

**Webster Zoning Board of Appeals  
Meeting Minutes – March 1, 2022**

A meeting of the Webster Zoning Board of Appeals was held via remote participation / Zoom on February 1, 2022 in accordance with Governor Baker's June 16, 2021 Act Relative to Extending Certain COVID-19 Measures Adopted During the State of Emergency.

**Present:** Chairman Jason Piader, Vice Chairman Dan Cournoyer, Clerk Chris Daggett, and Members Mark Mason and Dan Fales.

**Also Present:** Ann Morgan, Director of Planning & Economic Development; Brian Winner, Town Counsel, Mead Talerman & Costa

**1. Call to Order:** Chairman Piader called the meeting to order at 6:03 p.m. and read the notice posted on the agenda regarding the remote participation meeting noting that it was being recorded for the purpose of taking minutes and asked if anyone was recording the meeting. There were none. Mr. Piader asked Ms. Morgan to take attendance by roll call: Mr. Mason – yes; Mr. Daggett – yes; Mr. Cournoyer; Mr. Fales – yes; Mr. Piader – yes.

**2. Action Items**

- a. Approval of Meeting Minutes of February 1, 2022 – tabled.
- b. Draft Decision: Variance Application – Relief from Side Yard Setback Requirement - 200 Gore Road - Webster Venture LLC (Applicant / Owner); Assessor ID 60-D-17.

Ms. Morgan presented an overview of the draft decision. Mr. Piader stated that no additional testimony can be submitted at this time. He stated that the two applications - 200 Gore Road and 27 Lakeview Road - are interconnected and create an interesting matter of law. For the benefit of the Board he has invited Attorney Brian Winner, Special Counsel to the Board, to explain the legal issues that variance application for 200 Gore Road creates as it triggers another variance required for 27 Lakeview Road.

Mr. Winner introduced himself. He noted that the Board has identified an unusual situation where land is being donated by one lot and received by another lot in order to address development issues which creates a weird convergence of zoning issues. He noted that his comments do not reflect any knowledge of how the Board is going to vote. His comments will be stated in a neutral and objective manner. The application bumps into the concept of infectious invalidity. When you use land from one lot to donate to another lot and thereby “cure” zoning violations on one lot but create them on the donor lot you infect the donor lot. This creates zoning complications for both lots because they are both involved in the zoning transaction and both get imprinted with that zoning violation. The second level of complexity involves the variance. If this were a simple conveyance, and they went ahead and did this without coming to the Board for relief, the new property line for 200 Gore Road as there would not be compliant and still have a zoning violation. It would still leave 27 Lakeview Road with a non-compliant setbacks and in fact there may be new violations since the lot line would be changed. The pre-existing non-compliant setback would be exacerbated on 27 Lakeview Road. By coming to the Board they are seeking official approval for the arrangement that would create new and exacerbate existing zoning violations. Variances would make the setback violations compliant. Mr. Winner noted that he was not discussing the use issues, just the dimensional aspects of the proposal. If the Board were to grant the variance it would retroactively go back and bless the non-compliances that they, themselves, are now creating by jogging the lot line which segues into the variance standard. One of the findings of a variance is whether or not the violation is self-created. This is an issue that would be taken up under the hardship criteria. Is this something that is a self-created hardship or is it a hardship

that you can cure by way of a variance? Making this lot line jog to create new non-conformities and then they are asking for a cure by virtue of a variance.

Mr. Piader asked Mr. Winner about the specific elements for granting a variance - unique conditions or hardship. Mr. Winner stated that it would be both. He did not know how the Applicant argued or provide justification for the request. From his perspective, it's not soil conditions, doesn't appear to be topography, and if anything it would be shape of the lot which they are creating. The hardship criteria is inexorably linked as well. It's a hardship owing to the shape but then where did the shape come from?

