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ZBA 2018-69  
Petition of Paul Delaney  
251 & 251A Weston Road

Pursuant to due notice, the Special Permit Granting Authority held a Public Hearing on Thursday, October 4, 2018, at 7:30 p.m. in the Juliani Meeting Room, 525 Washington Street, Wellesley, on the petition of Paul Delaney requesting a Variance pursuant to the provisions of Section XIVE, Section XIX and Section XXV of the Zoning Bylaw to reconfigure two lots, adding 3,135 square feet from 251 WESTON ROAD to 251A Weston Road, conditioned upon the structure at 251 Weston Road being razed and leaving 251 Weston Road as a fully compliant lot, with 251 A Weston Road maintaining a garage with less than required side and rear yard setbacks. The properties are located in a 10,000 square foot Single Residence District and a Water Supply Protection District.

On September 13, 2018, the Petitioner filed a request for a hearing before this Authority, and thereafter, due notice of the hearing was given by mailing and publication.

**WITHDRAWN WITHOUT PREJUDICE**

Presenting the case at the hearing were David Himmelberger, Esq., representing the owners of 251 and 251A Weston Road, Paul and Kimberly Delaney, the Petitioner. He said that the Mark, Paul and Nancy are trustees of the Delaney Trust. Also present was Paul Delaney, who is a lifelong Wellesley resident.

Mr. Himmelberger said that the request is for a variance to remove a portion of the rear of 251 Weston Road, which currently contains a nonconforming garage, and to convey the land and the garage to 251A Weston Road, subject to a condition that the existing nonconforming home at 251 Weston be razed and the garage be reoriented to face 251A, effectively making it a side facing garage. The Board confirmed that turning the garage would be accomplished by changing the location of the walls and the doors, not physically turning the garage structure.

Mr. Himmelberger said that 251A is a nonconforming lot that pre-dates Zoning, with no frontage and less than 10,000 square feet. He said that the lot will be 9,887 square feet with the addition of 3,135 square feet, which is still nonconforming. He said that the relief requested is similar to a petition that the Board acted on at 28, 30, and 32 River Ridge, where lot lines of nonconforming lots were reconfigured. He said the primary benefit of this petition will be that 251 will become fully compliant. Mr. Adams said that the lot is compliant but the structure is noncompliant. Mr. Himmelberger said that by conditioning the conveyance of the parcel to 251A, and upon the razing of the structure at 251, it will leave a fully compliant lot upon which only a dimensionally compliant home can be built.

Mr. Himmelberger said that none of the setbacks will be worsened by the conveyance. He said that the shape of lot 251A provides the basis for a variance that can be granted without detriment to the Zoning Bylaws. He said that the variance would be unique to this property's shape, not generally affecting land or other structures in the Zoning district, and desirable relief can be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purpose of the Zoning Bylaw. He said that it will take two existing nonconforming lots, by virtue of nonconforming structures in one instance and nonconforming frontage and lot area in the other, and making 251 a fully compliant lot with a compliant structure on it. He said that setbacks for the nonconforming garage that is currently associated with 251 will be less nonconforming at 251A.

Mr. Levy questioned how the Board can approve this on a piecemeal basis without seeing an end plan. He said that the house at 251 will be razed and the proposal is to build another structure there. He questioned why a conforming house is not built at 251 since the lot itself is conforming. Mr. Himmelberger said that the garage at 251 is nonconforming. He said that the plan is to demolish the house but not the garage.

Mr. Levy asked if Mr. Delaney is a beneficiary to the trust for 251A. He asked if the lots will be merged for Zoning purposes. Mr. Himmelberger said that they are legally different entities. He said that it is not merger because there are two existing lots on which there are two existing houses that pre-date zoning. Mr. Levy questioned who the beneficial owners are.

Mr. Himmelberger said that the variance would grant relief to create a lot without sufficient frontage, adequate area, and insufficient setbacks. He said that the variance is predicate to seeking an ANR. Mr. Sheffield asked about razing and building a new house at 251 and then changing the lot line. Mr. Himmelberger said that they would face the same issue that by adding the two parcels they will need a variance because it will not comply with Zoning.

