Town of Milford
Zoning Board of Adjustment Minutes
May 5, 2016
Case #2016-03
Sherwood & Rochelle Wolcott, Co-Trustees
Variance

Present: Kevin Johnson, Chair
Mike Thornton
Joan Dargie
Jason Plourde
Len Harten

Absent: Fletcher Seagroves, Vice Chair
Katharine Bauer, Board of Selectmen Representative

Secretary: Peg Ouellette

The applicant, Sherwood and Rochelle Wolcott, as Co-Trustees, owner of Map 56, Lot 44-4, located at 362 Federal Hill Road, in the Residential R District, is requesting a Variance from Article V, Section 5.04.4 Lots Sizes and Frontages to subdivide the property into two (2) lots with approximately 25 feet and 75 feet of frontage where 200 feet is required.

Minutes Approved on May 19, 2016

Kevin Johnson, Chairman, opened the meeting and informed all of the procedures for the meeting. He read the notice of hearing into the record and the list of abutters was read. Abutters Robert Wolfson, Heather Bierschenk, and Jane Lyttle were present. Rochelle Wolcott owner of 362 Federal Hill Road, was present along with Attorney Michael Klass representing the applicant. Kevin Johnson, to save time, summarized a memo from Lincoln Daley, Director of Office of Community Development that this application came before the Board twice, but under previous rules for determining criteria for a variance. Together with Town Counsel it was decided it was appropriate for the Board to hear this application. K. Johnson invited the applicant and attorney forward to present their case.
M. Klass gave a brief description of the property, showing it on a map. It is an 11-acres parcel. They are asking for a Variance for minimum frontage; ordinance requires 200 ft. frontage and 2 acres minimum lot. They want to split into two lots depicted on plan as Lot A and Lot B. Lot A is just over 2 acres and would have 75 ft frontage. Lot B utilities 25 ft. frontage of Federal Hill Rd.

They are compliant with all other dimensional requirements. He gave history of the property. It was developed in 1991 on approx. 45 acres cut into 7 lots. He gave copies of plans to the Board. In 1992 the Wolcott's purchased Lot B which is the back 9 acres. In 1995 a portion of the property known as the remainder lot was subdivided into three parcels. In 1996 one of those was sold. Wen applicants bought the land they had right of first refusal but didn't have means to buy all five and bought it with the neighbors, coming away with 2 acres of Lot A and neighbors had remaining. It is a residential neighborhood. Lots vary in size and shape. To the north, east and west on GIS maps, the surrounding lots are a little smaller. A key factor of this neighborhood, the 45 acres, is existence of long narrow driveways into back land, one of which is the Wolcott's existing drive. As a result of subdivision the lots in the subdivision have unique shapes. Suggests that proposed subdivision is not inconsistent. First step is the procedural issue. He had talked with L. Daley; he hadn't seen the memo that K. Johnson read. With approval of the Board, he skipped the details on the memo. They were requesting a variance under Sec. V., 5.04.4

L. Harten wanted to clarify that on the previous application the applicants had 25 ft. section on Federal Hill Rd to reach property. How did they get away with 25 ft. initially?

M. Klass said that was how original subdivision was approved in 1991. He had four plans in the Registry, three of which were submitted in the packet that clarify how the neighborhood came to be. He gave copies to the Bd. He didn't know the zoning at that time but these driveways were allowed in 1991. On the 1991 plan the applicants' back nine highlight in yellow. They were always anticipated and part of this development.

K. Johnson said the 200 ft frontage requirement was added in 2009.

M. Klass said the second page is 1995 subdivision. Lot marked as Remainder was subsequently divided into three lots in 1995. As of 1995 total 45 acres always contemplated to have nine lots.

M. Thornton asked whether than was approved.

M. Klass said it was. They are approved plans, the first two recorded subdivision plans. The third plan in 1996 was when the 5 acres was separated into 2- and 3-acres. Two acres was conveyed to the applicants. On third plan is rectangle at bottom of Parcel B. This used to be a girls camp and that was a tennis court which is not a natural development. On front page is smaller copy of the conceptual subdivision plan which is on the easel. Any questions?

J. Plourde asked if driveway depicted on the bottom was the current shared driveway.

M. Klass said it was; it was shared in the sense, he called one curb cut. Very shortly after that cut it becomes two independent lots. He wasn't sure you could access the right drive from the left curb cut. It is a single drive at point it meets the road, but shortly after that it becomes two.

K. Johnson said from the Bd.'s perspective it is curb cut intensity. Ordinance specifies what curb cut is, not what you do once you get past the cut.

M. Klass understood.

K. Johnson said that driveway is servicing lots 44 and 45.

M. Klass said that curb cut is, yes.

K. Johnson asked, on subdivision would that share access or use 75 ft. for its own drive.

M. Klass said they were proposing the 75 ft. Felt it was appropriate location. On that stretch of road, it is pretty straight shot. Proposing to come in middle of that. Viewpoints will be good. Road narrows, so speed limits not an issue. At that point there is a confluence of lots and across the street – in same general area all drives meet in that area. 75 ft. is plenty from engineering and safety perspective.

J. Plourde said based on town guidelines for driveways you need 100 ft. separation between driveways. When M. Klass stated everything was safe, they have to go through whole process.

