

TOWN OF ALTON  
ZONING BOARD OF ADJUSTMENT  
MINUTES  
Public Hearing  
May 16, 2013  
Approved 6/6/13

**CALL TO ORDER**

Tim Morgan, Chairman, called the meeting to order at 7:00pm

**INTRODUCTION OF PLANNING DEPARTMENT AND ZONING BOARD MEMBERS**

Tim Morgan, Chairman, introduced himself, the Planning Department Representative, and the members of the Zoning Board of Adjustment

John Dever, Building Inspector and Code Enforcement Official  
Paul Larochelle, Alternate  
Lou Lacourse, Member  
Steve Miller, Member  
Loring Carr, Selectmen's Representative

Paul Monziona has recused himself  
Tim Kinnon, excused absence.

**Appointment of Alternates**

**S. Miller made a motion to appoint Paul Larochelle as a member for this meeting and L. Lacourse seconded with all in favor.**

Statement of appeal Process:

The purpose of this hearing is to allow anyone concerned with an Appeal to the Board of Adjustment to present evidence for or against the Appeal. This evidence may be in the form of an opinion rather than an established fact, however, it should support the grounds, which the Board must consider when making a determination. The purpose of the hearing is not to gage the sentiment of the public or to hear personal reasons why individuals are for or against an appeal but all facts and opinions based on reasonable assumptions will be considered. In the case of an appeal for a variance, the Board must determine facts bearing upon the five criteria as set forth in the State's Statues. For a special exception the Board must ascertain whether each of the standards set forth in the Zoning Ordinance has been or will be met.

**Approval of Agenda**

Mr. Dever stated that the applicant has requested that case Z13-3 be moved to the end of the agenda. L. Lacourse motioned to amend the agenda and was seconded by S. Miller, with all in favor.

Attendees were Attorney Regina Nadeau on behalf of the applicant, Attorney Randy Walker, from Walker and Varney representing Brewster Academy, and Bryan Berlind, licensed land surveyor and septic designer from Land Tech, Ossipee, NH.

Mr. Dever read the case into the record.

Case # Z13-2 443 Roberts Cove Road	Special Map 21/Lot 12-2	Trustees of Brewster Academy Lakeshore Residential District
Town of Alton Zoning Board of Adjustment	Regular Meeting MINUTES	Page 1 of 12 May 16, 2013

*On behalf of the Trustees of Brewster Academy, Regina A. Nadeau, Esq. of Normandin, Cheney & O'Neil, PLLC, is requesting a rehearing of the Special Exemption.*

Attorney Nadeau stated that it is a request for a rehearing for an approval received previously, 2 months ago. The approval was for a change of use from a seasonal to year round structure in a zone that does not allow multiple dwellings. There was a condition on the approval which stated that we needed to comply with all applicable setbacks and based on discussion by the Board it was suggested that we may be subject to a 25ft setback from a right away that goes through the property. The purpose of the request for re-consideration is to specifically address, based on the interpretation of the ordinance, whether in fact that provision of the ordinance applies to the facts of our case.

Attorney Nadeau reviewed the plans which includes an 11+ acre parcel of land, 600 feet of waterfront and has 7 dwellings, which includes 4 seasonal and 3 permanent. When previously presented to the Board two months ago, we asked permission to re-develop the site by removing 3 buildings and to build a new structure, and were granted the approval. Attorney Nadeau pointed out the right of way which runs through the property. The provision of the Ordinance at issue is Section 327A-2 provides that buildings and structures excluding septic systems and fences shall be set back a minimum of 25ft from the right of way line of any street or highway, whether public or private. There is a question if that right of way constitutes a street or highway because if it does, the structure that was proposed could not be built and it would have significant ramifications for almost 1/3 of the property. It is noteworthy that the only people that have the right to use the right of way are the Babson's, the abutters. We view it as a driveway that serves one family.

Attorney Nadeau continued that when Attorney Hoover discussed this matter previously he concentrated on the term "private". The language states 25ft from the right of way lane from any street or highway, whether public or private, Attorney Nadeau stated she construes that to mean a Class V or Class VI road, whether it is a public or private road, not whether it is a private right of way.