Mr. Levy asked about maintaining the status as a nonconforming lot at 251. Mr. Himmelberger said that, as a condition of the variance, they would be required to take the house down. He said that when a variance establishes a nonconformity, you cannot use that as a pre-existing nonconforming condition.

Mr. Sheffield asked if the driveway will be an easement. Mr. Himmelberger said that the driveway is already a deeded easement over 251 for the benefit of 251A. Mr. Adams said that it is not labeled on the plan.

Mr. Levy questioned whether the lots are merged for zoning purposes as being under common ownership. Mr. Himmelberger said that there are two other beneficiaries, so there is no sole identity of ownership. He said that, based on that, they do not merge. He said that 251 will become fully conforming once the conveyance is made and the house is razed. He said that the only relief will be for 251A. Mr. Levy said that 251 is a conforming lot but the house is nonconforming.

Mr. Levy asked if this would be a self-imposed hardship. Mr. Himmelberger said that the lots pre-date Zoning and the Applicant did not create the lots. Mr. Levy said that the request is to use the shape of the lot at 251A in order to change 251, which is not irregular. Mr. Himmelberger said that the focus should be on 251A because that is the lot that will need the Zoning relief. Mr. Adams said that the change will make 251A less nonconforming.

Mr. Levy questioned what variance the Board would be granting. He said that 251A is looking to get a variance from property that it does not own. He said that Mr. Himmelberger asserts that the properties are not merged because they have different owners but 251A is seeking relief on a parcel that it does not own. Mr. Himmelberger said that they are seeking a variance for the purpose of allowing the conveyance. He said that the both of the properties' owners are applying for the relief. He said that currently the side yard setback for the garage is 10.4 feet and it will go to 10.5 feet, which is an improvement.

Mr. Sheffield asked if any of the surrounding neighbors will be adversely affected by this change. Mr. Himmelberger said that his client spoke with all of the abutters and they are supportive of it.

Mr. Levy said that the Planning Board recommended the ZBA seek input from Town Counsel due to the number of complications in this petition. He said that this will create a new lot that is completely noncompliant. He said that 251A will never have adequate frontage.

Mr. Himmelberger said ANR's are not dependent on Zoning. He said that if Parcel A did not have a garage on it, they could get an ANR to add it on to 251A. He said that they want to keep the garage. He said that the ANR is discretionary on the part of the Planning Board. Mr. Levy said that if they meet all of the requirements of the statute, then approval is not required. Mr. Himmelberger said that this case has gone to Town Counsel, who has said, in connection with River Ridge, that the ANR is discretionary on the part of the Planning Board when it is a nonconforming lot. He said that the issue with ANR is that there is adequate frontage and lot size. He said that they can approve an ANR if there has been a variance that allowed the creation of the new lot that is still nonconforming. Mr. Levy said that this will have to go back before Town Counsel, in any case. Mr. Himmelberger said that this is consistent with River Ridge and Town Counsel's input that there is no issue with granting of relief by ZBA but the ANR Plan was discretionary upon the Planning Board. He said that the issue becomes how there would be any substantial detriment to the public good or nullification or derogation from the intent of the Zoning Bylaw. He said that this proposal will create a better set of conditions that are more consistent with Zoning, as 251 will become fully compliant.

Mr. Levy said that he had never been involved in a case where a variance was granted to create a lot. He said that variances are granted for frontage and other dimensional requirements. Mr. Adams said that the Board will grant relief for frontage, lot area, and front and side yard setbacks for the garage. Mr. Himmelberger said that it will create a new nonconforming lot. Mr. Adams said that a benefit is that addition of Parcel A will increase the size of 251A. Mr. Levy said that he is not objecting to the end result but wanted to determine if granting a variance is the correct procedure.