M. Klass agreed there is a Planning Bd. process.

J. Plourde expressed concern, if they approve, they could be saying yes to something completely nonconforming.
M. Klass said they come equal distance between existing drives. One inch equaled 400 ft on the GIS. Seemed to be plenty of room. Gave copies to Bd.
K. Johnson said since this is a lot subdivision they would need to go to the Planning Bd. if the variance was granted. Planning Bd. has their own criteria.
M. Klass said that is common condition he would expect. You can't separate them.
K. Johnson asked for questions from the Bd.
In response to M. Klass question as to addressing the criteria, K. Johnson said rather than read the whole thing – because that would be done later – to hit the high points they wanted the Bd. and the public to consider. Then will open to public comment and then go further if needed.
M. Klass said he'd summarize notes. When talking about these criteria the factors and findings, you can't separate so there is some duplication.

1. Granting the variance would not be contrary to the public interest because:

Re public interest, case law says to be contrary to public interest it must unduly and to a marked degree conflict with the ordinance such that is violates the ordinance's basic zoning objectives. What is the objective; it is frontage. Two prongs: 1. General health, safety and welfare; 2. Insure safe access and prevent overcrowding. Preventing overcrowding not a concern. As a matter of right they were within the 2 acres size limit, which was plenty to support a single family residence and consistent with the neighborhood and location of this building is consistent with distance between houses. Another lot & building always anticipated in terms of intent of the original subdivision. With respect to 75 ft, fact they have been using 25 ft and neighbors have been using 75 ft. highlighted that 75 ft away from everybody would be more than adequate. Re threat to public health and safety, there was sufficient acreage and frontage and was consistent with other neighbors. Re character of the neighborhood, believed it was consistent with size and shape of lots and single family home. Given topography, vegetation of surrounding houses will serve as buffer.

2. The use is not contrary to the spirit of the ordinance because:

Re second prong, spirit of the ordinance, which mirrored public interest, crowding not an issue. Safe access is insured with 75 ft. Size and shape and use of the lot consistent with the neighborhood.
K. Johnson commented when they get to spirit of ordinance, by its very nature, every variance request violates spirit because if it didn't there'd be no need for a variance. There has to be some safety valve, which is the ZBA. ZBA's job is to determine to what degree it violates the spirit. If a property requires 100 ft. setback butt 75 ft. in you had a cliff that went to 60 degrees you couldn't use it. Putting it 50 ft. back really is a balance. But if ordinance says certain things can go into a neighborhood and someone wants to put in an explosives factory, there would be clear violation of the ordinance. Public interest is general interest, not just the abutters. They take everyone's input. On the first two issues, as M. Klauss stated, courts are leaning towards combining them. Intent and spirit of the ordinance, because they are closely related and very difficult to separate. He and Len have been on the ZBA many years and cannot remember case where one was satisfied and not the other.

3. Granting the variance would do substantial justice because:

M. Klass continued re third prong, substantial justice. He believed this is often used as balancing test which is whether loss to the applicant is balanced by gain to the public. In this case denial will result in no appreciable public benefit. This lot would require and provide appropriate access to the proposed lots and given they will be used consistently and permitted use within neighborhood they are not threatening health, safety and welfare of town or neighborhood. Denying would result in loss to applicants by preventing use of portion of their property, particularly since it has two

unique access points to the public way and this subdivision was always contemplated another residence.

4. The proposed use would not diminish surrounding property values:

Re the fourth criteria, value of surrounding property not being diminished, this is an allowed use. Size of lot permitted as matter of right. Will be a single family home, which all abutters are. Won't produce significant traffic etc. Will not result in diminishing surrounding property values.

. Denial of the variance would result in unnecessary hardship.

A). "Unnecessary hardship means that, owing to special conditions of the property that distinguish it from other properties in the area:

i). No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property because:

Fifth, unnecessary hardship. This essentially goes to the special conditions of this lot in justifying nonconformance with ordinance. This is unique lot. Two access points, 11 acres. Oversize lot. Lot B in no way relies on Lot A. B was a stand- alone lot when purchased. The vegetation and topography are unique. It is at top of plateau. Views are unique and contemplated building envelope there. Given those conditions the ordinance re frontage there is no fair and substantial relationship there. Will comment further later. But no substantial relationship between general purpose of the ordinance with respect to frontage and the application to the property.

ii) and; The proposed use is a reasonable one because:

The second prong is the use should be reasonable. In this case, a single family home in a single family residential neighborhood is reasonable.

K. Johnson asked for questions from the Bd.

J. Dargie said that M. Klass stated that in 1991 there was always another residence planned. She pointed to map asking if that was it.

M. Klass said it was 1995. That was a tennis court. He pointed out the lot where house was always contemplated and some wetlands.

J. Plourde, to clarify, in 1991 there was one access point to the rear lot and in 1995 it got subdivided. How much of that has been developed?

M. Klauss agreed, into three lots. Total at that point was 8 lots in 45 acres. He pointed out the lots developed. He said there was always a house contemplated.

J. Dargie said the1995 lot she asked about, that frontage ended up being separated?

M. Klauss said yes. He pointed out on plan.

J. Plourde and M. Klass had brief discussion of the location of proposed access, existence of a curb cut now or not, presence of grass and gravel. M. Klauss said proposed driveway equal distance from Foster Rd. and existing drive. He pointed out on plan existing lot. He recollected drive on 366 was closer.

