

**MINUTES OF THE MEETING
LEE ZONING BOARD OF ADJUSTMENT
March 19, 2014
7:00 PM**

MEMBERS PRESENT: Jim Banks, Chairman; John Hutton, Tobin Farwell; John Hutton; Philip Sanborn; David Allen; Frank Reinhold, alternate; and Craig Williams, alternate.

OTHERS PRESENT: Attorney Sharon Cuddy Somers, Donahue, Tucker & Ciandella, PLLC; Bonnie Winona MacKinnon; Alice MacKinnon; Edward Bannister; Angela Moynihan; Frank & Judy Eitler and Caren Rossi, Planning/Zoning Administrator.

(ZBA1314-19)

An application from Three Swallow Properties LLC, agent, Ed Bannister. The applicant request a Special Exception to Article V, Section D to allow for a Day Care Center in an existing building. The requests are to the 2013 Town of Lee Zoning Ordinance. The property is known as Tax Map #11-6-0200 and is located at 5 Mast Rd. This hearing is held following the vote of the Lee Zoning Board of Adjustment on January 15, 2014 to grant a rehearing on the Special Exception Application.

Jim Banks, Chairman opened up the meeting at 7:00PM.

The Board members introduced themselves.

Tobin Farwell clerked and read the notice and abutters into the record.

Ed Bannister stated I am here to speak for a special exception for 5 Mast Rd. We are requesting a special exception for a daycare facility at 5 Mast Rd; His Angles Academy that presently operates in Lee. They are looking to move here and expand their operations. The daycare would be for thirty two children and five staff. With the hours of operation from 6:30am to 6:00pm, Monday thru Friday. The drop offs would be from 6:30am to 9:30am and pick-ups from 3:00pm to 6:00pm. Drop offs are typically five minutes long. There is no mass entrance or exits for this, it is a flow. You can see from the building that we have moved the entrance and egress away from the street side over to the other side by the parking. We have a DOT approved plan for the parking and the entrance and egress. Ed showed the locations on the plan. The front door will only be for emergency. There will be down lighting and one pole light at the entrance. Both shown on the plan.

Tobin Farwell asked if he has received the NH DOT driveway permit.

Ed Bannister replied yes and provided it to the Board. He also provided the Board with a letter from the former Police Chief Murch accepting the parking plan. He provided this to the Board as well. As well as Fire. Past Chief, Peter Hoyt had overlooked the plan and now Chief Nemet has a copy of the plan but has not yet gotten back to me. We have good traffic flow, we have

eliminated the parking on the front of the building, out of the DOT ROW. Good sight lines, the entrance will now be closer to the Town Hall. Exit closer to the building. Fencing along the property line to help eliminate noise and distractions. To keep everything clean and out of the way. No refuse will be outside of the building, it will all be inside and taken away. No dumpster. All of the play areas will be grass inside a six foot high fence along the boundary; we propose to put a barrier of shrubs and flowers; along the existing edge of the building there is a lilac bush that the abutter had planted.

Tobin Farwell asked if the solid panel fence will be six foot high as well.

Ed Bannister replied yes, six foot high.

Ed Bannister explained signage will go to the front of the building and what is allowable by the Town is fine for the business. They are not looking to increase it. A simple down light over the front of the building over the sign. The building will be sprinkled, top and bottom.

Tobin Farwell stated it is all pavements in front, you're not intending to remove any pavement, and it's going to remain?

Ed Bannister replied negative. If you see these posts here, this is rail fencing. Per DOT this is ok. The rail fencing continues and eliminates someone to be able to cut the corner. There is no allowable parking there, there isn't any reason to go there, none of the doors are entrances, just emergency bar release doors.

Tobin Farwell commented they are just going to drill a hole in the pavement and go thru it.

Ed Bannister replied yes. This was suggested and allowed by DOT.

Jim Banks, Chairman asked if the fence was on DOT property.

Ed Bannister replied negative.

Tobin Farwell stated it appears to be on the line as near as he can tell.

Ed Bannister replied that the plan was to put it on the line.

Ed Bannister continued that the plan with the parking is the drop offs will come and employees and tenants will park across the front so as they come in these other spaces will be left open as the drop offs don't linger. As it happens over a three hour period, there is no huge need. The staff will park along the front and the customers will come and drop their kids off closest to the door, they will have baffle doors, double doors so no one can come and run out into the parking lot.

Tobin Farwell stated so there is two apartments up above, the daycare is taking all of downstairs?

Ed Bannister replied correct.

Ed Bannister continued in the area of grass, will be at level, the rest pitches back towards the street so any drainage will go thru the grass area, it is a steep drop, 4: 1 drop coming right off the parking. Drainage shouldn't be an issue. Since the business hours are normal business hours, there isn't going to be any undue noise or anything to affect the surrounding properties.

Tobin Farwell asked what the business hours were.

Ed Bannister replied 6:30 to 6:00.

Ed Bannister replied that 6:30 is when the staff gets there and the odd one, most of the kids come in later and probably leave earlier.

Ed Bannister asked are there any questions for me?

Jim Banks, Chairman stated when I scale the drawing; it appears to me there is two feet difference between the line that is claiming to be the property line and the side of the building. Is that known to be true?

Ed Bannister stated when this gentlemen shot lines and put in stakes for our septic design, we also took a tape and strung it from the Town Hall to here, (showed a point on the plan) it is probably closer to a foot and a half, that starts there but it does meander away the way the building is set. So the line goes out but it widens. If you look at an old picture from the back of the building here, you can see where the building ends, and the fence went perpendicular to the back of the building and then ran along and this gas bottle was there. The cement supports of the gas bottles still exists and its maybe four feet beyond the back corner of the building. The lot-line tapers off parallel from the building towards the swamp.

Tobin Farwell asked how about the rear pins Ed? Did they find anything? Do you know?

Ed Bannister replied I talked to the guy who did the Town's survey and at the time, he said he could go out there but he will end up surveying the whole thing, I don't know what I am going to find back there but basically the way the deed reads its one hundred seventy five feet off the town building then it gives coordinates how it come back. It is pretty clear. They had done this. When he set the boundary pins when they did this he worked off of the pins from the previous town survey.

Attorney Somers asked if it was an actual survey plan.

Ed Bannister replied no, it is not.

Jim Banks, Chairman stated, ok, is that the application?

Ed Bannister replied yes.

Jim Banks, Chairman asked if there was anyone who wishes to speak in favor of this application.

None.

Jim Banks, Chairman asked if there was anyone here who wishes to speak in opposition to this application.

Bonnie Winona Mackinnon stated I actually have a question. It appears that Mr. Bannister has presented information about his parking area, which is not what I thought this hearing was about. You denied me the request for a rehearing on the variance to the parking area but granted one for the use. I don't understand what he is doing, or you all are doing.

Tobin Farwell replied that it is a rehearing on the special exception; parking is part of that special exception for the use.

Bonnie Winona Mackinnon asked is that the entire presentation?

Tobin Farwell replied that is.

Attorney Somers replied for the special exception.

Tobin Farwell replied for the special exception which is for the use.

Bonnie Winona Mackinnon spoke I am an abutter to Mr. Banister's property. Excuse me but in most of my notes I refer to the property owner as Mr. Banisters not Three Swallows, but I mean one in the same. Can you just show me what he has showed you? Especially the discussion about the property line. I couldn't see what we were talking about.

Tobin Farwell showed her on the plan what Mr. Bannister had previously explained.

Bonnie Winona Mackinnon stated as far as I know the lilacs are on my property. I wanted to make a point about that as it looks like he is planning to do something over there, is that were the fencing was going to go?

Tobin Farwell explained it appears to be an existing six foot high privacy fence?

Bonnie Winona Mackinnon replied there was a solid cedar privacy fence that I installed that was knocked down by the fire department when Mr. Banisters building burned. I also wish to submit and maybe Caren could give you a copy because this is the only copy I have left. This is my site plan which was approved by the Town of Lee Planning Board in roughly 1985 which asserts the boundary right at his building. In fact in the past, Mr. Bannister himself has told me that he believes the front corner of his building is on my property.

