I. Call to order

Reichlen called the meeting to order at 7:04pm

Members present: Marino, Thorpe, Reichlen, Moritz, Girard, and Jutton

Staff Present: John Greenwood, Zoning Administrator; Stephanie Maltais, Administrative Assistant; Genie Smith, Office Clerk

Reichlen-we have two emergency exits in the back of the room and one behind me. If you have a problem hearing, see Stephanie and she will set you up with hearing assistance. When you come to make your presentation, you must make it at the podium and speak clearly into the microphone so the tape can be transcribed properly. You must begin by stating your name and address. All questions and comments must go through the chair, we tape record each meeting so please keep noise to a minimum.

Our procedures are as follows: I will call the case, the clerk will read the application, and the applicant will then present their case. Once the applicant is finished we then allow comments and general information questions. I will ask who would like to speak in favor and who would like to speak against the application. There will be a rebuttal period for each. After the case has been heard we will close the public hearing and no more testimony will be taken. We will then deliberate the case before moving onto the next case. If the board is unable to finish deliberating the case, we set a time tonight to continue the meeting within the next 30 days.

If you feel a member of the board has a conflict of interest, please say so when the case is called. It takes at least three yes votes to grant an appeal or to deny an appeal. We do not have a full board this evening, applicants are entitled to wait for a meeting when a full board is present. There is a 30 day appeal period that begins on the date the decision is made.

Has any board member been contacted by anyone in anyway in regards to the application before us tonight? By email, phone or in conversation, or in any other way in how you would vote? *All board members responded no.*
Stephanie, will you take a roll call please?
Maltais- Marino-here, Girard-here, Thorpe-here, Moritz-here, Reichlen-yes,

II. Approval of Minutes

Thorpe moved, Girard seconded the motion to approve the November 4, 2021 meeting minutes as presented.
Voted 5-0, motion approved.

III. Public Hearing & Deliberations

#5107: Sean P. Donlon- an appeal for a **Variance** (Article V. Section D-4, B): to permit the construction of a covered porch with a side setback of 10.73 ft. where 20 ft. is required. Tax Map U39 Lot 1-22 located on Brookhurst Lane West in the Shoreline District.

Reichlen- this case has been withdrawn.

#5108: Sean P. Donlon- an appeal for a **Special Exception Wetlands** (Article V. Section G.4.a): to permit the construction of a single family dwelling 32.89 ft. from a non-designated brook where 75 ft. is required, with 1,930 sq. ft. of buffer impact. Tax Map U39 Lot 1-22 located on Brookhurst Lane West in the Shoreline District.

Donlon, applicant- just to clarify for the neighbors we are not looking at this project as a business property but rather for our families. I hope that what you have in your packet tonight answers the questions that were raised at the last meeting. The revised plans include several enhancements. We are proposing stone drip edges along the edge of the roof area, a vegetated swale and a few other enhancements.

Ted Ohnemus, Waltham MA- I grew up in the area through my grandparents' house, my parents moved up here in the01980's and reside in Center Harbor. I do have family in Meredith as well. We are looking to build this house for our family and children to enjoy this area the same way we did. We respectfully withdrew the variance application for a porch in an effort to open a dialogue with the neighbor's to further see options.

William Hess, Surveyor- we are proposing to minimize disturbance associated with the project and retain as much of the natural woodland buffer as possible. The non-designated brook will be protected during construction and the erosion control measures will not be removed until natural growth and lawn has been re-established and the ground surface is stable. The proposed home will be located within the current building setbacks. The leach field will be in the front yard out of the buffer area. Happy to answer any questions.

Reichlen- questions from the board? No comments

Reichlen- any comments or questions from the public? No comments

Crys Frederick-I have a question regarding the tree line at the south east corner. There is a tree of concern that is a 20 inch tree. I want to make sure that tree is not cut down, I believe it's important to the stabilization of the bank line. Hess-

that tree falls within the states 150 foot buffer, and we cannot cut anything in that area, so the tree will not be cut. Crys Frederick was amendable of that.

Reichlen- does anyone wish to speak in favor of this application? No comments

Reichlen- does anyone wish to speak against this application? No comments

Reichlen- does the board feel they have received enough information both verbally and from the application so the hearing can be closed? All members responded yes.

Reichlen- hearing closed.

Deliberations

Reichlen- that stream, if you look at it closely, you will see a lot of erosion going on there. It's important to retain any trees they can in that area which they are doing. Any other comments from board members? No comments offered.

