Lancaster Zoning Board
Location: Lancaster Town Hall
May 31, 2023

Call To Order: Chair Linda Ogle opened the meeting at 1830H and led the Pledge of Allegiance.

Roll Call:
Regular Members Present: Chair Linda Ogle, Vice Chair Tricia Frenette, Steve Young, Nathan Kenison
Absent: Les Hilton
Alternate Members Present: Donald Freddette, Melissa Potter
Absent: Chris McVetty
Others Attending: Land Use Coordinator Robin L Irving, Greg Westcott, Lynette Westcott, Brandon Boyd (Applicant/Appellant), Kevin Hammond, Sharen Robertson (Boyd Abutter)

Chair Ogle stated that the Board should vote to move the alternates to voting members for purposes of this meeting. Steve Young moved to shift both Don Freddette and Melissa Potter to full voting members for the meeting. Nate Kenison seconded the motion. All members of the Board voted to move Don Freddette and Melissa Potter to full voting members for the meeting, no objections. *Motion passed.*

Minutes:
Donald Freddette moved to approve the April 26, 2023, meeting minutes as written. Melissa Potter seconded the motion. All members voted to approve the April 26, 2023, meeting minutes as written, no objections. *Motion passed.* During motion discussion, the Board, Applicant Boyd, and Abutter Robertson stipulated to change any and all references to a distance of "15 feet" to "13 feet, 2 inches, or 13.08 feet" from the side property line pursuant to Surveyor Gardner Kellogg's measurement. Don Freddette moved to withdraw the approval of the April 26, 2023 minutes as written, and amend the minutes to replace "15 feet" to "13 feet, 2 inches or 13.08 feet" and approve as amended. Tricia Frenette seconded the motion. All members voted to withdraw the approval of the April 26, 2023 minutes as written, and amend the minutes to replace "15 feet" to "13 feet, 2 inches or 13.08 feet" and approve as amended, no objections. *Motion passed.*

Appointments: Motion/Appeal for Reconsideration/Rehearing of the following ZBA Case#545:

Case# 545 – Boyd, Brandon for an Equitable Waiver of Dimensional Requirements concerning article 5.04, "Building Setbacks in the Agricultural District". Applicant/Owner completed the foundation to a single-family home assuming it met all required setbacks. Owner/Applicant later found the foundation was placed 15' from the side property line when 40' is required. All other setbacks have been met. Lot Zoned Agricultural. (45 Buffalo Road, Tax Map R15-Lot 052, 4.26 acres).

Chair Ogle read the Equitable Waiver Application questions, applicant responses, Board decisions and asked the Board if they would change or amend their decisions based on the motion's new information "on good reason therefore?" Chair Ogle further explained to the public that only the Board would engage in deliberation and there was no public comment unless the Board requested clarification/information from the parties.

Q1: Does the request involve a dimensional requirement not a use restriction?

Applicant's response: *YES*

ZBA Public Hearing Finding: The Board accepted the answer as written.

ZBA Reconsideration Finding: The Board agreed that there was no new information that would change the 4/26/23 decision.

Q2: Explain how the violation has existed for 10 years or more with no enforcement action, including written notice, being committed by the town.

Applicant's response: *N/A-purchased the vacant land on 3/19/2020, Tax Map R15-Lot 052*

ZBA Public Hearing Finding: The Board accepted the answer as written.

ZBA Reconsideration Finding: The Board agreed that the question was not applicable and there was no new information that would change the 4/26/23 decision.

OR

Q3: Explain how the nonconformity was discovered after the structure was substantially completed or after a vacant lot in violation had been transferred to a bona fide purchaser.

Applicant's response: *The abutter, Sharen Robertson, thought the existing foundation was on her property (Map R15 Lot 038). Both the builder and the excavation contractor said it was not. Since then, Ms. Robertson said it was OK.*

ZBA Public Hearing Finding: The Board agreed that the nonconformity was discovered before the structure was substantially completed and evidence of such was ignored. Not only are the boundary pins in the ground, but Robertson's stakes for her proposed septic were in the ground before Boyd's installation(s) and these stakes were disregarded.

