8/22/22

CIVIL ACTION COVER SHEET

DOCKET NUMBER

Trial Court of Massachusetts
The Superior Court

COUNTY: Plymouth Superior Court (Plymouth)

Plaintiff 808 Market Street, LLC	**Defendant:** Robert C. Rosa, III
ADDRESS: 808 Market Street	ADDRESS: Town of Rockland Offices
Rockland, MA 02370	242 Union Street, Rockland, MA 02370
Plaintiff Attorney: Jonathan M. Hixon	**Defendant:** Stephen Galley
ADDRESS: Hackett Feinberg P.C.	ADDRESS: Town of Rockland Offices
155 Federal Street, 9th Floor	242 Union Street, Rockland, MA 02370
Boston, MA	
BBO: 692420	
Plaintiff Attorney: Michael L. Brown	**Defendant:** Gregory Tansey
ADDRESS: Hackett Feinberg P.C.	ADDRESS: Town of Rockland Offices
155 Federal Street, 9th Floor	242 Union Street, Rockland, MA 02370
Boston, MA	
BBO: 706810	
Plaintiff:	**Defendant:** Tim Haynes
ADDRESS:	ADDRESS: Town of Rockland Offices
	242 Union Street, Rockland, MA 02370
Plaintiff Attorney:	**Defendant:** Robert Baker
ADDRESS:	ADDRESS: Town of Rockland Offices
	242 Union Street, Rockland, MA 02370
BBO:	
Plaintiff Attorney:	**Defendant:** Robert Baker, Jr.
ADDRESS:	ADDRESS: Town of Rockland Offices
	242 Union Street, Rockland, MA 02370
BBO:	

TYPE OF ACTION AND TRACK DESIGNATION (see instructions section below)

CODE NO.	TYPE OF ACTION (specify)	TRACK	HAS A JURY CLAIM BEEN MADE?
C02	Zoning Appeal - G.L. c.40A	F	☐ YES ☒ NO

*If "Other" please describe:

Is there a claim under G.L. c. 93A? ☐ YES ☒ NO

Is there a class action under Mass. R. Civ. P. 23? ☐ YES ☒ NO

STATEMENT OF DAMAGES PURSUANT TO G.L. c. 212, § 3A

The following is a full, itemized and detailed statement of the facts on which the undersigned plaintiff or plaintiff's counsel relies to determine money damages. For this form, disregard double or treble damage claims; indicate single damages only.

TORT CLAIMS

A. Documented medical expenses to date

1. Total hospital expenses
2. Total doctor expenses
3. Total chiropractic expenses
4. Total physical therapy expenses
5. Total other expenses (describe below)

Subtotal (1-5): **$0.00**

B. Documented lost wages and compensation to date

C. Documented property damages to date

D. Reasonably anticipated future medical and hospital expenses

E. Reasonably anticipated lost wages

F. Other documented items of damages (describe below)

TOTAL (A-F): **$0.00**

G. Briefly describe plaintiff's injury, including the nature and extent of injury:

CONTRACT CLAIMS

☐ This action includes a claim involving collection of a debt incurred pursuant to a revolving credit agreement. Mass. R. Civ. P. 8.1(a).

Item #	Detailed Description of Each Claim	Amount
1.		
	Total	

Signature of Attorney/Unrepresented Plaintiff: X /s/ Jonathan M. Hixon Date: August 22, 2022

RELATED ACTIONS: Please provide the case number, case name, and county of any related actions pending in the Superior Court.

CERTIFICATION PURSUANT TO SJC RULE 1:18

I hereby certify that I have complied with requirements of Rule 5 of the Supreme Judicial Court Uniform Rules on Dispute Resolution (SJC Rule 1:18) requiring that I provide my clients with information about court-connected dispute resolution services and discuss with them the advantages and disadvantages of the various methods of dispute resolution.