Tobin Farwell stated I would like to talk about this for a minute. That plan holds about as much weight as this plan does. Until I have certified boundary plan, it is a vague notion where this property line is.

Bonnie Winona Mackinnon stated I understand that.

Tobin Farwell stated his best guess is as good as your best guess. I would like to look at them both.

Bonnie Winona Mackinnon stated she understands that, except her best guess is 30 years older than his and I have been openly and notoriously asserting that boundary for 30 years come September, none has ever challenged it, Mr. Bannister has never challenged it. Dick Wellington never challenged it. Mary Ennis never challenged it. Nobody ever said this is not your property. That means I have been keeping gardens, and a drip edge of pea stone that used to be there under his building.

Tobin Farwell stated my point is, you may or you may not own that property. Until somebody...

Bonnie Winona Mackinnon stated I do not disagree with you, but I do know in the State of New Hampshire and there is an *Easement By Prescription* allowed for a piece of property openly and notoriously for twenty years and nobody challenges you. It doesn't mean I own it, but it means I have the right to use it and he may not obstruct that part of the property unless he takes me to court and the court says I don't. So, it's an easement, you are not allowed to build on them or block them. Just a point here.

Tobin Farwell says so you are saying there is a line, but not really a line.

Bonnie Winona Mackinnon stated no, I am saying I have asserted this line right along his building extending into the swamp, probably at least two inches of most of this building and maybe the edge of the building at the beginning.

Tobin Farwell stated you have to prove that you openly and notoriously, you have to prove that he knew that was his property.

Bonnie Winona Mackinnon stated this is the plans that prove it. They have been on file in a public record for thirty years. I have pavement right up to the building, I have granite curbing and gardens right up to the building. I have pavement along, continuing along and also mowed a lot of that and I had a fence there until the fire department knocked it down that shows where I asserted the boundary. It wasn't anything that was done surreptitiously or quietly in the dark of the night. I have openly and notoriously asserted that boundary since I owned the property, since that is where it was shown to me, where my guy that did the same thing he did, said it was, and that is where, and I have been using it. I believe I have an *easement by prescription*. Even if the boundary is a few inches on either side of where I always thought it was. This was never an issue.

Tobin Farwell stated this Board is not here to determine who owns or does not own the property; we are here to evaluate the information that is being presented to us. I am glad you have brought forth your information.

Bonnie Winona Mackinnon stated what you approve is going to impact what the town approved thirty years ago which is why I am bringing it to your attention. You need to know the Town of Lee already said they accepted this as part of my site.

Tobin Farwell stated that the Town of Lee does not make a determination as to where property lines are.

Bonnie Winona Mackinnon stated and neither do you.

Tobin Farwell stated neither do I.

Bonnie Winona Mackinnon stated but he is saying this and I am saying that. Be aware of both sides, that is all I meant to convey. I wanted to also share with the Board, I am sorry the pictures aren't equal. This is his building prior to the fire. It was a lot smaller in volume than it is now. The ell on her roof line was a lot different.

Tobin Farwell asked what you mean by smaller in volume.

Bonnie Winona Mackinnon explained this ell is on the lot line, this part of his building here, used to be one story. Now it is two. The roof used to go like this, now it goes from a peak up here, that way. Do I make sense?

Tobin Farwell explained that you do know this is a special exception regarding the use, the proposed use of the land. I am not sure how this changed, I have sympathy, I am not sure this course of action or this is the right time to talk about this change. We are talking about the change of use.

Bonnie Winona Mackinnon stated one of the things I would like to do if you allow me, is briefly go thru the history that I have had with this property. On September 10, 2010 there was a fire at 5 Mast Rd. In the middle of the night two little children were in danger. Fortunately their father jumped out the window of the building, second story window, had a ladder laying in the yard and saved his children. The fire was serviced by the fire department from my property. There were trucks on my property, my office tenants could not go to work, they could not get into the building, and they drove to work and were blocked by the fire department. I am not necessarily complaining I am just bringing this up as a safety issue because this building is so close to my property that it really impacts it in many ways. At the time the fire department knocked down my cedar fence along the property line between the two buildings, between the two properties which had previously been damaged by a large piece of huge pine tree on Mr. Bannister's property that had blown down in a big windstorm in the spring before. I think it was in March or February, 2010. So on November 30, 2012, now this is a now a little over 2 months later, not quite 2 months later, my professional office tenants of 17 years left the premises. So I was now in the situation of having roughly \$1,600 a month taken away from me. It is also a bad economy, but

due to the condition of the property next door I could not find a tenant. I listed it with two or three brokers, the town didn't require Mr. Bannister to clean up his property within a year as the zoning ordinance states. So I couldn't find any tenants at all until March of 2011 and I now have part of that space rented.

Tobin Farwell asked is that the commercial space?

Bonnie Winona MacKinnon replied the office part. I am not talking about the apartments, they remained occupied.

Tobin Farwell asked how many apartments do you have?

Bonnie Winona Mackinnon continued. But that was more than a third of my income on that building. For two years it disappeared along with paying for the heat and the lights. So that is a lot of money. And I am still down about a \$1,000 a month that I was getting prior to the fire. So that has been going on now for quite a while. I have two other apartments to get back to your question, in the building. A two bedroom and a three bedroom. And the professional office. The building has some finished basement space, it looks smaller from the street than it actually feels when you get inside. On September 10, 2011, one year later, 5 Mast Rd remained un-cleaned up. It was rubble, ashes, plastic blowing, electric wires hanging onto my property that had been snapped. They weren't alive but they were still hanging over my property. And the town held a special meeting in hopes of buying the property for a park or to add onto the town hall or something like that. But the voters turned it down and they held the special exception on exactly the one year anniversary of the fire. So on October 28 the ZBA, you all, gave Mr. Bannister a one year from the fire date extension to the grandfathered status which the ordinance said elapsed in a year if he didn't continue his use it lapsed. That is what the Lee Zoning Ordinance says. Around the same time, Mr. Bannister requested, for no money, offered an easement across about half of my property. It went thru the building like this. He was very nice when he wanted that because he was going to drill a well right there. So he could have a restaurant or something. He assured me at the time that it would not impact the use of my property or impact me in any way. I said ok then I'll probably do it but first I want to check with DES and he suggested that I check with his septic designer. Probably that guy. I checked with DES because I thought they would be more impartial. And sure enough they said don't do it. And I said why not, they said you could never... they didn't even have this map, they didn't know how small my property was or that I had a spruce pond back here. They said you'll never be able to put a septic system there and I said, guess what, there is a septic system there. It is right here. Here is Mr. Bannister's well, here was the septic system which his professional designer failed to put on the plan which is required by state law. And Allan Dennis for some unbeknownst reason, signed off on the plan. If I hadn't called DES I would not know that. So, I complained of course, and they made them resubmit plans. My septic system, you can see how close it is. Defiantly, not allowed. This is my well, this is my septic, the septic was a very expensive chamber system that Allan Dennis made me put there so he surely knew where it was. I have had a whole series of things like this happen in the process of the last three and a half years. I think that a well has to be one hundred and twenty five feet from the septic. I am not sure of that but something like that, not twenty feet. On September 4, 2012, we are now two years after the fire, Mr. Bannister pulled his first building permit with no real plans. There was a floor plan and there was like a

three dimensional solid color, without windows, do you know what I am talking about Caren? Rendition of the building that came from some really non professional cad system. There was a little picture of what the building might look like. There were no elevations, no specifications, you could not see how the roof line was going to be changed. But I took the copy home with me and I looked at it, I am like wait a minute, they are adding a second story on to this ell, which I know is not the subject here tonight. But it is against the zoning ordinance to expand a grandfathered use in area. I brought it to the selectmen's attention, I asked them to revoke the building permit, they refused and Mr. Dennis refused. On October 7, I learned that Mr. Bannister had pulled a building permit, I didn't know it before, it is now two years later. Building permits are not noticed anywhere, there really isn't any way of finding out. You have thirty days to complain, or come see the ZBA or whoever. I was already three days too late to object formally. So I wrote to the selectmen. Because your zoning ordinance says they are in charge of enforcing it, it was definitely in violation of the zoning ordinance. So I asked them to revoke the permit and they said no and Allan Dennis said no. And so, there are lots of other things these are just the major things that I wanted to make you aware, I am not here just to bitch and moan. I had some legitimate, unbelievable things happen in the course of the process of Mr. Bannister's fire.

