

**UNAPPROVED MINUTES
Town of Auburn
Zoning Board of Adjustment
December 19, 2017**

Present: Jim Lagana, Vice Chairman. Mike DiPietro & Kevin Stuart, Members, Peggy Neveu, Stephen Carroll & Robert Beaurivage, Alternate Members. Minutes recorded by Denise Royce.

Absent: Mark Wright, Chairman.

Also Present: Carrie Rouleau-Cote, Building Inspector.

Mr. Lagana called the meeting to order at 7:06 p.m. and apologized for the Board being late. Mr. Lagan proceeded to inform everyone present tonight that this was a continuance of the October meeting which included just one case this evening. Mr. Lagana moved on to introduce the Board members to everyone present for tonight's meeting.

**Case #17-19
Kenneth & Jennifer Remington
371 Chester Turnpike – Tax Map 11, Lot 9-1
Zoned Residential Two**

Applicant is requesting an Appeal from an Administrative Decision – Interpretation of Building Official who has determined existing detached ADU does not meet criteria of non-conforming use based on lack of evidence that ADU was lawfully existing at time of adoption of Ordinance and permits were lawfully issued. Article 2, Section 2.02(28) & (62); and, a Variance to maintain a detached Accessory Dwelling Unit at the property under Article 14.09 of the Zoning Ordinance in a Residential Two zone.

Mr. Lagana elevated both Mrs. Neveu and Mr. Beaurivage to full voting members tonight. Mr. Lagana explained that this was a continuance of the meeting in October and asked Attorney Dodge to do a review and synopsis of what had occurred that he would appreciate it.

At this time, Attorney Dodge began by saying that she was here representing the Remington's' and that the Remington's are Appealing a Decision of the Code Enforcement Officer who determined that the detached barn on the property that has a barn on the property over it was not a legally lawfully permitted use and that their position is, is that it is a legally lawfully permitted use and should be grandfathered because it is a use pre-existing the zoning ordinance for Accessory Dwelling Unit. In the alternative, they have filed an application for a Variance and she realizes that since the case was continued in October that they never addressed the Variance application but that is essentially the alternate form of relief that they would be seeking and realized that if the

Board does not rule in their favor on the Appeal of an Administrative Decision then they would move forward for the Variance. If the Board does vote in their favor then the Variance is essentially moot. Attorney Dodge went on to say that the Board indicated that they wanted to see more information for the property and appreciated the opportunity which has proven productive in finding more information. At this time, Attorney Dodge presented the Board members with a package of documents that they have found. Attorney Dodge asked if the five (5) members of the Board that voted previously were the same five (5) members present tonight. Mr. Lagana said yes.

Attorney Dodge moved on to discuss the documents included in the package and went through each section with the Board members and pointed out that they had looked at tax and assessing records to see how long the town has been taxing the Remington's and on what. Attorney Dodge indicated that they did go through the bin of building permits that are not filed which was available at this meeting and informed the Board that they found a reference to a building permit that they believe is for the barn which shows the exact same dimensions of the barn. Attorney Dodge stated that there was talk about utilities and informed the Board members that they have records that the utilities are separately metered utilities which the house has its own meter and the barn has its own separate meter and had photos included in the package for the Board members to review. Attorney Dodge indicated that the utilities show that they have been separate and that the barn has been in use since when Craig Samson owned the property which was from 1978 to 1987.

With regard to the septic records, Attorney Dodge indicated that she worked with Jennifer Paition at the Department of Environmental Services who provided access to archived records and they found some records there that suggest that there is a separate septic approval plan and certification of operation for the barn which are included in Section 4. Attorney Dodge went on to Section 5 which showed some of the photos of the property showing how it complies with Article 2.02 of the Zoning Ordinance. Attorney Dodge stated that, the only way that it does not comply with the article is because it's detached. All of the other criteria and she has prepared a summary for the Board members which was located on page 6 of how it meets the criteria of the Zoning Ordinance except that it's a detached dwelling and not an attached dwelling. Attorney Dodge stated that, she believes the additional evidence is crucial and probably the most key thing that they found is a reference to the building permit which is shown behind Tab #1. Attorney Dodge did point out that it was not the building permit per se but was a stenographer's notebook and there is an item #76 reference on the second page that says Craig Samson, Chester Turnpike, 8/8/78 with a reference to "Residence & Garage 28 x 32" which is the exact dimensions as the barn. Attorney Dodge further explained that Mr. Samson originally owned the property and then it was deeded to his construction company so it went Samson Construction in 1978 and he applied for the building permit on August 8, 1978 and then the septic plan that he applied for to put a septic system on that property was literally three (3) weeks later which is referenced behind Tab #4.

Attorney Dodge moved on to Tab #2 which Mr. Stuart asked last time which was if they had any invoices of the septic being pumped which includes a Kent Septic receipt that

shows two (2) tanks being pumped which were two (2) 1,000-gallon tanks which were pumped on September 9, 2017. Their position has not changed as this is a dwelling that has been in use for almost 40 years and the use has not changed. It meets the criteria today of Article 2.02 of the Auburn Zoning Ordinance but it should be entitled to be grandfathered because it was a use pre-existing the Accessory Dwelling Unit ordinance that went in effect in town in 1993 and it has been a use that has not been altered, abandoned or changed.