J. Plourde expressed concern re traffic access and spacing drives and whether between two drives and driveways and the intersection. Didn't want to be in position to say yes and then create hardship and something out of compliance. Any consideration of having one access point almost to a pork chop, sharing the same driveway.

M. Klass said that was talked about. Would be willing to consider it. Common driveways have their own issues.

J. Plourde agreed, but looking at two residential homes, not an apartment complex. They will be within area requirement. It was about frontage which is about not crowding. Didn't think use was considered overcrowding, but was a matter of safety and access, not just for proposed development but surrounding houses.

M. Klass could understand common driveway idea and they would be fine if that was condition of the Bd. They hadn't designed a house; it hadn't been planned yet.
K. Johnson said Planning Bd would consider issue under their own subdivision rules. If it looked that was only point of access used the ZBA would consider it from safety standpoint and consider whether it was a hazard to public and would this variance create a hazard. It is those gray areas where ZBA looks at areas, Planning Bd looks at their areas, and areas that do overlap.
M. Klass said if it made more sense to consolidate the driveways, that was an option.
M. Thornton asked whether anyone contacted the Fire Dept. about safety of such narrow access.
M. Klass said no. Some towns do that automatically for the applicant.
K. Johnson said applicant usually goes to Fire Dept. first and Fire Dept. would say they reviewed it and said they saw no problem. If not, Planning Bd will send them to Fire Dept.
K. Johnson opened the meeting for public comment.
Heather Bierschenk came forward. She said everyone in the neighborhood bought.
K. Johnson asked if hers was the shared drive or access to Federal Hill.
H. Bierschenk said she lived at 358 Federal Hill Rd. They all bought at about the same time. Minimum lot was 5 acres. She has 5. Wollfson's have 5. Walcotts had 9. Birketts, and two other lots. All divided into 5 acre lots. They all bought at that time, intentionally with the larger acreage. She had understood when this was bought and divided it was to preserve the neighborhood and not have building. If a building were there it would be literally in their face. They have a rural setting. It may be an emotional issue and doesn't affect the law. Everyone who bought there is still there and have been for over 20 years. Would rather not see this.
Robert Wollfson of 360 Federal Hill Rd came forward.
K. Johnson said his property shared the existing drive.
R. Wollfson said this was a issue in 1965. He would request minutes of that. Mr. Birkett (who was not present) when that plot came up they bought it with intent to prevent the kind of thing from happening that was proposed here. It was 5 acres and bought by both to prevent it from being split. Re M. Krauss' comments, they have their perspective on it. Contrary to some thing said if you could zoom out you could see where they split the lot, existing lot, and several huge lots in the immediate adjacent area. The Clark property is one big farm; not to say it might not be in the future, but nothing has been planned there and nothing has been done. To say this would not impact is not true. If it was downhill, yes; but at the crest of the hill where they all live, it will. Existing houses in a semicircle. If plan proposed it would be stuck right in the middle.
K. Johnson said they have plan showing housing profiles on the lot, but slightly different than on the easel. R. Wollfson had Google image showing size of the houses and types of things that would be impacted. He had information, a legal statement on basic functions of NH Zoning Boards of Adjustment. A commentary by H. Bernard Waugh, a Zoning attorney and a member of a Zoning Bd. A variance is supposed to be hard to get. If not, everyone would claim one. On the proposed plan, if Birketts wanted to split into two acres would they be allowed? Would they be setting a precedent? One a technical point this is currently one contiguous plot. If subdivided they are making two subdivisions, one of which has 75 ft of frontage and one having 25 ft. of frontage. Returning to the points of law, it was mentioned earlier granting a variance constitutes a violation of the ordinance. It is only allowed because it would be unconstitutional not to allow for a particular purpose. Re unnecessary hardship, the Wolcotts have had full and functional use of that property. Fact that they bought extra land to prevent further subdivision and somebody else putting in a house was their decision, not made out of hardship. He disagreed there was no effect on values of property. If you went and looked, it would absolutely impact. He was sure they could get half a dozen real estate agents up there, they would see it. Currently, as you walk out his front door, he has a courtyard and can see an abandoned tennis court with nothing. With a house in