Mr. Himmelberger said that the lot is already a legal undersized lot. Mr. Levy said that Parcel A is not a legal lot. He said that Lot 1 is. He said that the garage is pre-existing nonconforming. Mr. Himmelberger said that the request is to combine Parcel A with Lot 101. Mr. Levy said that Parcel A would have to be created to do that. Mr. Himmelberger said that they want to have the ability to create a lot that includes Parcel A and 251A. He said that the newly combined lot will not have frontage or sufficient lot area. Mr. Levy asked which provision of the Zoning Bylaw will be varied. He said that the Planning Board has to create the new lot. Mr. Himmelberger said that the Board can insert a condition that the variance is conditioned upon successfully obtaining an ANR. He said that the request is to allow the creation of a new lot that is 9,827 square feet with inadequate frontage. Mr. Adams said that the

Applicant will not be able to do anything with the relief that the Board grants until the Planning Board acts on the ANR. Mr. Himmelberger said that the Planning Board will not take this up unless or until a variance is granted. Mr. Adams said that the Planning Board could deny the ANR.

Mr. Adams said that the River Ridge had a benefit that this case may not have. He said that it took two lots and subdivided them to create an odd shaped lot that would allow a new home to be built further back from the street. He said that was a benefit to the neighborhood. Mr. Himmelberger said that the lot that was ultimately to be created still had inadequate frontage. He said that the Board granted a variance subject to the tearing down of 28 River Ridge and conveyancing would not be done until they had an ANR.

Mr. Levy said that if this is allowed, the existing house at 251 will be razed and a conforming house will be built. He asked about plans for 251A. Mr. Himmelberger said that they will reorient the garage openings so that it is side facing. Mr. Himmelberger said that the conditions will be razing the existing structure at 251, reorienting the garage and recording of an ANR showing the reconfiguration of the lot. He said that if any of those conditions do not happen, the variance does not exist.

The Board discussed variance standards. Mr. Adams there is a unique shape of lot. He said that the matter of hardship is subject to interpretation. He said that the proposed change seems to be a benefit to the neighborhood.

Mr. Levy said that he would have liked to have seen a total plan for this. He said that he did not want to see 251A coming in next year for a Section 6, razing that and building a bigger house. He said that he would also like to see where the easement is. Mr. Himmelberger is unchanged. He said that it is shown on the plot plan as a dotted line that bends as it gets up to the garage. He said that it runs along the common property line. Mr. Adams said that the lot itself does not have enough room to get an egress path to the street. He said that there is no requirement that they have a driveway. Mr. Himmelberger said that the easement is fully deeded.

Mr. Adams said that the Board will need to see the plan that shows that the garage will be reoriented. Mr. Himmelberger said that the garage doors now face towards Weston Road and will be reoriented towards what is now the common property line for a 90 degree change. He said that the building will not change dimensionally. He said that the ANR Plan will require Town Counsel to weigh in because of the approval with a nonconforming lot.

Mr. Levy said that the Planning Board has concerns. He said that it makes sense to do this in a more streamlined process in getting the Town Planner and Town Counsel involved to see if this whole scheme is something that they would endorse. Mr. Himmelberger said that they went to the Planning Department and were told that this is the pathway that they blessed. Mr. Levy said that is not consistent with the Planning Board recommendation. He said that an ANR was granted on River Ridge because it created a better condition that was still not compliant. He said that the situation is similar here because it will create better lots for Zoning.

Mr. Levy said that the shape of this lot is not causing the hardship. He said that what is causing the hardship is the size. He said that the irregular shape does not cause the hardship. He said that the Board cannot grant a size variance. He said that the hardship must be due to the shape, topography or soil

condition. Mr. Himmelberger said that the shape is creating a hardship. Mr. Levy said that if this lot had a regular shape, the Petitioner would still be seeking the same relief.

Mr. Adams said that Chapter 40A does not say that the unique factor, whether it is shape, topography or soil conditions has to be the hardship. Mr. Levy said that you cannot have wetlands at the back of your lot and ask to improve the front of the lot if the wetlands have nothing to do with the relief that you are seeking.

Mr. Adams said that the variance would go with 251A, and the new lot at 251 will have a condition that the house must be demolished.

Mr. Himmelberger said that the Board has stated that it is its mission to strive for greater conformity to the Zoning Bylaw, which this does. He said that there is nothing that precludes 251 from granting an easement to 251A for all of Parcel A but they would be left with two pre-existing nonconforming lots by virtue of nonconforming structures under that scenario.