Attorney Nadeau stated she looked at other provisions in the Towns group of ordinances to try to get some clarity. In the zoning ordinance it defines a street as a public or private thoroughfare, highway, street, road or avenue including the full width of its right of way. It does not say right of way. The subdivision section 3.24 of the Subdivision Req. says a right of way is intended to be used, means any area of land used for or intended to be used for street, road or public use. Use of the term right of way for land planning purposes shall mean every right of way, here after established, and shown on a recorded plan that is to be separate and distinct from the lots and parcels adjoining parcels adjoining such right of ways and not to be included within the dimensions of areas or such other lots or parcels. Attorney Nadeau continued it makes it clear that right of way's, easements, that go through people's property for a private purpose do not fall under this definition of a right of way because it says it must run along the perimeter of it. It does not, it runs through it. 3.12 define a driveway as any path of access used by motor vehicles to gain entry to private property from any public right of way. Attorney Nadeau stated it has been termed a right of way by virtue of court cases, it serves one property and it is not open to the public. Because the implications could be huge to the land use potential, it could essentially be casting a net over 1/3 of the property. To avoid the appearance of a taking property, the ordinance would have to be clear that it intended that setbacks from internal driveways or right of ways were intended and there is nothing in the language of the ordinance that suggests the same.

Attorney Nadeau stated that in her motion for re-hearing she also went to Section 3.27 of the Zoning Ordinance. Section 3.27-A2 the 25ft setback from any street or highway. There are three other provisions in that section. One is 50 feet from the shore of any river, lake or pond. Another is 10 feet from all property lines not regulated by 1 and 2. The 4<sup>th</sup> is 20ft from the property line in the rural zone. Attorney Nadeau stated that it would seem to her that the setbacks were clearly intended to be from the property lines and not from internal features such as driveways.

Attorney Nadeau stated that two weeks ago Attorney Hoover had shown her a memorandum dated 1994 which was part of a subdivision application by a prior owner by the name of Bonnie Dunbar. In the

memorandum the Planning Board at the time asked to know what the status was of Beaver Brook Road. The person representing Ms. Dunbar showed how long Beaver Brook Road was and went on to say how many other lots had additional right of ways, easements beyond that. This raised concern that this whole looping road was once considered by the town as a road. Attorney Nadeau went to the Town offices and looked at the prior subdivision file.

Attorney Nadeau provided a map and showed the Board that at the end of 1994, beginning of 1995, a parcel of land located further down Roberts Cove Road that pertained to two lots and a request to do a two lot subdivision and they wanted to create a second lot. The Planning Board at the time asked about Beaver Brook Road and how many people have access rights. It was explained that it was only 610 feet long and was not running through Ms. Dunbar's remaining land. As a result of the explanation by the consultant, the Planning Board at the time added conditions that Beaver Brook Road be clearly identified as a 50 ft right of way or laid out as a separate lot of record for private road access purposes. This was on Ms. Dunbar's property and she laid it out as a 50ft right of way with a condition that it would be accepted by the Town unless it was brought up to the Town standards. The Planning Board added another condition that it must be extended. Attorney Nadeau estimated it based on the scale, another 50 feet for the sole purpose of bringing access to the newly created lot. It had nothing to do with the right of way that went beyond that. Attorney Nadeau stated she does not believe it was within the jurisdiction of the Planning Board at that time. It does dispense with the notion that the entire pathway was ever considered an official road of the Town, whether private or public.

In summary, the area in question is one parcel of land and does not reach any public road. It is not a Class V or VI road, which is the distinction between public/private roads. It clearly falls within the definition of a driveway and does not fall under the definition of a right of way under your current ordinance. That combined with a fact there would have to be a compelling or reasonable reason to impose such a condition. Whatever the width of the right of way is, you are adding 50ft to it. You are carving out a 65ft swath of land through a piece of property that was developed 75 years ago.

Attorney Nadeau stated she doesn't believe the zoning ordinance mandates the application of 327.A2 to this application or anything that pertains to this property and as a result of that asks that you declare that it is not applicable to this property and remove the condition that was placed on the prior approval.

Mr. Morgan asked Attorney Nadeau if she thought it was fair that when you bring an appeal to the Board that you should show new material or show that we misinterpreted the law, is that fair to say. Attorney Nadeau stated yes. Mr. Morgan continued the new material that you offered tonight would be the 1995 letter before the Planning Board and also the Dunbar property. Most of the rest of what that you said was presented in the last presentation and you are saying we misinterpreted, we didn't agree with your position based on the statutes and ordinances that were cited. Attorney Nadeau responded that because it is a question of law and I have to show that there may have been an error in the interpretation of the ordinance. If you recall this is an issue that came up at the very tail end of the hearing. None of us had anticipated it. There was very little discussion on it and that is why this Board had imposed the setbacks as necessary or required. Because of that ambiguity we wanted a definitive answer and so this is the first time that I am able to say look at all these various provisions of the ordinance. I wasn't able to make that argument that day.

S. Miller asked what is your contention about any abutters that would be included or prevented from using this right of way or driveway, whichever definition is accepted, if you got the special exemption.