Attorney Dodge went on to talk about that, Mr. DiPietro had asked about tax and assessing records which can be found behind Tab #2 and indicated that this task was tough and understood that assessing records were destroyed previously and was told by Jennifer Paiton at DES that it was not unusual back in the 70's and 80's to not get records for septic systems that were approved so to some extent they are out trying to get records for what the Board is looking for and it becomes frustrating when where your looking doesn't always have a lot of documentation to show. Attorney Dodge stated that the tax and assessing records that they do have show from 1990 which is the period of time at which Harold Towne owned the property all the way through 2017. Harold Towne conveyed the property in 1995 to the Remington's but in that time period of 27 years the assessing records shows the property being assessed as a residential and other dwelling. For 12 of those years when Avitar took over managing the records the assessing cards reference an in-law apartment over garage with a one bedroom one bath so that shows it on Avitar's records. Attorney Dodge reiterated that she submitted a summary which she believed was important on the way the town has treated this property and the way it has been assessed and taxed. Attorney Dodge stated that, the Remingtons have paid \$113,082.09 in property taxes on both of these structures since they have owned them. The town has taxed them that way and this is a property that has existed for years and nobody has taken an interest in it for 30 plus years and until April 25, 2017 there was a neighboring abutter that came before the Board to essentially have a detached dwelling unit on his property and was denied. Attorney Dodge pointed out that, until April 25, 2017 that this was never an issue and then suddenly her clients receive a letter from the Code Enforcement Officer indicating that their property is not in compliance and you need to cease and desist. There really wasn't time to review the property and believed the Building Inspector should have gone and knocked on the door and asked questions. Attorney Dodge also believed that there were other structures in town that are being used as Accessory Dwelling Units that aren't permissible and are very different then the Remington's case.

Attorney Dodge went on to say that this was not a situation where they are coming before the Board and asking for permission to do something and build something that is not in compliance with the Zoning Ordinance and it's also not a position where they are asking for forgiveness for something that they've done that they knew was wrong or permission to do something new. They are asking the Board to recognize this and grandfather it because the way it has been used and the way it's been treated for close to 35 years. Attorney Dodge stated that she realizes that she has given the Board a lot of information and if they had any questions that she would be glad to answer them. Attorney Dodge commented that, one of the most compelling documents is the reference to the Building

Permit in the stenographer's notebook because it was Craig Samson who owned the property and had a construction company.

Attorney Dodge again talked about the utilities of which Mr. Lagana had questioned and pointed out that she tried to blow up the photos for the Board which are located behind Tab #3. Attorney Dodge went on to explain that the barn has its own separate utility box and has its own circuit panel inside the garage of the barn. Attorney Dodge further pointed out the handwritten notes which she indicated was done by Auburn Electric, Glenn Shaw who had put this in for Craig Samson which was done years ago and it references Craig's office and bath and Craig's kitchen. Attorney Dodge said again, when Mr. Samson owned the property the timeframe was 1978 to 1987 before he conveyed it to Harold Towne. Her discussions with Harold Towne were always such that, Craig Samson had used this property and used the barn as an office and dwelling and it did have a kitchen and it did have bath facilities and they used the barn when they were building the primary residence the Remington's home. Attorney Dodge stated that, Mr. Towne had told her that, when the Building Inspector came out and the Building Inspector at the time, and she did not believe it was Frank Gamache anymore and David Jore is ringing a bell but, Harold Towne had said that, when the Building Inspector came out to approve the permit to build the home that they sat in the barn to discuss it and had coffee. There was a suggestion that this was done in the dark of night and under the radar but it was not something that was attempted to be put in without permission or approval. Attorney Dodge stated that, when Harold Towne subdivided the property and built the house in 1989 there is a permit issued for the house and there is a Certificate of Occupancy for the house knowing full well that the barn with a dwelling unit above it sitting 72 feet away.

Mr. DiPietro had a question regarding Section #4 about 4 pages from Section #5, there is a subsurface archive record which says barn up at the top corner and there is a note at the bottom and it looks like it has been recently added and could you explain that note. Attorney Dodge stated that it was her note that it was the septic plan for the barn 8/78 to 10/78 with that reference which matches the timeframe for the construction of the barn. Mr. DiPietro asked so there was a septic plan approval for the barn in 1978. Attorney Dodge answered that when she explained to Jennifer Paiton at DES what they were looking for that she had said to her that this was what she thought DES records thought she believed matched the dwelling that they were looking for the septic that existed for the barn which is before the septic was put in for the house which was built at a later date. Mr. Stuart also asked Attorney Dodge if the comments were her writing. Attorney Dodge said yes because she did it to distinguish between the two (2) septic plans because that was her application submission. Mr. Stuart asked Attorney Dodge to walk the Board through the septic documents which would be very helpful. Attorney Dodge went through Section #4 and began by saying that page one was an invoice from Kent Septic showing that there were two (2) tanks being pumped which was one tank for the house and one tank for the barn with an apartment over it. The second is a photo of that shows the barn and the septic vent pipe for the barn. The next page is a record request form that she submitted to DES and then this was what came back to her which is for the house when Harold Towne built the house on the property which is the Remington's house pictured in blue. Mr. Stuart commented that it looks like this document was the approval for