Marino Moved, Moritz seconded the motion to approve the application in regards to case **#5108:** Sean P. Donlon- an appeal for a **Special Exception Wetlands** (Article V. Section G.4.a): to permit the construction of a single family dwelling 32.89 ft. from a non-designated brook where 75 ft. is required, with 1,930 sq. ft. of buffer impact. Tax Map U39 Lot 1-22 located on Brookhurst Lane West in the Shoreline District. They have met the criteria for granting a special exception. The Special Exception is subject to the following conditions:

1. This Special Exception applies only for the project described by plans submitted with this application and on file in the Planning Office.

2. All State and Federal requirements must be satisfied and all required permits must be on file in the Planning Office.

Roll call: Girard, Moritz, Marino, Thorpe, Reichlen
Voted: 5-0. Applicants request granted.
Thirty Day Appeal Period

Frank Marino recused himself from the next three cases, Ray Moritz, alternate took his place and Robb Jutton; Vice Chairman arrived to the meeting.

#5063: Goodhue Meredith Real Property, LLC- Continuance of the public hearing on October 14, 2021. An appeal for a **Variance** (Article V. Section D): to permit lot coverage of 45% where a maximum of 30% is allowed. Tax Map U35 lots 8A, 11, 12 & 14. Located at 31 Lovejoy Sands Road in the Shoreline District.

#5064: Goodhue Meredith Real Property, LLC- Continuance of the public hearing on October 14, 2021. An appeal for a **Variance** (Article V. Section D-4, B & Article V. Section D. Table of Dimensional Regulations): to permit the construction of a pergola with a front setback of 34 feet where 65 feet is required. Tax Map U35 lots 8A, 11, 12 & 14. Located at 31 Lovejoy Sands Road in the Shoreline District.

#5065: Goodhue Meredith Real Property, LLC- Continuance of the public hearing on October 14, 2021. An appeal for a **Variance** (Article V. Section D-4, B & Article V. Section D. Table of Dimensional Regulations): to permit the construction of a showroom with a front setback of 15 feet where 65 feet is required. Tax Map U35 lots 8A, 11, 12 & 14. Located at 31 Lovejoy Sands Road in the Shoreline District.

Reichlen- In reviewing the materials presented in cases 5063, 5064 and 5065 there is reason for the Board to conclude that the applicant does not have sufficient legal rights to the property to undertake the project because it does not have permission for the project from the holders of easement rights across the Right of Way for access to Tall Pines. After careful review of the plans submitted, arguments presented from both sides (written materials), and independent review of case history, it seems clear that these cases should not proceed forward until the property rights dispute is resolved. Further it is clear the Planning Board will have the same difficulty hearing the Goodhue plans.

Therefore, *I move* the Board deny these applications without prejudice. If the motion passes, the Board would not hear any testimony or deliberate on the applications themselves. The applicant would be free to resubmit these plans or submit new plans once the property rights issue is resolved, or alternatively file an appeal of this decision. Does anyone wish to second that motion? Moritz- *I'll second the motion*.

Reichlen- both the applicant and anyone who wants to speak against this motion or in favor of the motion can get up and do so.

Attorney Boldt; Donahue, Tucker & Ciandella representing the applicant Meredith Realty (Goodhue) - the materials that came late to the board from attorney Sistare, actually support our position because that highlighted phrase on each of the two deeds actually says "or in a convenient manner over such road as may be constructed," that means it's very different from the case that attorney Reimers and his colleague Mr. Hannah are referencing. The Andrews case had no such language in it. This means that the developer of the marina, at the time when it sold to the Chivonies, retained the right to move that easement and that is why we say we can do what we are proposing to do by rerouting the easement instead of in front of building B.5 along the waterfront, to behind it. We are entitled to do so and normally this board does not take up disputes of civil rights that is a matter for the court to decide not this board. We have, with evidence before you, the right to move that easement.

Tom Hannah, Attorney at BCM Environmental & Land Law (Jason Reimers partner) - we agree with the motion as proposed. There may be an issue that was raised by Mr. Boldt as to whether the language in the deed is sufficient to give carte blanche approval to move that right of way anywhere that the applicant wants to. We think that would be a violation of the property rights. In my experience with easements is when a right of way has been established for decades and has been memorialized in a site plan, the land owner has lost the right to move it around, and so that's an issue. The issue should be resolved before the board spends lots of time and energy on a case that may not go forward at all in the configuration that is desired. I agree with the motion entirely.

