



# TOWN OF WARE

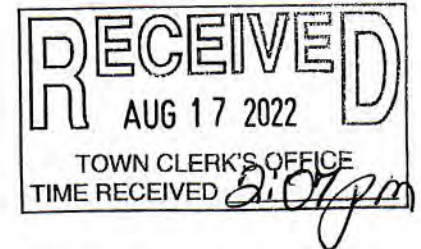
Planning & Community Development  
126 Main Street, Ware, Massachusetts 01082  
t. 413.967.9648 ext. 120      rwatchilla@townofware.com

## ZONING BOARD OF APPEALS MEETING AGENDA WEDNESDAY, AUGUST 24, 2022

Location:                      Selectboard Meeting Room  
                                    126 Main Street, Ware, MA  
Time:                            7:00 p.m.

### Virtual Participation:

Phone number:      929-205-6099  
Meeting ID:            784 604 1861  
Passcode:              01082



Instructions for call in option: Call the phone number above and when prompted enter the Meeting ID number and Passcode.  
Join the Meeting Online: <https://zoom.us/join>

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1. Pledge of Allegiance
2. Administrative
  - a. Approval of Minutes from June 1, 2022
3. Public Hearings
  - a. V-2022-01 (Yasser Fares – 30 Anderson Road)
    - i. Applicant is requesting Variance relief from a side yard setback in order to construct a car port for a primary residence. Site Location: 30 Anderson Road. Deed recorded in the Hampshire County Registry of Deeds, Book 12855, Page 30. Assessor's Parcel 10-0-123. Zoned: Rural Residential (RR).
4. Old Business
  - a. Continued discussion on pre-existing non-conformities
    - i. Discuss answers provided by Town Counsel at the June 1 meeting.
5. New Business
  - a. Discussion on the role of the ZBA
    - i. Address the role of the ZBA in regard to setting new zoning policy and influence, and its relation to the Planning Board and Building Commissioner.
  - b. Discussion on burned buildings and its relation to the Zoning Bylaw
    - i. Proposed discussion by Vice-Chair Jodi Chartier
6. Adjourn

*At the time of posting of this meeting, the agenda items listed above are what is reasonably anticipated by the Chairman to be discussed at this meeting. Other items not listed may be brought up for discussion to the extent permitted by law. The general public is invited to this and all meetings of the Ware Zoning Board of Appeals.*



# TOWN OF WARE

## Planning & Community Development

126 Main Street, Ware, Massachusetts 01082

t. 413.967.9648 ext. 120

## Zoning Board of Appeals / Planning Board

### Joint Meeting

Meeting Minutes from

**June 1, 2022**

Select Board Room, Town Hall

#### Zoning Board Members Present:

Lewis Iadarola, Chairman (remote)

Jodi Chartier, Vice Chairwoman

Chuck Dowd

David Skoczylas, Alternate

#### Zoning Board Members Absent:

Greg Eaton

Phil Hamel

George Staiti, Alternate

#### Staff Present:

Rob Watchilla, PCD Department Director

Stuart Beckley, Town Manager (remote)

Laura White, PCD Dept. Admin. Assistant (remote)

#### Public in Attendance:

Jonathan Murray, Town Counsel

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### PLEDGE OF ALLEGIANCE

Chairman L. Iadarola called the meeting to order at 7:02pm and, at the Chairman's request, C. Dowd led the Pledge of Allegiance.

### ADMINISTRATIVE

#### Approval of minutes from joint meeting with the Planning Board Thursday, February 10<sup>th</sup>, 2022.

**Motion** made by J. Chartier to approve minutes from February 10<sup>th</sup>, 2022. Seconded by C. Dowd.

L. Iadarola	Aye
J. Chartier	Aye
C. Dowd	Aye
G. Eaton	Absent
P. Hamel	Absent
D. Skoczylas	Aye, Alternate
G. Staiti	Absent, Alternate

All in favor. Approved 4/0/2.

## **Approval of minutes from joint meeting with the Planning Board Thursday, February 24<sup>th</sup>, 2022.**

**Motion** made by C. Dowd to approve minutes from February 24<sup>th</sup>, 2022. Seconded by J. Chartier.

L. Iadarola	Aye
J. Chartier	Aye
C. Dowd	Aye
G. Eaton	Absent
P. Hamel	Absent
D. Skoczylas	Aye, Alternate
G. Staiti	Absent, Alternate

All in favor. Approved 4/0/2.

## **OLD BUSINESS**

### **Large Scale Battery Storage Discussion**

R. Watchilla informed the Board there are not many federal or state guidelines regarding large scale battery storage facilities. He stated there is a utility scale battery storage facility in Sterling, connected to the Town's electrical grid, acting as a generator for the police and fire stations in the event of a power outage.

J. Chartier asked if Sterling has anything in their bylaws regarding large scale battery storage and if the Town of Ware could look into any information Sterling may have regarding this topic.

R. Watchilla stated he would look into it more over the next several weeks, and added Pioneer Valley Planning Commission (PVPC) applied for a Planning Assistance Grant to help create draft zoning bylaw language and allow other local towns to collaborate on this.

J. Chartier stated concerns about the lack of federal and state guidelines and emphasized the importance of doing research before any decisions can be made.

J. Murray informed the Board he is working with the Town of Oakham on their zoning bylaw and knows of a few other towns that are in the process of creating similar bylaws. He stated he will consult with his colleagues, who are doing similar work, and contact R. Watchilla with more information.

L. Iadarola requested J. Chartier follow up with R. Watchilla and J. Murray.

## **NEW BUSINESS**

### **Discussion with J. Murray from Town Counsel**

J. Murray informed the Board a "pre-existing nonconforming protection" is a use or structure which complies with zoning, but is rendered non-conforming as a result of a subsequent zoning amendment. These uses are given special protections as they existed prior to the zoning amendment. He stated this used to be referred to as "Grandfathering." However, due to racist origins, the term is no longer used.