ZBA Reconsideration Finding:

The Board discussed the timeline. The Savage Subdivision Survey generated by Gardner Kellogg is dated August, 2018, and recorded at the registry on November 30, 2018; the pins for the boundary lines were installed at this time. The Robertson test pits were dug and sewer boundary was flagged on August 26, 2018. The Lancaster Building Permit was issued on February 22, 2021. The permit includes a certification section that states "I/We [landowner]

understand that all construction will be done in accordance with the town, state, and building regulation and that compliance is the sole responsibility of the applicant." Don Freddette verified with Applicant Boyd that the permit application and sketch was submitted and signed by Boyd. The NHDES operational approval of the septic was approved September 14, 2021. Given that operational approval is granted when connected to a structure, the foundation was presumably installed at this time. Robertson's statement referenced several conversations with the landowner, septic designer, builder, and realtor, wherein she provided notice to each person that the foundation was staked and built too close to her property. This statement also asserts that Robertson's claims were dismissed and ignored. There is no rebuttal or denial in the reconsideration motion that negates that these conversations occurred. On December 29, 2021, Robertson and the builder reported the boundary dispute to the Lancaster Land Use Office; both the abutter and builder confirmed that the foundation was completed. Robertson hired in January 2022, Surveyor Gardner Kellogg to reflag the property; in Spring 2022 he flagged the upper lot with the cabin on it, and returned in late April 2023 to flag the lot abutting Boyd.

In the Boyd motion for reconsideration, Boyd asserts that he did not discover the violation until April, 2023 at which point Gardner Kellogg confirmed that the foundation was 13'2" from the boundary. Nate Kenison pointed out that pins and flags were set in 2018 and the landowner did not verify that the 2021 work was conducted relative to those reference points. Freddette emphasized that those pins and flags provided the landowner with NOTICE of reference points to which compliance was certified in the building permit application. Kenison added that the landowner, not the abutter, had the duty/burden to verify compliance with zoning setbacks per the certification; he also felt that after the planned and deliberate installation of the foundation when due diligence was not conducted makes all other application questions irrelevant and the motion for reconsideration should be denied at this point. LUC Irving stated that if denied, and Boyd appeals to Superior Court, it would be prudent to consider all questions rather than be ordered by the Court to rehear the case because the Board erred procedurally by not considering all of the questions. Melissa Potter pointed out that the motion for consideration does not deny that stakes and pins were placed.

The majority of the Board agreed that the pins and stakes provided the landowner with notice of the nonconformity before the structure was substantially completed, and additional notice was conveyed by Abutter Robertson to the landowner, septic designer, builder, and realtor, and this notice was ignored. The majority of the Board agreed that there was no new information that would change the 4/26/23 decision.

AND

Q4: How the violation was not an outcome of ignorance of the law or bad faith but resulted from a good faith error in measurement or calculation.

Applicant's response: *I hired a professional excavation company and builder to install a gravel driveway plus dig the foundation. They had the survey and blueprints for the dwelling. They apparently made a good faith error in measurement from the left survey line.*

ZBA Public Hearing Finding: The Board agreed that 1) not one professional verified what they needed to verify leading to negligence, 2) that this lack of due diligence was not made in good faith because there were three tiers of irresponsibility, and 3) they were provided sufficient notice to address and/or rectify and ignored the notice, if not brazenly refused to address it. This is supported by the landowner's deliberate construction of the foundation in the wrong location despite information that the stakes indicated otherwise and immediate listing of the property to dump it upon notice of the zoning violation.

ZBA Reconsideration Finding: Don Freddette referred to RSA 674:33-a(1)(b): "That the violation was not the outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority." Freddette emphasized that the key issue in this case revolves around "the failure to inquire." He further stated that, per the permit certification, the ultimate responsibility falls on the applicant/landowner. Freddette stated that the sketch associated with the building permit application clearly shows setbacks of 40 feet, therefore the applicant was not ignorant of the ordinance. Melissa Potter pointed out that Boyd asserts in the reconsideration motion that "we relied on the expertise of contractors in good faith," therefore the motion supports the finding that the landowner failed to inquire. Tricia Frenette stated that the survey pins provided the standard, and not only the landowner, but also the septic designer and builder failed to inquire and communicate to the landowner whether the stakes for the foundation were properly situated.

The majority of the Board agreed that the zoning violation was the result of Applicant Boyd's and/or his agents' failure to inquire and verify compliance. The majority of the Board agreed that there was no new information that would change the 4/26/23 decision.

