In attendance: Charlie Vars, Jamie Ramsay, and Danielle Pray.
Staff present: Nic Strong, Community Development Director, and Kristan Patenaude, Recording Secretary (remote).

Acting Chair Danielle Pray called the meeting to order at 7:00 pm. Danielle Pray introduced the Board members and staff. She explained that, due to Board attendance this evening, all applicants will need a positive vote from all three Board members present, in order for the application to be approved. Applicants may also consider asking their item to be tabled to the February meeting, in hopes of additional Board attendance. All applicants voiced their desire to move forward with the hearings tonight, as laid out by Acting Chair, Danielle Pray.

PUBLIC HEARING:

1. **CASE #: PZ15210-121321 – VARIANCE** – **Fairview Millwork (Applicant) and John T. Mahoney III (Owner); 108 Route 101A, PIN #: 002-043-006 –** Request for relief from Article III, Section 3.4, Paragraph D,3,b,iv to allow for the installation of an exterior wall sign on the existing building that is approximately 50.9 square feet where 25 square feet is the maximum allowed. *Zoned Industrial.*

Jamie Ramsay read the case.

John T. Mahoney, who goes by Ted Mahoney, presented the case. He explained that Fairview Millwork has been operated out of this location since 1953. Several years back the layout and configuration of adjacent Paul's Way changed, including the addition of a traffic light. He noted that the business is over 100 yards away from Route 101A. Its placement makes it difficult for customers and delivery trucks to find it. There is currently no signage on the building. He explained that the request is to place a sign over an existing portico at the entryway. The sign is proposed to be 50.9 s.f., where 25 s.f. is the maximum allowed. The business is only open until 5:00 PM, so the sign will not be lit.

Mr. Mahoney addressed the five tests:

1) **How will granting the variance not be contrary to the public interest?** We think this sign that includes a logo, and our company name will help identify our business and enhance the look of the building. The building is set back approximately 300 feet and customers have stated many times they do not know it is a business because there is not a sign of identification on the building itself.

2) **How will the granting of the variance ensure the spirit of the ordinance will be observed?** The spirit of the ordinance is observed because the neighboring commercial buildings are of similar aesthetics.

3) **How will substantial justice be done?** Customers, vendors, delivery trucks, and emergency response personnel will be able to identify the building from Route 101A. With the building being set back 300 feet, a larger sign would assist all of the above in locating the business. It would help with the traffic flow in eliminating drivers, especially delivery trucks, from driving past the location and having to turn around.

4) **How will the value of the surrounding properties not be diminished?** The value of surrounding properties would be enhanced as the existing structure looks like a warehouse building and with professional signage it would improve the exterior aesthetics.

5) **Literal enforcement of the provisions of the ordinance would result in unnecessary hardship because: A) for the purpose of this subparagraph, "unnecessary hardship" means that owing to special conditions of the property that distinguish it from other properties in the area:** With the proposed signage Fairview's building would appear as a retail showroom open to the public for business. The sign will assist in bringing more business to the store as opposed to the current appearance of a warehouse. Due to a past hardship, the State of New Hampshire took the land to reconfigure Paul's Way, there was a drastic change of frontage giving Fairview limited land to install a road sign. Currently, there is a road sign that is close to the road, but its view is impeded by an abutting company and telephone pole.

(i) **No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property because:** Fairview is looking to increase sales and bring more customers into our showroom. The sign will assist in creating the look of an established business that is open to retail customers.

(ii) **The proposed use is a reasonable one because**: We are improving the look of the building by installing a professional sign which will result in a beautiful exterior that will fit in with the neighboring commercial businesses.

(B) **Explain how, if the criteria in subparagraph (A) above are not established, and unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it: how will granting the variance not be contrary to the public interest?** Fairview's building will be recognizable from the main street, giving people the visibility and opportunity to visit the showroom and, ultimately, helping to create more sales.

In response to a question from Charlie Vars, Mr. Mahoney explained that he believes the existing signage on Route 101A is approximately 24 to 26 square feet.

Charlie Vars stated that he is unsure if the proposed sign needs to include the business logo and statement regarding it being a retail location. Removing these items may bring the sign closer to the required size.

In response to a question from Mr. Mahoney, Charlie Vars stated that he believes 30 s.f. would be an adequate size for the proposed sign. Danielle Pray noted that the applicant may still be able to fit the logo and retail wording within a 30 s.f. sign.

In response to a question from Danielle Pray, Mr. Mahoney stated that his abutters are all commercial enterprises.

There was no public comment at this time.