Mr. Levy said that only the Trust signed the application for the petition. Mr. Himmelberger said that Mr. Delaney is the record owner of 251 and a Trustee of 251A Weston Road. He said that there are three Trustees.

The Board discussed sending the matter to Town Counsel for review. Mr. Levy said that he would prefer to get Mr. Zehner and Town Counsel involved to look at the whole scheme. Mr. Adams questioned whether there should be two separate applications, one for each of the properties. Mr. Himmelberger said that there is only one mission here to create a new lot. He said that there is no relief being sought by 251. Mr. Levy said that it is to create a new lot involving property that it does not own. He said that it anticipates that it will acquire it. Mr. Himmelberger said that they cannot convey it ahead of that.

Mr. Levy said that this is not a typical variance. He said that the Board can say that the hardship is related the shape of the lot. He said that the hardship is related to the Petitioner wanting to add a parcel and a garage, which has nothing to do with the shape.

Mr. Adams said that even if they demolished both of the structures, they could not create two compliant lots.

Mr. Himmelberger said that the only is that the Planning Board will not render a decision without the variance. He confirmed with Victor Panak, Town Planner, that Town Counsel's opinion on River Ridge was that the Planning Board's endorsement of an ANR was discretionary, even though a variance had been granted. He said that if the Planning Board does not endorse the ANR, the variance is not fulfilled.

Mr. Levy asked about the substantial hardship. Mr. Himmelberger said that they would like to acquire land to make themselves more conforming. He said that they are currently in a hardship in that they do not have greater land than they have, they do not have a garage and would like to acquire one. He said that if Parcel A did not have a garage on it, they would still require Zoning relief to add it to 251A because they would be creating a nonconforming lot. He said that all that they are seeking to do is to make 251A a better lot and make 251 fully a compliant lot on which a compliant structure sits.

Mr. Levy said that he would be willing to speak with Town Counsel to see what his opinion is. Mr. Himmelberger said that Town Counsel was aware of the reconfiguration of the lots for which variances were sought at 28, 30 and 32 River Ridge. He said that Town Counsel has previously reviewed a similar situation. Mr. Levy said that there may have been other hardships there. He said that he did not see a hardship here other than wanting to do it.

The Board discussed continuing the hearing.

Mr. Himmelberger requested that the submittals that he made be submitted to Town Counsel.

Mr. Adams moved and Mr. Levy seconded the motion to continue the petition to November 1, 2018 and send a copy of the application to Town Counsel. Mr. Himmelberger said that he will submit a follow up letter trying to frame the issues. Mr. Levy asked Mr. Himmelberger to also focus on what section of the bylaw the variance would require relief from. The Board voted unanimously to continue the hearing to November 1, 2018.

Mr. Adams suggested that a modified plot plan that shows the driveway easement and at least a notation about reorientation of the garage doors be submitted.

### **November 1, 2018**

Presenting the case at the hearing were David Himmelberger, Esq., representing the Delaney Trust and Paul Delaney, the Petitioner.

Mr. Himmelberger said that the request is for a variance to carve out a portion at the rear of 251 Weston Road and convey it to 251A Weston Road. He said that at the last hearing questions were raised about the plot plan and showing the driveway easement more clearly. He said that a revised plot plan was submitted that shows the deeded driveway easement that runs over 251 for the benefit of 251A Weston Road. He said that the garage that is shown on Parcel A at the rear of 251 Weston Road would be reoriented and a note has been added on the plan to indicate that. He said that there was a suggestion that Town Counsel be consulted. He said that he sent a letter dated October 12, 2018 to the Board outlining what he believes to be the most salient points, the most significant of which is that the ZBA does have the authority to grant the requested relief. He said that this authority was previously exercised in a case before the Board in 2017, when three lots at River Ridge were reconfigured. He said that in this case there will be no change to the status quo. In that the garage location will not change. He said that approval could be conditional upon applying for and receiving an ANR from the Planning Board, which is a discretionary function even after the ZBA grants approval of a variance. He said that the pathway forward in cases like this is to first seek a variance and if it is granted, conditioned upon a favorable ANR, and subsequent razing of 251 Weston Road.

