

BOARD OF ADJUSTMENT MINUTES

JUNE 29, 2022, 5:00PM

TOWN HALL COUNCIL CHAMBERS, 321 CAU SEWAY DRIVE, WRIGHTSVILLE BEACH

The meeting was called to order at 5:00pm by Mayor Pro Tem Miller, followed by the Pledge of Allegiance. The following were present:

Board

Hank Miller, Mayor Pro-tem (Chair)
Vivian (Zeke) Partin, Alderman
First Alternate Catherine Brunjes
Second Alternate Cheryl Koballa

Staff

Timothy W. Owens, Town Manager
Brian E. Edes, Town Attorney
Tony Wilson, Planning & Parks Director
Robert Hornik, Attorney for Staff

APPROVAL OF MINUTES

Upon motion by Partin, seconded by Brunjes and carried by a vote of 3-0 (Miller abstaining because he was not present at the meeting), the minutes of the 8/26/21 meeting were approved.

CONDUCT A PUBLIC HEARING TO CONSIDER AN APPEAL FROM A DECISION BY THE UDO ADMINISTRATOR REGARDING THE INTERPRETATION OF LOT FRONTAGE FOR A NEW STRUCTURE PROPOSED FOR 14 MALLARD STREET

Edes: "We're sitting here tonight to hear an appeal of staff's decision as you described. This will be a quasi-judicial hearing which means it will be conducted in a manner to ensure both parties substantive procedural due process. The appellants are entitled to a fair and impartial decision-making body. All testimony will come from those who are personally sworn in and will be subject to both questions from the Board and cross examination. I need to ask the Board as a whole a few questions to make sure that the appellant does have a fair and impartial decision-making body. So let me ask you this, has anyone had any ex parte contact meaning substantive discussion about this appeal outside the context of this hearing with a staff member? (All Board members indicated that they had not). Same question about the appellants. Has anyone had any ex parte discussion with the appellants or anyone associated with the appellants about the subject matter of this hearing? (All Board members indicated that they had not). I realize that Wrightsville Beach is not the largest town in North Carolina, but has anyone made a site visit to the site for the purpose of assessing this appeal? (All Board members indicated that they had not). Has anyone had a family relationship with the appellants? (All Board members indicated that they did not). Does anyone have a close personal or business relationship with the appellants? (All Board members indicated that they did not). Does anyone have a fixed opinion on the subject matter of this appeal that you don't feel can be persuaded by the substantial, competent and relevant evidence if that evidence is produced? (All Board members indicated that they did not). The manner in which we'll proceed is that I'm going to allow Mr. Hornik and the appellants to give a brief opening statement. By opening statement, I don't mean you're putting on your full case, I mean simply an overview of what you believe the evidence that you're going to present is going to be. You can have that opening statement or you can decline to do it. We'll then hear from staff, Robert Hornik, who is representing staff, an attorney out of Chapel Hill, North Carolina. Is that correct Robert?"

Hornik: "Yes, sir."

Edes: "And the decision that's being appealed from was issued by Tony Wilson, and by statute he has to be here—he is here—and that decision was codified or reduced to writing in a February 10, 2022 letter. After we hear all of the evidence, you will begin your deliberations. Again, unlike a variance, this is an appeal from a staff decision and so in cases like this the issue is, did in this case Mr. Wilson adequately interpret the ordinance? And when you're construing an ordinance, it's common sense the first thing you do is look at the plain meaning of the ordinance and you give words that aren't already defined in the ordinance their ordinary meaning like we get a Webster's dictionary or whatever else we need and then you look to the intent of the ordinance and the intent of

the ordinance can be found by looking at the context of where these definitions of the ordinance are and things of that nature. I will likely keep the evidentiary hearing open during deliberations in the event that the Board members need clarification from either the appellants or staff. So having said that, let me ask all those who wish to provide testimony to come forward...how are we doing that?"

Miller: "I've got a bible."

Edes: "You don't have to come forward, you can just stand up."

Miller: "All right, here we go. Do you swear that the evidence you shall give to the Board shall be the truth, the whole truth, and nothing but the truth, so help you God?"

All persons present to give evidence then responded in the affirmative: Owens, Wilson, Hornik, and appellants Tom Conley and Teresa Henry.

Edes: "Before we get started, this is not a variance, you're kind of in the same position that Mr. Wilson was when he made the decision. Based solely on the competent, relevant, and substantial evidence produced during this hearing, it is your role to determine, 1) whether Mr. Wilson's interpretation is reasonable and accurate; 2) whether you would like to reverse it; or 3) whether there's somewhere in between like a modification of it. Those are your options at the conclusion of this hearing. I need to make sure the appellants are on record stipulating that you agree that we only have 4 members tonight. You were informed that we only had 4 members?"

Conley: "Correct, yes."

Edes: "And you consent to proceed with just 4 members?"

Conley: "Yes."

Edes: "So, a majority vote is what it would take, 3 out of 4. Mr. Hornik, do you have any preliminary matters?"

Hornik: "I actually do."

Miller: "One more question. Are you going to talk about hardships?"

Edes: "No."

Miller: "Because this is not a variance."

Edes: "Right. And we can talk about that because it is important. I have a feeling that both parties are going to shed light on that. This is not a variance. It only requires a simple majority. And you're in the same shoes as Mr. Wilson was when he made this decision and so based on the evidence, the question essentially is, was the decision appropriate, inappropriate or somewhere in between."

Brunjes: "So we can make suggestions for modifications?"

Edes: "You can't modify the code but to the extent it's possible, you could interpret it differently than Tony but it doesn't necessarily mean it was overturning Tony and it doesn't necessarily mean you'd be affirming Tony, so you'd have all 3 options."

Partin: "What's the in between?"

Miller: "Why don't we do this, let's hear what we've got to hear and let's ask our questions and let's ask what our decisions can be and you're going to leave it open so we can ask questions."

Edes: "I think both parties want to make sure that you understand your role here, so feel free to ask as many questions at any point that you need, procedurally, as to why we're here."

Conley: "Are we allowed to ask questions as well?"

Edes: "Yes, sir. Again, the way it will work is that both sides will get the opportunity to give a brief opening statement then staff will put on its case explaining the decision and how he made it. You will be able to cross examine everyone who testifies. Both parties will be subject to questions from the Board as we go along. What I don't want is a back and forth—I'd like testimony, the cross and then questions from the Board. Mr. Hornik, do you have any problem with that?"

Hornik: "No problem."

Miller: “If we have clarification questions, we can ask them, but otherwise we should hold. But at the end of the day we’re going to review everything and make sure everybody understands and is treated fairly.”

Hornik: “I do have an administrative housekeeping matter that’s a little technical but I think it’s important to get on the record. I’m Bob Hornik, of the Brough Law Firm of Chapel Hill, representing the Town staff here this evening. What I wanted to talk about is, I got the record on Friday and actually had access to it for a day or so beforehand as I was getting the engagement, and one of the things that I noticed in reviewing the Development Ordinance and reviewing the record is that Mr. Wilson’s decision letter was dated and sent out on February 10, 2022, that section 155.4.4.1 of the Development Ordinance provides that the owner of or other party involving the decision shall have 30 days from receipt of the written notice within which to file an appeal. Now, 30 days from February 10, 2022 would be March 12, 2022 because February only has 28 days. So in the staff packet we have the application for appeal on the Town’s standard notice of appeal form that was signed by Ms. Henry on March 10, 2022, so that seems timely to me, but you have Mr. Conley’s signature on May 8, 2022 and there’s a notation next to Ms. Henry’s name on the line ‘property owner’ where WBRP LLC Tom Conley is written and I understand that Mr. Wilson can provide testimony about that he signed the appeal on May 8, 2022. Now I know that he sent an email in February, 2022 but the Development Ordinance requires an appeal to be filed on the Town’s Notice of Appeal form and requires the appeal to be filed within 30 days of receipt of the written decision and I’m making a motion and putting on the record that the appeal for parcel 14b, which according to New Hanover County data, was owned by WBRP LLC, was untimely, in that we do not get the appeal on the Town’s Notice of Appeal form with the reasons for the appeal from the owner of that particular property, remember we have 2 pieces of property here, so that the Conley appeal is untimely and I would ask the Board to dismiss that appeal. Secondly with respect to the Conley appeal, because the property is owned by an LLC, the law provides that an LLC can only be represented by a licensed attorney and unless Mr. Conley is a licensed attorney, I submit that he’s not permitted to present evidence and to represent the LLC in the appeal. So I want those on the record. I would like the Board to dismiss the Conley appeal for those reasons. I’m also ready, of course, to prepare and address the merits of the appeal.”

Edes: “In fairness, he needs to be able to respond.”

Miller: “He can, but this has nothing to do with him. This is before we get started. So regardless of whether he has an attorney or not, are we allowed to go into closed session for the purpose of consulting with you?”

Edes: “If it’s to get pure legal advice. If we do, it’s to get legal advice about procedure, not my legal interpretation of the subject in question. That’s for these folks. We will have the minutes of this and if this goes beyond the Town of Wrightsville Beach to a court, everyone in this room wants a clean record so let’s make sure we’re cognizant and not talk over each other. For instance, a lot of times when someone’s asking you a question, you know what they’re asking before they finish the question so you want to jump in and go ahead and answer. Let’s let each other speak, not talk over each other and if I interrupt, it’s simply to make sure we’re protecting the record. Mr. Conley, where we are right now is Mr. Hornik’s made a motion to dismiss your appeal on 2 grounds, one is that it is untimely and the second is that the owner of the property is actually a corporate entity, an LLC, and under North Carolina law, a person who doesn’t have a law license can represent his or herself individually but a corporate entity must be represented by a licensed attorney. So at this stage I’m giving you an opportunity to address that motion.”

Conley: “First and foremost, the first motion where Teresa Henry filled out the application for the appeal, I was out of state for about a month at that time. She filled out the appeal for 14a and b, representing both units on the appeal. The Town came back to me in May and said your name needs to be signed on this as well. I signed it and sent it in in May. So the original appeal did have both units by my neighbor and co-owner of the property, Ms. Henry. So I don’t see anything there. The only thing that was truly missed for the 30 day bylaws were the Town of Wrightsville Beach responding to our appeal because they had 30 days to respond to our appeal and that didn’t happen. So, for the record, the Town of Wrightsville Beach is the only one that missed the 30 day window here. And as far as having an attorney, obviously it’s an LLC that I own. I was advised to get an attorney by several different people. Nobody ever told me I had to have an attorney present at this meeting.”

Edes: “Let me ask Ms. Henry a question. The appeal form, and you just heard Mr. Conley say that when you filled this out you did put 14a and 14b—is that accurate?”

Henry: “Yes.”

Edes: “Mr. Conley, the signature line at the bottom there—the 5/8/22—is that your signature?”

Conley: “That is correct.”

Edes: “And did you write the 5/8/22 on there?”

Conley: “Yes.”

Edes: “I want a clarification to a comment that you made. You said the Town of Wrightsville Beach had 30 days to respond to your appeal?”

Conley: “To the appeal that Ms. Henry put in.”

Edes: “What do you mean by respond?”

Conley: “It just says in the notes that once an appeal’s made, the Town of Wrightsville Beach will respond within 30 days and that never happened.”

Edes: “Can you point me to which section of the code you’re referring to?”

Conley: “It’s just on the application for appeal.”

Edes: “So it’s your position that the Town of Wrightsville Beach had some sort of legal duty to respond to Ms. Henry’s appeal within 30 days of March 10, 2022?”

Conley: “Correct, and that did not happen. I just wanted to state that for the record.”

Edes: “So within those 30 days, you had not yet signed the appeal, though, correct?”

Conley: “That’s correct.”

Miller: “So, Mr. Edes, I hate to do this but I’ve got a question that I think is attorney client privilege and I need to ask for a recess regarding the two motions.”

Edes: “Well, first off, Mr. Conley do you have anything else you want to add in response to Mr. Hornik?”

Conley: “No.”

Edes: “Ms. Henry, is there anything that you would like to state regarding Mr. Hornik’s motions.”

Henry: “I came down here 2 times. Then I came down here 2 or 3 more times and then I was told I never filed an appeal. And I said, oh, yeah I did. And then I was told I sent a check but nobody knew what it was for. And then I went to my email and said, this is where I sent it and this is where you said you got it. So that’s all I’ve got to say about the appeal process. And that was way after the 30 days. I’m the one that’s going to lose the 15 feet, so maybe he’s just riding and he has a problem because of me. Maybe he didn’t even need to appeal, maybe I only needed to appeal.”

Edes: “Who owns 14a?”

Henry: “I do.”

Edes: “Does Mr. Conley or any of his LLCs own any part of 14a?”

Henry: “No.”

Edes: “Who owns 14b?”

Conley: “I do. The corporation that I own and myself, an LLC—everything travels down an LLC to the owner, so I don’t want to say they are one and the same, but I own the LLC and the way I look at it is I own the building.”

Edes: “So you have an ownership interest in the LLC that owns 14b?”

Conley: “Correct.”

Miller: “Are you a 100% owner?”

Conley: “I am. Just to clarify, the WBRP LLC...a different corporation owns it now, High Tide Design. It did transfer. 50% of WBRP is mine and 50% is my brother’s and now I own 100% of High Tide Design.”

Miller: “So back to his point, you’re not disputing Ms. Henry’s application submitted on time?”

Hornik: “It appears to be submitted on time. Last point, I looked at the ordinance and I don’t find any 30 day obligation to make a decision on an appeal but I’ll leave that to your (indecipherable).”

Edes: “Mr. Conley, High Tide Design LLC owned the property when?”

Conley: “I don’t have the exact dates.”

