Pittsfield Planning Board
Town Hall, 85 Main Street
Pittsfield, NH 03263
Minutes of Public Meeting

DATE: Monday, January 7, 2019

AGENDA ITEM 1: Call to order

Chair Clayton Wood called the meeting to order at 7:00 P.M.

AGENDA ITEM 2: Roll call

Planning board members present:
Clayton Wood (chair),
Daren Nielsen (vice-chair),
Jim Pritchard (secretary),
Paul Nickerson,
Carl Anderson (selectmen's ex officio member),
Adam Gauthier (alternate), and
Jim Adams (alternate for the selectmen's ex officio member)

Planning board members absent:
James Hetu (alternate)

Pittsfield town officials appearing before the planning board: Jim Adams, selectman; Gerard LeDuc, selectman (vice-chair); and Jesse Pacheco, building inspector.

Other Pittsfield town officials present: Jim Allard, selectman (chair); Carole Richardson, selectman; Ralph Odell, master plan committee (chair); and Bob Schiferle, budget committee (chair).

Members of the public appearing before the planning board: Lee Carver, Carole Dodge, Mitch Emerson, Hank Fitzgerald, Larry Konopka, Norma Konopka, Matt St. George, Ammy Ramsey, Ray Ramsey.

"Members of the public appearing before the planning board" includes only members of the public who spoke to the board. It does not include members of the public who were present but who did not speak to the board.

Clayton Wood said that first he would ask the sponsor of each amendment or repeal proposal to explain the proposal and that second he would open the hearing to public input and questions.

AGENDA ITEM 3: Public hearings on four zoning amendments proposed by the board of selectmen

First board of selectmen proposed zoning amendment:

Amend Article 3, Section 3(b)(6) Table of Uses and Districts as follows;

(1) change DWELLING, SINGLE FAMILY, from prohibited (N) to **permitted by right (Y)** in both the Commercial and the Light Ind/Commercial Districts.

(2) change HOME OCCUPATION from prohibited (N) to **permitted by right (Y)** in the Comm. and Light Ind./Comm. Districts.

(3) change BED-AND-BREAKFAST from prohibited (N) to **permitted by right (Y)** in the Comm. and Lt. Ind./Comm districts.

(4) change ACCESSORY APARTMENT from prohibited (N) to **permitted by special exception (E)** in the Comm. and Lt. Ind./Comm. districts.

Carl Anderson said that he had objected since the adoption of the zoning ordinance (in 1988) to the prohibition of single-family dwellings in the Commercial and Light Industrial/Commercial Districts. Carl Anderson said that this amendment would reflect what is on the ground in the two districts. Carl Anderson said that the state law of nonconforming uses tries to smother nonconforming uses out of existence. Carl Anderson said that the zoning ordinance should permit single-family dwellings throughout town and that the other four selectmen agreed. Carl Anderson said that permitting single-family dwellings would mean that home occupations and accessory apartments should be permitted too. Carl Anderson said that the goal of the amendment was to afford single-family dwellings the rights that they should have had all along.

Clayton Wood opened the hearing to public input.

Dan Schroth said that he supported the amendment.

Matt St. George said that he supported the amendment.

Larry Konopka said that he supported the amendment.

Clayton Wood closed the hearing to public input.

Daren Nielsen said that he did not disagree with Carl Anderson's explanation of the amendment, but Daren Nielsen said that the way that Carl Anderson was reacting to the problem also had the potential to smother the storefronts in the two districts. Daren Nielsen said that the planning board was in the process of considering a redistricting of the Commercial District in order to relieve single-family dwellings of their nonconforming use status and to preserve the existing storefronts. Daren Nielsen said that the board mailed a questionnaire to property owners in the Commercial District asking their opinions on what to do and that the board had not finished gathering this information. Daren Nielsen said that the amendment proposal is premature.

Carl Anderson said that most of the existing storefronts are vacant. Carl Anderson said that the zoning ordinance had been trying for 30 years to reenergize the downtown. Carl Anderson said that the better approach was to permit single-family dwellings in the downtown and to let capitalism reenergize the downtown. Carl Anderson said that single-family dwellings displacing all commercial uses in the Commercial District was an extreme that he could not imagine.

Daren Nielsen said that the appearance of the downtown, such as the open cellar pit on Main Street, discouraged investment.

Carl Anderson said that converting empty storefronts to single-family dwellings would improve the appearance of the downtown.

Daren Nielsen said that the proposed amendment would not affect existing single-family dwellings and that the proposed amendment could only affect commercial uses. Daren Nielsen said that the planning board should finish

its research. Daren Nielsen said that other towns with blighted downtowns had been able to revitalize their downtowns.

Clayton Wood said that he had found Carl Anderson's proposal interesting when Carl Anderson had first proposed it to the planning board (on September 6, 2018) but that the preliminary map of the Commercial District divided as a Historic Homes District and a new Commercial District was looking more and more interesting. Clayton Wood agreed with Daren Nielsen that Carl Anderson's amendment proposal was premature. Clayton Wood said that Carl Anderson's amendment proposal was contrary to the master plan. Clayton Wood said that the planning board had done no research of how this amendment proposal could affect the Light Industrial/Commercial District. Clayton Wood said that the Commercial District has about 100 properties and that about 600 people total, most of whom are not from the Commercial District, would vote on the district's fate. Clayton Wood said that the planning board should ask the people in the district, as the board is doing, before such a town vote happens. Clayton Wood said that the historic aspect of the downtown was an important asset that the town should do more to preserve. Clayton Wood said that he opposed the amendment proposal.

Carl Anderson referred to Jim Pritchard's written objection saying in part that "in short, the amendment comes from nothing more than one person's impulse." Carl Anderson said that he had wanted this change for 30 years and that he had thought much about it. Carl Anderson said that sometimes a simpler way is a better way.

Jim Pritchard moved the planning board to not recommend the board of selectmen's first zoning amendment for adoption.

Daren Nielsen seconded the motion.

Vote to not recommend the board of selectmen's first zoning amendment for adoption: carried 3 - 2 - 0. Voting "yes": Jim Pritchard, Daren Nielsen, and Clayton Wood. Voting "no": Paul Nickerson and Carl Anderson. Abstaining: none.

<u>Second board of selectmen proposed zoning amendment:</u>

Repeal Article 2, section 3(c)(5) of the zoning ordinance which presently reads; The ACCESSORY APARTMENT shall not be rented.

Carl Anderson said that the board of selectmen thought that the no-rent zoning regulation of accessory apartments would not hold up in court if someone were to take the matter to court. Carl Anderson said that the state's accessory dwelling unit law (RSA 674:71 through :73) is silent on whether municipalities may prohibit renting accessory apartments but that he had found no towns other than Pittsfield that prohibit renting accessory apartments. Carl Anderson said that he had researched the legislative history of the accessory dwelling unit law and that representative Sterling said that a purpose of the law was to permit renting. Carl Anderson said that the legislature's statement of the purpose of the accessory dwelling unit law was to increase the supply of affordable housing. Carl Anderson repeated that the board of selectmen thought that the no-rent zoning regulation of accessory apartments would not hold up in court if someone were to take the matter to court. Carl Anderson said that some matters are worth the expense of a lawsuit but that some matters are not worth the expense of a lawsuit. Carl Anderson cited the lawsuit of the Mary H. Pritchard Trust, with James A. Pritchard acting as the nonlawyer representative, against the Stagecoach Station project as costing the town $20,000 "even though these cases were clearly won by the Town of Pittsfield."

(Comment of recording secretary Jim Pritchard: Carl Anderson did not explicitly identify the Stagecoach Station project, but he did explicitly identify the Mary H. Pritchard Trust as the appellant, and he did explicitly identify James A. Pritchard as the nonlawyer representative. Only the appeal against the Stagecoach Station project fits this description. Therefore, for clarity in describing the subject matter, these minutes explicitly identify the Stagecoach Station project. The planning board last considered the Stagecoach Station project on August 15, 2013, and denied the project for the final time on that date.)

Carl Anderson said that a few dollars to keep the town out of court was money worth spending and that the board of selectmen supported repealing the no-rent zoning regulation to ensure that the town was on the right side of the law. Carl Anderson said that policy decisions about whether more rental apartments would be good for the town were secondary to whether the no-rent zoning regulation might be unlawful.

Clayton Wood opened the hearing to public input.

Dan Schroth said that homeless in the state had increased 10% in two years and that zoning boards were responsible for the increase. Dan Schroth said that he supported the repeal proposal. Dan Schroth said that elderly people were be evicted from their homes so that the landlord could get market rate.

Larry Konopka said that he supported the repeal proposal. Larry Konopka said that many people are homeless.

Jim Adams, speaking for himself only and not for the board of selectmen, said that, from the board of selectmen's point of view, the town should avoid lawsuits "that are losers going in." Jim Adams said that letting the no-rent zoning regulation to stay in the zoning ordinance is "playing Russian Roulette with a round in every chamber."

Matt St. George asked whether the town attorney had vetted all of the board of selectmen's amendments.

Carl Anderson said yes.

Jesse Pacheco said that he had attended a seminar of the New Hampshire Municipal Association and that one of the instructors said that a no-rent zoning regulation was unlawful. Jesse Pacheco acknowledged that the accessory dwelling unit law (RSA 674:71 through :73) says nothing about renting, so Jesse Pacheco said that he did not know whether Pittsfield's no-rent zoning regulation was lawful or not.

Carl Anderson said courts consider the legislative history of a law when the law says nothing about a given subject. Carl Anderson said that the legislative history includes discussion of accessory apartments being rented. Carl Anderson again acknowledged that RSA 674:71 through :73 does not, by itself, prohibit a local no-rent zoning regulation.

Norma Konopka said that the repeal proposal would let a parent charge his child rent for living in an accessory apartment. Norma Konopka said that the repeal proposal was wonderful.

Matt St. George said that he supported the repeal proposal.

Lee Carver said that he supported the repeal proposal.

Clayton Wood closed the hearing to public input.