Attorney Nadeau responded if we got the special exception and we clarified the special exception to remove the setback, the abutters would have the exact same rights today that they have always had in and which have been upheld by the court. What would happen if the buffer were imposed it would give the abutters much more than needed. It would essentially take away our ability to site that house as we proposed.

S. Miller, there was testimony that if the right of way or driveway configuration was changed that would have a harmful effect to access of large vehicles or vehicles with a trailer that does not exist at this time. Attorney Nadeau stated she does not remember that testimony and continued that there are no plans to relocate the right of way or change the configuration or anything else.

S. Miller asked and your position is that it is a right-of-way or a driveway. What is your firm position? Attorney Nadeau stated she does not believe it is a right of way. Under the Boards terms of the ordinance under common law and how it was referred to in the court case it was called a right of way, but under the Town's ordinance I believe it believe it falls under the definition of a driveway. Because it does not go directly from the property to a public way and it also is not a right of way under your definition because that also has to be opened to the public and does not qualify as a street.

S. Miller asked if the definition were changed to a right of way, would town enforcement be different than it is today in anyway. Would that change enforcement of any Town regulatory body on that right of way? Attorney Nadeau stated no. We are talking about a term of art in two different forms, right of way, easement, whatever you want to call it that is the legal right. For purposes of land use, are we talking about a driveway, right of way or street? Based on this fact pattern it fits within a driveway definition.

S. Miller asked under the definition of a driveway once that path goes to two separate lots does that become no longer a driveway, on two separate lots, by two separate owners. Ms. Nadeau stated she does not know she did not see it addressed in the ordinance but factually that is not the case here.

Mr. Dever clarified that the plans the Board have before them are a representation of the site that he completed. Mr. Dever also provided photographs. Mr. Dever reviewed the pictures with the Board and with those in attendance. Attorney Nadeau stated she believed the width goes anywhere from 7-15 feet. If the Board were to impose a 25 ft setback from that, the entire building would be in the setback.

S. Miller stated you are tearing down an old structure and building a new structure. What is the hardship of moving that closer to the lake or in a different direction or configured so that it is no longer an issue.

Attorney Nadeau stated the first part is that the existing building is non-conforming because it is located in a wetlands buffer and it had to move back, also because of the shore front setbacks so it had to come closer to the right of way. The second part is that what ever decision the Board makes it is going to set precedent of anything else that is done within 50 ft. If they remove or fix anything else this ruling will be precedential and will say going forward, that 1/3 of the property from the shoreline back would be subject to that 50 ft. It is the precedential value going forward.

S. Miller stated you are looking to add additional buildings and use this precedent so that it is no longer an issue. Attorney Nadeau stated correct. That if we wanted tear down the shore front building we could build it to the same foot print but if we wanted to make it more conforming, we will be limited by other wet land pockets. If we have an adverse ruling on the right of way issue then we will have additional problems with on the site elsewhere. We are prohibited from adding any more dwellings, if we want to make it more functional or more conforming then we are boxed in at any turn we make on 1/3 of the property.

Attorney Walker stated that taking three buildings and removing them and putting one in they are making the property more conforming rather than less conforming. The other problem that they have with the main Oakland's Building, which is the one on the water, it is within the 50ft of the water front setback and as they pull it back to get it out of the 50ft setback it gets closer and closer to the right away in the back. We approve one set back and at the same time we are pushing at the other. It is a trade off. A choice for the Board. The house as it sits in the wetland setback it can stay there within the 50ft. The goal is to pull it back which the State and Town, the public would generally like and the abutters are not objecting to the project but it does pull it a little closer to the right of way with the 25ft setback if it applies.

S. Miller if it would be helpful do you have a long term plan of what you are going to accomplish, as a real estate strategy or whatever concerning this, subdivision, anything like that. Anything that would be helpful to know.

Attorney Nadeau explained that she represents a potential buyer for the property. These are the only plans that she knows of which includes eliminating 3 houses, taking one house that is non-conforming and putting up some type of storage structure. Given age of other building it is very likely they are going to want to do something with them and they are going to need maneuverability. Any imposition of turning a 7-15ft right of way to a 60ft buffer is significantly going to detract from it. I can't see that would be envisioned of the drafters of the ordinance.

Attorney Varney stated he represents Brewster Academy and not the buyer and the application before you is the only one that we are asking you to rule on. Whatever plans they may have would be irrelevant in the future.

J. Dever asked the Board looked at the blow up of the plans he provided including the pictures. Mr. Dever walked the property and provided his comments with the pictures he provide. Further development, given the location of the cottages, and if they were to replace or expand it would still remain a non-conforming use and they would have to come back to the Zoning Board and apply for a special exception in kind. Whatever they do unless they remodel it as it sits, it would require another trip back to the Board.