Edes: “The reason why I asked that is Mr. Wilson’s February 10 letter is addressed to High Tide Design.”

Conley: “That’s who I filled out the building permit application as.”

Edes: “So at the time Mr. Wilson sent the February 10, 2022 letter addressed to High Tide Design LLC, High Tide Design LLC did own 14b, correct?”

Conley: “That’s correct.”

Miller: “So High Tide owns it now, WBRP filled out the form and signed it in May.”

Edes: “Can you clarify for me why you put WBRP LLC on the application?”

Conley: “That was a mistake. It was still on the County tax record, it hadn’t transferred under there but officially it probably had. But now it says High Tide.”

Edes: “So the entity WBRP LLC did not own the property 14b on May 8?”

Conley: “But did own it when we filled out the building application and permit.”

Edes: “Did they own it on March 10, 2022?”

Conley: “Yes. Actually, no.”

Edes: “High Tide Design LLC was the actual property owner when Mr. Wilson’s letter was written on February 10?”

Conley: “Correct.”

Edes: “And continues to be the property owner?”

Conley: “That’s correct.”

Edes: “That’s all I had for Mr. Conley. Mr. Hornik?”

Hornik: “Mr. Chairman and Board members, this just adds more grounds for our motion to dismiss as Mr. Conley, WBRP. WBRP had no interest in the property in February nor in May when Mr. Conley, on behalf of WBRP signed the appeal application form. I suggest to the Board that’s another grounds for dismissing the appeal as to Mr. Conley, WBRP, High Tides unit.

Conley: “I’d also like to submit the email pdf which shows the correspondence that I had with the Town of Wrightsville Beach since February 14 when I started responding and you can see how far that goes.”

Miller: “I still want to make a request to confer with our attorney.”

Edes: “I want to get through this because a motion’s been made, Mr. Conley has the right to defend that motion. He’s just directed our attention to some email exchanges. I’m going to recommend that we allow them in at this point in defense of Mr. Hornik’s motion. Mr. Hornik do you have any objections?”

Hornik: “Without objection I’ll stipulate that.”

Edes: “Mr. Hornik, Mr. Conley and Ms. Henry, I’d prefer to number the exhibits sequentially whether they are staff exhibits or appellant exhibits. You’re receiving into evidence as Exhibit 1 the package of emails without objection from either party.”

Conley: “I received an email on February 11 with the letter dated February 10 that Tony Wilson...On February 14, I sent this email which said I’m on a family vacation, which is why I wasn’t able to submit the thing within 30 days, but I saw your email on Friday relating to 14 Mallard Street and I assume the letter is a mistake. I ask you to take another look at the site plans we developed and submitted in reliance to our prior discussions I have also cc’d Terre Henry who’s the owner of the half impacted by this new interpretation. When we brought up the impact of 10 Mallard Street in our presentation at the Board of Aldermen meeting about the corner setback lots we said it was unbuildable you very clearly said the specific lot would be buildable with a 15 foot setback on Mallard Street would be taken from the private street that’s on Mallard Street so I immediately said well, wait a sec, this can’t be right, this memo has....and I did not receive any response from that so I sent another letter on February 18 saying we’re hoping to hear something back before the holiday weekend if not today. Basically the Town recommended that I needed to go hire an attorney and to represent myself. The last time we went through this lengthy expensive process we ended up with no decision. I have attached one of the many presentations we did as a reminder which also points the clear decisions and treatment to other waterfront lots after the Columbia Street ruling took place. Another example of inconsistent, arbitrary treatment towards us depriving us of our property rights. A clear precedence has been made....”

Edes: “Mr. Conley, I don’t want to interrupt you I just want you to relay how this email responds to the motion to dismiss.”

Conley: “This email chain responds there is obvious communication that happened immediately after I finally received the memo and if you read through the communication, you’ll see the lack of communication by the Town of Wrightsville Beach and you’ll see the lack of response except for go hire an attorney to go deal with this.”

Edes: “What’s the date of that email you have up there about going to hire an attorney?”

Conley: “That’s February 18.”

Edes: “Is it accurate to say and I’m not trying to prevent you from offering evidence on the limited scope where we are right now on the motion to dismiss, but is your purpose in putting these emails up now at this point to show that you were at least in electronic communication with the Town about Tony’s February memo?”

Conley: “Correct.”

Edes: “In Tony’s February memo he advised you of the appeal process, is that right?”

Conley: “It took a while to get to that.”

Edes: “Regardless of the motion, since you own the property next door or at least you have an ownership interest in the LLC in the property next door, I will likely recommend to the Board that you have standing to testify tonight whether your appeal is still going forward or not. So you will have an opportunity later in the proceedings to walk through these emails line by line to prove whatever you believe they prove but for the purposes of right now of what you’re trying to show through these emails is that you immediately started communicating with the Town about Tony’s decision, is that correct?”

Conley: “That is correct.”

Edes: “Is there any other purpose you want to use these for at this point?”

Conley: “Well the other thing I want to say is this memo, even though some people may say it impacts Ms. Henry’s side more than it impacts my side because of the 7.5 foot setback, when we’re talking about tearing down and demoing a property and rebuilding it, it also impacts my side equally.”

Edes: “Anything else, Mr. Conley?”

Conley: “No.”

Hornik: “One last comment. I can see that there was an email back in February 11 or 14 or 18, but here’s what the rule says, and we’re here about the rules tonight. The rule says this is 155.4.4.1b is that appeals may be filed by any person with standing. An appeal is taken by filing a notice of appeal which is a Town form with the Town Clerk and that didn’t happen. Particularly with respect to what I’m referring to as the Conley property. For that reason, the Conley appeal I submit, should be dismissed.”

Edes: “Mr. Chairman, did you want to go into closed session to seek legal advice or do you want to move forward.”

Miller: “I absolutely want to go into closed session to obtain legal advice.”

Edes: “Mr. Clerk I want the record to reflect that there has been a request to go into closed session to seek the advice of the Board of Adjustment’s attorney and that there will be no discussion about the substance of the evidence, the agenda packet or Mr. Wilson’s interpretation. If those questions are asked, they will not be answered by me and we will come back out. I believe it’s a procedural question, so at this point any objections by staff?”

Hornik: “No objections.”

Edes: “Ms. Henry, do you have any objections?”

Henry: “No.”

Edes: “Let the record reflect, Mr. Clerk, that no parties have any objections to us going into closed session for that narrow scope that I just described.”

CLOSED SESSION

Upon motion by Partin, seconded by Brunjes and carried by unanimous vote, the Board entered closed session at 5:43pm for the purpose of consulting with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body as provided under NCGS 143-318.11(a)(3).

Upon motion by Partin, seconded by Koballa and carried unanimously, the Board returned to open session at 5:58pm.

RESUMPTION OF PUBLIC HEARING

Edes: “Mr. Conley, we have up on the screen an aerial photo that I believe you sent in that you wanted to use for this hearing?”

Conley: “That is correct.”

Edes: “My question is this, outside of the footprint of this building, do you know what the ownership status is of that area, what I’m going to call the yard?”

Conley: “Currently the lot is divided in half, 25 feet on one side and 25 feet on the other for about 170 feet lineal, so I would own this half and Ms. Henry owns the other.”

Edes: “Again, I’m not talking about the footprint, I’m talking about the lot area outside of the footprint.”

Conley: “It’s a 50 foot wide by 170 foot.”

Edes: “Can you just show me where the property line is as you understand what you own or what your LLC owns.”

Conley: “It’s kind of an odd lot, we actually still need to combine the lot together in order to be able to build what we want to build, which is what 12 Mallard did. It was 6 separate lots and this is still two lots, they’ve combined this lot into one and this is still two separate lots. We were waiting to get a building permit approval before we spend any more money or waste any time combining the lots.”

Edes: “Again, I’m just trying to figure out if there’s joint ownership of this area or do you take it down the centerline.”

Conley: “Right here there’s a 20 foot private road and easement that all 6 people share. The call it a private drive, private street, and a private easement on some of the surveys.”

Edes: “But when you say they share, having an easement is not the same as having ownership.”

Miller: “Who owns the property in between 12 and...”

Conley: “My property line touches their property line.”

Miller: “Your property line...Is that yours and Ms. Henry’s property line?”

Conley: “That’s just mine. My piece of property is 25 X 170 and hers is 25 X 170.”

Miller: “The question is he owns his unit and the land around it and there is a common wall in between the two buildings.”

Edes: “If I need to ask staff similar questions based on GIS or whatever as we proceed, are you going to be in a position to do that?”

Wilson: “Yes.”

Hornik: “That is consistent with what we understand, too.”

Edes: “Mr. Chairman at this point I’d recommend that we take Mr. Hornik’s motion to dismiss, and it’s still not clear Mr. Hornik whether it’s two separate motions or one motion based on two reasons.”

Hornik: “It’s really one motion based on two grounds.”

Edes: “Mr. Chairman, at this point I advise that the Board take the motion under advisement and we proceed without waiving our ability to grant that motion. In other words, I want the minutes to reflect that we are going to move forward holding that motion under advisement. We’re not denying the motion or granting the motion at this point and I think we may be able to shed some more light on evidence relevant to that motion as the proceeding progresses. Also even outside of the context of Mr. Hornik’s motion, my understanding of the law is as far as an individual representing a corporate entity—again, you can represent yourself as an individual but under North Carolina law, only a licensed North Carolina attorney can represent a corporate entity. Having said that, and without waiving any rights that the Board of Adjustment has, I’m going to advise that we proceed and allow Mr. Conley to testify. I think independent of whether or not he’s representing the LLC, he does have standing to give evidence in this hearing anyway. Are there any questions about that?”

Miller: “Before we vote on that, are they allowed to ask any questions about what you just proposed or not?”

Edes: “I’ll just say this. Mr. Hornik, do you have any comments or objections related to that advice?”

Hornik: “I have no objections or comments, really.”

Edes: “Ms. Henry, do you have any objections or comments?”

Henry: “No.”

Edes: “Mr. Conley, do you have any objections or comments?”

Conley: “No, I do not.”

Edes: “Did anyone else, outside of staff and the appellants get sworn in to provide testimony?” (No one stated they had)

Edes: “At this point, we need a motion to take Mr. Hornik’s motion to dismiss under advisement.”

Upon motion by Partin, seconded by Brunjes and carried unanimously, the Board took Mr. Hornik’s motion under advisement.

Edes: “I’m going to give the appellants an opportunity to give a brief opening statement, this is not your case in chief, you can walk through your evidence of your case in chief, but this is an opportunity to give the Board a summary of what your case is about and then when you’re finished, I’m going to allow Mr. Hornik to do the same and then we’ll hear from staff. I will allow each of you to

give an opening statement to the extent that you cannot be duplicative we all would appreciate that. Or you can waive the opening statement.”

Conley: “Good Evening. I’d like to just say thank you for your service and your time this evening. My name is Tom Conley and I’m a full time resident of Wrightsville Beach. I live at 716 South Lumina Avenue. I’m married, father of 3, a homeowner, a registered voter and I am one of your neighbors. I also own 14b Mallard Street. Teresa Henry is my adjoining neighbor who owns 14a Mallard Street and has owned her home for over 30 years and has had a lifelong plan and dream to retire at her beach house on Mallard Street. I would like to let it be known that Teresa Henry, also known as Terre, has read this statement, reviewed the presentation and is in agreement with everything that I’m presenting this evening. If you have not already, we are searching for 4 board members present tonight who will quickly realize there is no logical or justifiable reason for 14 Mallard Street to have a Crane Street address used as its street frontage. In the memo sent on February 10, it should never have been created. The memo should have been rescinded months ago. It has been over 4 months since the memo was sent with us. We submitted our initial request on February 14 for an explanation and have since sent multiple requests, including a formal appeal for any kind of explanation or logic without a response until this past Friday, June 24, 2022, more than 4 months after the memo was created and sent to us. As property owners and taxpayers, I am sure you can understand our frustration with the memo that was created which is a complete reversal of previous interpretations of building codes and lack of response or explanation from the Town of Wrightsville Beach for this reversal. We feel certain that after you hear the facts that we are about to submit and review with you, we believe that our decision on the setbacks of 14a and b Mallard Street should be a very easy decision to make this evening. I very much appreciate you guys giving myself a chance to stand up and do my presentation. That said, I’ll sit down and wait to go over my presentation with you guys.”

Edes: “Thank you Mr. Conley. Ms. Henry, do you care to give opening remarks?”

Henry: “My name is Terre Henry. I’ve owned this property for over 30 years. I moved off the beach when Fran and Floyd hit. I moved into town and lived there ever since. I’ve never gotten rid of the property and a lot of people said ‘why don’t you sell it’ and I knew that if I sold it, I’d never get another piece of property down here. As we all know this year it has just gone up and up. So I decided that I was going to move back down here when I retired and Tom and I got together and started working on it and he also was very instrumental in 12a and b getting done. We decided to move forward and we spent the money on the plans and everything but we got denied. So my goal is to move back down here but I do need a little more room than the way it’s built a long time ago. So I was just requesting that you all give us a fair chance and we’re not asking to do anything different than what’s there, really. But I was kind of shocked when I got the letter that I could not imagine having a 10 foot wide property because that’s what I would end up with. After all these years of paying taxes and insurance and if it blew down when a storm came, I always thought you could build it back, but right now I’m not so sure about that. So I hope you all give us a fair chance and appreciate your time.”

Edes: “Mr. Hornik?”

