

**Walpole NH Zoning Board of Adjustment**  
**October 21, 2022**  
**Town Hall**  
**7 pm**

**Present:** Chair Jan Leclerc, Vice-Chair Judy Trow, Clerk Tom Murray, Pauline Barnes. Alternates: Carolyn Vose, Shane O’Keefe and David Edkins. Absent: Board member Tom Winmill and alternates Don Sellarole and Myra Mansouri. Also attending the meeting were the applicant of the appeal, Jennifer Plante, and her attorney, Tom Hanna. There were 30-plus people in the audience.

**Minutes:** Written by Marilou Blaine. **This meeting was recorded. These minutes are unapproved and will be reviewed at the November 2022 meeting for corrections, and additions and/or omissions.**

**Call to order:** Ms. Leclerc called the meeting to order at 7 pm. Ms. Leclerc recused herself and turned the rest of the meeting over to the Vice-Chair.

**Minutes of August 2022:** Mr. O’Keefe mentioned on page 2, third paragraph, Newport, Vermont should be corrected to Newport, New Hampshire. Ms. Barnes made these corrections: page 1, bottom paragraph line 2, add a comma after the word “herself” and change “So” to lower case “s”; also on page 1 there is a double “two 2” in the third paragraph. On page 3, second to last paragraph from the bottom of the page, Ms. Trow asked to change her years as recording secretary to 16 years and she was on the board to 7 years. Also, add the word “the” after the word “in” in the same paragraph. Ms. Barnes made a motion to approve the minutes as corrected. The motion was seconded by Mr. Murray. The motion carried.

**Public Hearing: Appeal from Administrative Decision:**

BnB Realty LLC, 11 Maplewood Circle, owner Jennifer Plante is appealing the Planning Board’s June 14, 2022 decision regarding permitted uses in Residential B. Tax Map 24, Lot 14-1, commercial and residential B districts.

Ms. Trow said the Zoning Board was here tonight to hear the Appeal from an Administrative Decision from applicant Jennifer Plante, 11 Maplewood Circle in Walpole. Ms. Plante was appealing the Planning Board decision on a condition to an approval of a site plan on June 14, 2022 regarding Home Away from Home Daycare. Article V section B of the zoning ordinance was in question regarding permitted uses in the Residential B District.

Mr. Murray recused himself and joined the audience and Ms. Trow asked alternates Carolyn Vose, Shane O’Keefe and David Edkins to sit on the board for this public hearing. They agreed to fill in for the absent or recused board members.

Attorney Mr. Tom Hanna began by saying that a zoning board exists to rule on three types of cases: one is a variance, one is a special exception and one is an appeal, such as the board is hearing tonight. So this appeal is under RSA 675.6 III. There’s a long history of an applicant appealing an administrative decision, he said. This used to be more often for things like building permits, but more recently Planning Board decisions regarding site plans and subdivisions have been included in this process when the Planning Board makes a decision of the zoning ordinance. And so that’s what happened in this case when the Planning made a decision at its June 14, 2022 meeting. This is a particular part of the zoning ordinance so comments and complaints about traffic, noise, trash and speed are not appropriate at this hearing and have no relevance tonight. Likewise the character of the owner of the childcare center and the school is not relevant either. What is relevant is.....

At this point Mr. O'Keefe interrupted and asked the person speaking who he was and who he represented since he had not introduced himself and it was Mr. O'Keefe's first time as a board member. Mr. Hanna introduced himself as a partner in the law firm BCM Environmental and Land Law in Keene and said he had been practicing law for almost 40 years almost exclusively in land law. He is representing Jenny Plante, owner of a childcare center, Home Away From Home at 11 Maplewood Circle.

Mr. Hanna said, because this topic has been brought to this board before, he had to ask every person hearing the case if they are able to hear it without bias and be fair about it. All sitting board members said "yes" or nodded that they could be objective.