Q5: Explain how the nonconformity does not constitute a nuisance nor diminish the value or interfere with future use of other property in the area.

Applicant's response: *Since the foundation for the dwelling and septic system are on my property, the abutter's property rights are not compromised. Upon completion of the log cabin, the current fair market value of the dwelling on 4.26 acres would be +/- $380,000.*

ZBA Public Hearing Finding: The Board agreed that due to the professionals' failure to exhibit best practices and failure to construct the foundation based on the existing accurate subdivision survey, the abutter should not suffer 1) loss of value nor compromised ability to sell, 2) not be able to use the land in the manner that she planned by survey, or 3) be required to endure an infringement of her right to privacy that is supposed to be afforded by the setback requirements. The Board agreed that the foundation should be moved out of the 40-foot setback.

ZBA Reconsideration Finding: The Board disagreed that the reconsideration motion's statement that there is no right to privacy and no compromise to value or ability to sell. Regarding the abutter's right to privacy, the Board agreed that the abutter's level of "right to privacy" is afforded by the statutory 80 feet setback separation/buffer. A significant reduction of the 80-feet

to 53 feet, 2 inches buffer, in and of itself is a private nuisance, and this private nuisance would compromise the ability to sell and devalue the property because buyers of property in remote, rural, agriculturally-zoned districts typically have expectation of separation when purchasing more acreage than high-density residential lots. Regarding interference with future use of the other property, LUC Irving referred to Robertson's lot as a "finger lot," being long and narrow, whereby Abutter Robertson may not be able to move her proposed building to create the desired 80-foot separation without extending into her own setback. Don Freddette mentioned that the Robertson test pit area on the Kellogg re-plot indicates that her PERCable septic area is within her setback adjacent to the Boyd foundation so Boyd' proposed well must be moved so that its protective radius does not interfere with Robertson's septic zone. LUC Irving stated that the septic designer submitted a statement that the well could be moved onto the Boyd lot. The Board agreed that, if Boyd's well is installed in a manner that requires Robertson to move her septic, and there is no other PERCable area, her lot could be rendered unbuildable, so 1) future use is affected by the location of the proposed well, and 2) future use is affected by the foundation because buffers between structures may not be possible.

The majority of the Board agreed that the nonconformity did constitute a private nuisance, would diminish the value of the abutting property, and interferes with future use of the abutting property. The majority of the Board agreed that there was no new information that would change the 4/26/23 decision.

Q6: Explain how the cost of correction far outweighs any public benefit to be gained.

Applicant's response: *Wetlands on the property restrict the construction area and septic system installation area. The cost to demolish the existing foundation and possibly move the septic system and rebuild would be astronomical. The abutter, Sharen Robinson (Map R15, Lots 037 and 038) was only concerned my foundation was on her land. The plot plan proves otherwise. Also, the location of a drilled well will still be within the State-approved well radius. See letter from septic designer.*

ZBA Public Hearing Finding: The Board agreed that the abutter bought this piece of property relying on the ability to use it in a planned and pre-engineered manner and with expectation that Boyd's actions on the abutting property would not alter that ability. The inability to come to an agreement over the course of 2 years while aggression, abuse, and gaslighting by Boyd of the abutter Robertson occurred without recourse is inappropriate. If the abutter had been agreeable to have the well radius moved as a condition of approval of the waiver, the issue of infliction of distress remains. Because the abutter is not agreeable to the waiver AND that the survey was available to the landowner and was ignored, abiding by the zoning laws is the only resolution. The only benefit that would be to the landowner as cash when he is able to sell a non-conforming lot. Mr. Boyd can become whole through a lawsuit against the service providers. Ms. Robertson cannot become whole without removal of the structure even if the protective radius is situated within the Boyd lot.