Hornik: “Thank you very much Mr. Chairman and Board members, once again, the one thing I do agree with Mr. Conley about is I also think this is a very simple case or should be a very simple case although we disagree on how it ought to result. This is an appeal that deals with an interpretation of the Development Ordinance. I think the law and the facts are clear that Mr. Wilson is duty-bound, his charge as Zoning Administrator is to be the interpreter of the Ordinance. There may have been interpretations in the past which have been different than this one, but as my mother always said, two wrongs don’t make a right. I look at the definition of lot frontage. I look at the definition of street, the same two definitions that Mr. Wilson looked at and I submit that when you look at what the words say, the words dictate and the facts dictate, that this lot, lot 14 has frontage on Crane Street and therefore that the front yard setback ought to be measured from Crane Street. Your mailing address has nothing to do with lot frontage. Your mailing address has to do with identifying a piece of property and telling emergency services and your mailman and people when people want to send you things by ordinary mail these days where your property is. It has nothing to do with road frontage for purposes of development regulations. I really think that the appeal is that simple and that if the Board looks at that and considers some of the law that I’ll talk about when I finish up, you’ll come to the same conclusion as Mr. Wilson did—that the front yard setback ought to be measured from Crane Street.”

Edes: “Thank you Mr. Hornik. Mr. Chairman and Board, I need to admonish you that Mr. Hornik’s opening statement is not sworn testimony, it’s argument if you will. Having said that, we will now hear from staff on this matter.”

Wilson: “For the Town Attorney, Mr. Edes, does this need to be brief or is this my full presentation?”

Edes: “I’m going to leave that up to Mr. Hornik to present his case how he sees fit to.”

Wilson: “Good evening Chairman Miller and members of the Board of Adjustment. For some background, WBRP LLC is the property owner of unit 1, that’s what the application stated. Teresa Henry is the owner of unit 2. This is also known as 14 a and b Mallard Street. They are requesting an appeal from staff’s interpretation of lot frontage to the Town of Wrightsville Beach Board of Adjustment. This appeal is from my letter dated February 10, 2022 from myself, Tony Wilson, Planning & Parks Director. The proposed site plan for the new structure located at 14 Mallard indicated a setback of 7.5 feet from the rear, 7.5 feet for the north side of the property, and then 7.5 feet off of Crane Street and on the ocean side, 37 feet. After reviewing the submitted CAMA minor permit application, it was discovered that the front setback is not consistent with the Town’s definition of lot frontage. To give you some project history, you’ll see where I made a different interpretation. When I started looking at the plans for 10, 12 and 14 Mallard Street, you see that zoning permits were issued in 1977 for these structures. The site plan had a number 7812-1 for the duplexes approved. John Nesmith the setbacks indicated exhibits a and b were 7.5 for the sides, 7.5 for the rear and 12 feet for the front deeded ocean side. The main entrance for these properties was from Mallard by a private drive. So on page 1 you’ve got lot frontage and we’ve talked about lot frontage to be the portion nearest the street for the purpose of determining yard frontage on through lots all sides abutting, approximate parallel streets shall be considered frontages. For landlocked waterfront lots the side of the lot abutting the water shall be considered the rear lot line and the side opposite the rear shall be considered the front line. You have the definition of street and then under staff comments, there’s more comments about information that was in the file of these properties. And then my second paragraph you’ll see town staff did have conversations with and sent email conversations with the owners’ surveyors and designers of 12 and 14 Mallard Street for the required setbacks for the new structures. The town staff reviewed the site plan again, this is months later, we started looking at the definition of lot frontage and realized that there was an issue with that and that’s where we made that decision months later that it did not meet the lot frontage for this property. You have the Board of Adjustments appeal and variance interpretation--all the information in here--if you have any questions for me I’ll be glad to try and answer them for you.”

Hornik: “If I might Mr. Chairman, I’ve got a few questions that I’d like to ask Mr. Wilson to help elucidate on some of the staff reports. First, Mr. Wilson, there’s been a staff report that was prepared as part of the package tonight. Did you prepare that report?”

Wilson: “Yes.”

Hornik: “Turning to the 2nd page of the staff report, there are sections of the Development Ordinance, is that correct?”

Wilson: “Yes, sir.”

Hornik: “Did you copy those from the Development Ordinance?”

Wilson: “I did.”

Hornik: “And you are the UDO administrator?”

Wilson: “Yes.”

Miller: “You want to let us know what you are referring to?”

(Much crosstalk regarding where in the printed staff report the information was)

Hornik: “Mr. Wilson, do you see the aerial photograph that is up on the screen?”

Wilson: “Yes.”

Hornik: “Do you recognize the properties that are depicted there?”

Wilson: “Yes.”

Hornik: “What structure is on the right hand side?”

Wilson: “14 Mallard is the one closest to Crane Street.”

Hornik: “And what is the green line that is running through the middle of that?”

Wilson: “That’s considered townhouse lots, so you see two 25 foot lots there.”

Hornik: “That would be lot 14a and 14b respectively?”

Wilson: “Yes.”

Hornik: “Can you show us where the Crane Street right of way is?”

Wilson: “Yes.”

Hornik: “So, when you were considering the question of what is the lot frontage for 14 Mallard Drive, tell us how you came to your conclusion.”

Wilson: “When you look at the definition of lot frontage it leads you to Crane Street for 14a and b Mallard Street.”

Hornik: “So, on the first page of your staff report, there’s a town definition of lot frontage. Is that definition taken from the Wrightsville Beach Development Ordinance?”

Wilson: “Yes, sir.”

Hornik: “Can you read that definition for us?”

Wilson: “Lot frontage: the front of the lot shall be construed to be the portion nearest the street. For the purpose of determining yard requirements on through lots, all sides of a lot abutting parallel or approximately parallel streets shall be considered frontages. For landlocked waterfront lots, the side of the lot abutting the water shall be considered the rear lot line and the side opposite this rear lot line shall be considered the front lot line.”

Hornik: “So with respect to lot 14, tell us how you applied that definition of lot frontage to lot 14.”

Wilson: “When you read the definition, Crane Street is the frontage, so 15 feet would come off of Crane Street.”

Hornik: “Up above lot 14 is lot 12, right? And that’s a landlocked lot?”

Wilson: “Yes.”

Hornik: “So the rules with respect to that lot are a little bit different than the rules with respect to 14?”

Wilson: “That’s correct.”

Partin: “Is that the ocean?”

Hornik: “Ocean is to the right.”

Hornik: “Now the definition, Mr. Wilson, of lot frontage starts out with the first sentence, that the front of a lot shall be construed to be the portion nearest the street?”

Wilson: “Yes.”

Hornik: “And what is the definition of street as found in the UDO?”

Wilson: “The definition of street includes any public way, road, highway, street, avenue, boulevard, parkway, alley, lane, viaduct, bridge, and the approaches thereto within the town and shall mean the entire width of the right-of-way between abutting property lines.”

Hornik: “So, with respect to lot 14 Mallard, is there any other public street or public way other than Crane Street that abuts it?”

Wilson: “No.”

Hornik: “Now we’ve heard talk of and there is on the ocean side of Lots 10, 12 and 14 a parking area and a driveway. Is that a public drive or a public street?”

Wilson: “It’s considered a private easement or access to the properties.”

Hornik: “In fact there’s a sign there that notifies people that from the Mallard Drive right-of-way on the northeast corner of lot 10 and heading south, that the area south of lot 10 is a private drive, right?”

Wilson: “That’s correct.”

Hornik: “So based on the interpretation of plain language of the definitions of street and lot frontage, what was your conclusion with respect to the applicable setback for lot 14?”

Wilson: “The way the ordinance reads of the definition of lot frontage and street, Crane Street is the front where the 15 foot setback would be coming off of.”

Hornik: “So Mr. Wilson that was the basis that you just explained to the Board of your interpretation that resulted in your February 10, 2022 letter to Mr. Conley of High Tides, LLC?”

Wilson: “That’s correct.”

Hornik: “That’s all I have.”

Miller: “So we’re going to ask him questions before we do the cross?”

Edes: “I think if we allow cross first you’ll have all the testimony and then you’ll be able to ask.”

Miller: “Ok, then I’ll hold mine.”

Miller: “Mr. Conley?”

Conley: “You said that 12 Mallard is a landlocked lot?”

Wilson: “Yes.”

Conley: “Where’s the 15 foot setback that you just applied?”

Wilson: “I applied it on the oceanfront side.”

Conley: “Oh, you did? And what was the logic behind that?”

Wilson: “My first interpretation was, like I said in my memo, to 12 and 14, that the information I had in the file showed it to be coming off the ocean.”

Hornik: “I’d like to object to any testimony about interpretations of frontage, other than with respect to lot 14, which is the lot that we are talking about.”

Edes: “Mr. Hornik, your objection is noted and Mr. Chairman I’d say at this point to note the objection and overrule it and allow Mr. Conley to continue with his questions.”

Conley: “As Mr. Hornik brought up, 12 Mallard Street and asked Mr. Wilson where the setback applied, he clearly said it was a landlocked lot. If you look at the definition of a landlocked lot, it’s abutting the ocean and if it was truly a landlocked lot, the 15 foot setback for 12 Mallard would have been on the western side of the lot, not the ocean side of the lot. The only possible way they could have recognized 12 Mallard Street and put the 15 foot setback on the ocean side of the lot would be recognizing Mallard as a private street, as they already have done multiple times in other presentations. That’s all I have to say.”

Edes: “Do you have any questions of Mr. Wilson?”

Conley: “What’s the logic of what 12 Mallard’s 15 foot street setback is?”

Edes: “Mr. Hornik objected to that question earlier. That’s been noted and overruled. Go ahead.”

Wilson: “My first interpretation of this—we started looking at these properties more than a year, 2 years ago, probably. When I looked at the information in the file, I think there’s a deeded front that I assumed that was where you came off the front setback of.”

Conley: “So you made that decision for 12 Mallard Street...”

Wilson: “That was my first interpretation.”

Conley: “So you made that decision for 12 Mallard Street in 2022 several months ago and gave them their building permit based on that setback and you changed your mind when I handed my building permit in?”

Wilson: “It was a different interpretation about a year or a year more.”

Conley: “So, you reinterpreted what you just approved at 12 Mallard Street and what you also presented in 2020 at the Board of Alderman meeting when you eliminated 14 and 10 Mallard Street from the corner setbacks.”

Wilson: “I think my testimony is pretty clear on where I did give the information out to property owners of 14 and 12 of what the setbacks were. And then I had a different interpretation here.”

Conley: “After we had architectural and engineering drawings done and had surveys done. So we spent the time and submitted the request made by the Town and spent a lot of time and a lot of money and it wasn’t a full year after it was approved, it was just a few months after 12 Mallard was approved and our request was submitted sometime in October or November of 2021.”

Miller: “Ms. Henry, do you have any questions?”

Henry: “No. I might have one. You said address doesn’t matter and I’m on Crane Street. I don’t have access to Crane Street from my property, so I guess it’s just that I can see Crane Street because I have no access.”

Edes: “Is that a question, Ms. Henry?”

Henry: “Am I supposed to have access to Crane Street if I live on Crane Street? Because I don’t.”

Edes: “The question should be directed to Mr. Wilson.”

Wilson: “The way the building’s built now is to have access from Mallard Street via a private drive. If you choose to rebuild, then I think you would have to have Crane Street as the access.”

Edes: “Any other questions of Mr. Wilson, Ms. Henry?”

Henry: “No.”

Edes: “Mr. Hornik, a brief redirect, if any.”

Hornik: “One question Mr. Wilson, is there any provision within the Wrightsville Beach UDO which would prevent 14 Mallard from having access directly to Crane Street?”

Wilson: “No, there’s nothing forbidding that.”

Edes: “Mr. Chairman, now let’s open up questions from the Board for Mr. Wilson.”

Partin: (questions regarding the map on the screen).

Edes: “As a matter of housekeeping, we need to identify this exhibit. Mr. Hornik?”

Hornik: “I’d like to move the entire packet to be an exhibit.”

Edes: “Mr. Chairman, town staff has offered as Exhibit 2 the entire town staff packet. It begins with the June 20, 2022 memorandum authored by Mr. Wilson and the very last page is an aerial photograph that has 2021 aerial photo of the site in the upper right hand corner. Mr. Conley and Ms. Henry, you have no objections to the Board receiving this into evidence? We will mark this as Exhibit 2.”

Brunjes: “Did you make a determination later to change the location of the frontage?”

Wilson: “If you look at my packet, when I started looking at the original information for 10, 12 and 14 Mallard Street, there’s site plans in there and information like that so my first interpretation was that it looked like the Board of Aldermen had approved this. We never could find distinctly where the Board approved the site plan. So that was my reasoning. My first interpretation was I had this information and I thought the Board had approved it. After months of looking at it, 6 months later, we never could determine that.”

Brunjes: “So your first determination was what?”

Wilson: “That those were approved by the Board of Aldermen.”

Brunjes: “In 1977?”

Wilson: “Yes.”

Brunjes: “And this frontage could be on the ocean side?”

Wilson: “Yes.”

Koballa: “So then when you discovered that you really didn’t have evidence, you went back to what we have now and now we have the lot frontage and so forth?”

Wilson: “Yes.”

Koballa: “So you changed your determination from the original one on the ocean side because that’s what it says now?”

Wilson: “If you look at the 1974 lot definition, there’s not a lot of difference. It reads very similar.”

Koballa: “You mean that the front of the lot should be on the street side?”

Wilson: “Well if you read it back then, the question was if that was an approved site plan. That was the whole reasoning behind the interpretation.”

Brunjes: “So had you advised Mr. Conley and Ms. Henry that they could use the ocean as the front of their house?”

Wilson: “Yeah, if you looked at...I’ve got an email from 2021...we started these discussions probably in 2021 or before on some of these structures. Here’s an email to those 2 property owners and others too.”

Edes: “Is the email you’re referring to in Exhibit 2, the staff packet?”