L. Lacourse asked if the cabin if it was just stripped to the frame, there would be no special exception required. Mr. Dever stated in that case no because they are working within the existing frame, not going up or down or out. Just remodeling.

#### Public Discussion

Attorney Hoover represents the abutters, The Babson's, and stated his clients have no objection to the project. The only issue that came up was when I spoke to the Town Enforcement Officer and asked if there was a setback and was told that it was 25 ft for a right of way. Attorney Hoover stated he would like to point out a couple of things. We are not opposed to the project and it is a wonderful use for the property. This is a vested right a way. It is in everyone's deed. It is not a path or driveway. I understand Attorney Nadeau's research and I did the same and came to a different conclusion. The right of way exists through my clients property through Brewster property and ongoing all the way to the public road which is Robert's Cove road. The right of way is does have its access beginning from a public road. It starts at Roberts Cove Road goes up Beaver Brook Road cuts across a number of properties and ends up on my client's property. The only person who uses the portion of the property that crosses the Brewster property is the Babson's. However leading from Roberts Cove there are at least four other properties that have the right to use the right away. It is not just our lot. Our lot happens to be the tail end of the lot coming from Roberts Cove. If you look at the language the Dunbar property is a right of way, the Knipes' have a right of way, the Remage's have a right to use the right of way to reach the beach. Bonnie Dunbar gave a 10 acre parcel to her son and he has a similar right of way, so there are other people that have a right away but they don't cross over the Brewster property. The right of way doesn't end at the end of the Brewster property it continues down and all these people have the right to use it. That right of way leading to and providing access to the Babson home has been in existence for years. Preliminary research shows more than fifty years. For many, many years that was the only way to access the Babson property. Subsequently they have acquired another alternative access but have not abandoned this one.

This whole issue of the right of way was litigated by Bonnie Dunbar who still owns property next to the Brewster property. The litigation was extensive and reached the Supreme Court, but it has always been called a right of way. It was never called anything different. It confirmed the right of way and its existence and the right to use it in favor of my clients. My understanding was that the prior owner of the Brewster property tried to block the right of way by placing boulders on it which led to the litigated matter and the ruling in favor of the Babson Family. But it is not just used by the Dunbar's, delivery people use it, other people that need access use it, family members come up on weekends use it. It is not

just used by the Babson family, but sometimes by their guests. It is also used for travel purposes. The Brewster people have to use a portion of the right of way to reach one of the cottages. This adds traffic,

What caught my client's attention was they are replacing a two bedroom seasonal cottage that is far away from the right of way with a five bedroom year round house with a huge garage right next to the right of way. This is a different issue. It raises the issue of traffic and safety issue. They will now be passing by within a few feet of a five bedroom home with a huge garage. It adds traffic. If they were looking for recreation or commercial use they would have to come before the Board. It is a different use. The proposal, and I am just suggesting, those buildings that are there are not going to be moved are grandfathered. Whatever the distance is from the right of way that exists. We are suggesting that if they are replaced they have to be replaced in kind or for the same foot print, some buildings or they have to come back and get a special exception. Some of the buildings are closer than the 25 foot setback. Any new buildings we think should be subject to the setback, whatever is established. The issue is 0 setback by one side and 25 ft setback for the other side. This Board has the authority to establish conditions. There has to be some measure of compromise that makes sense that protects the rights of my clients to be free from safety issues and more intense use. It has been treated as a right of way road in the past. The policy according to J. Dever has been 25ft if it is a traveled road. I concur with Attorney Nadeau that this is one of those places where the ordinances are not well defined and doesn't define. I am familiar with the work that she has done and just point out to the Board that the policy has been 25ft and used in the same fashion a long time before there were zoning ordinances and subdivision regulations in this Town. It has been used in a different manner than is being proposed here which brings the buildings closer to what has been traveled. I can tell you that I have been to the property and I have traveled with my client over the right of way and parts of it are in fact a little too rugged and narrow and parts of it aren't. Mrs. Babson uses it at least once a day if not more frequently. It is not an abandoned use. We are not here opposing the project. We are not here asking that it be shot down; we are just here saying that at some point in time, you can't have buildings up against a right of way. 25ft was what we were told and 25ft is the only indication of footage from the traveled right of way from the road. We are asking the Board be reasonable when it approaches this. The answer may not be 25ft but it should not be 0ft.