construction was in May 11, 1988. Attorney Dodge said yes and there is a better copy that she had and the approval for operation was for the house. Mr. Stuart went on to the next was in September of 1988. Attorney Dodge said yes and the smaller one is the plan for the house and the second is the first page of the application for the barn, the approval for construction for the barn when Craig Samson owned it and he built the barn. Mr. Stuart commented that, this was September 6, 1978 and this is for the barn/garage. Attorney Dodge said yes as the reference to the building permit is 8/8/78 and then in September the application for the septic and the approval for operation for that and then the plan. Mr. Stuart asked where the date for the approval for operation was. Attorney Dodge said 10/4/18 which you can barely see it and pointed it out for the Board members. At this time, the Board members reviewed that page. Mr. DiPietro asked Attorney Dodge if this was for operation of the septic system for the barn. Attorney Dodge stated that she believed it was. Attorney Dodge talked about Jennifer Paiton of DES and stated that, Ms. Paiton indicated that, septic records back then is that, back then the way they kept records is that a lot of times that they relied on the towns to communicate and exchange the information and sometimes records weren't even available as they were on microfiche. Attorney Dodge again stated that it was frustrating when you go out and try to prove that something exists and the records are unavailable. Attorney Dodge indicated that it was important to add too that, in reading back the minutes of the last meeting with the septic and agreed that the septic and the Board needs to make sure that the septic is adequate but the statute for Accessory Dwelling Units says that they do not have to have their own separate septic system but they just have to have adequate water and sewer regardless of whether its attached or detached. Attorney Dodge indicated that, since the Remington's have owned the property since 1995 that they have maintained two (2) separate septic systems and have had the tanks pumped regularly and the system has never failed and there has never been a problem and believed it was adequate water and sewer. Attorney Dodge also pointed out that at the October hearing that no abutters complained and if anything the abutters were in support of the Remingtons which was important for the Board to consider. Attorney Dodge also stated that there were abutters who commented how the barn has been used and they recall Harold Towne living at the property and his son living in the barn and that neighbors would come and pick up his son. Mr. Stuart asked if the water was a shared well. Attorney Dodge said that the water was a shared well but they had two (2) separate septic tanks at 1,000 gallons each.

Mrs. Rouleau-Cote wanted to clarify that, having adequate septic means that it has to be a state approved septic system if it was built any time after 1967 when the state septic laws went into place so having adequate septic would mean that it would have to be a state approved septic. Mrs. Rouleau-Cote had a question regarding to the records in 1978 is referencing the barn and asked Attorney Dodge if she found anything that was referencing the septic to the house because the building permit issued in 8/8/78 was for a residence and a garage so did you find any reference that was for a septic for the residence. Attorney Dodge stated that there was a septic for a residence but it was for the parent tract which the Spencers' own. Mrs. Rouleau-Cote commented that Attorney Dodge makes reference to a building permit that was issued for a Residence and Garage on 8/8/78 then there should be reference to two (2) septic systems and asked Attorney Dodge if there were two (2) septic plans for the parent tract because the Remington's

house wasn't built until 1989. Mrs. Rouleau-Cote pointed out that there was a Residence and a garage on the parent tract. Attorney Dodge stated that the other reference to the garage for the septic system that they had for Craig Samson is for the barn that existed and indicated that this was all the state sent her. Mrs. Rouleau-Cote indicated that, that had to do with the garage on the parent tract. Attorney Dodge said correct. Mrs. Rouleau-Cote went on to ask that, in 1978 there should have been two (2) septic systems constructed because we have a building permit for a residence and a garage. Mrs. Remington commented how do we know if when they say "Residence and Garage" that it doesn't mean the residence in the garage. Attorney Dodge further added that, when you look at the assessing records for the parent tract, the garage on the Spencer's property was built in 1990 according to the assessing records. Mrs. Rouleau-Cote stated that she was not disputing that the garage on the parent tract was built after the subdivision. Mrs. Remington again stated that, how do they know if it was for a separate residence because they assume its for the garage with a residence and believed there should have been two (2) separate permits if it was for a separate residence and garage. Mrs. Rouleau-Cote explained that they are saying that, in 1978 they were allowing a second residence on that property which would have been in violation of the Zoning Ordinance at that time. Mrs. Rouleau-Cote was just asking if there was a septic design for the barn. Mr. Lagana indicated that he had the same concerns and that in 1978, having a second residence on a property would have been disallowed. Mrs. Rouleau-Cote said that, it would have been disallowed by the Zoning Ordinance. Mr. Lagana asked Mrs. Rouleau-Cote when the Zoning Ordinance was created so that one dwelling unit per property was allowed. Mrs. Rouleau-Cote said 1975 there is language in the Zoning Ordinance that says only one residence is allowed per parcel. Mr. Lagana reiterated that this was a very difficult case and that Attorney Dodge has done a wonderful job in masterful job in trying to document it and trying to justify the reasons why this second ADU should be allowed on this lot but what he keeps coming down to is that, even if everyone knew that the red barn was inhabited and Samson was living there and there is an apartment above the garage that when the existing Remington home was built then that makes the existing Remington home illegal for a lack of a better term. Attorney Dodge agreed. Mr. Lagana explained that in 1988/1989 when the Remington's home was built that condition did not meet the ordinance and in order for it to be grandfathered that it would have had to of been legal at the time of the ordinance at the time of construction and we just heard that back in 1975 that, only one dwelling unit was allowed per property and here we have two (2). Attorney Dodge added that, we have the Auburn Building Inspector going out and granting a permit for them to build a house knowing that the barn was there with a dwelling unit and granting a Certificate of Occupancy. Mr. Lagana believed that was being very assumptive because they may have met in the garage and they may have known that Samson was living upstairs but did not see any documentation or any specific permit which stated that, after the house is built that this use will be continued. Mr. Lagana continued to say that, he would have to believe that if things were that loose then that they probably also thought that once the home was constructed that he would be moving out of the apartment upstairs. Mrs. Neveu took it as Mr. Samson lived in the main house before subdividing the property and that the barn was used as his office.