L. Iadarola asked about uses that are not listed in the Town bylaw and if those uses are considered pre-existing nonconforming uses.

J. Murray stated there is a difference between pre-existing nonconforming uses and lawfully pre-existing nonconforming uses. The protections only apply to pre-existing nonconforming uses, if they were specifically allowed at one point, and are no longer allowed due to a zoning amendment. If a use was not allowed and was later allowed, but not in that particular zoning district, the zoning amendment does not make it lawful. If a use predates zoning bylaws in a Town, it would be lawfully allowed.

L. Iadarola asked, if a use was not protected as a legally pre-existing nonconformity, and a new zoning amendment allowed it, with restrictions, would the use be required to comply with the new restrictions.

J. Murray confirmed that, in general, the use would be required to comply with the new restrictions.

J. Murray stated one and two-family residential uses are entitled to extra protections due to the Zoning Act.

L. Iadarola asked if the Board is limited to size, shape, and topography for appeals.

J. Murray stated size, shape, and topography only apply to variances. The Board is not limited to only these criteria when making determinations on appeals.

L. Iadarola asked if the Board is able to apply additional criteria for variances.

J. Murray stated the Board is not able to apply additional criteria, however, the Board is able to impose reasonable conditions to variances, and no one is entitled to a variance.

L. Iadarola asked about the 6-10 year statute of limitations on nonconformities and how that applies to Board decisions.

J. Murray stated this depends on when and if a permit has been issued to the use. If no permit was issued, the applicant must submit any proof when their use was established. He added that the statute was passed to ensure towns address zoning issues within a reasonable time period.

L. Iadarola asked if licensing authorities are able to issue licenses in zones where they are not allowed.

J. Murray stated licensing authorities may issue licenses in zones where they are not allowed, however, the applicant must comply with all laws, and obtain all permits.

J. Chartier asked about the laws for allowing a subdivision on a nonconforming lot.

J. Murray stated subdivisions and zoning are two different things. The Planning Board's decision to approve a subdivision does not make a determination on pre-existing nonconforming status or zoning compliance. The applicant must still comply with zoning.

J. Chartier asked about what rights a Board member has as an abutter to a property that comes before the Board.

J. Murray stated the Board member needs to recuse themselves with a statement before any deliberation can take place regarding the property. The Board member still has the right to remain in the room and can listen to any discussion that takes place after they recuse themselves.

J. Chartier asked if the Board member would be allowed to ask questions or state facts during the hearing.

J. Murray stated, once the Board member is recused, they are only allowed to listen, not participate in the deliberation. They may still ask questions, but should be careful not to participate in the same way they would as a member of the Board.

## ADJOURN

**Motion** made by J. Chartier to adjourn at 8:19pm. Seconded by D. Skoczylas.

L. Iadarola	Aye
J. Chartier	Aye
C. Dowd	Aye
G. Eaton	Absent
P. Hamel	Absent
D. Skoczylas	Aye, Alternate
G. Staiti	Absent, Alternate

All in favor. Approved 4/0/2.

Minutes from June 1, 2022

Respectfully submitted by,

Laura White  
Administrative Assistant  
Planning & Community Development

**Minutes Approved on:** \_\_\_\_\_

Iadarola \_\_\_\_\_

Chartier \_\_\_\_\_

Hamel \_\_\_\_\_

Dowd \_\_\_\_\_

Eaton \_\_\_\_\_

Skoczylas \_\_\_\_\_





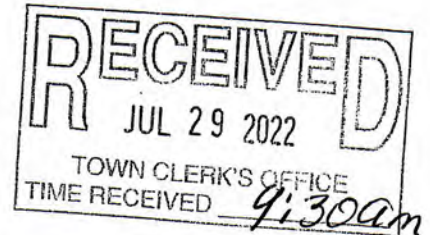
# TOWN OF WARE

Planning & Community Development

126 Main Street, Ware, Massachusetts 01082  
t. 413.967.9648 ext. 120 rwatchilla@townofware.com

## Notice of Public Hearing Ware Zoning Board of Appeals

LEGAL NOTICE  
to be published in the *Ware River News*  
issues 8/4/2022 and 8/11/2022



V-2022-01

NOTICE is hereby given that the Ware Zoning Board of Appeals, per the powers given under M.G.L. Chapter 40A, will hold a Public Hearing on **Wednesday, August 24th, 2022 at 7:10 PM** on the application of Yasser Fares for a Variance (V-2022-01). Applicant is requesting dimensional variance relief from a side yard setback in order to construct a car port for a primary residence, under Section 7.3 of the Zoning Bylaw, and pursuant to MGL Chapter 40A. Pursuant to Chapter 22 of the Acts of 2022, this hearing will be conducted in person and via remote means, in accordance with applicable law. This means that members of the Zoning Board of Appeals, as well as members of the public, may access this meeting in person, or via virtual means. In person attendance will be held in the Selectboard Meeting Room, 126 Main Street, Town Hall, Ware, MA. It is possible that any or all members of the public body may attend remotely, with in-person attendance consisting of members of public. The meeting may be accessed remotely via zoom. Go to <https://zoom.us/join> or join by phone. Phone Number: 929-205-6099; Meeting ID: 784 604 1861; Password: 01082.

**SITE LOCATION:** 30 Anderson Road, Ware, MA. Deed recorded in the Hampshire County Registry of Deeds, Book 12855, Page 30. Assessor's Parcel 10-0-123. Zoned: Rural Residential (RR).

A complete copy of the application can be found at the Town Clerk's office and on the Planning & Community Development Department website under Recent Filings. Anyone interested or wishing to be heard on the application should appear at the time and place designated.