S. Miller addressed Attorney Hoover and stated he has had some experience living in a zero lot line. Can you be very specific on what safety and traffic issues you are speaking about? Attorney Hoover responded currently there are none. It is only used seasonably. Mr. Miller continued if it is approved, if they build five feet or ten feet away what are the traffic concerns. Attorney Hoover responded one would be children playing that you may or may not have an opportunity to see because there is no space between the building and the road. Another would be cars exiting the driveway or garage, backing up. In the winter perhaps snow removal and the road gets narrower. It is a little difficult to answer because he has not seen how it will be situated other than what is on the plan.

Attorney Hoover stated he wanted to make it clear that he is not in opposition to the project we need some clarification on the issue.

#### Closed Public Input

Attorney Nadeau wanted to re-iterate the basis of the argument based on Town ordinance that the piece of land does not constitute a thoroughfare, a public or private thoroughfare, highway or street. It is not under your definition of a right of way because it is not separate and distinct and outside of the perimeter of a lot. It traverses through a lot. Your ordinance doesn't recognize interior right of ways. It only recognizes a right of way that runs outside of the parcel. So that can only leave you with a definition of a driveway which does in fact connect with a public highway. That being said what we are asking from the Board is to interpret the ordinance and not split the baby because it would have ramifications. The law is what the law is. The ordinance is what the ordinance is. If the Babson's wanted a 25ft buffer on either side of its right of way it could have negotiated for one back when it obtained the right to cross this property. To ask the public entity to take away the reasonable use of my client's land that isn't provided for in the ordinance or to just come up with an arbitrary number in between just doesn't seem to be within the purview of the law.

S. Miller stated that your position is all or nothing. Attorney Nadeau responded yes because it is going to have implications for anything else they want to do. It is too much control over what is a private situation between two landowners. The reason I don't think it was intended by the Town when they drafted this ordinance is I can't see them thinking of putting a 65ft swath through people's lands without any repercussions. It seems excessive and if they don't directly speak to that I think it is a big leap to get to that.

Attorney Walker stated that there is no opposition to this project going forward. To address a concern raised by Mr. Miller and the 0ft lot line. The difference is we own both sides of the lot line and this is 100% private property. It is not a town road that goes through the middle of the property and there would be legitimately a 25ft set back on either side of it. This is private property. It is not a development, not a subdivision it is not a lot line, it is 100% private. We would have the right to build a house next to the driveway. It is suggested that we have to place it 25 ft away from the driveway. I do not think that is fair nor as Attorney Nadeau has suggested the intent of the ordinance specifically says public thoroughfare, this is not open to the public it is private. I don't see how you get past placing a condition on private driveway because it doesn't fall under the definition of highway, street, road or avenue. This is a right of way. It is none of those things and Attorney Hoover did not suggest once that the 25ft set back was from a private driveway. It is only from a street, like Roberts Cove Road, not a private road. In further support of that there is a definition of street in frontage in your Ordinance under Article 200 that says the frontage along a street is a right of way along a Class V highway. This isn't a public Class V highway or better lawfully existing or is approved by the Planning Board. This is not a road that has been approved by the Planning Board. With regarding to safety the houses as shown on Pictures 1 and 10 they are right on the driveway. Even if the new house if built right on the line it is not going to change the safety at all. I believe that Attorney Nadeau is correct and that the condition that the Board placed on this is inaccurate and you should withdraw the condition because I don't think it applies to this property as it is rurally private.

Mr. Miller asked is it your position that an interior right of way was not addressed by the ordinance and therefore a special exemption should be granted. Attorney Walker responded yes.

Attorney Hoover stated it was litigated and the court made a decision that it is a right of way, it is not a driveway and connects to Robert Cove Road and runs through this property and other properties. The other thing in terms of what is before the board and what was before the board when the Board rendered its decision was a change in use Special Exception and you are entitled to attach conditions to that when it is going to be moved. One of the conditions could be that you grant some distance between the travelled right of way and the building. That is a legitimate exercise at the discretion of the Board. Not taking for the position that because they are asking for a change of use and they are moving the building closer to the road you are entitled to adjust, put a condition under that should you choose to do so. The safety issue Attorney Walker is correct, some of the old cabins are very close to the road, but they are seasonal no more than 2 bedrooms. We are replacing a cabin of that nature with a five bedroom home and a large garage. It is a different and more intense use. Those are the significant differences that are currently there.

Chairman Morgan offered Attorney Nadeau one additional input. Attorney Nadeau had nothing further.

#### Discussion

S. Miller's thought is that one position is that it is an all or nothing, they would prefer all or nothing adjudication and he is comfortable with that if that is what they want. The simple issue is whether or not the ordinance addresses an interior right of way. It is my feeling that it does because I don't see an exception in the zoning regs. That is what the issue that was brought down to us, bare bones. That is how I see it. I stand to be corrected if someone has a thought on it.

