



**TOWN OF MIDDLEBURG
BOARD OF ZONING APPEALS
MEETING MINUTES**



**Wednesday, May 31, 2023
PENDING APPROVAL**

A meeting of the Middleburg Board of Zoning Appeals was held on Wednesday, May 31, 2023, in the Town Hall Council Chambers. Chair Combs called the meeting to order, and the roll was called at 6:00 p.m.

PRESENT: Eric Combs, Chair
H.H. “Dev” Roszel, Vice Chair
Jonathan Gifford
Trow Littleton
Catherine “Bundles” Murdock

STAFF: William Moore, Deputy Town Manager/Town Planner
Rhonda S. North, MMC, Town Clerk
Martin Crim, Town Attorney
Estee LaClare, Planning & Project Associate

Approval of Minutes

Board Member Gifford moved, seconded by Board Member Murdock, that the Board of Zoning Appeals approve the October 17, 2022 organizational meeting minutes as presented.

Vote: Yes – Board Members Combs, Roszel, Gifford, Littleton, and Murdock
No – N/A
Abstain – N/A
Absent – N/A

Public Hearings & Related Action Items

BZA 23-01: Variance of Section 120(D) of the Middleburg Zoning Ordinance Pertaining to Maximum Building Lot Coverage – 403 Lincoln Road – Doug Barbour

Deputy Town Manager Moore explained that this variance request involved the building lot coverage regulations, which were previously titled “lot coverage” regulations. He further explained that the definition was the same, and that the ordinance applied to the area under roof on a lot and identified a 30% maximum coverage. Mr. Moore reported that a permit was issued in March of 2022 for the demolition of the existing house and the construction of a new one. He advised that upon review of the permit application, it was determined that the new home would be constructed to the 30% maximum allowed under the regulations for the R-2 District and noted that prior to the permit being approved, the applicant revised the plans to show the demolition of the existing shed. Mr. Moore advised that when he was contacted for an occupancy permit, he noted that the shed remained, at which time, the applicant expressed a desire to keep it, as he realized its value during the construction. He explained that there was no administrative relief available, and he advised the applicant that the only potential avenue for relief was to seek a variance. Mr. Moore noted that questions have been raised by the neighbors and reported

that the variance request did not involve the newly constructed home, which was built in accordance with the regulations. He further reported that the request before the Board was for a variance to allow for additional area under roof, in the form of the garden shed, and noted that if the request was not approved, the shed must be demolished.

Deputy Town Manager Moore reminded the Board that in order to approve a variance, they had to make certain findings and noted that he provided them with a summary sheet of those findings. He advised that they must make a finding of at least one item in the left column on the sheet and all the items in the right column.

Deputy Town Manager Moore reported that the lot was non-conforming from the perspective of lot area. He reminded the members that the minimum required lot area was 8,000 square feet in the R-2 Residential District. Mr. Moore reported that at 4,700 square feet, this was a particularly small lot and advised that it was unique as to its size. He reported that there were not many lots this size in Middleburg and noted that of those that existed, most functioned in conjunction with an adjoining lot as if it was a single parcel. Mr. Moore advised that the applicant provided additional materials earlier in the day, which were on the members' desks.

Doug Barbour, the applicant, advised the Board that he rebuilt on an extremely small lot and noted that under the application of the Town's lot coverage requirements ordinance, there was no room left for the existing shed. He displayed aerial photographs of the property, taken from Loudoun County's website, which depicted the conditions of the lot in March when he obtained his building permit versus April, one month after the house was built. Mr. Barbour advised that the County maps showed his lot to have a fifty-foot width; however, it was actually only forty feet. He further advised that he left the rear yard untouched, with the exception of having moved the house back by one foot, and noted that the yard had the same maintenance requirements.

Mr. Barbour displayed a photograph that depicted the location of the property boundaries and the footprint of the house. He confirmed the new house, which had a footprint of 1,407 square feet, covered 30% of the lot. Mr. Barbour advised that the house was the same shape and size as the old house's footprint and noted that he simply spun it around and moved the garage to the front. He advised that he reduced the footprint by 202 square feet, or 13%, and reduced the width of the house by 7%. Mr. Barbour noted that the old, covered garage space could accommodate two cars; however, it went to the edge of the property. He advised that they fixed that setback violation when they constructed the two-car garage. He reviewed the location of the utilities that served the new house. Mr. Barbour advised that his neighbor allowed him to use twenty-one feet of his property as a construction access, otherwise, there would have been no way to get the equipment to the rear of the property.

Mr. Barbour stressed that the size of the lot was particularly small and equated to just over 60% of the minimum lot size requirement. He noted that the Town took an additional 3.7 feet of his land for the installation of Town utilities and the widening of the street, which reduced the lot size to 4,692 square feet. Mr. Barbour reiterated that their lot was only forty feet wide and advised that he would need an additional thirty feet to reach the Town's minimum lot width requirement. He noted that he tried to work out a deal with the adjacent property owner to purchase thirty feet from him; however, the deal fell through once he realized he would not be able to subdivide his property into three lots in the future if he sold a portion of it. Mr. Barbour advised that he exhausted all possibilities in trying to do something with the old house. He explained that he looked at alternative home designs to rebuild within the side yard setbacks, while still retaining the functionality of the old house.

Mr. Barbour reminded the Board that the Town Code relaxed the side yard requirements, which allowed him to build a thirty-foot-wide house, and noted that he would not have constructed a twenty-five-foot wide one if he had been required to meet the 7.5-foot side yard requirements. He advised that at thirty feet, he could construct a two-car garage and keep most of the functionality of the old house, with the

exception of the first-floor primary bedroom. Mr. Barbour advised that at 30% lot coverage, a 1,407 square foot house provided an extremely challenging design limitation. He reiterated that he reduced the house's footprint by 13%, reduced the width of the house by 7%, and shortened its length by nine feet if the front porch was included. Mr. Barbour advised that the new home was constructed to meet the building code requirements. He noted that the old house was in bad shape and would have required costly repairs. Mr. Barbour advised that the old water line was a galvanized steel one and the old sewer line was a tar, impregnated cardboard one, both of which required replacement. He reiterated that renovating the old house was not an option, which was why he built a new one.

Mr. Barbour reminded the Board that the lot existed prior to the Town's zoning ordinance and advised that to meet its requirements would be a hardship and restrict his ability to fully develop and use his property. He noted the Town Code requirements related to non-conforming lots that allowed for reduced side yards; however, he advised that the Code contained no alternatives to allow for increased lot coverage. Mr. Barbour opined that it was reasonable to conclude that because there were no alternatives provided for in the ordinance for lot area for non-conforming lots, there should be no lot coverage requirements.

Mr. Barbour opined that the ordinance basically guaranteed a minimum buildable area of 2,400 square feet. He acknowledged that due to his lot's size, he was limited to 1,407 square feet of buildable area. Mr. Barbour suggested he could have two sheds if he were allowed to have a comparable buildable area for his lot.

Mr. Barbour noted that the Virginia Code allowed for administrative approval of minor deviations; however, Middleburg had not adopted those provisions, so there was no way to grant him an exception. He further noted that the constraints he was required to meet were extremely tight. Mr. Barbour suggested an alternative requirement be based on the 80% benchmark and the allowable buildable area for a standard lot, which would allow him to have the equivalent lot coverage of 37.5%. He noted that he was only asking for 32.5%.

Mr. Barbour opined that he had proven by a preponderance of the evidence that he met the requirements for a variance and advised that complying with the ordinance would create an undue hardship. He reiterated that what he rebuilt, reduced their existing property by 12.5%; reduced the new house's length and width; corrected the side yard setbacks; and, moved the house ten feet further from the roadway to allow for two off-street parking spaces, in addition to the two-car garage. Mr. Barbour opined that it was reasonable to conclude that there was no lot coverage requirement defined for a non-conforming lot. He noted that as to the other requirements, his situation did not result in a detriment to other properties; was not a recurring one; did not change the use of the property; nor was there any other remedy available. Mr. Barbour opined that to enforce the ordinance and require the removal of the shed would create an unnecessary hardship for him; and that by granting his variance request, the spirit of the ordinance would be observed, the public safety and welfare would be secured, and substantial justice would be done. He requested the granting of the variance request.

Laurie Alavery, 412 Lincoln Road, advised that she lived two houses down and across the street from the Barbours. She opined that the shed was in good shape and advised that if it were hers, she would want to keep it. Ms. Alavery noted that if there was no shed, Mr. Barbour's equipment would have to be stored in the yard. She advised that she was okay with the variance request, as this was a small lot.

Mike Rocconi, 105 Sycamore Street, advised the Board that he was in favor of granting the variance. He noted that Mr. Barbour reduced the footprint of the house and opined that when someone did that, they should be able to recapture a part of it for the purpose of having a shed in the yard.

No one else spoke and the public hearing was closed.

Deputy Town Manager Moore advised the Board, for clarification purposes, that Mr. Barbour's statement regarding the applicability of the requirements was not appropriate to the question before the Board. He noted that this was a variance request, which by its nature was an affirmative statement that the applicant understood that there were requirements they were not meeting but that they believed a hardship existed. Mr. Moore further noted that Mr. Barbour had outlined his reasons for why he believed the application of the requirements was a hardship. He advised that the lot coverage requirements applied even to exceptionally small non-conforming lots. Mr. Moore noted that in the case of non-conforming lots that were under the 80% threshold, the ordinance allowed for relief of the side yard requirements but not from any of the other requirements.

In response to an inquiry from the Board as to whether the lot coverage requirements could be met if the size of the shed was reduced by 38%, Deputy Town Manager Moore confirmed it could not because the house was built to the maximum 30% lot coverage allowed under the ordinance.

In response to inquiries from the Board, Mr. Barbour confirmed a survey was done of the lot when he purchased it. He advised that it was not clear to him as to the lot size, as the survey showed the side boundary as 121 feet and the lot to be 121 feet by forty feet; however, the survey noted that it was less than except 140 square feet as referenced in the document that gave the Town the property to widen the street. Mr. Barbour further advised that he did not know of the lot coverage requirements prior to starting the permitting process.

Vice Chair Roszel noted that Mr. Barbour agreed to remove the shed when he sought his permit. He questioned whether it struck him that the house was a tight fit when he saw the drawings for it.

Mr. Barbour reiterated that he looked at alternative house designs. He noted that if he pulled one foot off it, he would have had to pull four feet off the length of the house and the design would not work. Mr. Barbour advised that he moved the bedroom upstairs, which meant he had to add stairs, which took up a lot of space. In response to an inquiry from the Board, he advised that he did not know the lot was non-conforming when he purchased it.

Vice Chair Roszel noted that Mr. Barbour knew when he built the house that this was a non-conforming lot, and that he had to meet the lot coverage requirements. He further noted that the ordinance was in place when the house was built, and that Mr. Barbour now expected the Town to change its requirements to fit his house. Mr. Roszel asked Mr. Barbour why he did not adjust the house, knowing that it was a small lot and that he would need to get to the materials behind the house. He questioned why Mr. Barbour expected the Town to approve a variance for something that he built on a very small lot.

Mr. Barbour advised that he was given a design constraint of only 1,407 square feet and noted that their house design required every bit of that. He further advised that he had no alternative but to agree to remove the shed if he rebuilt the house. Mr. Barbour noted that he left it for use during construction, at which point, he realized its value. He advised the Board that he had land maintenance requirements for the backyard and needed storage. Mr. Barbour noted that if the shed must be removed, the alternative would be to place the equipment on the concrete slab and cover it with tarps. In response to a suggestion that he use his two-car garage for storage, Mr. Barbour advised that it would be difficult to get to the equipment without going through the house or going onto someone else's property.

Vice Chair Roszel noted that Mr. Barbour agreed to remove the shed at the very beginning, knowing he would have yard maintenance needs; however, he later made a decision to not remove it and expected the Town to grant him a variance to allow the shed to remain. He questioned where Mr. Barbour's thoughts came from.

Mr. Barbour advised that he was trying to get a viable house plan, and noted that the yard was a secondary consideration for him. He advised that he didn't realize the need for equipment for the back yard. Mr. Barbour noted, for reference, that a basketball court was bigger than his entire lot.

Vice Chair Roszel explained that this was irrelevant and noted that Mr. Barbour built on a non-conforming lot. He opined that Mr. Barbour should have been able to tell from his property survey and the house drawings that he did not have enough space. Mr. Roszel further opined that it was not applicable for Mr. Barbour to put the onus on the Town to change its ordinances because he built a house that really didn't fit on the lot.