Mr. Stuart asked Attorney Dodge to walk him through the timeline one more time about the subdivision and the order of building of these various properties. Attorney Dodge began by saying that Mr. Samson owned the property in 1978 and that the property is identified as Tax Map 11, Lot 9. Attorney Dodge moved on to say that, from 1978 to 1979, he conveys from Samson Construction to he and his wife individually. In 1978 there is the application for the permit. Mr. Stuart asked if it's the 8/8/78, the permit for the residence and garage. Attorney Dodge said yes and went on to say that, the home on the parent tract was built in 1975 and is referring it as the Spencer home because it is currently owned by the Spencer's and then the barn which is on the Remington's property was built in 1978 which is referred to in the Building Permit book that says residence and barn. Attorney Dodge pointed out that it may be wrong to assume but to some extent we're all engaging in assumptions because we do not have the benefit of going back and seeing exactly what happened. Mr. Stuart asked to clarify that in 1978 it was all one tract because it had not been subdivided yet. Attorney Dodge said yes. Mr. Stuart tried to understand that, in 1975 there was a house and then in 1978 the barn was built showing the permit saying residence and barn in 8/8/78. Mr. DiPietro added that there was a septic system and Attorney Dodge agreed. Mr. Stuart asked if in 1987 it sold to Harold Towne. Attorney Dodge said yes, in July of 1987 and it was in her original application materials the subdivision approval and in 1987, Harold Towne proposes a subdivision plan to divide the lot into two (2) creating Tax Map 11, Lot 9 and Tax map 11, Lot 9-1. At this time, the Board reviewed the subdivision plan. Attorney Dodge pointed out the barn and the Spencer house which is located on the subdivision plan. Mr. DiPietro asked if the septic system is shown on the plan. Attorney Dodge stated that the septic system is referenced right on the corner of the parent tract. Mr. Stuart asked which building is the septic for. Attorney Dodge said that she believed that it was for the original house and was unsure if it was originally connected to the barn. Mr. Stuart believed that at that point that the septic had already been installed for the barn and believed that there were septic documents in 1978 but it's not shown on the subdivision plan. Attorney Dodge agreed and said that now there is a house on it that the Remington's own and that there was a permit application for the house, a permit that's issued, approval for it and a certificate of occupancy for it. Attorney Dodge added that, in 1995, Harold Towne conveys to the Remington's. Attorney Dodge showed the Board members the MLS listing for the Remington's home when it was on the market which was advertised noting that it had a great in-law/potential in-law apartment. The Remington's viewed the property and went in the barn and could clearly see that Mr. Towne's son was living in the barn at the time. Mr. Remington explained that, at the time they went to see the house that the barn was occupied and that his dad was a builder and they checked out the house before putting a bid on it.

Mr. Lagana asked Mrs. Rouleau-Cote if she had anything to add. Mrs. Rouleau-Cote added that the subdivision plan that is before the Board members and explained to the Board that the subdivision regulations in 1987 would have required that all locations of sewers, utilities and septic would have had to of been shown on the plan. There is no indication of any septic system indicated for the barn. There are no easements for water or sewer or electric coming from the parent tract. In 1987 all of these things should have been shown on the plan and they were not shown and it should have also been shown