Tobin Farwell commented I am glad to have the history.

Bonnie Winona Mackinnon continued. Craig isn't an insider like some of you who live in town. Frank who has been here since he was born practically. So I thought it was worth bringing forward. There were lots of other things, these were just the major things. That were to me, mistakes that the town made, very bad mistakes. And mistakes that nobody who has been the building inspector for 25 years should ought to be making. Like not having my septic design on the plan. This is just normal that you put it on a septic plan. This is my little history and I wanted to at least equal his point about that boundary. So... there are five criteria that any applicant must prove in order to be granted a special exception. I didn't hear Mr. Bannister to address even one of them. The burden is on the applicant to prove that. The first thing he has to prove is that the variance would not be contrary of the public interest. I didn't hear him speak to that.

Attorney Somers commented excuse me, Chairman you might want to point out that we are talking about the special exception right now and the criteria for a special exception.....

Bonnie Winona Mackinnon excuse me, this is a typo. I am looking at....

Attorney Somers explained. The criteria for a special exception isn't the same as the criteria for a variance.

Bonnie Winona Mackinnon stated some of them are? Are they not?

Caren Rossi provided her with a copy of the criteria for a special exception.

Bonnie Winona Mackinnon stated ok, the landscape buffer zone is one of the things that is not delineated here. I don't think there is a landscape buffer zone, I don't think he can meet that

requirement. Isn't there a setback for commercial use in the special exception? I think we discussed this last time and I think it was the reason you granted me the rehearing.

Tobin Farwell replied yes, the issue is, a landscape buffer zone must be installed between the special exception and any residential lot line. We do not define, that is our issue, with a width, what a landscape buffer is.

Jim Banks, Chairman replied it is a failure with the ordinance.

Philip Sanborn asked is it a residential buffer or is it a commercial residential buffer?

Tobin Farwell commented that is another issue as well.

Philip Sanborn commented it is a dual use purpose on both lots. It is not straight commercial on one side and straight residential on the other.

Bonnie Winona Mackinnon continued he would submit then that he doesn't meet control of noise where he is going to be using this area as a play area, very close to where my people, its not shown on the map of his, there are decks here, a patio and another deck here, right where my tenants would be trying to enjoy their summer afternoons. And unless this buffer is significant, I know it is not shown here, but he has a door here and last time he said he wanted to use.

Tobin Farwell stated you are a good attorney too, you use words like significant which are, what is significant to you, isn't significant to me.

Bonnie Winona Mackinnon stated I am not an attorney I am a simple yoga teacher, but, unless there is a map or a plan of this, you are not showing...

Tobin Farwell stated he has given it a width, he is saying three foot wide, landscape area, mix of plants and shrubs and I assume it is that hatch area and he is saying existing lilacs are there.

Bonnie Winona Mackinnon stated this is the existing end of the building anyway so the lilacs are irrelevant, they are on my property and he has a wall here that is probably thirty feet tall. He doesn't need a fence there or anything.

Tobin Farwell replied he isn't proposing anything at the end of the building.

Bonnie Winona Mackinnon stated so a three foot.....

Tobin Farwell stated and the six foot high fence is going to be put back I assume.

Bonnie Winona Mackinnon asked and the fence will be on the edge?

Tobin Farwell replied no it looks like it is into his property by a foot or less.

Bonnie Winona Mackinnon continued I think that what he is asking is going to cause a lot of problems for me to be able to rent my properties because this is a noise that has never been on this property before, children are noisy. And I don't feel like this fence is going to do anything about it. Maybe it will keep anyone for seeing them but there is like a swamp here that is not very far back from the building. And noise has a way of going around things like that.

Bonnie Winona Mackinnon continued. Also, the density of use of this building is being exponentially expanded. Prior to, this is not a grandfathered use he is asking for, this is a whole new ball game. In the thirty years I have owned the building, there has been a store there, and a pizza place. The pizza place is the most recent, except for nothing which has been the last three years or four years because the pizza guy left before the fire. He did very little business, I never saw more than three or four people in his store at once. He was the only employee that I ever saw. You are allowing him a density of five, six, seven or occasionally eight people in that building, now to thirty-two plus, last time he said six employees this time five. Is it five employees or six?

Ed Bannister stated I said five the other night too.

Bonnie Winona Mackinnon continued to thirty seven people that is five or six times as many people that have ever been in here at once. And also, he is asking to expand the commercial use on the building that would be one thing, to the outside, which is where I see a great impact to my property. I don't think that his use is very compatible with the rest of the neighborhood for that reason. Then additionally, he has expanded the upstairs of this building too, he has added square footage over this part of the building and over that stairway on the edge, but also see this tiny roof that used to stick out, he has also closed that in. Even though there is no footprint under it, and all the way up. He has expanded the upstairs apartments so that one is a three bedroom and one is a two. Even though his septic permit doesn't allow that. It is still showing in the planning office as being five bedrooms up there. Five bedrooms could mean ten people up there so there is almost fifty people in that building where there used to be seven, eight or nine.

Tobin Farwell asked where did you get the fifty?

Bonnie Winona Mackinnon explained thirty-two clients downstairs, five staff, ten people upstairs. They are all going to be using the whole property. Whereas before, the apartments were very lightly inhabited. And before the downstairs was very lightly inhabited. I worked in that building in the 70s and have owned the building next to it, almost since I worked in it. There has never been that kind of density there, never. It is definitely going to adversely affect my property. It is going to make it more difficult for me to find tenants, I am not going to be able to charge as much money, I have already lost all this money over Mr. Bannister's fire. I just don't find that very just of you to even consider giving him this kind of use. That kind of density in a building that now dwarfs' my property since he made it even bigger. Especially given the safety issue when the fire department can't service his ell without crowding me out. I am not saying they should, but it might have been a factor in my tenants leaving. It is a huge expansion of what was there before, not a lesser one, in all ways, traffic, foot traffic, noise. I think it would adversely impact my property values and my ability to find and keep tenants there. She showed pictures to the board of the building before the fire. (in file) she should have brought one of it now because

it is so much of a bigger feeling and it is much bigger because the town allowed him to add that square footage upstairs. Even though he is not supposed to have a two & a three bedroom, he is supposed to now have a one bedroom and a two bedroom. Who is to say how many people are going to be up there, it doesn't impact the actual number of people who might be living there. Living without a closet. So we are going from ten people max to fifty people in that building.

Jim Banks, Chairman stated thank you and asked if there was anyone else who wished to speak against the application? Is there anyone here who wishes to discuss it in any manner? Hearing none, we will close discussion from the floor unless initiated by a member of the Board.

Tobin Farwell looked at the plans submitted by Bonnie Winona Mackinnon and asked so this is the store?

Jim Banks, Chairman explained that is what she says that for more than twenty years that has been the lot-line and nobody ever did anything to block the use of it temporarily or just to remind everybody that 20 years will start over again.

Tobin Farwell stated so this one clearly shows a space between the property line and the building.

Jim Banks, Chairman stated about a half a foot. There is a half a foot of space, what part of the building is that, the out most portion of the roof? Or is that the concrete?

Tobin Farwell replied it is hard to say. He continued to say, in reviewing the criteria, we are here only to talk about the use. This is a special exception for the use, it is an allowed use, there are six criteria ingress and egress, looks like DOT has handled that, we have to say he is meeting this criteria. Off street parking and loading area, seems reasonable. Control of noise and glare, I still think that if you mowed your lawn it's louder than children playing out in back. That is my feeling on it. A landscape buffer zone must be maintained between the special exception and any residential lot line. There is still the two uses, are the two uses residential commercial and if it has any residential in it, I feel we should deny the special exception. And just call it a variance to cover or that is my feeling.