Mr. Hanna read RSA 675: III. It says "If, in the exercise of subdivision or site plan terms review, the Planning Board makes any decision or determination which is based upon the terms of the Zoning Ordinance, or upon any construction, interpretation, or application of the Zoning Ordinance, which would be appealable to the Board of Adjustment if it had been made by the administrative officer, then such decision may be appealed to the Board of Adjustment under this section: provided, however, that if the Zoning Ordinance contains an innovative land use control adopted pursuant to RSA 674:22 which delegates administration, including the granting of conditional or special use permits, to the Planning Board, then the Planning Board's decision made pursuant to the delegation cannot be appealed to the Board of Adjustment but may be appealed to the superior court as provided by RSA 677:15.

In a nutshell, Mr. Hanna said, in 2008 the Zoning Board approved Ms. Plante's daycare as a school. No appeal was taken from that and that use has continued for all these 14 years. A private school is permitted in either the Residential B or commercial districts and therefore the condition of obtaining a variance "was misplaced" because there was no need for a variance because this a permitted use. It doesn't really matter if in 2008 the Zoning Board made a decision on this or not because if Ms. Plante were coming to the Zoning Board now, it would be approved because a school is permitted in Residential B.

The Walpole Ordinance states, "Article V Residential A and B Uses Permitted:

1. One single or one two-family dwelling per lot, with private garages and accessory buildings. Churches and religious institutions, hospitals (excluding animal hospitals), nursing homes, municipal buildings, parks and playgrounds, and schools, public or private. Residences may be used to house such customary uses by the owner or tenant as offices for doctors, lawyers, real estate and insurance, or other recognized professions, or such home occupations as hair dressing or dress-making, except that the number of persons employed at any one location shall not number more than two persons in addition to the owner or tenant. Adequate off-street parking shall be provided on the premises."

Regarding the property, the first 250 feet is commercial and then starting at the 250 mark it becomes Residential B. So, Mr. Hanna said, he thinks three-quarters of this property is in the commercial district and all the buildings are in the commercial district and the play areas are and they have been used like this for 14 years.

Mr. Hanna said in 2008 in the minutes, it says "Mr. Britton asked about "schools" in the Residential B being allowed. Ch. Mansouri and Mrs. Lester said all uses allowed in the Residential B zone are also allowed in the Commercial district including home businesses and schools." Therefore, they were pointing to the childcare center as being used as a school, Mr. Hanna said. Mr. Hanna pointed out that there was no reason to get a variance because the land in question was Residential B and that schools are a permitted use in Residential B.

There is no childcare center use in the Walpole Zoning Ordinance but if you look at the statute RSA 170-E:2 it defines 'Group Child Day Care Center as child day care agency in which child day care is provided for preschool children up to age 5 and school-age children, whether or not the service is known as a day nursery, nursery school, kindergarten, cooperative, child development center, day care center, center for the developmentally disabled, progressive school, Montessori school or by any other name.'

Mr. Hanna's premise in his written analysis is that "this definition of Group Child Day Care Center categorizes day care centers as a type of school." All these facilities are regulated by the Department of Health and Human Services whereas kindergartens and preschools that are attached to a public school are regulated by the Department of Education. It was declared to be a permitted use in 2008, its use hasn't changed and the ordinance is the same and the portion of use that is playground, customarily associated with a school, which is an accessory use to a school or in any event a playground is permitted. He asked the board to decide for the applicant that the variance was not required as a condition of approval.

Ms. Trow asked for questions from the board. Mr. O'Keefe asked why Ms. Plante went to the Planning Board. Mr. Hanna said his client was told this was the best way to resolve concerns of neighbors and clear up an issue that was decided in 2008. The Planning Board approved the site plan and if the board were here now, they would probably agree, Mr. Hanna said. He also said that back in 2008, it was agreed that the day care center was a school and that residential B, as well as the commercial district, permits schools. He said that Health and Human Services treats these as school, according to RSA 170.

Mr. O'Keefe asked if the Residential B property was used for a playground in 2008. Mr. Hanna said it's exactly the same use as it is today. No difference in the property size. Back then it was leased, Ms. Plante bought the property at a later date.

Ms. Barnes said she wanted to raise that issue because in the 2008 minutes the only references are to the commercial district. There is nothing in those minutes that refers to a day care center being in residential B. Mr. Hanna said the Zoning Board probably wasn't aware in 2008 of the split zoning district. Ms. Barnes said the 2008 minutes say "Ch. Mansouri handed out copies of the zoning map in order to locate the parcel for members not familiar with its location and to determine the zone.....She said the commercial district is designated back 250 feet from Main Street. They went out and measured it finding the property is approximately 175 back and within the commercial district." Ms. Barnes said so this illustrates that the 2008 Zoning Board was just looking at the commercial district not the residential B district.

