. To him, he is not sure that the existing structure is part of this equation anymore as once the Board approved those variances from the dimensional control horizontal control, now there is a new structure. This would mean that it would simply fall under the overall height and because the Board has allowed a reduced side setback, the structure would have to fall under 25 ft in the setback, which it does. The rest of the structure would just have to conform to the 40 ft maximum height requirement.

Chairman Simpson said that he looks at the intent of the Ordinance as applying to a pre-existing structure on or about the footprint. If you were to move the structure entirely in some other location on the property within a different required setback issue but a different location, it would not qualify for a special exception as it is against the spirit of the Ordinance. He does not think that this meets the criteria for number four or number eight.

Vice Chair Claus said that the fact is that the proximity of this new garage is close to the existing; if they tore down this garage but moved it to the other side of a lot and were asking for these variances for the horizontal relief, and they were approved, he questions if height is even an issue outside that reduce side setback that portion would have to meet 25 ft height in the setback. He thinks that it almost seems like it becomes a non-issue. Mr. Bonin said that that is how this was approached when they were discussing how to approach the Board with this project.

Mr. Marquise said that the Board has approved a variance for the two setbacks. He suggested the height on the exception because he was thinking horizontally, however, if the Board in its variance approval is looking at this building as a two-story building, the height is seemingly moot at this point if they stay under 25 ft in the reduced side setback.

Chairman Simpson said that the Board has a special exception addressing height and he is going to have a hard time finding the criteria are established. Mr. Marquise said that the Board could decide that the special exception is not necessary and that the height issue has been addressed.

633 Mr. Bonin said that the direct abutter, is most impacted by the height and that was somewhat
634 addressed in the variance process with windows, light trespass, and those types of things. He thinks
635 that the variances did start to take these things into consideration even though they did not address the
636 height. However, the variances have been approved and the new location has been approved which
637 addresses the first sentence of the Ordinance as it is replacing a structure with a higher structure.

638 Ms. Chiarella said that she does have concerns about the overall height of the project and would like to
639 know exactly how many feet it will be.

640 Mr. Bonin said that within the setback it is 24 ft 10 and overall height from the entry side, which is the
641 opposite side and where the door is, it is 27 ft. Vice Chair Claus asked and Mr. Bonin confirmed that the
642 existing structure, measured from the roadside to the peak, is 12 ft. Mr. Bonin said that was how he
643 started the process, because the building is basically in the right of way from the street, that sets the
644 height for the garage to function. As the building slides building back and land falls away, everything gets
645 taller.

646 Ms. Silverstein asked if a special exception is needed if within the side setback as the structure is under
647 25 ft and the overall height is under 40 ft. Chairman Simpson said that he thinks that there are different
648 criteria. Ms. Silverstein said that they do not even need a variance. Chairman Simpson said that they
649 have a preexisting non-conforming structure. The 25 ft is a maximum height allowed which they can
650 seek a variance from; it is a section that was written that could never be enforced because it is always
651 going to be under 25 ft.

652 Vice Chair Claus said that he thinks think that this is no longer a pre-existing non-conforming structure
653 as it is bigger and moved; he think it is a new structure now. Chairman Simpson asked and Vice Chair
654 Claus confirmed that it is 27 ft from lowest to highest point maximum height and maximum heights 40 ft
655 in that in that Zone. Chairman Simpson said that it is except when they do not meet the setback
656 requirements. Vice Chair Claus said that then it is a maximum of 25 ft and they have shown it is 24 ft 10
657 inches. He thinks if this building would have been proposed on the other side of the driveway, and the
658 Board would have approved those same horizontal dimensional controls, the height is a moot point,
659 except for what portion falls in the reduced side setback. He thinks as Mr. Marquise said, the Board has
660 the ability to basically say they do need this special exception.

661 Ms. Silverstein said that she would withdraw the special exception application and at that point they will
662 comply with the current Zoning Ordinance, which is 25 ft within the setback and 40 ft within the regular
663 Zoning requirements. Vice Chair Claus asked if the Board has the ability to withdraw the application or if
664 they need to vote on it. Mr. Marquise said that is the cleaner way because that way it is understood
665 from an administrative standpoint, that it is the Board's intent that the two variances have cleaned this
666 up, and a Certificate of Zoning Compliance can be issued. He has said in the past that the Board has the
667 right in every case to determine if it a case is necessary.