Wilson: “I’m not sure if it is or not. I can submit this.”

A recess was declared at 6:42pm. The Board resumed the hearing at 6:47pm.

Edes: “I’ve handed everyone a 5 page packet of emails that I’d recommend that we accept into evidence as Exhibit 3. The appellants stated they had no objections. Mr. Hornik?”

Hornik: “No objection.”

Edes: “Exhibit 3 will be this packet of emails.”

Wilson: “Staff always keeps the emails. I don’t erase them. They’re good for future reference and this is one reason I kept these emails. You’ll see that the owners of 14 were cc’d on these emails and they talk about setbacks, things like that and the design at the very beginning was talking about the oceanfront setback. I want to read this on the first page. It’s not uncommon for people, if they jump the gun with design work and engineering, but my approval process...it’s stated staff cannot approve any plans until the easements have been approved. I will attached the CAMA small structure setback in this email for your review. The approval steps are easement approval, CAMA approval, zoning and then a building permit. Once I receive a survey I will need to review with the division of coastal management to review the oceanfront setbacks. So on these oceanfront or sound front, there’s a set of steps that you have to go through to get to that point and the first step is CAMA. I just wanted to bring that to everyone’s attention. And that’s all I have to say about these emails. Yes, we did in the beginning, my initial interpretation, but it changed over a year later about that different setback.”

Edes: “Mr. Wilson, on page 2 bullet point #7, the Town setbacks are 15’ (oceanfront side) 7.5 for sides and rear for 12 and 14 Mallard Street.”

Wilson: “That was my statement back to one of the property owners.”

Edes: “So you were at least at this point interpreting the code to say that 15’ was on the ocean side?”

Wilson: “Yes.”

Brunjes: “That is my question. They received at least an email or letter from you stating that you were using the oceanfront as their front and the Crane Street was 7 and a half. So, what happened to make you change that? Did they receive confirmation from you that this is what you have permission to do?”

Wilson: “It was an email. It wasn’t approval as far as an application did come in where I approved it or anything like that. I did give them that information, but after further review when I couldn’t find that the Board had approved that, I started having to look back at our Town’s definition.”

Brunjes: “Were they aware that this may change? Did you in any way indicate to them that right now it’s 15 off the oceanfront but I’m in the process of researching I may have to change that?”

Wilson: “No, I did not say that until later.”

Brunjes: “So if he received this information from you and he went out and got a builder, would that have been too soon for him to have gotten plans?”

Wilson: “I think they could do preliminary review but just remember you don’t get approval until you go through all of those steps. CAMA--there’s a process—it has to be reviewed with the Division of Coastal Management and then zoning has not been applied for, the building permit has not been issued. None of those things have happened.”

Brunjes: “At this time he thought that he had oceanfront approval. And then you at some point had done some research and discovered that you needed to change that to Crane Street?”

Wilson: “Yes.”

Brunjes: “How did he find this out?”

Wilson: “I think when they sent the CAMA in January or February that’s when I started looking at it again and I sent my response back, going maybe the Board of Aldermen did not approve that in 1977.”

Miller: “If I read this, once I receive a survey I will need to review it with the Division of Coastal Management to review the ocean setbacks, that would tell me if I read this that the only one you were concerned about is the ocean setback, not the street.”

Wilson: “At this point in time.”

Koballa: “I was just going to ask him that and the other thing I had was that all this keeps talking about the site plan number. If you had found the site plan and it had been approved by the Board of Aldermen, would we be in the same boat we’re in right now?”

Wilson: “I don’t know the answer to that.”

Koballa: “From what I gather, this stuff was all built on a site plan, but they can’t find that the Board of Aldermen approved the site plan.”

Miller: “Can we safely assume that it was approved because it was built?”

Wilson: “I can’t answer that.”

Edes: “The hearing’s not over yet but as I understand the evidence, and I’ll certainly give Mr. Conley the option to comment on this comment, that Tony originally thought there was an approved site plan. Is that correct Mr. Wilson?”

Wilson: “That’s correct.”

Edes: “And that upon further research, you could not locate where the site plan was actually approved?”

Wilson: “That’s correct.”

(crosstalk)

Wilson: “Let’s say the inspector approved it wrong back in 1977, that doesn’t give them the right to build it.”

Miller: “Just so we’re all on the same page, the only question we have tonight is lot 14. It doesn’t matter what we did down the street or across the street or anything else, we’re talking about lot 14 and do we agree or do we not agree.”

Koballa: “If there was a site plan and it was approved, would they be able to do what they are asking?”

(crosstalk)

Edes: “We have to maintain some order here or this will digress quickly.”

Miller: “Does anybody have any more questions of Mr. Wilson?”

(crosstalk)

Miller: “Mallard Street is a public street to what point?”

Wilson: “Mallard Street would go to the high water line. It would extend, even though it’s sand, it would extend out there.”

Miller: “What about Crane?”

Wilson: “Same way.”

Miller: “So Crane runs the entire length of the property?”

Wilson: “Yes.”

Edes: “To put these emails that are marked as Exhibit 3 in context, they are in reverse chronological order, correct?”

Wilson: “That’s correct.”

Edes: “My first question is, who is Ms. Sutherland?”

Wilson: “They are the property owners of number 12.”

Edes: “Then in the first email she talks about two options being attached?”

Wilson: “Yes, sir.”

Edes: “What was your understanding of the purpose of that email and what were those options?”

Wilson: “I think with the discussion with number 12, in the very beginning we were really concerned about the ocean front setback as far as the division of CAMA.”

Edes: “Which is a separate issue than the town setback?”

Wilson: “Yes, that’s true.”

Edes: “So on page 4, Ms. Sutherland emails you 6 days later, she’s thanking you for confirming the buildable footprint. Do you see that?”

Wilson: “Yes, sir.”

Edes: “Was that buildable footprint in any way related to your interpretation as to lot frontage?”

Wilson: “Not as far as CAMA, but far as theirs and on the site plan there’s a buildable footprint that is on the site plan.”

Edes: “And that’s the site plan you’ve seen but you’ve not seen where the Board of Aldermen took formal action to approve it?”

Wilson: “We could not find it.”

Edes: “If I understood your testimony earlier, originally you’re reviewing that site plan and saw at least a reference to it in some minutes, which led you to the conclusion that the 15 foot would be oceanward.”

Wilson: “That’s correct.”

Edes: “Since that time, you have determined through additional investigation that you are unable to locate where that site plan was actually approved by the Board?”

Wilson: “That’s correct.”

Edes: “It looks like these emails span from February 18, 2021 through March 4, 2021?”

Wilson: “Yes.”

Edes: “Were there any formal pending applications with the town regarding this interpretation?”

Wilson: “No sir.”

Edes: “Would you say that these were informal discussions?”

Wilson: “Yeah, they were informal discussions, there’s not approval until someone signs the permit and goes through that process.”

Edes: “In fact, you led off with your testimony if you look on page 1, the very last email, you talk about the various things that have to occur with respect to the approval process.”

Wilson: “Yes, sir.”

Edes: “So would you say that your indication in these emails about the oceanward being the 15 foot setback was an informal opinion?”

Wilson: “I would say that was an informal opinion.”

Edes: “Versus like a zoning compliance—someone applies for a zoning compliance and then you give a formal response?”

Wilson: “Yes.”

Edes: “At this time were you ever asked for a formal opinion, and by this time I mean this February through March, 2021?”

Wilson: “Not as a formal.”

Brunjes: “What does formal mean?”

Wilson: “We have a zoning compliance form that individuals sometimes do fill out, sometimes they don’t fill out.”

Edes: “Just going on the distribution list on some of these, you’ve already explained who Ms. Sutherland is. I’m assuming Mark Sutherland is related to Laura Sutherland?”

Wilson: “Yes.”

Edes: “Mr. Tom Conley is the Tom Conley who’s here today, correct?”

Wilson: “Yes.”

Edes: “Ms. Henry’s here today, correct?”

Wilson: “Yes.”

Edes: “Who is Stan Tennant?”

Wilson: “They are also the owners of number 12.”

Edes: “And so is Maggie Tennant, right?”

Wilson: “Yes.”

Edes: “And at the time, in February 2021 through March 2021, were any of Mr. Conley’s corporate entities the owner of any of these properties at this point or were they contemplating purchasing the property?”

Wilson: “They had already purchased the property.”

Edes: “Mr. Chairman, that’s all I had for Mr. Wilson, thank you.”

Hornik: “My redirect will be limited to trying to figure out the relevance of the 1977 or 78 site plan approval would be. So Mr. Wilson, assuming that the site plan had been approved in 1977 or 78, if a property owner comes to you today and says they want to tear down their house and rebuild it on the lot that doesn’t conform with the 1977 or 78 site plan, would they be allowed to do that?”

Wilson: “It depends on how much the change is. I think it depends on if they restricted the square footage of the house or, in this situation, I think it shows a buildable footprint. So, I don’t know the answer to that.”

Hornik: “Assuming that the site plan is approved as is, are you familiar with the law about non-conforming uses?”

Wilson: “Yes.”

Hornik: “If they tore the houses down, or tore the house down at number 14, even if it was built based upon an approved site plan, and they wanted to rebuild something outside the footprint of the approved plan from 1977 or 1978, would they have to comply with the current UDO regulations?”

Wilson: “I think if it was extended outside of the approved footprint, yes.”

Hornik: “Do you know with respect to lot 14 Mallard, Mr. Conley and Ms. Henry, is their proposal to build something that’s outside of the footprint?”

Wilson: “I don’t think it’s outside the construction footprint, when you look at that site plan, it goes within 7.5 feet of the property, but their structure probably would be bigger than their original house, but it would still be in the construction footprint that was approved.”

Hornik: “If they tear down the old house, are they still entitled to the non-conforming status with respect to setbacks and the like?”

Wilson: “I think I would get some legal advice on that.”

Edes: “If I may, Mr. Hornik, you’re familiar with preexisting legal nonconformity and you’ve had to deal with people applying for permits after storm damage, right? And you’re familiar with the 50% rule, which means that if property is damaged more than 50%..”

Wilson: “It has to come into compliance with the current code.”

Edes: “So, if you have a preexisting legal nonconformity, and whether it’s by choice (they tear the house down) or by mother nature, if you’re going to rebuild and it’s more than 50% damaged, do you then have to bring it up to the current code?”

Wilson: “Yes, you do.”

Edes: “Mr. Hornik?”

Hornik: “That’s essentially what I was getting at.”

Edes: “And just so we’re clear in the minutes, you have to deal with that often, don’t you?”

Wilson: “Yes, I do.”

Edes: “How many years have you been doing this?”

Wilson: “Almost 26.”

Edes: “In 26 years, you’ve had to deal with preexisting legal nonconforming properties that were damaged and you’ve had to make a decision as to whether it’s been more than 50%?”

Wilson: “Yes.”

Edes: “And the ones that you did determine were more than 50%, you told them they had to what?”

Wilson: “Come into compliance with local zoning and ordinances.”

Edes: “The site plan that you are talking about that you can’t find as voted on as approved, is that site plan conforming with today’s code?”

Wilson: “It is not conforming with today’s code.”

Edes: “It would be a preexisting legal nonconforming.”

Miller: “Is that specifically because of the setback?”

Wilson: “Setbacks, yes sir.”

Miller: “Do the plans have anything to do with your determination of setback?”

Wilson: “Yeah, the plans that were submitted do not meet the current zoning ordinances.”

Miller: “I understand what you’re saying, but her question earlier was when you made the determination and came back and made the determination, they were going on the premise that, Mr. Conley indicated that they were spending money and they did so based on your emails that they took to mean that the setbacks were from the oceanfront, so just because they submitted a set of plans would not have changed your determination of the setbacks?”

Wilson: “No.”

Brunjes: “I’m not sure I understand that.”

Miller: “We’re talking about 1977 versus today and we’re talking about nonconforming versus conforming and I’m not going to make any arguments for them, but we were earlier requesting for around what did he mean when he sent these emails. My question was, the building, whether it conformed or not conformed had anything to do with setbacks because all we’re talking about is setbacks. I’m asking Mr. Wilson did the building plans in and of themselves have anything to do with setbacks and he just answered no.”

Wilson: “I’m just saying it did not meet our current..”

Miller: “I get that, because of the setbacks.”

Wilson: “Exactly.”

Brunjes: “You see I’ve lived this. I lost my house and I had to build it back by all the rules. The only thing that bothers me is did he receive an email or letter from you that gave him the impression that he could move on, because when you start hiring builders, you’re forking out some money. How much time went between you first telling him ok and then wait a minute, I’ve discovered that isn’t right?”

Koballa: “That’s the only thing that bothers me.”

Wilson: “I think you see some emails from 2021 then you see a determination almost a year later but nobody’s applied for building permits. Nobody’s applied for zoning permits.”

(crosstalk)

Brunjes: “So a year went by, almost, that you never saw any building plans or anything and that you had not regrouped at that point.”

Miller: “Let’s let Mr. Conley redirect his redirect.”

Conley: “So what you’re saying is that it’s not going to be a problem for me to drive a car down here to get to my access easement and then cut over?”

Wilson: “That street can be extended, yes sir.”

Conley: “How does that happen?”

Wilson: “The Board of Aldermen can approve a street extension.”

Conley: “If Ms. Henry owns this lot, how do I get to mine on this side?”

Wilson: “It depends on the design of your house. I don’t know, Tom.”

(crosstalk)

Conley: “Has 12 Mallard been issued a CO yet?”

Wilson: “No sir.”

Conley: “Should we consider putting a stop work order on it?”

Wilson: “No sir, we’re not. We’re talking about 14.”

Conley: “There are several other examples that I could bring up that are waterfront.”