Reichlen- any other comments from the public? No comments. Reichlen- do board members have any questions for the people who have spoken? After we are done with questions we are going to close the public hearing to talk about this motion.

Moritz- it appears the current debate is that there is a legal question about the right to move the right of way and the position is that we shouldn't be ruling on this until that is resolved. My question is to both of you, since it's not moved until we do anything, is there even grounds to take it to court to resolve it? How will you settle this?

Boldt- we could .bring a slander of title action and quiet title action against the parties that are claiming that this is a right that is theirs and interfering with our property rights. I would remind the board there is a very recent case that was issued by the Supreme Court, concerning our neighbors to the north in Conway. It's the Bellevue Property Vs.13 Green Street that dealt with the Mountain View Grand Hotel on one side and the Market Basket project on the other side. Market Basket had a similar situation, there was a previous road that went through the middle of their project, and the town released all of its rights, and the developer who was doing the Market Basket had the right of way going through another part of the property. Mountain View Hotel said "you can't move that, I have a right for that easement right there." The court was emphatic in saying, the rule of reason has to apply and there was no overriding property interest to say you couldn't "be here, and not be there." There was a balance of the constitutional property rights- property rights of the easement holder, and the property rights of the development. The court allowed it to be moved, and that's exactly the same as what we have here. We would prefer to go forward with you and have these variances heard and hopefully granted so we can go to the Planning Board. We have been months in this process and to have this kind of a claim now, when we have tried very hard to work with all the neighbors (members in the audience laugh). It's not a popularity contest and the crowd may be against me, and that's fine. It's one where the case law, I do not believe, supports Mr. Hannah in this case.

Hannah- well I do agree with one thing, there is a way to resolve this property right issue and that it should be done prior to this board's review of zoning issues. The only way that the parties that have benefit to this right of way found out about this proposal to move their right of way was the variance application. So, that says something in and of itself about working with the neighbors. I would suggest that there is a bona fide legal issue here and ought to be resolved before they move forward.

Boldt- Tom (Mr. Hannah) is new to the project, this relocation was part of our entire package filed on August 17, 2021. It is clear in our narratives, it was filed with notice to all of the abutters including Tall Pines Condo and all of the abutters to the north. I have looked at all of these deeds for all of the Tall Pines Harbor, which is the northern section, as well as Tall Pines Condo. The Tall Pines Harbor folks have no rights whatever in this easement, they have a right to go through Soley Lane to Turtle Lane to Tall Pines Way to reach the common beach. They do not have the right to come out on this one. We are talking about a muddy set of deeds from the Chivones to the 5 property owners in Tall Pines plus Mr. Sistare who is the successor in the link project which is outside the condo. We gave notice to everybody, the fact that this is something hidden is flat wrong.

Hannah- I didn't say it was hidden, I said that the first notice came in this zoning process.

Reichlen-do any board members have any questions? Jutton- yes, I would like to know if the Town of Meredith has any stake in the right of way or any interest in this in any way.

Boldt- no.

Reichlen- the public hearing is closed and no more testimony will be taken.

Deliberations:

Reichlen- the difficulty of this one is they are proposing to move the right of way and then build a building on the existing area where the right of way was. This property issue is much more important to us and why we need to entertain this more than we have other ones in a recent case where we went ahead and ruled and there was still a property issue. There was no discussion of building on what could be argued as somebody else's property. That's why this one is significantly different. I will also tell you that obviously this has been vetted with our legal counsel and she felt this was the proper thing to do given the extent of this project. It's going to be a long process to go through the zoning board and then this whole thing is going to get upset at the end because this has to get resolved before the Planning Board can hear it anyway, one way or another. Unless of course the abutters drop the issue. That's why we are here discussing this. Does anyone have anything to add?

Girard- so even if we move forward and it goes to Planning, what's the legal basis or the decision making process for them not to hear this? Reichlen- the only way it can get to the Planning Board in actuality is if the abutters decide to drop this thing. If we were to grant these variances, the abutters have the opportunity to appeal the case. Until it gets finished with the Zoning Board, it can't get to the Planning Board. It has to get approved by the Zoning Board before it can even get there. If the abutters were to continue the case by taking it to court, it's got to get resolved and then if that process gets resolved in such a way that is favors the abutters, then we are right back here with a whole new plan, which is what brought this on.