668 Ms. Silverstein asked and Mr. Bonin said that this decision would be fine with them.

669 Chairman Simpson said that without voting on this they do not have to build the building as presented,
670 it could be built higher. Mr. Bonin said that they could build it 2 inches taller but would not do that.
671 Vice Chair Claus said that the applicants would have the potential outside the reduced side setback to go
672 up to the maximum of 40 ft height. Chairman Simpson said that the prior variances approvals were not
673 conditioned on the plans as submitted. Ms. Silverstein said that they could add a condition to the
674 current special exception. Chairman Simpson said that he thinks that the Board wants to consider
675 whether the application for the special exception is necessary. Ms. Silverstein asked if the Board could
676 make a motion that the special exception is not necessary with the understanding that the height will
677 conform with the side setback to be less than 25 ft. Chairman Simpson said that might be an
678 inappropriate condition. Mr. Bonin said that he thinks if the special exception is not necessary, they are
679 held to the plans as approved through the variance and the heights are in the drawings and none of the
680 dimensions can be changed without coming back to the Board.

681 Chairman Simpson asked and there were no additional questions or comments so he closed the hearing
682 to public comments.

683 Chairman Simpson said that there are two options for the Board. The first is to find the applicants do
684 not need the special exception and the second is to consider the special exception.

685 Vice Chair Claus said that he is not comfortable approving the special exception as he thinks it fails on at
686 least at least number four and possibly number eight. He would like to do this in a cleaner way and to
687 just annul this requirement.

688 Mr. Munn said that Mr. Bonin made the clear point that there would be no logical reason to go beyond
689 the 25 ft per the plans submitted and he does not have an issue with the way they have been submitted
690 and Mr. Bonin also agrees to all the other conditions and Mr. Bonin must build as he designed it and it
691 fits within the Zoning requirements at that point.

692 Mr. Lyons said that he does not believe the criteria for the special exception are met but there is a
693 petition for a special exception and he thinks that the Board must act on it.

694 **Ms. Silverstein made a motion for Case ZBA 21-19 the Charles S. Morrison II Revoc Trust property**
695 **located at 68 Birch Point Rd; Parcel ID: 0136-0051-0000 that a Special Exception is not needed for the**
696 **structure to allow the pre-existing non-conforming structure to be replaced with a higher structure.**
697 **Mr. Lyons seconded the motion.** Chairman Simpson said that this is a tough question and he sees the
698 point that by effectively granting the variances the Board has waived the need for the special exception.
699 If the order had been reversed, however, it would still be required. He thinks that this is an issue with
700 identifying height properly in the Ordinance as it is too vague. Mr. Lyons said that he does not see how
701 the expert, Mr. Marquise, can conclude that a special exception is required and then the Board can
702 decide it is not needed. Chairman Simpson said that he agrees with Mr. Lyons but he would not call Mr.
703 Marquise an expert, he is here to assist the Board and is obviously well versed in the Zoning Ordinance
704 as he helped write it over the last 20 years. Vice Chair Claus said he has only been on the Board a short
705 time but this would not be the first time the Board has decided that a case coming before them was not
706 necessary. He does respect Mr. Marquise's experience and knowledge and agrees that if the case had

707 been presented differently with the height handled first it would have been a different conversation.
708 Ms. Silverstein said that then the resolve would have been that they relocated the structure and made it
709 within the 25 ft height. Chairman Simpson said that they may have withdrawn their variance requests
710 and reconsidered what they were going to submit. Ms. Silverstein said that would have just been a
711 different timeline. She does not fault anyone for bringing the discussion before the Board. She thinks
712 the applicants have been very transparent and insightful in terms of what they are trying to do which is
713 to make a non-conforming structure more conforming and they thought they needed a special
714 exception. As the Board has looked at it, they realized that it does not apply now that the variances
715 have been granted. **A roll call vote was taken: Mr. Munn voted yes, Ms. Silverstein voted yes, Vice**
716 **Chair Claus voted yes, Mr. Lyons voted no, Chairman Simpson abstained. The motion passed with**
717 **three in favor, one opposed, and one abstention.**

718 MISCELLANEOUS

719 There was a discussion about plans and the Board's procedures or to require as built plans. There was a
720 discussion to put a reference to the Rules of Procedures into the applications and to add that "all
721 documents must be submitted within five days of the hearing" to the application. There was a
722 discussion regarding requiring surveys and engineers preparing plans based on surveys.

723 There was a discussion regarding having the Planning Board invite the Zoning Board to discuss
724 Amendments.

725 There was a discussion about getting metrics for how many cases the Board has heard on different areas
726 and lot sizes to determine if there are different areas where zones can be looked at to possibly make
727 some changes. There was a discussion about ensuring the Board knows about decisions that have been
728 made in the past on the properties that come before them.

729 Chairman Simpson adjourned the meeting at 9:05 pm

730 Respectfully submitted,

731 Melissa Pollari