on the septic plan for Tax Map 11, Lot 9-1 when it was prepared because on the septic plan for the new home there is no indication that there is already a septic system on Tax Map 11, Lot 9-1. Mrs. Rouleau-Cote again pointed out that they are going on the presumption that the State of New Hampshire has some kind of indication but we have nothing on file that actually shows where it is located on this lot and that it was intended for this barn. Again, Mrs. Rouleau-Cote said that during the subdivision plan there is no indication that there is a barn with an ADU or a barn with living space but is basically labeled a barn on the plan. Mr. DiPietro asked about the test pit. Mrs. Rouleau-Cote explained that the test pit was for the new house to be constructed because whenever you are creating a lot under 5 acres you have to do a test pit to show that the lot can support a leachfield. Mr. Lagana asked Mrs. Rouleau-Cote if there was a septic plan for the barn on file with the town. Mrs. Rouleau-Cote said no. Attorney Dodge added that the Planning Board approved this. Mr. Lagana said that they approved a subdivision. Attorney Dodge asked that, if the requirement was to show the septic location on a plan then why did the Planning Board approved a plan that did not have it. Mrs. Rouleau-Cote commented that a barn does not usually have a septic system. Attorney Dodge said that this one did. Mrs. Rouleau-Cote went on to say that, this plan did not show that it was a barn with an ADU. Attorney Dodge believed that this should have been an issue that should have been addressed in December 9th, 1987 when the Planning Board approved this plan. Mrs. Rouleau-Cote pointed out that on the subdivision plan it indicates that the existing house and septic shall remain on Tax Map 11, Lot 9 and that the barn and shed shall be located on Tax Map 11, Lot 9-1 and that no statement was made that it was a barn with an apartment above it because Mr. Towne called it a barn. Attorney Dodge asked if it was Mr. Towne's obligation to disclose that. Mrs. Rouleau-Cote and Mr. Lagana said yes, it would have been up to Mr. Towne to disclose that information. Mr. Lagana reiterated to Attorney Dodge that as he said in the October hearing that, this Board is working very hard to accommodate you and go through the documentation and stated that she makes a great argument but that the Board is here to uphold the ordinance and the fact is that he is not convinced that this meets grandfathering criteria because there are two (2) dwelling units on that piece of property that were built post 1975. Whether or not building permits existed, whether or not people understood that people were living over the barn in an apartment. Whether or not you can or cannot find proper documentation for approved septic systems, wells and utilities which are mitigating factors but did not believe it was the acid tests. The acid test is that there are two (2) dwelling units on one piece of property post 1975 and if this had occurred in 1965 and bringing us forward to 2017 then maybe there would be a strong case for grandfathering but in his opinion, he does not see this here but would like to hear from the rest of the Board members. Mr. Lagana further stated that, he did not believe that this case could be adjudicated here at the ZBA and believed it was one that would have to go before a Court. Again, Mr. Lagana pointed out that he did want to hear from the Board members as well.

Mr. Lagana went on to say that, in terms of being taxed, he could understand how that would sting being taxed \$113,000 which was a lot of money but believed that Attorney Dodge's client has had the use of that property by collecting rent on that apartment over the last 20 plus years so it's not like the property has been taxed with no enjoyment from it. Mr. Lagana added that, going forward with future taxation may be contested and that

frankly he would agree with them but going back, there has been taxation based on the use of that property as a dwelling unit and it has been inhabited as a dwelling unit. Attorney Dodge commented that, she disagrees that for as long as this has been in existence that no one has raised an eyebrow at it and nobody has complained about it and the town has taxed it so that they are going to treat it like that for tax purposes and then turn around and say that the Remington's cannot continue to use it where the town has taxed them continuously and then penalize them for using the property now for lack of oversight of the Planning Board when they approved a subdivision plan or failure of someone 30 years ago didn't show an adequate septic system that at some point it's an equitable unfairness thing. Attorney Dodge disagreed with Mr. Lagana that it was a matter for the courts and pointed out that they are a five (5) member board and that they know this town better than a judge in the Superior Court and that the people of this town are looking at the Board to do their job and to do what's fair. Mr. Lagana added that he would disagree and that they are trying very hard to do their job and does not think that anybody is aqueous to the use of the property as the property is immaculate and appreciate how her client keep the place and what their neighbor's think of them and it's very rare to have abutters show up and to speak up and at the same time the Board is here to uphold the ordinance. Attorney Dodge understood. With that said, Mr. Lagana, in his opinion, did not believe that this case met the criteria of the ordinance but he is one member of five (5) and asked the Board members to speak.

Mr. Beaurivage commented that the package put together by Attorney Dodge was very thorough with a lot of information but what he looks more closely at is the septic system and just did not see it and that is what he has focused on mostly. Attorney Dodge asked if seeing the invoice showing the two (2) septic tanks have been pumped helped because to some extent they are at the mercy of the records that exists and cannot create a reference to a septic system if it's not there. Attorney Dodge explained that it has been frustrating to go searching for documents and that they have found some information that supports the case but that they are at the mercy of the town in maintaining records. Attorney Dodge stated that at what point do the Remington's get penalized because the records aren't sufficient or there isn't adequate reference on a subdivision plan when a Planning Board approves a subdivision and what she meant by the town acquiescing is this is what's unique about this property is that it has been in existence and has been in use for almost 40 years and the town has never raised an issue with it. The Town Historical Society took a picture of the Barn and put it in a book with other barns within the Town of Auburn.