Mr. Piader asked if the concept of infectious invalidity is fairly bright line where, if this is appealed, it might create a lawsuit against the Board and the Town. Could a decision be easily over turned? Mr. Winner noted that by granting a variance you are essentially curing the infectious invalidity which is what the Applicant is asking the Board to do. They are creating new zoning violations by transferring land from one property to another and creating new ones. Setback violations will continue to exist. Once you redraw the lot line you are essentially creating a new lot. You can't call the ongoing violations pre-existing non-conformities anymore because this is going to be a new lot line. The lot shown on the plan submitted doesn't exist yet and it won't exist until they record it and convey it potentially. It will be a post existing lot with non-conformities. If you grant the variance that would cure the infectious invalidity which could be challenged by anyone aggrieved by that decision and variances are difficult to defend. Mr. Winner stated that by recognizing the legal doctrine or by being cognizant of it when taking whatever vote the Board takes - that in and of itself is any misstep or error. It's a doctrine that's well recognized by the Courts in a series of two different cases since 2010. It's a well-recognized and established zoning principle.

The Board reviewed Findings F1 through F9. Mr. Piader asked that a new finding F10 be added to include the doctrine of infectious invalidity as presented by Special Town Counsel to the Board and that it was shown to be present and detrimental to the variance application. Mr. Piader asked if there were any further edits or discussion. There were none. Motion to approve Findings F1 through F10 made by Mr. Cournoyer, seconded by Mr. Daggett. Motion passed unanimously 5-0 by roll call vote: Mr. Mason - yes; Mr. Daggett - yes; Mr. Fales - yes; Mr. Piader - yes; Mr. Cournoyer - yes.

The Board reviewed Finding F11. Mr. Piader found that the presence of the pavilion, determined to be in that location for over 20 years, is unique but does not satisfy the criteria relating to soil conditions, shape or topography. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There was none.

Motion to find that the Applicant has demonstrated that there are unique site conditions made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett - no; Mr. Mason - no; Mr. Fales - no; Mr. Piader - no; Mr. Cournoyer - no.

The Board reviewed Finding F12. Mr. Piader found that the legal theory of infectious invalidity negates the substantial hardship that would be financial or otherwise by the redrawing of the lot line at 200 Gore Road. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that the Applicant has demonstrated a substantial hardship made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – no; Mr. Fales - no; Mr. Piader – no.

The Board reviewed Finding F13. Mr. Piader found that the proposed division of the lot and the requested side yard setback variance requests do not present a substantial detriment to the public good. Development of two single family houses would not create excessive noise, dust, overcrowding of the land or impact adequate light and air. Single family houses are the predominate use in the area and the zoning district. He further found that the legal theory of infectious invalidity would cause the desirable relief and redrawing of the lot to be against the public good as a matter of public policy. The curing of a zoning violation should not cause another zoning violation on an abutting property. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that there is not a substantial detriment to the public good made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – no; Mr. Fales - no; Mr. Piader – no.

The Board reviewed Finding F14. Mr. Piader that the legal theory of infectious invalidity would cause a derogation from zoning where one zoning violation being cured causing an additional zoning violation. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to approve the proposed division of the lot and the requested side yard setback variance requests and that it does not nullify or substantially derogate from the intent and purpose of the Zoning By-law made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – NO; Mr. Fales - no; Mr. Piader – no.

Motion to GRANT the VARIANCE with CONDITIONS based on information received throughout the public hearing the FINDINGS stated herein made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – no; Mr. Fales - no; Mr. Piader – no.

Motion to direct Ann Morgan, Director of Planning & Economic Development, to sign the Decision on behalf of the Board made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously 5-0 by roll call vote: Mr. Daggett – YES; Mr. Cournoyer – YES; Mr. Mason – YES; Mr. Fales - YES; Mr. Piader – YES.

- c. Draft Decision: Variance Application – Relief from Side Yard Setback Requirement - 27 Lakeview Road – Indian Ranch Realty (Applicant / Owner); Assessor ID 60-D-17.

The Board reviewed Findings F1 through F9. Mr. Piader asked that a new finding F10 be added to include the doctrine of infectious invalidity as presented by Special Town Counsel to the Board and that it was shown to be present and detrimental to the variance application. Mr. Piader asked if there were any further edits or discussion. There were none. Motion to approve Findings F1 through F10 made by Mr. Cournoyer, seconded by Mr. Daggett. Motion passed unanimously 5-0 by roll call vote: Mr. Mason - yes; Mr. Daggett – yes; Mr. Fales - yes; Mr. Piader – yes; Mr. Cournoyer - yes.

