**TOWN OF FREEPORT**

**BOARD OF APPEALS**

**Monday, April 7, 2025**
**Beginning at 5:30 P.M.**

**FREEPORT TOWN HALL COUNCIL CHAMBERS**
**30 Main Street, Freeport, Maine**

## Minutes

**Attending**: James Arrison, Dr. Ronald Davis, Jordanna Feely, Vice Chair Shannon Garrity, Pauline Levasseur, Chair Preston Noon, CEO Nick Adams and Town Attorney Amy Tchao

A workshop was held with Town Attorney, Amy Tchao from 5:30 -6:30

Chair Noon opened the meeting at 6:40 p.m. and welcomed new members: James Arrison, Jordanna Feely and Pauline Levasseur to the Board. He explained that the Board is dealing with a tabled matter this evening to consider a setback variance for construction of a new one-family dwelling for James F. Hughes, 26 Spar Cove Road, Tax Map 27, Lot 8, Book 6750, Page 7.

He asked the new members if there is any conflict of interest? Ms. Levasseur pointed out that she may have a potential conflict of interest in that Mr. Davis is her attorney.

**Minutes** of the August 27, 2024 meeting. Chair Noon asked if there are any amendments? Dr. Davis advised that he was at that meeting and made motions but he was not listed as an attendee. Vice Chair Garrity pointed out that under Tabled Matters in the paragraph that starts with Attorney Tchao, she is listed as Chair Garrity when she is our Vice Chair. She referred to the 5th paragraph where Ms. Leone pointed out that Mr. Hardenbergh abstained. He mentioned the straw poll but is intending to vote on this application tonight. Mr. Hardenbergh mentioned that **she** would have to wait and that should have been **he.**

> **MOVED AND SECONDED:** To approve the minutes as amended. (Garrity & Davis)
> **VOTE:** (3 Ayes) (3 Abstentions: Arrison, Feely and Levasseur) (0 Nays.

Ms. Levasseur disclosed that she feels she is able to honor the facts of the case to make her decision. There is no relationship to the matter before the Board and can be impartial and apply the facts in the law in this case. Other Board members did not voice any objection to having Ms. Levasseur vote in this matter. The applicant did not voice any objection as well. Attorney Tchao pointed out that Board members should vote on whether Ms. Levasseur, should be allowed to remain and participate.

Chair Noon asked the Board to vote.

**MOVED AND SECONDED:** That Ms. Levasseur be allowed to participate. (Noon & Garrity) **VOTE:** (6 Ayes) (0 Nays)

## 1. Tabled Matters, Unfinished, or Remanded Business:

Chair Noon asked for our tabled matter to consider a setback variance has the Board reviewed the materials and are they versed in the case? Attorney Tchao trying to be more specific, noted we have three new Board members who were not present in the proceedings. She provided a brief synopsis procedurally and why we are here tonight. She requested that Mr. Arrison advise the materials he has reviewed. Mr. Arrison believes he has seen and read carefully all of the legal documents, all of the minutes, all of the applications and the statements from the various lawyers as well as the court decision, the deliberations as they have been in the minutes here, the audio and relevant ordinances and listened to the entire recording of the last two meetings.

Ms. Feely advised that she read through all of the materials. She did not watch the meetings but read through the minutes of the meetings. Ms. Levasseur advised that she read through all of the materials given to her and did not listen to the audio but did read all the minutes. Attorney Tchao asked the three remaining Board members that have been here since the beginning, is that correct? Dr. Davis added that having read the minutes and listened to the audio, the minutes are extremely detailed and he did not learn anything additionally from the audio that he didn't see in the minutes.

Attorney Tchao asked if there is any objection from either party to the three new Board members participating in this matter? Both attorneys did not voice any objection.

Mr. Adams explained what he sent in the record. Everything every Board member had was the original variance application, all the briefs from the attorneys on both sides , the meeting minutes, the audio from the meetings, the entire record to the Superior Court, the superior Court's decision and the whole record is all the briefs to the court from al parties so there was a couple hundred pages in that one and everything that was part of the record, each Board member has from Day One.

Attorney Tchao added very good and pointed out that the applicant first brought an application to this Board on July 14, 2023 to apply for a side setback variance for a single-family dwelling on a lot we will call Lot 49 for the purposes of this proceeding. There was a public hearing on February 5, 2024 before this Board. There was a decision rendered on March 4, 2024 and the decision was that the setback variance issue was not reached by the Board because the Board made a determination that Lot 49 was not a legal lot of record and could not be built upon and that was a threshold decision that made consideration of the variance request not something that the Board decided to reach. The Board never reached the setback standards or the merits of that request. That decision was appealed to court and Superior Court issued a decision on December 18, 2024. Essentially what the court said was you should have applied the setback variance criteria. The court did not touch the question of the Board's finding that Lot 49 was not a legal lot of record but the question of whether this is a buildable lot isn't something necessarily a decision the Board should have used to prevent from getting to the setback area so the court remanded this case back to you to apply the setback variance criteria to the application.