L. Lacourse did unofficial research by going out on the net and trying to find articles, things from other towns. The common factor was the right of way across private property the set back was from the

property lines not from the right of way. In one instance it said you can build a house right up against the right of way. Because the right of way is just somebody's ability to cross your land. I think the hinge is whether it is a public or private right of way. Everything I have heard and understand says it is a private right of way and because of that I think they are well within their right to build within the 25ft.

P. Larochelle stated in his opinion he sees the property owners trying to make a property non conforming more conforming by pulling back from the lake, doing a beautification of the property and making it more conforming than it was and by eliminating buildings and taking those buildings out and making one good building which we have already approved. This is a private property. In my opinion I agree it is a driveway at this point.

Mr. Morgan stated he believes Attorney Nadeau is absolutely correct, we can't as Attorney Hoover suggested, come to a compromise. It is either 25ft or not 25ft. What we are being asked to do tonight is to decide if we were mistaken in our original granting of this special exception by attaching the requirement that they adhere to a 25ft setback. We really need is to have to vote as to whether we think we made a mistake.

**S. Miller motioned that we do not accept the appeal and let the original adjudication stand as presented. P. Larochelle asked which means that you keep the original finding of the 25ft setback There was no second**

**P. Larochelle motioned to accept the new application and to withdraw the condition of the 25ft setback and to consider this as a driveway access on private property and was seconded by L. Lacourse, with a vote of 3 in favor and 1 against (SM).**

Case # Z13-6 443 Roberts Cove Road	Variance Map 21/Lot 12-2	Trustees of Brewster Academy Lakeshore Residential District
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*On behalf of the Trustees of Brewster academy, Regina A. Nadeau, Esq. of Normandin, Cheney & O'Neal , PLLC, is requesting two variances from Article 320 Non-conforming Uses, Paragraph A:6 and from Article 320 Non-conforming Uses, Paragraph A:7. The proposal is a redevelopment of the 11.275 acre site from 3 year-round and 4 seasonal structures to 3 year-round and 2 seasonal structures, with no increase in number of bedrooms (but conversion of 3 seasonal bedrooms to 3 year round bedrooms.*

Mr. Dever read the case into the record.

**S. Miller motioned to accept the application as complete and was seconded by L. Lacourse with all in favor.**

Ms. Nadeau recapped her previous request from two months ago. We had also applied for a special exception because articles A6 and A7 were non-conforming uses to structures, speak to change in structures not just the use on the property. It was brought to the Boards attention by Attorney Hoover that A6 allows for an in-kind replacement of structures which houses non-conforming use and we are not doing any in kind replacements. Also, A7 which is going beyond the existing dimensions. It was not clear which provision Attorney Hoover felt that we needed to get a variance from because it looks under the ordinance that you get a special exception if you are not changing the footprint of the building. That is why I am requesting a blanket variance on both of these because what we are doing is a completely different building. Attorney Nadeau stated we have seven dwellings on this property and that under the current zoning only one would be allowed. Attorney Nadeau gave an overview of the proposed project. We are asking for a variance from A6 and A7 which allows you to grant a special exception so long as you do not change footprints and that is why we are asking for a variance.

Attorney Nadeau went through evaluation criteria for the variance. The first two items have been combined by the Supreme Court because they ask a similar question in a different way. The variance will not be contrary to the public interest and is in harmony with the spirit of the ordinance. The presumed limitations of the ordinance are with regard to non-conforming uses and structures. It is presumed to



eventually phase out non-conforming structures. We are doing that. We are getting rid of two dwellings that don't meet the dwelling unit provisions of the ordinance, we are becoming more compliant by now complying with wet land buffers and also eliminating something in wetland pocket and we are substituting for all of that a structure that is entirely conforming within every aspect of the ordinance.

If you look at the goal of the limitations which is to make properties become more conforming by placing restrictions on it this would seem to be the perfect candidate to meet that criteria. The substantial justice will be done because there is a question what would the public have to gain by refusing this variance in exchange to what the burden might be on the land owner. We are not furthering the public purpose in trying to bring properties more into compliance. The burden to the land owner would be to rebuild a structure that is limited in functionality, footprint, when there is really no reason to limit it because it is an entirely compliant structure under the terms of the ordinance.