Mr. Lagana indicated that he would like to hear from the other Board members at this time. Mrs. Neveu did not have anything else to add at this time. Mr. DiPietro stated that, he was convinced that the use dates back and can see that they don't show a septic system and can imagine why they didn't. Mr. DiPietro believed that they should get past the Administrative Decision part and move on to the Variance. Mr. Stuart asked Attorney Dodge to address the point that, in 1975 the ordinance did not allow two (2) units on the same property and it looks like in 1987 when they subdivided it into two (2) lots how does she address that if it's going to be a non-conforming use it had to be legal at the time. Attorney Dodge commented that, maybe back in 1978 when the proposal to build the

second structure that it probably shouldn't have been approved back then but the point is that it was and it was approved by the town and there was a permit for the house and there was a Certificate of Occupancy issued for this house and then. Mr. Stuart said in 1988 when the house was built. Attorney Dodge said yes, in 1988 when Harold Towne built the house and believed there was a municipal estoppel. Attorney Dodge pointed out that the only structure on the property in 1988 was the barn and then he applies for a permit to build the house which would in fact make the Remington's home illegal by having two (2) structures on one lot. Mr. Stuart commented that the plan shown does not show a septic located on the property with the barn. Attorney Dodge stated that there is reference to a septic plan near the boundary line but believed it was a septic for the parent tract and believed that the Planning Board should have raised that issue back during the subdivision process back in 1987. Mrs. Rouleau- Cote indicated that she had the minutes of the meeting back in 1988 when Mr. Towne went before the Planning Board that had testimony by the applicant indicating that it was a barn and a shed on Tax Map 11, Lot 9-1 and nothing was said about a barn with an apartment above it. Mr. Remington asked if the question was asked. Mrs. Rouleau-Cote informed Mr. Remington that the Board did not have to ask the question because when the surveyor is putting a plan together that the checklist in the subdivision regulations tells him what he is supposed to include on the plan. Mr. DiPietro believed that, if a developer wanted to put in a three (3) bedroom home where he already had a dwelling he might not want anyone to see that it was a dwelling unit especially in light of the new regulation passed in the last few years that you cannot have two (2) dwelling units on one lot so he may have told his drafter not to show any septic system there because it's just a barn. Attorney Dodge believed that the Board was just speculating. Mr. DiPietro stated that, they were not convincing him that the barn and the septic was there before the house was built. Attorney Dodge pointed out that there was an application for a plan to put a septic in for the barn. Mr. DiPietro explained that by looking at the subdivision plan and the septic plan for the house that neither one shows a septic system for the barn and found it hard to believe it was a mistake and indicated that this was his opinion only. Mr. DiPietro went on to say that he understood why they wouldn't want it shown because the Building Inspector and the Planning Board would not have allowed the house to be built and through nobody's fault in this room tonight. Attorney Dodge did not believe they could speculate what occurred some years ago. A brief discussion ensued about the comments being made.

Attorney Dodge understood that the language in the Zoning Ordinance regarding ADU's indicates that they do not have to have their own septic and well but do have to have adequate sewer and water whether they are detached or attached.

Mr. Lagana asked Mr. Carroll if he had anything to add to this. Mr. Carroll commented that it was pretty emotional and where boards like this have to keep their emotion between the lines and to make sure that they are doing everything consistently and fair for all the residences which was all he had to say and believed that everything that has been presented from both sides has been extraordinary but did not have anything additional to add.

Mr. Lagana stated that, he would like to entertain a motion to move forward and move the meeting along and asked if anyone needed anymore testimony from the applicant.

Mr. DiPietro made a motion to vote on the Appeal from an Administrative Decision (Building Inspector) for Case #17-19, 371 Chester Turnpike, Tax Map 11, Lot 9-1. Mrs. Neveu seconded the motion.

Julie Spencer wanted to comment before the Board voted on the application and commented that she was a little confused because the Board had a septic for the barn because they're pumping two (2) tanks. Ms. Spencer did not believe someone would put in a septic system without the town knowing about it. Also, when you go on to build another building you have to be careful where you're parking your equipment and where you're digging and it did not make sense to her that the septic that is with that barn isn't clearly identified at the time of building. What it appears is that, the town has a lack of records and has nothing to do with the Remington's but has to do with the town and their recordkeeping. Mr. Lagana added that he believed that we were all confused with the lack of records and pointed out that he just asked the Building Inspector if there was a septic plan on file for the barn and she indicated no. Mrs. Rouleau-Cote wanted to clarify the comment being made by saying that, the town does have a septic plan on file for the Remington's house but that they do not have one for the barn because one was never submitted to the town for the barn.

Julie Spuria commented that they did find a building permit for the barn that was found in a box so they have actually found a permit but that they cannot prove it to the level that the Board needs and she did not understand that. Mrs. Rouleau-Cote explained that, she and Ms. Royce actually pointed out the building permit that was found in a stenograph pad to Attorney Dodge when she showed up and they have gone through their files and that we have asked Assessing and that the assessing files that Attorney Dodge mentioned earlier is that we are not required to keep those. After every re-assessment we are allowed to get rid of those materials and we did ask Avitar when the second tax card was created for the barn and we were told that in 2002, the second tax card was created for the barn and did not know what prompted that but we have done everything we could to go through our files. Again, when you talk about files in the mid 1970's, the files are very vague and Attorney Dodge has had the opportunity to go through all the files that we had. Also, Mrs. Rouleau-Cote informed everyone present tonight that she does have septic plans from the 1960's for houses on Rattlesnake and Margate and when septic's were done, we sometimes did get plans. Whether there is a copy in Concord or not, Attorney Dodge still has not produced a plan for the barn to show exactly where the septic system is. Mrs. Rouleau-Cote also commented that, when the septic design was done in 1988 for the new house, it shows the barn but there is no indication on there of any other septic system on that lot which would have had to have been shown by the designer at the time. Attorney Dodge stated that, if it had been asked it would have been disclosed and pointed out that there was a mechanical permit in the file that the tenant obtained to change out a gas tank of which Carrie Rouleau-Cote approved it. Mrs. Rouleau-Cote answered by saying that gas tanks don't necessarily mean someone's living there. Attorney Dodge reiterated that to penalize the Remington's for something