Clayton Wood said that the *Concord Monitor* had reported last February that the new accessory dwelling unit law (RSA 674:71 through :73) had been a failure across the state and that the need for these apartments had not materialized as the state legislature had expected. Clayton Wood said that the law had imposed certain restrictions on how municipalities could regulate accessory dwelling units but that the law had imposed no restriction on whether municipalities could regulation renting. Clayton Wood said that the town had adopted the no-rent zoning regulation many years ago. Clayton Wood said that common opinion was that the accessory dwelling unit law was one of the worst laws written. Clayton Wood said that he had attended the lecture of the New Hampshire Municipal Association that Jesse Pacheco had cited. Clayton Wood said that none of the guidelines from the state agencies addressed a no-rent zoning regulation, so the planning board had not disturbed what the town had already put in place. Clayton Wood said that a common perception in Pittsfield was that the number of renters in town was a problem bigger than either the zoning ordinance or the planning board. Clayton Wood said that he had an accessory apartment and that he would like to make money renting it but that the town does not want accessory apartment rentals. Clayton Wood said that the town could permit accessory apartments rentals if the town wanted to do so as a matter of policy but that saying that the town must permit accessory apartments rentals because the law requires the town to do so is dishonest.

Daren Nielsen said that the current law is unenforceable because the town has almost no way to know when someone is renting an apartment, so a lawsuit would be very unlikely.

Carl Anderson said that the town should repeal zoning regulations that are unenforceable. Carl Anderson said that he, as the zoning ordinance administrator, could not tell someone that the zoning ordinance prohibits renting an accessory apartment but that the law is unenforceable.

Clayton Wood repeated that the majority of town sentiment opposes letting accessory apartments be rented.

Carl Anderson repeated that the no-rent zoning regulation might be unlawful.

Daren Nielsen said that other towns are scrutinizing accessory apartments more closely. Daren Nielsen cited Wolfboro, New Castle, and Manchester. Daren Nielsen said that Pittsfield had done the minimum to satisfy the state accessory dwelling unit law but that other municipalities were doing more. Daren Nielsen said that Manchester was imposing impact fees. Daren Nielsen said that Exeter and Nashua were requiring special exceptions and were imposing legal covenants recorded in the registry of deeds. Daren Nielsen said that Concord was requiring two separate septic tanks. Daren Nielsen said that his point was that these other municipalities were seeing potential for abuse in permitting accessory dwelling units. Daren Nielsen said that the no-rent zoning regulation should stay in the zoning ordinance because no one could show anything concrete in the law saying that the no-rent zoning regulation is unlawful. Daren Nielsen said that he favored more scrutiny on accessory apartments, not less.

Carl Anderson said that he had suggested the repeal at a planning board meeting and that Daren Nielsen had not suggested greater scrutiny then.

Daren Nielsen said that he had not investigated what other towns were doing until after the board of selectmen had proposed the repeal.

Paul Nickerson said that RSA 674:72, X, prohibited municipalities from imposing a no-rent zoning regulation. Paul Nickerson read RSA 674:72, X, which says as follows:

"An accessory dwelling unit may be deemed a unit of workforce housing for purposes of satisfying the municipality's obligation under RSA 674:59 if the unit meets the criteria in RSA 674:58, IV for rental units."

Clayton Wood said that RSA 674:72, X, does not prohibit a no-rent zoning regulation and that the town does not have a workforce housing problem.

Daren Nielsen said that he had begun investigating the impact that renting accessory apartments would have only since the board of selectmen had proposed their zoning amendment but that he had always been concerned about the potential for abuse.

Carl Anderson suggested that Daren Nielsen should make his points next year about potential for abuse in renting accessory apartments.

Clayton Wood said that the regulations for accessory apartments should not be proposed piecemeal from one year to the next. Clayton Wood said that the zoning law had important nuances and that understanding these nuances was important for successful planning.

Jim Pritchard said that accessory apartments are accessory uses and that RSA 674:16, V, empowers the town meeting to "regulate and control accessory uses on private land." Jim Pritchard said that renting an accessory apartment is an enterprise and that RSA 672:1, VI, empowers the town to displace or limit enterprise as may be necessary to carry out zoning purposes. Jim Pritchard said that Carl Anderson had admitted that the accessory dwelling unit law, RSA 674:71 through :73 is silent on a no-rent zoning regulation. Jim Pritchard said that Carl Anderson had talked about possible intents, purposes, or wishes that people in the state legislature might have had, but Jim Pritchard said that, at bottom, these intents, purposes, or wishes did not go in the law and that the New Hampshire Supreme Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." (*Town of Amherst v. Gilroy*, 157 N.H. 275, 950 A.2d 193 (2008).)

Jim Pritchard moved the planning board to not recommend the board of selectmen's second zoning amendment for adoption.

Clayton Wood seconded the motion.

Vote to not recommend the board of selectmen's second zoning amendment for adoption: carried 3 - 2 - 0. Voting "yes": Jim Pritchard, Daren Nielsen, and Clayton Wood. Voting "no": Paul Nickerson and Carl Anderson. Abstaining: none.

<u>Third board of selectmen proposed zoning amendment:</u>

Repeal Article 4, section 5, (a) The subject LOT is not CONTIGUOUS to any other LOT under common ownership. (see Vachon v. Concord, 112 N.H. 107, 289 A.2d 646 (1972), and repeal Article 4, Section 5 (b) The subject LOT has not been CONTIGUOUS to any other LOT under common

ownership since the date when the subject LOT was first a NONCONFORMING LOT or since the effective date of adoption of this condition (March 14, 2017), whichever date is later.

Carl Anderson said that someone had threatened to sue the town in a case involving these two development conditions and that town attorney had said that the lawsuit would "more likely than not" succeed. Carl Anderson said that the board of selectmen had decided not to enforce a development condition that, in the board of selectmen's opinion, would likely get the town sued. Carl Anderson said that the two development conditions had had unintended consequences. Carl Anderson said that the two development conditions reduced the value of a contiguous nonconforming lot relative to what the value of the lot would be if the two development conditions did not exist. Carl Anderson acknowledged that the two development conditions would not prevent a contiguous nonconforming lot from being sold. Carl Anderson said that he did not know whether the supreme court would find the two development conditions to be an unconstitutional taking, but Carl Anderson said that he and the other four selectmen thought that the two development conditions were an unconstitutional taking.

Clayton Wood opened the hearing to public input.

Hank Fitzgerald said that three board members were speaking out of the same mouth. Hank Fitzgerald said that one board member was "representing legal opinion to a public board, which is improper." Hank Fitzgerald said, "you've never seen a law that doesn't do it my way or the highway." Hank Fitzgerald said that he was very disappointed by the three board members "acting in unison." Hank Fitzgerald said that the other two board members had made valid points and that the first three board members were giving the other two board members' points lip service but were not truly considering the other two board member's points.

Dan Schroth said that he supported the repeal proposal.

Adam Gauthier said that he supported the repeal proposal. Adam Gauthier said that he had wanted to buy a nonconforming lot, but Adam Gauthier said that the two development conditions had prevented him from buying the lot because he could not afford to hire a lawyer to enforce his rights. Adam Gauthier said that he could have used the nonconforming lot for a driveway.

Clayton Wood said that Adam Gauthier could have applied to the zoning board of adjustment for relief.

Merrill Vaughn said that he supported the repeal proposal even though the development conditions do not affect him.

Matt St. George said that Clayton Wood's suggestion to seek relief from the zoning board of adjustment had been disrespectful. Matt St. George said that the two development conditions make developing a nonconforming lot more difficult. Matt St. George said that the two development conditions are unlawful because the two development conditions force a merger. Matt St. George said that he supported the repeal proposal.

Mitch Emerson said that the two development conditions had prevented him from buying two lots and investing in Pittsfield.

Carole Dodge said that the two development conditions were unconstitutional. Carole Dodge read the 2010 amendment to RSA 674:39-a:

"No city, town, county, or village district may merge preexisting subdivided lots or parcels except upon the consent of the owner."

Carole Dodge said that she supported all of the board of selectmen's proposals because "there's been a lot of shady, sneaky business going on for the last few years with the planning board putting through and ramming through all kinds of zoning amendments, and I voted against them for the last three years because they've been bad. So I support this, and I support our selectmen and the changes and the amendments they're trying to make, because they're trying to correct some wrongs." Carole Dodge complained that Jim Pritchard had a history of changing people's comments.

Clayton Wood closed the hearing to public input.

Carl Anderson read from Jim Pritchard's written statement of reasons opposing the repeal proposal:

"The protection that property owners expect from the zoning regulation in question was an important issue in 2016, when all of the residents on Tan Road northeast of the so-called pest house lot, which is a nonconforming lot, signed a petition asking the board of selectmen to sell the pest house lot to

an abutter instead of to a downtown landlord, because the zoning ordinance prohibited any abutter from developing the pest house lot. The case of the pest house lot shows that developing a single nonconforming lot can scar a whole neighborhood."

Carl Anderson said that the development on Tan Road was relatively recent (since 2005), that many residents in Pittsfield would consider these houses a blight, that the petition was "offensive, elitist, and exclusionary," that the petition was "shutting the door behind someone," and that the petitioners were "expecting too much from the zoning ordinance."

Clayton Wood said that zoning ordinance, article 4, section 5, (a), had been in the zoning ordinance since the zoning ordinance was adopted.

(Comment of recording secretary Jim Pritchard: The original zoning ordinance of 1988 said, "Non-conforming contiguous lots under the same ownership shall only be developed with such adjacent lot. (Article 4, section 2, Non-Conforming Lots (Contiguous).).)

Clayton Wood said that zoning ordinance, article 4, section 5, (b), (development condition (b)) had not happened in secret but had happened with hearings and the cooperation of the board of selectmen. Clayton Wood said that the board of selectmen at the time was trying to sell certain town properties that were problematic for building and that the board of selectmen was trying to find a way to ensure that the properties, once sold, would be merged. The board of selectmen found that development condition (b) was necessary because the board of selectmen had had to come to the planning board for the planning board's nonbinding comment on proposed sales. (RSA 41:14-a, I.) The planning board found that other towns have development conditions similar to development conditions (a) and (b). Clayton Wood said that most municipalities restrict development on contiguous nonconforming lots and that Pittsfield has done so since 1988 but that suddenly the board of selectmen says that such restrictions are ridiculous and too harsh. Clayton Wood said that the state was preempting municipalities and extinguishing nonconformities itself because municipalities lack the will to do it themselves. Clayton Wood said that he sympathized with Adam Gauthier's situation but that granting relief in situations like Adam Gauthier's situation was why the zoning board of adjustment exists.