Signature of Attorney/Unrepresented Plaintiff: X /s/ Jonathan M. Hixon Date: August 22, 2022

CIVIL TRACKING ORDER (STANDING ORDER 1- 88)	DOCKET NUMBER 2283CV00612	Trial Court of Massachusetts The Superior Court
CASE NAME: 808 Market St, LLC vs. Robert C Rosa, Chairman, III et al		Robert S. Creedon, Jr., Clerk of Courts
TO: Robert C Rosa, Chairman, III No addresses available ,		COURT NAME & ADDRESS Plymouth County Superior Court - Brockton 72 Belmont Street Brockton, MA 02301

TRACKING ORDER - F - Fast Track

You are hereby notified that this case is on the track referenced above as per Superior Court Standing Order 1-88. The order requires that the various stages of litigation described below must be completed not later than the deadlines indicated.

STAGES OF LITIGATION	DEADLINE		
	SERVED BY	FILED BY	HEARD BY
Service of process made and return filed with the Court		11/21/2022	
Response to the complaint filed (also see MRCP 12)		12/20/2022	
All motions under MRCP 12, 19, and 20	12/20/2022	01/19/2023	02/21/2023
All motions under MRCP 15	12/20/2022	01/19/2023	02/21/2023
All discovery requests **and depositions** served and non-expert depositions completed	06/20/2023		
All motions under MRCP 56	07/18/2023	08/17/2023	
Final pre-trial conference held and/or firm trial date set			12/15/2023
Case shall be resolved and judgment shall issue by			08/21/2024

The final pre-trial deadline is not the scheduled date of the conference. You will be notified of that date at a later time.

Counsel for plaintiff must serve this tracking order on defendant before the deadline for filing return of service.

This case is assigned to

DATE ISSUED	ASSISTANT CLERK	PHONE
08/22/2022		

at 8/22/22

COMMONWEALTH OF MASSACHUSETTS

PLYMOUTH, SS.

SUPERIOR COURT DEPARTMENT
C.A. NO. 2283CV00612

808 MARKET ST, LLC,
Plaintiff
vs.

ROBERT C. ROSA, III, Chairman,
STEPHEN GALLEY, GREGORY TANSEY,
TIM HAYNES, ROBERT BAKER, and,
ROBERT BAKER, JR.
As they constitute the Town of Rockland
Zoning Board of Appeals,
Defendants

COMPLAINT TO ANNUL AND CANCEL DECISION OF THE TOWN OF ROCKLAND ZONING BOARD OF APPEALS *and* FOR DECLARATORY JUDGMENT & OTHER EQUITABLE RELIEF

Introduction

This is an action (i) pursuant to M.G.L. c. 40A § 11 for judicial review of a decision of the Board of Appeals of the Town of Rockland (hereinafter the "Board"), denying Plaintiff's application for a variance from § 415-22 of the Rockland Zoning By-Laws requiring a lot have 32,670 sq. ft. per residential unit; (ii) pursuant to M.G.L. c. 231A and M.G.L. c. 40A §§ 15 and 16 seeking declaratory relief to enforce the Board's first vote which allowed the variance as a result of a motion to deny the variance that failed by a vote of 3 – 2, and annul and/or void the second unlawful vote on the Board's motion for reconsideration to "grant" the variance which was passed and adopted by the Board; (iii) pursuant to M.G.L. c. 40A §§ 7 and 17 seeking a determination that the Board is barred and/or equitably estopped from enforcing the Decision through an enforcement

action or otherwise because it has allowed the structure to remain in existence, under its non-confirming state, for a period of more than 10 years in violation.

Parties

1. The Plaintiff, 808 Market St, LLC, is a Massachusetts limited liability company, with an address at 808 Market Street, Rockland, Massachusetts, 02370, that was duly organized to take title to the two-family property located at 808 Market Street, Rockland, Plymouth County, Massachusetts (the "Property").