Jim Banks, Chairman commented that is a separate hearing.

Tobin Farwell replied yes, he has applied for a variance and that can be heard tonight.

Attorney Somers stated that before you get into the meat of your deliberation just to follow up on some of the comments that Tobin just made, you are talking about a special exception right now, and your job, and I encourage you to articulate this in the record, is that the proposed use is allowed but only where the ordinance says the Board can make satisfactory provision and arrangements can be made for the following. And then it lists the six criteria, some of which Tobin has just discussed right now. That is your job and I encourage you as part of the record to go thru each of the criteria and state for the record whether you believe that the representation by the application satisfactorily addressed those criteria.

Tobin Farwell stated isn't that what the whole voting is all about? I thought we were just discussing now and see if we had any issues.

Attorney Somers replied, right, eventually when you vote, I am just saying because this has been the subject of some debate that it is important, as part of the record to really discuss this thoroughly.

Craig Williams stated then we should go thru each of the six criteria.

Tobin Farwell stated so the first one is ingress and egress to the property. *Proposed structures or use with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and in case of fire or catastrophe.*

Tobin Farwell continued and stated he has applied for an obtained a NH DOT permit which did look at access and egress. He talked about closing off the front door, certainly you don't want the kids using that front door, and he is going to use the proposed side door. The cars can queue up as they drop little Bill and Ginny off so that they won't be out into the road. Does anyone have any thought; this seems to make my criteria acceptable.

John Hutton replied that he thinks the traffic flow program that he has right now is much better than what has existed in the past. I think he has addressed those issues.

Craig Williams stated that seems to qualify for me anyway.

Frank Reinhold stated very much so.

Tobin Farwell continued to read.... *Off-street parking and loading areas where considered necessary by the board.* He has moved the loading area which used to be in front of the building, which was terrible.

John Hutton commented he has moved it off to the side. And he has a parking plan which they have direct control over. Where people will park and where they will not park.

Jim Banks, Chairman stated the nature of this business would not require a very large loading dock anyway. Almost anything that comes in and out has legs.

Tobin Farwell stated and the fact that he is moving off to the side is huge.

Tobin Farwell continued to read.. *Control of noise, glare, odor or other potentially adverse effects of the proposed use on nearby property and screening or buffering to alleviate such effects.* He has labeled on his plan, he has two play areas outback which the abutter has brought up saying that is louder than in the past and the applicant is proposing to put a three foot wide landscape area of plants and refuse and a six foot high privacy fence.

Jim Banks, Chairman commented but only against the play area, not against the building. They are not going to do anything against the building.

Tobin Farwell agreed and stated but he is thinking about in terms of stopping the noise.

John Hutton asked when did the zoning go in for the landscape buffer?

Caren Rossi replied if it doesn't have a foot note, a while 15 years.

John Hutton stated the property has been that way longer, it predates the landscape buffer.

Caren Rossi asked when was the building built?

Someone commented the fifties.

Caren Rossi stated so it predates zoning.

Jim Banks, Chairman stated but that addition wasn't there, it came later.

Ed Bannister replied seventy three.

John Hutton stated he would really like to know what that is.

Tobin Farwell stated that even still, once you apply for a special exception which is an allowed use, you have to look at the project as he is apply for it. Every time it changes, you have to evaluate it to see if it meets the criteria.

Attorney Somers replied I think there are two issues, one is that you really have two criteria that you are talking about, one is the control of noise and the use of screening or buffering to elevate noise and those other effects and then you a separate stand alone criteria with regard to the landscape buffer zone. I think to your point Tobin you do need to take into effect that fact that for a special exception, even if the building had been there prior to that it may need to comply with this criteria.

Tobin Farwell replied that he agrees, that is how he looks at it.

Jim Banks, Chairman that buffering along the side of the building basically then would say that you can't grant a special exception for anything in there. It doesn't make any difference what the special exception is for, you can't have a vegetative buffer unless it is mold or something.

Tobin Farwell states I agree, we have to deny it and consider it as a variance, it is a variance request. But, let's go thru all the criteria. As far as control of noise and glare, let's do noise first. Do children make noise? Yes. Does mowing your lawn make noise? Yes. And so therefore I don't think the level of noise created by children exceeds the normal level of noise maintaining your lawn. So therefore even this slight fence meets that criteria. There is no excessive noise being created, therefore there is no need for excessive blocking of said noise.

Jim Banks, Chairman stated well, you wouldn't mow a lawn for eight hours a day.

Tobin Farwell stated I don't think the kids are going...

Craig Williams stated as far as noise goes, there is not going to be forty seven people playing in the yard at one time, I remember the original presentation they are going to allow the kids out in groups of five or six. It's no more noise than just a neighborhood barbeque or whatever. It's not a crowd. Limiting the discussion to that one particular thing, when you talk about a barrier alleviating noise, it is virtually impossible.

Tobin Farwell commented that it will affect it, not a ton, your right. You'll know someone is mowing their lawn or the kids are playing out back.

Craig Williams stated it isn't going to be any different than any other neighboring property.

Philip Sanborn stated my feeling is being that I live on route 155, there is noise there, traffic noise. A lot of traffic noise and it starts earlier than 6:30am, and it continues later than 6:00pm. This is not kids. These two properties are right on the roads. So if it was to me, if it was a property that was four miles back on a dead end road that would be different. But both these properties have always been right in a busy area.

David Allen stated the kids are not going to be playing outside at 6:30 in the morning.

Tobin Farwell stated so there is a background noise of the road that will most likely exceed even the noise level.

Jim Banks, Chairman stated and since these buildings have a commercial history, you want to be on the road and have traffic. You wouldn't want to be where there wasn't any because then there wouldn't be any business unless by appointment or something.

Tobin Farwell continued this one has a lot into it. So we talked about noise, glare, he is showing new lights, but they are downcast and shielded so I think there is no issue with glare.

Jim Banks, Chairman asked what was on this light pole? It says down lighting on the building but what about the pole? What is going to be on the pole?

Ed Bannister replied it is the same, down lighting, box down lighting. I live across the street, we don't want to ruin any night sky. We have the beacon from the Town Hall already.

Tobin Farwell continued to read... *odor or other potentially adverse effects of the proposed use on nearby property.* I don't think there are any odor issues. *Screening or buffering to alleviate such effect.* We have already discussed that.

Philip Sanborn stated it seems like the fencing is the challenge.

Craig Williams stated the landscape buffer is the deal.

Jim Banks, Chairman acknowledged Bonnie Winona Mackinnon as she had her hand raised to speak.

Bonnie Winona Mackinnon stated excuse me for interrupting, I know I am not allowed to speak again.

Jim Banks, Chairman stated I invited you to speak.

Bonnie Winona Mackinnon stated I am very tired this week, I have a very sick mother and so forth. I think one of the reasons I asked you to rehear in my letter which I forgot to present to you is the requirement in the zoning ordinance for when the use is permitted by special exception in the residential zone setbacks shall be front 50' from the public row, back and side 35' from the lot-line, parking areas shall also adhere to the above requirements for special exceptions. They stuck it in under new lots but it speaks to any special exceptions in the residential zone.

Jim Banks, Chairman stated it underlines the fact that we can't grant a special exception for this lot.

Tobin Farwell asked is this the residential zone?

Philip Sanborn stated it has always been commercial but it is the residential zone.

Jim Banks, Chairman commented these are commercial buildings that predated zoning.

Philip Sanborn stated that is what I am saying, it was never residential. Why would it be classified as the residential zone?

Tobin Farwell asked Attorney Somers if she had any thoughts on that?

Attorney Somers replied first of all, what has been noticed here is a special exception from section D. So technically that is all you are legally discussing. In reading this provision, it notes that that amendments, it was amended in 2001, in terms of these setbacks, I don't know the answer to this, in terms of the addition to the building that has been built or as it has been reconstructed, but were the setbacks of the building compliant with the or are they more non-conforming from the setbacks that are listed here in 3A now as opposed to 2001? We may have a grandfathering issue if the building had the setbacks in 2001 that are depicted here what is being discussed right now, then I don't believe necessarily that this particular provision is going to be an issue. I think this goes more towards when you are trying to establish a use permitted by special exception and you might be doing a new building or an addition to a building or something like that. I think that is what this is designed to cover.