Mr. Barbour disagreed with Deputy Town Manager Moore's assessment that the ordinance was applicable. He questioned how an area requirement was applicable if he could not meet it. Mr. Barbour advised that he tried to leave the shed; however, the Town said it must go in order to get the permit. He further advised that he did not have any alternative if he wanted to proceed.

Chair Combs noted that Mr. Barbour indicated that the reason he wanted to keep the shed was because it was difficult to move his lawn maintenance equipment from the garage to the rear yard. He suggested Mr. Barbour relocate his HVAC equipment, which was currently located on the side of the house, in order to open a path from the garage to the rear yard so he could move his equipment.

Mr. Barbour advised that to move it to the rear yard would put the HVAC equipment next to his patio area. He further advised that the ideal location for this equipment was in the side yard.

In response to an inquiry from the Board as to whether there was a reason that prevented the HVAC equipment from being relocated, Mr. Barbour advised that, at this point, it would be almost impossible to relocate, as he would have to tear into the walls to run new Freon and electric lines.

Chair Combs noted that the original house had a larger footprint and the shed. He further noted that the previous situation was non-conforming as to lot coverage and questioned whether it was possible to continue with a less non-conforming situation. Mr. Combs questioned why the non-conformity could not continue.

Deputy Town Manager Moore explained that with the demolition of the previously existing structure, the non-conformity went away, and that any new construction must comply with the ordinance requirements. He advised that once the previous structure was taken down, it did not matter what its footprint was unless a specific item was met. Mr. Moore explained that if a building official determined that a building must come down for public safety reasons, there were provisions that would allow the non-conformity to continue. He confirmed that what was reconstructed, including the shed, did not conform to the ordinance requirements, and that the coverage was less than the previously existing conditions. Mr. Moore advised that this was something the Board could consider as a part of their deliberations.

Chair Combs questioned whether the State Code required that it be presumed that the Zoning Administrator's decision was correct.

Deputy Town Manager Moore advised that this was the case for an appeal of the Zoning Administrator's determination; however, this was a request for a variance. He advised that there could be no argument for an appeal of the determination during this hearing, as that was not part of Mr. Barbour's application.

Chair Combs questioned whether the burden of proof applied to a variance request. He further questioned whether the applicant had to present sufficient evidence to overcome anything with respect to the elements before the Board. He inquired as to which standards the applicant must meet to be successful.

Town Attorney Crim advised the Board that the applicant was responsible for bearing the burden of showing each of the elements in order to be granted a variance and noted that the burden of proof used to be more difficult. He advised that the application of the ordinance must place unreasonable restrictions on the property or meet one of the other two criteria. Mr. Crim reiterated that the applicant must prove all the elements to the satisfaction of the Board in order to be granted a variance.

Chair Combs noted that one of the elements that must be satisfied was that the property was acquired in good faith and that the hardship for which the variance was sought was not created by the applicant. He opined that the Board had not heard any evidence that the hardship was not self-created.

Mr. Barbour opined that the hardship was created by the lot coverage limitation for a small area; and, noted that he could not meet the area requirement. He advised that he did not understand how an area requirement could be applicable when he could not physically meet it and opined that it was beyond his control.

Chair Combs noted that Mr. Barbour met the area requirement for the house.

Mr. Barbour confirmed he did and noted that it took every bit of the area requirement to come up with a viable house plan.

In response to an inquiry from the Board as to whether he could move the HVAC system to the other side of the house by the stairs, Mr. Barbour advised that there were utilities in that area. He noted that this would also place it by the front door. He advised that there was no space for the HVAC system in that area.

Board Member Littleton noted that he looked at the property and advised that there was ample room to move the HVAC units. He suggested the lines be run under the basement.

In response to a board member's suggestion that the equipment be stored in the garage, Mr. Barbour advised that it would take up space in the garage. He advised that he would also have to get the equipment into the back yard and did not have adequate side yard to do so.

In response to a board member's inquiry as to whether Mr. Barbour thought about this when he had time to eliminate the shed and create storage room in the garage, Mr. Barbour advised that he was trying to meet the square footage limit of 1,407 square feet. He noted that he wanted to keep the shed; however, the Town said it had to go.

In response to a board member's inquiry as to why he agreed to remove the shed and did not, Mr. Barbour advised that he realized the need for it to store his equipment to maintain the property. He advised that his only other alternative was to store the equipment under a tarp.

Board Member Murdock suggested he could store the equipment in the garage.

Deputy Town Manager Moore explained that the problem with storing the equipment in the garage was that the five-foot side yards were narrow and encumbered with a stairwell and mechanical equipment. He further explained that there was not a clear path to get the equipment from the front to the back yard.

Board Member Murdock noted that not everyone had the luxury of a garage. She advised that she wished Mr. Barbour could keep the shed; however, what bothered her was that Mr. Barbour was asked to remove it and then didn't.

Board Member Gifford noted that he was looking at the elements that must be met in order to approve the variance. He asked that Mr. Barbour say more about how he did not create the hardship if he knew of the requirement to remove the shed and agreed to do so in advance. Mr. Gifford reminded Mr. Barbour that the Board was not in a position to say whether the ordinance requirement was reasonable. He explained that the Board must make a determination as to whether Mr. Barbour created the hardship for which he was seeking a variance and advised that he had not heard a persuasive argument yet that this was not a hardship that he had created.

Mr. Barbour opined that the requirement was reasonable for a standard lot and noted that it allowed for 2,400 square feet of lot coverage. He opined that the 30% limit did not mean anything by itself and suggested it was only reasonable when taken against something. Mr. Barbour opined that he would not have a problem if he was near the threshold of the benchmark.

Board Member Gifford noted that the Board had no authority to determine whether a requirement was applicable and advised that that was a Town Council decision. He explained that the Board could only determine if there was an unreasonable restriction that was not created by the applicant. Mr. Gifford noted that Mr. Barbour agreed through his application filing that this was an applicable requirement; therefore, that was not relevant to the discussion.

Chair Combs reminded Mr. Barbour that there were criteria that the Board must be satisfied were met, one of which was that the interest was acquired in good faith and the hardship was not created by the applicant. He noted that they were struggling to see evidence that this element had been satisfied.

Vice Chair Roszel moved, seconded by Board Member Littleton, that the Board deny variance application BZA 23-01 to increase the maximum building lot coverage for the subject property based on the following findings: (1) the applicant has failed to prove by a preponderance of the evidence that the standard for a variance as defined in Code of Virginia Section 15.2-2201 is met because such variance would be contrary to the purpose of the Ordinance to limit the negative effects of building lot coverage; and (2) the applicant has failed to prove by a preponderance of the evidence that the criteria for granting a variance as set out in Code of Virginia Section 15.2-2309 is met because the hardship was created by the applicant for the variance in choosing to build the principal structure to the maximum allowable building lot coverage.

Vice Chair Roszel noted that it was not within the Board’s purview to comment on whether an ordinance was good or bad, only whether the request fit within the guidelines of the ordinance.

Chair Combs advised that he would support the motion. He further advised that while he sympathized with the applicant, the Board did not have an avenue to grant the variance.

Vote: Yes – Board Members Combs, Roszel, Gifford, Littleton, and Murdock
No – N/A
Abstain – N/A
Absent – N/A

BZA 23-02: Variance of Section 120(E) of the Middleburg Zoning Ordinance Pertaining to Maximum Impervious Lot Coverage – 4 Locust Street – Thomas & Marianne Dodson

Deputy Town Manager Moore reported that this was a request for a variance to the impervious lot coverage regulations, which applied to buildings under roof and other impervious surface areas created on a lot. He advised that in late 2018, the Dodson’s applied for a permit to build on their mostly vacant lot; however, they did not do so for health reasons and the permit expired in late 2019. Mr. Moore further advised that they recently re-applied for a permit; however, the rules had changed in the interim. He

reminded the Board that the State Code provided for protections of vested rights; however, that only applied if a permit was still in effect at the time of the rule change. Mr. Moore explained that in this case, the permit expired in 2019 and the zoning ordinance amendment was approved in 2022. He advised that the applicants could meet the regulations, with the exception of the impervious surface one, under their current plans. Mr. Moore explained that the Dodson's owned two adjoining lots, one of which contained their existing home and the other of which was a vacant lot that contained the driveway that served their existing home. He reviewed the history of a boundary line adjustment that was approved several years ago that allowed the lot areas to remain the same but required the driveway that served the existing home to remain on the vacant lot. Mr. Moore advised that the driveway was considered to be an impervious surface. He noted that if not for that, the project would meet the standards.

Steven Price, an attorney, appeared on behalf of the applicants. He confirmed the staff's memorandum thoroughly explained the facts needed for the Board to render a decision. Mr. Price reported that the lot was 6,956 square feet, which was over 1,000 square feet less than the minimum size required under the zoning ordinance. He advised that the Dodson's wished to build a retirement home that was 1,630 square feet, which was a modest house. Mr. Price opined that this was the highest and best use of the property. He reported that the 45% impervious surface limitation equated to 3,130 square feet of impervious surface and noted that the proposed house equated to slightly more than half of that number. Mr. Price advised that the driveway was what put the Dodson's over the limit and created the problem. He explained that as proposed, they would need to have 53% impervious surface coverage and were asking for a variance to this effect.

Mr. Price noted the elements that must be met for the Board to approve the variance. He reiterated that the Dodson's desire was to construct a 1,630 square foot house on the lot and advised that in order to meet the impervious surface limits, they could only construct a 1,100 square foot one, which would unreasonably restrict the use of the property. Mr. Price noted the element related to alleviating a hardship due to a physical condition related to the property or an improvement thereon at the effective date of the ordinance. He explained that the previous property boundaries split the house and advised that the boundary line adjustment, which necessitated placing the existing driveway in an easement on the vacant lot, did not create the problem. Mr. Price noted that the problem was only created once the impervious lot coverage ordinance was adopted. Mr. Price opined that the existing physical condition created the hardship, giving need for a variance. He suggested that either elements one or two were met. Mr. Price reiterated that the applicants had a previously approved site plan; however, a medical issue forced them to postpone the construction. He advised that there was no evidence that this would be a substantial detriment to the neighbors, nor was it a recurring problem. Mr. Price noted that this was not a case of using the property for something that would not be otherwise permitted, nor could a special use permit be granted to address the issue. He opined that the Dodson's met the requirements for a variance.

Town Attorney Crim reminded the Board that the purpose of adopting the impervious lot coverage ordinance was to reduce the amount of water run-off, so it did not impact adjacent public or private land. He advised that the Board had the ability to impose conditions on a variance that would mitigate the water run-off conditions.

Mr. Price advised that the Dodson's explored the cost of using a semi-permeable material; however, the estimate was \$30,000 versus \$5,000. He noted that if the cost was modest, they would be open to using semi-permeable materials; however, the additional \$25,000 cost was too steep.

In response to an inquiry from the Board about the cost to replace the existing driveway with semi-pervious paving stone, Marianne Dodson, one of the applicants, advised that the cost estimate she received to use semi-pervious pavers for the construction of the new driveway and patio was \$32,000. She noted that their driveway would be gravel; however, that did not count.

Deputy Town Manager Moore advised that gravel was considered to be an impervious surface.

Mrs. Dodson further advised that it would cost \$7,500 to use permeable pavers just for the back patio.

Board Member Murdock noted that the Ridgeview area had a terrible drainage problem, which was why pervious surfaces were recommended.

No one else spoke and the public hearing was closed.

Deputy Town Manager Moore reported that several months ago, the Planning Commission adopted a resolution requiring drainage/grading plans be submitted to the Town for single-family detached dwellings. He explained that this was due to the poor drainage in the Ridgeview area. Mr. Moore advised that he now reviewed all plans to mitigate any negative effects of water run-off. He further advised that if a project moved forward, there was a careful review to ensure the new construction would not exacerbate drainage conditions. Mr. Moore advised that the project could successfully meet the water run-off requirements with or without the variance; however, he recommended the Board include that as a condition of approval. In response to an inquiry from the Board as to whether the plans would be sent to the County, Mr. Moore advised that this would depend on the threshold of the area of disturbance. He noted that the Town looked at the plans regardless of the limits of disturbance.

In response to an inquiry from the Board, Mrs. Dodson advised that the existing driveway, which would remain, was asphalt. She noted that their plan was to sell their existing home. Mrs. Dodson advised that their new driveway would be constructed of gravel. In response to an inquiry from the Board, she advised that she did not secure an estimate to replace the existing driveway with permeable pavers and only focused on the new construction.