2. The Defendants are each and all members of the Town of Rockland Zoning Board of Appeals who reside in Rockland, MA as follows:

Robert C. Rosa, III, Chairman: 242 Union Street, Rockland, MA 02370
Gregory Tansey: 242 Union Street, Rockland, MA 02370
Stephen Galley: 242 Union Street, Rockland, MA 02370
Tim Haynes: 242 Union Street, Rockland, MA 02370
Robert Baker: 242 Union Street, Rockland, MA 02370
Robert Baker, Jr.: 242 Union Street, Rockland, MA 02370

Despite numerous requests, the Town Clerk of the Town of Rockland refused to provide Plaintiff the residential address of the members of the Zoning Board in order to effectuate service, as required by G.L. c. 40A. She insisted the town hall address be used.

Statement of Facts

3. The Property is the first home purchased by Eliviano Henkert, a Brazilian immigrant, who moved into Unit 1 at the Property with his wife, Simone Ferreira de Oliveira Henkert and their three children (the "Henkert Family") as renters in 2017. Eliviano and Simone are the members/owners of Plaintiff, and each speak very little English.

4. The Henkert Family purchased the Property on October 4, 2021, which was occupied as a two-family home at that time and utilized a limited liability company (the Plaintiff) to hold title since they intended to continue leasing the second unit at the Property.

5. When the Plaintiff purchased the Property, Unit 2 was occupied and continues to be occupied by Patricia Rodrigo and Enzo Guedes, also Brazilian immigrants, and their now six (6) year old son.

6. The Property has two units, each with a separate entrance: Unit 1 and Unit 2. Unit 1 has three bedrooms, a kitchen, two living rooms and a bathroom. Unit 2 has two bedrooms, a kitchen, living room and a bathroom.

7. The two-family home has two gas meters and two electric meters clearly visible from the street.

8. The Property is located in the R-2 Zone which permits two-family residential uses.

9. When Plaintiff purchased the Property, there was no reason to check on the zoning status since the Properly clearly appeared to be a two-family home in the R-2 Zone which allows two-family homes. Review of zoning status is not customarily done in connection with a title exam of residential property.

10. However, unbeknownst to Plaintiff at the time of purchase, the Board contends that the Property was part of a larger parcel that was divided in 2010 by the filing of an ANR Plan with the Town of Rockland Planning Board by a prior owner. The ANR Plan took this larger parcel of land, divided it into Lot A (where the Property is located) and Lot B, and allowed a new single-family home to be built on the new Lot B.

11. The Board contends that when the larger parcel was divided in 2010, the new Lot A, which includes the Property on which the two-family home is located, did not have sufficient lot area to continue as a two-family and thus would need to be changed to a single-family home.

12. While the ANR plan is recorded at the Bristol County Registry of Deeds, there is nothing on it or on any recorded document that indicates that the Property (on Lot A created in 2010) is or would become non-compliant as a two-family home and as a result could only be used as a single-family home.

13. On information and belief, the new single-family home was not built on Lot B until 2018.

14. Plaintiff did not learn of this issue until after it purchased the Property and was looking into a building permit to perform certain work at the Property. Plaintiff was only then informed by the Building Inspector that the Property should not be used as a two-family home, and that Plaintiff should request a variance from the Board.

15. Thus, Plaintiff applied for the variance, and on July 19, 2022, a hearing was held on the Plaintiff's application, whereby the Plaintiff requested relief from § 415-22 of the Rockland Zoning By-Laws. Specifically, that by-law requires that the lot have 32,670 sq. ft. per unit, for a total of 65,340 sq. ft. for a two-family structure such as the Property. The total area proposed by Plaintiff for the Property, which has existed for the two-family home since 2010, is 40,678 sq. ft.

16. The two-family home on the Property complies in all respects with zoning except for the relief that was requested from the Board regarding lot area.

17. In fact, the Board has not taken *any* action with regards to the non-conformance of the Property since the creation of the non-conformance in 2010, despite having knowledge about the non-conformance.

18. After Plaintiff made its presentation to the Board, at the conclusion of the July 19, 2022 hearing, a member of the Board made a motion to *deny* the variance. After it was seconded, only three members voted in favor of denying the variance and two members voted opposing the motion to deny.

19. Counsel for Plaintiff stated to the Board that since the motion to deny did not get the required four votes, that the motion to deny the variance failed and thus variance was granted.