ZBA Reconsideration Finding: Melissa Potter stated that there is no public benefit in this case, so the cost of correction is not an issue to deliberate over; she emphasized that this is a private owner benefit, so given that the majority of the Board found that the foundation is a private

nuisance that could have been avoided if the landowner and/or his agents had not failed to inquire, the finding is already made. She went on to compare that public benefit would be when a structure impacts town land, or when a store that contributes to local economic development impacts an abutter. She asked "why should the private landowner be rewarded for a nuisance that could have been avoided if he had done his due diligence?" Chair Ogle stated that she felt that the abutter is pertinent to this analysis as she is entitled to a public right, so the Board should think about cost of correction. LUC Irving pointed out that the reconsideration motion states that the cost of the kit was $136K. There is no other price of correction on the record. Chair Ogle asked Boyd if he had a cost associated with correction; he said that if the house does not get built soon, he will lose the value of the kit, so the cost of correction would be the same. Boyd was otherwise arranging for the builder to appear at the rehearing. Nate Kenison said that whatever the builder would say, whether it is an admission of mismeasurement and failure to communicate or misinformation to the landowner, it doesn't matter because the landowner was responsible for compliance ever since he was notified of a possible violation in September, 2021. He added that it has been a year and a half with neither verification of the boundary line nor corrective action. LUC Irving asked the Board members if, given that information in the motion for reconsideration did not change the Board's findings for the previously decided questions, would the Board consider granting a limited reconsideration hearing only on the issue of cost of correction versus public benefit? Melissa Potter was adamant that the builder's testimony would not matter because the benefit is not to the public. LUC Irving asked the Board if the builder 'fell on his sword,' and admitted to making a mistake in measurement and failed to communicate this failure to the landowner, would the Board be inclined to change their decision? The majority of the Board agreed that testimony relative to fault at a limited rehearing would only provide to the landowner a record for a lawsuit and would have no bearing on the Board's finding.

Granted permission to speak by Chair Ogle, Kevin Hammond, potential buyer of the Boyd property and contractor, stated that, based on his experience as a contractor, he would estimate that correction of the foundation would cost between $25-30K. Tricia Frenette said that the Board could consider any figure between the estimate of $25K to the cost of the kit at $136K, the analysis is to weigh the cost against impacts to Robertson; because the Board already agreed that keeping the foundation in its location could affect Robertson's ability to sell the property, Robertson is at 100% loss of the value of her land, especially if the foundation adversely affects the buildability of the lot. Hammond asked when the foundation would be required to be removed if he were to buy the lot with knowledge of the zoning nonconformity. Given that concrete availability typically ends in late Fall, the Board indicated that mid-November would be by when the foundation would have to be removed. LUC Irving stated that the removal would require a land use demo permit and she would impose the deadline for removal. Tricia Frenette stressed that the Board can review the case anytime, so it would behoove the landowner or the buyer to become compliant as soon as possible or the cycle of appearing before the Board repeats or code enforcement starts.

<u>The majority of the Board agreed that the cost of correction of the nonconformity versus public benefit was not applicable; the landowner's nonconformity adversely affects a private abutter. The majority of the Board agreed that there was no new information that would change the 4/26/23 decision; the Board iterated that Boyd can litigate against any/all of the professionals to recover cost of correction.</u>

Don Freddette moved to **DENY** the applicant's Motion for Reconsideration of Equitable Waiver. Steve Young stated that he was in favor of a reconsideration hearing, like a reset to the beginning. Chair Ogle stressed that testimony and any other information should have been presented at the public hearing and not granted a second bite at the apple; she felt that most information in the Motion for Reconsideration was of 'he-said/she-said' character, emotionally charged, and not substantive or material. Tricia Frenette seconded the motion. The majority (3) of the Board voted to **DENY** the applicant's Motion for Reconsideration of Equitable Waiver based as presented, one (1) objection, and one (1) abstention from Kenison because he was not present for the original public hearing. *Motion passed.*

LUC Irving reminded Applicant Mr. Boyd that he may submit an appeal to Superior Court.