We talked about what standard of review should be in various proceedings and this is a proceeding where someone is before you on a remand but asking for a setback variance. You are going to be looking at Denovo, the evidence can come in regarding whether the four or five prongs of the setback can be met. You did not reach that evidence so she feels it is open and fair game for the record to be developed actually on that issue so you can make a decision. In general, the Board will be asking the applicant who has the burden to show that the four or five prong standards have been met.

Attorney Jonathan Davis advised that he is representing the applicant and feels it is a pleasure to see all of the Board again and some for the first time. He appreciates hearing the thoroughness which the new Board members have prepared themselves for today and he is sure the sitting Board members have done the same so he will not rehash all of the preliminary points they made.

Counsel will recognize that we are talking about what we refer to locally as Lot 49. Mr. Hughes owns three lots in the neighborhood shown on the application in repeated surveys from as early as 1960 to the most survey from 2024. He is here today to ask for a setback variance pursuant to Ordinance Section 601.G.2.C.5 and there are some very specific criteria the Ordinance requires and they believe they can check each one of those boxes. The first criteria the Board needs to address is whether the need for the variance is due to the general condition of the neighborhood or to the unique circumstances of the lot. If the Board looks at the recorded plans, you will see that we started from as early as 1960, your typical 1950 small lots and over time many of the lots were combined in keeping with more modern times. Part of the submissions from their first hearing included minutes from the Planning Board from a 1976 or 1977 amendment that talked about updating the size of the lots to reflect market conditions. Lot 49 was not changed and remains as it was. Lot 49 unlike many of the lots in this subdivision is undeveloped. Most of the lots have been combined into larger lots that have structures on them. The Board has the submissions they provided regarding analysis of the tax records showing the construction, the lot size of each lot and also when the lot was improved on the tax map.

They are talking about a unique lot. One that has not been developed and one that has not been combined. From that perspective, it clearly shows that it is unique and not subject to the general conditions of the neighborhood. There are not other lots like this in the neighborhood.

The second criteria: was the hardship the result of action taken by the applicant or former owners? The answer they believe is absolutely not. The hardship is the result of the changes made to the ordinance after this Lot 49 was created. At their last hearing, the Codes Enforcement Officer provided some information that the district in which this property is located was created around 1976. The Board has the materials that clearly show that their lot was created in 1960, Sixteen years prior to the Ordinance change. The hardship is not because of something that has been done by the applicant or prior owner. The hardship they submit is a result in the change in the Ordinance in 1976, not by the applicant.

The next criteria: is the variance going to alter the essential character of the neighborhood?
They believe the answer to that question is no. The neighborhood is full of houses of different styles, different locations, some built prior to the 1976 Zoning Ordinance and many built thereafter so they have a mis-mash of different house sizes, house styles, lot sizes and lot styles. They firmly

believe given the various residences that the setback is not going to have any negative impact on the neighborhood or specific properties. In fact, as the material shows, two of the lots in the immediate vicinity already had under a different ordinance scheme have had setback reductions. The McClelland lot has a setback reduced by 23 feet. That is the common line they are seeking a reduction for as well. The lot across the street, the Blanchard/Kipp lot had a reduction of approximately 2 feet. The McClelland variance was in 1998 and predates their ownership and the Blanchard/Kipp variance was in 1992. You will also see the McClelland line and the location of the McClelland structure on the Owen Haskell survey of Lot 49 that is in your materials. The difference here is that rather than coming to the Board and begging for forgiveness after the fact, they are coming to the Board beforehand and asking for permission. The two variances he just mentioned were based on the Mislocated Building Variance process in town where the owner built a house that encroached into the setback. They don't want to do that. They want to come and ask for permission for the process they want to do. Again, the main line in question between their fellow lot and Jim's lot is a wooded forested lot so not only do they have the setback buffer and they are only asking for a reduction o 10' on that line from 50 feet to 40 feet. There is a plethora of vegetation between the two buildings between where they would like to build and residences. There is not only going to be a spatial buffer still of 60 feet. There is also a natural buffer in terms of growth and trees and greenery foliage that will provide buffering between the two.