Miller: “I understand but what I’ve been advised is that we’re here tonight and what we’re allowed to do is talk about 14, is that correct?”

Edes: “If Mr. Conley’s point is that similar situated properties in the past, if there’s been a different interpretation, you’re allowed to bring that out.”

Miller: “Then go right ahead, I misunderstood you.”

Conley: “Since you reinterpreted and haven’t issued a CO, shouldn’t we put a stop work order on...”

Edes: “Now, that’s different Mr. Conley. If you’re going to establish that Mr. Wilson has interpreted these same ordinances for similar properties in a different manner than he did in this case, you can establish that.”

Conley: “Ok. I’d like to establish that it’s very different from what he approved at 12 Mallard from what is being denied at 14 Mallard.”

(crosstalk)

Edes: “I would ask you, sir, I mean we’re here on this interpretation of these two definitions, right? To the extent that you want to put on evidence regarding previous interpretations by Mr. Wilson of these two definitions, you’re entitled to do that, but I think it’s kind of crossing the line when you’re saying why don’t we issue a stop work order.”

Miller: “So you understand what he said, if you see something that has a street frontage question that you have examples of, that’s fine. But we’re not judging that we should stop work on something else. We would look at similar situations that look at street frontage. Is that fair enough?”

Edes: “Yes, the scope of this hearing is not whether we should issue a stop work order on a different property, but I do think it could be relevant to show that he’s had different interpretations in the past, Mr. Conley, and those are fair questions if you want to ask them.”

Conley: “I’d like to put out there 12 Mallard Street. I’d like to put out 900 Schloss Street and 100 Water Street. All 3 of those properties are currently being built. All 3 are waterfront properties. All 3 of them have side streets that were not used as a 15 foot setback against those 3.”

Edes: “Mr. Wilson, do you agree with Mr. Conley that those properties are similarly situated?”

Wilson: “I don’t agree with 102 Water Street. 900 Schloss, is that the rental house?”

Conley: “I believe it is.”

Wilson: “It has a street frontage of 900 Schloss, so I don’t agree with either one of those.”

(crosstalk)

Edes: “Mr. Conley, I’ve seen this morning there was an email, I don’t know when it was sent, but it looks like it has some power points and overheads and if the chair will allow, I will give you the opportunity to when you show that power point, if you choose to do so, to ask Mr. Wilson a question about that as you go through.”

Miller: “You’ve already said that with 12 Mallard, you used the oceanfront as a setback.”

Wilson: “That’s correct.”

Edes: “Anybody else have any questions for Mr. Wilson? Mr. Hornik, a brief redirect?”

Hornik: “No further.”

Edes: “Mr. Wilson, you can step down. Mr. Hornik, did you want to call any other witnesses?”

Hornik: “That’s all we have.”

Edes: “So staff has concluded its presentation? Mr. Chair now it would be appropriate to hear from the appellants.”

Conley: “So we’ve all hear this a couple of times. Relevant definitions, lot frontage is the front of the lot, shall be construed to be the portion nearest the street for the purpose of determining the yard requirements on through streets. All sides of a lot abutting parallel or approximately parallel streets shall be considered frontages. For landlocked waterfront lots, the side of the lot abutting the water shall be considered the rear lot line and the side opposite this rear lot line shall be considered the front lot line. Street includes any public way, road, highway, street, avenue, boulevard, parkway, alley, lane, viaduct, bridge, and the approaches thereto within the town and shall mean the entire width of the right-of-way between abutting property lines. Landlocked waterfront lot, lots not abutting any streets but abutting a public beach or waterway. I bring this up because I had a situation a couple of years ago with a very similar situation on the corner of oceanfront lots. I had a property that I owned regarding a 15 foot setback. I only bring this up because I went through this process and review, which included 3 Planning Board meetings, 3 Board of Aldermen meetings. A special ad hoc committee was created to help make a decision. After all of this time and expense was spent and done, at the Board of Aldermen meeting, the decision was a no vote, so nothing happened. I bring this up because I’d like to avoid that situation from happening again and delaying this project any further. As you can see through the presentation, we will have clearly stated the facts regarding the water frontages for 14a and b Mallard. With this property being located on a private street, we are requesting a vote tonight on this.

Miller: Will you tell us the address to the one you’re referring to?

Conley: “15 Augusta Street. It’s a corner oceanfront lot. The town and myself, we spent a year plus reviewing these corner oceanfront lots and this entire thing is kind of perplexing to me. These are the comments I received this past Friday after submitting the request. On page 27 and 28...”

(discussion regarding materials being cited)

Conley: If you look at page 39 and 48, they both say the same thing on the town’s packet. The very first sentence is highlighted as if it’s the only way to read this paragraph. All you’ve got to do is read the next two sentences, along with the definition of corner street....)

(crosstalk regarding materials)

Conley: “This just points out that in the presentation I was handed on Friday, there were 6 or 7 pages that may have had some relevance to them. So I was addressing it. Page 27 and 28 were the main ones. There were a lot more than one sentence in the paragraph, there were 3 and then there was the definition of a street. If you take the entire thing you will understand that what their stance is completely contradicts.”

(crosstalk concerning materials)

Conley: “This is the Town of Wrightsville Beach justification on the reversal of interpretation on setbacks for 14 Mallard Street is in black. Tom Conley and Teresa Henry’s comments are each in blue below.”

(crosstalk regarding materials)

Conley: “Tom Conley and Teresa Henry, 14 Mallard Street, are requesting an appeal from the staff’s interpretation of lot frontage to the Town of Wrightsville Beach Board of Adjustment. This appeal is specifically from the decision set forth in a letter dated February 10, 2022 from Tony Wilson, Planning & Parks Director, within the Planning Department. The proposed site plan for the new structure located at 14 Mallard Street indicated a setback of 7.5 feet for the rear, 7.5 feet on the north, 7.5 feet off of Crane Street and 37 feet on the ocean side. After reviewing the submitted CAMA Minor Permit Application, it was discovered that the front setback is not consistent with the town’s definition of lot frontage. Our response to that is that from the Town of Wrightsville Beach’s previous presentations regarding 10 and 14 Mallard Street and the recent approval of 12 Mallard Street’s building permit, what the owners of 14a and b Mallard Street are proposing are consistent with the town’s definition of lot frontage. Project History: Zoning permits were issued for 3 duplexes on May 27, 1977 for 10, 12 and 14 Mallard Street. The site plan number 78-12-1 for the 3 duplexes was

approved on December 19, 1978 by John Nesbit. The setbacks indicated on exhibit A and B were 7.5 feet for sides, 7.5 feet for the rear and a 12 foot deeded setback on the ocean side. The main entrance for these properties was from Mallard Street by a private drive. That was from the town's presentation. Our comments back to that were please note the project history of this property that the town provided it clearly says the main entrance to these properties is from Mallard Street by a private drive. It also says the 12 foot setback is on the ocean side of the lot. All of this is very consistent with what we have been asking for all along. Town definition—lot frontage. The front of a lot shall be construed to be the portion nearest the street. For the purpose of determining yard requirements on through lots, all sides of a lot abutting parallel or approximately parallel streets shall be considered frontages. For landlocked waterfront lots, the side of the lot abutting the water shall be considered the rear lot line and the side opposite this rear lot line shall be considered the front lot line. Nearest street is the private drive portion of Mallard Street that was used in 1978 and is still used today. This is the same street frontage that was just used in 2022 by the Town of Wrightsville Beach as street frontage for 12 Mallard and is the same as Tony Wilson already said would be used for 10 Mallard. Street includes any public way, road, highway, street, avenue, boulevard, parkway, alley, lane, viaduct, bridge, and the approaches thereto within the town and shall mean the entire width of the right-of-way between abutting property lines. Our response to this is that the town noted that 10 Mallard and 14 Mallard would not be applicable to the side 15foot setback because there was a private street going in front of them. Again, the same street frontage they just approved at 12 Mallard. Staff comments: After reviewing the information in the file for 10, 12 and 14 Mallard Street, staff based their initial zoning decision and assumed that the original site plan number 78-12-1 was an approved site specific plan and would be exempt from the current town zoning setback requirements. In a letter from J. Franklin Martin to the Mayor Robert Sawyer and the Board of Aldermen, a request was made to direct the building inspector to permit our development of the three ocean front lots between Crane and Mallard Streets in accordance with the attached plan, exhibit a and exhibit b, this letter indicates a twelve foot deed restriction for the front yard requirement. Town staff did have conversations and sent emails with the owners, surveyors and designers of 12 and 14 Mallard Street for the required setbacks for the new structures as approved by the Town on 12/19/1978. When Town Staff reviewed the site plan again submitted concerning the front setbacks we questioned if the original site plan was an approved site plan and had questions about the town's definition of lot frontage that may apply to this site. A letter was sent to High Tide Design LLC on February 10, 2022 denying the site plan for 14a and b Mallard Street because of the front yard setback of 7.5 feet from Crane Street. The owners' response to that is that we, the owners of 14 a and b Mallard, 1) do not understand how this denial was sent based on the site plan from 1978 and not the current 2022 codes, which have been outlined in great detail; 2) do not understand how the codes of 1978 are at all relevant to the current building codes which would be followed for the rebuild of the property; 3) received a memo denying our project on February 10, 2022 without explanation and have still not received any reasonable justification for the change in interpretation; 4) are asking the four elected board members that are here tonight to agree that we are correct on the setbacks per all evidence that has been submitted to allow us to move forward with our project without further delay. This picture we all saw already. (description of picture). Google earth clearly denotes Mallard Street located on the ocean side of the lot. Since our request, this is the back yard—this fence was completely collapsed over at one point. There is exposed wires, exposed conduit, and there's exposed irrigation and it's quickly collapsing into the neighbor's house and this is happening because I haven't been issued my building permit and I wasn't able to clear the lot like the neighbors did.

Hornik: "I'm going to object in that this testimony has nothing to do with setbacks on lot 14—totally irrelevant."

Edes: "We are here tonight to determine if Mr. Wilson's interpretation of the UDO is accurate, inaccurate or somewhere in between. The objection is noted and overruled."

Conley: "This is another Google earth where you can see how Mallard Street comes in and turns. They told me numerous times we can't build in front of each other. Clearly approved in front of 10 and 12 Mallard Street to be built in front of it and I kind of question that. So if you were to take 12 Mallard Street address, it's obviously a lot closer to Crane Street than it is Mallard Street, so this one...."

Hornik: "Objection. That has nothing to do with the setbacks for lot 14."

Miller: “Correct. But I’ll go back to what Mr. Edes said.”

Conley: “12 Mallard Street clearly should have been a Crane Street address. 12 Mallard Street’s CAMA permit and...”

Hornik: “Object.”

Miller: “Same answer.”

Conley: “Clearly you can see the 3 setbacks that they were granted which only shows that they were granted a 15 foot setback on the oceanfront side, which is what we expected and requested. This is from the 2020 ad hoc meeting—you have the entire presentation. We notated in 2020 that we found 62ish waterfront corner lots in this year and a half thing. The town came back after our presentation and said there are only 11 waterfront lots that would be subjected to a side street 15 foot setback and this is the town’s presentation. In our presentation that we did prior to this, 10 and 14 Mallard Street were both on there, were part of the 62 lots, the Town eliminated those 2 lots as well as 50ish other lots and said these were the only ones that look at the side street setback at the time in 2020.”

Edes: “I want to make sure I understand your testimony just then. I recall that ad hoc committee. Are you saying that you had your own presentation that showed 14 Mallard Street being subject to this?”

Conley: “Yes.”

Edes: “So your presentation showed that it would be affected by having the 15 foot off Crane Street?”

Conley: “No. I had all the corner oceanfront lots on there if it were to be considered a Crane Street lot, yes. Specifically, the biggest example I used in our presentation was actually 10 Mallard Street because in my presentation I said these people have a 17.5 foot wide house and I said it’s going to be unbuildable and that’s why Mr. Wilson came back and said actually, Mallard Street has a private street going through it so the setback wouldn’t be on there and then he followed it up with a presentation that showed that as well.”

Edes: “My question is simply this. You compiled or had someone working with you compile a depiction that showed 14 Mallard Street being a property that would be subject to a 15 foot setback off the adjacent street?”

Conley: “Correct.”

Edes: “You’re saying that Mr. Wilson’s presentation didn’t depict 14 the way yours did?”

Conley: “I did a presentation where I said here’s 60ish give or take lots that I think would be impacted by the side setback of 15 foot instead of the 7.5 foot. I did that presentation in 2020 and he did this presentation in 2020 and said that there’s only 11 that would be impacted.”

(crosstalk)

Edes: “From your perspective, in the presentation you have prepared, you depicted 14 Mallard as a lot that would suffer from a 15 foot street setback. And you or one of your companies sought a text amendment to address that?”

Conley: “At Augusta Street. We ended up getting a no vote. 14 and 10 Mallard and the other 60ish properties that were notated on our presentation...”

Edes: “My recollection was that there was a discussion about what would be the impact if we did a text amendment town-wide and that’s how we got to all of these numbers. Is that consistent with your recollection?”

Conley: “Yes.”

Edes: “In the depiction that either you did yourself or had drawn up, you showed 14 Mallard as one of the properties that would suffer from this interpretation?”

Conley: “That could possibly suffer, yes.”

Conley: “This is probably the most similar properties that I could find compared to Mallard Street. This is on Columbia Street and its 3 properties. 20 Columbia Street and 16 Columbia Street were

also brought up on my presentation and they were also eliminated on the town's presentation as suffering from the side 15 foot setback."

(crosstalk)

Conley: "On Columbia Street, they did the corner one and they did the middle lot and they made the side setback on both. Somehow the middle lot setbacks just somehow disappear. They changed the setback on the middle lots to be the back or the front depending on...."