In response to an inquiry from the Board as to whether a condition could be imposed that should the existing driveway ever be replaced, it should not be replaced with asphalt, Deputy Town Manager Moore advised that this was not something the Town monitored.

In response to an inquiry from the Board as to whether there was a way to relocate the existing driveway onto the lot it served, Deputy Town Manager Moore confirmed there was not. He noted that this condition was created in 2016 when the boundary line adjustment was approved.

In response to an inquiry from the Board, Deputy Town Manager Moore advised that it was not possible to have a shared driveway for the two homes in order to reduce the amount of impervious surface.

Vice Chair Roszel noted that if the home had been constructed when it was originally proposed, this would not have been an issue. He further noted that if the applicants could mitigate the water run-off from their patio and driveway, he would have no issue with the granting of the variance. Board Member Littleton agreed.

Chair Combs noted that the Dodson's permit expired in 2019 and the ordinance was changed in 2022. He acknowledged the health issues that prevented the Dodson's from moving forward with their project earlier.

Vice Chair Roszel moved, seconded by Board Member Littleton, that the Board of Zoning Appeals grant the variance application BZA 23-02 to increase the maximum impervious lot coverage for the subject property to 54% based on the following findings: (1) the applicant has proved by a preponderance of the evidence that the standard for a variance as defined in Code of Virginia Section 15.2-2201 is met because: (a) strict application of the ordinance would unreasonably restrict the utilization of the property, (b) such need for a variance would not be shared generally by other properties, and (c) such variance is not contrary to the purpose of the ordinance; and (2) the applicant has proved by a preponderance of the evidence that the criteria for granting a variance as set out in Code of Virginia

Section 15.2-2309 is met because: (a) the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance; (b) the granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area; (c) the condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practicable the formulation of a general regulation to be adopted as an amendment to the ordinance; (d) the granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property; and (e) the relief or remedy sought by the variance application is not available through a special exception process that is authorized in the Ordinance. Vice Chair Roszel further moved, seconded by Board Member Littleton, that the variance is subject to the following conditions: (1) development of the property shall be in substantial conformance with the Zoning Plan titled "Dodson Residence" dated 01/25/23 by Kirk Engineering, PLC.; (2) no further expansion of impervious lot coverage shall be permitted; and, (3) a requirement that certain new services defined as impervious be constructed using semi-permeable materials, e.g. the new driveway and/or new patio must be constructed of semi-permeable materials subject to approval by the Zoning Administration.

The Board held some discussion of whether the variance request met the elements necessary to be granted.

Deputy Town Manager Moore opined that there were a couple of ways the Board could look at whether a variance was not contrary to the purpose of the ordinance. He advised that they could look at it in the general sense of protecting the public health, safety, and welfare. Mr. Moore further advised that they could also look at the impervious lot coverage requirements and whether the issues it was intended to address could be prevented. He suggested the Board weigh the impacts of granting the request and whether the Dodson's could adequately mitigate the negative effects of the stormwater run-off. Mr. Moore opined that this could be achieved.

Vice Chair Roszel opined that there was a third consideration, which was that the application could be approved with the condition of using semi-permeable materials. He suggested if the applicants did so, the project would not be contrary to the purpose of the impervious lot coverage ordinance.

Board Member Gifford agreed. He questioned whether gravel was considered to be semi-permeable.

Deputy Town Manager Moore confirmed it was not. He advised the Board that the ordinance allowed for a reduction in the impervious surface and explained that gravel would not allow water to flow through it, as the base compacted over time and functioned like asphalt. Mr. Moore noted that the motion provided some flexibility and would not necessarily require the use of an extremely expensive material. He opined that he could work with the Dodson's to meet the intent of the ordinance.

Board Member Gifford noted the need to also consider the rate of the water run-off. He further noted that while not a permeable material, gravel would slow the travel of the water.

Chair Combs opined that under the third option, consideration could be given to replacing some of the existing driveway with gravel.

Deputy Town Manager Moore confirmed that would satisfy the condition if they did.

Chair Combs advised that he supported the motion as he felt all the required elements were met.

Vote: Yes – Board Members Combs, Roszel, Gifford, Littleton, and Murdock
No – N/A
Abstain – N/A
Absent – N/A

Discussion Items

BZA Training

Deputy Town Manager Moore reported that Town Attorney Crim had offered to conduct formal BZA training at the Board’s next organizational meeting. He opined that it would be helpful to have it from the Town Attorney’s perspective.

Town Attorney Crim opined that the Board meeting was well run. He noted, however, that the statutes and case laws were constantly changing. Mr. Crim further noted that appeals of the Zoning Administrator’s determinations were more difficult.

There being no further business, the meeting was adjourned at 8:03 p.m.

RESPECTFULLY SUBMITTED:

Rhonda S. North, MMC, Town Clerk

BZA Meeting Transcript – May 31, 2023

(Note: This is a transcript prepared by a Town contractor based on the video of the meeting. It may not be entirely accurate. For greater accuracy, we encourage you to review the video of the meeting that is on the Town's website – www.middleburgva.gov)

Eric Combs: All right. Is everyone ready to get started? [multiple speakers] Okay. Okay. The Middleburg Board of Zoning Appeals Meeting for Wednesday, May 31, 2023, will now come to order. First item on our agenda, let's do a roll call and Jonathan, I'll start with you. Please just turn on your microphone and announce your name into the microphone for the record.

Jonathan Gifford: Is it on or not? Jonathan Gifford.

Eric Combs: Eric Combs.

Dev Roszel: Dev Roszel.

Bundles Murdock: Bundles Murdock.

Trow Littleton: Trow Littleton.

Eric Combs: No need for staff. Okay. [off mic] And just please, for record clarity, green light on means, microphone on. And when you're not speaking, please just turn your light off. Next up on our agenda, approval of minutes. We have draft minutes from the October 17th, 2022, organizational meeting. Are there any comments, additions, questions regarding the draft minutes?

Jonathan Gifford: Motion to approve.

Speaker4: Happy.

Bundles Murdock: Second.

Eric Combs: All in favor of the motion to approve the minutes as presented, please say Aye.

All of Board: Aye.

Eric Combs: Motion passes 5-0. And then let's jump right into our public hearing and action items. First up is BZA 23-01 request of Doug Barbour for a variance of Section 120 D of the Middleburg Zoning Ordinance pertaining to maximum building lot coverage at 403 Lincoln Road Zoned R2 Single Family Residential District. And Will we'll look to you to kick us off.

Will Moore: Yes, sir. Thank you, Chairman, Members of the Board. It's good to see you. We don't see you often. So the case before you is regarding what is now referred to in our ordinance as building lot coverage. I say what is now referred to when the permit was originally approved for the new construction of this home. The term is simply lot coverage. Subsequent to the issuance of that permit, there were some modifications to our regulations wherein we retitled this regulation from lot coverage to building lot coverage. The definition remained the same. This applies to area under roof on a lot as well as the standard. The maximum coverage amount in the R2 Zoning District of 30% remained the same. But that amendment simply retitled this. So if you hear the terms interchange lot coverage and building lot coverage, that's the reason [off mic]. So in this case, there was a permit issued in March of 2022 to the Barbour's. The permit was for the demolition of the previous older home on the lot and construction of a new home. In the view of the permit when it was first submitted it was determined that the proposed new

principal structure, that is the main house, was going to be built to the maximum lot coverage that was allowable in R-2 district of 30%. And as such, the original plans which showed upon first submission retention of an existing garden shed at the rear of the property, could not be approved because with the new proposed structure being built to the maximum 30%, that left no additional area under roof to be permitted on the lot. So prior to the permit being approved, the applicant owners revise the plans to indicate demolition of the shed as part of the permit. When Mr. Barbour contacted me a couple of months ago to begin the process for getting occupancy issued for the newly constructed building, it was noted that the shed was still existing on the property and at that point in time, Mr. Barbour and I started to have conversations about his now desire to keep the shed. So and in that conversation, I think it's important to note that he stated that it was during the construction process where he really realized the value of having that shed for storage of materials and things. I say that because I think there was no intention to deceive on the part of Mr. Barbour from my conversations with him, this wasn't like I'll show it to be demolished and then try to slip it by. There was nothing like that going on. There was a genuine expression that he realized the value of that shed during the construction process and then at the end was inquiring about the possibility to potentially keep it. And there is no administrative relief available for that. And with the new home, the principal dwelling that is being built to the maximum lot coverage is only a potential avenue of relief would be to seek a Variance from the Board. It's also important to note, as there have been some questions from some of the surrounding property owners. Nothing involved in this variance request involves the newly constructed principal dwelling being constructed other than as permitted. What I mean by that is that everything about the new home was constructed in accordance to our regulations, from setbacks to building, height, massing all of that was constructed appropriately. What this request boils down to is whether or not he can receive a variance that would allow for the additional area under roof which consists of a garden shed. So if the variance is approved, he could retain the shed. If not, then the shed would need to be demolished [off mic]. As outlined in the report and as we were discussing just briefly, though, there are certain findings that you must make in order to approve a variance. This worksheet kind of lays that out. You must find at least one of the three items that you see in the left-hand column. You don't need all of them. You don't need two. You need at least one of those. And if you satisfy one of those being met, then all five elements on the right-hand column must be met in order for you to approve a variance. So within the staff report in particular with five items in the right-hand column, we give you certain notes, some commentary on how we see issues or compliance with those different five elements we need to consider as you deliver [off mic].

So a couple of other notes. We do note in here and. Mr. Barbour noted in his original submission to you that this is a nonconforming lot when it comes to lot area. So the minimum lot area in the R-2 District as it stands today is 8,000 ft². That means that you would create new lots if you subdivide [off mic]. The minimum size is 8,000ft². There are many lots throughout the various neighborhoods that have R-2 zoning that are non-conforming as to lot area. I do note, though, that in this particular case, at just under 4,700ft², this is a particularly small lot. Don't see many this size. And the few that you do see that are this small are being used functionally in conjunction with an adjoining one, as if it were one parcel of land. So that applies there's a home a little further down Lincoln Road on the south side, where there are a couple of lots of the exact same size, but they're being used functionally as one lot. So it is a particularly unique situation with the size of this particular lot. Otherwise that covers it again after the applicant's presentation and then after the hearing there will be a question-and-answer time if you have specific questions for [off mic] motion for approval.

Eric Combs: Okay, so Board Members defer any questions of staff until after.

Will Moore: Yeah, [off mic].

Eric Combs: Okay, wonderful. Is there anyone on behalf of the applicant who would like to give a presentation? So if you would please come forward and take the seat at the end of the table here and just announce yourself into the microphone.

Will Moore: And as Mr. Barbour approaches, I do note that this is a different packet of material than what is contained in your advanced packet. This was provided by Mr. Barbour just two days, and we have a hard copy of this presentation that [off mic]. I'll have it on the screen, but it's a little difficult to see. You might want to refer to [off mic]. Okay.

Eric Combs: Thank you.