Now Mr. Hughes owns the lots on the other side of Lot 49 as well and although their preference would be as the application requests, a 10' reduction on each side of the side setbacks. If there is real concern amongst the Board of the potential negative impact on the direct neighbor, McClelland, Mr. Hughes would certainly be willing to entertain, consider and be pleased to deal with keeping the McClelland setback line at 50' and reducing the setback on the other side by 20'. Instead of having 10' on each side, which presumably we are impacting the McClellands and we don't feel it does, we could certainly keep the McClelland's setback intact, unchanged and shift the burden if there is such a burden to Jim's property, by shrinking his property by 20' on his common property line. They also think the request is based on a demonstrated need. The Board has the plans of the survey that shows the very narrow building envelope based on the 50' setbacks. What they have is basically a 20' wide strip where there is a building envelope that is barely wide enough for a single-family mobile home but they are not allowed in the RR-II District. That is the type of structure that under the current setbacks, could potentially be put in there. They think that is a detriment to the neighborhood and a detriment to the neighbors and having the ability to build something that is more in keeping with the general characteristics of the neighborhood such as the dotted line on the plans that Mr. Hughes submitted with his original application, something along the lines of a modern farmhouse structure or cottage structure would be much more appealing than in essence a stick-built mobile home. The other alternative available to them, of course, is the McKneely lot down in South Freeport on the Harraseeket River where there was a setback issue and a tower was built that is totally out of character with everything else in the neighborhood but that is not something Mr. Hughes wans to do to the neighbors. He wants to build something that fits in and is as compatible in harmony with the other homes in the area. In terms of the no feasible other alternative, Attorney Davis hopes that the Town's attorney will echo what he is about to say. The rule of ordinance construction is if a word is undefined in the ordinance, we use the common everyday definition of the word in its everyday meaning. He emphasized that because "feasible" in its ordinary everyday meaning does not mean "possible." Feasible means practical, likely to occur. While it is true that there may be other possible alternatives for Mr. Hughes within the

existing building envelope, the question then becomes not only whether it is feasible and their position is that it is really not. In the 20' area, a 16' wide single-family he supposes could go in but is it really practical or feasible? They suggest no.

The other criteria is it is obviously going to be for a single-family residence and that is what they want to build and that is what the application clearly states for a year-round residence for the occupant. Mr. Hughes' submission explains his logic an what he is trying to do. In fact, attached to the McClelland's most recent filing, there is a note from Jim to Blanchard from September of 2023 and Mr. Hughes is very candid in that letter with his plans. He would like to have alternatives for Lot 49 but when you focus on the third to the last paragraph in that letter, it addresses this particular point. He says in effect to his neighbors in writing, "If they don't buy half of Lot 49, my plan is to build a smaller house on the lot and move into it and then sell my existing house. The house I want to build is more than 20' wide so therefore I have begun the process of getting the Appeals Board's approval to reduce the side setback on Lot 49." In September of 2023, outside of the presence of this Board, in communications with his neighbor Mr. Hughes is setting forth the criteria of using it as his primary residence. He is telling them to read that letter about some of the financial hardship he is experiencing, about the impact of the divorce and its financial obligations and trying to figure out how he can stay in Freeport and use Lot 49 to do so. When you look at the opposition and you heard, "oh, it's not his primary residence." Of course, it is not today. He needs to talk to the Board first to build the primary residence that he has been consistently talking about building since at least 2023. The opposition asks this Board also to go down the rat hole they went down last year. The opposition argues that even though the court didn't expressly overturn the Board's determination but sent it back to the Board for a decision based on the Ordinance's criteria, we should somehow give weight to the decision of the Superior's Court and the Court's earlier decision to find that this lot is not buildable. That is not the question. The question is that the Town's Counsel appropriately pointed out are the Ordinance's criteria as part of the natural planning process we will deal with whether or not the lot is buildable after we receive the variance decision (your thumbs up or thumbs down).

In conclusion, they feel they have checked all the boxes of the criteria and in each one they feel they met clearly and, therefore, ask again either a 10' on each side for the side setback reduction or if the Board feels that will have too much impact on the neighbor, shift the burden of the setback reduction onto Mr. Hughes and buffer the neighbor and reduce the setback on the other side between Lot 49 and Lot 50 by 20'. He offered to answer any questions the Board might have.

Vice Chair Garrity did not have any questions now but wanted to reserve the right to ask some later.

Attorney Gordon Smith explained that he is representing two sets of neighbors to Mr. Hughes. One is David McClelland who is the immediate adjacent neighbor to the area where the setback request is being made and the other is Guy Blanchard and Michael Kipp from across the road. It is true that the Superior Court instructed the Board to apply the setback variance criteria and the Board needs to do that because that is what the court said. However, that needs to be contextualized. The court did not expressly reach the question of whether Lot 49 is a separate buildable lot. From the original hearing, the Board found, based on all the evidence submitted that in this former subdivision lot, Lot 49 is not a separate buildable lot. That has not changed. What