Tobin Farwell stated that would seem so.

Attorney Somers commented that she doesn't have the factual answer but I think that is how you ask the question.

Tobin Farwell and the Attorney discussed the procedure to debate this matter. She reiterated that what we are here tonight to discuss what is noticed.

Tobin Farwell continued *refuse and service area*. He says it is going to be interior refuse, doesn't generate much waste, not going to be a dumpster outside.

Tobin Farwell continued *control of drainage and erosion*. I don't see much difference to what was previously done.

Jim Banks, Chairman stated the land slopes towards the back like it has always done.

The Board all agreed with Tobin Farwell.

Tobin Farwell continued... *Lighting must be installed with due regard to glare, traffic safety and compatibility and harmony with adjoining property and the character of the area*. There has been previous lights on this site, I haven't really noticed.

Jim Banks, Chairman commented that there used to be wall packs which admittedly light out onto the road, which is terrible. This is obviously better.

Tobin Farwell commented boxed and downcast, he is purposing new pole sign (I believe it should have been light) on the opposite side than this abutter. This is the first six. He continued... *In addition, any use under Special Exception must conform to the following criteria*. Here is my rub. *A landscaped buffer zone must be maintained between the Special Exception and any residential lot line*. This is the lot-line, you can make an argument whether it is a residential lot-line because these are both a mixed use.

John Hutton commented that the end of that building is commercial end of the building, that is what is shown on the plan that she had.

Tobin Farwell stated there is some debate on exactly where that line is but we all know it is very close to the building.

Craig Williams stated it looks impossible to have a buffer where the building is.

Tobin Farwell stated right, that is where I run into trouble, I need to have this sort of be a precedent that no buffer is required. Even if we were to define where the property line is, it is somewhere between one foot and a foot and a half. Or two-feet. It seems inadequate.

Craig Williams commented if the abutters were to agree installing an adequate buffer there, it could work but it is not going to happen. It is impossible.

Tobin Farwell continued ... *Signs must conform to requirements of Article XVII of this ordinance.* They are saying that they will, they will be wall mount. He continued... *Only one (1) residential structure and/or one (1) business, shall be permitted for that use on each lot.* It is a combined structure, its one structure, with a residential and a business use. It is only one lot.

Jim Banks, Chairman asked when you say one structure?

There was discussion as to if the parking lot was a structure.

Attorney Somers stated I think the intent is if you just go to the basic preference language at the beginning of the ordinance where it talks about the purpose of this section is to allow on a selective basis certain types of low impact enterprises to be located in the residential zone. If you take that basic thought and then you apply that to this last criteria, which says only one residential structure and or one business shall be permitted for that use on each lot, I think that what they are trying to say here is that if the Board determines all these other criteria have been met to your satisfaction, and if what is being purposed is, you don't want to have multiple business on one lot for example. That is what this is really getting at. I would not be too concerned about parking whether the parking lot is a structure in conjunction with the residence or not. Just look at the core purpose at what the special exception ordinance is all about.

Tobin Farwell stated he thinks that makes sense. So now we have to do Findings of Fact.

Jim Banks, Chairman explained that it sounds to me like the problem is the buffer against the building. We can't do it.

Tobin Farwell stated yes, but we have to follow through with the motion.

Jim Banks, Chairman stated I understand that.

Caren Rossi explained we have to first decide who is voting and who is not.

Frank Reinhold and Craig Williams both alternates stated they will not be voting.

Jim Banks, Chairman read the Finding of Facts and the Board determined the outcome.

PRELIMINARY FINDING

After reviewing the petition and having heard the presentation by the applicant, it is found that the Board **has (majority)** sufficient information available upon which to render a decision. If there is sufficient information, the application will be deemed accepted and the public hearing will continue. If it is found that the Board does not have sufficient information, the public hearing will be postponed to a date certain on _____.

For Special Exceptions permitted under Article V:

The use is specifically permitted under the terms of Article V for a Special Exception.

Yes: (majority)

No: _____

Satisfactory arrangements have been made for the following as required by Article V of the Zoning Ordinance:

1. Ingress and egress to the property and proposed structures or uses with particular reference to automotive and pedestrian safety and convenience, traffic flow and control, and in case of fire or catastrophe;

Yes (majority) No _____

2. Off-street parking and loading areas where considered necessary by the board;

Yes (majority) No _____

3. Control of noise, glare, odor or other potentially adverse effects of the proposed use on nearby property and screening or buffering to alleviate such effects;

Yes (majority) No _____

John Hutton commented we have already said we can't do the screening.

Tobin Farwell stated but that is a separate thing.

Jim Banks, Chairman commented that screening is where the building isn't.

Tobin Farwell stated it is funny how they list the first six but they don't talk about the last three.

Jim Banks, Chairman stated we do have these three over here. (Page three of findings)

4. Refuse and service areas; Yes (majority) No _____

5. Control of drainage and erosion; Yes (majority) No _____

6. Lighting must be installed with due regard to glare, traffic safety and compatibility and harmony with adjoining property and the character of the area.

Yes (majority) No _____

Jim Banks, Chairman stated this isn't really a questions, it just says you must do it.

The Board agreed.

In addition, the following criteria have been satisfied:

1. A landscaped buffer zone must be maintained between the Special Exception and any residential lot line.

Tobin Farwell stated this is a no.

Jim Banks, Chairman stated well it says it must be maintained, that's what the ordinance says. So it really it is a question, is it maintained?

Philip Sanborn stated and is it a residential lot line?

David Allen stated essentially, you guys are getting hooked up on the buffer zone of where the building is. Correct?

Jim Banks, Chairman stated yes, because effectively there isn't any.

David Allen continued there never has been you can say. On either of these properties. When it was a store, when it was a garage, when it was a service station.

Jim Banks, Chairman stated if you go back far enough, the building was smaller.

David Allen continued what I am getting at is, really effectively as far as, the way I see the business, the building in itself is its buffer zone of the impact of the daycare. Other than building the six foot fence in the back, with a buffer zone in that area, where the outside play area is. The building is what it is. The line is what it is.

Philip Sanborn stated it will be pretty hard for the tenant to make noise in that structure.

David Allen continued there are no windows, there is nothing over there. It is a solid wall.

Jim Banks, Chairman stated but the ordinance says there has to be a landscape buffer.

David Allen asked well how big?

Jim Banks, Chairman the ordinance...

Tobin Farwell explained that he understands but to make it clear for the next case.

David Allen stated in his opinion you have to look at everything on its own, you can't set a precedent with everyone. Next thing you know you're going to be down to a three inch buffer zone. You are talking about two pieces of property that are unique with a lousy foot and a half between them that has always been there. It has been there since I have been in this town and I have been here my whole life.

Jim Banks, Chairman stated it hasn't been, maybe since before the addition was put on.

David Allen stated I can never remember not having that addition on.

Frank Reinhold commented if we can think to the people who wrote it, they wanted a landscape buffer for the purpose of mitigating the vision between the two. The fact of the matter is there has never been one that amounted to anything before. We are trying to put something there that wasn't there before. The fact of the matter is the difference between the two is theoretically

a child's or children's noise, if I remember the presentation possibly 5 at one time out in the back yard, and that landscape buffer is to either buffer the noise or the presence of people in the back yard as the people exist there. That is what the buffer probably is for. That is what we have to mitigate. I think trying to define a buffer or try to define what it is. What was the purpose? The purpose was to separate what was on one side from another. Since we don't have definition of what a landscape buffer is, it can be a wood wall, a brick wall, or most anything because we haven't defined it. We will define it today. We can be as gargantuan as saying we want a brick wall at the end of the building and go out ten feet or we can have a stockade fence. That to me is still the interpretation of what the intent was. I don't think we should take the landscape buffer literally and say Ok, we need to have six begonias out there and five evergreens. I think that is not the interpretation we are looking for.