**WARE ZONING BOARD OF APPEALS**  
Lewis Iadarola, Chairman



Zoning Board of Appeals

Robert A. Watchilla  
Director of Planning &  
Community Development

Town of Ware  
Planning & Community Development  
Application for Variance

V 20 22 - 01



126 Main Street  
Ware, MA 01082  
413.967.9648 ext. 120  
www.townofware.com

Applicant

Name of Applicant (primary contact): Yasser Fares  
Company: \_\_\_\_\_  
Address: 30 Anderson Rd. Ware, MA 01082  
Phone: 413-768-7221 Cell: \_\_\_\_\_  
Email Address: Yasser\_Fares12@yahoo.com

Owner

Name of Owner (primary contact): Same  
Address: \_\_\_\_\_  
Phone: \_\_\_\_\_ Cell: \_\_\_\_\_  
Email Address: \_\_\_\_\_

Request

Choose applicable Zoning Bylaw section: 7.3 and 5.2  
Will the project require a: Site Plan Review: ☐ Yes\* ☒ No Special Permit: ☐ Yes\* ☒ No \*Explain in narrative

Property

Location of Property: 30 Anderson Rd. Ware, MA 01082  
Assessor's Tax Map/Parcel Number: 10-0-123  
Deed Reference - Hampshire District Registry of Deeds Book/Page Number: 12855/30  
Plan Reference - Hampshire District Registry of Deeds Book/Plan Number: \_\_\_\_\_  
Acreage: 0.2984 Zoning District: Rural Residential (RR)  
Constraints on the property; check all that apply: ☐ Wetlands ☐ Floodplain ☐ Aquifer

Proposal

Brief description of the proposal: Wants to build car port on western side of house which encroaches side yard setbacks. Currently has 30 feet on western side yard.

Sign

Applicant's signature: Yasser Fares  
Owner's signature: Yasser Fares  
Date: 07/25/2022

Town Clerk's stamp:



Official Use Only: Preliminary Review By: RAW Date: 7/25/22  
Fee: \$ 250.00 Date Paid: 7/25/22 Check #: 133  
Date of Public Hearing: August 24, 2022  
Decision of Board: \_\_\_\_\_  
Date of Decision: \_\_\_\_\_ Expiration Date: 9/29/2022









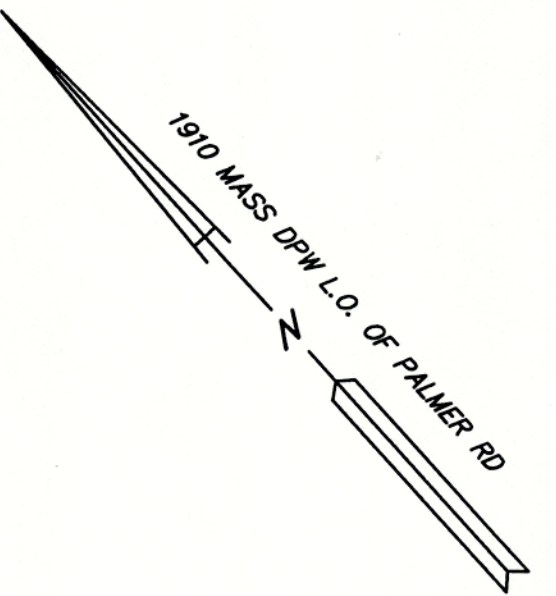


I HEREBY CERTIFY THAT:

- 1) THIS PLAN HAS BEEN PREPARED IN CONFORMITY WITH THE RULES AND REGULATIONS OF THE REGISTERS OF DEEDS OF THE COMMONWEALTH OF MASSACHUSETTS.
- 2) THIS PLAN SHOWS THE PROPERTY LINES THAT ARE THE LINES DIVIDING EXISTING OWNERSHIPS, AND THE LINES OF STREETS AND WAYS ARE THOSE OF PUBLIC OR PRIVATE STREETS OR WAYS ALREADY ESTABLISHED AND THAT NO NEW LINES FOR DIVISION OF EXISTING OWNERSHIP OR FOR NEW WAYS ARE SHOWN.