The Hardship Criteria now has two different tests. The first test is whether or not there is a fair and substantial relationship between the general public purpose and the specific application we are making. We are furthering the goals of the ordinance by taking down the non-conforming structures and erecting a much less impacting structure in its place. The second provision is whether or not the proposed use is reasonable. This is a residential zone and we are proposing a residential building. We are not increasing density we are decreasing non-conformities. This application on its face appears to meet that first test. There is no fair and substantial relationship. What the ordinance is trying to protect as to the application of this property and also whether or not our use is reasonable. The site is unusual because it is completely developed. The applicant is boxed in for anything it can do other than replacing the buildings exactly as they are. To relax it and allow them to do a less intensive use makes sense when you balance the town interests vs. the individual land owner's private property interests.

Bob Hughes owner of Spencer Hughes Real Estate spoke and stated he has been dealing with property for 10 years. Nine out of 10 prospective buyers have all been developers. For the abutters and the Town this is a dream use. There is 615ft of waterfront and 11 acres and you could have 8 lots, 4 waterfront lots. Because of wetland issues they would have to maximize that. It would be a very intense use to get your money back out of it. When the buyer expressed his uses it would raise property values. It is the perfect person. We have probably had about ten different perspective buyers and every one of them made some form of 20,000 sq foot home and three of four waterfront homes and then trying to subdivide some of the back land.

Attorney Nadeau closed by saying the purpose of the application is to lift the prohibition in the zoning ordinance that requires you to rebuild in kind. We are hopeful that in trade off with all the square footage and the reduction in nonconformities would warrant the granting of the variance.

#### Public Discussion

Attorney Hoover spoke that this is a variance request asking for relief from a requirement that you must fill in the same footprint. I just ask that the Board consider that a condition be attached to the approval that protects the right of way whether it is by a setback or some provision that does not interfere with the rights of my client's to pass through the existing right of way which was previously vested.

Attorney Walker commented that Attorney Hoover is trying to backdoor with what we just did with the prior application of some type of setback it has been very clear from his presentation that his client's have a right to go over this property, there is no dispute about that. There is no way that the right of way can be interfered with or that driveway use can be interfered with. I don't think there is any reason to place a condition on that. They can continue to go down that same path that they have been using for decades without any kind of condition.

#### Public Interest

All members agree that the variance will not be contrary to the public interest there is no major changes in the land if anything it looks like what is being done, buildings being consolidated into one larger one and others being removed and we are reducing the non-conforming impact on the property.

All members agree that the request is in harmony with the spirit of the zoning ordinance, the intent of the Master Plan and with the convenience, health and safety and character of the district within is proposed. They are phasing out non-conforming buildings which are in harmony with the Master Plan. They are reducing the number of buildings on site and testimony that values will be increased.

All members agree that by granting the variance substantial justice will be done. I believe the town will have no interest in opposing anything that is going on for this project. The benefit to the applicant far outweighs any detriment to the people of the Town of Alton. It will make the property more desirable make it more live-able and increase the aesthetic quality of the property.

All members agree that the request will not diminish the value of surrounding properties there is no reason to believe that approving the residence on the property would have any effect and we have had testimony from a real estate expert that it would not diminish the value. There would be no substantial impact on property values. Property values and the tax base will be increased and there is only a limited number of ways to increase the value of the property and this is one of them.

#### Hardship

All members agree the criteria Statement A is for the purposes of the subparagraph of unnecessary hardship means that owing to special conditions of the property that distinguish it from other properties in the area that no fear and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to that property and the proposed use is reasonable one. The special conditions of the property, it is a large piece of property on the lake and there is a lot of wetland on it, scattered all over it.

Specific application proposed use feel that special conditions of the property have a lot of wetland on property so that would be my justification. As for the reasonable use of the property obviously they are making it less non-conforming and also stopping a development from going in there. We are building a residential building in a residential zone and there is no increase in density and again we are reducing non-conforming structures. The property has a number of residences on it that came to be before the ordinance was in place and that creates a hardship on the further development of the property and the residential use is the use that it has been. It meets the hardship criteria.

**S. Miller motioned to approve application Z13-06 and was seconded by L. Lacourse with all in favor.**

Case # Z13-3 443 Roberts Cove Road	Special Exception Map 21/Lot 12-2	Trustees of Brewster Academy Lakeshore Residential District
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*On behalf of the Trustees of Brewster academy, Regina a. Nadeau, Esq. of Normandin, Cheney & O'Neil, PLLC, is proposing a physical expansion of a dwelling structure having a non-conforming use.*

Attorney Nadeau stated the reason she filed the application was that if an appeal was brought against any of these and my client has the staying power to live through litigation, I don't want to prejudice Brewster's rights to preserve this issue for the future.

Mr. Dever read the case into the record.

**S. Miller motioned to accept the application as complete and was seconded by L. Lacourse with all in favor.**

Attorney Nadeau gave an overview of the prior two special exception applications.