Mr. Himmelberger said that 251 Weston Road is a pre-existing nonconforming structure due to side yard setbacks. He said that it will be razed and a fully compliant new structure will be built on the newly created conforming lot. He said that 251A will remain a nonconforming lot. He said that the shape of the lot is the prong upon which the Board can grant relief without doing damage to the goals and intent of the ZBL. He said that if the relief is granted, there will be a lessening of nonconformities, as 251 will become a conforming structure. He said that 251A will be less nonconforming but the lot size will still be under

10,000 square feet. He said that the side yard setback for the garage will increase slightly. He said that Zoning relief can be granted based on the shape of the lot. He said that the hardship is that 251A would like the benefit of a garage. He said that the garage is already there. He said that they are simply seeking to transfer ownership to 251A. He said that they believe that there is nothing detrimental to the bylaw brought about by this actions and request favorable granting of a variance. He said that with the granting of a variance, any future relief that is sought for 251 A must be to modify a variance.

Mr. Levy said that he spoke with Town Counsel, Michael Zehner, Planning Director, and Michael Grant, Building Inspector. He said that there were several issues that were not resolved at the previous hearing. He said that he was concerned about jurisdiction that the Board has to grant a variance for a lot that is not owned by the Petitioner. He said that Mr. Himmelberger said that these are two separate lots with separate ownership that do not merge. He said that the owner of 251A is seeking a variance on 251. He said that 251 would not be entitled to a variance because the structure is pre-existing nonconforming and there is no relief that it would need unless the owner wanted to alter it.

Mr. Levy said that, by creating a new lot, it becomes subject to Table 3 setbacks where 18 feet is required for the rear yard instead of 10 feet. He said that the current structure is 12 feet off of the rear and 10 feet off of the side. He said that the proposed change will exacerbate the rear yard setback by 8 feet. He said that the relief requested in the petition was to legalize the lot. He said that it appears that two variances will be required, one for the rear yard and one for the side yard. He said that it appears that the side yard is self-imposed because they arbitrarily decided to draw the line 10 feet away where they could have drawn it 20 feet away. Mr. Himmelberger said that they could not do that because taking another 10 feet would make 251 a nonconforming lot. He said that if the Board grants the variance, Lot 1, with the removal of Parcel A at the rear, will have 10,047 square feet. Mr. Levy questioned why this would not be a self-imposed hardship. He said that it is an irregularly shaped lot with two feet of frontage but under the variance statute, the shape of the lot has to have a bearing to relief being sought. He said that he did not see how the shape bears upon the relief they are seeking.

Mr. Levy said that this house has existed for 90 years without a garage. He questioned why it is a hardship now. He said that the Board has seen many other petitioners look to expand detached garages from one to two bays. He said that this Board has consistently said that is not a hardship. Mr. Himmelberger said that the garage will remain with a rear setback of 15 feet, regardless of the Board's action tonight. He said that if the Board does not act favorably tonight, the garage will remain with a 10.4 foot side yard setback. He said that it is not a case that is similar to petitions for a variance to expand or build a garage. He said that this is simply a case of trying to reconfigure existing lot lines and in the absence of reading the variance, the world would never know that the lot lines had changed. He said that this request does differ in substance from those instances in which the Board has held that the desire to have a new garage or an additional bay does not rise to a hardship level. He said that all that is changing is the lot lines. He said that the garage will be reoriented to face 251A Weston Road. He said that the proximity of the structures to one another and to the world will remain the same. He argued that the relief can be granted without substantial detriment to the public good and without nullifying or derogating from the intent of the ZBL. He said that the tables were put in the ZBL with the intent to apply to new building lots. He said that when that bylaw was amended, it was presented to Town Meeting as applying to new building lots. He read an excerpt from Section XIX B. of the ZBL. He said that this petition is not to erect or place a new structure upon a lot at 251A. He said that they do not believe that they are offending the bylaw with regard to the table because they are not creating a new building lot or placing a new