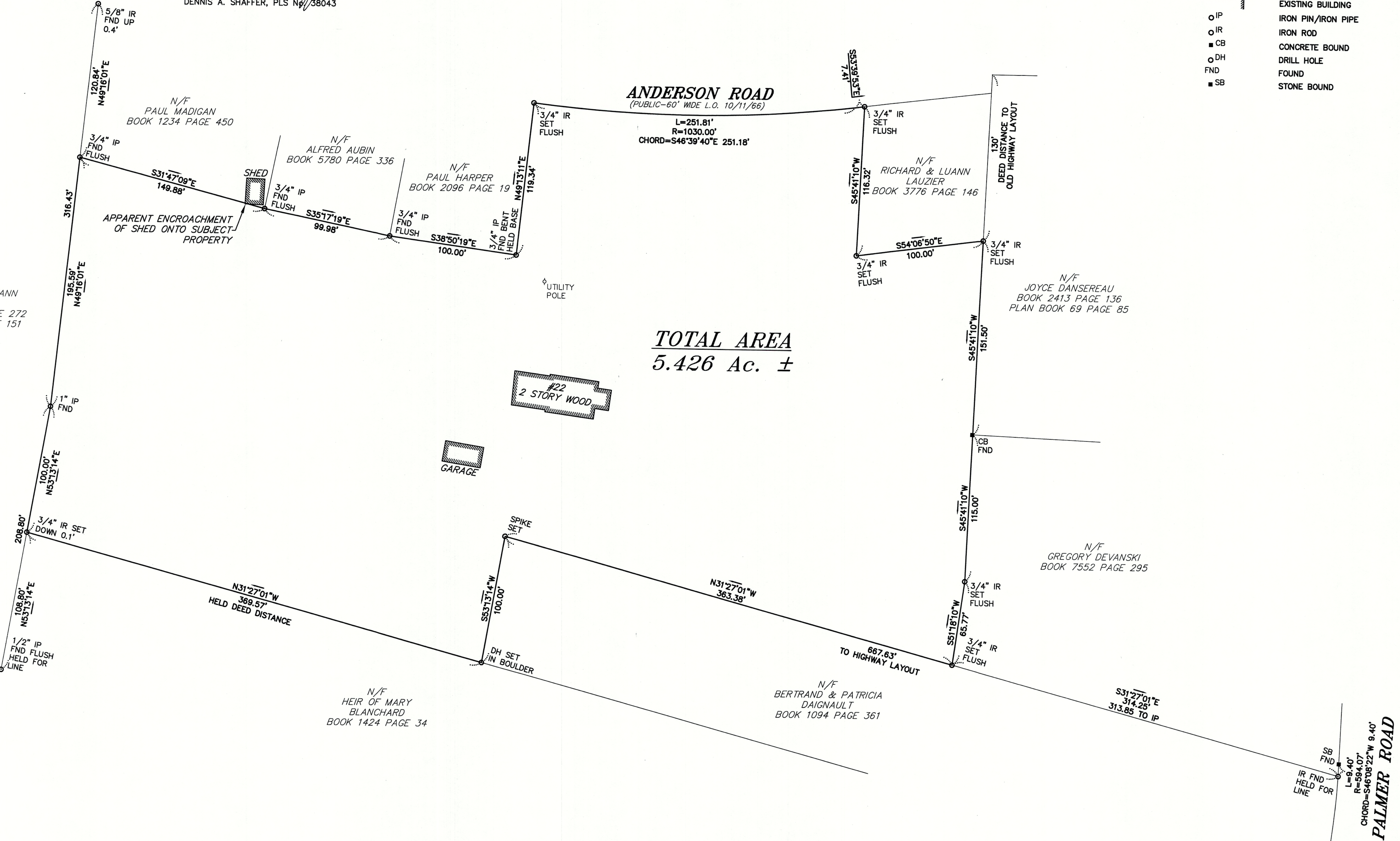
DATE 8/19/08  
Dennis A. Shaffer  
DENNIS A. SHAFFER, PLS No. 38043

- NOTES:
- 1) DISCREPANCIES TO LOCUS PLAN 75 PAGE 84.
  - 2) SEE PLAN 69 PAGE 90 OF 1965 FOR HIGHWAY TAKING OF ANDERSON ROAD.
  - 3) APPARENT ENCROACHMENT OF SHED.



LEGEND

- EXISTING BUILDING
  - IRON PIN/IRON PIPE
  - IRON ROD
  - CONCRETE BOUND
  - DRILL HOLE
  - FOUND
  - STONE BOUND
- IP
  - IR
  - CB
  - DH
  - FND
  - SB



**TOTAL AREA**  
**5.426 Ac. ±**

PREPARED FOR:

**DONALD & JANE DESJARDINS**

22 ANDERSON ROAD  
WARE, MA

RECORD OWNER:

**DONALD & JANE DESJARDINS**

BOOK 1580 PAGE 337