there, he would see it and Lyttles and Birketts. If the applicants were not the ones doing it, that house would be 100 yards from them and the view from their property. Forcing another house and making almost cluster housing. Not contrary to spirit, if not there wouldn't be an ordinance to require 200 ft. Anything not is contrary to the spirit. Contrary to the public interest. Four people there who feel it is. How many people needed to be considered the public, at the expense of one individual? M. Klass gave very narrow view based on what he wanted to do. Re substantial justice, doesn't say how it would do substantial justice by granting or not. Nothing wrong with the status quo. Abutters are against it. They are immediate abutters, not across the street or down the road. They feel strongly about having this going through and would dump a house in the middle of their serenity. There were covenants when they bought. Legally those have gone away, but as stated, they bought it because there was nothing there. All the others built for that reason.
M. Thornton asked why the covenants weren't still binding.
R. Wollfson thought they had a ten year life span.
K. Johnson said they frequently technically lapse at 20 years.
R. Wollfson said the Hardman's sold their property and no had a vested interest. However, covenants still live on with everybody in that area. Putting a house in the middle of those 5-acre lots was not what should be happening. It didn't meet the ordinance and there was no need for a variance.
J. Plourde asked R. Wollfson if he had the shared curb on Federal Hill Rd.
R. Wollfson said it was shared in as much as they could make use of it. When the Wolcotts moved in they didn't want to share. They took 25 ft. and he took 15 ft. and it splits apart.
J. Plourde asked once they were on property, off the road, that was where individual ownership was.
R. Wollfson pointed out on the map where it did so.
J. Lyttle of 364 Federal Hill Rd spoke next. She lives in what was the existing camp, building that has been on the property for 200 years. She looked at the property in 1993 on 9 acres. It was subdivided. When they bought, it came down to about 3 acres and that was when Wolcotts and Birketts bought. They were told it was so that no one could build. There was no access to the road because they owned the property. Other point is what Allen said but she remembered discussion when Wollfsons were building their home it would be easier and more aesthetically pleasing for all of them. She has a driveway, the Wolcotts and Wollfsons had small space between. It is a shared driveway now and there is a lot of noise right by her kitchen window. Adding another home and more cars will be a noise factor. There will be more cars driving out with two driveways basically right there. Not a huge safety factor, but somewhat of a safety factor. Other option going further down it cuts through the field which is her view and hindering her view and it would affect hers and Heather's property. It was mentioned impact of the house. She had tree line now, but if house was put in she would look out and see it or see into that home.
K. Johnson asked for any other questions.
R. Wollfson had copy of minutes from last time – not that different other than changes in the zoning. He requested the Bd read it.
K. Johnson said because it wasn't received prior to the meeting, he could only have him read all of it to them, the pertinent points. If he felt it was information they should have in making their decision it was Mr. Wollfson's right to read it.
R.Woolfson said he'd read pertinent parts. Comments from Gary Birkett, an abutter, who stated most of the comments and they were public testimony. When we were approached by the Wolcotts to buy the lot the intent was to prevent all future building on the 5 acre lot. It was not our intention to purchase that lot other than to prevent all further building in the total development. He suggested the Board look back at the minutes of the Hardman subdivision which indicated the

covenants and all the rest. The Birkett's consolidated their two tracts and Birkett stated he had 275 ft. of frontage on Federal Hill but the driveway situation was exactly the same as it always had been. There was never a change. It was a big bone of contention at the time. Beth Birkett stated if they could break another driveway off their Foster Rd. driveway to get to their 2 acres that are in the field next to the two areas, and they wanted to sell their existing house with 5 acres, and most of the houses up there had 5 acres, and the reason why they purchased the extra 3 was because they wanted 5 acres and also they purchased the extra acreage in order to protect their property. So at the time the covenants were still in effect. The original building permit that Shelly alluded to back then was on the 5-acre lot. But, it was contemplated. There never was anything firmed up in terms of building on that lot. You have intentions but unless something done about it is pie in the sky. Never intent to build one the covenants fell away. This is some information about the right of way. Diminishment of surrounding property. They went up and read the covenants which was spirit of what they wanted. Now that is being destroyed. Despite the fact it is not really there, the spirit of it lives on.

K. Johnson asked for any other public comments. There were none. He closed the public comment portion of the meeting and asked M. Klass to read the application into the record.

M. Klass said he had drafted a narrative which would be easier but it could be dry. Or he could just talk to the Bd. Any preference?

K. Johnson said it was an extensive application; it is part of the public record and anyone wishing to read it could do so. He would ask M. Klass to give a narrative for that and they would go on and discuss anything additional M. Klass wished to add.

M. Klass said, noting that it is an extensive narrative, and that he did this five minutes ago and the facts were before the Bd, he would be brief. First prong is if granting would not be contrary to the public interest. Courts have interpreted this statutory prong and linked it to the next one, spirit of the ordinance, and said that to be contrary to the public interest it must unduly and to a marked degree conflict with the ordinance such that it violates the basic zoning objectives. Important, because these are all factual inquiries. Have to look at what is being requested, as applied to the facts of this case. Other issues may not be relevant. Overriding purpose is to insure safety and welfare. He didn't believe overcrowding was a concern. Both lots are compliant with zoning which requires 2 acres. Fact that new house is going in was not determinative. Two acres is adequate for a single family home and with the neighborhood. He understood adjacent lots were bigger but the neighborhood was more than adjacent houses. He noted larger lots to the south, a cluster development to the east, and to the north and west there were multiple smaller lots. That is the neighborhood, not just the immediate abutters. Properties are provided safe and reasonable access. 75 ft. is plenty of frontage notwithstanding any planning considerations. Given fact that two houses rely on 25 ft. he felt that one new house could rely on 75 ft. It is relatively straight shot to the road. No threat to public health or safety. Sufficient acres for a single family home. It is consistent with character of the neighborhood given lot size and shape and means of access to the back portion. Location of this lot being on the plateau with unique topography and vegetation actually do buffer it from neighbors a bit. In 5 years if this is approved he didn't think you will know it is new. In conclusion, it is not contrary to public interest. Re spirit of the ordinance, this mirrors public interest. Rationale for frontage is to insure safe access and address density concerns. Believes this proposed lot addresses those adequately. Density is not a concern – it is a concern for some folks, but this lot acreage permitted by right. Looking at GIS these houses are not isolated on their 5 acres. They are all in the front portion. You see your neighbors. Spirit of the ordinance is observed. Re substantial justice, it is a balance test. Commentary has spoken to this point and it basically is what is gain to the public vs. loss to the applicant. If gain to public is minimal, it is justified. Here the variance requested will not result in appreciable gain to the