Jamie Ramsay moved to close the public hearing for this item. Charlie Vars seconded.
Voting: 3-0-0; motion carried unanimously.

2. **CASE #: PZ15211-121321 – EQUITABLE WAIVER OF DIMENSIONAL REQUIREMENT** – **Gerry Fortier (Applicant) and Renee & Dave Lucia (Owners); 2 Colonel Wilkins Road, PIN #: 005-023-000 –** Request for relief from Article 3.11, Section B, Paragraph 12 to receive approval due to the encroachment into a scenic setback for a new house. *Zoned Residential/Rural.*

Jamie Ramsay read the case.

Gerry Fortier, and Dave and Renee Lucia presented the case. Mr. Fortier explained that Renee Lucia is his daughter, and that she and her husband purchased this lot in July 2020. The group hired Fieldstone Land Consultants and began the process of creating a plot plan and septic plan. A building permit was approved by the Town, and it was noted that there is a 100' setback requirement from scenic Colonel Wilkins Road. Mr. Fortier stated that a surveyor came out to pin and stake the property. While working with Scott Tenney, Building Inspector, the foundation was poured, and construction proceeded. At the end of September, Mr. Fortier contacted Fieldstone Land Consultants regarding needing an as-built plan. At that time, Fieldstone informed him that the foundation was over the 100' setback requirement. He asked that the survey markers be double-checked, and Fieldstone again noted that the front of the house was over the 100' requirement.

Mr. Fortier stated that he has pictures of where the survey stakes were placed while the foundation was being poured and backfilled. It appears that one of the stakes was knocked over during this time. He stated that the house is currently approximately 90% completed. He believes the staking issue was a mistake of the surveyor.

Mr. Fortier addressed the Equitable Waiver questions:
1. Explain how:
1b. **The nonconformity was discovered after the structure was substantially completed.** We did not know there was an issue until we had the surveyors return to the site to make the as-built. We were told this needed to be done after the house was framed, septic system installed, and well installed. As we stated in our attached letter, we hired Fieldstone surveyors to perform all surveying and septic site work required. Aware of the scenic road 100' setback, we asked Fieldstone to come back to the site just prior to digging the foundation hole to give us stakes to denote the setback. With everyone having cell phones today, at least three different people have pictures showing the location of the stakes before, during, and after the foundation was poured. We are not sure what happened but most of the front porch is over the line now. This is a large house that fits in with the neighborhood. The house position could have been moved further back on the property, but the owners desire to keep it close to the front setback to maximize space. There are existing trees in the front for privacy.

1c. **The violation was not an outcome of ignorance of the law or bad faith but resulted from a good faith error in measurement or calculation?** Not being a surveyor, we had to rely on Fieldstone to provide us with accurate measurements. The site contractor that dug the foundation hole and installed the septic system stated to us that one of the old benchmarks from the original plot plan was off by 10'. We are not here to place blame; we just want to resolve the matter and proceed with completing our dream home and raising our two small children in the town of Amherst. The benchmark pin that created the issue was on a tree which was removed early in the process of construction.

2. **Explain how the nonconformity does not constitute a nuisance nor diminish the value or interfere with future uses of property in the area?** The nonconformity does not encroach on the abutters' property. The home is still well back from Colonel Wilkins Road. The home we are building fits into the neighborhood as far as size, value, and style. It is a $1,000,000+ plus home, which should enhance the value for abutters and the neighborhood. There are three immediate abutters to this property. The fact that the house is located 10' further forward from where it should be does not impact these abutters.

3. **Explain how the cost of correction far outweighs any public benefit to be gained?** Having to remove and rebuild the home, which is 75% complete, would be financially impossible for us. We don't see how there would be a public benefit to be gained. The owners were planning to move into the house at the end of February.

Gerry Fortier stated that the house was now 90% complete. The owners hoped to move in in February and want to raise their family in Amherst. He stated that he did not see how getting into a legal battle with anyone would change the situation. He explained that someone could have moved the stakes, but he did not see why anyone would do that. Mr. Fortier went on to say that anything was possible, but that the damage is done. The construction does not encroach on the neighbors and does not diminish any property values.

In response to a question from Danielle Pray, Jamie Ramsay stated that he believes the encroachment into the front setback is approximately 16'. The existing porch structure on the house is 84' from Colonel Wilkins Road, per the plot plan.

Jamie Ramsay explained that two benchmark stakes are shown that establish space to the leach field. Mr. Fortier stated that he believes the contractor's mistake was that a benchmark measurement was taken from the stakes to the existing stone wall, believing that was the setback line, when it actually runs through the property and is not the setback line.