20. In response to counsel for Plaintiff, another member of the Board made a motion to reconsider the vote, which motion for reconsideration was seconded and passed by a vote of 4-1, over Plaintiff's objection. The Board made no findings of specific or material changes in the conditions upon which the previous action taken by the Board was based, and a description of such changes in the record of its proceedings was never made, as required by Massachusetts law.

21. Only then did the Board make a motion to grant the variance, which was seconded. The Board did not have any discussion as to the motion to grant the variance, which did not pass by a vote of two members in favor of granting the variance and the three votes against granting the variance.

22. As such, Plaintiff brings this action to appeal the Board's decision, declare the second illegal vote a nullity and for equitable relief to estop the Board from enforcing the by-law against Plaintiff due to their inaction since 2010.

COUNT 1

(G.L. c. 40A §11 appeal)

23. Plaintiff realleges and reavers paragraphs 1 through 22 as if set forth fully herein.

24. Plaintiff brings this action pursuant to Massachusetts General Laws, Chapter 40A, for judicial review and/or a trial de novo/or a remand to the Zoning Board of Appeals, of a decision of the Board of Appeals of the Town of Rockland, denying plaintiff's request for a variance. A *certified* copy of the Findings and Decision of the Zoning Board of Appeals (the "Decision") is attached hereto as **Exhibit "A".**

25. Site constraints at the Property present a hardship for Plaintiff, which were not created by Plaintiff but instead result from the 2010 subdivision plan, which has existed since 2010.

26. The Board has taken no enforcement action against any prior owners to enforce the by-laws and stop the Property from being used as a two-family home, despite the fact that the Board and the building department knew it was being used as a two-family, which is visible from the busy public way that passes by the Property.

27. The relief requested by Plaintiff would not cause substantial detriment to the public good or impair the purposes and intent of the By-Law or impact the general area, which permits two-family properties as of right. The variance can be granted without nullifying or substantially derogating from the intent or purpose of the Zoning By-Law.

28. The Board's Decision exceeded the authority of the Board of Appeals, and therefore violates the appropriate provisions of M.G.L. c. 40A.

29. The Board's Decision to deny the variance failed to make a detailed record and failed to set forth a factual basis to support the Decision, instead it is a repetition of statutory language without specific application to the Property and/or Plaintiff's application for variance.

30. The Board's Decision was also contrary to law, arbitrary and capricious and based on untenable grounds.

WHEREFORE, Plaintiff hereby requests with respect to Count I that this Court:

a. Hear all pertinent evidence and determine the facts;

b. Determine and adjudge that the Town of Rockland Zoning Board of Appeals' decision denying the variance was an error as a matter of law and fact, and that the Board of Appeals exceeded its authority;

c. Annul, Cancel and render void the Decision of the Rockland Zoning Board of Appeals;

d. Following a trial de novo, enter judgment in favor of the Plaintiff granting the variance;

e. In the alternative, remand this matter to the Rockland Zoning Board of Appeals with specific instructions;

f. Grant such other relief to the Plaintiff as this Court deems just and appropriate.

COUNT II

(G.L. c. 40A §16 appeal)

31. The plaintiff realleges and reavers paragraphs 1 through 30 as if set forth fully herein.

32. M.G.L. c. 40A §16 provides in part that "*No appeal, application or petition which has been unfavorably acted upon by the special permit granting or permit granting authority shall be acted favorably upon within two years after the date of the final unfavorable action unless said special permit granting authority or permit granting authority finds ... by a vote of four members of a board of five members, specific and material changes in the conditions upon which the previous unfavorable action was based, and describes such changes in the record of its proceedings ...*"

33. At the public hearing on July 19, 2022, after considering the Plaintiff's application for a variance, the Board made a motion to *deny* the variance. After the motion to deny was seconded by another member, only three members of the Board voted in favor of *denying* the variance and two members voted opposing the motion to deny.

34. G.L. c 40A, §15 provides in part that the concurring vote of four members of a board consisting of five members shall be necessary to reverse any order or decision of any administrative official under G.L. c. 40A, or to effect any variance in the application of any ordinance or by-law.