Doug Barbour: Well, good evening. I'm Doug Barbour. I was a Civilian Operations Research Analyst for the Army for 30 years and I retired, it'll be coming up on two years ago at the end of the month. My wife and I, Catherine, are here because we did rebuild, as Mr. Moore mentioned, on an extremely small lot. And the way that the town applies the ordinance, specifically the lot coverage requirement, says that there's not enough room for the shed and it was an existing shed. So I'd like to start looking at these aerial photos. Mr. Moore sent out some aerial photos from the front of the property, but these I pulled off of the Loudoun County website and they show a different angle. They show the rear of the property and the first one is from March, right when we got the building permit. And the second was from April, just a month ago after the build. And this first slide, slide one shows those images as they come off of the website. You can see the before on the left and the after on the right, the red line indicates what Loudoun shows to be the property boundary. And when I first started looking at this, I went here, and they show 50ft as the width. And I thought, okay, that's great. I looked at the ordinance minimum lot size 50ft. I thought I thought we were good you know seven and a half side yard setbacks. That's 15 feet, that leaves you 35ft for the building width. I thought maybe we could get it down 32ft or so. We could work with that. It turns out that's not the case. We're at 40ft, and you can see that as indicated where our fencing was. The other thing to notice is the rear yard is basically untouched. We did end up moving the house back about a foot. So we lost the foot in the back. But other than that, the rear yard remains the same, has the same requirements for maintenance. And you can see the shed in both pictures. On the next slide, I've added some stuff to indicate where the property boundary actually is, the white lines. And from this perspective, it's really hard to see where the footprint of the building is. So on the new picture, I've indicated that with the white line and the kind of white, translucent, shaded area. That footprint is, as Mr. Moore mentioned, 1,407 square feet. That happens to be 30% of our lot coverage. And if you take that and rotate it 180 degrees, I've put it on the other image so we can compare it to the old footprint. It's essentially the same shape. We just spun it around and put the garage in the front. The dashed line there indicates the old building footprint. We were able to reduce the footprint by 202ft². We reduced it 13%, a significant 13%, and we reduced the width of the property by 7%. If you look on the old picture, we had covered space for two cars and that came literally out to the edge of the property. So, I mean, gross violation of the yard setback. We were able to fix that. And I've indicated on the new property in the blue line, blue dash line where the utilities run. Every one of the utility contractors wanted to run their utilities across the neighboring lot because it looks like that's what our lot should be. The grayed-out area over on the side or not grayed out. It's actually straw now, our good neighbor on the right that owns the lot all the way out to the corner allowed us to use roughly 21 feet or so of his property in order to conduct the build. And without that, we would not have been able to do it. There would have been no way to get equipment and stuff to the back of the property. And we've regraded and strawed that. So that's that tanned area to the right. Every one of the utility people wanted to run the utilities on that property. The water and sewer lines, they actually did run on that property three feet off of the boundary line. And I was able to get there in time and stop them and get it moved and put back on to our property. And it's interesting to note, too, that when the town went to put the sign for this hearing on our property, they missed it by 8.5 feet. The lot is very small. So on the next slide I talk about the size of the lot continually is overestimated. And I think it helps to restate that as the smallness of the lot is continually underestimated. Everyone always underestimates how small this lot is. As Mr. Moore noted, it's particularly small. Originally it was created years ago at 4840 square feet, which is just over 60% of the minimum, 8,000ft². When the town went to put water and sewer in, they widened the street, and they took an additional 3.7ft from all the properties. So they took 148ft² in a way as well that reduced it to its current size 4,692. That's 58.7% of the required minimum lot area. And that is a full more than 20% less than the benchmark for minimum lots. Our width as well doesn't meet the requirement. We're at 40ft. In order for us to meet the 8,000 square foot

minimum, we would need excuse me, an additional more than 30ft of width to the property in order to reach even the 80% mark, we would need an additional 15ft. With the old structures, we would need more nine feet to get to 30%. With our current structures, we would need three almost three- and one-half feet to get to a 30% lot coverage. We had worked with our good neighbor that let us use this property. We had actually worked a deal with them where we were going to be able to purchase 30ft, a 30-foot slice of his property, which would enable us to have been over 8000ft², and then there wouldn't have been any problem. However, looking at the Loudoun County site, his lot is just over 24,000ft². And if he were to cut a slice off and sell it, then that would prohibit him from being able to divide it into three separate parcels due to the ordinance. So we had a deal to work to purchase a slice, but the ordinance prevented it. He very understandably decided not to sell when he realized that. I think I've mentioned the other bullets. In trying to do something with the old house we exhausted all the possibilities. Like I say, we tried to purchase extra land. We looked at tons of different home designs trying to see if we would be able to rebuild and get within the side yard setbacks at 30ft and still retain the functionality of the old house. The four nonconforming lots, the ordinance relaxes the side yard requirement. So instead of a 25-foot-wide building, it enabled us to build a 30-foot-wide building. At 25% there was just no design or, I'm sorry, 25ft there is no design that would work. It was dead in the water. We never would have rebuilt a house if we were limited to 25-foot width. But at 30ft we could retain two car parking garage front entryway. Most of the functionality from the old house except for first floor primary bedroom space. That's basically what we had to forfeit in order to reach a 1,407 square foot footprint for the main house. And at 30% 1,407 is an extremely challenging design limitation if you've ever tried to build a house and retain this functionality from the old property. We were able to reduce the house footprint by 13%. We reduced the width of the house by 7%. We shortened the length of the house by five feet, actually nine feet if you include the front porch. And we moved the house back. You know, we upgraded everything to meet building codes. The old house was in pretty bad shape. It was basically just, you know, cinder block, piers for the foundation. The crawlspace was 12 inches the floor joists were undersized. The girders were sagging. And parts of the crawlspace you couldn't even get to physically because of piping and ductwork. The hallway was 28 inches instead of the required 36 inches. There is no insulation. You know, we were looking at some pretty hefty impending repair costs as well. The water line running through the house was old, galvanized steel pipe. And I know this because it sprung a leak in the driveway and I dug in there and found a one eighth inch hole in it that was leaking, that had corroded. And I put a hinge clamp, temporary fix on it. That repair alone, we were looking at \$8,000. We still had sewer lines that are tar, impregnated cardboard. You know, renovation was not an option for the house. So that's why we basically decided to rebuild. On the next slide I want to talk about area requirements. Our lot was legally established before the town had a zoning ordinance and long before there was a lot coverage requirement. To require us as such a small nonconforming lot of record it poses challenges and hardships for us as property owners. And imposing full compliance with the lot coverage restricts our ability to fully develop and utilize the property, potentially reducing its value and limiting functionality. Section 89 is the part of the ordinance that talks about nonconforming lots. It recognizes them and defines them as any lot that is 80% or less of the required area or width. As I've mentioned, our lot is 58.7%, well below even the benchmark, much less the standard lot size. And the ordinance does make an allowance for the side yard setbacks. You can relax the side yard setbacks and meet all other applicable ordinance requirements. And I've highlighted the word applicable because I think that's key. It recognizes width an area as the two metrics for determining when requirements are not applicable. For the width if you're unable to meet 80% of the minimum requirement, the ordinance specifies an alternate applicable side yard requirement indicating that the standard side yard requirements are not applicable. And it just stands up to reason if you cannot meet width requirement, then a width requirement is not applicable. For area likewise, it stands to reason if you can't meet 80% of the area requirement, then an area requirement lot coverage is not applicable. But here the ordinance does not specify an alternative applicable requirement and it does not follow to reason that by such admission the requirement somehow is rendered applicable. So it's reasonable to conclude this section does not say all other requirements are to be met regardless, it says all other applicable requirements are to be met. It's reasonable to conclude, since the ordinance does not specify an applicable alternate requirement for lot area for nonconforming lots that there is no lot coverage requirement. And on the next slide, the idea of a buildable area it supports that conclusion. The ordinance

basically guarantees a minimum buildable area of 2400ft². If the lot cannot be less than 8000ft² the buildable area cannot be less than 2400ft². However, 30% of our lot requirement limits us to 1,407ft². That's roughly 1,000ft less than the guaranteed minimum requirement. 1,000ft is an area of 30ft wide by 33ft. Our house is 30ft wide. With that, we could go another 25ft and still have room for two of our sheds. If we were given the same amount of buildable area our shed is roughly only 2.5% of our lot size. In regard to precedents. If there's a concern about setting precedents, Mr. Moore mentioned the state code contains what he sent out. The packet that he sent out, he mentions that Virginia State Code contains provisions for allowing administrative approval of minor deviations, but Middleburg has not adopted these provisions, so they don't have a way of granting any kind of an exception. As far as using it as a precedent, it's an extremely tight set of constraints that would have to be met. Less than 60% of the lot area 10% of the lot width and a deviation of only two and a half percent. As far as what might be an applicable alternate requirement, it could be based on the ordinance itself, the 80% benchmark. If you were allowed the buildable area for a standard lot 2400ft², if you allowed that for an 80% lot, that's an equivalent lot coverage area of 37.5%. We're only asking for 32.5%. If our lot were at 80% instead of where it is below 60 with the current structures on it, our lot coverage would be 24%. We'd only be at 24% lot coverage if we were at 80%. So we're to prove by preponderance of the evidence that we meet requirements for variance. The state defines that to mean the evidence as a whole shows that the facts are more probable and credible than not. We did not establish the size of our lot at only 58.7%, and applying a full requirement creates undue hardship. We did rebuild with the extreme challenge of reducing our existing property by 12.5%. And after looking at many different plans, we found that to be the absolute maximum reduction we could come up with and still retain functionality from the old house. As I mentioned, we reduced the width, we reduced the length, we corrected side yard setbacks. And we moved the house ten feet further from the road, which allows for off road parking for two cars in addition to the two covered spaces that we have. From the ordinance itself, it's reasonable to conclude that no applicable lot coverage requirement is defined for a non-conforming lot. And regarding all the other requirements mentioned, there's no detriment to other properties. The situation is non-recurring, does not change the use of the property, and no other remedy is available. So from wording right out of the ordinance enforcement to remove the existing shed and I quote, the ordinance would result in unnecessary hardship from the applicant, and that in granting the variance, the spirit of the ordinance will be observed, public safety and welfare secured, and substantial justice done. I think this taken as a whole is more probable and credible than not and we request that you grant variance approve the variance.

Eric Combs: Thank you, Mr. Barbour. At this time, let's go ahead and open the public hearing. Is there anyone from the public who'd like to speak on this application? If so, Mr. Barbour, I'd ask you to step aside and let them come forward and speak into the microphone. And then Mr. Barbour, don't go too far. We may call you back for some questions. But if anyone would like to speak on the application, please step up to the table.

Laurie Alavery: Hello.

Eric Combs: Hi. Good evening. If you would just announce your name for the record, please.

Laurie Alavery: Yes. Laurie Alavery. I live at 412 Lincoln Road. Just a few houses down and across the street. I met the Barbour's probably a week ago. So I don't have a long relationship in any way, but I think I've seen that first of all, the house is beautiful. They did a lovely job. The shed is really in good shape and if it were me, I'd want to have someone to put my mower, the weed whacker, shovels, bags of salt, bags of sand. Because if there's no shed, then it's sitting in the yard and that's going to look pretty terrible. So I'm 100% okay with the variance. I think that I would be really supportive of our new neighbors and it's a really nice shed and I wouldn't want to tear it down either. Let's see what else. It is a really small lot, that's for sure. I know because I live on a really small lot. Anyway, just wanted to say thumbs up for variance and thanks for having us all out.

Eric Combs: Thank you. Ms. Alavery. Anyone else who'd like to speak, please come forward.

Mike Rocconi: Hi, I'm Mike Rocconi. I live at 105 Sycamore Street. I'm in favor of granting the variance. I've seen their lot. It is very small. I've seen the shed. The shed is a reasonable sized shed. It's not very big. I think the most important point that Doug made is the fact that they reduced the footprint of the original house. And it seems fair to me that if you do that when you rebuild, you should somehow maybe be able to recapture that square footage for the purpose of having a shed on the yard.

Eric Combs: Thank you, Mr. Rocconi. Anyone else here in the room tonight who would like to speak on the application? So please, just come forward. Going once. Twice. Okay. Public hearing is now closed. Members of the Board, any questions? Actually, before we get to questions would staff or the applicant like to respond to any of the public comments?

Will Moore: Staff will make just a couple of comments. And I certainly don't want to seem to be arguing with Mr. Barbour at all. There are a couple of statements that I think need to be made clear. So we spoke at a bit a little bit of length about whether or not certain requirements are applicable. That's not a subject for this application. This is a request of a variance. A variance request by its nature is your affirmatively stating that you understand that there are requirements and you're not meeting them, but you believe there's a hardship that exists. And he's outlined those things and taking nothing away from the remainder of his presentation. But there is no questioning in a variance application of what would be an appeal of a determination which would be saying, I don't believe these regulations actually apply in my case. Okay. So lot coverage does apply. It does apply to even nonconforming lots. It does apply to exceptionally small nonconforming lots. Those that are under that 80% threshold wherein you do get relief of your side yard, but you don't get relief of any other requirements. So just want to be clear that it is an applicable regulation. But again, notwithstanding that, he's making arguments for hardship and those things that you should be considering [off mic] application. So we just want to make that clarification.

Eric Combs: Okay. Thank you, Will. Okay. Now let's jump into questions of staff or the applicant. Trow, please.

Trow Littleton: Yeah, I've got a question of Will. If he reduced the size of the shed by 38ft², would he then meet the requirements? I think it's 38.13ft² and the shed now is 117ft².

Will Moore: So no, sir. He would not. So his principal structure, the main house is built to the absolute maximum lot coverage allowed under the ordinance of 30%. So even one square foot additional. So there's no opportunity to reduce the size and then alleviate the need for a variance.