Jutton- I am torn because I agree a building on top of what is the existing right of way is a serious matter that said, I don't believe this doesn't get arbitrated in court where it belongs. My opinion is that I think we should move forward and hear it. This has been going on long enough, I am not saying how I am going to vote one way or another, I want to hear testimony. At the end of the day this is going to have to be arbitrated in court, it's obviously not going to get settled here. It doesn't matter which way the board votes, it's going to be appealed one way or the other. In the end, I would say we move forward with the information and the plan as presented as the applicant desires and then it will take care of itself in court afterwards.

Girard- backing into this, we know what the process is going to be. Either decision we know what the process is going to be. It's going to be muddy down through the process. Our action by tabling this tonight is going to expedite that process, I would assume, between the parties and then therefore will bring us a final presentation at some point that is not encumbered by all these issues. There is legal basis for this. Reichlen- our attorney thinks that what we are doing here is very defensible. She has spent a lot of time of this and feels this is a defensible argument. Girard- in looking at past practices, she feels comfortable with that decision, because this is different by nature of the potential construction on that right of way in particular. The damage is potentially much greater than other. Reichlen- and Mr. Hannah noted that it is documented in a site plan that was produced by a previous owner and the easement has been there for more than 20 years. If we do pass this, as I said in the motion itself, the applicant has the right to appeal our decision tonight and we will be back having this discussion again.

Moritz- given our own counsel has said its not only a defensible thing to do, but I was under the impression she would it's a wiser thing to do rather than spinning our wheels going through all of the variances, only to have it turned around by the court. Reichlen-if the court turns around and says the applicant can do this than we move forward. If they say they can't do it, than the applicant redoes their plans and we move forward. The goal here is to get us moving forward. Moritz- I am in favor of the motion. Girard- I think we have to put some faith in the guidance/recommendation from counsel. They are there to represent our interest and the town's interest in the best possible way. Reichlen- to be clear she didn't

recommend we do this, she went through all the alternatives with me and I said I felt this was the best approach and her comment back was "it's the most defensible." I want to be clear that she is not telling us what to do, she is good at advising what the best move forward is.

Thorpe- If we move forward and approve or deny the variances, if they are approved, it seems reasonable that the parties are going to have to settle this right of way dispute before anything else can happen. It seems to me a logical sequence is to settle the right of way issue first and then depending on how that is settled, that would generate the applicant's presentation as submitted or revised. I am in favor of agreeing with your motion and getting the right of way dispute settled legally before we hear the various cases.

Roll call: Jutton-no, Thorpe-yes, Girard-yes, Moritz-yes, Reichlen-yes
4-1, motion approved.
Thirty Day Appeal Period

Reichlen- before you go anywhere next issue. Attorney Boldt, after careful review of everything, and sorry we didn't catch it the first night, lot coverage variances must be done lot by lot, they cannot be done as a total thing. If you read the application, I think it might be misworded that it lists out 8A, 11, 12 & 14 where you might have only meant lot 8A. Unless you actually join the lots to make them one big lot, we need to hear them lot by lot. At the same time, if lot coverage is not increasing from the current coverage that exists than no variance is needed. If lot coverage is decreased from what it currently is, no variance is needed. Only if lot coverage is being increased on a specific lot do we need a variance and that variance needs to be for that lot. After digging through town records, I found this easement from October 31, 2002. Boldt- that's our exhibit 'H." Reichlen- a significant concern has been raised into this easement. We are not finished looking into the case history on that easement. I want to raise this to your attention now so you can address it in advance. On Page 4, #2 in the last paragraph of that section, the easement states "it is a condition of this easement that the land area described above shall remain permanently eligible as open space for purposes of calculating density, lot coverage and size of Marina Cove Associates Landholdings in connection with any future use of the land of Marina Cove Associates and its successors and assigns." That language appears to be granting a variance for lot coverage, in certain cases of additional lot coverage, which I believe applies in this application. If the numbers come out right it has potential the way that was done and the way you are using it, you are lowering lot coverage than what is actually there, but the easement is suggesting that you can do that. By suggesting that, the easement is in affect giving you a variance. I suspect that the Selectboard cannot grant variances, they must go to the Zoning Board. This easement was never vetted to the Zoning Board in any way, it's only signed by the Selectboard and it never went in front of the public for debate in an open form. There is a question whether this thing is legitimate, using the parking lot as an open space and not counting it towards your lot coverage numbers. We aren't done researching that, we are here now with this denial that just passed

without prejudice. I wanted to bring this up with you so that you can address it. I do have a question, and if it's out of line you just tell me. Would you agree now that the lot coverage needs to include any impervious surface that is in that parking lot? If you do, it saves us a lot of work, if you don't, than you need to be prepared for whatever our research does.