the court said was it wanted the Board to reach the merits regardless of whether this lot is buildable or not, they want you to reach the merits of these variance criteria. So, the Board is required to do that. They heard the applicant say Mr. Hughes owns three lots. That is a mischaracterization. They are three former subdivision lots that make up what is now Mr. Hughes' parcel but in terms of what is a lot under the ordinance, the lots have all merged and that is what the Board found in the first go round. The lots had merged under the ordinance and, therefore, there are not three lots on that property. There is one left as deeded under the terms of the ordinance. What Mr. Hughes is proposing to do is create a new lot on Lot 49. It is not a lot in the ordinance but he wants to split it off from the rest of his parcel that has been merged into one lot. His asking for a setback variance on what he is proposing to create as a newly created lot. That Lot 49 is not conforming under the ordinance because it is undersized in terms of lot area. The ordinance requires 2 1/2 acres per lot in this Zoning District and Subdivision Lot 49 is .8 of an acre. It is also non-conforming as to road frontage. The ordinance requires 200' of road frontage and this is just over 100'. When we are talking the variance request and the request is being made on this Lot 49, that lot doesn't even exist. There is no Lot 49. As Attorney Davis said, there have been a couple of different subdivision plans over the years to create lots by combining several former subdivision lots. Many of the lots in the neighborhood are comprised of multiple former subdivision lots.

To give some color to what happened with the court and why the court remanded this, if this is not a legally independent buildable lot, why is the court making the Board apply these variance criteria? He thinks the court misunderstood what was happening. He thinks the court thought that the lot was unbuildable because of the setback issue. The court said that the Board found that the lot was unbuildable but in fact, the Board's findings in the first go-around said the lot was unbuildable but it did not say that the findings of fact did not specify that it was unbuildable because of lot size and road frontage. It said it was unbuildable because it had merged with the other lots on Mr. Hughes' parcel, the former subdivision lots. He thinks the court thought that well, you come before the Board with a variance request and the variance request is intended to make the lot buildable, you can't just ignore the variance because that is what the person is there to do and say we need relief in this particular standard in order to make this lot buildable. That is true and would be proper. If this lot were not buildable because of setback issues, and the applicant came before you and said we are requesting a setback and you said it is not buildable so we are not going to hear your variance request. That is what the court did not understand that the lot was not buildable not because of the setback issue but because of the lot size. He is interpreting the court's order.

He would ask, and the Board might not do this, but he thinks it would help clarify the situation for the town and the parties if the Board in its findings tonight would include a finding to clarify the basis for "Lot 49" being not a separate buildable lot being the fact of its road frontage and size.
That said, we need to apply the variance criteria as the court asked and there are several criteria here and he wanted to start with this no feasible alternative and the standard has to be based on a demonstrated need and not convenience and no other feasible alternatives. Those are two different questions there. As shown in the submission they gave to the Board last week, Mr. Hughes' current house has been there well before Mr. Hughes bought the property in 1985 and is 25' wide according to the Town's tax records. Mr. Hughes is asking for a variance that would create a building envelope of 38 ½' wide so the question of how do you want to define "feasible"? Right next door in the house Mr. Hughes is currently living in, 24' seems feasible. The applicant has

demonstrated that it is based on need not convenience and there is no feasible alternative, he does not feel that standard has been met. Mr. Hughes in his application said it would be feasible. He could build a 20' wide stick-built building There have been many plans for houses that are 20'. Without the variance, the building envelope is 163' so he could build a 20' wide house by 100' 80' or whatever he wants that would be more than ample in size and the plans are for very nice houses. He thinks that Mr. Hughes' own submission shows that there are feasible alternatives and the setback that he is requesting that would create a 38 ½' wide building envelope it based on what he wants rather than needs.

When we are talking about the unique circumstances of the property, the standard is that the variance is needed not due to the general conditions of the neighborhood but due to the unique circumstances of the property and we heard from Counsel for the applicant say, "Lot 49 is a vacant lot and that is unusual in this neighborhood. Again, there is no Lor 49. Right now, Mr. Hughes' property is a single undivided parcel that used to be three different subdivision lots but now is a single lot under the ordinance and that is the lot that should be looked at. As discussed, most of the lots in this area consist of multiple former subdivision lots.

The hardship is not the result of action taken by the applicant or former owner. Here we have a single undivided 2.8-acre parcel that Mr. Hughes is proposing to create a new lot and is asking a setback variance on that newly created undersized lot. That is a 100% self-created hardship. Then we have the standard about: granting the variance will not substantially reduce or impair the use of the abutting property. One question is why do Mr. Blanchard and Mr. Kipp care about this and the idea is that the zoning regulations are there for a reason and when Mr. Blanchard and Mr. Kipp bought their property in 2016, we had the 2 ½-acre minimum lot size that was part of the ordinance when they bought their property across the road. They looked out at this property and understood based on the ordinance, that the property across the road would not be further subdivided. That is what the ordinance required so one house in the neighborhood is not going to change the neighborhood but it will affect the immediate abutters and what their reasonable investment based expectations on the law in Freeport were.

We heard about the setback issues and the fact that there were setbacks granted to prior owners of the McClellands and the Blanchard/Kipp parcels. These were granted in 1977 and 1982 or 1983 or 1992 under circumstances that we do not know. They have little persuasive value for what the Board is being asked to do tonight. The setback reduction on what is now the McClelland parcel was granted in 1977. Their house was built in 1977 and those setbacks and the lot sizes then were totally different than what they are today. Saying that this happened 50+ years ago under a different ordinance standard at the time the house was built has anything to do with what is happening today. Whether or not this is going to be Mr. Hughes' primary residence, no one can really know that. We have various statements and that is not something the McClellands or Mr. Blanchard and Kipp have first-hand knowledge of. That is an intent by Mr. Hughes and we know there have been statements in the record. With that, he offered to answer questions.