(crosstalk)

Edes: "We've got 3 things. A standing objection that we're going to overrule. Mr. Conley, I'd remind you that if you feel you have examples of similarly situated properties like 14 Mallard that have been interpreted differently, you have the opportunity to ask Mr. Wilson whether that's correct or not. Thirdly, regardless of what our experiences have been out there, we have to base our vote tonight on the evidence produced during this hearing. That's the law, that's not Brian Edes. I'd ask you to focus on the evidence tonight. You don't have to check your common sense at the door but if you have independent knowledge of something that could affect you, you have to disclose that."

Conley: "There's multiple examples of where they reinterpreted the code."

Brunjes: "Every time you did this you said possibly would cause a problem. So why are you saying possibly?"

Conley: "The way I just brought it up. Here's the lots that could be impacted by this side street setback that these people don't know because they have 35 foot wide houses or they might want to tear down their 30 foot wide house and now they can only build a 27.5 foot wide house because the setback has changed from what it was to this side street setback."

Brunjes: "But you're not referring to your own property when you're saying possibly?"

Conley: "I did in my original presentation in 2020 and when the town took my presentation and interpreted it, they interpreted there only to be 11 lots and they circled them. Thus neither 10 nor 14 Mallard are on there to be affected by the side street setback per that interpretation."

Edes: "When you say the interpretation of the town in 2020, you're not referring to a vote of the Board of Aldermen or anything like that, you're talking about a power point created by staff, correct?"

Conley: "That was done for an ad hoc committee."

Edes: "If you're aware of any formal Board of Aldermen action taking the way you're characterizing you had X number of properties depicted and then the town shrunk it down. If you're aware of any Board of Aldermen action endorsing that, you need to put that into evidence now. I'm talking about a vote of the majority of the Board of Aldermen because presentations are one thing, but the Town acts officially through a majority of its Board members voting yea on something."

Conley: "So a presentation at a Board of Aldermen meeting or an ad hoc committee in front of everybody, that nobody objects to and nobody pushes back on doesn't mean anything?"

Edes: "It doesn't mean it's a legal binding act of the town. As I recall that, it was an educational campaign to try to determine if the text amendment was granted, what was going to be the effect town-wide. I'm giving you a lot of liberty to talk about that, but I'm just saying that if you're aware of formal Board of Aldermen vote in that regard, you need to bring it into evidence."

Conley: "I don't have that. I just have what I presented and what was.."

Brunjes: "What are you insinuating when you say he took off 14?"

Conley: "So there were 62 lots that I presented that were a possible issues that could lose 7.5 feet down the road if they wanted to rebuild or do something that they might not know about and the ad hoc presentation that was put together and it was also presented at a Board of Aldermen meeting, specifically 10 Mallard Street, and they said that would not be impacted because that was a private street. My point is, this is just one more example of the stance that the town took that showed me where my setbacks were on 14 Mallard Street."

Edes: “Again, sir, when you say the stance that the town took, you’re not referring to any formal approval or vote of the Board of Aldermen, correct?”

Conley: “Just in a presentation, correct.”

(crosstalk)

Conley: “This was another example. It’s actually 100 Water Street, not 102. It doesn’t even touch Water Street and they did not lose a 15 foot side setback.”

(crosstalk)

Conley: “The current structure of 14 Mallard is 35 feet wide. What has happened since the late 70s and early 80s that has changed on this lot that would require a new structure to now be 7.5 feet more narrow? Is the town’s stance that all waterfront lots touching a street need to have a 15 foot setback off of that street? The LPO officer for TOWB (Tony Wilson) marked and staked the lots located at 12 and 14 Mallard Street. Requests from the town for surveys, architectural drawings, and engineered drawings were all completed and sent to the town. Why would the memo be issued without explanation many months after the lots were marked and staked and the requested documents were submitted? Five main points: 1) 14 Mallard is a 35 foot wide duplex structure located on the private portion of Mallard Street that has no access from Crane Street; 2) Mallard Street has a private street providing access to the 3 duplexes located here; 3) in the Power Point presentation from the Board of Aldermen meeting in August of 2020 it was stated that 10 Mallard Street would not be required to lose 7.5 feet of width due to the private street in front of it; 4) in 2022, 12 Mallard Street was approved to build using the private Mallard Street as street frontage; and 5) the only logical conclusion would be to use the private Mallard Street as street frontage for 14 Mallard or to consider 14 Mallard a landlocked lot.”

Koballa: “It was stated that 10 Mallard Street would not be required—who stated that?”

Conley: “Tony Wilson.”

Conley: “In conclusion I realize that there are multiple ways for this decision not to be made this evening like not voting on it which has obviously happened to me before. I say this because we’ve been through this very similar process and presented a very similar case. Many of you were involved in. I was involved in 3 Planning Board meetings, Board of Aldermen meeting and special ad hoc committee only to receive a no vote and no decision on my request. You were elected to make decisions and the facts speak for themselves and I hope you will not let this drag out and continue to add to the hardships we’ve already incurred. Based on everything we’ve presented tonight, we would ask that the Board of Adjustment to end this delay in our project and vote tonight for the street frontage for 14 a and b Mallard Street to remain on the ocean side as it always has been and what was just approved at 12 Mallard and is consistent with the town’s definition of lot frontage and the setback requirements. This is not asking for an exception or variance, I’m asking you not to let this continue unnecessarily and add to additional hardships that have already occurred. Thank you all for your time this evening and I will be more than happy to answer any questions that anyone has.”

Edes: “Thank you Mr. Conley. The first opportunity for questions will come from Mr. Hornik. We’ve been here quite a while, do you all want to stretch your legs?”

Miller: “We are in recess.”

A recess was declared at 7:59pm. The meeting resumed at 8:04pm.

Hornik: “Mr. Conley, I just have 2 or 3 questions. First, do you agree that Mallard Drive on the ocean side of 10, 12 and 14 is a private drive, correct?”

Conley: “I’ve seen it labeled as a private drive. I’ve seen it labeled as a private street and I’ve seen it labeled as an easement.”

Hornik: “Secondly, the 2020 ad hoc committee was made up of citizens, Board members and some staff members to help the Board of Aldermen consider whether to adopt some kind of text amendment to the setback requirements, is that right?”

Conley: “That is correct. There was a 2010ish Columbia Street ruling changed the standard business practice and they started adding the side setbacks.”

Hornik: “No action was taken?”

Conley: “There was no vote after a year and a half. In hindsight I should have went to the Board of Adjustment.”

Hornik: “I’ve got no further questions.”

Partin: “Mr. Conley, when you received this memo on March 4, 2021, the sentence that says once I receive a survey I will need to meet with the Division of Coastal Management to review the ocean front setbacks. How did you interpret that?”

Conley: “This was addressed to Laura, not me. But I was copied.”

Partin: “Did you interpret it as he was implying anything?”

Conley: “No, and if you look at the next page it says the town setbacks are 15 feet from the ocean side.”

Partin: “What have you done to proceed based upon the interpretation?”

Conley: “I’ve gotten surveys, architectural drawings and the town asked me to get engineering drawings done as well. I submitted all of those and it takes a decent amount of time to put that together.”

Edes: “Mr. Conley, you agree that the paved portion in front of those 3 structures is private, not open to the public, correct?”

Conley: “Yes.”

Edes: “In fact there’s a sign that says it’s a private road. This page of your submission, and it’s not numbered, that begins we the owners of 14 a/b Mallard, could you turn to that? Number 2 you state that you don’t understand how the codes of 1978 are at all relevant to the current building code? Is that correct?”

Conley: “Correct.”

Edes: “So is the inverse of that true, that you don’t believe the 1978 building code should govern here?”

Conley: “That’s correct. There was one page in the packet that had building codes from 1978 and it had no relevance. I don’t understand why we would be talking about codes from 1978 when they clearly change over the years and the latest code where (unintelligible).”

Edes: “Earlier I think both Mr. Hornik as well as you went to the two definitions within the town’s UDO, do you recall that?”

Conley: “Yes.”

Edes: “One was lot frontage and the other was the definition of street. And based on this slide, do you agree that those two definitions are the present UDO code?”

Conley: “I do.”

Edes: “Do you agree that geographically Crane Street is closer to Ms. Henry’s property than Mallard Street?”

Conley: “No. Mallard Street has a private drive.”

Edes: “I’m not talking about a private drive. The public right-of-ways, which one’s closer?”

Conley: “It’s Crane Street.”

Edes: “Have you ever attempted to get access to Crane Street from this property?”

Conley: “No.”

Edes: “To your knowledge, has Ms. Henry?”

Conley: “Not to my knowledge.”

Edes: “Therefore, to your knowledge, neither one of you has ever been denied from getting access to Crane Street?”

Conley: “I never thought it could be accessible because there’s a bulkhead that the town put in that blocks access if you’re talking about access for a vehicle.”

Edes: “So is the answer to my question, no, you’ve never been denied?”

Conley: “No, I’ve never been denied.”

Brunjes: “I had folded down that exact page where you say he doesn’t understand why 1978 is relevant now but yet he’s using the 1978 standards as far as where the frontage is.”

Conley: “I’m just saying nothing’s changed.”

(crosstalk)

Brunjes: “You said you do not understand how the denial is based on a site plan from 1978.”

Conley: “Correct. Because in tearing the house down and rebuilding it to 2022 codes, why would 1978 come into play?”

Brunjes: “But the codes now are what he interpreted with this new interpretation. The codes for the setbacks, but you don’t mean setbacks, you just mean building codes, is that what you’re saying here?”

Conley: “Correct.”

Brunjes: “So you aren’t using the setbacks, but you are using the building codes. You’re happy with the 1978 setbacks but you’re not happy with the building codes.”

Conley: “With the 1978 building codes? I mean, I don’t know the details of the building codes, but the setbacks in the codes, it was a 35 foot wide duplex that was built. We’re not asking to make it any wider.”

Brunjes: “What you say is it’s based on a site plan from 1978 and while you’re not using the 2022 codes instead of the 1978. What you’re saying is you’re ok with the setbacks that are in the 1978 code but you’re not okay with the building codes.”

Conley: “I’m saying that they’re denying this based on what may or may not have happened, it’s not clear whether it was approved by the Board of Aldermen or not. Why does any of that matter?”

Brunjes: “His rejection is based on what the current codes are.”

Conley: “The current new interpretation.”

Koballa: “His rule now for a front is Crane Street.”

Conley: “I adamantly disagree with the reversal of the interpretation on the setbacks. The building codes of 2022 I don’t have any issue with.”

Miller: “You’re saying his statements look contradictory?”

Brunjes: “They do look contradictory.”

(crosstalk)

Edes: “You heard the question and answer I had earlier with Mr. Wilson regarding preexisting legal nonconformity? With your experience in developing property, are you familiar with the concept of preexisting legal nonconformity?”

Conley: “Yes, somewhat. The 50% rule?”

Edes: “Yes. Is it your understanding that under the 50% rule, that if a property is damaged more than 50%, that the reconstruction of that property has to be up to the then-existing code?”

Conley: “Correct.”

Edes: “And in this particular case you’re purporting to tear down a piece of property?”

Conley: “Correct.”

Edes: “And therefore, you agree that it the rebuild would have to be compliant with today’s code?”

Conley: “Correct.”

Miller: “Ms. Henry has an opportunity to make a statement.”

Henry: “I heard all this and I’m listening and I hear what everybody else is saying but all I know is I have a 25 foot piece of property. If a storm knocks it down, I have to make my property 15 feet, so I have a 10 foot wide property on my side. I think I have an unbuildable lot and one time I was down here, I mentioned that I might just sell it. Well, you have to tell the people that they have an unbuildable property. That’s all I have to say. I just hope you all make the right decision because I’ve owned it for 30 years. I’ve paid taxes, insurance, everything and if this is not approved, I have nothing.”

Edes: “Presently there is a structure. You own that property?”

Henry: “Yes, sir.”

Edes: “And it is habitable, right?”

Henry: “Yes, sir.”

Edes: “I think it’s a good idea to leave the evidentiary portion open for clarifications during deliberations but I do not want that to digress into plowing old ground. So if we can all agree that clarification questions are asked, answers are given, no cross examination. Can we agree we are going to go that route? Mr. Clerk, let the record reflect that all agree with that. Mr. Chair, at this point we’ll stop receiving evidence by way of case in chief. Let them do a quick summation if they want to.”

Edes: “We’ll hear from Mr. Hornik as a summation. Again, Mr. Hornik, as an attorney deemed to be under oath as an officer of the court, however what he is about to say is his argument, not evidence.”