Boldt-let me answer your question in a roundabout way. By going first to your statement of whether it was legitimate for the Selectmen to do this. There is a difference in the Selectmen settling a Planning Board or Zoning Board case, they cannot do that, that's clear in case law. From acquiring property rights and negotiating the purchase price for that, this is a reciprocal easement document. It allowed the town to utilize marina property, it allowed the marina to cross the town lot in two roadways and in utilities. There was a reciprocal easement because the towns launch is partially on the marina property, so they resolved title issues, land ownership issues with these terms. I don't think it is ill legitimate, I also don't think that we have treated in an incorrect way. We have flagged it from the beginning of our materials, we have said that our impervious coverage calculations don't count the portion of lot 14 that has the existing upper lot on it and our proposed 30 additional parking spaces on it. Where we go from here, is, I think a matter of either we agree that those property rights are valid and binding on both sides or you're saying the 2002 document goes away? I don't think anybody can say that, but it was a term of the condition just like instead of $10,000 in cash given by the town for that there is no way of re-dealing that hand. I believe it's a legitimate benefit of the bargain so that it's there. If we needed to count it or show it we can that, easily enough, it just means that we are over the 30% more and we're needing a higher calculation of the 42% that we are currently asking for. That doesn't make sense to me because the document is there and has been there for almost 20 years.

Reichlen noted a case he was involved in that he felt was similar to this situation. Boldt responded to the scenario- I guess what you are suggesting is that when I am needing to sue Mr. Hannah's clients I need to sue the town for declaratory judgement that the easement is valid? Reichlen- that would be the case. Boldt- it's one of those things that it's the natural course. Reichlen- I am just letting you know that this is a concern that is being looked into. Boldt- I am fine with showing the additional numbers but I don't want that to be a waiver of the rights that we have in that easement. Reichlen- and that is an acceptable alternative, we may by the time the meeting comes have reason to say that this is valid, and looking at the easement and figuring out what number we are agreeing to (the variance I mean). It may be insignificant in the end, it may get granted anyway. Boldt- I will have to think of the timing of the next steps, I'll consider this with my client. Reichlen- and when you present you bring both sets of numbers so that we can cover it all. In the meantime this is being looked into. It was my doing in wanting to inform you about this tonight. I feel bad it wasn't brought up earlier, you need to know all the issues up front. Boldt- just to be clear, this is a project that has been several years before the town staff. Reichlen- I understand, but this is the first it's been brought to us, I'm doing what I can do. Boldt-would this be through

Christine or Laura? Reichlen- I am working with Christine, not Laura. Boldt- fair enough.

Reichlen- I believe that concludes the cases for tonight. Mortiz- in regards to case #5063, and requiring the variance only for lot 8A. Reichlen-if we had just crossed out lots 11, 12 and 14, and the numbers are correct for lot 8A, I think that may have been miswritten. Boldt-staff and I agreed to present all information to both boards on all lots so that all abutters to all lots got notice of all things, so we viewed the entirety as having an impact, so that we wanted to show you all of the pieces at one time. Reichlen- in the current plans the only lot that needs a variance is 8A. Lots 11, 12 and 14 do not because they are either the same coverage or reduced coverage and one is below 30%. This issue with the parking lot we are speaking of, I don't know which that would apply to. Boldt- its lot 14, the one on the south side. Moritz- would the same logic apply to the other two cases (5064 & 5065)? The things they are asking for the variances are occurring on lot 8A and not all four lots. Reichlen- correct. We need it lot by lot. Boldt- we will give you what you want. Reichlen- thank you.

Jutton- is this continued to a date certain? Reichlen- no, they were denied with without prejudice. Jutton- ok so they have to re-apply. Reichlen- they will re-submit and people will be re-noticed.

I. Other Business

II. Adjourn

Meeting adjourned at 8:07p.m.

Minutes respectfully submitted by,
Stephanie Maltais
Administrative Assistant, Community Development Department

Approved by the Meredith Zoning Board on December 9, 2021

By Bruce Reichlen