Tobin Farwell stated so if we interpret that the fence is proper, then the fence could be the landscape buffer.

Frank Reinhold continued I think if we take into consideration that there is going to be children out there, there may be some noise, then we should probably have something that would help with the noise, but we also want something to make it visually not seeable to it should be a solid structure. That may absorb noise, which is what we are dealing with; I think that was the intent. It is doable; I don't think the permit should be disapproved because we can't figure out what it is.

Tobin Farwell stated that is his only counter argument is that it doesn't really fit nicely into the special exception box. Therefore, let's deny it and let's call it a variance. If we don't think it really fits, it doesn't fit. Therefore it fits better as a variance. We realize it doesn't make the rules and we are still asking for it anywhere. That is where I trip. It is very close, but it doesn't quite rise to the level I would like it to. Therefore I am happily denying it and considering it on a variance appeal. The result is the same.

Jim Banks, Chairman stated maybe not, there are other criteria that isn't being discussed here.

David Allen commented that I think we are getting hung up on, one what the landscape buffer is, I can't see dealing with a landscape buffer against a concrete block wall.

Philip Sanborn commented and the other parcel is commercial so that needs a landscape buffer.

David Allen replied it has a driveway right next to it. It isn't like it is a lawn or garden right next to it. It is a ROW driveway, it is being maintained as that.

Jim Banks, Chairman commented even if there were plantings in that, the plantings they are not likely to be as tall as the whole building. You are not going to cover the whole building.

Tobin Farwell stated it goes back to the intent and that is to soften the noise and the visual.

Philip Sanborn stated he doesn't feel you will get any noise from the building.

Craig Williams stated he feels Frank has the voice of reason here. The intent is being satisfied by the building.

Dave Allen stated he would agree with that.

Frank Reinhold stated that ultimately you could say that the objection to the process is there any way in which the abutter would be appeased or is the abutter's objection more that they don't want a daycare there. As opposed to there is a way to achieve a buffer that is satisfactory?

Jim Banks, Chairman stated that it sounds to me like they don't want the daycare.

Frank Reinhold commented that my interpretation. So now the question is have we justified ourselves saying the landscape buffer is in fact what we are going to interpret as.

Tobin Farwell stated I just want to be on secure ground.

John Hutton stated we have a piece of property that has a long history, how it was subdivided or whatever is not our issue. We are looking at a use of the building that is more restricted than it has been historically. It is going to be open five days a week, specific opening and closing hours, we have traffic that is now being controlled and it wasn't controlled in the past. If we take everything into consideration, we have a more restrictive use of the building that it has been historically. There has never really been, the dividing line has always been questionable. Who built it, who didn't build it? Whatever. The opportunity of us having another property like this is very slim. I have to agree with Dave, we are not really setting a precedent here, we are taking this and we are going to have to say what is are interpretation of a buffer at this point and time and its purpose. I think we are allowing a more restrictive use than it has been historically, I think that is a good thing that we are doing. We are taking something that could have been open seven days a week, god knows how many hours and parking wherever.

Jim Banks, Chairman stated we are getting an allotted number of customers too.

John Hutton continued we are getting a lot of control for not a lot of enforcement. They are going to be really restricting themselves. And you have two properties that are side by side, they are both residential and commercial. If this other building were totally residential I'd feel a little bit different but it isn't. It is very grey. I think I could feel good about the fence being the landscape buffer. I think that was the intent, there would be something there.

Jim Banks, Chairman commented another condition that you didn't mention is the potential occupant is under state license. Monitored for all kinds of things to make sure they get done. Much more so than someone selling pizza.

John Hutton commented that they will be monitored for how they put kids in and out of the car. Children will not be allowed to go by themselves. There are so many things that a daycare has to meet. My sister runs one so I am kinda up on that. They are going to have to do a lot of things and will have a lot of people looking over their shoulder.

Attorney Somers stated that one of the things the Board might want to consider because of course you have the right to impose reasonable conditions if you do decide to approve this. Is to consider having some sort of condition just explicitly that all necessary Daycare Licenses and so forth have to be maintained at all times. That might ensure that that level of oversight that you have just been talking about will be enforced and in effect at all times.

Jim Banks, Chairman stated he is not sure how an unlicensed daycare of that size would exist.

Angela Moynihan raised her hand to speak and Jim Banks, Chairman acknowledged her and let her speak.

Angela Moynihan stated we would not be allowed to operate unlicensed. She continued to explain the state licensing process.

Yes (John; Philip; Dave) No (Tobin)

2. Signs must conform to requirements of Article XVII of this ordinance.

Yes (Majority) No _____

3. Only one (1) residential structure and/or one (1) business shall be permitted for that use on each lot.

Yes (Majority) No _____

Tobin Farwell stated you can have a house and one business. So you could have a house and a garage and an office in the garage. Not have multiple business on site.

John Hutton stated you can't have a business in the house and a business in the garage.

For all Special Exception requests, findings and rulings.

After reviewing the above, the Board has determined the following findings of fact, all of which must be satisfied to grant a special exception as required by Article XXII.3 of the Zoning Ordinance.

- 1) The proposed use **will** _____ **will not** _____ be detrimental to the character or enjoyment of the neighborhood or to future development by reason of undue variation from the kind and nature of other uses in the vicinity or by reasons of obvious and adverse violation of the character or appearance of the neighborhood or cause diminution in the value of surrounding property.

Bonnie Winona Mackinnon asked Chairman Banks if she could speak to this?

Jim Banks, Chairman allowed her to speak.

Bonnie Winona Mackinnon stated I disagree with your finding respectfully. I have been the owner of that property for a long time, I used to be in the real estate business but I have not

been licensed for the last decade and a half so therefore I don't consider myself any longer up on the conditions of the market and other things that real estate people have to be up on. I did request an opinion from a long standing realtor in the area and I have a letter that I would like to read into the record from Brandt Atkins from NH Real Estate.

David Allen stated shouldn't this have been done before?

Attorney Somers stated Mr. Chairman isn't the public hearing closed?

Bonnie Winona stated they didn't discuss any of this before.

Jim Banks, Chairman I allowed her to speak. She asked if she could speak and I allowed her.

Bonnie Winona Mackinnon read the letter into the record. (In file) She stated that she didn't know what she didn't remember that being discussed in the public part of the hearing.

Tobin Farwell stated it is unusual that in the book we have the special exception section of the book and yet it doesn't have all the criteria.

Caren Rossi explained it is back in the zoning ordinance. Article twenty three.

Tobin Farwell stated I agree the public should speak.

Bonnie Winona Mackinnon stated I did make a note of a court case that might relate to submitting expert testimony which I got out of one of these LGC Booklets. The decision making process. She read. *The Board may rely on personal knowledge of the area but not in the face of uncontradicted expert testimony unless the Board can adequately explain in a written decision.* That was a 1989 case. (She cited the court case but I could not hear it). ... East vs. Conway. Grant was the most experienced person I could find. As it turned out he is familiar with both properties.

Attorney Somers commented if I could suggest, given that your Findings of Fact forms apparently references this article twenty two of your ordinance, which has some additional criteria that really should be referenced as part of your decision. I would suggest that for the record that you might wish to invite the applicant to directly speak to these. Just to make sure you have something that correctly address these points. You just heard some comment from someone in opposition to the application. That way you will be able to make an informed decision one way or the other.

Jim Banks, Chairman allowed the applicant to speak.

Ed Bannister stated I am not aware of this section. The purposed use will not be detrimental to the character enjoyment. As we said this is a busy area, I live across the street, I am familiar with the traffic patterns, the noise levels. There is roughly nine thousand cars per day that go between George Bennett Rd and Mast Rd. Through this intersection. Traffic starts well before five and long after the daycares hours would end and also the focus is away from this abutter.