public. Proposed lot is designed for safe and appropriate use and is consistent with the overall density. The Wolcotts were the first buyers in this subdivision. Everyone else bought with knowledge of ability to put another house in. Will not threaten the health, safety, welfare. Denial will result in substantial loss to the applicant, prevent use of a substantial portion of the property. In light of the above law, denying exceeds any gain to the public. Re values of surrounding property, it will not diminish character of the neighborhood. It proposes same use of everybody in the neighborhood. It will be a use – a structure. But the fact that a portion of this land will be used will not reduce property values. It will be the same noise, same odors, the same vehicle traffic, as all the neighbors. Re unnecessary hardship owing to the special conditions of the property that distinguish it from other properties in the area, denial of this variance would result in unnecessary hardship because there is no fair and substantial relationship between the general public purpose of the ordinance and the specific application of that provision to the property. There is no doubt this property is unique. Two points of access on Federal Hill Rd. , large size. Lot B does not rely on Lot A. Lot A added after the fact. Heavy existing vegetation to provide a buffer. Structure to be placed behind a house, so completely isolated from Federal Hill Rd. Unique topography, with this being a plateau with decreasing elevations toward valley with contemplated building site envelope on the top. Given special conditions the ordinance provision at issue re frontage there is no fair and substantial relationship between its policies and the property. If they had 200 ft. frontage instead of 75 ft, what would that change? He suggested nothing would change.
M. Thornton said it would change density. It would change fact that it was in strict obedience.
M. Klass understood they were requesting a variance. Understand it is not an allowed right. You have 200 ft. You have a house. That would not change.
R. Wollfson wanted to correct an inaccuracy in a statement.
K. Johnson said public portion was closed. Let Mr. Klass finish. Then he'd ask the Board and get back to Mr. Wollfson.
M. Klass continued re unnecessary hardship. No substantial relationship between general public purpose of the ordinance governing minimum frontage requirements and its application to this property. Use is reasonable. A single family in a single family neighborhood on a 2-acres lot off the road. It doesn't change the character of the neighborhood.
M. Klass asked the Chair if he should address the public comments.
K. Johnson said yes.
M. Klass said he appreciated public commentary. Whatever happens, these folks will be living next to each other. Respects input and the Board's role. Several abutter commented how this would be a new house in a vacant portion of the property. That is an emotional issue but when this subdivision was built there was another lot contemplated to be put there. He understood at one point there was a house footprint staked out there. They are not carving out the original 9 acres; they are seeking to put a house where a house was once contemplated. Regarding it being close to another home, looking at GIS website, there is an opening in between all the houses. There is a opening because another house was contemplated. Setbacks are to prevent being too close. Folks have gotten used to a vacant place they enjoy, but it is not their. The Wolcotts could put a barn out there, though he hadn't look at the zoning on that. This is their property. They did buy first. As of 1995, there are nine total lots contemplated. With respect to prior variances denied, the legal standard has completely changed.
K. Johnson commented, substantially changed, not completely.
M. Klass stated it has changed. Didn't believe that mimicking what happened before is not determinative of what happens now. Not suggesting that portions of that didn't come from case law, but suggesting that the legal standard is different. Each application is weighed on its own. To deny this because of similar request made in the past.

M. Thornton asked if early on a shared drive has been acquiesced and agreed on they wouldn't be having this meeting.
M. Klass asked for clarification.
M. Thornton had heard twice that a shared driveway was proposed and applicants said no. Is that factual?
M. Klass said he didn't know. Property rights are property right, which is reflected on the plan. There is a crosshatched portion that typically designates easement rights. If he had to guess, he would guess that Lot 56-44-5, #360, looks like the Wolcotts have rights over that property for a driveway. Re common drive, there could be one – if it was permitted they could have one point of access. They have one curb cut. He didn't see how having one for both lots impacts.
M. Thornton said one of the comments was that early on a shared driveway was proposed to meet the 200 ft of lineage and some discussion followed..
R. Wolcott said they were first buyers there and didn't know anybody. When they purchased the land from the Hardmans at that time they didn't want a shared drive, not knowing who the neighbors would be. When the Wilson purchase their land they (Wolcotts) were asked to make it common but they didn't want to do that. Didn't want to change anything.
M. Klass said at one point it was a 5-acre lot that would have been buildable. In 1996 that was separated into 2 acres and 3 acres. It would be easy if one lot extended over pinched other off. They didn't. They split it both ways. They kept that frontage. Some comment about the immediate adjacent lots being 5 acres or larger. Referring to GIS image showing structures and sizes of lots. Depending on elevation of your view that changes sizes of the lots but would suggest that community in sense of variance includes some of the smaller lots. Re being too close to existing, look at GIS. It is obviously a building site. Fact that any structure would go up would not change. They will be almost equal distance from one another. The 2-acres parcel that Wolcotts have is distinct from 3 acres. 2-acre parcel on top with unique view. There are wetlands. These are not mirror images of each other. Believes the 2-acres is unique from the 3-acres parcel. Re absence of development on this lot, would refer to the 1995 plan which at that time contemplated nine total houses. Right now there are seven. Doesn't know when everybody bought. If they bought between 1995 and before there was always that lot contemplated. With respect to seeing the new house, you can see houses there. Some folks have gotten used to absence of a house but did not believe that was a part of the statutory prong. The covenants had a ten year life. They were not reinstated. Folks suggest spirit going on. He'd suggest uses of those lots have changed over time. Believes those properties being used inconsistent with those covenants. These folks have been there for many years. Commentary about the Birketts, who aren't present, they were not there. To the extent somebody testifies for somebody else he would not think that was totally appropriate.
K. Johnson asked for any question.
J. Dargie asked about an e-mail.
K. Johnson said there was not one on this case. Only thing was a memo from Lincoln. Nothing in the packet either. He re-opened meeting for public comment.
R. Wollfson said M. Klass trying to pull wool over their eyes. Seemed the cornerstone of the case was they should all expect something would be built and because the space invites it and it is divided and they should have known. When they all bought it was a 9-acre lot and no subdivision. No way of knowing. It was subdivided because when the Wolcotts came they didn't want the entire property; they split it to prevent this type of thing from happening. No expectation of this happening. Fact that house going in you can look at houses there all end to end. Nobody questions how front door in looking into the face of somebody else. With this proposed house he