Mr. Fortier explained that he requested that Fieldstone come back out to re-survey the property as the foundation was being dug. He has a number of pictures that show the stakes remaining in place until the framing began.

Jamie Ramsay stated that the septic plan has a date of December 17, 2020. He noted that the footprint of the house between the septic plan and plot plan seems to be different. Mr. Fortier

stated that the septic system was moved slightly on the property, but the house footprint was not changed. Jamie Ramsay stated that there are no notes on the approved septic plan that there were ever any changes to the location or design of the septic.

Jamie Ramsay stated that the as-built plan seems to have a larger house footprint than the original house plan, with crosshatches. He questioned how this could be done without moving the house back. Mr. Fortier stated that the foundation footprint and porches were never changed. The only thing changed were some of the interior walls. Mr. Fortier stated that he believes some of the documents he submitted, with cut/paste items, are what is causing the confusion.

Charlie Vars explained that he has empathy for the owners, as there was a mistake made at some point along the way. It was noted that the original plan included the front porch. He questioned if the benchmark stake was possibly moved along the way. Charlie Vars stated that a lot of towns used to require plot plans when the footings were poured, but that caused problems for the builders who would have to wait around for the plan to be prepared before they could move forward with construction. He stated that he had worked in Amherst to get that requirement changed, but obviously problems like this can arise. Mr. Vars noted that the neighbors to the back are left with an additional 15’ of space to the owner’s house, and the neighbors to the side are unaffected by this issue. He explained that the Board could make the owners take down the existing house, remove the foundation, and move it farther back, but it is unclear if that would make sense. He suggested a solution might be to increase the tree line in front of the house, for additional privacy to the road.

Mr. Fortier explained that the owners plan to hire a landscape designer to work around the outside of the house and are open to adding more trees on the property.

Charlie Vars noted that the Board could tell the applicants to remove the porch, which is 10-12' wide, from the house, but that would deteriorate the appearance of the house. Renee Lucia stated that the porch was her favorite part of the house design. Charlie Vars stated that he would like to see heavy landscaping added inside the tree line. He noted that the distance from the lot line to the road is greater than it normally would be in other areas, which is helpful because it adds an additional 10-12' to the visual appearance from the street. He noted that he had driven by a few times and there was nothing that stood out as being far too close to the road. Charlie Vars stated that part of the wording for the equitable waiver addresses the cost of taking the house down and starting from scratch, which he was not sure was a fair outcome in this case.

Danielle Pray noted that one of the criteria the Board must deliberate on is “that the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owners agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owners agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority.” She stated that she knows the applicant does not want to place blame on anyone for this issue, but she believes this criteria needs more information.

Gerry Fortier stated that Myles Cooke is the builder and did the site work. Mr. Cooke and his partner characterized the situation to Mr. Fortier that the stakes in place were used to set the foundation, and one of them appeared to be off. Someone from Fieldstone Land Consultants came back out to the site, with Mr. Cooke present, and seemed unclear if something was off with the stake. Mr. Fortier stated that, in order to get the Board more information, he would have to hire a lawyer to prove what happened and, even if this was done, it would not change the fact that the house is now in the wrong place. He stated his goal was to get his daughter and family into the house. Danielle Pray stated that the law provides the solution, and the Board has to make sure the situation fits the criteria.

Charlie Vars stated that the equitable waiver of dimensional requirements states that "waivers shall be granted under this section only from physical layout, mathematical or dimensional requirements, and not from use restrictions. An equitable waiver granted under this section shall not be construed as a non-conforming use, and shall not exempt future use, construction, reconstruction, or additions on the property from full compliance with the ordinance. This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them." He noted that this violation has not existed for more than 10 years. This nonconformity was discovered after the structure was significantly completed.

Danielle Pray asked that an email chain between the applicant and Fieldstone, alluded to by Gerry Fortier and submitted to the Board for review at this meeting, be included in the record for this case.

Mike Ploof, LLS, Chief of Survey for Fieldstone Land Consultants, stated that he is in support of the Board granting this equitable waiver. He believes this was an unintentional error, but it was not a survey error, and he can prove that. He stated that he does not want to enter into a civil matter in front of the Board but wanted to describe Fieldstone's process and role. He explained that Fieldstone Land Consultants were contracted to work on this site and visited the site twice. During the first visit, on March 17, 2021, the 100' scenic setback was staked out and four stakes were placed along the setback line. He stated that, during this process, when a stake is set, its coordinates are logged using GPS so that their location can later be proven, if necessary. He handed out 11"x17" plot plans and photos showing the four stakes that were set on March 17, 2021, highlighted in yellow. There is also a pink highlighted stake that was found to be disturbed, leaning and loose when Fieldstone returned to complete the as-built on October 6, 2021. It was not in its original location at that time but had been moved 22'6" closer to Colonel Wilkins Road. A photo shows the original location of the stake and where it was found to be disturbed in October. He is unclear how the stake got moved, but it was not in its original location, in line with the other four stakes. Fieldstone staked out the 100' setback line with four stakes in March. These were logged and overlaid onto the plan at that time. Fieldstone did not return to the site until the final certified plot plan was requested on October 6, 2021, at which point the stake had been disturbed.