Hornik: “Mr. Edes, members of the Board, I think you have 5 cases that I delivered today. Not that I expect you to read them, I expect that your attorney will probably give you some advice about the law and if you have any questions about the law. But these are very important cases for one of the issues that’s before the Board today. First, before I get to the cases, you have to remember that under the UDO, which Mr. Wilson is charged with making interpretations of the UDO. And the first rule of interpretation of the UDO is to look at the language and you read the plain language and you apply the definitions that you find in the UDO to try to discern what does the UDO mean. What’s most important from the staff’s perspective with respect to this particular appeal is that it has to do, of course with the setbacks, we all know about that at this point. But it’s really only two sections of the UDO that are really relevant to the interpretation. One is the principle most important question about what is the lot frontage. When you look at the definition in the UDO of the term lot frontage, the front of the lot shall be construed to be the portion nearest the street. You heard Mr. Conley say just a few minutes ago that Crane Street is the street closes to lot 14. So the front of the lot shall be the portion nearest the street. We say the lot front is Crane Street. Even though vehicular access isn’t from Crane Street, that doesn’t mean that the lot front isn’t on Crane Street. Now I think that what Mr. Conley and Ms. Henry are arguing with respect to that definition has to do with the last sentence which says that for landlocked waterfront lots, the side of the lot fronting the water shall be considered the rear lot line and the side opposite this rear lot line shall be considered the front line. I don’t know if their interpretation is that somehow lot 14 is a landlocked lot because it doesn’t have access to Crane Street. That’s not accurate. They may not use Crane Street for access, but they’ve got frontage on Crane Street that they could use for access to their lot. The definition of the word street includes any public way, road, highway, street, avenue, boulevard, parkway, alley, etc. I think that Mr. Conley and Ms. Henry were under the impression that public maybe only modify the word way, the next word. But because if Mallard Drive, a private drive, is considered a street and setbacks can be measured from the oceanfront Mallard Drive, but that’s not the interpretation. We know from the testimony that Mallard Drive on the ocean side is private. The definition of street only includes

public ways, public roads, highways, streets, avenues, etc. I submit that Mr. Wilson's interpretation of where the lot frontage is, that is from the public street on Crane Street, is the correct interpretation. Now, the other issue is, and this gets back to the case law, is well, it seems like there was a different interpretation that was used in the past and that now a new interpretation is being used by Mr. Wilson and the town staff. I'll quickly refer to each of the 5 cases I've provided and tell you why I think they're relevant for your consideration. First is the City of Raleigh versus Fisher case it's a North Carolina Supreme Court case from 1950. In that case, it involved a woman who purchased the property in a residential zoning district in Raleigh, built a house there, and started using it as a bakery shop even though bakeries weren't allowed in a residential zoning district. And this was with the knowledge of City officials. She paid her privilege license taxes and had inspections and the like and about 10 years later, the City said, you know what? The bakery use isn't allowed in the residential district. To make a long story short, the case goes up to the Supreme Court and the Supreme Court says, in enacting and enforcing zoning regulations, this is on page 6 of the opinion, the municipality acts as a governmental agency in exercising the police power of the state. The police power that is inherent in the state which enables it to govern and prohibit things hurtful to the health, morals, safety and welfare of society. This being true, the municipality cannot be estopped to enforce the zoning ordinance against the violator by the conduct of its officials in encouraging or permitting such a violator to violate such ordinance in times past. What that's saying is that even if the code officer allowed an illegal or improper use, in this case for 10 years, the City couldn't be prevented from enforcing the ordinance 10 years later to tell the property owner they couldn't use the property the way they were using it. A couple of the cases are Town of Wrightsville Beach cases. Sherrill versus the Town of Wrightsville Beach case basically stands for the proposition that in that case the town in some way or another violated its own zoning ordinance. Then later on, attempted to enforce the ordinance. The court basically said even though by their past conduct they violated the ordinance, it's still right for them, proper, and legal to properly enforce the ordinance in moving forward. We have the Westbery case from Mecklenburg County that's a 1977 Court of Appeals case. In that case, the defendants were using their property in an improper way, although they had gotten a permit for the use of the property. The court says if the permit was not lawfully issued, then the property owner can't rely on that permit to protect their use of the property. What I'm getting at with these cases is that even if the town staff had been interpreting the ordinance differently or even improperly in the past, that there's nothing that prevents them from properly interpreting and enforcing the ordinance moving forward. Maybe it seems unfair. Maybe it seems unfair to the people who suffer from the new interpretation, but if the new interpretation is the right interpretation, that's what the law charges the staff to do and I submit charges you to do, that is to interpret and properly apply the law and the zoning ordinance is the law. Helms versus City of Charlotte is another case where it basically said even the bad conduct of a municipal official in issuing permits or enforcing ordinances does not prohibit the town from properly enforcing ordinances moving forward. I submit and I urge this Board to uphold Mr. Wilson's February 10, 2022 interpretation because I think it's right when you use the plain language of the ordinance. The fact that the language of the ordinance may have been interpreted differently in the past from a legal perspective is of no import. I mean, it may feel bad, but as a matter of law, what we're looking for is the proper interpretation of the ordinance. And I think we have it here now and I would ask this Board to uphold and affirm Mr. Wilson's interpretation."

Conley: "So enforcing the ordinance 10, 20, 30 years later—interesting concept that if we did enforce the ordinance, there should be a stop work order on multiple properties including 12 Mallard and I guess a lot of people will have to cut 7.5 feet off the side of their house on a lot of these lots because they misinterpret the ordinance. The codes 10, 15 years ago so if we take this stance of enforcing previously interpreted codes there's going to be a lot more people upset besides me and Ms. Henry on this. The town has always used private streets, alleys, ways, and easements as street frontage in many other circumstances and they even put it in the ad hoc committee presentation that I presented. They had easements and private streets as the street frontage that is used for the 15 foot setback. I'm in awe at this new reversal of interpretation in that it impacts so many other lots very negatively throughout the island and those folks that own those lots need to be informed so I go back to the 62 or so lots that I previously pointed out that if this were to go through and this new code interpretation I would ask the Board of Adjustment to immediately contact those homeowners of those lots and let them know what their home really is if they want to rebuild."

Henry: “I understand enforcing laws, I just don’t know when the law changed. When did the law change? Again, I keep saying, I bought the property in good faith. I’ve insured it. I didn’t know there was such a law that it had to be...I don’t know when that happened...and if what he says is true, that there’s properties all over the island, then there’s a lot (unintelligible).”

(crosstalk)

Miller: “If there are any clarification questions, I’d like to do that now.”

Edes: “What I mean by clarification is we’ve heard evidence tonight, and I need to inventory that real quick. We’ve received 4 exhibits. If you have a question about some of the evidence, or if you have a question about what somebody testified that you need clarified. For instance, the easy one would be if someone said 15 Mallard, did you really mean X. They both had as long as they needed to put on their case. They have now put on their case and now they’ve given you a summation. The only reason that I’m leaving this open is because otherwise we’d have to reopen the evidentiary hearing and that’s a whole new situation.”

Brunjes: “Ms. Henry, you have a certain amount of square footage that you want to put in your house. With where the front is, why would that take away any of your square footage? It might be differently arranged, but why would you lose your (unintelligible)?”

Henry: “Well, it would be very long and narrow and it would be 10 feet wide and I’ve never seen many rooms....I mean the whole house would be 10 feet wide—I don’t know how you’d get from one room to the next. With the firewall, my building would be less than 10 feet wide.”

Brunjes: “So how wide is it to start with?”

Henry: “Right now it’s 25 minus 7.5.”

(crosstalk)

Partin: “I read these definitions at least 20 times today and when I read the street definition, the way it’s written, it says includes any public way. It doesn’t then talk about public roads, public highways or public alleys or lane. So I’m looking at this private street and in my mind I’m saying that this is the front street of these houses which you can interpret to be the front of the lot. Now I know Tony is way smarter than I am because he’s been doing this for how many years? I kind of go by the street definition and this is a street that goes by these 3 houses.”

Brunjes: “Is that the official address of the houses? 14 Mallard? Is that based on the private street?”

Miller: “This is debate and we need to save that for later. If you have any questions of anybody that’s sworn in for clarifications before we....”

Brunjes: “Tony, is the address 14 Mallard based on the private street or is it based on the side street?”

Wilson: “My determination would be the side street being Mallard Street. That’s a private street in front of it.”

Brunjes: “So the Mallard is based on the Mallard Street?”

Partin: “So it’s an unnamed street.”

Miller: “What has been stated is that it is a private easement and Google shows it as Mallard Street. Is that fair?”

Conley: “If you go back, they call it a private drive or a private street.”

(crosstalk)

Edes: “I don’t think there’s any debate that the address has a “Mallard Street” address. I think that’s in the record 10 ways to Sunday. In my legal opinion and based on the evidence, that’s a private access easement.”

Koballa: “I have a question for Tony. 14b, Mr. Conley’s, the Town has those completely separate, correct?”

Wilson: “They have separated them. The Town never did that. At some point in time that happened. I don’t know how it happened. It’s on our zoning map.”

Koballa: “Now, they’re 2 separate properties. Is he actually considered a landlocked piece of property?”

Wilson: “I don’t know the answer to that.”

Miller: “The deeds are 6 separate deeds. I think 12 has been recombined. So that’s why we go back to what we said when we said we needed more clarification. If these are two separate lots, which I don’t know how they aren’t.”

Koballa: “I almost think we need more clarification on that. I hate to put it off but I think we need to know how this legal description of these two. If I’m understanding landlocked waterfront lot, he’s landlocked waterfront lot, she’s not. But I don’t know how all of that is set up.”

Miller: “I don’t think he’s landlocked because he’s got an easement. Ms. Henry has access to Crane Street. Technically he doesn’t because he’s landlocked. Is that what you’re saying? Because they are two individual lots which I go back to saying that’s why it matters. They are calling 12 landlocked, but her question is, is 14b landlocked?”

(crosstalk)

Wilson: “The determination from number 12 was from the original plat and the deeded front which says oceanfront. They have a deeded front, 12 foot.”

Miller: “You’re relying on the 1978 site plan to say that lot 12 is that the setback comes from the ocean.”

Wilson: “The setbacks come from the ocean, which was my first interpretation.”

Brunjes: “So why does his deed not say that?”

Miller: “Not his deed, his site plan. Did you say deed?”

Wilson: “There is a deeded front yard setback on that property. If you look in my packet, one of the attorneys refers to a deeded front yard setback, ocean front side for all the lots.”

(crosstalk)

Miller: “It doesn’t override the ordinance, but we’re just trying to make sure. You gave them a building permit on number 12 based on that 1978 site plan that shows (unintelligible). And in the letter that you wrote on February 10, you had done further research and you had determined...”

Wilson: “I could not find that the Board approved it.”

Miller: “But you’d already assumed that they had approved it on number 12.”

Wilson: “Yes.”

Miller: “Any other clarification questions?”

Edes: “Do we define landlocked in the UDO?”

(crosstalk)

Edes: “A landlocked waterfront lot is a lot not abutting any streets but abutting a public beach or waterway. That’s our definition.”

Miller: “It doesn’t say anything about an easement. Anyone have any more questions or can we go meet with Mr. Edes to get some legal advice?”

CLOSED SESSION

Upon motion by Koballa, seconded by Partin and carried by unanimous vote, the Board entered closed session at 8:49pm for the purpose of consulting with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body as provided under NCGS 143-318.11(a)(3).

Upon motion by Partin, seconded by Brunjes and carried unanimously, the Board returned to open session at 9:08pm.

Edes: “I want to summarize the evidence. We first heard opening statements from all parties. We then heard from the staff through Tony Wilson. Mr. Wilson was subject to both cross examination and questions from the Board. We then heard from Mr. Conley. Mr. Conley was subject to both cross examination and questions from the Board. We then heard from Ms. Henry, she too was subject to questions from the Board and cross examination. All of the following 4 exhibits were received without objection from either side. Exhibit 1 was the email packet from Mr. Conley. Exhibit 2 was the staff packet. Exhibit 3 was the 5 page email packet that Mr. Wilson had. Exhibit 4 was the entire appellant’s submission including the Power Points and everything Mr. Conley went through. Mr. Hornik, do you have any comment on that?”

Hornik: “That’s exactly what I have.”

Edes: “Mr. Conley?”

Conley: “I do not.”

Edes: “Ms. Henry?”

Henry: “No.”

Edes: “We’re at a juncture right now, and the rules allow us to do this, Mr. Hornik’s made a motion to dismiss. The ownership status of those two units is not clear to me and there have been no deeds presented tonight and that bears, I think, on the legal analysis of Mr. Hornik’s motion to dismiss. Particularly the timeliness component of it. Secondly, there has been some questions about whether Mr. Conley’s unit is landlocked. I’m advising the Chair and the Board that we recess this meeting and I want to talk to you guys on how we prove that—whether we look at deeds or you want to offer new evidence. We need to establish if there’s any joint ownership between those two units. I think that’s a (unintelligible) question on both your motion to dismiss Mr. Hornik as well as whether Mr. Conley’s LLC’s unit is landlocked. Because if it is landlocked, then these are essentially two different appeals.”

Conley: “I don’t agree with that because 12 Mallard is not landlocked.”

Edes: “I’ll agree to disagree with you from a legal perspective. I’m not talking about staff interpretations. What I’m saying is that, that question needs to be answered because it bears on Mr. Hornik’s motion to dismiss as being untimely. And it bears on the question of which setback applies if your LLC’s portion is landlocked. That’s going to be my advice, Mr. Chairman, I’m assuming that you’re ok with that?”

Miller: “Yes, sir.”

Edes: “That should be pretty straightforward. I’m not a real estate attorney but we can get one or we can just get the deeds, but I’m open to suggestions on how to expedite finding that out.”

Miller: “It’s not whether they own it together...”

Edes: “I’m not disputing that you own your unit...”

Conley: “Can’t we pull it up online right now? I hate to drag this out.”

(crosstalk)

Miller: “The only two people in this room who don’t have an attorney sitting at their table is you and I caution you that we’re postponing this to ask some questions ourselves and perhaps you may want to..”

Edes: “So the question is, are we going to open up the evidentiary hearing and you put on evidence of who owns what and you put on evidence of who owns what or can we agree to something streamlined?”

Hornik: “It seems to me that the deeds and certification (unintelligible)”

Miller: “Do you have a current survey? You all can probably agree and bring it back to us when we reconvene.”

Conley: “What’s the survey going to do?”

Miller: “It’s going to tell us whether you are landlocked or not.”

Hornik: “The question is whether it’s really lot 14a and lot 14b or is it lot 14a-b?”

Conley: “The survey I have is both lots together.”