The Board reviewed finding F11. Mr. Piader found that based on the theory of infectious invalidity that creating a new lot line approximately 2½ feet from the existing house in order to accommodate the pavilion does not meet the criteria for granting a variance as it relates to soil conditions, shape or topography. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that the Applicant has demonstrated that there are unique site conditions made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – no; Mr. Fales - no; Mr. Piader – no.

The Board reviewed Finding F12. Mr. Piader found that there is no hardship, financial or otherwise, due to the legal theory of infectious invalidity. This is the donor lot. The curing of this zoning violation would create a new violation. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that the Applicant has demonstrated a substantial hardship made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – no; Mr. Fales - no; Mr. Piader – no.

The Board reviewed Finding F13. Mr. Piader found that allowing the variance application to pass and having a donor lot cure a zoning violation and then cause another zoning violation is not in the public's best interests or good public policy to allow these types of variance to be approved. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that there is not a substantial detriment to the public good made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – no; Mr. Fales - no; Mr. Piader – no.

The Board reviewed Finding F14. Mr. Piader found that allowing the variance application to be approved it would derogate from the intent and purpose of the Zoning By-law of the Town of Webster as setbacks are clearly stated. The concept of infectious invalidity would create a public policy issue where curing a zoning violation would derogate from the Webster Zoning By-law. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that the proposed application does not substantially nullify or derogate from the intent and purpose of the Town of Webster Zoning By-law made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – no; Mr. Fales - NO; Mr. Piader – no.

Motion to GRANT the VARIANCE with CONDITIONS based on information received throughout the public hearing the FINDINGS stated herein made by Mr. Cournoyer, seconded by Mr. Mason. Motion failed unanimously 5-0 by roll call vote: Mr. Daggett – no; Mr. Cournoyer – no; Mr. Mason – no; Mr. Fales - no; Mr. Piader – no.

Motion to direct Ann Morgan, Director of Planning & Economic Development, to sign the Decision on behalf of the Board made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously

5-0 by roll call vote: Mr. Daggett – yes; Mr. Cournoyer – yes; Mr. Mason – yes; Mr. Fales - yes; Mr. Piader – yes.

- d. Draft Decision: Variance Application – Relief from Minimum Lot Size Requirement - 9 Prospect Street – Sean Smith (Applicant), Cynthia Godin (Owner); Assessor ID 1-J-4-0.

The Board reviewed Finding F1 through F6. Mr. Piader asked the Board if there were any comments or edits. There were none. Motion to approved Finding F1 through F7 made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously 5-0 by roll call vote: Mr. Daggett – yes; Mr. Cournoyer – yes; Mr. Mason – yes; Mr. Fales - yes; Mr. Piader – yes.

The Board reviewed Finding F7. Mr. Piader found there are special circumstances related to the shape of the lot and small size with affects 9 Prospect Street. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that the Applicant has demonstrated that there are unique site conditions made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously 5-0 by roll call vote: Mr. Daggett – yes; Mr. Cournoyer – yes; Mr. Mason – yes; Mr. Fales - yes; Mr. Piader – yes.

The Board reviewed Finding F8. Mr. Piader found that the literal enforcement of the minimum lot size requirement will cause a substantial financial hardship as it would result in causing this lot to be undevelopable. Although not precedent, this Board has shown in prior cases that a financial hardship of an undeveloped lot meets this criteria. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that the Applicant has demonstrated hardship made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously 5-0 by roll call vote: Mr. Daggett – yes; Mr. Cournoyer – yes; Mr. Mason – yes; Mr. Fales - yes; Mr. Piader – yes.

The Board reviewed Finding F9. Mr. Piader found that a multi-family home is consistent with the area, is allowed under the zoning by-law, and would not create excessive dust, noise, overcrowding, or impact the passage of light and air through the property. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that there is no substantial detriment to the public good made by Mr. Cournoyer, seconded by Mr. Mason. made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously 5-0 by roll call vote: Mr. Daggett – yes; Mr. Cournoyer – yes; Mr. Mason – yes; Mr. Fales - yes; Mr. Piader – yes.

The Board reviewed Finding F10. Mr. Piader found that the variance application can be granted without nullifying or substantially derogating from the intent and purpose of the Zoning By-law. The Board further finds the Webster Zoning By-law allows for multi-family homes. They have been allowed in this area and have been prevalent in this zoning district. It is the intent of the By-law to promote development of land in this zoning district. Mr. Piader asked the Board if there were any additional findings, comments or discussion. There were none.