Mr. Ploof noted that the 100' scenic setback from Colonel Wilkins Road is what the Town wants from a point on the road to the structure. He believes there is approximately 105' from the edge of the existing road to the porch structure. The scenic setback is from the right of way line, but there is approximately 105' from where a car or person would be on the road to the structure. He also noted that Colonel Wilkins Road was realigned in 1986. At one time, if the stone wall was still the right of way, the house would not be located in the setback. He does support the equitable waiver. He believes this was unintentional, although he is unclear how it happened.

In response to a question from Jamie Ramsay regarding if Fieldstone was timely in its compliance to this matter, Mr. Ploof stated that there are two as-builts: one when the building gets constructed, and another that is the septic as-built, which is submitted to the State when changes are made. Mr. Ploof stated that the septic location did change a fair amount, and the house was moved forward quite a bit, the State did require this amended septic plan as-built. There may have been confusion with the applicant regarding which as-built was being discussed.

In response to a question from Jamie Ramsay regarding if Fieldstone was asked to check the foundation location before building began, Mr. Fortier stated that this was requested. Mr. Ploof stated that the email chain shows that he was told a member of the Town came out to certify the foundation and that it was all set. At that time, he stated that Fieldstone would come back when the septic was in place to create the amended septic as-built to send to the State. Mr. Ploof stated that he was told the applicant was given authority to backfill, and, thus, Fieldstone did not need to go out at that time.

Charlie Vars noted that a stump, originally shown on the plan, if used as a benchmark could have been moved at some point, thus creating confusion.

Pete Christman, 3 Colonel Wilkins Road, stated that he was curious about the marking mistake, but that the testimony presented seems to show it was not an issue created by Fieldstone Land Consultants. He welcomed the owners to the neighborhood.

Jamie Ramsay moved to close the public hearing for this item. Charlie Vars seconded.
Voting: 3-0-0; motion carried unanimously.

Charlie Vars moved to enter deliberations. Jamie Ramsay seconded.
Voting: 3-0-0; motion carried unanimously.

<u>CASE #: PZ15210-121321:</u>

Charlie Vars moved no regional impact. Jamie Ramsay seconded.
Voting: 3-0-0; motion carried unanimously.

It was noted that there will be a condition on this approval that the sign does not exceed 30 s.f., and that the owner is allowed to place any wording/logos on the sign, at that size, as he sees fit.

Danielle Pray addressed the five variance tests.

1. The Variance will not be contrary to the public interest.

- C. Vars – true, the proposed sign will allow the building to be better identified.
- J. Ramsay – true, the proposal is not unreasonable in any way and the reduced size is in better compliance
- D. Pray – true.

3 True

2. The Variance is consistent with the spirit and the intent of the Ordinance.

- J. Ramsay – true, the proposal does not constitute a substantial change to the surroundings of this commercial zone. The proposal will enhance the building.
- C. Vars – true, the variance will allow for the ordinance to be observed in this case. This is one of the few buildings along Route 101A with such a large setback and it is difficult to identify the building without a sign on the building.
- D. Pray – true, the purpose of the sign ordinance is to protect the public health, safety, and welfare by reducing conflicting or ambiguous information. This does not violate that item. The Town also does not wish for signs to detract from the rural character of the area. This is not in a rural area and thus, does not violate that item.

3 True

3. Substantial justice is done.

- J. Ramsay – true, the applicant has every right to promote the business in any way he can, which speaks to enjoyment of the property, in a way.
- C. Vars – true, the benefit to the applicant for approving the variance outweighs any public benefit that might come from denying it.
- D. Pray – true, the ordinance allows for businesses to have signs. While the original sign requested was larger than allowed, the applicant is willing to reduce the size to make it more palatable.

3 True

4. The values of the surrounding properties will not be diminished.

- C. Vars– true, the proposed sign fits with the existing signage on the street and will not diminish the value of surrounding properties.
- J. Ramsay – true, the proposed sign will keep with surrounding properties along the Route 101A commercial corridor.
- D. Pray – true.