Vice Chair Garrity had a question about Attorney Smith's comment about color commentary of what happened at the court. She obviously was not there but reading the order, the first sentence in the last paragraph, "Regardless of the characterization of Lot 49, single lot, merged lot or lot of record." Reading that sentence, she found it to be clear to her that they knew there was some piece

of information about was it a single lot, a merged lot or lot of record? She asked if he wanted to change his opinion or is he still sticking with that? Attorney Smith does not feel that that statement by the court is inconsistent with what he said. The court said it is expressly not reaching the question of whether or not the lot was merged, whether it is an independent lot, a merged lot or any of those things, it didn't reach that question and said "The Board finding that it could not apply the variance criteria." This is based not on that sentence but on the other reasoning that pointed out the variance standards and the non-conforming lot standards and said, "look you can build on a non-conforming lot without a variance and you can get a variance to build a non-conforming lot so the Board cannot shirk application of the substantive variance criteria based on a determination that the lot may be unbuildable. That reasoning of the court makes sense if the reasons the lot is unbuildable is the reason for the variance request. It doesn't make sense if the lot is unbuildable for other reasons and you come in for a variance request for something that has nothing to do with the unbuildable nature of the lot and the court saying, "you can't deny the variance based on the fact that the lot is unbuildable if what the applicant is asking for is relief so the lot can be buildable." Here the setback is not related to the lot being buildable. The lot is either buildable or not buildable unrelated to the variance request that is being made to the Board. The lot is unbuildable is not what the Board found in the first go-round and the court did not expressly reach that the lot had merged with the other lots and under current zoning standards, the lot that was being proposed (Lot 49) did not meet the current zoning criteria for a buildable lot. As he said, the Board's Finding of Facts in the first go-round did not expressly say it was not buildable because of lot size and road frontage. It did not make that express determination so that, as he said, he is interpreting the court's order. Let's say that the Board finds that the lot is unbuildable, the Town finds the lot is unbuildable, Staff finds that the lot is unbuildable because it is not a conforming lot. It is not an existing lot. It is a newly created lot that doesn't meet zoning standards so you can't build on it.

Dr. Davis added that obviously, if the lot were buildable, there would be no need for a variance and no need to have this meeting. Attorney Smith explained that given the lot size requirements of 2.5 acres, you could have a lot that met the lot size requirements of 2.5 acres but was very narrow, so some setback relief was requested because of the configuration of the lot. You can have a buildable lot but still need a setback reduction because of the irregularly shape of the lot. That is something that happens. He advised that someone can request a variance for both lot size and road frontage requirements but it is a different variance test than the setback test. The setback variance request's criteria are that the need for the variance is based on demonstrated need and not convenience and no other feasible alternative is available. That only applies to setbacks for single-family homes. It is a much lower standard than a normal request which is a very high standard.

He advised that Mr. Hughes could come to the Board and say, "I want to create Lot 49. It does not meet these particular dimensional standards and I want a variance from lot size and road frontage". He would need to prove that the need for the variance is not due to the applicant and that would be an issue in this case where you have what the Board has determined a single new merged lot and a new lot is being proposed for creation.

Attorney Davis implored the Board to not once again go through the looking glass and implored the Board as he knows they will do, to read your authority. Your authority is to hear appeals from decisions made at the administrative level by other town officials. Your authority is to hear in the first instance variance requests. This Board does not have the authority in this context to make the

determination of whether or not a lot is buildable He suggested that the Board read Section 601 of the ordinance. The natural planning process involves application for a building permit, a threshold determination by the permitting authority about whether the project meets the ordinance and if somebody is aggrieved by that determination, such as whether the lot is buildable, whether or not the lot is merged. If someone disagrees with the original determination made, then this Board hears it. It is called an appeal. This Board in a legal parlance has original jurisdiction and in the eyes of law, original jurisdiction means to hear the case in the first instance over appeals. They are not here appealing anything. They are asking for a Section 602 Variance. Your inquiry should then be limited to those specific criteria. Don't go down the rabbit hole of reported, alleged, on Lot 49. That is not your issue today. Your issue today are the specific criteria in the ordinance regarding the setback request. Don't short circuit the planning process. Don't fall for the smoke, mirrors and flashing lights of Lot 49 being an independent lot, a lot of record, former subdivision lot. That doesn't matter. The Superior Court decision tells you to follow your ordinance and unless you can put something in the ordinance for the criteria for a setback variance under Section 602 that says is the lot buildable, has the lot merged, is it Lot 49? Unless it says that in the ordinance, don't do it. There were claims that expressly referenced during Codes' presentation that setbacks and lot sizes back in 1977 were totally different than today. That is right and that is why they are here asking for a variance because they are different and they are asking the Board to give them the setback variance. Again, the Board can use its common sense to determine a determination on what the term feasible means. Again, don't rise to the bait. Make your determination based on Section 602, the ordinance's criteria. He thanked the Board.