looks out his front door at looking straight at it. Jane comes out back and stares straight at it. Not told they should be expecting something to be built there.
J. Lyttle spoke, saying when she bought the property it was on 9-acre lot. When Wolcotts bought and anybody else bought in 1996 that was not a buildable lot. It only became one when the Wolcotts went before the Bd. and asked for it to be a buildable lot; they bought it with the Birketts so no one else would build. When everybody else bought it was not buildable. That 9 acres didn't get split until August 1995. Then it was up for sale and it became an issue because no one else wanted to build and then the Wolcotts bought it.
There being no further speakers, K. Johnson closed the public comment portion of the meeting. He gave M. Klass an opportunity to rebut.
M. Klass said he wasn't trying to pull the wool over anybody's eyes.
K. Johnson understood. He explained that the Bd. is a quasi-judicial board and explained what that entailed.
M. Klass said he created a presentation for this case. They respect others' opinions. These folks will be neighbors and he acknowledged some tension. He didn't have personal knowledge of the history.
R. Wolcott said when the Lyttles purchased their 5 acres broke off they signed a legal agreement with the Hardmans if ever there was to be a lot they (Wolcotts) would have first rights to refuse. They would bring a signed purchase and sale agreement. They would have one chance, and three days. No negotiation. They chose to do that with the 5 acres. They sold 3 acres to Birketts. That was a approved buildable lot by the Town. They bought it as an approved lot and they broke it off between the Birketts and themselves.
K. Johnson then moved on to consideration of the criteria by the Bd.
He said usually he would go last, but because of the new member, J. Plourde, he would lead, with the approval of the Board. He said applicants have requested a variance, which has five criteria set by combination of court system and State legislature. Reason this case was before them again was the court made a ruling on determination of hardship. Legislature didn't like that ruling and in 2009 changed the criteria by which Zoning Board determines hardship in response to the court cases. Now there are 5 criteria. The first two, not contrary to public interest and spirit of the ordinance are very close together but a little different. Courts are close to combining them but since they haven't yet, Bd. has to discuss them separately. Bd. will go through each, and every member will give opinion. Re variance not being contrary to public interest, the Bd may refer to the Handbook. He explained what the Handbook was. Some of the information in the Handbook has been superceded by court cases. But it gives guidance as to determination of criteria.
K. Johnson moved on to the discussion of the criteria.

1. Would granting the variance not be contrary to the public interest?

K. Johnson – courts have determined for variance to be contrary to the public interest it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance. To determine this, does the variance alter the essential character of the neighborhood OR threaten the health, safety, or general welfare of the public? He addressed comments to the essential character of the neighborhood. He disagreed with applicants on what constitutes the neighborhood. On GIS, he saw 5 different neighborhoods developed as a group. Bd. has previously seen where Res. R on one side of street and Res A on other side. And you have Res A applicants saying across the street they have to do this and we want to do it. Or the Res R, say it's much more dense across the street so we want it followed. But that allows Bd. to draw lines between neighborhoods. This group of properties forms its own neighborhood. Separating this small piece would alter the essential character of the neighborhood. Didn't believe creating a 2-acre lot with a

narrow access would be within the characteristics of the neighborhood. All the rest are large lots. They do have narrow access to the road. One of the reasons the 200 ft. frontage was created was specifically to avoid situations like this, created when the development was designed with long narrow lots with small access to the road. Intent of that was to prevent these long, narrow, tiny-access lots. There has to be clear need to set aside that frontage requirement.
J. Dargie – same thing Kevin mentioned. While there are 2 acres, the ordinance says 200 ft. frontage in addition to 2 acres. Reason it was created with 200 ft. of frontage, if somebody else bought, they would have 200 ft, and so on. Would granting not be contrary to public interest? Who is considered public? Should be the neighbors who are affected by that particular item. Has to say granting would be contrary to the public interest.
M. Thornton – pointed out this is a double negative where a yes is a no and a no is a yes. Court wanted a yes to be able to be given for each answer. Not able to give yes to whether granting would not be contrary to the public interest because of the 200 ft and 100 ft stipulations which were in effect well in advance of the current desired division. As he understood, perhaps it is not fair, but as he understood it, the reason for purchasing some of these properties was to avoid congestion. Getting a feel of a different intent. They are not there to talk intent but if it was against public interest before, it is now.
L. Harten – other side of the coin. Looking at the Handbook he believed a literal enforcement of the provision of the ordinance would result in unnecessary hardship.
K. Johnson noted they weren't there yet. They were discussing contrary to public interest.
L. Harten said he knew that but it was part of the public interest. Didn't believe if this were granted it would create unnecessary inconvenience to houses in the area. Realized other lots were larger but 2 acres was certainly allowed in this district. Didn't believe if this were granted there would be any harm to the public interest. Realized the public interest was the neighbors but also the entire community. One drive has 25 ft frontage and this is 75 ft with good line of sight on Federal Hill Rd. Didn't have a problem with this part of the guideline. Didn't believe it would be contrary to the public interest.
J. Plourde – a lot of good information presented on both sides. He came in with open mind, did a lot of research on zoning ordinance. Going back and forth on these first questions. If they were talking about public interest and just abutters, that was one thing but talking about people traveling along Federal Hill Rd. Also fire engines, police cars. Town has ordinance and design criteria for a reason. They are being asked to approve two nonconforming lots because of the limited frontage. Now there is one nonconforming lot. Based on that he would have to say no on question 1.