Trow Littleton: Okay.

Eric Combs: Other questions. Dev, please.

Dev Roszel: Thank you, Mr. Chairman. I do have some questions, and they're just questions that I'm not placing any, I'm not making judgment. I just have questions for you, Mr. Barbour. And there's a couple. There's 4 or 5. But when you purchased the property, did you get a survey?

Doug Barbour: We had a survey, yes.

Dev Roszel: Okay. So you knew what the not the GIs, but what the actual surveyed lot size was.

Doug Barbour: It wasn't really clear at first until I started looking at it. It still showed the side boundary as 121ft and 121 by 40ft is the original requirement. And then it says less than except 140ft² and references the grant document that gave that property to the Town of Middleburg to widen the street.

Dev Roszel: Okay. Did you know what the requirements were prior to building the house from the town?

Doug Barbour: Not prior to starting that process, no.

Dev Roszel: Okay. One of the things that I noticed in your comments was that you had agreed to not have a shed. When they first came out, you agreed in writing that you would take the shed down because it was non-conforming. It didn't meet the requirements. When you looked at your house on that lot with the drawings, I'm assuming you spent money and got drawings for the house. Did it not strike you as being like a very tight fit?

Doug Barbour: Well, I mean, we designed the house, I designed it, and we looked at iteration after iteration to try to reduce it further. And literally, if we had pulled one foot, we would have had to pull four feet off the length of the house, an additional four feet off the length of the house. And it just didn't work. In hindsight, looking at it, the main structure of the old house, if you pulled off the addition that was the first-floor primary bedroom is 855ft. What we came up with is 840 is 853.7, almost identical. We moved that space upstairs, so we had to put a staircase in. If you've ever had tried to design a staircase, they take up an aggravatingly lot amount of space. So out of that space that was roughly equivalent to what we had, we had to incorporate, you know, we had to remove additional space to accommodate the stairwell.

Dev Roszel: Okay. You know, you purchased the lot knowing that it was a non-conforming lot.

Doug Barbour: No, sir, I did not know that when we purchased it.

Dev Roszel: Okay, so when you purchased it, but you knew it when you built the house. It became you became aware of the fact that it was a nonconforming lot and that you had requirements to meet certain coverage, lot coverage sizes with the house. Yes. So I guess my question is the ordinance was in place and then you built the house and then expect the town to change the ordinance to fit the house. My question is, why would you not have adjusted the house to allow for you know, it's a small lot and the house covers 100% of the coverage space. But knowing that you can't get any material back behind the house. I'm just merely asking. I'm not placing judgment. I'm just asking, why would you expect the town to approve a variance for something that you built on a very small lot?

Doug Barbour: We were given a design constraint of only 1,407ft², and the design that we came up with required every bit of that. We really didn't have an alternative if we were going to rebuild. So we agreed that, well, if the lot has to go, then I guess the lot has to go. But we left it so that we'd have a place to store things during construction, a secure place, you know, something that we could lock up during construction and that proved invaluable. And then when we got to the end of it, we realized the backyard space has the same maintenance requirement. We need local storage. The alternative is would be if we removed the shed, we're going to have a concrete slab and we'll put the equipment there and cover it with tarps.

Dev Roszel: You have a two-car garage?

Doug Barbour: Yes, but it's difficult to get to it from the backyard without going through the house or onto other people's property.

Dev Roszel: Right. Right. No, I understand. So I guess, you know, in the very beginning when you agreed when they said that you had to take the shed down, you agreed to doing that, knowing that you were going to have yard equipment to work on the house. So I guess my question here is you knew it going in and then you decided not to remove the shed? And again, expect the town to provide a variance for allowing the shed. And I guess I'm confused on where that thought process comes from.

Doug Barbour: In trying to get a viable house plan the yard was kind of secondary. I really didn't realize the need for equipment in the back yard. I was trying to get a house design that would work within that

extremely tight constraint. I mean, we're at 58 point. We're barely half, you know, just over half of the the lot size. For reference, a basketball court is bigger than our entire lot.

Dev Roszel: And I understand that I'm not arguing that point at all. The fact of the matter from my perspective is that's sort of irrelevant because you built the house on a lot that's non-conforming. And so you could have looked at the drawings and seen the size of the lot from the survey and realized that you didn't have enough space. And not you know, I built several houses myself. I just know that those things happen. And so all I'm saying is I don't think it's applicable to put the onus on the town to change its ordinances because you built a house that doesn't really fit on the lot.

Doug Barbour: Well, I respectfully disagree with Mr. Moore's assessment of the applicability. The ordinance does state that applicable requirements. If we can't meet an area requirement, how is an area requirement applicable? I mean, we tried. We put a design together and submitted it with the shed. And he, you know, town said sheds got to go. There really wasn't an alternative if we wanted to proceed.

Dev Roszel: Okay. I appreciate that. Thank you, Chair.

Eric Combs: Yeah. Thank you, Mr. Barbour. You mentioned that the house has a two-car garage currently, and one of the reasons you want to keep the shed is because it's tough to move the equipment from the rear yard to the front yard. And is that because on the one side you have an area way.

Doug Barbour: The area way, and on the other side are the air compressor.

Eric Combs: The two heat pump units?

Doug Barbour: The two heat pumps.

Eric Combs: Can those heat pump units be located elsewhere on the property? Could they, for example, be relocated to the rear of the property, thus opening up some sort of pathway on the side yard?

Doug Barbour: It'd be right in the backyard. I mean, right out the back yard where the patio is. The ideal place is on the side.

Eric Combs: Ideal, but they can be relocated. That is something that there's nothing standing in the way of them being relocated other than it's not ideal?

Doug Barbour: At this point, it would be difficult to relocate them. I would say almost impossible. I mean, you'd have to tear into the walls rerun all kinds of Freon lines and electrical lines.

Eric Combs: Will, I'm going to jump over to you for a question. The house that was previously on the lot was of a larger footprint?

Will Moore: Yes.

Eric Combs: And it had the shed. So there was an existing then a previously existing nonconformity as to lot coverage.

Will Moore: Correct.

Eric Combs: And so what's so what prevents that nonconformity from being able to continue here? So meaning they've come in with something less intensive, right? It's less square footage than the previous nonconforming lot coverage use. So why doesn't that nonconformity still continue here?

Will Moore: Well, with the demolition of the previously existing structure, that nonconformity goes away. So anything that's constructed new at that point must be in conformance with the ordinance requirements. I certainly understand the point that you're making. For example.

Eric Combs: Is that because of the footprint change, so if they had built in the previously existing footprint, would that have been allowed to continue?

Will Moore: No. Once you take it down, it doesn't matter what the footprint was.

Eric Combs: Okay.

Will Moore: Unless specific things are met, like if a building official determines that for public safety reasons, the building has to come down, there's a provision that could allow the nonconforming [off mic] created. But it is a fair point to make that while what has been reconstructed with the shed addition does not conform to our requirements, the coverage is less than previously existing condition. That's something that you can certainly take into consideration in your deliberations.

Eric Combs: Okay. But it's not a case where the previous nonconformity is allowed to continue.

Will Moore: Correct [off mic].

Eric Combs: Okay. With respect to our purview as a Board of Zoning Appeals, I know the statute code Section 15.22 309 says we're to presume that the zoning administrator's decision is correct. Is that?

Will Moore: So that's in the case of an appeal of a determination.

Eric Combs: Okay.

Will Moore: That's a little different with a variance. Again, we're this is a variance request. There can be no argument made for an appeal to determination during this hearing because that was not part of the application.

Eric Combs: Right. So that statute speaks about a burden of proof in that in that scenario where there's a presumption that it's correct and the applicant can come in and by a preponderance of the evidence, overcome that by a certain showing of evidence. Does that same burden of proof apply here in a variance? Meaning does the applicant have to come in with sufficient evidence to overcome anything with respect to the elements that have been put before us about. I'm sorry, Martin. You weren't here when we were first introducing the sheet.

Martin Crim: Yes.

Eric Combs: We have this sort of decision tree right before us.

Martin Crim: Right.

Eric Combs: And I'm wondering, what is the standard for the applicant to meet in order to perhaps satisfy these?

Martin Crim: Thank you. And I appreciate your courtesy in allowing me to come in late. I apologize for that. I was unavoidably detained, but I am Martin Crim, the Town Attorney. And the answer to your question is that the applicant bears the burden of showing each of the elements of the variance. One this is kind of Chinese menu, isn't it? One from column A and all from column B, And so that's the burden on the applicant. It's not [inaudible]. But so it's and the standard has been somewhat loosened since it used to

be what it used to be. And if I might mention the letter we got from Ann and Dan Allen cites to a 2001 case when the standard was much tougher. So to be fair to Mr. Barbour, the standard is a little bit less strict than it is now. You don't have to show, the previous standard was a hardship approaching confiscation. Now it's a much looser, unreasonable restriction or, you know, the other two that are listed there in column A. So the burden is on the applicant to show that they meet all of the elements to the satisfaction of the BZA.

Eric Combs: Thank you. Thank you, Martin. Very helpful. Mr. Barbour then back to you. I've got a question with respect to one of these elements and what perhaps you have to say in response to it. There's an element here that must be satisfied in any event, it's that the property of interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance. And I'm not sure that we've heard evidence from you yet as to how the hardship that you're seeking the variance for was not a self-creation.

Doug Barbour: As I mentioned, we were kind of at a critical timing point where we needed to do something, move forward and build. And I would say the hardship is actually created by the lot coverage limitation for such a small area. It's an area of requirement we cannot meet. I don't understand how an area requirement can be applicable when we don't we physically cannot meet the area requirement and that's beyond our control. That was established back in the 60s or 50s.

Eric Combs: Yet you've met the requirement, the area requirement with the 1407 square footprint for the house?

Doug Barbour: With the house itself. Yes. It required every bit of that in order to come up with a viable house plan.

Eric Combs: Okay. I don't have any further questions. Any other Members have questions of the applicant or staff?

Trow Littleton: Yeah, I was just going to ask the applicant.

Bundles Murdock: You have to push the button.

Trow Littleton: Can you move the two air conditioners just over to the other side where the stairs are?

Doug Barbour: We ended up having to run water lines, electrical, and then it's right at the front door. That's right.

Trow Littleton: I mean, we're just talking about refrigerant lines. They can stay up top. They don't have to go underneath for the AC units. For the AC and the heat.

Doug Barbour: I'm sorry to move the heat pump units?

Trow Littleton: Just to the other side. Yes.

Doug Barbour: To the other side of the house?

Trow Littleton: Because of their size. So you have room to use on the.

Doug Barbour: There's really not space. It's you have the front. You have.

Trow Littleton: I went by and looked and from the stairway from the back of the stairway to forward towards the garage to me looked like there was an ample room there for those two units to go and they still will be connected. I don't know if you have a basement or not but.

Doug Barbour: We do and that's why the.

Trow Littleton: That you could take and very simply run it across.

Doug Barbour: We do have the exit stairwell that comes.

Trow Littleton: Yeah. That doesn't come forward. It goes back towards the rear of the house. Right?

Doug Barbour: Well, it comes from the rear of the house forward.

Trow Littleton: Right. Exactly.

Doug Barbour: To within feet, you know, 5 or 6ft of the front porch. The front door entry.

Trow Littleton: No, no I'm going the other way. I'm going towards the garage. Bring in other words where the stairway starts in the back half of the house, take, and put the two AC units just in front of it.

Doug Barbour: That's the front door entrance.

Trow Littleton: There's the front door on the side of the house?

Doug Barbour: It's on the side of the garage. The front. The garage is here. And you come around the sidewalk to the front porch and the front door entry. Yeah. Just feet away from that is the exit well for the basement.

Trow Littleton: I'm just looking at your picture here. And I think you would probably have a room over there to put them. But that's just a suggestion.

Eric Combs: Any other questions or comments?

Bundles Murdock: So the shed, what you have in the shed was not possible the equipment to put in the garage. Did you contemplate that, the equipment?

Doug Barbour: Lawn mowers. Wheelbarrows.

Bundles Murdock: There wasn't enough room when you were building. I mean, I'm just.

Doug Barbour: They would take up space in the garage.

Bundles Murdock: And you've got. Yeah.

Doug Barbour: But it's getting them from the backyard.

Bundles Murdock: But when, because I mean when you were building, did that not enter into your [multiple speakers] thought process of maybe eliminating the shed when you had time to eliminate it of making an area in the garage and putting all both car and the equipment so you wouldn't have had to have the shed and we wouldn't be here?