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4	
3	
2	
1	
0	04/13/2008 INITIAL ISSUE
	ISSUE DATE DESCRIPTION
DAS	DAS DAS DAS
FLD	CALC DWN CHK'D

Seal of the Commonwealth of Massachusetts, Surveyor General, Dennis A. Shaffer, No. 38043.

Dennis A. Shaffer  
8/19/08

**PLAN OF LAND**

**22 ANDERSON RD  
WARE, MA  
(HAMPSHIRE COUNTY)**

PREPARED BY:

**SHAFFER LAND MANAGEMENT CONSULTANTS**

Land Surveyor  
168 WARREN ROAD  
BRIMFIELD, MA 01010  
Tel.: (413) 245-9620

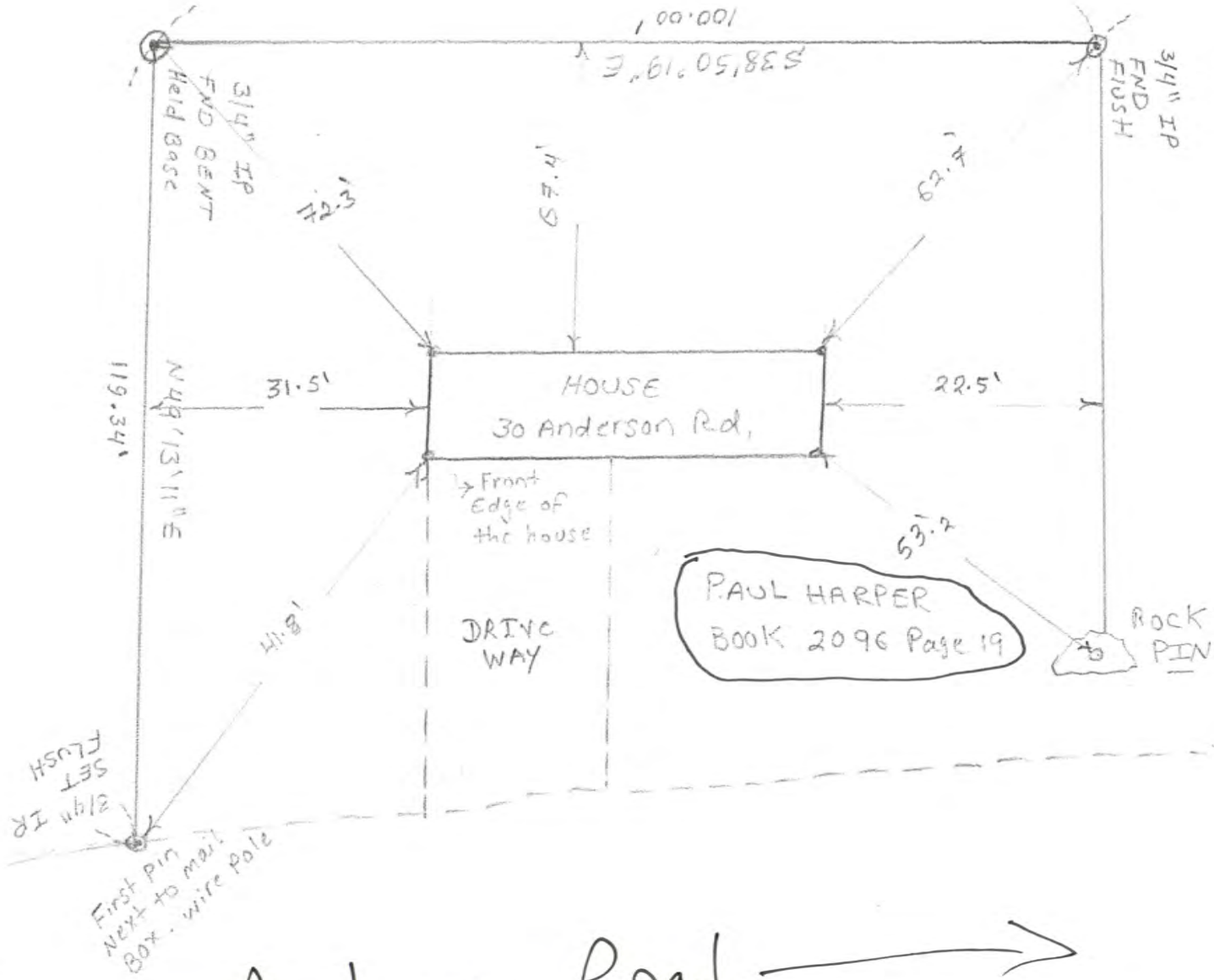
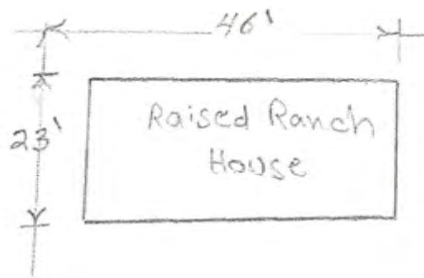
DATE: APRIL 13, 2008