that was done over 30 years ago seems a bit unequitable. Mr. Lagana understood and appreciated it and reiterated what he said during testimony that, all these concerns and all these comments being said about septic plans and utilities and tax payments are all important and contributing factors but in his mind, the acid test is whether or not the two (2) dwelling units on the same parcel of property is a grandfathered condition and in 1988, when the cape was built, that was the second dwelling unit on that property. Attorney Dodge stated that it was approved by the town. Mr. Lagana agreed that it was approved by the town but that he did not see anything official and explained that it can be marketed by a real estate agent, it can be taxed by a third-party assessor. Attorney Dodge again pointed out that there was a building permit and a certificate of occupancy that was issued for the house and by virtue of constructing that house on the lot with the barn deemed it not in compliance, then the permit and the occupancy should never have been issued.

Mr. Lagana appreciated that and moved on to the motion that was made and seconded and explained to the Board members that would be voting tonight that a vote to grant the appeal or deny the appeal will mean to uphold the Code Enforcement's decision.

Mr. Beaurivage believed there was a lot of emotion and saw the disconnect between the septic system to grant this appeal and did not believe it met the criteria and would have to deny the request, Mrs. Neveu agreed with the emotion and all the rest of it and voted to deny, Mr. DiPietro voted to Deny, Mr. Stuart agreed it was a difficult case and voted to deny for the reason presented with the documents as this does not appear to be a legal non-conforming use at the time and the building permit document does not describe a residence as it talks about a garage and when the house was approved it did not approve two (2) dwelling units and therefore vote to deny and Mr. Lagana also voted to deny for reasons given in testimony this evening. All voted to DENY, therefore the motion did not pass.

Mr. Lagana explained to the applicant and Attorney Dodge that the Appeal did not pass and believed that the applicant had also filed a Variance at the same time the Appeal was filed and asked Attorney Dodge if they'd like to proceed. Attorney Dodge said yes and asked the Board if they'd like to take a brief recess. Mr. Lagana indicated that it was 8:15pm and that the Board would reconvene at 8:20pm.

At this time, the Board and the applicant took a 5-minute recess.

The Board reconvened at 8:22pm and Mr. Lagana asked Ms. Royce to read the case into the minutes for the record.

Case #17-19
Kenneth & Jennifer Remington
371 Chester Turnpike – Tax Map 11, Lot 9-1
Zoned Residential Two

Applicant is requesting a Variance to maintain a detached Accessory Dwelling Unit at the property under Article 14.09 of the Zoning Ordinance in a Residential Two zone.

Attorney Dodge read the application into the minutes for the record and went on to say that, at the October 24th hearing they submitted their application with a copy of the package with the letter she submitted. Attorney Dodge gave Mr. Carroll a copy of the package to review at tonight's hearing. Attorney Dodge proceeded to talk about Section 2.02 (a) through (g) and went through each one and indicated that they all meet the requirements except for (c) having their own smoke/carbon monoxide detector and (h) which does not allow detached Accessory Dwelling Units and therefore that is why they are asking for a Variance because it is detached at 72 feet away from the home. This is the only criteria that they cannot meet because the ADU/Barn is 72 feet away. Attorney Dodge went through the criteria for a Variance and pointed out that the loss to the Remington's would be great if they were unable to use the property that they have utilized for the past 30 plus years. Attorney Dodge believes that it has been validly permitted and assessed as well as acknowledged by the town.

Attorney Dodge moved on to the unnecessary hardship and stated that there would be unnecessary hardship to the Remington's because the property is unique as this is how the Remington's purchased the property with a detached barn with an apartment over it. The barn is detached and is 72 feet away so to restrict their right to use it and the fact it's been used for the past 30 years as an ADU. Attorney Dodge went on to reiterate that the town has taxed it as such and there have been no complaints and the Historical Society has taken a photo of the barn and included it in the book. Attorney Dodge concluded by saying that she would be happy to answer any questions that the Board may have and understands that the Board must apply the Variance criteria as well.