Attorney Nadeau continued that it was suggested that we also want to apply under Article 320 A7 of the ordinance which specifically says expansion for structures for non conforming uses beyond existing building dimensions. This provision says a structure which houses a non-conforming use may not be expanded upwards or above the existing roof line without first obtaining a special exception. The ZBA shall not grant such a special exception unless it finds the proposed expansion will not have an adverse impact on abutters and that any expansion of the use be accommodated by a water supply and sewage disposal system.

It was brought to Attorney Nadeau's attention that because we had a special exception for the use making it thereby conforming since we were proposing a structure which would house a conforming use and the structure itself was conforming it did not seem that we needed a special exception for that. The reason I would like clarification from the Board there was a Supreme Court case at the end of February where the court held the Zoning Board does have the right as a threshold issue to determine whether it has jurisdiction to hear a particular application. It doesn't have to start at the Code Enforcement Officer's level. To the extent that this issue comes back again, whether it is with another one of our buildings or somebody in the future, I would like a ruling if I could from this Board to say if we get a special exception under A3 for a change of use, would an applicant then also need to get a special exception for a structure that is housing an approved use. The ordinance says expansion of structures for non-conforming uses which I think means structures which house non-conforming uses. To me that would seem to be a redundant process. If you get the special exception for the change of use and everything we are proposing is conforming in the structure itself it seems redundant to have to get to special exceptions. I ask that for going forward.

Mr. Morgan stated that the change of use you received a month ago was to change the seasonal use. Attorney Nadeau responded from seasonal to year round. Mr. Morgan asked are you asking for an A6 or A7. Attorney Nadeau responded A7, was for expansion of structures for non-conforming uses. I am saying I am starting with a brand new building so it is not an expansion. I am starting with one that has an approved use by this Board. The structure itself is conforming to every other provision of the ordinance. When it is a tear down the change of use is approved would we also be required to get an A7 Special Exception for changing the footprint when we have already raised the building.

S. Miller inquired would it be more applicable if they wanted to build a roof higher than 35ft as an example, as opposed to the actual footprint and the expansion that has been approved. Mr. Morgan stated that would be his understanding.

Attorney Nadeau stated the query began when we were all trying to deal with what I think has been relatively recent new language in the ordinance. In meeting with J. Dever, the best guess at the time was that we needed two special exceptions.

Mr. Dever explained further, that in all the work that has been done in addressing non-conforming structures and to allow for replacement, the one we have not addressed is take a non-confirming structure and allow it to be expanded physically footprint wise. A7 it to go up down, put in a full basement, second story, raise the roofline, etc. but remaining in the same foot print. In all of our planning for this the one thing we didn't plan for was a situation where they want to take and physically enlarge the footprint. When we looked at this initially, myself and K. McWilliams this was the closes to the thing to the request. To expand, in retrospect in going back and looking at it this does specifically say you have to stay strictly within the footprint but you can go up or down. So in this case it really doesn't apply to their request and that was an error made on my part and my interpretation of this. The correct thing to do would be the variance because we do not address that particular situation in the ordinance then it becomes a variance.

Mr. Morgan stated the application was made since that discussion so Mr. Dever in your opinion doesn't that render this moot. Mr. Dever responded yes.

Mr. Morgan asked Attorney Nadeau if she was asking that they just vote that you don't need this?  
Attorney Nadeau responded yes.

S. Miller stated is that a vote on jurisdiction issue and Attorney Nadeau responded yes.

P. Larochelle stated that initially we were looking at 320A-2 which is abandonment of the old structure. The old structures are being torn down because of non-conformity. This new structure moves it forward; it is not non-conforming.

Mr. Dever stated on the abandonment there is a time frame attached to it also. Abandonment you have to physically abandon the use for 18 months in order for it to be considered abandoned. Not the use of an existing continually the use of itself has not been abandoned for 18 months. It doesn't speak to any of this.

M. Morgan stated he was not sure that not accepting jurisdiction is quite the proper approach. He would be more comfortable if we accepted jurisdiction and found the application was unnecessary.

**Mr. Miller motioned that we accept jurisdiction for application Z13-3 and ask for a finding and was seconded by L. Lacourse, and with all in favor.**

**A motion was made by L. Lacourse towards the disposition that it is not needed and was seconded by P. Larochelle with all in favor.**

**Previous Business - None**

**New Business – None**

**Minutes - will be held until the next meeting**

**Correspondence – None**

**S. Miller motioned to adjourn and was seconded by L. Lacourse with all in favor.**

Meeting adjourned 8:37 pm

Respectfully submitted,

Peggy Hawksley, recorder