SCALE: 1"=40'

REGISTRY SHEET 1 OF 1

**POL**

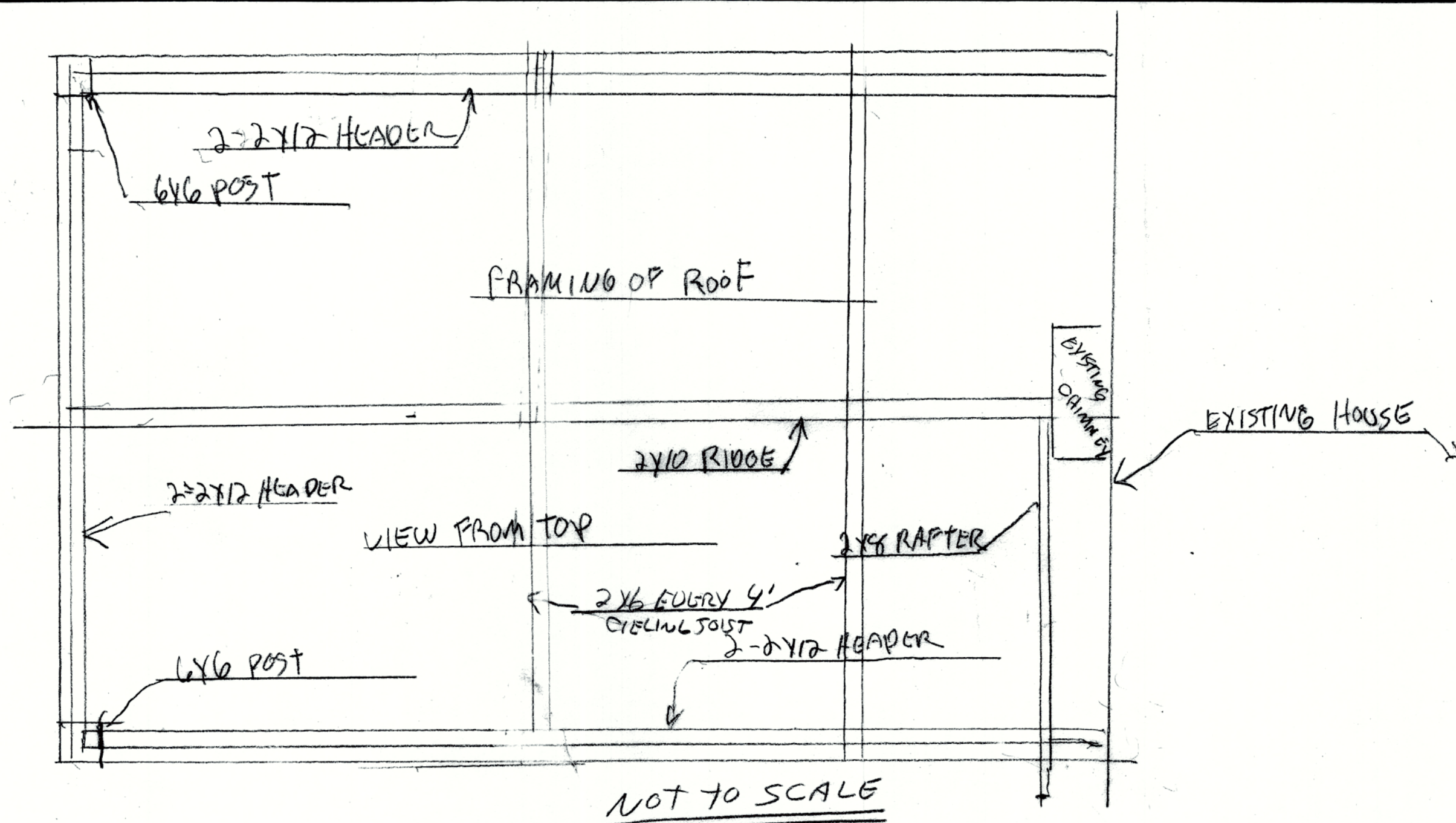




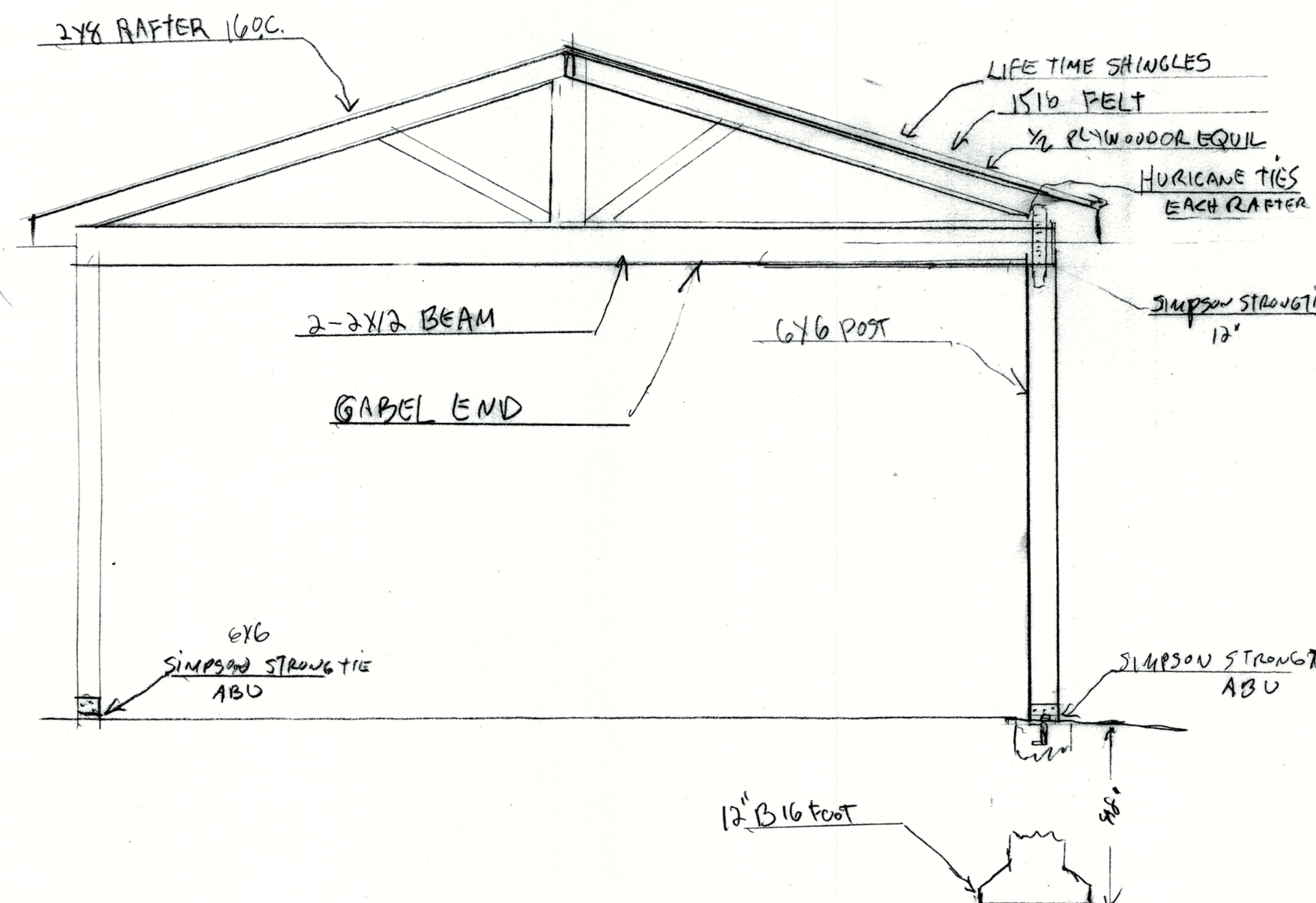
ANDERSON ROAD - 60' WIDE L.O. 10/11/66  
PUBLIC