Daren Nielsen said that for him the important question was whether the repeal proposal was good planning. Daren Nielsen said that the town had problems with land values and with taxes. Daren Nielsen said that he had looked at what successful towns do and that successful towns do not encourage substandard development; they encourage high quality development. Daren Nielsen read Pittsfield original restriction on developing contiguous nonconforming lots:

"Non-conforming contiguous lots under the same ownership shall only be developed with such adjacent lot. (Pittsfield Zoning Ordinance, 1988, article 4, section 2, Non-Conforming Lots (Contiguous).)

Daren Nielsen read from Bedford's zoning ordinance:

"No portion of said parcel shall be used or sold in a manner which diminishes compliance with frontage and area requirements of this chapter, nor shall any division be made which creates a lots with frontage or area below said requirements." (Bedford Zoning Ordinance, section 275-23, A, (3).)

Daren Nielsen read from Manchester's zoning ordinance:

"In cases in which development is proposed on a non-conforming lot where abutting other lot or lots in the same ownership, these lots shall be consolidated as necessary to eliminate the non-conformity to the maximum extent possible." (Manchester Zoning Ordinance, article 11, section 11.03, D, 2.)

Daren Nielsen read from Concord's zoning ordinance:

"Where development is proposed on a nonconforming lot abutting another lot or lots in the same ownership, these lots shall be consolidated as necessary to eliminate nonconformity to the maximum extent possible." (Concord Zoning Ordinance, article 28-8-3, (c), (2), c.)

Daren Nielsen read from Nashua's zoning ordinance:

"Where any nonconforming contiguous lot or lots were held in common ownership on or after October 14, 1976, they shall not be sold, consolidated or transferred to eliminate the common ownership unless they are sold,

consolidated or transferred so as to create a conforming lot." (Nashua Zoning Ordinance, section 16-302.)

Daren Nielsen said that municipalities with professional planners are requiring that contiguous nonconforming lots must be merged as a condition precedent to development because these municipalities are trying to encourage high quality development and because high quality development does not come from developing nonconforming lots.

Clayton Wood said that Daren Nielsen had gone to the heart of the planning concern: the town wants to improve property values. Clayton Wood said that a contiguous nonconforming lot presents an opportunity to make both lots conforming and thus have more value. Clayton Wood said that nonconforming lots are less valuable than conforming lots.

Carl Anderson said, "One of the things is this comes down to a fundamental difference in how Daren and you [Clayton Wood] and I look at what Pittsfield ought to have for a zoning ordinance. I think trying to imitate or mimic Portsmouth or Manchester or Nashua or Bedford is ludicrous for Pittsfield. We're a small town that needs to have our own approach to how to address the concerns of Pittsfield. And I'm just not on board with copying big cities. Maybe Portsmouth is a wannabe, but we're never going to be Portsmouth. It's just not going to happen. We need to find our own solutions."

Jim Pritchard said that he appreciated Carl Anderson's admission that the repeal proposal was really about an ideological difference, which Jim Pritchard said was more honest than claiming that the development conditions were unlawful, but Jim Pritchard said that to address the unlawfulness argument, he wanted to cite New Hampshire Practice, New Hampshire's foremost treatise on land use law:

"The law [the 2010 amendment to RSA 674:39-a] does not ... appear to prevent a municipality from requiring a property owner to merge contiguous substandard lots as a condition precedent to developing the lots. It merely states that the municipality itself may not merge them." (*New Hampshire Practice*, 2010 edition, section 11.07, page 202.)

Daren Nielsen said that if Pittsfield wants to continue in the condition that it is, then Pittsfield should continue to do as it has done. Daren Nielsen said

that if Pittsfield wants to improve, then Pittsfield should look how other towns have avoided problems.

Carl Anderson said that the board of selectmen was trying to make some changes and that making changes is why the board of selectmen was proposing zoning amendments.

Daren Nielsen asked what the old timers had done when developers were raping the downtown in the 1970s.

Carl Anderson said that the old timers were "thinking that everything was out of our hands."

Paul Nickerson said that every lot of record is buildable even if the lot of record is a nonconforming lot no matter how old.

Clayton Wood moved the planning board to not recommend the board of selectmen's third zoning amendment for adoption.

Jim Pritchard seconded the motion.

Vote to not recommend the board of selectmen's third zoning amendment for adoption: carried 3 - 2 - 0. Voting "yes": Jim Pritchard, Daren Nielsen, and Clayton Wood. Voting "no": Paul Nickerson and Carl Anderson. Abstaining: none.

<u>Fourth board of selectmen proposed zoning amendment:</u>

Amend Article 3, section 3, (c) Number of Principal Structures Permitted on a Single Lot, and Article3, section 3, (e) Number of uses Permitted on a Single Lot, as follows:

Article 3, section 3(c): No more than one PRINCIPLE ***RESIDENTIAL*** STRUCTURE shall be on one single LOT except as provided in article 2, section 3, RENEWABLE-ENERGY POWER PLANT, (b); article 18, Telecommunications Equipment and Facilities, section 18.4 B; or article 4 Nonconforming Uses and Lots.

Article 3, section 3, (e)(2): The number of PRINCIPAL ***RESIDENTIAL*** STRUCTURES on the LOT shall be not more than one except as provided

in article 2, section 3, RENEWABLE ENERGY POWER PLANT, (b); article 18, Telecommunications Equipment and Facilities, section 18.4, B; or article 4, Nonconforming Uses and Lots.

Carl Anderson said that the purpose of the amendment was to permit multiple principal structures, other than "PRINCIPAL RESIDENTIAL STRUCTURES," on any given single lot.

Clayton Wood opened the hearing to public input.

Larry Konopka said that he did not like the procedure by which the board heard public input and then deliberated. Larry Konopka thought that the public should be able to address board deliberations too.

Adam Gauthier said that the board should be drawing comparisons with towns of comparable population sizes.

Clayton Wood said that if a regulation is unlawful, then the regulation is unlawful.

Matt St. George said that he supported the amendment proposal and that he hoped that it would correct what Matt St. George said was the problem of prohibiting more than one principal building on any given lot. Matt St. George said that the people who had come to tonight's hearing were interested and that the planning board should listen to the people who had come tonight.

Merrill Vaughn asked the board to hear public input after the board's deliberations.

Matt St. George asked the board to hear public input after the board's deliberations.

Lee Carver said that he supported the amendment proposal because a person should be able to have multiple buildings, all of which are identical storage-locker buildings, on one lot.

Larry Konopka said that he supported the amendment proposal.

Matt St. George asked whether the board would hear more public input after the board's deliberations.

Clayton Wood said yes.

Merrill Vaughn said that he supported the amendment proposal.

Clayton Wood closed the hearing to public input.

Clayton Wood said that he did not know what problem the amendment proposal addressed or why the board of selectmen was proposing the amendment. Clayton Wood said that two principal buildings define a subdivision. (RSA 672:14, I.) Clayton Wood cited a property on Catamount Road where one lot had both a house and an independent industrial building as an example of a property that was already subdivided in use. Clayton Wood discussed the doctrine of merger by conduct. (See Newbury v. Landrigan, 165 N.H. 236, 75 A.3d 1091 (2013), explaining the doctrine of merger by conduct.) If a person goes to a board, such as the board of selectmen, and the board says that a proposed use is prohibited, then having a clear zoning ordinance will help the person know what his rights are and whether the board is, in fact, wrong.

Daren Nielsen said that a problem could arise from the amendment proposal if a given lot had two commercial buildings, if one of the two buildings had direct access to the road frontage, if one of the two buildings did not have access to the road frontage, and if the owner were to decide to sell the rear building. Daren Nielsen said that the planning board could not deny subdivision approval because the two principal buildings already subdivided the lot, but Daren Nielsen said that the rear building would have no road frontage. Daren Nielsen said that the planning board cannot deny subdivision approval to a parcel with two principal buildings on it.

Carl Anderson said that he had proposed earlier in the year (on September 6, 2018) an amendment to permit multiple principal buildings on one lot and that Jim Pritchard had read from a treatise saying that multiple principal buildings on one lot would subdivide the lot.

(Comment of recording secretary Jim Pritchard: The treatise from which Jim Pritchard read on September 6, 2018, was *GRANDFATHERED - The Law of Nonconforming Uses and Vested Rights* (2009 Ed), by H. Bernard

Waugh, published by the New Hampshire Municipal Association, and the passage in question was as follows from chapter 8, section 8-F, page 47:

"'I. 'Subdivision' means the division of the lot, tract, or parcel of land into 2 or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance or building development....'

"The implication is clear that if an owner creates 2 or more "sites" for "building development" (for example by building a home on a lot where another home already exists, in a manner which is clearly not "accessory" under the common-law or local ordinance), then ***that*** point in time is when the "subdivision" occurs, even though any division of ownership is still "future." Therefore the owner needs subdivision approval prior to constructing such a home."

(Emphasis on "***that***" in original.)

* * * * *End of Jim Pritchard's comment.)