Vice Chair Garrity asked Mr. Adams and Attorney Tchao if an accessory apartment and accessory structure can be built in the RR-II? Mr. Adams replied that they can be. If the argument is that this is one lot, there is nothing that Mr. Hughes' neighbors can do to prevent him from building an accessory apartment. Mr. Hughes agreed and added that he can put a 20' wide house there right now. Vice Chair Garrity advised him that he would only have to conform to the one side if all three of the parcels are a single parcel, Mr. Adams added that we agree that the ordinance appears under Section 532 to allow the construction of an accessory dwelling unit. He thinks it was the Statute the Legislature adopted about two years ago and the governor signed it to permit Accessory Dwelling Units. We have various rules but he is familiar with the section. He thinks it is 532 but the State's enabling Statute talks about the number of dwelling units, how they can be configured, whether they can be a duplex or a separate detached dwelling. We agree within those requirements that we could on Jim's three lots, create such a lot.

Attorney Davis directed the Board's attention to the letter that the opponent submitted that Jim wrote to the neighbors where he is talking about trying to sell the main house and build a retirement place. Mr. Hughes added that he has a three-bedroom house now and wants to move into a two-bedroom house.

Vice Chair Garrity mentioned the court's continued use of undue hardship which she doesn't feel is required here. Attorney Davis wanted to address this with an unbiased approach. Undue Hardship is a term of art. Freeport's ordinance defines it twice. When it comes to your jurisdiction and your authority, once is the traditional variance request and there are five criteria that are defined as being undue hardship. There is a different definition or different term of art when it comes to the setback variance. The term is used but it means term of art that means one thing in a

personal records setback request and another thing in the context of the 602.C.5 or whatever it is for a setback. Attorney Tchao agreed. She advised that the term undue hardship is mentioned both in the variance appeal under Section 601.G.2.B and suggested calling it the no reasonable return highest ascriptive variance. Under 601.2.G.C. the setback variance for a single-family dwelling that is a year-round residence, you can see the reference in that language with undue hardship in quotes so when you are looking at a setback variance for a regular single-family dwelling, they do call it an undue hardship but the standard is that no reasonable alternative or demonstrated need. She does feel the court uses some confusing terms there but regardless of whether Lot 49 is a buildable lot, the court is asking this Board to apply the setback variance criteria and standards to that "lot" letting things go from that point on and whether or not the lot is unbuildable because it is merged or there are other dimensional requirements that Lot 49 does not meet or where a variance has not yet been applied for. Whether that is the case, this court did not reach a clear decision on that and the Board did not reach a clear decision on that. She thinks the task before you is to apply the merits of the actual setback variance criteria to this lot and let the rest play out. When the rest plays out, it is possible you will see another variance application but she cautioned the Board about what may happen. What the court has asked is pretty clear. Dr. Davis wanted to be clear that the Board is not being asked to give a variance to build a building there. We are being asked to give a variance on the setback. Attorney Tchao agreed. He mentioned that later on there could be a problem with the road frontage or the size of the lot, etc. What specifically is being asked for the variance? He has heard a couple of scenarios. Is there one specific scenario that we are supposed to be considering? Attorney Davis advised that the application asks for a setback reduction on each of the sidelines by 10' so from 50' to 40'. Under the ordinance, the Board has some discretion and what we have proposed is an alternative that might minimize the perceived impact on the McClelland lot by keeping that 50' setback intact and instead reducing the common setback for Lots 49 and Lot 50 as shown on the original subdivision plan from 50' to 30'. They are looking for a total 20' reduction. They would prefer it to be 10' on each side but if the Board is overly concerned with the potential impact on the neighboring McClelland lot, shift that burden onto Jim so it will be 50' on McClelland and 30' on the common boundary for Lots 49 and 50 shown on the subdivision plan.

Dr. Davis asked if 50' is the standard? If you wanted to build a little house to live in, and an Air B&B on the current house, all he has to be is 50' from the McClelland lot with this new house? Mr. Adams explained he would have to have 50' setback off the sideline and the front and 75' on the rear for any new structure. Whether or not he can have another dwelling there is another provision and we don't want to go down that rabbit hole.

Attorney Davis pointed out that it is their understanding that deciding on that variance as it is before us now in no way prejudices any of the other decisions that go forward about what may or may not be allowed to be built there. Attorney Tchao agreed and added that since we are here on remand, the original application proposed 10 and 10. What you are hearing from the applicant is that they would consider 20. She would urge the Board to at least in its deliberations, review this application as it was presented in the original application. It was not presented in the alternative. It was presented as 10 and 10 and not 20 on one side. If the applicant wants to come back and ask for a new setback variance in a different application, he can do that. Mr. Arrison mentioned that if it is declined, there is a year before they can do that and Attorney Tchao agreed there is that provision but she is not ready to make that call. It is not in the application before the Board.