structure on the property. He said that they believe that the Board does have authority to grant a variance to individuals at 251A for the purpose of their acquisition of Parcel A. He said they are asking that the variance that they are seeking be conditioned upon the conveyance of Parcel A to 251A. He said that this Board has done that in the past, which says that the Board has the authority to do it. He said that they are asking for the relief so that the lots can be more effectively utilized, with 251 becoming a fully conforming lot with a fully conforming structure, and 251A will enjoy the benefit of a garage. He said that because they are not building new structures, that outweighs a hard and fast interpretation or denial of the relief. He said that this will not be substantially detrimental. Mr. Levy said that this is not a Section 6 finding. Mr. Himmelberger said that there must be a finding by this Board that desirable relief may be granted without substantial detriment to the public good, and without nullifying or substantially derogating from the intent or purpose of the ZBL. Mr. Levy said that there are several other requirements before you get to that. Mr. Himmelberger said that the shape of the lot is the predicate. Mr. Levy said that the shape of the lot does not relate to the garage, and if it does, it is self-imposed because they are creating the lot where the garage is. Mr. Himmelberger said that if the lot at 251A was rectangular, the relief could be granted more easily or not be required. He said that the shape of the lot does provide the Board with the ability to go to the next step to determine whether the desire relief can be granted without substantial detriment to the public good. Mr. Levy said that if this was a discretionary permit, based on a Section 6 finding or on one element of a variance, the Board could get there. He said that he is troubled by the fact that it is very difficult in the State and the Town to get a variance. He said that the Board grants very few of them over the course of a year. He said that the Board takes the requirements seriously. He said that the bylaw says that Table 3 is applicable to lots recorded or endorsed on or after April 8, 1997.

Mr. Adams said that the Board has in the past allowed a nonconforming building to seek a special permit to be demolished and reconstructed to be less nonconforming. He said that if the Board was to find that it could grant a variance to 251A to allow them to acquire additional land, which would decrease the nonconformity of that parcel while allowing the parcel at 251 to remain nonconforming as to lot area, he would not want to see the owners of 251 come back to the Board prior to the demolition of the existing structure to request a special permit/finding to demolish and reconstruct a structure that is not fully compliant. Mr. Himmelberger said that the intention is to not do that. He said that the Petitioner would accept that condition as part of the variance. He said that the proposal was that the variance be granted subject to favorable ANR from the Planning Board and the razing of 251.

Mr. Adams said that it is an unusually shaped lot that is nonconforming as to area and setbacks. He said that a hardship could be that the lot is of such a shape and size that it would not be possible to find a spot on that pie shaped lot to place a garage. He said that this proposal provides 251A with an opportunity to acquire a garage. He said that he had not thought of the Table 3 issue. He said that Mr. Himmelberger made the argument that Table 3 was intended for new buildings on new lots. Mr. Levy said that any new lot created is subject to Table 3. He said that it exacerbates the relief being sought.

Mr. Levy said that he sent a copy of the petition to the Board Chairman, Dick Seegel, for review. Mr. Seegel said that he reviewed it and was troubled. He said that he did not see a hardship with the lack of a garage. He said that the house has been that way for dozens of years. He said that he was also troubled by the argument that the shape of the lot has any bearing because it does not relate to the relief granted. He said that there are many lots in town that have a similar situation and not all of them are solvable.

Mr. Adams said that it seems like this could be a no harm, no foul situation. He said that there will be no harm done to Lot 1 at 251 and no harm done to 251A, where it acquires land and a garage. He said that the Board did not hear any public comments at the previous hearing. He said that he did not see how this arrangement would create any inconvenience, hardship or imposition on any adjacent properties. Mr. Levy said that is not what the legal standard is. Mr. Sheffield said that Mr. Adams expressed his views very clearly.

Mr. Sheffield asked about the easement that accesses a parking area for 251A. He asked about extending the right of way to the new garage doors. He said that no harm, no foul applies here as well.

Asked if there was anyone present at the public hearing who wished to speak to the petition.

Mr. Adams said that the statute and the bylaw use the term financial or otherwise in terms for the hardship. He questioned how the Board would get to how the hardship has to be specific to the nonconformity that is being accepted as the basis for allowing the variance to be granted. Mr. Levy said that the bylaw mirrors the statute. He read an excerpt from Section XXIV-D of the ZBL. He said that case law is clear that just because you have an irregularly shaped lot, that you can have a variance anywhere on the lot.