Anderson Road →

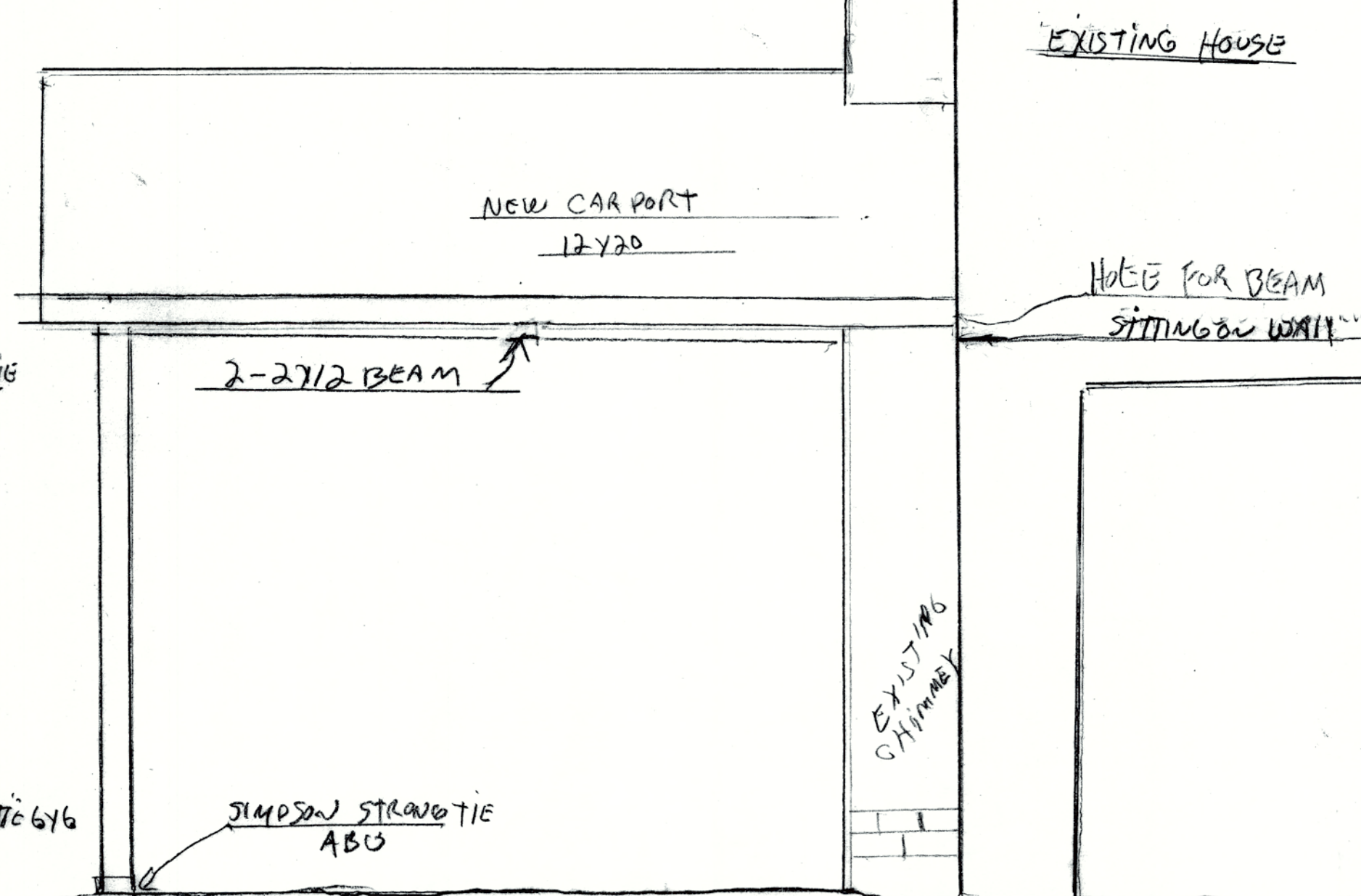




VIEW FROM END



FRONT VIEW



12x20 CAR PORT		
SCALE: 1/2" = 1'	APPROVED BY:	DRAWN BY: DOA/ALG
DATE:		REVISED
FOR YASAR ON HIS HOUSE ON ANDERSON RD WARE		DRAWING NUMBER
30 Anderson Rd, Ware.		10FFI



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**TO:** Robert Watchilla, Town of Ware Director of Planning & Community Development  
Lewis Iadarola, Chair, Town of Ware Zoning Board of Appeals

**FROM:** Jonathan G. Murray, Esq.

**RE:** Zoning Board of Appeals Questions Regarding Pre-Existing Non-Conforming  
Uses and Structures

**DATE:** May 31, 2022

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You have asked a series of questions regarding the application of the Town's Zoning Bylaws to pre-existing non-conforming uses and structures (i.e., "grandfathering").<sup>1</sup> Please be advised that the following information is intended for general educational purposes. The application of the Zoning Act to pre-existing non-conforming uses and structures often involves factual and legal analysis based on the history and specifics of a particular use or structure. With that said, I will answer each question in turn.

## **1. What is Grandfathering?**

A preexisting nonconformity is a use or structure that lawfully existed prior to the enactment of a zoning restriction that otherwise would prohibit the use or structure. See generally G. L. c. 40A, § 6; Shrewsbury Edgemere Assocs. Ltd. Partnership v. Board of Appeals of Shrewsbury, 409 Mass. 317, 319 (1991). Preexisting nonconformities may become protected or "grandfathered" when zoning laws change, as a result of the long-standing recognition that "rights already acquired by existing use or construction of buildings in general ought not to be interfered with." See Opinion of the Justices, 234 Mass. 597, 606 (1920).

Preexisting nonconforming lots and structures throughout the Commonwealth may be protected under the Zoning Act, G. L. c. 40A, § 6. General Laws c. 40A, § 6, provides, in relevant part:

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<sup>1</sup> Please be advised that in 2020, the Massachusetts Appeals Court made the decision to cease using the term "grandfathering" due to its racist origins. See Comstock v. Zoning Bd. of Appeals of Gloucester, 98 Mass. App. Ct. 168, 178 n. 11 (2020) ("We decline to use that term, however, because we acknowledge that it has racist origins. Specifically, the phrase 'grandfather clause' originally referred to provisions adopted by some States after the Civil War in an effort to disenfranchise African-American voters by requiring voters to pass literacy tests or meet other significant qualifications, while exempting from such requirements those who were descendants of men who were eligible to vote prior to 1867."). Therefore, I will utilize the phrase "pre-existing non-conforming protections" in place of "grandfathering" whenever possible.

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Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun . . . but shall apply to any change or substantial extension of such use . . . to any reconstruction, extension or structural change of such structure and . . . to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent, except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood

In summary, if a use or structure lawfully exists before a zoning change becomes applicable, such use or structure:

- Automatically acquires the status of a nonconforming use or structure;
- Need not comply with the requirements of the zoning change; and
- May remain in existence as a lawful nonconforming use or structure.

A nonconforming use or structure is thus exempted from compliance with subsequently enacted zoning laws, and is “grandfathered.” The right to continue a nonconforming use or structure is not personal to the owner or occupant on the date when a zoning change first becomes applicable. Rather, the protections afforded by Section 6 of the Zoning Act relate to the nonconforming use or structure itself. Revere v. Rowe Contracting Co., 362 Mass. 884, 885 (1972).

## **2. What can be grandfathered?**

A use or structure that lawfully began or lawfully existed before the zoning change with which the use or structure does not comply became applicable.