Chair Noon asked if there is anyone from the public that has something to add? No one came forth.

Vice Chair Garrity suggested looking at the five criteria and a couple of them are pretty easy for her to say yes. No. 2. the granting of the variance will not alter the essential quality of the locality. She has driven through Spar Cove many times and knows people that live there and she does not think the plans we were shown would change the character of any area in her opinion.

Attorney Tchao asked other Board members if they wanted to comment if this would alter the character of the locality? Mr. Arrison concurred that it would not. Dr. Davis added that he has never seen the area so he has no idea. No other comments were provided.

Chair Noon closed the public hearing and moved to Board discussion. Ms. Levasseur pointed out that looking at No. 2 she does not feel that a 10' variance on each side will alter the essential character of the locality. Ms. Feely concurred. Dr. Davis advised that he feels it is a big enough lot with road frontage and it seems to him that these five criteria are met for a variance setback.
He knows that he is not necessarily to take that into account but if we are just dealing with the setback itself, he has no problem finding that it meets those five in the 10' setback.

Attorney Tchao wanted to take them one at a time. Chair Noon suggested starting with the first that the need for a variance is due to the unique circumstances of the property and not the general condition of the neighborhood. Board members concurred that the width of Lot 49 is such that limits with the 50' setback, a 20' wide house and looking at the requirements the applicant is limited to a 50' tall house so that becomes pretty small. It is a very small footprint and she does not think the size of the house being requested is abnormally large for this area or this lot.

Chair Noon pointed out No. 3 that the hardship is not the result of action taken by the applicant or former owner. Mr. Arrison noted that to him, this is based on matters raised and he is not sure about this. The sticky wicket here for him is if we are looking at it as three separate lots, the thing that brings us to this point is something the owner never had to deal with and did not do. No. 3 seems clearly to be true. If we are dealing with one big lot and this is how the owner is attempting to subdivide it, which is not happening here tonight, but will have to happen elsewhere that would be where he is uncertain. Vice Chair Garrity echoed that but does not necessarily think it is the owner but wonders about the prior owner.

Dr. Davis feels it seem like the reasons for a lot of the hardship is due to changes in the ordinances from the time the lots were created and the buildings were built rather than the owner or prior owner. It is nobody's fault. It is what it is.

Chair Noon read No. 4. The granting of the variance would not substantially reduce or impair use of the abutting property. Vice Chair Garrity and others noted they feel this was met and have not heard any argument about that.

No. 5. The granting of the variance is based upon demonstrated need and not convenience. No other feasible alternative is available. Mr. Arrison feels that one can build an attractive stick-built house within the 20' width that would fit in the neighborhood and could look like a cottage and

does not need to look like a trailer. He thinks a decent case has been made that there are feasible alternatives. Ms. Feely agreed that there are feasible alternatives and not all alternatives have been explored yet. Ms. Levasseur feels there is a demonstrated need. She knows that information was brought forth that the building envelope for what is being proposed was 38' x 38' but that also includes a garage. She is asked if she is correct in that the proposed building will also have a garage when it was stated that the current home the applicant lives in is 25' but that was not including the square footage of his current garage? Vice Chair Garrity pointed out that the draft paper drawing of the house in the original application from August shows that the garage does go a bit wider than the house for that particular design. A question was directed to Mr. Adams if Freeport has a standard for a minimum sized garage" Mr. Adams advised the answer is no.

Ms. Levasseur referred back to No. 5 and stated she does not feel there is a feasible alternative that could be built for putting a house and a garage in the current available building envelope at 20' wide. Vice Chair Garrity added that the length of the buildable space is 160' but Mr. Adams noted it could be a bit skued. The height limit is 35'. She does not think the house being requested is abnormally large for this area or this property but she does think there is value in looking at changing the orientation of the house to find a different place to put the garage and end up with a flatter elongated house and see if it would fit in there. Can the garage go behind the house or further away from the house? Dr. Davis asked if the driveway can be in the setback? Mr. Adams replied yes. Chair Noon feels there are feasible alternatives and Dr. Davis can see that a change in the alignment of the house, garage and driveway would probably be feasible to keep it in the footprint. The house would be 20' deep.