Mr. Levy said that there is a solution without getting relief. He said that 251 can give an exclusive easement to 251A to the garage. Mr. Himmelberger said that it is generally perceived that houses and properties that are encumbered with easements are less desirable than those without. He said that while there is a driveway easement that is separate and apart from a larger Parcel A easement, they still could reorient the doors and come in that way. He said that under the exception to the Subdivision Control Law, the division of property upon which two functioning structures existed at the time that the town or municipality adopted the Subdivision Control Law, and on where the two functioning structures still exist, may be subdivided without subdivision control as an ANR. He said that is also a possibility and in that instance, with the conveyance of Parcel A to 251A, there would then be a merger for zoning of that ANR process, Parcel A having been created under the ANR. He said that, in that fashion, it would then merge with 251A if they are under single ownership. He said that the net result at that point would be that any future action at 251A would come in the guise of a special permit. He said that the Board has more control if it grants the variance. He said that it is a no harm, no foul situation where they will get the same result. He said that he believes that the shape of the lot allows the Board to make the finding and go on to the next determination that there is no detriment to the public good or derogation from the ZBL. He said that there are other ways around this but this is the preferred pathway by the parties involved because it is the least cumbersome and the cleanest way of addressing it, and gave the Board the most jurisdiction going forward. He said that the petition be allowed to be withdrawn without prejudice if the Board cannot unanimously approve the petition for a variance.

Mr. Levy asked Mr. Zehner if the Planning Board would consider an ANR for this without a variance. Mr. Zehner said that the Planning Board has done that in the past as long as the variance was not related to the frontage. He said that in this case, there may need to be notes about the buildability of the lots, independent of other lots. He said that the Planning Board originally viewed the sequence to need a variance contingent on the eventual ANR. He said that after discussions with Town Counsel, the Planning Board could feel comfortable considering the endorsement prior to the variance.

Chris Heep, Town Counsel, said that he agreed with what Mr. Zehner just said. He said that he did not believe that the ANR could be endorsed in its present form but with additional notes on the plan, he believes that it probably could. He said that the notes would probably have to designate Parcel A as not independently buildable. He said that if the plan were endorsed and Parcel A was conveyed to 251A without a variance, that would trigger a Zoning violation with respect to the existence of the garage on Parcel A being located for the first time ever within the side yard setback. He said that they could get their ANR endorsement probably as a matter of right with a few tweaks to the plan but if they do that, they are potentially buying themselves a Zoning Enforcement Action.

Mr. Himmelberger asked why the Merger Doctrine for Zoning violations would not apply. Mr. Heep said that, absent a variance, they will create a new side yard setback violation that cannot be mitigated by merger of the lots. He said that the merger will apply and help with respect to the undersized status of 251A, where it will make 251A less nonconforming. He said that structural violation will be new, absent a variance from the Board.

Mr. Himmelberger said that he doubted that his client would want to move ahead with an ANR that would lead to a Zoning Enforcement Order to remove a garage, which was the whole purpose of the proposition here and the relief sought. Mr. Levy said that it would get two things, one of them solving the issue of granting a variance on a lot that they do not own, and the second would be to come back before the Board again.

Mr. Adams said that he thinks that it is in the discretion of the Board if all three agree, that it could grant a variance based on the uniqueness of the lot and the hardship that was discussed. He said that there would still be the opportunity for a citizen to appeal the decision of the Board. He said that if there was no appeal filed during the appeal period, it would be a done deal. Mr. Levy said that the bylaw does not say no harm, no foul. He said that the relief being sought is not owing to the shape of the lot. He said that they are creating this lot, so it is self-imposed.

Mr. Sheffield said that the location of a new property line at the rear of 251 creates a side yard setback violation for the garage that has been self-created. Mr. Himmelberger said that it will remove an existing side yard setback violation at 10.4 feet and substitute a 10.5 foot setback.

Mr. Himmelberger asked that the petition be allowed to be withdrawn without prejudice. He said that similar relief was sought at River Ridge. Mr. Adams said that each case is dealt with individually.

Mr. Adams moved, Mr. Levy seconded the motion, and the Board voted unanimously to allow the petition to be withdrawn without prejudice.