35. The Board only obtained three votes in favor of the motion to deny the variance, and as such the motion to deny the variance failed. As a result of the failure of the motion to deny the variance, the variance was granted.

36. Thereafter, when counsel for Plaintiff informed the Board about the vote, the Board then made a motion to reconsider their previous vote, which was seconded and then passed by a 4 -1 vote. However, the Board made no findings of specific and material changes in the conditions upon which the previous unfavorable action was based, and

description of such changes in the record of its proceedings was never made, as required by M.G.L. c. 40A §16.

37. The Board then made a motion to grant the variance, which was seconded, and failed by a vote of two votes in favor and three opposed, thus denying the request for a variance.

38. Thus, this second vote is illegal and should be determined a nullity in violation of G.L. c 40A, §§ 15 and 16.

WHEREFORE, Plaintiff hereby requests with respect to Count II that this Court enter judgment declaring that the Defendant Board's vote on July 19, 2022 resulted in the granting of the variance, since the motion to deny the variance failed by a 3-2 vote, and that the second votes are deemed null and void in violation of G.L. c 40A, §§ 15 and 16, and for such other relief as this Court deems just and proper.

COUNT III

(G.L. c. 40A §7 appeal)

39. The plaintiff realleges and reavers paragraphs 1 through 39 as if set forth fully herein.

40. M.G.L. c. 40A §7 provides in part that "*If real property has been improved and used in accordance with the terms of the original building permit, no criminal or civil action intended to compel abandonment, limitation or modification of the use allowed by the permit... shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies ... within 6 years of the commencement of the alleged violation.*"

41. The Property is located in a two-family zone and is not in violation of any building permits issued. Upon information and belief, the Property was occupied as a two-family home, with all of the characteristics of a two-family home (i.e. separate entrances, gas meters, electric meters, etc.) before the Property was divided from a larger parcel in 2010.

42. The Board contends that when the Property was divided from the larger parcel in 2010, it no longer complied with the lot area zoning by-law. Yet, the Board took no action to enforce the by-law despite knowing that the Property did not comply with the by-law within the time required by G.L. c. 40A §7.

43. As such, the Board should be precluded and/or estopped from enforcing the by-law against the Plaintiff and the Property.

WHEREFORE, Plaintiff hereby requests with respect to Count III that this Court enter judgment declaring that the Board can maintain no action against the Plaintiff, or with respect to the Property, since it has failed to file any required action timely as required by M.G.L. c. 40A §7, and for such other relief as this Court deems just and proper.

Plaintiff,
808 MARKET ST, LLC
By its attorney,

Jonathan M. Hixon (BBO #692420)
Michael L. Brown (BBO # 706810)
Hackett Feinberg P.C.
155 Federal Street, 9th Floor
Boston, MA 02110
617-422-0200
jmh@bostonbusinesslaw.com
mlb@bostonbusinesslaw.com

Dated: August 22, 2022

Exhibit "A"

Town of Rockland

Town Clerks Office
242 Union Street
Rockland, MA 02370

April 22, 2022

Owner of Property: 808 Market St, LLC
808 Market Street #1
Rockland, MA 02370

Property Location: 808 Market Street
Rockland, MA 02370

Book 55905, Page 175

To Whom It May Concern:

I certify that twenty (20) days have elapsed since the Zoning Board of Appeals filed the attached decision (August 1, 2022) in this office and that no appeal has been filed.