3 True

5. Literal enforcement of the provisions of the Ordinance would result in an unnecessary hardship.

- J. Ramsay – true, this property is not accessed from Route 101A and never has been, but it does have an address located on Route 101A. To enforce the literal constraints would be an injustice to the applicant.
- C. Vars– true, the actual frontage on Route 101A is 29.68'. Paul's Way was moved to line it up with Caldwell Drive for safety purposes. It would be a hardship to not allow signage on the building.
- D. Pray – true, there are special conditions due to land taken, lessening the ability for signage, and thus signage on the building makes sense.

  3 True

The Acting Chair stated that the application, as it passed all of the tests, is granted, as submitted. It was noted that there is a condition on this approval that the sign does not exceed 30 s.f., and that the owner is allowed to place any wording/logos on the sign, at that size, as he sees fit.

<u>CASE #: PZ15211-121321:</u>

Jamie Ramsay moved no regional impact. Charlie Vars seconded.
Voting: 3-0-0; motion carried unanimously.

Danielle Pray addressed the three equitable waiver criteria.

1a. That the violation was not noticed or discovered by any owner, former owner, owner's agent or representative, or municipal official, until after a structure in violation had been substantially completed, or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value

- J. Ramsay – true, although he questions the lag time, but based on the information given, this is true. This is a mistake that could happen. It is unlikely that this would have been granted as a variance if it had come before the Board ahead of time.
- C. Vars – true, this was discovered after the structure was substantially completed. This was likely due to one or more people making a mistake and there is not much that can be done about it now. He noted that this was the first time in his seven or eight years on the Board that he has addressed such an application.
- D. Pray – true, there was no evidence submitted to show that this was known early on in the process.

  3 True

1b. That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of any owner, owner's agent, or a representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority

- C. Vars – true, the evidence brought forward by Fieldstone that the actual frontage of the structure is 105’ from the road is important. Section E of the ordinance, Scenic Roads, lists Colonel Wilkins Road from Old Milford Road and not from the lot line.
- J. Ramsay – true, this is a corner lot, and the 100' setback is in place from Old Milford Road. He stated that the 105’ statement is germane, and the intention has been preserved, even though there is a violation in terms of the setback to the front lot line.
- D. Pray – true, there does not seem to be any evidence of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation, or bad faith on the part of the owner, leaving the Board with the idea that this must instead have been caused by either a good faith error in measurement or calculation made by an owner or owner’s agent.

  3 True

1c. That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, nor interfere with or adversely affect any present or permissible future uses of any such property

- J. Ramsay – true, the only abutter that has come forward on this item did not seem to indicate an issue and welcomed the owners to the neighborhood. The constructed home is a slightly different style, in that it is not a colonial home, but it is not offensive to the surroundings.
- C. Vars – true, the home fits in with the neighborhood. There does not seem to be an intent to deviate from the ordinance.
- D. Pray – true, the violation does not constitute a public or private nuisance, and there has been no evidence shown that it will diminish property values in the area. There was also no evidence that this will adversely affect the present or permissible future uses of abutting property. This waiver is for a visual purpose.

  3 True

1d. That due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of corrections so far outweighs any public benefit to be gained that it would be inequitable to require the violation to be corrected

- C. Vars– true, the house has been constructed approximately 75%, as previously mentioned. There is testimony that the house is 105' from Colonel Wilkins Road. There is nothing to be gained by refusal of the waiver.
- J. Ramsay – true, nothing malicious was undertaken in this case; it was simply a mistake.
- D. Pray – true, the public benefit to the scenic setback is to preserve and enhance the rural open character of the Town as viewed from the main roads and to prevent unsightly development along these routes. The encroachment of 16’ does not violate this and the house is not unsightly.

  3 True

Charlie Vars moved to add a condition that, to overcome some of the encroachment, a design by a professional landscaper to diminish the appearance of the front of the

house from Colonel Wilkins Road be completed and that existing mature trees be preserved, unless there is a safety issue or unless part of the landscaper's design. Also, that the plan be submitted to the Community Development Office for review, prior to Certificate of Occupancy. Jamie Ramsay seconded.
Voting: 3-0-0; motion carried unanimously.

The Acting Chair stated that the application, as it passed all of the tests, is granted, as submitted.

OTHER BUSINESS:

1. **Minutes: September 21, 2021**

The Board tabled review of these minutes to a future date.

Jamie Ramsay moved to adjourn the meeting at 8:50pm. Charlie Vars seconded.
Voting: 3-0-0; motion carried unanimously.

Respectfully submitted,
Kristan Patenaude