Public Hearings: None

Land Use Permits: LUC Irving announced the most recently issued land use permits: 1) Zachary Colby (Landowner) and Alan Brasseur d/b/a Norther Woods Garden Center at 212 Main Street; construct temporary seasonal 10'x20'x8' metal-framed with plastic/tarp covering greenhouse with no electric power anchored with tie-downs, intended as retail plant shed/kiosk, includes several unfixed wooden display bleacher shelves, electric power to site not structure; 2) Dayna Brundle & Alyssa Brundle (Applicants) & Page Hill MHP Coop LLC at 85 Third Street; construct stick-built 12'x18'8' addition with metal roof on concrete slab to existing 14'x76' mobile home, intended use as another bedroom; 3) Leah Hart & Tristan Williams at 150 Pleasant Valley Road; install fixed-tilt 36°, flush-mounted rooftop solar (8.64 kW/DC w/7.6W/AC—9.5kWh to grid) PV arrays w/IronRidge Flashfoot2 B&R PV Mounting System w/18-87.20"x41.10"x1.38" Al-alloy framed Hanwha QPeak Duo XL-G10+ 480W bifacial double glass modules with 6x26 configured monocrystalline solar half cells (~550sf) w/SolarEdge P405 optimizers, rooftop JBox, SolarEdge SE7600H-US inverters w/DC disconnects, RSSs connected to utility meter/SP-200A MSP, 60A AC disconnects; 4) Brian Beattie d/b/a/ Mount Orne Enterprises (Landowner) & Catherine Conklin o/b/o AT&T (Applicant) at 246 Stebbins Hill Road; install and wire via conduit a backup self-contained 30kW Generac diesel generator with auto Tswitch on 4'x10' concrete pad adjacent to existing steel platform; 5) Alexander Kopp at 553 North Road; construct stick-built 12'x26'x20' addition to existing SFH with oil heat, shingled roof, on concrete slab, intended use as another bedroom; 6) Tyler King & Patrick King (Applicants) & Page Hill MHP Coop LLC (Landowner) at 68 Third Street; construct 14'x70'6" concrete pad & install 14'x66' Titan MH Remington Model 880 #23-9-880-2980 and construct 5'x6'x6" concrete for oil AST; 7) Melissa Hicks (Applicant) & Page Hill MHP Coop LLC (Landowner) at 71 Third Street; install 2023 16'x76'x14'2" Redman Northwood Model L27615 Serial #122-000-H-A012137A mobile home onto existing concrete pad—AFTER THE FACT PERMIT; 8) Eric & Sally Livingstone, Trustees of the Eric and Sally Livingstone Family Trust of 2023 at 6 Grandview Drive; install fixed tilt 22°, flush-mounted rooftop solar (8.82 kW/DC w/7.6kW/AC—9.995kWh to grid) PV array w/rack mounting system w/18-89.0"x40.8"x1.37" AA framed SilFab SIL-490HN Si mono PERC modules w/156 half cells (~460sf) w/18-SolarEdge P485 optimizers, rooftop JBox, one SolarEdge SE7600H-US(240V) single-phase inverter, RSSs, option to replace with metal roof under array; 9) Mark Fixter at 137 Prospect Street; construct wraparound 10'-wide deck on both gable ends and one side of existing 14'x24'

workshop, all on piers, eventually enclosed--RENEWAL & AMENDMENT; 10) Christopher & Jessica Williams at 279 Main Street; renovate interior to include replacement of flooring, removal of showers and conversion and reduction of 2 full baths to half bath, install 2 hair rinsing sinks, and construct 2nd egress stairwell for front doorway; 11) Ronald Therrien (Applicant) & Page Hill MHP Coop LLC (Landowner) at 41 Second Street; construct 14'x70'x6" concrete pad & install 14'x70'x13' (1987) Allison Custom MH Serial #1616-0388W, transfer from Errol NH; 12) Alan Brasseur at 212 Main Street, SIGN PERMIT for 4'x8' free-standing wooden sign "Northern Woods Garden Center;" 13) Jamie Samson at 98 Main Street, SIGN PERMIT for 4'x4' hanging MDO with vinyl lettering sign "Bouquet Boutique;" 14) Jessica Williams at 279 Main Street, SIGN PERMIT for 5'x6' free-standing on wooden mount Al composite sign sheet with black background, white copy and gold border for "Mary's New You."

Planning Board Decisions: The Planning Board approved the site plan for Joel Dupuis to operate a business from their home property to sell vehicles and utility trailers as well as provide minor repairs to same. Access to property is from Main Street (Route 3) and a small display area is proposed along that frontage

Training Topics/Materials: The *Hard Road to Travel* publication was shared with the Board members

Announcements/Correspondence: REMINDER: Housing Community Roundtable scheduled for 1800H on Wednesday, June 7th.

Other business: None

Tricia Frenette moved to adjourn the meeting at 2010H. Nate Kenison seconded the motion. All Board members agreed to adjourn the meeting at 2010H, no objections. *Motion passed.*

Respectfully submitted,
Robin L. Irving, Land Use Coordinator

Approved:
RL
Linda Ogle
Linda Ogle, Chairman of the Lancaster Zoning Board of Adjustment