As previously stated in our earlier presentation there is only a small amount of students that go out in any one time and some of these students that come are toddlers that are very small that aren't going to be out there at all. I don't see any kind of issue that would damage the value of the surrounding property. The same with number two. Small children playing in small groups outside in small portions of the day in a fenced in area. Buffered of landscape trees, bushes inside the fence area which will help absorb a lot of the sound. The use will not be contrary to the public health safety or welfare because we have a controlled traffic plan, fencing for the children, double fencing so they enter and egress the property nobody can run away and all this traffic is put back to the side of the building.

Jim Banks, Chairman stated I would like to mention that a comparison is made between a variety store, a pizza parlor versus this daycare program saying that the pizza parlor and the variety store were very low impact, I think they may have been low impact because they were not economically viable, if they were, they would still be there. They had the potential to grow big, but they didn't, but they could have. There is nothing that prevented them from serving five hundred pizzas a day or whatever. They probably wished that they could. There were no limits imposed. In fact that this thing was very tiny in comparison to the projected daycare, was only because it was probably the wrong business in that location.

John Hutton stated unsuccessful.

Ed Bannister commented in previous years it was a dry cleaner drop off there was a children consignment center that had stuff out into the front parking lot on display outside. This was before I owned it. The place had been very busy at times and also late at night.

Bonnie Winona Mackinnon stated that she can't find it in her notes, but I made mention earlier of the setback requirement for a special exception which on the sideline is thirty-five feet. This really is my biggest beef with Mr. Bannister's property, barring the things that have already happened. Is that area behind that ell is very small, if there are kids there, they are going to be congested. The bog drops off right there, so, I would appreciate it if you would make him meet that setback for the outside use. There has never been any outside use behind that use, there has never been anyone who ever mowed it, including Mr. Bannister. There has never been any activity there in the past. This request which is not grandfather should be required to meet the setbacks that make it possible for the abutters not to be impacted by what he is doing. If he would move the door. Do you know what I had to do to get my special exception. I had to redo everything. It's not a big thing to move a door. If he moved the playground thirty-five feet towards the town hall, I'd be a lot happier. Because that area is so small it is going to impact my tenants, it's going to impact the professional as well as the residential who sit right there, their decks and patios are there. Maybe twenty-five feet away from his new playground. It seems to me that is a reasonable compromise that he move it down his lot line and let the kids go out a different door that doesn't go out near my property line. Plus I have people parking there, it's not even safe. There is a huge drop off to the bog, he isn't going to be losing much area because of the lot configuration.

Ed Bannister stated that the behind the ell is for toddlers. The older children are going to be behind the main building. He showed on the plan where the play areas are. He stated they are

going to walk them outside and take them in, it's not like they are going to be playing field hockey. In this sight used to be the gas bottle which would be serviced, the compressor for the cooler is here running all the time when this was operating as a store. With this vegetated buffer on the inside and a six foot privacy fence, it is up against the driveway and a parking area. It is quite a ways away to their deck area, I don't see it is going to make any difference.

Jim Banks, Chairman stated but she offered a compromise.

Angela Moynihan spoke and stated that we wouldn't be able to do that we have state licensing requirements as to the spaces and the types of equipment that are allowed to be out for toddlers. The space would not be adequate.

Tobin Farwell asked what the requirements were.

Angela Moynihan stated she doesn't know off the top of her head. She explained her current space requirements and her programs core values.

The Board discussed the neighbors decks height, windows on that side of the building and the fence height.

Bonnie Winona Mackinnon commented the ordinance, I don't know what you noticed, I heard the attorney talking about what was noticed tonight, but I know that my request to you did not request any particular section of the zoning ordinance and through your zoning ordinance it says thirty-five feet from the lot-line, side lines and back lines for a special exception in the residential zone, which I am in.

Jim Banks, Chairman stated we heard Bonnie offer a compromise some success limiting things to the first thirty five feet.

Ed Bannister stated my tenants spoke to this to me long before we sat before you folks, they divided up the interior space for toddlers and others. It is not a big impact but it is an important space for them. It is not going to have bat mitten and volley ball. They are not going to play baseball there, its toddlers. It is adjacent to a parking lot and driveway. We have done our best I think to plan to erect a six foot fence and put in a vegetative buffer of shrubs and flowers on the inside to help soften any noise. Rather than bouncing off that it hits the brush and bushes first and helps diffuse it a little bit. They are not screaming kids. It is not how they run their business. It is not like a playground behind a school, it is small children.

Tobin Farwell asked is it the issue of the site or the sound and the site.

Bonnie Winona Mackinnon stated Mr. Bannister's building as it is newly constructed is now like having a giant behemoth on my parking lot. It dwarfs the space, it blocks light. Everything he does encroaches on my rights as a property owner. This is your own ordinance, I am just asking that you meet it, thirty-five feet from the lot-line. It doesn't say in here this is only for new lots, it doesn't say. It probably should be in your special exception ordinance again. But it says when the use is permitted by special exception, thirty-five feet from the lot-line, to me that is

reasonable. He has, as far as I see this use is much more of a dense use than what has been there in the thirty years I have owned the property. There will be way more people on that lot, and the problem is the building is on the lot line. The building is right on top of me already. You are all disposed, I can tell, to granting him having forty seven people in that building instead of seven or eight. It is going to impact me. If you don't even meet your own requirements, I didn't write this, your town has adopted it. I might not have thirty five feet on mine, I hear this all the time, please keep in mind my special exception is thirty years old. The ordinance has changed enormously in thirty years. Almost every year there are things that change. Every planning board is busy all the time trying to improve their ordinance. I believe this requirement is there for a very good reason. There never were any barbeques back there. They were on the town hall side. This is a little space between my property and that ell that is on the property line and the bog. I don't know how long this building is, but it's probably more than thirty-five feet, he could move the playground down that back. At least make him meet the setback. I understand he can't move the building back.

Tobin Farwell commented that the topo lines, it is very steep along the back.

Ed Bannister stated they are going to fence along the top, long before it drops away. They are fencing all along there. It is more of a pass thru than an entrance with a few small children out there for a small portion of each day. As I said before, there were compressors, gas bottles, trays and people in and out when it was store. And the fence was there and everything was fine.

Bonnie Winona Mackinnon stated he didn't ask for a variance to that requirement.

Jim Banks, Chairman stated gentlemen; we need to answer these last questions. He reread question one.

The proposed use **will** _____ **will not** _____ be detrimental to the character or enjoyment of the neighborhood or to future development by reason of undue variation from the kind and nature of other uses in the vicinity or by reasons of obvious and adverse violation of the character or appearance of the neighborhood or cause diminution in the value of surrounding property

Tobin Farwell stated she got a letter from a realtor saying that it will. I hate to ignore that. I have a hard time saying that's not right. And that is where I get hung up. How do people feel about the real estate value? A realtor who knows the land has said that he is a licensed realtor, this is supposedly his business. I kind of **choked** on that one. Ed **does not** have something to the opposite effect.

Philip Sanborn stated he doesn't think he had time to prepare for it either. It was something he didn't realize. He didn't realize these three were in there. We have asked him to come before us.

Jim Banks, Chairman stated, wait a minute, aren't you on the planning board? You should know what the criteria are.

Ed Bannister replied yes I am. My understanding is after the summation is these are questions you ask yourself based on the testimony. I didn't realize it was to introduce evidence. That aside, she presented a letter that.... I really truly did not know this.

Tobin Farwell stated do we want to give him some time, or look at other ways to deal with it.

David Allen asked if we moved it thirty-five feet where does that put the fence?

Jim Banks, Chairman commented still behind the building.

The Board members looked at the plan and looked where it would possibly be if moved. They determined if it was moved, it would take a big chunk out of the play area.

Frank Reinhold stated for the record, I was a licensed real estate broker for twelve years in Durham, I managed a real estate a brokerage. Prudential. I don't consider myself a professional at this time because I have been out of it for fifteen years, but I can tell you I significantly disagree with the conclusions with the real estate broker and I dealt specifically with commercial real estate but since I am not longer licensed & professional, I can't make that conclusion but for your information, I can tell you I don't agree with the dramatics of the statement.

Jim Banks, Chairman stated that what is interesting to me if indeed as represented by the letter from the realtor, the value of the property is diminished by this use then when she proposes thirty-five feet, it will be okay.