Miller: “What this Board is saying is that there are enough questions about that, that we need further information to make a decision. And the four of us are willing to come back as quick as we can.”

Edes: “To the extent that it’s possible for remote participation, maybe we can make that an option, too. I will tell you this that the only people who are going to be deliberating are these 4 because they are the only ones who have heard the evidence.”

Miller: “Mr. Edes, I understand you’re not a real estate attorney, but if there was a lawyer sitting over there, you would be talking to him and you would be talking to their lawyer about next steps that don’t necessarily need to be discussed in the wide open room. May I suggest that since he’s representing himself and Terre’s representing herself, that they may have a conversation with you offline on what you would...”

Edes: “Well, I’d rather them talk with Mr. Hornik. Here’s what I would propose is the 3 of you try to reach some agreement on we will base the ownership off of these documents, whether it’s the deed, survey, plat, whatever. If not, we’re going to have evidence again.”

Hornik: “Unless there’s a recombination plat, the deeds ought to do it.”

Edes: “That’s what I’m saying. If you guys can get your deeds to Mr. Hornik, and Mr. Hornik, you tell them that based upon what I reviewed, here’s what I think the ownership is and if you all are in agreement on that, we can stipulate to that and we won’t have to have another hearing other than deliberating.”

Miller: “Are you okay with that?”

Conley: “Yes.”

(crosstalk regarding scheduling, documents, etc.)

Miller: “Do you want to wait?”

Conley: “If that’s my only option.”

Miller: “It’s not your only option. It might be your best option.”

Conley: “Ok, we’ll wait.”

(crosstalk regarding scheduling)

Edes: “What would be in order now is a motion to recess and continue this hearing until Monday, July 11 at 5:00pm with the understanding that in the interim, the staff and the appellants are going to attempt to stipulate as to the ownership status of lots 14 a and b. Ms. Henry, Mr. Conley, do you consent to that?”

(Both indicated that they did)

Edes: “Mr. Chairman, based on the understanding and agreement of both parties as I’ve just outlined, is there a motion to recess this meeting and continue it until July 11 at 5:00pm?”

Upon motion by Koballa, seconded by Partin and carried unanimously, the meeting was recessed at 9:24pm.

MEETING RECONVENED JULY 11, 2022 AT 5:00PM AT TOWN HALL COUNCIL CHAMBERS

The meeting was called to order at 5:00pm by Mayor Pro Tem Miller. The following were present:

Board

Hank Miller, Mayor Pro-tem
Vivian (Zeke) Partin, Alderman
First Alternate Catherine Brunjes
Second Alternate Cheryl Koballa

Staff

Timothy W. Owens, Town Manager
Brian E. Edes, Town Attorney
Tony Wilson, Planning & Parks Director
Robert Hornik, Attorney for Staff

CONTINUE A PUBLIC HEARING TO CONSIDER AN APPEAL FROM A DECISION BY THE UDO ADMINISTRATOR REGARDING THE INTERPRETATION OF LOT FRONTAGE FOR A NEW STRUCTURE PROPOSED FOR 14 MALLARD STREET

Edes: “Thank you, Mr. Chairman. As you indicated, we recessed the June 29 Board of Adjustment appeal matter to allow the parties to come back with evidence of ownership. That was to be the only additional evidence to be heard tonight. However, it is my understanding that the parties have discussed the matter and are willing to make certain acknowledgements or statements. Sam Frank needs no introduction to this Board. Sam is representing both Ms. Henry and High Tide Design LLC. We’ll hear from Mr. Hornik first.

Hornik: At the Board’s instruction, over the last week and a half I did a little more research about the title to the property, because that was a question that the Board had about what impact, if any, the condition of the title to the property have. What I found is that Ms. Henry since 1991 has owned 14a. Mr. Conley or now High Tide has owned half the property, 14b, for 4-6 years. High Tide acquired the title—the deed is dated August, 2021 and is recorded February, 2022. What does that mean? I don’t know exactly what it means but if we look at the deeds it seems to me that Ms. Henry is the only one, because the properties are described separately, who has frontage on Crane Street. Mr. Conley’s or the High Tide parcel does not have frontage on Crane Street. On that basis, I would ask that the Board (and on the basis that I argued before), dismiss High Tide and Mr. Conley from the appeal. He’s not affected by whatever interpretation is made. Here’s the tough part. What do we do about Ms. Henry’s lot, 14a? While I think that the interpretation that Mr. Wilson made based on the strict letter of the ordinance is a good interpretation, I also think that it in this particular case, hanging our hat on that interpretation leads to a little bit of an absurd result. And the law frowns on absurd results. Because, theoretically, if you applied all of the setbacks based on the strict letter of the ordinance, she’d have a 5 foot or a 2 foot wide building envelope. All that being said, I think the Town would not be adverse to some kind of an interpretation that would allow Ms. Henry to use the property in what’s an economically reasonable way. That’s how I think we’re trying to thread the needle here. This is a hard case. Hard facts make bad law. We know that this is a hard fact case. So, in trying to be equitable and trying to avoid absurd results and trying to resolve some ambiguities in a fair way, the Town would not have heartburn if this Board reached some kind of result that would dismiss the High Tide appeal but perhaps modify Mr. Wilson’s interpretation of the current language. If anyone has questions, I’d be happy to try to answer them.

Edes: Is part of staff’s position now based on the way the adjacent lots have been treated and are configured?

Hornik: Exactly. You’d be creating really out of character structures on this lot when you look at what’s around it and what has apparently been the historical treatment of similar situations.

Edes: If I I’m hearing you correctly, staff would not be opposed to this Board essentially reversing Mr. Wilson’s interpretation so the setback would be 7.5 feet, which is what Ms. Henry wants?

Hornik: That’s what I believe she wants.

Edes: “Any questions for Mr. Hornik? Mr. Frank, would you like to add anything?”

Frank: “Good evening Mr. Chairman and members of the Board. I appreciate the opportunity to speak to you about this one. First, we are prepared to acknowledge that first WBRP LLC and subsequently High Tide Design LLC, the first being the entity that signed the application late and the second entity being the one that owns title to the property today could be removed from this action. Very distinguishable to me from dismissing the appeal, there’s only one appeal before you, and we, of course, don’t agree that it should be dismissed. But we will concede to the removal of either of those entities from the action—and Mr. Conley if you feel it necessary, otherwise I don’t think that’s

applicable. We agree with Mr. Hornik's suggestion that the appropriate outcome here is that the Town interpret the Mallard Street alley as the front of this property and apply a 7.5 foot side setback to the boundary of this property that abuts the Crane right-of-way. If you have any questions, I'd be pleased to answer them.

Edes: "Mr. Frank, you heard Mr. Hornik speak of the general maxim that law shouldn't be interpreted to absurd results?"

Frank: "I did."

Edes: "Do you agree with that?"

Frank: "I do."

Edes: "And you heard Mr. Hornik state something about part of staff's position tonight is based on the way the adjacent property has been treated?"

Frank: "Yes, and with a limited period of time to research it, but based significantly on the testimony you've heard before, it appears to me that the Town's widespread practice prior to this matter was to treat streets that ended in a waterway and were beside a piece of property as a side of those lots and treat either the oceanfront or waterfront or opposite of waterfront as the front of those lots for setback purposes. So, the conclusion that Mr. Hornik suggested and that I agreed to suggest strikes me as consistent with historical practice."

Edes: "My concern is that, if I understand staff's position, is that by and large their position is based on this locality and the way the adjacent property has been treated as opposed to a Town-wide practice."

Frank: "With regard to the most analogous lot, it's the lot that's identified as 10a and 10b on Mallard Street which fronts on the Mallard Street alley and has a side property line that's adjacent to Mallard Street right-of-way proper, where the Town has historically applied a 7.5 foot setback."

Edes: "You weren't here, but Mr. Hornik handed out several cases that stand for the proposition that just because a zoning ordinance was interpreted one way in one instance...what I want to make sure the record shows is that, and you correct me if I'm wrong, Mr. Hornik, staff's position tonight is not based on some Town-wide historical practice. It's based on the locale of structure's adjacent to the subject structure. Is that correct?"

Hornik: "I think that's right."

Edes: "That's all I had, Mr. Frank."

Brunjes: "Why did you use 10?"

Frank: "10a and 10b are currently approved."

Koballa: "It's 12."

Miller: "It's an improved piece of property that has the same setback as this one. It hasn't been improved in a long time."

Frank: "But your point is also correct, that 12, even though it's in the middle, even though it's not adjacent to a right-of-way on the side, the Town interpreted the front of 12 as the alley."

Brunjes: "I didn't want you to use 10 because 12's the one we're really talking about."

Koballa: "I think he's saying that 10 did, too."

Hornik: "I understand what Mr. Frank was saying and I'm good."

Edes: "Mr. Chairman, I think as a matter of housekeeping, we first need to address Mr. Hornik's motion to dismiss. I don't know whether to call it the High Tide LLC or WBRP LLC or Mr. Conley. I do agree with Mr. Frank that Ms. Henry timely filed an appeal. There were some emails that I think were introduced into evidence that seem to suggest Mr. Conley, and or his LLCs, were also appealing. To the extent that it could be construed as 2 appeals, I recommend the Board grant Mr. Hornik's motion to dismiss the WBRP or High Tide Design LLC appeal, which does not affect Ms. Henry's appeal. A

motion to grant the motion to dismiss would be in order at this point and then I'll move on to Ms. Henry's appeal."

Upon motion by Koballa, seconded by Partin and carried unanimously, the Board voted to grant Mr. Hornik's motion to dismiss any appeal other than Ms. Henry's appeal.

Edes: "Mr. Chairman and Board members, it sounds like staff, after having reviewed this matter further, based on the way the adjacent property has been treated recently, and I understand 10 has not undergone any recent renovations, but the fact of the matter is it still is being treated the same way as 12 is, and that's the way Ms. Henry wants 14a to be treated. In light of staff's having no objection to this Board reversing Mr. Wilson's interpretation so as to allow 14a to have the 7.5 foot setback off of Crane and the oceanward side being treated as the front yard, I think a motion, based solely on the fact of the way the adjacent properties have been treated, to reverse Mr. Wilson's interpretation would be in order at this point."

Miller: "Here's the confusion. The question is, number one, is this going to be clear to the people sitting up here 30 years from now and number two, are there six lots or three lots. And if there are 3 lots, is it a townhome or an individual lot. I don't know that we need to answer that question to answer this, but there's still going to be some confusion."

Edes: "Mr. Hornik, as I understand it, you did some research and you found some deeds, but there's also a reference to a condo on the deed?"

Hornik: "Both the deeds for the High Tide Design and for the Henry property refer to a plat which also refers to a plat that's recorded as a condo plat 2, page 2, which shows this parcel being divided into 14a and 14b as a condominium plat. But I haven't found any condominium documents or covenants, other than the plat."

Edes: "So, is it fair to say that you don't have a conclusive legal opinion as to whether, to answer the Chairman's question at least with respect to 14, whether there's two lots or one lot?"

Hornik: "I can't opine about that. I know there were two deeds. Whether that makes it two lots is a completely different legal question. I also know that the adjoining properties are likewise to have an a and b."

Edes: "Mr. Frank, do you have anything to add to what Mr. Hornik just stated?"

Frank: "No. My quick title research led to the same conclusion. Those units are depicted as units and treated as condominium units on the plat. The plat depicts limited common element and common element which are conventions or terms typically associated with condominiums. But I've not yet found a declaration of condominium for 14a and 14b, which is necessary to form a condo and therefore I'm not in a position to opine to the Board either whether for certain it is a condo or it is not. If you allow me I'd say that distinction is more of an academic question than a practical one. If the appropriate frontage for 14a is the Mallard Street alley, then it doesn't matter whether these are condos or lots because the appropriate frontage for 14b would also be the Mallard Street alley. And if 14b is a separate fee simple lot, it does not abut Crane Street and therefore there is no question that Crane Street would potentially be the lot frontage for it."

Miller: "What would that do to the side setback between Ms. Henry and him?"

Frank: "Between 14a and 14b?"

Miller: "Based on what you just said."

Frank: "My best guess is that it is a condominium today. That's the way the thing was constructed. There's a zero foot setback so it certainly appears to be a condominium. The obvious approach for that piece of property if one were to rebuild upon it and they were separate lots would be to simply combine those lots and create a condo if there isn't already one there. You mention that maybe because Mr. Hornik said that there was a declaration for 12a and 12b but that declaration's not from last year. That declaration is from 1979 or something like that."

Miller: "What I'm trying to do is to make sure we're not creating a problem down the road. I agree today we fix it—the ocean side is the front and be done with it. However, I don't want to create a problem down the road and maybe I'm overthinking it."

Edes: “It’s a valid concern. I don’t know that it’s within the scope of this hearing. However, there’s a structure there now so nothing is going to change until that structure is removed. If that structure is removed, staff will have the opportunity to look at the issue of whether it’s two lots or one lot and address it at that time.”

Edes: “If there’s a motion to reverse the decision based on the way the adjacent property’s been treated, I would like for that to be stated because none of us may be here in the future and I want the minutes and the motion to reflect that this is based on staff’s review of the adjacent property.”

Koballa made a motion to reverse the decision of the UDO administrator based upon the way the adjacent property has been treated. The motion was seconded by Brunjes and carried unanimously.

Edes: “Mr. Frank and Mr. Hornik, could you work together on an order?”

Frank and Hornik: Indicated that they would.

Edes: “Ms. Henry and Mr. Conley, I want to thank you for the way you’ve conducted yourselves through this hearing.”

Miller declared the meeting adjourned at 5:30pm.

Respectfully submitted,

Lance G. Heater, Town Clerk