Carl Anderson said that the statement in the treatise did not sit right with him when Jim Pritchard had read it, so Carl Anderson said that he had asked the New Hampshire Municipal Association whether the construction of two industrial buildings for independent automotive businesses under common ownership on one ownership lot would subdivide the lot. Carl Anderson said that the New Hampshire Municipal Association had said that the construction of two industrial buildings for independent automotive businesses under common ownership on one ownership lot would not subdivide the lot. Carl Anderson said that he had next asked the board of selectmen and that the board of selectmen had also said that the construction of two industrial buildings for independent automotive businesses under common ownership on one ownership lot would not subdivide the lot. Carl Anderson said that the board of selectmen had said that he should ask the town attorney, and Carl Anderson said that the town attorney had also said that the construction of two industrial buildings for independent automotive businesses under common ownership on one ownership lot would not subdivide the lot. Carl Anderson said that he had next asked Matt Monahan and that Matt Monahan had also said that the construction of two industrial buildings for independent automotive businesses under common ownership on one ownership lot would not subdivide the lot. Carl Anderson said that

he had asked an English teacher from Pittsfield High School, Amybeth Engler, and that the English teacher had also said that the construction of two industrial buildings for independent automotive businesses under common ownership on one ownership lot would not subdivide the lot. Carl Anderson concluded that the establishment of two principal buildings on one ownership lot does not divide the land and thus does not subdivide the land or apply to subdivision. Carl Anderson said that the board of selectmen thought that the proposed amendment to permit multiple principal buildings on one ownership lot would enhance commercial potential.

Daren Nielsen asked what would happen in Carl Anderson's example of two industrial principal buildings on one lot if the owner were to decide to sell one of his buildings.

Carl Anderson said that the owner could not sell the one building separate from the other because everything would go with the land, which, Carl Anderson said, is not divided.

Daren Nielsen asked for confirmation that New Hampshire Municipal Association published the treatise that Carl Anderson was disputing: *GRANDFATHERED - The Law of Nonconforming Uses and Vested Rights* (2009 Ed), by H. Bernard Waugh.

Jim Pritchard said that New Hampshire Municipal Association does publish the treatise that Carl Anderson was disputing.

Daren Nielsen said that the New Hampshire Municipal Association's advice to Carl Anderson conflicted with the New Hampshire Municipal Association's own treatise. Daren Nielsen read from *GRANDFATHERED - The Law of Nonconforming Uses and Vested Rights* (2009 Ed), chapter 8, section 8-F, page 47:

"The implication is clear that if an owner creates 2 or more "sites" for "building development" (for example by building a home on a lot where another home already exists, in a manner which is clearly not "accessory" under the common-law or local ordinance), then ***that*** point in time is when the "subdivision" occurs, even though any division of ownership is still "future." Therefore the owner needs subdivision approval prior to constructing such a home. But furthermore, if such a home has been constructed legally, prior to the beginning of subdivision review in the town,

then the owner has, in my opinion, a "grandfathered" right to sell that second home separately. Of course RSA 674:37 would still prevent the plat from being recorded without subdivision approval. But if such a "grandfathered" right to subdivide exists, the planning board could not withhold such approval in the absence of an adverse effect on public health or safety."

Carl Anderson said that the New Hampshire Municipal Association's latest advice did not conflict with their own treatise because, according to town attorney Matthew Serge, residential principal structures are fundamentally different from nonresidential principal structures in that multiple residential principal structures do subdivide land whereas multiple nonresidential principal structures do not subdivide land.

Daren Nielsen said that he saw no such difference between residential principal structures and nonresidential principal structures.

Jim Pritchard said that the state definition of "subdivision," RSA 672:14, I, does not distinguish between residential building development and nonresidential building development:

"Subdivision" means the division of the lot, tract, or parcel of land into 2 or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance or building development....

Carl Anderson said that the state definition of "subdivision" also does not distinguish between building development for principal buildings and building development for accessory buildings. Carl Anderson said that Jim Pritchard's literal interpretation of the definition of "subdivision" meant that a two car garage accessory to a home would subdivide the land.

Jim Pritchard said that the New Hampshire Supreme Court had said otherwise in a case discussing merger by conduct. Jim Pritchard referred to Clayton Wood's discussion of merger by conduct and said that building a home on one lot and a garage on an abutting lot under common ownership erases the lot line. (Roberts v. Windham, 165 N.H. 186, 70 A.3d 489 (2013), holding that a "seasonal cottage" principal building on one lot and a "bunkhouse" accessory building on a contiguous lot under common ownership erased the dividing lot line.)

Carl Anderson repeated that multiple principal buildings do not subdivide land.

Clayton Wood said that he did not know what problem the amendment proposal was solving and that a nonresidential expansion would have to have site plan approval despite the amendment.

Carl Anderson said that the amendment proposal would not change the use table but would make commercial expansion easier.

Daren Nielsen asked whether Carl Anderson could cite any examples of other towns with regulations similar to the proposed amendment.

Carl Anderson said that he had found some other towns that do have such regulations, but Carl Anderson said that he did not know which towns they were.

Clayton Wood reopened the hearing to public input.

Larry Konopka asked whether the town attorney had vetted the board of selectmen's proposed amendments.

Carl Anderson said that the town attorney had vetted the board of selectmen's proposed amendments.

Larry Konopka asked whether the town attorney had vetted other proposed amendments.

Carl Anderson said that he thought not but that he was not sure.

Jim Pritchard asked public input to confine its comment to tonight's proposals.

Matt St. George asked about the planning board's use of Matt Monahan, from Central New Hampshire Regional Planning Commission, and whether the board had confidence in Matt Monahan.

Clayton Wood said that the planning board used Matt Monahan for third-party review of land use applications and at the amendments.

Matt St. George asked how much confidence in Matt Monahan did the planning board have.

Clayton Wood said that Matt St. George's question was difficult to answer. Clayton Wood said that the planning board also used the New Hampshire Municipal Association.

Matt St. George said that the planning board should stand behind Matt Monahan's advice in the case of the proposed amendments.

Clayton Wood said that he must vote on the basis of what he thinks the law requires.

Ammy Ramsey said that the boards should work together. Ammy Ramsey said that other towns do not matter. Ammy Ramsey said that a teenager should be able to read the zoning ordinance but that she cannot read the zoning ordinance.

Ray Ramsey said that no one was questioning anyone's integrity. Ray Ramsey said that another person had simply been making the point that the planning board uses the same counsel that the board of selectmen uses.

Clayton Wood said that the planning board does not have legal counsel.

Carl Anderson disagreed with Clayton Wood and said that the town attorney represents all of the town boards, including the planning board.

Clayton Wood said that he had been on the planning board for 10 years and that he had received nothing directly from the town attorney but that he, Clayton Wood, had heard unofficial information about the town attorney. Clayton Wood said that a group of selectmen had spent $6,500 on the town attorney to try to have Clayton Wood removed from the planning board. Clayton Wood said that the town attorney had been used to attack Jim Pritchard, Ted Mitchell, and him, Clayton Wood. Clayton Wood said that a report attacking him had been put on the town web site and that the town had paid $6,500 to the town attorney for the report.

Jim Adams said that the town attorney's only function was to keep the town out of court on frivolous cases.

Ammy Ramsey said that the boards should not be treading on people's rights and that she thought that the planning board was treading on people's rights. Ammy Ramsey said that a person should be able to do what he needs to do to prosper.

Clayton Wood said that letting people do as they want is problematic and becomes complicated when abutters object.

Daren Nielsen said that he wished that the planning board had had more time to consider the amendment proposal but that, for now, the New Hampshire Municipal Association's treatise on grandfathering appeared to Daren Nielsen to conflict with the proposed amendment.

Clayton Wood closed the hearing to public input.

Clayton Wood moved the planning board to not recommend the board of selectmen's fourth zoning amendment for adoption.

Jim Pritchard seconded the motion.

Vote to not recommend the board of selectmen's fourth zoning amendment for adoption: carried 3 - 2 - 0. Voting "yes": Jim Pritchard, Daren Nielsen, and Clayton Wood. Voting "no": Paul Nickerson and Carl Anderson. Abstaining: none.

Carl Anderson stated some changes that he said were textual and that he said that the board of selectmen would make to the board of selectmen's second, third, and fourth amendment proposals. The planning board did not vote on these changes.

AGENDA ITEM 4: Public hearing on a citizen petition to repeal the Town of Pittsfield Zoning Ordinance

Clayton Wood invited Dan Schroth to explain his petition.

Dan Schroth said that the hearing was a legal formality.

Dan Schroth said that he was concerned that a person needed a lawyer to understand the zoning ordinance. Dan Schroth said that he was concerned

for Teen Challenge and what would happen to them when they returned to the zoning board of adjustment on January 24.

Dan Schroth said that rental apartments are not Pittsfield's problem. Pittsfield's real problem is the way that the school is funded.

Dan Schroth talked about zoning in Minneapolis, Minnesota.

Dan Schroth talked about climate change, homelessness, and federal deficit spending.

Dan Schroth said that "when you control the land, you control the people."

Dan Schroth said that the town will not take care of him when he is older. Dan Schroth said that people need to be able to do what they need to do to take care of themselves when they are older.

Dan Schroth said that 100,000 people die from drug use and suicide every year.

Dan Schroth said that homelessness had increased by 10% in two years.

Dan Schroth said that he ignores the land use regulations.

Dan Schroth said that the town needs more houses.

Dan Schroth said that the zoning board of adjustment is not acting properly as the "circuit breaker."

Dan Schroth said that he had tried to abolish the planning board.

Clayton Wood opened the hearing to public input.

Ammy Ramsey asked whether there would be a state ordinance if the repeal petition were to succeed.

Clayton Wood and Paul Nickerson said yes.

Jim Pritchard said that there are no state zoning regulations.

Ammy Ramsey asked what Clayton Wood was talking about.

Jim Pritchard said that the state regulations were mostly enabling statutes, not land use regulations.

Ammy Ramsey asked Clayton Wood whether, he, as a public official, should vote as the public wanted him to vote.

Clayton Wood said that there are more people than what are in the room.

Matt St. George asked whether land use regulations would be less strict if the zoning ordinance were repealed.

Clayton Wood said yes.

Jim Pritchard repeated that he was unaware of state zoning regulations.

Clayton Wood said that there would still be subdivision regulations.

Jim Pritchard said that the subdivision regulations would not have frontage or area requirements.

Matt St. George said that lots would still have geometric sides even if the subdivision regulation did not impose specific requirements on those sides.

Ammy Ramsey said that the town could build a new zoning ordinance from scratch if the repeal petition were to succeed.

Gerard LeDuc said that the zoning ordinance had started out as a Chihuahua.
Gerard LeDuc said that the zoning ordinance had become a Doberman.
Gerard LeDuc said that the zoning ordinance would become an elephant.
Gerard LeDuc said that he would vote for the repeal petition.