Doug Barbour: It really didn't come to the fore of what I was trying to do in terms of meeting the limitation of the square footage, 1407 square feet. You know, we wanted to build with the shed, and we submitted that and said the shed had to go so.

Bundles Murdock: So and the town said the shed had to go. And you agreed. And so why didn't you take the shed away?

Doug Barbour: We left it for the construction period.

Bundles Murdock: But we said the shed had to go. And you said yes.

Doug Barbour: Well, we left it for construction.

Bundles Murdock: And then why didn't it go?

Doug Barbour: Toward the end of the build is when we realized.

Bundles Murdock: Then it was too late to take it away.

Doug Barbour: Too late to take it away?

Bundles Murdock: Because you couldn't move it because the build was done. Right.

Doug Barbour: Well, there's that. But we realize how much it was actually required in order to keep equipment in the backyard to maintain the property.

Bundles Murdock: Right.

Doug Barbour: Like I said, the alternative now would be keeping stuff under a tarp.

Bundles Murdock: Right. Or putting it in the garage.

Doug Barbour: We'd have to go across neighbor's property to do that.

Bundles Murdock: But I thought you had some side places for the cars. You said earlier.

Trow Littleton: [off mic] I think he's talking about in front.

Bundles Murdock: In front. Okay.

Will Moore: So it's helpful that it might be a little confusion. Confusion, Mrs. Murdock. The problem that Mr. Barbour faces, even if he were to store equipment in the garage, is that the side yards on either side are so narrow and they are encumbered by [off mic] building doesn't go to the side yard, there are certain things that can go [off mic] side yard like the stairwell to the basement. Mechanical units, a side stoop. Those kind of things that prevent a clear path to get [off mic] So that's. [off mic]

Bundles Murdock: Because not everybody has the luxury of a garage trying to get at. Okay. I'm just wondering. I mean because I wish. Well. I mean, I wish you could keep the shed is what we'd love to have you do, but. What bothers me is that you were asked to take it away and then you didn't. That's where I'm having a little issue with the rules and regulations. So I just have to grapple with that a bit.

Eric Combs: Please, Jonathan. Go ahead.

Jonathan Gifford: Mr. Barbour, I wonder if you you know, I'm looking at this list of, you know, elements that must be met. And we've already mentioned this hardship was not created by the applicant must be met. And you've responded to Eric's question about that. I wonder if you can say any more about that? I'm having difficulty seeing how this was not a, you know, a hardship that you have created yourself. You have said, well, no, it's created by the requirements, but you were aware of the requirements and agreed to the requirements in advance. And saying that the requirements are not reasonable. You know, may create a hardship. But it's my understanding we don't really you know, we're not really in a position of saying whether the requirements are reasonable or not. It's I mean, Will might address it or but, you know, we're trying to make a determination about did you create this hardship for which you're asking now us to grant a variance. And I sort of agree with Bundles. I'd love to figure out a way to allow you to keep it. But I haven't heard, you know, a persuasive argument yet that this is not a hardship that you created, that you yourself created and that sort of a deal breaker in terms of what our what our statutory requirements are, at least as I understand them.

Doug Barbour: I don't mean to imply that the requirement is not reasonable. It's reasonable for the standard lot that gives you 2400ft². The ordinance talks about applicable requirements. That's applicable. You know, 30% by itself doesn't mean anything. It's only when you take a percentage of something that you can talk about whether it makes sense or not. 2400ft² is a reasonable amount of buildable area or not. I mean, you can argue that. If we were anywhere near the threshold of a, you know, the benchmark, the 80% benchmark for non-conforming lots, we wouldn't have a problem. We wouldn't be here.

Jonathan Gifford: But if I can just interject, I mean, I think Will stated earlier. We're not here to talk about I mean, we have no authority to determine that this is not an applicable requirement. That's the Council. It's the Council's requirement. The Council determines whether it's applicable. You know, we're here to determine whether there is an unreasonable restriction. And if we were to accept that, that the hardship was not created by the applicant. And I mean, that's sort of it seems unambiguous. So whether it's an applicable requirement or not. I think Will said, You have agreed, you know, in your petition that it is applicable, and you are asking for a variance. But so arguing applicability isn't really. I'm not a lawyer, but it seems like it's not relevant to our discussions here.

Doug Barbour: I don't think it's a matter of what the ordinance should be. I think it's what is in the ordinance. Right now and it recognizes that an area requirement cannot be met and yet turns around and applies says that an area requirement is applicable. I think it's reasonable to argue that it's not.

Jonathan Gifford: I don't think we have any authority to determine that it's not applicable. I don't think that's within our scope.

Eric Combs: So yeah, I think. Mr. Barbour, what Jonathan is getting at is, is one of the criteria that must be satisfied in any case, and that's that the interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance. So not in terms of which provisions of the ordinance are applicable or not applicable. That's not for us to assess, but of our many elements, that's one that I think we as a board are struggling to hear or see evidence that would somehow allow us to determine that that element alone has been satisfied. Any further comments or questions from the Board? If not, I'm happy to entertain a motion. Anyone like to make a motion? We've got draft motions in our packet pages 4 and 5.

Bundles Murdock: This from here.

Dev Roszel: Yeah, Mr. Chairman, I'd like to make a motion that I move that the board deny the variance application BZA 23-01 to increase the maximum building lot coverage for the subject property based on the following findings. One The applicant has failed to prove by a preponderance of the evidence that the standard for a variance is defined in Code of Virginia Section 15.2-2201 is met because such variance would be contrary to the purpose of the ordinance to limit the negative effects of building lot coverage.

And two the applicant has failed to prove by a preponderance of the evidence that the criteria for granting a variance is set out in Code of Virginia Section 15.2-2309 is met because the hardship was created by the applicant for the variance in choosing to build the principal structure to the maximum allowable building lot coverage.

Eric Combs: Motion made by Member Roszel. Do we have a second?

Trow Littleton: Second.

Eric Combs: Seconded by Member Littleton. Dev is there anything you'd like to offer by way of opening in support of the motion?

Dev Roszel: Not other than what I've already said.

Eric Combs: Okay. Any comments or deliberation on the motion?

Dev Roszel: You know, I would like to say one thing. I think it's important that as. Jonathan has pointed out that our purview is as and as Will has noted, is really not to comment on whether the ordinances are right or wrong or good or bad. It's whether or not the request fits within the guidelines of the ordinance. And so that's really where I believe that our role is in doing this.

Jonathan Gifford: Thank you.

Eric Combs: Yeah, Thank you. Any other comments or questions? Deliberation? Mr. Barbour, I thank you for coming out and for submitting your application. I'm going to support the motion. I agree with Dev in that we've got very strict lanes that we can travel down here. And unfortunately, I think in your instance, while I'm sympathetic and would love for you to keep that shed, I don't see an avenue for us to to really go down that would allow you to do that with the variance being requested. So for that reason, while I am sympathetic, I support the motion. If there is no further comments or deliberation, let's vote on the motion pending. All those in favor, please say aye.

All of Board: Aye.

Eric Combs: Motion passes 5 0. Okay. Our next item is BZA 23-02 request of Stephen C Price on behalf of Thomas and Mary Ann Dodson for a variance of Section 120 E of the Middleburg zoning ordinance pertaining to maximum impervious lot coverage at 4 Locust Street, zoned R-2 Single Family Residential District and Will we will look for you to take us away again. Thank you.

Will Moore: Thank you, Mr. Chair. So another variance request. This one is dealing with the standard of impervious lot coverage. So I made reference during the previous case that there were certain amendments made during the past year to our regulations. One was the adoption of this impervious lot coverage standard. So in addition to the building lot coverage, which applies to area under roof, the impervious lot coverage applies to the area under roof building lot coverage, plus other impervious surfaces that are created on the lot. Those could be driveways, walkways, mechanical units, uncovered porches, and other things that would be classified as impervious areas. In this particular case, and not to reread my entire memo to you, but in late 2018, the owners the Dodson's applied for a permit to build a home on this mostly vacant lot. I say mostly vacant. It does have the encumbrance of a driveway serving an adjacent lot, which we'll touch on in a moment. But they received a permit for a new construction home. They did not follow through at that point in time. The applicant, Mr. Price, cited that there were some health reasons that the Dodson's did not proceed at that point. That permit expired 12 months later. So at the end of 2019, that permit expired. When they have recently reapplied or submitted plans for to now proceed, the rules have changed in the interim. So the impervious lot coverage standard, which they are requesting a variance of, did not exist in late 2018 when their original plans were approved and then

subsequently expired. I've made a note in the memo that there's a code provision in the Code of Virginia to protect landowners' rights when they have a vested right. [off mic] Being affected by a subsequent amendment to the ordinance. But that code provision only applies if that significant governmental action, which the granting of a permit, remains in effect at the time that the rules are changed. In this case, the permit had expired in December of 2019. The rules were changed in 2022, so they were not granted the protection of that code section. But regardless, you have the remainder of the report. The building lot coverage standard, which was subject of the previous case there well, less than that on this proposal, the new home would cover 23.43% of the lot. It's the impervious lot coverage, which in R-2 is limited at 45%, which they cannot meet with their current plans. And going back to the driveway issue. So. The Dodson's have two lots adjoining one another. One is built upon with their current home at the corner of Barton and Locust. And this is the vacant lot just to the south of that. They have owned these lots for since the early 80s. There was a boundary line adjustment done to these lots several years ago. That boundary line adjustment took a previous condition, which had a north south dividing line that went through part of their existing home, and it reconfigured the lot configuration to what it is today. But in doing that, because both of those lots are non-conforming as to lot area when they readjusted the boundary, they had to make the lot areas exactly as they were before and the reason that is, is because they are both non-conforming. They're both less than the 8000ft². You cannot do an adjustment to a lot if it results in an increase in the nonconformity. The other way to say that is you can't adjust the lots and have either one of them become smaller because that would increase the nonconforming. So when the adjustment was made, they had to end up with two lots that were exactly the same size as the previous two lots. That was one challenge in trying to get the driveway on the lot with the house that it serves. And just a physical constraints. There's no way to get it on that lot. So this easement was created on the mostly vacant lot so that a driveway would remain on that lot to serve the adjoining lot. So that's impervious coverage that even though they're the owner of both lots, they still can't get rid of that driveway. So that's seems to be the kind of difference. Were it not for that driveway they would be, if not very close to meeting the standards, meeting the standards. So there's not an actual computation of that particular element. But that is kind of the swing factor here is the encumbrance of this lot by an existing driveway. Otherwise I will give up the floor [off mic].

Eric Combs: Thank you Will very much. Anyone on behalf of the applicant?

Stephen Price: Yes.

Eric Combs: Wonderful.

Stephen Price: Good evening, I'm Stephen Price. I kind of reminisce here because I was acting Town Attorney for Middleburg for about two months in between permanent attorneys. So it's nice to be back. I am a lawyer. I guess I'm here as a lawyer. But the Dodson's have been friends for over 40 years. Tommy is the godfather of my son, Thomas. And so I'm really more here as their friend with Tom with some health issues he wanted me to come along. So I'm honored and pleased to be here. I don't have a whole lot to add. Will did his usual careful, thorough job in writing the memo and said most of the facts that you need to have in order to make your determination. There's a few things that I would like to emphasize is the square footage of this lot is 6,956ft². So it's almost it's over 1000ft less than what the current zoning is for this type of lot. You have as part of the package; I furnished a copy of the plans that had been prepared back in 2018. They were tweaked a bit. And but on page two of those, I don't, I guess. Do you have it electronically? Anyway, there's this page that shows the layout. And what it shows is the Dodson's are basically building a retirement house that has 1,630 ft². So this is a they're building a modest house on this lot and the highest and best use of this property, I would submit, is to build a single-family dwelling on that. So with the 45% limit on the lot, that would be 3,130ft² of impervious surface. So you've got a 1,630 square foot house that represents only just slightly more than one half of the limit of impervious surface. So it's not putting up some huge house on it that's driving it. It's this preexisting driveway that really puts it well over the top. You look at it, the plans, if I could maybe step forward because the print's kind of small here. Here's the house. And other than as you can see, a very modest I mean, the house here

is 48ft this way, 30ft this way, 40ft there. And they've got a patio that's ten feet by. I can't see, but it looks like it's probably 20 or 25ft. So it's a modest patio there, a front covered porch, and a single carport. But it's this driveway easement that's over there. Well, they need to have someplace for their car, but they can't block the easement which runs. So this is the garage over there that runs there. So it's really this easement for the garage that's on the other lot that's creating it. And so the problem so they need to get to 53% of the 6,956ft² they need an additional 2,057ft² of impervious surface. And as you can see looking at it, it ain't the 16,000 or the 1,630 square foot house in the stoop and the carport and that patio that's putting it over. It's the other the sidewalk and the like. So we're asking for a variance. This worksheet that will prepared is very handy. I'm going to I've got another one coming up in front of the Loudoun County BZA here in a few weeks and I'm going to cannibalize it and use that but. [laughter]

Jonathan Gifford: [off mic] Put in a footnote.