2. Could the variance be granted without violating the spirit of the ordinance?

K. Johnson – what is spirit of the ordinance? Why was it enacted? He read from the Handbook, focusing on the spirit of the ordinance the courts have concluded, in a court decision "While a single addition to house… might not greatly affect the …congestion or overall value" of properties, "cumulative impact of many such projects might well be significant. For this reason, uses that contribute to …congestion and over development could be inconsistent with the spirit of the ordinance." Applicants have argued it is unique and has two points of access on Federal Hill Rd. He is strictly correct in that it has two points of access on Federal Hill. However #155 also has two points of access on Foster Rd and Federal Hill. The Bd could consider the fact that if they grant this one, each of the other properties could also request the same type of variance. Cumulative effect would seriously alter the character of the neighborhood. In his opinion, spirit would not be observed by granting this variance.

J. Dargie – Could be granting without violating spirit of the ordinance? Again, spirit of the ordinance is 200 ft frontage and 2 acres, same argument she made on previous one. If the spirit was 200 or- there was reason for having 200 ft frontage- to prevent long narrow drive. She had to say no.
M. Thornton – Since he answered no in #1, he would answer no in 2 for same reasons Joan said. Also it seemed intent with these pieces of property had gone back and forth over time – at times to guarantee privacy, and now to subdivide it. Believed that was arguing both sides of the same coin to their own advantage. No, it cannot be done without violating spirit of the ordinance.
L. Harten – didn't believe it would violate spirit. Handbook speaks to health, safety and general welfare of the community. Couldn't see putting a house even with only 75 ft frontage on 2 acres would contribute to any health, safety and general welfare problem. Didn't believe it would create any additional congestion on Federal Hill Rd. Didn't believe that, if approved, would violate the spirit of the ordinance.
J. Plourde – his understanding of spirit of the ordinance was to make sure they were not overcrowding and also about access. Access because of the 200 ft. frontage. Looking at 5.04.04 Res. R District, there are acceptable uses listed. Also acceptable uses and yard requirements by Special Exception etc. not that they are looking to subdivide and know there will be two single family homes. They are looking at subdividing in Res. R. Any of those uses could be constructed on those lots. Felt they shouldn't look at it in a bubble and say it will be two residential homes. It could be any of these uses. They could come back and request any of these other uses. If they subdivide, they would violate the spirit.

3. Would granting the variance do substantial justice?

K. Johnson read from the Handbook re substantial justice, "the only guiding rule is that any loss to the individual that is not outweighed by a gain to the general public is an injustice." Denying this could be done while still remaining just in that the applicant still has use of this entire property as a residential property. They have a house on it. They are using it as a residential property. They purchased it for use as a residential property and to continue to use it as a residential property even if the variance were denied would not create a significant loss to this individual. There was a gain to the majority in maintaining the character and to the public in maintaining minimum number of properties that have access below what is required by the statute and, as pointed out, there are many reasons for that. One is to prevent creation of long narrow lots clustered on a driveway. Also access for emergency services. Valid reasons to the general public as well as the neighborhood to deny this variance. There was a gain to the public that offsets whatever minimal loss conceived to continue to use this property as it was designed, as a residential property.
J. Dargie – granting the variance would not do substantial justice, for the reasons stated.
M. Thornton – would do justice for one or two individuals, but if you look at other properties each of them could by same rational be divided. Therefore, looking at original intent of properties were to maintain a minimum density, you would have to say no. For the other people, it was not a substantial justice.
L. Harten – believed if this request was granted it would do substantial justice. Believed harm to the individual was outweighed by any gain to the general public. Believed if it was granted, it would do substantial justice to the applicant.
J. Plourde. – believed, based on the criteria and the definition in the Handbook (he read definition that had previously been read by K. Johnson), that granting would do substantial justice for the individual. Based on that he would say granting would do substantial justice but he didn't see any substantial benefit to the general public by denying.

4.. Could the variance be granted without diminishing the value of abutting property?

K. Johnson – addressed 1995 plot plan provided by applicant showing property which was subsequently purchased by the applicant and another of the property owners and subsequently divided. While 1995 plot plan shows this was intended to be a buildable lot the layout of that lot, the location of any house on that lot would be highly dissimilar to any location of any construction, a house or any other allowed use in Res R would occur on that lot. To build in that subdivided portion of original 56-47 would create a cluster of buildings together which was clearly different than shown on GIS maps by which they can take a step back and see original intent was to have this openness of development. While no specific evidence presented by the applicant or opposition that this would diminish value, could see where 3 or 4 directly adjacent properties would be affected. It was conceivable that could diminish value of that property by comparing what exists in this neighborhood today vs. what would exist in the future.