Clayton Wood closed the hearing to public input.

Clayton Wood said that he thought that zoning was not the town's problem.
Clayton Wood said that the worst things that had happened to the town had happened in the 1970s. Clayton Wood said that the conditions of the 1970s were where the town would return if the town were to repeal the zoning ordinance. Clayton Wood said that the planning board had not been

following its rules when he first came on the board. Clayton Wood said that zoning has never been given a real chance. Clayton Wood said that the Historic Homes District was important planning and that people visiting the town had said that the historic downtown was an important asset. Clayton Wood said that the planning board is trying to encourage design review so as to provide a means by which the planning board can lawfully negotiate with developers. Clayton Wood said that Ammy Ramsey's suggestion that the boards should work together was a good suggestion. Clayton Wood said that his experience with the past four town attorneys had been bad. Clayton Wood said that there is no cooperation and that the board of selectmen had not given the planning board advance information. Clayton Wood said that the zoning ordinance needs work and that the planning board needs to listen but that taking short cuts is not the right thing to do. Clayton Wood said that the planning board had given extensive public exposure to the amendments that the board had proposed in recent past years. Clayton Wood said that if the town wanted to repeal zoning, then the town had the option to do so.

Paul Nickerson said that the town would still have the planning board, the zoning board of adjustment, and the master plan if the repeal petition were to succeed. Paul Nickerson said that the town needs a zoning ordinance but that the zoning ordinance is too long.

Carl Anderson said that Dan Schroth, Gerard LeDuc, Paul Nickerson, and Ammy Ramsey had all made good points. Carl Anderson said that he agreed with Dan Schroth in that "we've all gone crazy." Carl Anderson said, "the whole world's gone nuts." Carl Anderson said that he would have to oppose the repeal petition for two reasons: first, because he wanted to support the board of selectmen's amendments and, second, because repealing the zoning ordinance "would kick the door wide open for Teen Challenge to come in, and I am dead set against that."

Jim Pritchard asked, "how is opposition to Teen Challenge not slamming the door behind you."

Carl Anderson said that Teen Challenge was "a whole different discussion."

Daren Nielsen said that strong zoning correlates to strong property values. Daren Nielsen said that about five towns in the state do not have zoning and that most of these five towns are in the far north. Daren Nielsen said that an interesting town to study was Gilmanton. Daren Nielsen said that

Gilmanton did not have a downtown but did have a number of large buildings that could have been converted to rental apartments. Daren Nielsen said that Gilmanton had avoided this problem by adopting a zoning ordinance in 1970. Daren Nielsen said that Pittsfield had been late in adopting its zoning ordinance, in 1988. Daren Nielsen said that most of Pittsfield's damage happened in the 1970s.

Paul Nickerson said that Chichester's land use regulations were based on soil types.

Clayton Wood said that Chichester's zoning district are scattered but that Chichester does have a zoning ordinance.

Clayton Wood said that Gilmanton was a good town to study.

Matt St. George said that Pittsfield had lost industry that Gilmanton never had.

Clayton Wood said that he understood Pittsfield's loss of industry. Clayton Wood said that he had lived in Fall River, Massachusetts, and that Fall River had once been the textiles capital of the world.

Matt St. George repeated his support for the board of selectmen's amendment proposals.

Daren Nielsen said that he appreciated Matt St. George's civility.

Mitch Emerson asked whether Clayton Wood were taxed on Clayton Wood's accessory apartment.

Clayton Wood said yes. Clayton Wood said that the town taxed the accessory apartment as a separate living space.

Mitch Emerson asked what a person would have to do to remove the accessory apartment.

Clayton Wood said that he would have to remove the stove.

Clayton Wood said that he had considered recusing himself from the discussion of the repeal of the no-rent regulation for accessory apartment

because he has an accessory apartment. Clayton Wood said that he realized that he had to do what was best for the majority of the town.

Matt St. George said that putting regulations in writing made getting variances more difficult because the board applied what was written instead of what might have been intended.

Clayton Wood said that he had worked with the board of selectmen on previous proposals.

Paul Nickerson said that the town suffered badly when NH 28 bypassed the town.

Clayton Wood moved the planning board to not recommend the citizen petition to repeal the Town of Pittsfield Zoning Ordinance for adoption.

Paul Nickerson seconded the motion.

Vote to not recommend the citizen petition to repeal the Town of Pittsfield Zoning Ordinance for adoption: carried 5 - 0 - 0. Voting "yes": Jim Pritchard, Daren Nielsen, Clayton Wood, Paul Nickerson, and Carl Anderson. Voting "no": none. Abstaining: none.

AGENDA ITEM 5: Members' concerns

No board member stated any concern.

AGENDA ITEM 6: Adjournment

Paul Nickerson moved to adjourn the meeting.

Daren Nielsen seconded the motion.

Vote to adjourn the planning board meeting of January 7, 2019: carried 5 - 0 - 0. Voting "yes": Jim Pritchard, Daren Nielsen, Clayton Wood, Paul Nickerson, and Carl Anderson. Voting "no": none. Abstaining: none. The planning board meeting of January 7, 2019, is adjourned at 9:50 P.M.

Minutes approved: February 7, 2019

_____ _____
Clayton Wood, chairman Date

I transcribed these minutes (not verbatim) on January 12, 2019, from the digital audio recording that Chairman Clayton Wood made during the meeting on January 7, 2019, and uploaded to the Internet.

_____
Jim Pritchard, planning board recorder and secretary

Attachments:
1. Jim Pritchard's reasons for opposing the board of selectmen's proposed zoning amendments.
2. Carl Anderson's letter of October 24, 2018, saying that zoning ordinance, article 4, section 5, (a) and (b), are "indefensible according to the town attorney."
3. Town attorney Matthew Serge's e-mail of October 9, 2018, saying that a state court would "more likely than not" read zoning ordinance, article 4, section 5, (a) and (b), as violating the 2010 amendment to RSA 674:39-a.
4. *New Hampshire Practice*, 2010 edition, section 11.07, pages 201, 202, and 277.
5. *GRANDFATHERED - The Law of Nonconforming Uses and Vested Rights* (2009 Ed), chapter 2, section 2-B, page 7.
6. Concord, NH, zoning ordinance, September 11, 2018, article 28-8-2, e, and article 28-8-3.
7. Manchester, NH, zoning ordinance, August 15, 2017, article 11, section 11.03, D, 2 (page 11-3).
8. Petition of Tan Road residents to the Pittsfield Board of Selectmen regarding the sale of town property, tax map R-44, lots 7 and 8, and tax map R-48, lot 6, in 2016.
9. *GRANDFATHERED - The Law of Nonconforming Uses and Vested Rights* (2009 Ed), chapter 8, section 8-F, page 47.

Jim Pritchard's reasons for opposing the board of selectmen's proposed zoning amendments.

On December 6, 2018, Carl Anderson explained the board of selectmen's four proposed zoning amendments. He acknowledged that the planning board had discussed these proposals before, and he said that he expected that the planning board would not support the proposals. Following for the record of the hearing on January 7, 2019, is my review of the past record and why I suggest that the planning board should oppose the board of selectmen's proposed zoning amendments.

First board of selectmen proposed zoning amendment, to permit single-family dwellings in the Commercial and Light Industrial/Commercial zoning districts:

The planning board should vote to not recommend this amendment for adoption because the amendment has the potential to displace all commerce from both the Commercial District and the Light Industrial Commercial District and because, in short, the amendment comes from nothing more than one person's impulse. An amendment that has the potential for such a strong change in a district and that conflicts with the zoning ordinance statement of a district's purpose, as this amendment does for both districts, should come from careful research of and feedback from the district itself. The planning board is doing this research now, and a well-researched and well-planned solution is worth the effort.

Second board of selectmen proposed amendment, to permit accessory apartments for single-family dwellings to be rented:

The planning board should vote to not recommend this amendment for adoption for two reasons: first, because, contrary to what Carl Anderson has said, the town has authority to impose the existing prohibition against renting accessory apartments for single-family dwellings and, second, because proliferating rental apartments would most likely harm the town.

Accessory apartments are accessory uses, and RSA 674:16, V, empowers the town meeting to "regulate and control accessory uses on private land." Renting an accessory apartment is an enterprise, and RSA 672:1, VI, empowers the town to displace or limit enterprise as may be necessary to carry out zoning purposes. RSA 674:71 through :73 do impose some limits on how municipalities may regulate accessory apartments for single-family dwellings, but these sections of RSA 674 do not preempt all additional municipal regulation because RSA 674:72, I, empowers municipalities to require special exceptions or conditional use permits for accessory apartments for single-family dwellings but does not specify what the permitting conditions must be. The no-rent zoning regulation is important to ensuring that accessory apartments are in fact *accessory* apartments and not half of a duplex. Municipalities with thorough planning are using the special exception or conditional use process to scrutinize accessory apartments to avoid neighborhood blight. Carl Anderson has previously presented some opinions that the purpose or legislative history of RSA 674:71 through :73 indicates an intent to

prohibit a no-rent zoning regulation, but Carl himself has admitted that RSA 674:72 is silent about a no-rent zoning regulation, and the New Hampshire Supreme Court "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." (*Town of Amherst v. Gilroy*, 157 N.H. 275, 950 A.2d 193 (2008).) The Pittsfield Planning Board should follow the New Hampshire Supreme Court's lead.

Third board of selectmen proposed amendment, to repeal the prohibition against developing a vacant nonconforming lot contiguous to other property under common ownership when the grandfather rights under RSA 674:39 have expired:

The planning board should vote to not recommend this amendment for adoption for three reasons: first, because contrary to what Carl Anderson has said, the zoning regulation in question is lawful; second, because the grandfather rights under RSA 674:39, Five-Year Exemption, adequately protect the owners of contiguous nonconforming lots; and, third, because the existing zoning regulation is necessary to protect the reasonable expectations of other property owners in a neighborhood that development will be generally zoning compliant.