Mr. Lagana asked if there were any abutters who wished to speak. None were known. Mr. Lagana asked the Board members if they had any questions or comments. Mr. Stuart asked Mrs. Rouleau-Cote if she had any further comments. Mrs. Rouleau-Cote started out by saying that, the only comments that she had was with regard to the acknowledgement by the town and that the assessing records is one thing and she wanted it to be clear that other properties in this same area have been before the Board seeking relief for a detached ADU and one was denied. Mrs. Rouleau-Cote also talked about the previous owner of the parent tract that wanted to convert the garage into an Accessory Dwelling Unit and was told to stop. Mrs. Rouleau-Cote went on to say that, the circumstances for this case are different than the case that the Board had before them previously that started this ball rolling and understood that the Board would be taking that into account. Mrs. Rouleau-Cote indicated that, the only thing that she would like to reiterate is that, last year the ADU ordinance was rewritten to comply with the State of New Hampshire's legislative changes. The Town of Auburn did continue with the

language to prohibit detached Accessory Dwelling Units and that language was added. Mrs. Rouleau-Cote also stated that, it was her understanding that there would be a Petition Warrant Article presented to the Planning Board tomorrow night for the March ballot for the town voters to consider allowing "Detached Accessory Dwelling Units" and that will be before the voters in March. There is probably the opportunity for the town voters to weigh in on that. If the Board does determine to grant this variance, she would ask that conditions be considered with regards to the applicant securing what we would consider a permit after the fact for the ADU so that we have a permit in place acknowledging the ADU and then that would give her an opportunity to go in and perform life safety inspections with regard to fire separation, the smoke and CO, egress from the bedroom, those kinds of item's. With regard to the septic that, she would ask that the applicants provide the information obtained from DES with regard to the septic system and that in the Springtime, an as-built of the septic system components be presented which will show her where the septic tank is and either Kent Septic or somebody who their septic pumper knows just give her a rough dimension of what kind of pipe and stone field is out there so that we have that as part of the record. Mrs. Rouleau-Cote went on to say that it would be accompanied by any information that they have from DES. Mr. Lagana thanked Mrs. Rouleau-Cote and went on to say that the Board has heard testimony from the applicant's attorney for the Variance and they have taken input from the Code Enforcement Officer and abutters and asked if there was anything further that the Board wanted to add. Mr. Stuart had one more question for Attorney Dodge to touch upon the special conditions of the property one more time. Attorney Dodge began by saying that, the Remington's acquired the property with the Accessory Dwelling Unit detached but the property is so unique because of the way it existed when they acquired it and asking for a Variance for them to use it as such with the dwelling unit detached. Mr. Stuart thanked Attorney Dodge.

Mr. Lagana asked if there were any further questions or comments or would the Board like to go into deliberation or would they like to proceed to a vote on the application for a Variance.

Mr. DiPietro made a motion to vote on the variance application as presented tonight for Case #17-19, 371 Chester Turnpike, Tax Map 11, Lot 9-1, Mr. Beaurivage seconded the motion.

Mr. Lagana commented that, for discussion purposes would the Board like to condition it because Mr. DiPietro said as presented so would you like to add the conditions as requested by the Code Enforcement Officer. Mr. DiPietro said yes and added 1) securing a permit with the Building Inspector to check for life safety, 2) the septic system plot plan, and 3) the as-built septic plan in the Springtime to show where the septic tank is located.

Mr. Lagana explained that the motion has been made and seconded and that the Board has amended the vote as follows:

Mr. DiPietro made a motion to vote on the variance application as presented tonight with the following conditions: 1) securing a permit with the Building Inspector to check for life safety, 2) the septic system plot plan, and 3) the as-built septic plan in the Springtime to show where the septic tank is located for Case #17-19, 371 Chester Turnpike, Tax Map 11, Lot 9-1, Mr. Beaurivage seconded the motion. Mr. Stuart stated that he believed they met the first four (4) criteria easily and the fifth (5th) one was a challenge and voted to grant based on the conditions stated above and commented that the property was unique because of the subdivision, Mr. Beaurivage voted to grant as he believed they met the criteria with the three (3) stipulations, Mrs. Neveu voted to deny because she did not believe it met the spirit of the ordinance, Mr. DiPietro voted to grant as he believed it met all five (5) factors including the special condition that the subdivision plans lacked and Mr. Lagana voted to deny as he believed the application fails the spirit of the ordinance and also failed the contrary to public interest considering one goes hand in hand with the other and until the ordinance changes having two (2) units on one property fails the public interest criteria. The motion passed by a vote of 3 in favor and 2 against.

Attorney Dodge stated that she could certainly e-mail everything that she has obtained from Jennifer Paiton of DES. Mr. Lagana thanked Attorney Dodge for her presentation and believed she did a great job presenting the case. At this time, Mr. Lagana informed the applicants along with Attorney Dodge that there was a 30-day appeal period where abutters or interested parties including the Board of Selectmen could appeal the Board's decision.

At this time, Attorney Dodge and Mr. and Mrs. Remington thanked the Board members and exited the meeting.

Minutes

At this time, Mr. Lagana moved on to the approval of minutes for November 28th, 2017.

Mr. DiPietro made a motion to accept the minutes of November 28th, 2017, with the change noted, seconded by Mrs. Neveu. All were in favor, and the motion passed.

Mr. Lagana indicated that he would entertain a motion to adjourn.

Adjourn

Mr. Neveu made a motion to adjourn, seconded by Mr. Carroll. All were in favor, the motion passed unanimously and the meeting stood adjourned at 8:51 p.m.

The next ZBA Hearing is scheduled for January 23rd, 2018 at 7:00 pm and will be held at the Town Hall, 47 Chester Road.