Stephen Price: I will have no problem giving full credit to Will.

Will Moore: Because [off mic] in all fairness I cannibalized it from [off mic] [laughter]

Stephen Price: Yeah.

Will Moore: Martin sent me that he acquired from somewhere else.

Eric Combs: So two footnotes, please. Yeah.

Stephen Price: Anyway Lawyers are great Plagiarizers. If we can pick up something from someplace, we'll use it. So looking at the elements that must be met and the Dodson's meet either 1 or 2. Strict application of the terms of the ordinance would unreasonably restrict the utilization of the property. So all they're trying to do is put a 1,630 square foot house on this lot. And if they were going to meet the limit under 45% is 3130ft². So if these other items are are taking that require over 2000ft² in order to to meet that limit, they'd have to be putting up about 1,100 square foot house. I mean is that? It would require them to put up 1100 square foot house to meet it I believe would unreasonably restrict the utilization of the property or two it says granting of the variance would alleviate a hardship due to a physical condition relating to the property or improvements thereon at the time of the effective date of the ordinance. Well, the boundary line, as Will pointed out, it was kind of crazy. I don't know. It was called the Armfield Division. I don't know if we can blame Howard Armfield for it or not. I doubt it, but he's not here. But the lot line had it was of course the Dodson's didn't build it so, but the lot lines went like this, and you created two bowling alleys if you will, side by side and the house was kind of sitting smack dab in the middle. So when the boundary line adjustment to get rid of that encroachment, of course it violated the setback requirements from the side lot lines and everything like that. They were forced into doing this and putting in the driveway. Well the drive, putting in the driveway with an easement for the other lot did not create a problem at the time. It was only for the recent adoption of the impervious surface requirements. And that was after they'd already done the boundary line adjustment. So they did not. So I would say that it talks about a physical condition, an existing driveway that's there under an easement, that's an existing physical condition and that creates the hardship, giving the need for it. So I would submit under either 1 or 2 of the left column that the requirements are met. And over on the right. They did not create it. I mean, they had approved plans that were ready to go. Medical issues in the family that they needed to postpone it and came back. And in the meantime, the rules had changed so they didn't create it. There's been no evidence of any substantial detriment to any of the neighbors by by doing this. So there's no evidence of that and it's not of a condition of a reoccurring. Obviously, the problem with these non-conforming lots, you know, with the impervious surface and the size is a bit of a problem. But this is driven by the fact that there's an easement across the property and there's been nothing to show that that there's a lot of these non-conforming lots that are encumbered with easements for neighbors and so that you're going to have multiple variance applications. I was astounded for Will to tell me that I think it was at 20 years since you'd had and then all of a sudden you have two at once. But anyway, so I don't think there'll be a

reoccurrence of that, and it doesn't meet either. It doesn't run afoul of either 4 or 5. This isn't a situation where it doesn't have anything to do with use of the property that is not otherwise permitted. And it's a special exception wouldn't get us where we need to be. So I believe we've met the requirements. Happy to answer any questions that you might have. Perhaps if I can't answer them, then perhaps Tom or Marianne can.

Eric Combs: Wonderful. Thank you. Martin, Please.

Martin Crim: Thank you, Mr. Chairman. This raises an interesting point, because the purpose of adopting the impervious surface requirement was to control the amount of runoff that is created that does potentially impact both public lands and adjacent private lands. And one thing we haven't talked about tonight is that the Board has the ability to impose conditions. I'm reading from the statute now 2309. In granting a variance, the Board may impose such conditions regarding the location, character and other features of the proposed structure or use as it may deem necessary in the public interest and may require a guarantee or bond to ensure that the conditions imposed are being and will continue to be complied with. So there might be some kind of mitigating condition that the property could provide. Such as I'm just I'm not a landscape engineer, but so I don't know what all the things that could be done on that property. But I wonder if the applicant has any has given any thought to ways to mitigate the runoff.

Eric Combs: Well, thank you, Martin, and fair question.

Stephen Price: And I'd be happy to answer. One of the suggestions that Will had and it's in the packet that you came on this is rather than pay to use these I gather these blocks or whatever that and the Dodson's in fact did investigate it but found that the cost of doing that was \$30,000 as opposed to \$5,000 for it. So you know, I guess a civil engineer could look at this and see what the runoff is and is it properly controlled where the stormwater is going and all that. But so I think if it were a more modest cost of mitigating, if you will, runoff, then they'd be open to it. But an additional \$25,000 is pretty steep.

Eric Combs: Sorry, Mr. Price, I didn't catch the first part. The additional \$25,000 is to then study to get [multiple speakers]?

Stephen Price: No, no. What I'm saying, the alternative that Will had posed, he referred in here he talks about let's see.

Will Moore: It's in the draft motion to approve if you were to go that way an optional third condition.

Eric Combs: The conditions. Okay.

Stephen Price: The using semi permeable materials and that Marianne Dodson could better answer the questions on that. But I did see the email where she got back from the contractor that get the guesstimate the ballpark figure was \$30,000.

Eric Combs: And that was an estimate for replacing the existing driveway with some sort of semi pervious or impervious or, with your new impervious materials using?

Stephen Price: I think both.

Eric Combs: Okay.

Marianne Dodson: And actually, it was.

Stephen Price: You want her to come sit?

Eric Combs: Sure. Please. Come on up.

Stephen Price: You want to sit here Marianne.

Marianne Dodson: I got an estimate for the new driveway walkway and patio for pervious paving stones, and the estimate was \$32,000, which I think is a lot of money compared to \$5,000, which is in the contract for it to be. And the driveway is going to be gravel. It's not going to be asphalt, which is good, but that still didn't pass. Whatever it is.

Eric Combs: It's still gravel is considered impervious. [multiple speakers]

Will Moore: It's still considered impervious. Correct.

Marianne Dodson: But it is going to be gravel. And then I got another estimate for the back patio for doing pervious pavers, and that was \$7,500. So it would probably be. I don't know how much the patio by itself would be. Just, you know, for the contractor to do it. But that would be an extra \$7,500 just for the patio. I mean, I was trying to, you know, do something that would help with runoff and stuff.

Eric Combs: So I think perhaps you're suggesting to all of us that we're in the wrong business. And instead of being on the BZA, we should be contractors and do impervious installations. [multiple speakers]

Bundles Murdock: Ridgeview has a terrible drainage problem. We definitely do. I mean, at your end it's much better. It's because it's on a hill, it goes down. Anything that goes down your way is we need to. We have a terrible storm water so impervious is recommended for as much as we can do. And so gravel is impervious.

Dev Roszel: Pervious.

Marianne Dodson: Pervious is what lets the water through.

Dev Roszel: Impervious is [off mic] because impervious doesn't let it work.

Bundles Murdock: Well, we want it to run.

Eric Combs: Right.

Bundles Murdock: We want gravel.

Marianne Dodson: Yeah. So it's not going to be paved.

Bundles Murdock: No paving. Yeah.

Marianne Dodson: So that's it.

Eric Combs: Okay. Thank you very much. Let's go ahead and open the public hearing. Is there anyone who'd like to speak on this application? Seeing nobody. Let's close the public hearing. Will, is there anything you'd like to offer by way of response to anything the applicant provided?

Will Moore: It's not necessarily in response to the applicant, but I think it is worthy to note that the Planning Commission a number of months ago adopted a resolution requiring certain plans, grading and drainage plans to be submitted with single family detached dwellings. That was not previously required in our ordinance. And due to the condition that Ms. Murdock accurately described the Ridgeview

subdivision, in particular having poor drainage aspects in many of its areas. That was adopted. So regardless of whether impervious surfaces are being used, we do now review all plans to mitigate any negative effects of runoff. So there. If this project were to go forward, there is still going to be careful review that whatever is done on the property doesn't exacerbate drainage conditions. It might not improve them in the neighborhood, but it will ensure that the new construction does not worsen drainage conditions.

Eric Combs: Okay. So that new requirement will apply as this project moves forward?

Will Moore: Correct.

Eric Combs: Okay. So they'll need to submit some sort of grading or some sort of stormwater runoff calculation that would.

Will Moore: [off mic] Part of their submitted materials to this point. Has that yes.

Eric Combs: Okay. So the town is able to to assess the impact of the proposed variance and perhaps calculate what that additional impact might be in light of the additional impervious?

Will Moore: I think that the best way to answer that is that this project could be successful in meeting our requirements with or without the granting of the variance. Okay.

Eric Combs: Thank you.

Bundles Murdock: So we don't have to mention it in the motion?

Will Moore: I'm not sure.

Bundles Murdock: You've got it mentioned in the motion here.

Jonathan Gifford: It's optional, right?

Bundles Murdock: You said, subject to the following and you mentioned the impervious. No further expansion of impervious lot coverage shall be permitted.

Will Moore: I would still recommend that. [multiple speakers]

Bundles Murdock: You would still recommend it as a condition.

Will Moore: In other words, they could add if this were approved, they could come back in. Okay. And add a garden shed.

Trow Littleton: They these plans also go to the county, right?

Will Moore: Possibly. It depends on the threshold of disturbed area that they have. That was one of the issues that we ran into, was that there were some projects that did not meet the threshold necessarily that were requiring a grading plan. [off mic]

Eric Combs: Is that 5000ft²?

Will Moore: Or. Yes.

Eric Combs: Okay.

Will Moore: Or there were others that mistakenly went through the county. There should have been a grading plan submitted. There was not. And there were some issues. So we decided we're going to look at your grading and drainage regardless of whether it meets the [off mic]

Doug Barbour: Good. [off mic]

Bundles Murdock: This is too much to read.

Jonathan Gifford: So my question is, what is the material of the driveway, that is on the easement? [off mic]

Marianne Dodson: It's. No, it's asphalt. Yeah.

Dev Roszel: You're taking that out?

Marianne Dodson: No, it's when we sell the house that's existing that we live in now, that's going to go to the people that buy the house.

Stephen Price: The one that you're talking about, the one that goes to the drive through the carport will be gravel side by side.

Marianne Dodson: Oh, excuse me. Yes. Well, the new.

Jonathan Gifford: The new one will be gravel. [multiple speakers] Yes, the existing one is that this.

Marianne Dodson: The existing one is paved.

Jonathan Gifford: Right. And that's the one that goes to your current garage, which it will sell and carry the easement with it. Right?

Marianne Dodson: Yes. Right.

Dev Roszel: So the current one I got to look at the picture.

Eric Combs: So the existing driveway, the existing 900 square foot drive aisle that's in place is asphalt?

Marianne Dodson: Yes.

Eric Combs: And you had an assortment of estimates from a contractor. Did one of those estimates include what it would cost to replace that asphalt with pervious material?

Marianne Dodson: No.

Eric Combs: Okay.

Marianne Dodson: No, I was focusing on the new property.

Jonathan Gifford: And so I had to. So do we. I guess the direction I'm going. Could we put a condition in that says when the driveway on the easement is next renewed that it needs. It should not be asphalt. But I don't know whether we issue permits for driveway renewals or that's not something we regulate. So there's no way there would be no way to. I think we could require a bond or something, but that's a little bit of a it might be a bridge too far, so. Okay. Thank you. [off mic]

Eric Combs: So when you sell the existing house, the current driveway, which is on the vacant lot property, it's on easement, that driveway and that easement will benefit the new owner of the existing house?

Marianne Dodson: Correct.

Eric Combs: Okay.

Bundles Murdock: Yeah. Say again?

Dev Roszel: This easement stays with the house. [off mic]

Bundles Murdock: Why is this line here?

Bundles Murdock: That's what confused me. [off mic]

Eric Combs: So the line we're looking at an aerial. That line is the boundary of the vacant lot.

Dev Roszel: But the easement belongs to this. That driveway belongs here. Even though it's on their property. Yeah. So it's always going to stay paved and. [multiple speakers]

Stephen Price: Depending on what the new owner does, right?