A true copy attest:
Liza J. Landy

Liza J. Landy, Town Clerk

TOWN OF ROCKLAND
ZONING BOARD OF APPEALS

Town Hall - 242 Union Street, Rockland, Massachusetts 02370
Phone: 781-871-0154, ext. 1195; E-MAIL: zoning@rockland-ma.gov

FINDINGS AND DECISION OF THE ZONING BOARD OF APPEALS

Date: August 1, 2022

Decision: Denial of Dimensional Variance

Applicant: 808 Market ST LLC

Property Address: 808 Market Street, Rockland, Massachusetts 02370

The Rockland Zoning Board of Appeals has considered the application submitted by 808 Market ST LLC, 808 Market Street, Rockland, Massachusetts, c/o Attorney Edward Valanzola, Valanzola Law Group, 273 Chauncy Street, Mansfield, Massachusetts 02048, for a dimensional variance pursuant to Sections 415-22, Building and Lot Regulations and 415-89.1, for lot area for 2 family existing home. The Bylaw expressly requires 32,670 square feet for each dwelling unit where more than one dwelling unit is permitted. The subject property is known as and numbered 808 Market Street, Rockland, MA; has a total 40,678 square feet. The property is located in the R-2 Residence Zoning District, Section 415-9 of the Bylaw, and is further identified as Lot 7, Map 54, on the Rockland Assessor's Maps. The owner of the property is 808 Market ST LLC, 808 Market Street, Apt. 1, Rockland, Massachusetts 02370.

The Board certifies that it has complied with all statutory requirements relative to notice to abutters and new publication of notice of the public hearing and has filed copies of this decision and all plans referred to herein with the Town Clerk, Planning Board, and the Building Department pursuant to Mass. Gen. L. c. 40A, Section 11.

A True Record, Attest
Liza J. Landy
Town Clerk, Rockland, MA

Advertised: July 5, 2022, and July 12, 2022, in the Patriot Ledger.

The Board lastly has taken into consideration testimony of the applicant, the applicant's attorney, the public, the application materials, plans and revised plans, and communications from various Town boards, abutters, and with interested parties.

A Public Hearing was held at the Rockland Town Hall at 8:00 P.M. on July 19, 2022.

ATTENDANCE:

Board Members: Robert C. Rosa, III, Gregory Tansey, Robert Baker, Jr., Robert Baker, Sr. and Stephen Galley.

Also present: Land Use Counsel Attorney Robert W. Galvin as well as Building Commissioner/Zoning Enforcement Officer Thomas Ruble.

MEMBERS VOTING: Chairman Robert C. Rosa, III, Gregory Tansey, Robert Baker, Jr., Robert Baker, Sr., and Stephen Galley.

DISCUSSION ON JULY 19, 2022

The Chairman of the Zoning Board introduced the members of the board.

The Chairman read the advertised notice in the Patriot Ledger with a Public Hearing Date of July 19, 2022.

The applicant's attorney, Edward Valanzola, indicated that he represented the owner and its representative, Eliviano Henkert, who lives with his family in Unit 1, 808 Market Street. Attorney Valanzola indicated that property is in an R2 Zone where a 2 family is permitted. Because of the lot area requirement, he is seeking a variance for dimensional relief. Attorney Valanzola explained Mr. Henkert purchased the property in October, 2021, and the mortgage was based on a 2 family with the second income. He explained the tenant in Unit 2 is the same tenant as when the property was purchased, pays below market rent, and could be displaced unless the Board grants the requested relief. Attorney Valanzola explained that there was no broker involved and the applicant purchased the property directly from the seller and he offered some

pictures of the property including the entry doors for Unit 1 and Unit 2, and 2 utility meters on the building.

Mr. Rosa asked counsel what was the defect in the land enabling the Board to consider allowing the variance.

Attorney Valanzola stated the applicant did not create the non-conformance, the hardship is the shape of the lot with a personal hardship to both parties and that this issue came up due to applicant applying for a building permit.

Thomas Ruble, Building Commissioner/Zoning Enforcement Officer, who was present, stated the issue has been on going since the endorsement of a Form A filing.

The Chairman then opened the meeting to the Board for questions.

Gregory Tansey had no questions.

Stephen Galley asked who was responsible to determine the zoning.

Attorney Valanzola stated this would not be part of a title search.

Robert Baker, Sr. asked about the 3rd electric panel and was advised it was for solar panels. He asked what the garage was being used for and was advised it was for storage purposes only. Mr. Baker also stated that there were a lot of cars on the side of the property and was advised applicant was not running a business out of the property. Mr. Baker also said there were 7 entry doors on the building.