Motion to find that the proposed division of the lot and the requested side yard setback variance requests do not nullify or substantially derogate from the intent and purpose of the Zoning By-law made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously 5-0 by roll call vote: Mr. Daggett – yes; Mr. Cournoyer – yes; Mr. Mason – yes; Mr. Fales - yes; Mr. Piader – yes

The Board reviewed the draft conditions. Mr. Piader asked if there were any edits. There were none. Motion to **GRANT the VARIANCE with CONDITIONS** based on information received throughout the public hearing the FINDINGS stated herein made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously 5-0 by roll call vote: Mr. Daggett – yes; Mr. Cournoyer – yes; Mr. Mason – yes; Mr. Fales - yes; Mr. Piader – yes.

Motion to direct Ann Morgan, Director of Planning & Economic Development, to sign the Decision on behalf of the Board made by Mr. Cournoyer, seconded by Mr. Mason. Motion passed unanimously 5-0 by roll call vote: Mr. Daggett – Yes; Mr. Cournoyer – Yes; Mr. Mason – Yes; Mr. Fales - Yes; Mr. Piader – Yes.

### 3. Public Hearing

- a. Variance Application – Relief from Front Yard and Side Yard Setback Requirements – David Chappell (Applicant), Cynthia Ostowski (Owner); Assessor ID 46-A-42-0. Site is located in the Lake Residential (LR) and Lake Watershed Protection (LWP) zoning districts.

Mr. Piader opened the public hearing. Mr. Daggett read the public hearing notice. Ms. Morgan presented an overview of the application noting that the Applicant is seeking both front yard and side yard setback variances to install a 10 foot by 16 foot pre-built shed in the front yard. The Building Commissioner submitted comments noting that the proposed shed and location fits the area and that the lots are so steep and built out they have to hug the road. There were no other comments from other Town Departments. She displayed a map of the area on the screen. Mr. Piader noted that in looking at the required front yard setback of 29.3 feet was interesting given the fact that the area was fairly congested with lots of other structures close to the road. Ms. Morgan noted that the district regulations require a second calculation for the front yard setbacks can be problematic for properties in the Lake Residential zone. Recent variances of a similar nature were granted for similar structure on several properties in the area including 122 Point Breeze Road and two others that also don't meet the same required standards.

Mr. Piader asked Mr. Chappell to present the application. He noted that there is an existing asphalt driveway where he would like to place the pre-built shed. There is a retaining wall behind the driveway which creates the only level spot to place the proposed shed. The lot slopes down approximately 100 feet towards the water. It would be located approximately 4 feet from the side yard lot line and 5 feet from the front yard property line. The proposed location would enable him to still park his car in the driveway.

Mr. Piader asked why a 16 foot length shed was needed. Mr. Chappell explained that the length is based on the dimensions of the floor model that was on sale and that he got a good deal on the purchase price. Mr. Piader asked about the slope beyond the proposed location and if the shed could be moved further back onto the lot. Mr. Chappell noted that the slope is approximately 45 degrees and that he would have to build a support system that would have it hang off the retaining wall which would be a financial hardship.

Mr. Piader questioned the distance from the side property line. A Google map of the property was displayed on the screen and reviewed. Mr. Piader noted that there was a grassy area further away from the side lot line. Mr. Chappell explained that he chose the distance noted in the application because that was where the edge of the existing asphalt starts. Mr. Piader noted that there is a large grassy area at the front of the house that appears to be fairly flat and asked if there was a specific reason why the shed couldn't be placed there. Were there reasons related to soil, topography, structures, or shape of the lot which is causing the structure to be four feet off the side lot line? Mr. Chappell stated that the proposed location was flat and already prepped for placement of the shed. It comes down to a financial issue as he wouldn't have to prep or pour a pad to support the shed. The grassy area slopes down about two feet from the road. Placing the shed there would involve work to prepare the site.

Mr. Piader asked if the Board had any comments. Mr. Cournoyer where the door to the shed would be located to which the answer was facing the road. Mr. Daggett noted that he was familiar with this area of Point Breeze and asked that the aerial view be displayed on screen. He noted that there are abutters that have their garages right on the street. Several neighboring properties were reviewed.