Mr. Hanna disagreed and said he thought the board probably thought the property was within the 250 feet. But the additional property was used as a playground and is still a playground. Ms. Barnes said the minutes say they went out and measured the property.

Mr. Edkins said he's never seen an actual map of the property. The secretary had one in the file and it was circulated among members but Mr. Edkins still asked to clarify where the zone line lies. The zone line was the property line between the end of the property where the buildings are located and adjacent to the property. Also, if you add up 250 feet from Main Street, you could determine it was where the property lines meet.

Ms. Barnes said your premise is that a daycare center is a school. Mr. Hanna agreed. Ms. Barnes cited from the said RSA 170 E section IV. "Child day care means the care and supervision of a child away from the child's home and apart from the child's parents. Child day care agency means any person, corporation, partnership, voluntary association or other organization, either established for profit or otherwise, which regularly receives for child day care of one or more children, unrelated to the

operator or staff of the agency.” It doesn’t say anything about a school, Ms. Barnes said. Our Zoning Ordinance is known as a permissive ordinance meaning that in the absence of a variance or special exception a permissive ordinance functions generally to prohibit uses of land unless they are expressly permitted as primary uses or can be found to be accessory to a permitted use. Day care center is not mentioned in our ordinance but school is. What is permitted are listed such as other business. So there is a situation where Health and Human Services licensing day care centers and the definition given is care and supervision of a child but no mention of school. There is in the administrative code, in which the Department of Education regulate and gives the definition of a school. Ms. Barnes asked why a day care center isn’t it defined as a school. “I can’t tell you,’ Mr. Hanna replied.

Ms. Barnes continued, according to the Board of Education "school" means an educational institution whose primary purpose is the development of individual potential by means of a systematic method of instruction of a defined type comprising of:

- (1) A single grade or more than one grade group or other identifiable grouping;
- (2) A teacher or more than one teacher(s) who guides and supervises the learning experience of pupils;
- (3) An education program leading to the awarding of a diploma or appropriate certificate upon completion of the requirements of the program.

*N.H. Code Admin. R. Ed 401.01*

Ms. Barnes asked Mr. Hanna if he could give a definition of a school. Mr. Hanna said the statute 170 E-2 equates a child care center with a school. Ms. Barnes replied that’s somewhat circular and vague. So it goes back to why the definition of a day care center is not defined as a school. Again Mr. Hanna went back to RSA 170. Mr. Hanna stated again that his premise in his written analysis is that “this definition of Group Child Day Care Center categorizes day care centers as a type of school.”

Ms. Barnes didn’t agree with his premise saying the Department of Health and Human Services licenses day care centers views their licensing as primarily a health related situation and never calls day care center schools. She asked Mr. Hanna why he thought that was so. Mr. Hanna said he couldn’t tell her that but suspected that the primary objective is because they are focused on health and welfare of the child. Ms. Barnes said that was her supposition as well.

Ms. Barnes said that what she was getting at is that she sees a day care center as a separate entity and something different as defined by the Department of Education.

Ms. Trow said maybe it’s because the education of a child 5 and older is mandated by the state.

Mr. O’Keefe said to go back to the 2008 minutes and maybe the board wanted the day care center to happen so much they shoehorned it in.

Mr. Edkins asked if anyone was at the meeting from the Planning Board to explain the minutes. They are vague. Why did they add the condition? No one from the Planning Board was at the meeting.

There being no more questions from the board, Ms. Trow asked for questions or comments from the public.

Ms. Amanda Raney lives at 15 Maplewood Circle and said that the Planning Board made the correct decision to add the variance condition since the day care has expanded its business. Businesses are

not allowed in a residential district without a variance. She believes the Planning Board made the right decision.

Someone else said that in the 2008 minutes Ms. Plante promised parking in a parking area on the property, which is the driveway and this is not being used for any cars. The cars are on the street. Mr. Hanna objected saying this is not germane to these proceedings. Ms. Trow agreed and asked the public to keep the questions on the variance.