Attorney Galvin stated that if the Board was convinced the applicant met all the requirements, they could grant the variance.

Robert Rosa stated that it was financial only and was a title issue.

Mr. Rosa asked the Board if they felt they had enough information to make a decision.

Robert Baker, Jr. asked if it was a legal 2 family previous to the Form A endorsement.

Attorney Galvin opined that ANR plans are recorded but legality of a use would not show up on a title search. Zoning compliance is excluded from a title search unless it was commercial property and then a Zoning Certification would be required. Attorney Galvin explained that if the lots were divided and the division resulted in a zoning issue both lots were affected under the concept of "Infectious Invalidity" which he briefly discussed.

Mr. Ruble's concern is that if the variance is granted it sets a negative precedent.

Mr. Rosa stated the applicant does not meet soil, shape or topography of lot.

Mr. Baker, Sr. stated the Board cannot consider a personal financial hardship unless its relating to the soil, shape or topography.

Attorney Galvin discussed a brief history of the ownership of the lot and explained on the basis of the information in the file that the subject lot resulted from the ANR division of the land into two parcels. The ANR division did not confer any compliance with zoning.

The Chairman then opened the meeting up to members of the public, asking if any of the attendees would like to speak either in favor or opposed to this applicant.

Ashley Barnes, 800 Market Street, spoke in favor of the applicant.

Robert Manzella, 799 Market Street, spoke in opposition of the applicant. He testified that the lot was divided into two single family dwelling lots and this is close to his property and the one property which had a two family was to revert to a one family.

Mr. Baker, Jr. inquired about commercial vehicles parked in a residential zone.

Mr. Rosa and Attorney Galvin discussed a possible solution of an accessory apartment, which is allowed by right, but the maximum unit size is 650 square feet and the unit must be occupied by family members.

Mr. Rosa asked if anyone else wanted to speak.

Mr. Manzella again spoke in opposition.

Mr. Rosa reminded the public that the meeting was being recorded.

Mr. Galley asked if the variance was approved, could it set precedent where the town could be forced into granting variances.

Mr. Ruble stated the lot does not have the square footage to make a single family into a 2 family.

Attorney Valanzola stated the case before the Board is unique.

There was discussion between Robert Baker, Jr. and Attorney Valanzola as to what would set a precedent if the variance was granted.

Mr. Manzella had copies of pictures that he wanted entered into the file.

The Chairman asked the members of the board for a motion to close the public portion of the meeting. So moved by Robert Baker, Sr.
Seconded by Stephen Galley.

Mr. Rosa stated there was a motion on the floor. Motion was seconded by Mr. Galley. The ZBA members take a vote: Robert Rosa – Yes, Robert Baker, Sr. – Yes, Gregory Tansey – Yes, Robert Baker, Jr – Yes, Stephen Galley – Yes. The vote is unanimous, and the public portion of the meeting has been closed.

The Chairman reads to the applicant the appeal process and states a decision will be made at tonight's hearing, and that they are welcome to stay and await the result. One of the conditions is always to show the Building Commissioner proof of recording.

DELIBERATION:

Mr. Tansey stated that the Board upholds the Bylaws to prevent things from getting out of control.

Mr. Baker, Sr. stated the property does not meet the lot area requirements for a 2 family dwelling.

Mr. Rosa and Mr. Ruble discussed the building permit and Mr. Ruble stated that applicant did take his recommendation to get a lawyer.

Mr. Galley stated a 2 family was allowed by right with an appropriate full lot. There was discussion regarding the Form A Plan.

Mr. Baker, Jr. stated that the applicant did nothing wrong, everything points to a 2 family, the problem was self-inflicted in a broad sense by an unsophisticated buyer, and that this does not set precedent unless it is identical circumstances and he would be in favor of granting the variance.

Attorney Galvin opined that this is not a minor deviation from the Bylaw, it is a personal financial hardship, and not related to the soil, shape or topography of the lot which is a hardship that could set precedent. It must stand on its own, a variance is rare and unusual where all circumstances are met. A personal financial hardship is not and does it give a special privilege. The lot is missing 25,000 square feet which is a significant deviation.