Bonnie Winona Mackinnon stated but I didn't say that. That is a separate issue.

Jim Banks, Chairman stated but that would be your liking.

Bonnie Winona Mackinnon stated they are two separate issues. I also disagree that he has had less time to prepare than I have. I am the town moderator, I have been busy as hell for the last two or three weeks. He has been thru the special exception process in November.

Ed Bannister stated it is my understanding of these last three questions, as I think I stated, after the information was gone thru, these were questions the Board asked themselves, there wasn't testimony to be.

Jim Banks, Chairman stated but in order to answer them we have to have whatever testimony is available because we are not licensed professionals in that regard.

Ed Bannister commented well it is a letter that is pulled out in the last hour, it is not notarized, I could whip several out of my computer. I am not doubting it is from this gentlemen but I could come with as many if not more that would refute that.

Craig Williams stated we don't have enough information to judge that. We have a letter from a realtor another realtor might have another opinion. We don't have enough information to make a decision.

Philip Sanborn stated that in some aspects of it; it seems like the spirit of the ordinance is what we are always trying to do here is to follow. This we have to look at, it's a cluster, it's what were dealing with and what is the options. And when you listen to what John said and the multiple things that we have gone from, I used to work at that store, back when Bonnie was Gladus and it was crazy, there was no control. We have two parties here that are not agreeing but the spirit of what we are trying to do looks to me like we are making the best out of what we have for unknown property lines for buildings there is no perfect scenario. But there is improvement. I think that is what zonings purpose was to improve. Meeting every criteria, that building never had thirty-five feet, ever. It was long before everybody even thought about thirty-five feet. To try to squeeze it into that envelope in this application, it's not a new building, it's an existing building. That has been rebuilt from a fire.

Attorney Somers commented I am not sure if this is going to help the conversation or not but you are all kind of struggling with what to do here, one of the things I keep hearing is there seems to be some pretty good consensus that in many respects the proposal will help some of the historical situation out there. But at the same time you have an obligation in order to approve a special exception you have to concur that all of the criteria for a special exception have been met. If you were to decide that those criteria have not been met, and I am not suggestion you do that, I am suggesting an option would then be to consider this in light of a variance context and which you could, your point now one of the criteria you would be discussing explicitly under a variance was weather the spirit of the ordinance is observed or not. To some extent...

Tobin Farwell stated but then we will be back to the same question of diminution of value.

Attorney Somers continued I understand that, there is nothing frankly which would compel you to make a decision one way or another on either of these applications tonight. You are always free to take action to continue if need be. In order to address this issue and get whatever information that you as a Board feel you need to make an adequate decision. All I am trying to say is given the constraints you have, one of the things to bear in mind is that some of the criteria under the variance lend themselves to the flexibility that you are talking about. Whether the variance is going to be contrary to the public interest; whether the spirit of the ordinance is done; whether substantial justice is done. Again, you have another venue to try and attack this problem.

Tobin Farwell stated but we are going to be right back to the same issue. My hurdle was the landscape buffer and the majority of the Board is over that hurdle we would be sat back at the same issue, diminution of value. Maybe spirit and intent is the way to look at it.

Philip Sanborn asked and with the findings of fact with the variance would that look different?

Attorney Somers replied that it would look different in the sense, Tobin is absolutely correct , I think no matter how you slice it you are going to have to deal with this issue because your special exception criteria reference values of surrounding properties. The variance criteria references values of surrounding properties. So you are going to have to deal with this and analyze this no matter what context it comes up in. The special exception criteria don't explicitly talk about spirit of the ordinance, it talks about a bunch of other things that really have to do with the character of the neighborhood, that kind of thing. I think your point is really you should not get hung up on the technical language but look at the basic purpose of the ordinance is. I think that is what you are trying to get at. And that is some of the analysis in the special exception, but I think it is also very much evident when you analyze a variance. Again, the thing you seem to be struggling with is the issue about the level of information you have about the property valuation, you haven't even opened up the public hearing on the variance, its nine o'clock now, you may wish to make a decision on the special exception, open, up the variance public hearing and continue that for further discussion after more evidence is presented on the property value issue. That might be one way to try to address this.

John Hutton stated what we can do is make a motion to deny the special exception and move on to the variance, if the variance is going to give more flexibility.

Tobin Farwell stated but for not this particular question. We have never had people submit a real estate letter saying there will be a change. That through me a curveball.

Jim Banks, Chairman stated over the past twenty five years we have had that.

Tobin Farwell stated the value has sure gone up since it was a burned out shell. I feel comfortable saying that. I just don't know about a change in use, a daycare verses when it was a pizza parlor. I don't know.

Frank Reinhold stated he doesn't think that is the question, the question is; is Bonnie's property less a value now, if it becomes a daycare.

Tobin Farwell commented he is allowed to open a pizza parlor tomorrow, that could be there today, and is this special exception of a daycare instead of a pizza place going to lower the value? According to that letter, somebody said yes.

Jim Banks, Chairman stated there is also the uncertainty. The stock market does not like uncertainty. To some degree the value of property is kind of related to things like the stock market, I would think that having a building with something is going to something happen but it is not clear what that is, might be more uncertain and therefore lowering the value the one that actually knows what it is. Once it becomes defined some of the what if fears go away. Now you know what it is going to be. I would guess it has less value now because anything could go in there.

Tobin Farwell stated good point.

- 1.) The proposed use **will (Tobin) will not (John; Dave; Philip)** be detrimental to the character or enjoyment of the neighborhood or to future development by reason of undue variation from the kind and nature of other uses in the vicinity or by reasons of obvious and adverse violation of the character or appearance of the neighborhood or cause diminution in the value of surrounding property.
- 2) The use **will _____ will not (majority)** be injurious, noxious or offensive and thus be detrimental to the neighborhood.
- 3) The use **will _____ will not (majority)** be contrary to the public health, safety or welfare by reason of undue traffic congestion or hazards, undue risk of life and property, unsanitary or unhealthful emissions or waste disposal, or similar adverse causes or conditions.

Tobin Farwell made a motion to Grant the request from Three Swallow Properties LLC, agent, Ed Bannister. The applicant request a Special Exception to Article V, Section D to allow for a Day Care Center in an existing building The requests are to the 2013 Town of Lee Zoning Ordinance. The property is known as Tax Map #11-6-0200 and is located at 5 Mast Rd. Subject to the following condition:

- 1.) **The Daycare Center be fully licensed.**

John Hutton second.

Vote: **majority**, motioned carried.

Attorney Somers explained the only way this decision can be the subject of an additional motion to rehear is if the applicant or the abutter or a party of interest says that there is a new basis for your decision tonight that wasn't part of your decision tonight. Other than that, anybody who is unhappy with the decision from tonight has to go to court within thirty-days.

Jim Banks, Chairman asked Bonnie Winona Mackinnon if she heard that, she nodded her head yes.

(ZBA1314-20)

An application from Three Swallow Properties LLC, agent, Ed Bannister. The applicant request a Variance to Article V, Section A, Permitted Uses to allow for a Day Care Center in an existing building This request is to the 2013 Town of Lee Zoning Ordinance. The property is known as Tax Map #11-6-0200 and is located at 5 Mast Rd.

Attorney Somers explained that it is unclear sitting here if the decision made tonight is going to go any further in terms of nay additional motions to rehear and any court proceedings. You certainly can proceed tonight to start the variance application and then continue it to a further date, if you feel you don't have all the necessary information or you can simply continue in

general, you don't even need to start it tonight. You can come back and have the variance at a time certain.

Ed Bannister stated that would make sense to him.

Tobin Farwell made a motion to continue the variance application to continue to the first meeting after the appeal period, which is May 21, 2014 at 7:00pm.

Craig Williams second.

Vote: all, motion carried.

MINUTES TRANSCRIBED BY:

Caren Rossi, Planning & Zoning Administrator

MINUTES APPROVED BY:

Jim Banks, Chairman

John Hutton

David Allen

Tobin Farwell

Craig Williams, Alternate

Philip Sanborn

Frank Reinhold, Alternate