Ms. Trow then read a letter from Tammy Simpkins, who also lives in Maplewood Circle. In one portion of her letter she said, "I have come to learn that Jenny and her lawyer are claiming the initial licensing was for "school" rather than a daycare. There are several pieces of evidence show the business is a daycare. If however, town officials were in error and she is in fact a school really is no concern of mine. She is providing a business to the community. I am not interested in arguing school versus daycare. My concern remains unchanged. Let's find a way to get the street free of cars that create and an unsafe and congested area of travel for vehicles."

Parent Jamie King said her child benefited from the day care center and received a preschool certificate from the school and she presented the certificate to her child's first grade teacher.

There being no other questions from the board or public, Ms. Trow closed the public hearing.

Ms. Barnes made a motion to break for a brief time in order to consult with counsel. Ms. Vose seconded the motion. The time was 7:55 pm. The group met in the town offices. At 8:20 pm Mr. Edkins made a motion to return to the meeting. Ms. Barnes seconded the motion and the motion carried.

Ms. Trow said the board has to determine if this is a school. Ms. Vose said this is to determine the use of the Residential B part of the property. Ms. Barnes said she was going to come down on the side that day care is not a school. We have a permissive ordinance where day care is not mentioned in the ordinance. The ordinance does mention school but does not define school. She thought Health and Human Services were regulating childcare because of their interest in the health and welfare of young children, but they are not mandating an educational program. The Department of Education has a definite education component to its definition of a school. Merriam Webster defines day care as "a supervision of and care of children or physically mentally disabled adult that is provided during the day by a person or organization. Merriam Webster defines school as an organization that provides instruction. She read a New York Times' sports section article about a particular athlete as a family man shuffling his children between school and daycare. So the New York Times was differentiating the difference between a school and daycare. They are two different things.

Ms. Barnes also questioned the 2008 zoning meeting. It's kind of all over the map. Chair Mansouri is talking about home businesses and the commercial district. Selectman Sheldon Sawyer refers to complaints about the disruption of businesses so he refers to it as a business, not a school. She also felt that since our ordinance focuses on specifics the board shouldn't want to blow too large a hole in the ordinance to explain group day care, which is known as a vague definition.

Ms. Vose said she is considering what schooling and this age group means while recognizing that the NH Dept. of Education doesn't address kindergarten and younger children. She went on to say that it is undeniable that learning takes place with children below the first grade. Learning takes place whether kids are in kindergarten or in day care or at home. The building blocks of learning take place in kindergarten or day care with people who have training and those people have to keep up that training. They are providing services and have a background in education in early childhood learning. I think this is a school and a day care. She referred to Ms. King's sharing that there's a certificate that a child receives when they have gone through those steps of learning. Ms. Vose said the board could

be very strict in defining day care vs. school, but the board is only considering the use of the piece of property in the residential B zone and its relation to the use of the larger area. So as not to blow a hole in the ordinance, we need to be strict to show the land being used is limited. She went on to say that if the board is going to be strict in consideration of the land it needs to also be strict in its decision. The two pieces of property and what is happening on them now and the growth of use must be taken into consideration. There are so many gray areas. What is in the commercial zone should not be part of our consideration.

Mr. O'Keefe pointed out that the 2008 decision says that the board concurred that the use presented is an allowed use in the Zoning Ordinance. The minutes say, "Mrs. Pschirrer moved to have the board concur that the use as presented is an allowed use in the Zoning Ordinance and the board will approve it as an approved use. Mr. Carrigan seconded. Motion carried by unanimous vote." He queried if they meant that it is a school because so it is an allowed use in the commercial zone - but day care is not mentioned. Ms. Barnes asked if that because it was a business. Mr. O'Keefe said it's vague because it doesn't say. It doesn't mention business and doesn't mention day care.

Ms. Vose said in the 2008 it was about a commercial zone. The variance is about a residential B zone. The board's concern is about that smaller piece so we have to figure out whether 2008 has any bearing on that piece of land that is residential B and how it is being used. Both Vose and Barnes agreed that they use the words day care, school, business interchangeably and that makes it very vague and it's also about the commercial piece of land with the buildings.