The New Hampshire Supreme Court upheld a similar zoning regulation in *Vachon v. Concord*, 112 N.H. 107, 289 A.2d 646 (1972), and Carl Anderson's current attack is via the 2010 amendment to RSA 674:39-a, which says, "No city, town, county, or village district may merge preexisting subdivided lots or parcels except upon the consent of the owner." Carl's letter of October 24, 2018, says, "RSA 674:39a ... rendered Article 4, Section 5 parts (a) & (b) moot and indefensible if taken to court" Carl's letter somewhat misrepresents the town attorney, who in fact said that "Reasonable minds can differ" on how a state judge would rule and that he, the town attorney, thought that a state judge would only "more likely than not" find the zoning regulation to violate the 2010 amendment to RSA 674:39-a. In any case, the analysis in *New Hampshire Practice* is more convincing than the town attorney's "more likely than not" opinion. *New Hampshire Practice* says, "The law [the 2010 amendment to RSA 674:39-a] does not ... appear to prevent a municipality from requiring a property owner to merge contiguous substandard lots as a condition precedent to developing the lots. It merely states that the municipality itself may not merge them." Many other municipalities, notably Concord, Manchester, and Nashua, which also have attorneys, agree with *New Hampshire Practice* and have similar regulations. The Pittsfield Planning Board should agree with *New Hampshire Practice* too.

The protection that property owners expect from the zoning regulation in question was an important issue in 2016, when all of the residents on Tan Road northeast of the so-called pest house lot, which is a nonconforming lot, signed a petition asking the board of selectmen to sell the pest house lot to an abutter instead of to a downtown landlord, because the zoning ordinance prohibited any abutter from developing the pest house lot. The case of the pest house lot shows that developing a single nonconforming lot can scar a whole neighborhood.

Fourth board of selectmen proposed amendment, to amend zoning ordinance, article 3, section 3, (c), and article 3, section (e), (2), relating to the number of principal structures permitted on any single lot:

The planning board should vote to not recommend this amendment for adoption because this amendment does nothing but add confusion and conflict to the zoning ordinance.

This amendment is, in a word, bizarre. The all-capital-letters spelling of "PRINCIPAL ***RESIDENTIAL*** STRUCTURES" means that this term is in article 2, section 3, but in fact article 2, section 3, has no such entry. The meaning of the bold italics is a mystery. The amendment presents renewable energy power plants and telecommunications structures as types of PRINCIPAL ***RESIDENTIAL*** STRUCTURES.

The meaning of "PRINCIPAL ***RESIDENTIAL*** STRUCTURE" is vague, but the amendment's obvious intent is to exempt some type of building-site subdivision from the area and frontage regulations. The amendment states no reason for exempting some type of building-site subdivision from the area and frontage regulations, but in any case, the amendment will not fulfill the intent because, first, multiple principal structures subdivide land under RSA 672:14, I; second, these divisions of land meet the zoning definition of "lot"; third, the frontage and area regulations apply to every lot; and, fourth, under RSA 676:14, these area and frontage regulations control because they are stricter than the conflicting regulation for PRINCIPAL ***RESIDENTIAL*** STRUCTURES. This zoning amendment would be a step backward to when the zoning ordinance was poorly written and had conflicts that let the land use boards treat people inconsistently.

TOWN OF PITTSFIELD

Office of Selectmen
85 Main Street, Pittsfield NH 03263
admin@pittsfieldnh.gov ~ telephone (603) 435-6773 ~ fax (603) 435-7922

October 24, 2018

James Hetu, Chairman
Pittsfield Zoning Board of Adjustment
85 Main Street
Pittsfield, NH 03263

Dear Chairman Hetu,

The Board of Selectmen, who are charged with administration and enforcement of the Pittsfield Zoning Ordinance, discussed in non-public session, correspondence received from David Lefevre, an attorney representing Larry and Norma Konopka, as well as advice and opinion from town attorney Matt Serge.

The Board of Selectmen decided the following;

(1) The Konopka zoning question clearly violates Pittsfield Zoning Ordinance Article 4, Section 5 Development of Nonconforming Conventional Lots, parts (a) & (b) and the decision to require a Variance was a correct strict interpretation of the Ordinance.

(2) The zoning administrator had no knowledge, nor reason to believe, that the Ordinance was indefensible according to the town attorney, based on NH RSA 674:39a, and in fact had been placed on the town ballot by the Pittsfield Planning Board well after RSA 674:39a was in place and rendered Article 4, Section 5 parts (a) & (b) moot and indefensible if taken to court. Typically, the town would have been advised of such a contradiction long before a zoning change was placed on the ballot because review of proposed changes of this type would be vetted by the counsel who would have to defend the ordinance in a court of law. Upon investigation, it has been determined that such vetting was never requested of counsel by the Planning Board.

(3) In light of this information, and the tenuous position the town has been placed in, the Board of Selectmen has voted NOT to enforce these two provisions of the Pittsfield zoning ordinance, and to rescind the requirement that a Variance be obtained in order for the lot in question to be developed. The Board of Selectmen will be proposing a repeal of those two requirements for a non-conforming lot to be developed on next March's ballot.

(4) The Board of Selectmen strongly encourages you to share this email with the entire ZBA prior to Thursday night's hearing.

Sincerely,

Carl Anderson
Zoning Administrator

-------- Original Message --------
Subject: RE: Another question
Date: 10-09-2018 11:58 AM
From: "Matthew R. Serge" <MSerge@dwmlaw.com>
To: "'bulldriver'" <bulldriver@metrocast.net>

Hi, Carl. I have reviewed the nonconforming lot issue. RSA 674:39-a governs lot merger, as you know, and currently provides that "No city, town, county, or village district may merge preexisting subdivided lots or parcels except upon the consent of the owner." RSA 674:39-a, I. When using the term merger, the statute includes mergers for zoning and/or taxation purposes.

The Pittsfield Zoning Ordinance states at Article 4, Section 5 (a) that a landowner cannot develop a nonconforming lot of record if it is contiguous to another parcel (of any size) under the same ownership. Stated another way, the Zoning Ordinance does not recognize the separate non-conforming lot because it should be merged with the contiguous lot. Section 5 (b) is a somewhat confusing because it states that the subject lot cannot be built upon if it has ever been contiguous to another lot under the same ownership. This suggests to me that if I one owned a contiguous lot and then sold it, leaving only my nonconforming lot of record, I still cannot build because I filed to merge the two lots at some point in the past.

In summary, a court could read this portion of the Zoning Ordinance as penalizing landowners who failed to merger these contiguous lots, when RSA 674:39-a now makes clear that a municipality cannot require such merger, for zoning purposes or otherwise. This could also trigger a claim that the application of the Zoning Ordinance results in an unconstitutional taking of vested property rights. See Dugas v. Town of Conway, 125 N.H. 175 (1984). Reasonable minds can differ, of course, on whether a court would interpret the Zoning Ordinance as suggested, but I think it is more likely than not that a judge would read it that way.

As for the question you present below, RSA 674:72, VI states that "A municipality may require owner occupancy of one of the dwelling units, but it shall not specify which unit the owner must occupy. A municipality may require that the owner demonstrate that one of the units is his or her principal place of residence, and the municipality may establish reasonable regulations to enforce such a requirement." Further, RSA 674:72, VIII states "A municipality may not require a familial relationship between the occupants of an accessory dwelling unit and the occupants of a principal dwelling unit." As a result, I read these two paragraphs to say that a municipality cannot prohibit the renting of the second dwelling unit. Because the municipality cannot require the owner to occupy a specific unit, it cannot ban renting ADUs. Indeed, the legislative history of the ADU law contains discussion about ADUs being used as rental units to help subsidize an owner's income. I think part of the reason for this law was to assist landowners who face rising property taxes, as the rental of one unit provides a means to defray those costs.

So, I think if the Town were to prohibit the rental of any ADU the court would find that violates RSA 674:72.

Please let me know if you have any questions. Thanks.

-Matt

From: bulldriver [mailto:bulldriver@metrocast.net]
Sent: Friday, October 5, 2018 10:44 AM
To: Matthew R. Serge <MSerge@dwmlaw.com>
Subject: Another question

Hi Matt,

Thanks for calling me yesterday. I look forward to hearing back from you on that subject as soon as you can.

While I have your attention, I have a second issue that maybe you can address as well. This is in regards to RSA 674:72, accessory dwelling units. Pittsfield has a definition on page 14 of the zoning ordinance entitled "accessory apartments", which is meant to comply with state statute, and that is allowed by special exception in the zones which currently allow single family homes. However, there is a clause in that description (#8) that was left in from the old ordinance that states the apartment may not be rented. I have been led to believe, from numerous sources, that such a prohibition on renting an adu is illegal as per 674:72 (which seems silent on the issue) because there is no enabling legislation and if we were challenged in court we wouldn't have a leg to stand on. My question to you is, in your opinion, if the town was sued over this prohibition on renting, could you mount a defense that would have any likelihood of being successful, or would you expect we'd seriously risk getting our butts handed to us in court if we don't get it out of our ordinance? Thanks, Carl Anderson

Sent from my Sprint Samsung Galaxy S8+.

same lots for purposes of zoning.[82] It was not until 1995 that selectmen or assessors had any obligation to consider whether tracts could be legally transferred separately under the provisions of the subdivision laws.[83]

Whether a particular parcel of land will be considered to be a single lot or two or more lots may also depend upon the way in which the property has been treated by the landowner. If the landowner has treated the property as a single lot, he or she may not be able to later claim that the property constitutes more than one lot.[84] On the other hand, consistent use by the landowner and recognition by the town of the property as two separate lots may require the municipality to recognize the property as two lots for land use purposes.[85]

An owner of two or more contiguous pre-existing approved or subdivided lots who wishes to merge them for purposes of municipal regulation and taxation may do so by applying to the planning board.[86] Unless the merger would create a violation of then-current land use regulations, such requests must be approved without the necessity of notice or public hearing.[87] No new survey plat is required, but a notice of merger must be filed in the registry of deeds and a copy mailed to the municipal assessing officials.[88]

While the plain language of RSA 674:39-a (2010 Supp.) gave property owners the right to merge contiguous lots, the Supreme Court in *Sutton v. Town of Gilford*,[89] held that nothing in its language precluded a town from automatically merging substandard lots pursuant to its zoning ordinance.[90]

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[82] Robillard v. Hudson, 120 N.H. 477, 416 A.2d 1379 (1980).