Bundles Murdock: [off mic] And whose garage is this going to be?

Eric Combs: Will you had I think you had said in your presentation that there is no way to locate that driveway on the existingly improved lot.

Will Moore: We looked at that at the point in time when they were doing the boundary line adjustment and there was no feasible physical way to do that.

Dev Roszel: Because it made it smaller?

Will Moore: Right. And the driveway had to they still had to meet an off-street parking requirement with the adjusted lot. So that's why this encumbrance was put in place.

Eric Combs: Okay. And when was that? The boundary line adjustment done. Do we know?

Will Moore: I want to say around 2016.

Eric Combs: Okay. So before all of this.

Will Moore: Correct. [off mic]

Stephen Price: I've got it on my laptop if you want me to find out.

Doug Barbour: No. Go ahead Jon.

Jonathan Gifford: So another, I guess, just thinking. You probably thought of all these and already ruled them out as not practical. But is there any I mean, you will retain rights to use the driveway to pass through the driveway, the existing, you know, on the easement. You would still be able to drive across that driveway to a garage that might abut on the side, or I mean, is there any way to have one street

entrance and reduce the amount of driveway? I'm not sure if I don't think I said that very clearly, but. Will, did you understand what I'm trying to get at? [off mic]

Will Moore: If I could direct your attention up here, I don't think that possibility exists. So this is the neighboring property up here. This is the existing driveway, which leads straight back to a garage that's on the neighboring property. So this has to remain unencumbered by the Dodson's if and when they would build here. And then they'll have a driveway that goes alongside. But there's no real way to serve this single car carport. But there's no really feasible way to share a driveway, if you will, with the arrangement of the improvement here with the [off mic]

Jonathan Gifford: That was my question. So thank you. And you said it much more efficiently than I did. [laughter]

Eric Combs: Other questions, comments?

Bundles Murdock: Is that Jan Sodolski's backyard? [off mic] Garage.

Marianne Dodson: No, no. Our garage and her back shed are connected. Oh, and then it used to be one property, and that was she lives in what used to be the barn. And it's. It's just, you know, we share.

Bundles Murdock: Got it.

Stephen Price: That's back when property lines ran through houses.

Eric Combs: Yeah, go ahead Dev.

Dev Roszel: Well, you know. My thoughts are had there not been any complications when the original plans were drawn, and this submission was made this would have been a done deal and we wouldn't even be having this conversation. So I'm a little you know, I'm not as I don't see that as being the driveway. If the new driveway is gravel and we and you can do something with the patio to mitigate the runoff from that maybe I'm looking at it from a very naïve perspective, but I don't see an issue with you know, granting the variance.

Trow Littleton: No, I don't either.

Eric Combs: The previously approved plans that were submitted in 2018. That approval was good for one year and expired in 20 when? In 2019?

Will Moore: December 2019. Okay.

Eric Combs: So late. Late 2019. [off mic] And so the intervening. So January 2020 to Here we are now. A lot's happened since January 2020, and you've submitted that there were family health issues that prevented you from moving forward with that approval in essentially calendar year 2019 while the approval was valid.

Marianne Dodson: Right.

Eric Combs: And I'm not trying to pry into what those issues were, and I don't want you to explain it. I'm just painting the sequence.

Dev Roszel: Understood agreed.

Eric Combs: And then the ordinance that the applicant seeking a variance from was was adopted by the town when?

Will Moore: July of 2022. [off mic]

Eric Combs: July 2022. Okay. Okay. Thank you. If there are no other comments or questions, I'm happy to entertain a motion.

Dev Roszel: Yeah. Are you looking for a motion?

Eric Combs: If someone's ready.

Dev Roszel: Yes. I move that the Board grant the variance application BZA 23-02 to increase the maximum impervious lot coverage for the subject property to 54% based on the following findings. The applicant has proved by a preponderance of the evidence that the standard for a variance is defined in the Code of Virginia section 15.2-2201 is met because A strict application of the ordinance would unreasonably restrict the utilization of the property. B Such need for a variance would not be shared generally by other properties and C such variance is not contrary to the purpose of the ordinance and two the applicant has proved by a preponderance of the evidence that the criteria for granting a variance is set out in Code of Virginia Section 15.2-2309 is met because A the property interest for which the variance is being requested was acquired in good faith and any hardship was not created by the applicant for the variance. B The granting of the variance will not be of substantial detriment to adjacent property and nearby properties in the proximity of that geographical area. C The condition or situation of the property concerned is not of so general or recurring a nature as to make reasonably practical the formulation of a general regulation to be adopted as an amendment to the ordinance. D The granting of the variance does not result in a use that is not otherwise permitted on such property or a change in the zoning classification of the property. And E The relief or remedy sought by the variance application is not available through a special exception process that is authorized in the ordinance. I further move that the variance is subject to the following conditions. Development of the property shall be in substantial conformance with the zoning plan titled Dodson residence dated 1-25-23 by Kirk Engineering PLC. Two no further expansion of impervious lot coverage shall be permitted. And three, optional, a requirement that certain new services defined as impervious be constructed using semi-permeable materials. E.g. the new driveway and or new patio must be constructed of semi-permeable materials subject to approval by the zoning administration. So ends my move.

Trow Littleton: Second.

Jonathan Gifford: Okay. So you're putting in the optional condition?

Dev Roszel: Correct

Jonathan Gifford: Okay.

Eric Combs: Okay. So motion made by Member Roszel. Seconded by Member Littleton. Any discussion on the motion?

Jonathan Gifford: Question [off mic]?

Eric Combs: Go ahead. Jonathan, please.

Jonathan Gifford: So on provision 1C, it says such variance is not contrary to the purpose of the ordinance. So the ordinance in question here is the lot coverage ordinance, right?

Eric Combs: Impervious lot.

Jonathan Gifford: The impervious. That's the ordinance. And so. Isn't the variance contrary to the purpose of that ordinance? I mean, it seems like it's increasing the impervious coverage of the lot. So I see A and B are real clear. But C, can we really say that it's not contrary to the ordinance? This is [multiple speakers]

Dev Roszel: I would like to state that because they meet at least one element from the original column. I guess maybe I shouldn't have changed that motion to not include all of those. Because it does meet the other ones. [multiple speakers]

Will Moore: It's a little bit different.

Eric Combs: Yeah, it's not quite this worksheet that's in the findings in the motion. But Will, can you address Jonathan's point, which I think was the question about the impacts of the additional impervious area and the town's ability to assess.

Will Moore: Right. So there are a couple of different ways of looking at that particular provision that the variance is not contrary to the purpose of the ordinance. One would be to look more general that just the overarching ordinance to protect public health, safety, welfare, those kind of things. Another way to look at it would be to look specifically at the requirement for which the variance is being requested, which is the impervious lot coverage. It is correct that one of the driving forces of that was to prevent issues with drainage and certainly impervious standards is one element of that. But you could use impervious materials and grade your lot 10% fronting forward to the front of the lot and still create issues. So in this consideration, you need to weigh whether or not by granting that additional percentage that's requested with this particular variance, would we still be able to adequately mitigate the negative effects of stormwater runoff? If you're looking at that specifically, and I believe in evaluating the drainage plans, the grading of the property, that that could still be achieved [off mic].

Dev Roszel: I also would say to that I don't disagree with your point, Jonathan but the option the third option is a requirement that certain new services defined as impervious constructed using semi permeable materials. That they must be constructed of semi-permeable materials subject to approval of the zoning administration. So I think that if they do that, it will not be in contrary to the purpose of the ordinance.

Eric Combs: A condition meant to to address or mitigate that impact. I think that's.

Jonathan Gifford: Well, I would agree. So if the if that, you know, optional is there and that's what we are debating that's in the motion and that is not gravel. That's not considered semi-permeable. Right?

Will Moore: Well again, this is subject to evaluation. It does not meet. So our ordinance allows for a certain percentage of reduction. Getting into the weeds here when you're calculating your impervious surface. There are certain surfaces that must be calculated as though they don't let water through. And one of those is a gravel driveway. And the reason is over time, the subbase becomes compacted, and it functions just like asphalt. There are certain materials that if you use them. And these are some of the materials that Mr. Dodson referred to with the much higher cost that they over time will adequately allow some penetration of water. If you use those kind of materials, we allow that to be calculated at 50% of the actual area. What does that mean? If you're building a 400 square foot driveway and it's asphalt or gravel or concrete, it's counted as 400ft² of impervious surface. If you build a 400 square foot driveway on one of those kind of materials, we only calculate it as 200 square feet. So but the way this motion is worded, it allows a little more flexibility there that you wouldn't necessarily have to use one of these extremely expensive materials. But then if approved, it's worded. I can work with the Dodson's on something that would meet [multiple speakers]

Jonathan Gifford: Okay? Okay. That's helpful. I would add, being a civil engineer, although not a licensed civil engineer, that it's not only the I mean, from a drainage standpoint, you care not only about the permeability of the surface, but about the rate at which water runs off of it. And so if you have concrete or asphalt, the water concentrates very quickly. So when you have a heavy rain, you know, it surges. Gravel, I'm sure would have a lower runoff rate than and so it doesn't address the permeability issue, but it does sort of what's it slows it down and that means that your drainage ditches don't overflow as fast and or it may delay it long enough for the rain to pass and so forth. So thank you.

Eric Combs: Question on that, that third option. Certain new surfaces defined as impervious be constructed using semi permeable materials. So in subject to zoning administrator's approval, would there also be an option to do something with respect to that existing driveway to perhaps remove some of the asphalt replaced with gravel? I know you've gotten some outlandish estimates from contractors here and there. So is that another option as well? It's a new surface. Perhaps there's some flexibility with that piece as well. Is that allowable in satisfying that condition?

Will Moore: That certainly would satisfy. [off mic]

Eric Combs: Okay. [off mic] Okay. Thank you. Okay. We've got a motion on the table. For the record, I'm supportive of the motion. I'm happy to support it. I find our conditions have been met. I find the conditions. I'm sorry our elements have been met. I find the conditions fairly address the impact and mitigate it. I'm hopeful that this can move forward now without impediment and, [multiple speakers]. No not yet. Are there any other comments on the motion? Okay. All those in favor of the motion, please say aye.

All of Board: Aye.

Eric Combs: Motion passes Five zero. Thank you very much.

Marianne Dodson: Appreciate it.

Eric Combs: Will back to our agenda. Any administrative or discussion items?

Will Moore: I have nothing at this time.

Bundles Murdock: That's good.

Will Moore: Well, you know what? [laughter]

Jonathan Gifford: Oh, sorry. On the record. And cannot be erased. [multiple speakers]

Will Moore: Mr. Crim has offered to do. I know we do kind of an informal training if you will.

Bundles Murdock: We just did [multiple speakers] training.

Will Moore: [multiple speakers] During our organization training. But the next time we have an organizational meeting, Mr. Crim has offered to do more formal. [multiple speakers] Training and I think it would be helpful to have it from his perspective. So the next time we convene. [multiple speakers]

Martin Crim: Whenever that might be.

Jonathan Gifford: We'll certainly 15 years.

Jonathan Gifford: 15 years right. [multiple speakers]

Dev Roszel: Out of the box. Too much. [multiple speakers]

Martin Crim: No, no, that was a very well-run meeting. I thought. I would so but yeah, there's always something else and there's the law is constantly changing with the statutes and the case law. And so I'm happy to do.

Bundles Murdock: [off mic] A mock thing the way you wanted us to do last time I thought this was pretty mock [off mic].

Jonathan Gifford: This was real.

Dev Roszel: This was real.

Martin Crim: This is not a drill. [off mic].

Will Moore: Mock trial, although in a mock. Appeal, [off mic] determination would might. [multiple speakers]

Martin Crim: Be helpful. Yeah, the determination appeals, those are a bit trickier than the variances in my experience. [multiple speakers]

Bundles Murdock: What's a determination?

Eric Combs: Well, I look forward to that training. [multiple speakers]

Martin Crim: So we'll comes out with an opinion saying that what you're asking for is not allowed under the ordinance and the owner says, Oh yes, it is, and brings it to you to disagree with them.

Bundles Murdock: I'm not here for that.

Eric Combs: 15 more years.

Jonathan Gifford: I think I'm gonna be sick.

Eric Combs: Okay. Will anything further administratively?

Will Moore: No, sir.

Eric Combs: Okay. Meeting adjourned. Thank you all. Thank you.