J. Dargie – on this she would vote the other way. Without any evidence present either way it could be granted without diminishing property values.

M. Thornton- Agreed it could be granted. The original intent was to have, as he understood it, 5 acres to insure privacy. RSAs were changed and now it was 2. If everyone followed that example they could at least recover a large part of their initial investment back by subdividing and selling. That would completely abrogate the original intent. However, the question was, would it diminish values? Answer was, it could be granted without diminishing values. Yes.

L. Harten – agreed with M. Thornton. Assuming this will go to Planning Bd and assuming Planning Bd would have input as to location of the house on this property so it would not interfere. He was assuming it would be placed in the center of the new subdivided lot or in a portion where it would not continuously interfere with the other abutters in close proximity. Also they talked about if they granted this the other landowners in this parcel could come forward and ask to subdivide their lots. He didn't believe approving this would set a precedent. Each case has to stand on its own. This was the one he was looking at. Didn't believe, if it was approved, there would be any diminishment.

J. Plourde – going back and forth on this. Only property he could see that could be in question would be #366. But looking at existing situation the house on #362 could be located closer to #366. By subdividing A & B it will not change situation that could exist today. Didn't see that the variance being granted would diminish value of the abutting properties.

5. Would denial of the variance result in unnecessary hardship taking the following into consideration:

A) i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;
ii. The proposed use is a reasonable one.

B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.

K. Johnson said the final criteria is usually the most difficult criteria to meet and generates the most discussion, and that is the literal enforcement of the ordinance would result in unnecessary. He read from RSA "For purposes of this subparagraph, unnecessary hardship means that owing to special conditions of the property that distinguish it from other properties in the area,

no fair and substantial relationship exists between the general public purposes of the ordinance and the specific application of that provision to the property" and the second is "the proposed use is a reasonable one." Re proposed use being reasonable, in this instance the proposed use is a reasonable one. Creating a parcel within Res R that meets most of the Res R criteria is reasonable. However, this is where he didn't' believe this property met the unique test. It was not the only a long narrow parcel in this development nor the only one in the development with two access points to the road. Didn't meet unique property. Nothing that sets it apart from others to justify subdividing this lot.
J. Dargie – there were no special conditions of the property that distinguish it from others in the area. Property can be reasonable used as it is in strict conformance with the ordinance.
M. Thornton – No. Because the property can be used right now in strict conformance with the reasons for which it was purchased which was to insure privacy and guarantee owner the sense of rural exclusion they wanted. It would be a little difficult to argue that today I'm right to want to have this privacy and tomorrow I'm right to want to cut it up and along the way not meet the same standard of acceptable uses that other people have to meet.
L. Harten – Didn't have problem with this use. Would denial result in unnecessary hardship? Facts speak for themselves with this property subdivision. They are making it unique by uniqueness is one of the items they have to look at. It certainly met the requirements of the ordinance as it contains minimal amount of acreage. The 75 ft drive provided on the original plan is there. That makes it unique on its own. No problem with that piece of this criteria.
K. Johnson pointed out the original plan provided 150 ft. not 75 ft.
L. Harten believed there was uniqueness to proposed subdivision. No problem with first portion of the requirement. Also believed the use of this proposed lot is a reasonable one. Didn't believe this particular setting overcongests the area. It is rural district as he mentioned the lot has the required 2 acres. Believed putting a structure was a reasonable use.
J. Plourde – agreed that the proposed use was a reasonable because it is allowed in Res R. Problem he had was that they can only base decisions on information presented and not on "what if." Not "what if" they did come in with only one driveway as a shared access. They were looking at two nonconforming driveways, so they were creating the hardship themselves. He will be voting against it #5 criteria.

K. Johnson called for a vote.

1. Would granting the variance not be contrary to the public interest?
M. Thornton – no L. Harten –yes J. Plourde – no J. Dargie – no K. Johnson - no
2. Could the variance be granted without violating the spirit of the ordinance?
L. Harten – yes J. Plourde – no J. Dargie – no M. Thornton – no K. Johnson – no
3. Would granting the variance do substantial justice?
J. Plourde – yes J. Dargie – no M. Thornton – no L. Harten – yes K. Johnson - no
4. Could the variance be granted without diminishing the value of abutting property?
M. Thornton – yes L. Harten – yes J. Plourde – yes J. Dargie – yes K. Johnson - no
5. Would denial of the variance result in unnecessary hardship taking the following into consideration:
A) i. No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property;
ii. The proposed use is a reasonable one.

B) If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.
J. Dargie – no M. Thornton – no L. Harten – yes J. Plourde – no K. Johnson – no

K. Johnson asked if there was a motion to deny variance requested in case # 2016-03.
M. Thornton made the motion to deny Case #2016-03.
J. Dargie seconded the motion.
K. Johnson called for final vote, a yes vote being to deny.

Final Vote:
M. Thornton – yes
L. Harten – no
J. Plourde – yes
J. Dargie – yes
K. Johnson - yes

Case #2016-03 was denied by 4 to 1 vote.
K. Johnson reminded the applicant of the thirty (30) day appeal period.