Ms. Trow said playgrounds are allowed in the Residential B zone. There could be a playground there that did not have a daycare center or school next to it and that would be allowed. Ms. Barnes said it is an accessory use. Ms. Trow said a playground is fun but it's also used for teaching physical education such as building muscles and problem solving, like what is learned in school. Ms. Vose added it's the building blocks to learning in school. The things you do with the larger muscles helps the things you do with the smaller muscles which help you be able to work with keyboards and that all these things build on each other.

Ms. Vose made a motion to grant the appeal. Mr. O'Keefe seconded the motion.

Mr. Edkins said he had to come down to the idea that it is a school. It looks like a school, it acts like a school. Education is a component and it fits the definition of a school as close as we can come to a definition. "I agree with the motion that no variance is required."

Ms. Barnes disagreed. This is about two different animals. One is about child care and the other is about education.

Ms. Trow said she thought it was education and whether you call it a school or day care, if children are being taught their colors and their numbers, singing songs or how to hop on one foot, they are being educated.

Mr. O'Keefe agreed.

Ms. Vose said she feels like the definition fits. She understands there is a firm definition of a school but it is a school along with a day care in the broader meaning within the age group. Yes.

Ms. Trow called for a vote. The vote was 4 yeas and 1 nay so the appeal was granted.

## **Gravel Pits:**

Inspection of gravel pits were assigned at the September meeting. A couple of teams submitted their inspection forms. Thank you. Other teams may hand in their inspection forms at the November meeting.

## **Handouts:**

Chair Leclerc distributed a few papers to the board. The paper had ideas to help the board function more smoothly. The board will discuss these handouts at the November meeting.

**Clarion article on non-conforming use.** By Dave Edkins.

Mr. Edkins distributed his piece for The Clarion at a previous meeting. Ms. Barnes corrected a couple of typos and the piece reads as the following:

### **Zoning and Non-conforming Uses**

The term “non-conforming use” refers to an existing use of land or buildings that does not conform to the specific requirements of the Walpole Zoning Ordinance. Usually, it refers to a use which legally existed prior to the enactment of a zoning requirement or provision but which no longer complies with the newly enacted provisions. The term can apply either to the actual use of the property; e.g. a commercial use of residential zone; or to an existing property’s non-conformance with the dimension requirements specified in the ordinance; e.g. minimum lot size, minimum road frontage or building setbacks from the property line.

The Walpole Zoning Ordinance provides that any legally preexisting, non-conforming use may continue in its state in perpetuity. Such uses are often referred as “grandfathered.” But if such use is intentionally discontinued for a period of one year or more, it may not thereafter be reestablished without approval of the Zoning Board of Adjustment (ZBA) after it holds a public hearing on the matter.

The Walpole Zoning Ordinance also provides that a legally exiting non-conforming use may be expanded, enlarged or even changed to another non-conforming use, but only with the approval of the ZBA when it finds, after a public hearing, that the expansion, enlargement or change will not materially increase the hazard or nuisance value of the nonconformity with respect to the surrounding properties in the same zoning district.

When a question arises as to whether a particular use or piece of property is legally non-conforming, it is the responsibility of the Select Board, in their capacity as the administrative and enforcement authority of the Walpole Zoning Ordinance, to make that determination. Such a determination may be appealed to the ZBA if there is disagreement with the Select Board’s decision.

Mr. Edkins will make any corrections and send the final copy to the chair.

### **Abutter fees for certified letters**

The cost of sending certified/return receipt letter has gone up to \$7.85. The ZBA currently charges \$8 for abutter fees. Some members of the board thought the fees should be raised to cover the secretary's time for writing out and posting the letter. A motion was made and seconded to raise the abutter fees to \$10 per abutter. The motion passed unanimously.

### **Adjournment**

Ms. Trow made a motion to adjourn. Ms. Vose seconded the motion and the motion carried.

Respectfully submitted,  
Marilou Blaine  
Secretary

cc: ZBA, WPB, Town Offices, The Walpolean.

Posted: Inside the Town Offices, on the bulletin board outside the post office,  
[www.walpolenh.us](http://www.walpolenh.us)

**Next meeting October 19, 2022.**