[83] Laws of 1995, ch. 291:2; RSA 75:9.

[84] Robillard v. Hudson, 120 N.H. 477, 416 A.2d 1379 (1980).

[85] Keene v. Meredith, 119 N.H. 379, 402 A.2d 166 (1979) (two lots in single ownership which were separated by a roadway and which had been treated by the town as separate lots did not require subdivision approval in order to be sold separately).

[86] RSA 674:39-a.

[87] RSA 674:39-a.

[88] RSA 674:39-a; while no survey plat needs to be recorded, a notice of the merger must be sufficient to identify the relevant parcels and endorsed in writing by the planning board or its designee. Once lots are merged in this manner, they may not be separated in the future without subdivision approval.

[89] 160 N.H. 43, 992 A.2d 709 (2010).

[90] 160 N.H. 43, 55–56, 992 A.2d 709, 719–20 (2010) (the evidence supporting the finding of merger included (1) evidence showing that the landowner and the Town had treated the property as a single lot; (2) the property was recorded as a single lot in the Town's assessing records and in the Homeowners Association (Governor's Island Club) records; (3) the landowner acquired the property by a single deed; (4) the very same property at issue had been at issue in a case decided 20 years previously [Governor's Island Club v. Gilford, 124 N.H. 126, 467 A.2d 246 (1983) (legal analysis had made it clear that the property had been

Despite dealing with a case with a number of very difficult facts, the Supreme Court's treatment of the merger doctrine in *Sutton v. Town of Gilford*,[91] was thoughtful, consistent with good planning principles, and consistent with a half century of zoning law in New Hampshire. The Legislature's response to the issues in the *Sutton* case was none of the above.

Laws 2010, ch. 345 amended RSA 674:39-a, the so-called "voluntary merger" statute, by adding the following sentence:

> No city, town, county or village district may merge preexisting subdivided lots or parcels except upon the consent of the owner.

Since this amendment will presumably only apply prospectively, the amount of mischief created by it may be limited. The law does not appear to invalidate involuntary mergers that are deemed to have occurred by operation of law prior to the effective date, nor does it appear to prevent a municipality from requiring a property owner to merge contiguous substandard lots as a condition precedent to developing the lots. It merely states that the municipality itself may not merge them. However, questions will no doubt arise as to the status of four and five thousand square foot lots which were shown on early 20th Century subdivision plans which have not been developed, but which have been continuously shown on a municipality's tax plans.

Library Reference

1 P. Salkin, American Law of Zoning, §§ 9:68–9:70 (5th ed.)

§ 11.08 The Vesting Doctrine Regarding Health and Safety Regulations

While private property rights are protected from subsequently enacted zoning or subdivision regulations by both statute,[92] and the New Hampshire Constitution,[93] there is no comparable protection from subsequently enacted health and safety regulations.

Fischer v. New Hampshire State Building Code Review Board,[94] involved a number of two family dwelling units in the Town of Durham that had been rented to groups of four to six University of New Hampshire students for

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in common ownership since 1947 and considered a single merged lot)]).

[91] 160 N.H. 43, 992 A.2d 709 (2010).

[92] RSA 674:19.

[93] N.H. Const., Part I, Articles 2 & 12; L. Grossman & Sons, Inc. v. Town of Gilford, 118 N.H. 480, 387 A.2d 1178 (1978); Town of Hampton v. Brust, 122 N.H. 463, 446 A.2d 458 (1982) (landowner had a right to continue use of penny arcade at Hampton Beach and to substitute new video games in place of existing non-electric games).

[94] 154 N.H. 585, 914 A.2d 1234 (2006).

Zoning Board's judgment in hearing the appeal.[67]

The appeal to the Zoning Board of Adjustment is an "administrative remedy" and, generally, parties must exhaust their administrative remedies before appealing to the courts.[68] The requirement for the exhaustion of administrative remedies is based on the policy of encouraging the exercise of administrative expertise, preserving agency autonomy, and promoting judicial efficiency. It is particularly applicable when substantial questions of fact exist concerning a local zoning ordinance and other interpretations that belong in the first instance to designated local officials.[69] It is only in limited situations that a party is not required to exhaust administrative remedies.[70]

§ 16.03 Presumption of Validity of Zoning Regulations

There is a general presumption of the reasonableness, validity, and constitutionality of all land use regulations and all amendments to land use regulations.[71] The presumption may be overcome only by clear and convincing evidence.[72] It is presumed that the zoning power has been exercised reasonably by the zoning ordinance and that the ordinance is for public purposes within the scope of the police power.[73]

When a land use regulation is challenged, there is a presumption that it is valid and, consequently, it is not likely to be overturned.[74] The party attacking the validity of a municipal land use regulation has the burden of overcoming the presumption that the ordinance is valid.[75] Minor deviations from the procedure set forth in the enabling legislation will not invalidate an ordinance if there was substantial compliance with the legislation.[76]

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[67] Sutton v. Town of Gilford, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010) (*citing* McNamara v. Hersh, 157 N.H. 72, 73, 945 A.2d 18 (2008)).

[68] Sutton v. Town of Gilford, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010).

[69] Sutton v. Town of Gilford, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010).

[70] Sutton v. Town of Gilford, 160 N.H. 43, 52, 992 A.2d 709, 717 (2010) (*citing* Pheasant Lane Realty Tr. v. City of Nashua, 143 N.H. 140, 141–42, 720 A.2d 73 (1998) (where the only substantive issue raised at the Superior Court and on appeal was the authority of the City's supplemental assessment for under-assessed property under RSA 76:14)).

[71] 8A E. McQuillin, Municipal Corporations, § 25.295 (3d ed. 2003).

[72] 8A E. McQuillin, Municipal Corporations, § 25.295 (3d ed. 2003).

[73] 8A E. McQuillin, Municipal Corporations, § 25.295 (3d ed. 2003).

[74] Rochester v. Barcomb, 103 N.H. 247, 169 A.2d 281 (1961); Nottingham v. Harvey, 120 N.H. 889, 424 A.2d 1125 (1980).

[75] Nottingham v. Harvey, 120 N.H. 889, 424 A.2d 1125 (1980); Alexander v. Hampstead, 129 N.H. 278, 525 A.2d 276 (1987); Delude v. Town of Amherst, 137 N.H. 361, 628 A.2d 251 (1993).

[76] Bourgeois v. Bedford, 120 N.H. 145, 412 A.2d 1021 (1980) (filing of protest petition several hours late did not invalidate petition in light of the fact that town had time to verify

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2-B. WHO GETS THE BENEFIT OF THE DOUBT?

As far back as 1958, the N.H. Supreme Court said that:

> **"Since zoning by its very nature restricts and regulates the use of land and buildings to specified uses, provisions which permit the expansion, extension and enlargement of nonconforming uses are generally strictly construed."** *Keene v. Blood*, 101 N.H. 466, (citations omitted).

As recently as 1988, the Court said that provisions allowing ***continuation*** of nonconforming uses are also "strictly construed." (*New London Land Use Assoc. v. Zoning Board*, 130 N.H. 510 at 518 (1988).) As you might expect from the words "strictly construed," the Court has said that the burden of proof is on the landowner who claims a "grandfathered" use, to prove all the necessary elements establishing that right, (*New London v. Leskiewicz*, 110 N.H. 462, 467 (1970)), or to show that an expansion of use is "not a new and impermissible one." (*Hampton v. Brust*, 122 N.H. 463, 470 (1982)). In *Bio Energy LLC v. Town of Hopkinton*, 153 N.H. 145, 155 (2006), the Court reiterated that "(t)he burden of establishing that the use in question is fundamentally the same use [as the 'grandfathered' use] and not a new and impermissible one is on the party asserting it."

> ***Note on Trend:*** In prior versions of this article, I cautioned towns against putting too much reliance on this burden of proof. I cited *Dugas v. Town of Conway*, 125 N.H. 175 (1984), where the N.H. Supreme Court required the Town to pay the landowner's attorney's fees when the Town applied literally the Town's one-year "use it or lose it" clause and refused to allow the restoration of a nonconforming sign that had been down for over a year.
>
> That caution no longer applies, and the trend over the last 20 years has been to truly give towns more of the benefit of the doubt on 'grandfathering' issues. In fact, virtually every aspect of the *Dugas* case has been reversed by later case law: (a) "Use it or lose it" clauses are presumed valid (*see McKenzie v. Town of Eaton*, 154 NH 773 (2006)). (b) Furthermore the Court said in *Taber v. Town of Westmoreland*, 140 N.H. 613 (1996) that in the case of quasi-judicial officials such as a Zoning Board, principles of judicial immunity prevent attorney's fees from being awarded in the absence of a showing of bad faith.

* * *

(e) *Restoration of Merged Lots* .

(1) "Involuntary merger" and "involuntarily merged" mean lots merged by municipal action for zoning, assessing, or taxation purposes without the consent of the owner.

(2) "Owner" means the person or entity that holds legal title to the lots in question, even if such person or entity did not hold legal title at the time of the involuntary merger.

(3) "Voluntary merger" and "voluntarily merged" mean a merger under RSA 674:39a, or any overt action or conduct that indicates an owner regarded said lots as merged such as, but not limited to, abandoning a lot line.

(4) Lots or parcels that were involuntarily merged prior to September 18, 2010 by a city, town, county, village district, or any other municipality, shall at the request of the owner, be restored to their premerger status and all zoning and tax maps shall be updated to identify the premerger boundaries of said lots or parcels as recorded at the appropriate registry of deeds, provided the request is submitted to the governing body prior to December 31, 2021.