Attorney Tchao asked if there are other comments before going to a finding that this is a primary year-round single-family residence of the applicant? This is another standard that needs to be met. It is in the record as evidence presented. Dr. Davis added that the applicant is working very hard to get this done. There was consensus that this is a primary residence. Dr. Davis asked if we decide to not allow the 10 or 10 variance which is all we can decide on tonight, do they have to wait a certain period of time before they can come back and say we want to go with no variance on one side and 20 on the other? He is thinking of hardship on the applicant. Vice Chair Garrity added that they have the option to withdraw their application today. Attorney Tchao wanted to find the section that describes the denial of an application. Mr. Adams read the section into the public record. Dr. Davis asked if nothing on one side and 20' on the other would be considered the result of not being able to obtain the first variance requesting a totally different variance? Mr. Adams advised that he feels sit would be up to the Board to make that decision but we should probably ask Attorney Tchao. She advised that the Board would have to apply that but if the applicant provides substantial new evidence, would the Board change its mind on that or if there is a misunderstanding of facts or error on the stated law but she is not sure what that could be. She feels the Board is right to raise it but it could be addressed to the Board and you could make a decision on the application presented to you.

Dr. Davis mentioned his greatest concern is its effect on the neighbors, that could make a big difference in a decision of this Board but his sense in going through each of the points is that that was not the biggest concern. His biggest concern was No. 5 and it would not be affected by where the thing was located. If there is new evidence on how it is not feasible that he has not heard today.

He was thinking if they came back and said they just don't want to build this thing only 20' wide, so they will have to get a variance on the other side so they can build a different building. Mr. Arrison heard him but is not sure that would change the feasibility and Vice Chair Garrity agreed. Dr. Davis feels it would change the feasibility in his mind for 10 and 10 but if they came back with 20' on the other side, and obviously the other side is not going to be the one complaining. He wonders how long they would have to wait to come back. Attorney Tchao feels that thinking about what could happen next falls into speculation and a number of things could happen. She asked if there is any more discussion on the criteria?

Mr. Adams went back to No. 3 that the hardship is not the result of the applicant or prior owner. He thinks the discussion was if this is not a new lot that was created. He thinks that that is the way the Board was going if this lot was standing alone today and was newly created by the owner or previous owner. That is what the whole hinge has been since Day One saying is it a new lot or not

Mr. Arrison feels for him it comes down to the feasibility question of No 3 that would then be moot.

Attorney Tchao added that if she is drafting this and she is not going to be doing it tonight, that in No. 3 there was a sentiment that the hardship was caused by changes in the ordinance and passage of time and not necessarily by the owner or previous owner. That is probably how she would write it. She asked if this agrees with the Board's thinking. The Board agreed. She is pretty clear on the findings but wanted to be sure she covered them all.

Mr. Arrison wanted to be sure that if that does relate to how we vision the way the lots are breaking up that it still does not prejudice any other decision as to whether it still needs to be subdivided. Attorney Tchao agreed and added that it is still an issue off to the future which seems more straight forward to address this.

Vice Chair Garrity wanted Attorney Tchao to be sure to add that line or somewhere based on the evidence presented in No. 3. She agreed.

> **MOVED AND SECONDED:** to have the Town Attorney write up the Findings of Facts as discussed today in the presentation of the attorney for the applicant and the abutter's attorney in discussion amongst the Board for the remanded application.

Attorney Tchao asked if the Board wishes to vote on this and the vote would be a motion to deny the setback variance on the ground that at least one of the criteria which would be the 5th one that there is no demonstrated need and no feasible alternative that that standard has not been met and the motion would be to deny this setback application. If the Board wants to take a vote tonight, she could draft up the notice of decision. She would be comfortable doing that in seven days or the Board could wait for her to draft that decision and come back for a vote at a later date. Vice Chair Garrity advised that she feels we should do it tonight and other Board members agreed.

Attorney Davis pointed out to the extent that it matters, the applicant would be most appreciative if we could have a vote. From what they are hearing, it sounds like the vote would say yes, on 1 through 4 and no on No. 5. Yes, on primary residence etc. Given the length of time this has been

pending, it would provide some real guidance for the applicant. It sounds like it is yes on everything except No. 5 and that would be the motion the Counsel would prepare the proposed findings and would be helpful for the applicant to move forward.

Vice Chair Garrity proposed a different motion.

> **MOVED AND SECONDED:** To vote on the application remanded to us to deny the setback variance request based upon Criteria No. 5 that there is no other feasible alternative standard not having been met although the Board finds that based on the presentation of evidence that Criteria 1 through 4 of the setback variance criteria and the year-round residence criteria were met. (Garrity & Dr. Davis) The Board was polled individually. **VOTE:** (6 Ayes) (0 Nays)
>
> **MOVED AND SECONDED:** To authorize the Chair to sign the Findings of Fact and conclusions within 14 days (Garrity and Dr. Davis) **VOTE:** (6 Ayes) (0 Nays)

2. **New Business Public Hearings:**

   None

3. **Next Meeting**

   TBD

4. **Adjourn**

5. **MOVED AND SECONDED:** To adjourn at 7:50 p.m. (Garrity &Arrison) **VOTE:** (6 Ayes) (0 Nays)

Respectfully submitted,

Sharon Coffin, Recording Secretary