Mr. Baker, Jr. said they should weigh the consequences; not the letter of the Bylaw, but the spirit of the Bylaw.

Mr. Rosa asked if it was 10 years or greater regarding a zoning violation as the new house was built in 2018 and both would be in violation.

Mr. Tansey stated that zoning is in place to control and prevent noxious usage.

DECISION ON VARIANCE:

Robert Baker, Sr. made a motion to deny the variance as there is no hardship to the land. The motion was seconded by Gregory Tansey. Mr. Rosa stated he had a motion and a second. Mr. Rosa then asked if there was any other discussion. There being none, he asked all in favor to deny the variance. Mr. Tansey, Mr. Baker, Sr. and Mr. Galley all voted in favor of denying the variance. Opposed and in favor of granting the relief were Mr. Rosa and Robert Baker, Jr. The Motion to deny the variance is 3 in favor of denial and 2 in opposition and in favor of approval. Attorney Galvin confirmed that the vote was 3 in favor of denying the variance and 2 in favor of granting the variance and that this vote was not sufficient to grant the variance.

Attorney Valanzola stated he thought the motion should have been framed in favor of granting the variance and Attorney Galvin disagreed stating that the motion to deny passed by majority vote. Attorney Valanzola stated that it would take 4 to deny the variance and 3 to grant it. Attorney Galvin disagreed.

As the public hearing had not been closed, Mr. Baker, Sr. made a motion to reconsider the vote. The motion was seconded by Mr. Galley. Mr. Rosa asked all in favor to reconsider the vote and Mr. Baker, Sr., Mr. Galley, Mr. Rosa and Mr. Tansey voted in favor. Mr. Baker, Jr. was opposed. The vote for reconsideration passed by a majority of 4 to 1.

Robert Baker, Jr. then made a motion to approve the grant of the variance. The motion was seconded by Mr. Rosa. Mr. Rosa then asked if there was any discussion. There being none, Mr. Rosa and Mr. Baker, Jr. voted in favor of granting the variance and Mr. Baker, Sr., Mr. Galley and Mr. Tansey voted in favor of denying the variance. The vote is 2 in favor of granting the variance, 3 opposed to granting the variance. As a result of the inability to obtain 4 of 5 votes of the 5 member Board, the grant of the variance fails.

Mr. Baker, Sr. made a motion to close the public hearing. The motion was seconded by Mr. Galley. The ZBA members take a vote: Robert Rosa – Yes, Robert Baker, Sr. – Yes, Gregory Tansey – Yes, Robert Baker, Jr – Yes, Stephen Galley – Yes. The vote is unanimous, and the public hearing is closed.

FINDINGS:

The Board found that this is not a minor deviation from the Bylaw, that the financial hardship was personal to the owner, and not related to the soil, shape or topography of the lot and granting a variance in such a case would set a bad precedent. A personal financial hardship is not and does not give a special privilege. The lot is missing 25,000 square feet which is a significant deviation.

The Board also credited the evidence that when the lot was divided into two lots the prior owner represented that he would convert the existing two family on one of the resultant lots into a single family and then the other lot would become its own single family house lot.

The Board indicated that such significant relief was not minor and would derogate from the intent and purpose of the bylaw.

REASON FOR DECISION:

The Board found that the lot did not meet the standard to create a dimensional hardship.

NOTE:

- ❖ This decision may be appealed to the District Court, Housing Court, Land Court or Superior Court pursuant to Chapter 40A, Section 17. Said appeal must be filed within twenty (20) days after this decision is filed with the Town Clerk.
- ❖ Chapter 40A, Section 11, states that in part, that no variance or Special Permit shall take effect until the Town Clerk certifies that twenty (20) days have elapsed, and no appeal has been filed.
- ❖ This Board certifies that copies of this decision have been filed with the Planning Board as well as with the Town Clerk.

FOR THE ZONING BOARD OF APPEALS

By: _____
Robert C. Rosa, III
Chairman