(5) Lots or parcels that were voluntarily merged prior to January 1, 1995 by any owner in the chain of title, and where no evidence of voluntary merger exists on the lots or parcels since January 1, 1995, may, at the request of the owner, be restored to their premerger status, and all zoning and tax maps updated to identify the premerger boundaries of said lots or parcels as recorded at the appropriate registry of deeds, provided:

a. The request is submitted to the governing body prior to December 31, 2021;

b. No owner in the chain of title voluntarily merged his or her lots on or after January 1, 1995. In that case, all subsequent owners shall be estopped from requesting restoration. The municipality shall have the burden of proof to show that any previous owner voluntarily merged his or her lots; and

c. The merged lot does not have any unpaid real estate taxes or a real estate tax lien thereon.

(6) If there is any mortgage on any lot to be unmerged, the property owner shall give written notice to each mortgage holder prior to submission of the request to unmerge the lots. The written consent of each mortgage holder shall be required prior to submission of the request to unmerge the lots, and shall be recorded with the notice of the restoration of the lots. The City of Concord shall not be liable for any deficiency in the notice to mortgage holders.

(7) All decisions of the governing body may be appealed in accordance with the provisions of RSA 676.

(8) Any unmerged lot under this ordinance shall not gain the right of a nonconforming lot. Nonconforming status relief must be obtained through the zoning board of adjustment.

(9) This ordinance shall take effect immediately upon passage and shall remain in effect until December 31, 2021.

(Ord. No. 2975, § I, 3-13-17)

28-8-3 - Nonconforming Lots.

(a) *Evidence of Nonconforming Lot.* A nonconforming lot shall be deemed to exist where the Code Administrator determines, based on information submitted by the property owner or by the public record, that all of the following conditions are true:

(1) The lot was created prior to the effective date of this ordinance, or prior to the effective date of relevant amendments affecting the conformity of the lot, and no further division has occurred since that date;

(2) The lot met the minimum size, frontage and area standards which were in effect when the lot was created; and

(3) The lot does not conform with present size, frontage, or other dimensional standards of the zoning district, and the present owner does not own, and has no contract, option or other enforceable legal right to acquire any adjoining property to the extent necessary to make the lot conforming with present standards, or is prevented by law from doing so.

(b) *Date Lot Was Created.* The date of creation of a lot shall be considered established by its most recent change in configuration by parcel area reduction, consolidation, land division, or other official action if such was required.

(c) *Use of a Nonconforming Lot.* A nonconforming lot may be developed for the purposes and uses permitted within the district in which it is located under the following conditions:

(1) *Lots of Substandard Size.* When a nonconforming lot can be used in conformity with all applicable regulations except for minimum lot size, then the lot may be developed for a permitted use in accordance with Section 28-2-4(h), Table of Principal Uses, of this ordinance. However, no use is permissible on a nonconforming lot where the lot size requirements for such use pursuant to Articles 28-4, Development Design Standards, or 28-5, Supplemental Standards, of this ordinance, would necessitate a lot of a size greater than the established minimum lot area as specified in Section 28-4-1(h), Table of Dimensional Regulations, of this ordinance;

(2) *Conditions for Development of Nonconforming Lot.* In any residential district, a one-family detached dwelling may be constructed on a nonconforming lot, and in any nonresidential district, a permitted use in accordance with Section 28-2-4(h), Table of Principal Uses, of this ordinance may be developed on a nonconforming lot, provided that the following conditions are met:

a. The lot has at least twenty-two (22) feet of frontage on an accepted City street;

b. All yard, setback, parking and other requirements of this ordinance can be met;

c. Such lot, at the effective date of this ordinance or an applicable amendment thereto, was held under separate ownership from the adjoining lots or has been made nonconforming since that time through public acquisition;

d. Where development is proposed on a nonconforming lot abutting another lot or lots in the same ownership, these lots shall be consolidated as necessary to eliminate nonconformity to the maximum extent possible, and proof of that consolidation shall be filed with any application for a permit for development of the lot. After that time, the consolidated lot, if still nonconforming, shall continue to have the same rights of use as other nonconforming lots as provided in this article. Where, prior to the adoption or amendment of this ordinance, abutting nonconforming lots in the same ownership were developed with structures housing separate principal uses, said lots shall be exempt from the requirement for consolidation unless a structure is or has been abandoned or destroyed pursuant to the provisions of this article; and

e. Where the municipal sewer system is not available to serve the lot, an approval has been received from the New Hampshire Department of Environmental Services Water Division (NHDES-WD), for an on-site subsurface disposal system to serve the proposed use to be located on the nonconforming lot.

1. Lots of substandard size. When a non-conforming lot can be used in conformity with all applicable regulations except for minimum lot size, then the lot may be developed for a permitted use, provided that the development can comply with all other applicable standards of this ordinance. However, no use which would necessitate a lot size greater than the established minimum lot area for a particular zone is permissible on a non-conforming lot.

2. Conditions for development of non-conforming lot. In any residential district, a one family detached dwelling may be constructed on any non-conforming lot; and in any other district, any permitted use may be developed on a non-conforming lot, provided that:

a. The lot has at least 20 feet of frontage on an accepted City street; and

b. All yard, setback, parking and other requirements of this ordinance can be met; and

c. Such lot at the effective date of this ordinance or applicable amendment was held under separate ownership from the adjoining lots or has been made non-conforming since that time through public action such as a taking by eminent domain; and,

d. In cases in which development is proposed on a non-conforming lot where abutting other lot or lots in the same ownership, these lots shall be consolidated as necessary to eliminate the non-conformity to the maximum extent possible, and proof of that consolidation shall be filed with the application for a development permit. After that time the consolidated lot, if still non-conforming, shall continue to have the same rights of use as other non-conforming lots as provided in this Article.

11.04 Non-conforming uses.

A. Continuation of use. Where a non-conforming use, or where non-conforming characteristics of a use exist, such as signs, off street parking and loading, lighting, landscaping, or similar features, such non-conforming uses and characteristics of use may continue except as provided in this Article.

B. Expansion of the area of a non-conforming use on a lot. No expansion of a non-conforming use which would require additional lot area, devoted to such use, shall be permitted.

C. Limits on expansion of non-conforming use within lawfully existing structure. A non-conforming use may be expanded to those parts of a building which were clearly designed or arranged for such use prior to the effective date of this ordinance, or prior to amendment to the zoning ordinance, text or map, which made the use non-conforming.

Dear Pittsfield Board of Selectmen:

We, the residents of Hertel development on Tan Road, ask the board of selectmen to honor its current agreement to sell the two town-owned lots on Blake Pond, designated as tax map R-44, lots 7 and 8, and tax map R-48, lot 6, to Mary Pritchard.

We are alarmed that the board of selectmen put these properties to indiscriminate auction in the first place. Anyone could have bought these properties, and, in fact, a downtown rental landlord did buy the pest house lot and had plans to put a rental building on it. This development plan, if it had gone through, would have devalued our homes. Thankfully, Mary Pritchard worked a deal to buy this lot and preserve it as undeveloped land.

The course of negotiations before the board of selectmen also leaves us concerned about what the board might do with this property in the future if the property remains the board's to sell.

Mary Pritchard has been a gracious land owner who has never posted her land and who has maintained the values of our homes by not developing her land. The Pritchard family has been, and we believe will be, a more stable and responsible owner than the town has shown itself to be under the board of selectmen's stewardship. The pest house lot may yet fall into the hands of the downtown rental landlord if the board reneges on its agreement to Mary Pritchard. We, the residents of Hertel development on Tan Road, believe that honoring the current agreement to sell the two town-owned lots on Tan Road to Mary Pritchard would be not only in our best interest but in the town's best interest too.

GARRY L. TUCKMAN	53 TAN ROAD
Jason R. Rokezch	81 Tan Road
Larry J. Veal	71 Tan Rd
Angela St Germain	43 Tan Rd.
Nick St. Germain	43 Tan Rd.
Sarah Perorino	7 Tan Rd.
Jeff Doody	63 Tan Rd

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Furthermore, 5 years after *Isabelle*, in the case of *Seabrook v. Tra-Sea Corp.*, 119 N.H. 937 (1979), the Court held that an owner of a "grandfathered" mobile home park, who had previously only rented out lots, had a vested right to sell those same lots. The lots were substandard under the current ordinance, but were protected by a substandard lot clause, even though at the time the restriction was enacted, they were only rental lots.

Both *Tra-Sea* and Grimes' dissent in *Isabelle* were cited in *Cohen v. Town of Henniker*, 134 N.H. 425 (1991), where it was held that the planning board could not refuse subdivision approval to a nonconforming apartment complex whose owner wanted to change it to the condominium form of ownership, and where no change in the actual use of the property would occur. The *Tra-Sea* result is further supported by the definition of "subdivision" in RSA 672:14, I:

> **"I. 'Subdivision' means the division of the lot, tract, or parcel of land into 2 or more lots, plats, sites, or other divisions of land for the purpose, whether immediate or future, of sale, rent, lease, condominium conveyance or building development...."**

The implication is clear that if an owner creates 2 or more "sites" for "building development" (for example by building a home on a lot where another home already exists, in a manner which is clearly not "accessory" under the common-law or local ordinance), then ***that*** point in time is when the "subdivision" occurs, even though any division of ownership is still "future." Therefore the owner needs subdivision approval prior to constructing such a home. But furthermore, if such a home has been constructed legally, prior to the beginning of subdivision review in the town, then the owner has, in my opinion, a "grandfathered" right to sell that second home separately. Of course RSA 674:37 would still prevent the plat from being recorded without subdivision approval. But if such a "grandfathered" right to subdivide exists, the planning board could not withhold such approval in the absence of an adverse effect on public health or safety.

The cases concerning condominium conversion of existing 'grandfathered' uses (*see* § 4-B(iv) above), supports the conclusion in this section.

> [***DON'T GET ME WRONG*** here. The above discussion concerns a second use on the property, which is "grandfathered" as a subdivision because that use began ***before*** the enactment of a restrictive ordinance. This discussion does ***not*** apply to, say, a "mother-in-law apartment" which was built under an ordinance provisions ***allowing*** that use. If the ordinance (or a controlling ZBA decision) attaches conditions to such a use, preventing future subdivision, then those conditions ***are*** binding on the owner, and there is ***not*** a "grandfathered" right to subdivide.]

(***Finis***)