Mr. Piader asked if there were any further questions from the Board. There were none. He asked if there were any comments from the public. There were none.

Motion to close the public hearing made by Mr. Cournoyer, seconded by Mr. Mason. Mr. Piader asked if there was any discussion from the Board. There was none. Motion passed unanimously 5-0 by roll call vote Mr. Daggett – AYE; Mr. Mason – AYE; Mr. Fales - AYE; Mr. Cournoyer – AYE; Mr. Piader – AYE.

#### 4. Discussion – Board Member Liability

Mr. Piader thanked Attorney Winner for staying on the line at the meeting. He noted that some of the Board's decisions have been appealed and asked Mr. Winner to explain individual Board member liability in that process. Mr. Winner stated he was happy to do so and is assuming that the Chairman is referring to a MGL Chapter 40, Section 17 appeal. Mr. Piader confirmed that, yes, he was referring to an appeal of a Zoning Board of Appeals decision. Mr. Winner noted that the process is a function of the statute. There's no implication that because your name appears on it that Board members have any individual liability. The statute requires that the plaintiff appealing the case name the Board members and serve them via certified mail. And while you may be individually named it's actually the Town who is the defendant. The Board is an entity of the Town and not separate legal entities. By virtue of your service on the Board it is the Town that defends the appeal and not you individually. This is underscored in the Massachusetts Tort Claims Act, 258, Section 10, which specifically states that a municipality can't be held liable for "discretionary functions" in permitting decisions. There is no individual liability of members who are, voting or participating in a public hearing as Board member.

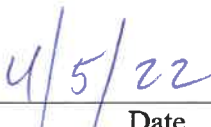
Mr. Daggett thanked Mr. Winner for discussing the issue and found the information to be reassuring. Mr. Winner stated that this question comes up fairly often.

3. **Next Meeting Date:** Mr. Piader asked the Board if there were any objections to meeting in person for the April meeting. There were none. The next meeting will be held on Tuesday, April 5, 2022 at Webster Town Hall.

#### 4. Adjournment

Motion to adjourn the meeting made by Mr. Cournoyer, seconded by Mr. Mason. The motion passed unanimously 5-0 by roll call vote: Mr. Daggett - yes; Mr. Mason - yes; Mr. Fales - yes; Mr. Cournoyer – yes; Mr. Piader - yes. The meeting was adjourned at 7:32 p.m.

  
Chris Daggett, Clerk

  
Date

#### EXHIBITS

Public Hearing 3A - Variance Application – Relief from Front Yard and Side Yard Setback Requirements – David Chappell (Applicant), Cynthia Ostowski (Owner);

- Application packet submitted and stamped by the Town Clerk on December 15, 2021; includes the following documents:
  - Certified Abutters List; dated October 4, 2021; 5 pages.
  - Deed; submitted on December 15, 2021; 2 pages.
  - Form; Application for Variance; dated December 1, 2021; 5 pages.
  - Letter of Permission from Cynthia Godin, 2104 Nina St. Navarre, FL, 32566; dated October 12, 2021; 1 page.
  - Locus Map and Site Photos prior to 2011 and also from December 2021; color, 4 pages.
  - Plot Plan; prepared by Jarvis Land Survey, Inc.; dated December 14, 2021; 1 page.
- Town of Webster Zoning Board of Appeals Public Hearing Notice; stamped by Town Clerk on January 6, 2022; 1 page.
- Correspondence; Comments submitted by Town Assessor; dated and received January 11, 2022; 1 page.
- Correspondence; Comments submitted by the Town of Webster Health Department; dated and received January 11, 2022; 1 page.
- Correspondence; Comments submitted by the Town of Webster Building Department; dated and received January 11, 2022; 1 page.
- Correspondence; Comments submitted by the Town of Webster Water and Sewer Department; dated and received January 11, 2022; 1 page.
- Correspondence; Comments submitted by the Town of Webster Fire Department, dated and received January 18, 2022; 1 page.
- Correspondence; Comments submitted by the Town of Webster Water and Sewer Departments, dated and received February 9, 2022; 1 page.
- Correspondence; Comments submitted by the Town of Webster Conservation Agent, dated and received February 10, 2022; 1 page.