Conversely, a use or structure that violated the zoning laws at the time of its establishment and was not rendered lawful by intervening zoning changes will not receive any of the protections afforded by Section 6, and will continue to be an illegal, noncomplying use or structure. See, e.g., Bruno v. Bd. of Appeals of Wrentham, 62 Mass. App. Ct. 527 (2004); Hall v. Zoning Bd. of Appeals of Edgartown, 28 Mass. App. Ct. 249, 258-59 (1990).

## **3. How does Grandfathering effect the implementation of Wares by laws?**



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If a use or structure lawfully exists before a zoning change becomes applicable, such use or structure need not comply with the requirements of the zoning change, and may remain in existence as a lawful nonconforming use or structure.

Any changes, alterations, or extensions of a pre-existing non-conforming use or structure would, instead, be considered under the relevant provisions of Section 1.9 (“Nonconformities”) of the Zoning Bylaws, and G.L. c. 40A, § 6.

#### **4. Can home rule in each town allow defining grandfathering?**

Section 6 of the Zoning Act does not address whether a municipality may adopt zoning laws defining nonconforming uses and structures differently than the Zoning Act. With that said, case law is clear that zoning laws that define a nonconforming use or structure more narrowly than does Section 6, or afford them less protection than the Zoning Act, would be void.

However, a municipality may treat the owners of nonconforming lots and structures more favorably than under Section 6 of Chapter 40A. See, e.g., Roma, III Ltd. v. Battistelli, No. 000085, 2016 WL 6673441 (Mass. Land Ct. Nov. 14, 2016) (protection for changes and alterations to nonconforming structures that create new nonconformities); Desalvo v. Chatis, Land Court Misc. Case No. 149615 (1991) (protection for nonconforming lots); Bellalta v. Zoning Board of Appeals of Brookline, 481 Mass. 372 (2019).

#### **5. Can non-conforming uses be grandfathered?**

Yes, so long as the use conformed to the zoning laws at the time the use first commenced and left unchanged, despite all subsequent zoning changes.

#### **6. Can preexisting dimensional nonconformities be grandfathered?**

Yes, so long as the use, structure, or lot conformed to the zoning laws at the time the use first commenced, or the structure was first constructed, and is left unchanged, despite all subsequent zoning changes.

#### **7. How are grandfathering appeals handled?**

It is unclear what is meant by “grandfathering appeals.” This could refer to a determination as to whether a use or structure is entitled to pre-existing non-conforming protection. It could refer to whether someone has abandoned a pre-existing non-conforming use

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or structure, and is therefore no longer entitled to protection. It also could refer to a request to change or extend a pre-existing non-conforming use or structure pursuant to G.L. c. 40A, § 6 (“Section 6 Finding”). If there is a particular type of “appeal” the Board is referring to, I am happy to supplement this answer accordingly.

**8. Are ZBA boards currently limited to Size, Shape and Topography issues for appeals?**

No. “Size, shape, and topography” generally refers to the statutory criteria necessary to grant a petition for a variance. See G.L. c. 40A, § 10. However, pursuant to G.L. c. 40A, § 14:

A board of appeals shall have the following powers:--

- (1) To hear and decide appeals in accordance with section eight.
- (2) To hear and decide applications for special permits upon which the board is empowered to act under said ordinance or by-laws.
- (3) To hear and decide petitions for variances as set forth in section ten.
- (4) To hear and decide appeals from decisions of a zoning administrator, if any, in accordance with section thirteen and this section.

In exercising the powers granted by this section, a board of appeals may, in conformity with the provisions of this chapter, make orders or decisions, reverse or affirm in whole or in part, or modify any order or decision, and to that end shall have all the powers of the officer from whom the appeal is taken and may issue or direct the issuance of a permit.

Therefore, the ZBA is not limited to “size, shape and topography” appeals. The ZBA is responsible for hearing the appeals of any “person aggrieved by reason of his inability to obtain a permit or enforcement action from any administrative official” under the Zoning Act. See G.L. c. 40A, § 8. The ZBA is also responsible to hear and decide applications for special permit, to the extent it is the special permit granting authority. G.L. c. 40A, § 9.

**9. In 2017 the house ways and means passed a bill allowing nonconformities to exist if not acted upon by the town's enforcement officer within a 6- or 10-year period. How is that period verified and how is it implemented by the homeowner and the town?**

The “6- or 10-year period” refers to the statute of limitations under G.L. c. 40A, § 7, which states in relevant part:



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If real property has been improved and used in accordance with the terms of the original building permit, no criminal or civil action intended to compel the abandonment, limitation or modification of the use allowed by the permit or the removal, alteration or relocation of a structure erected in reliance upon the permit by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 6 years of the commencement of the alleged violation. No criminal or civil action intended to compel the removal, alteration, or relocation of a structure by reason of an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter or the conditions of a variance or special permit shall be maintained unless the action, suit or proceeding is commenced and notice of the action, suit or proceeding is recorded in the registry of deeds for each county or district in which the land lies or, in the case of registered land, the notice is filed in the registry district in which the land lies within 10 years of the commencement of the alleged violation.

If real property has been improved by the erection or alteration of 1 or more structures and the structures or alterations have been in existence for a period of at least 10 years and no notice of an action, suit or proceeding as to an alleged violation of this chapter or of an ordinance or by-law adopted under this chapter has been recorded in the registry of deeds for the county or district in which the real estate is located or, in the case of registered land, has been filed in the registry district in which the land is located within a period of 10 years from the date the structures were erected, then the structures shall be deemed, for zoning purposes, to be legally non-conforming structures subject to section 6 and any local ordinance or by-law relating to non-conforming structures.

The 6- or 10-year period is determined by reviewing the Town's records (for example, building permits, zoning permits, certificate of occupancy, Title V permits). The existence or use of a structure may also be determined by outside evidence (for example, testimony, deeds, photographs, plans).

This provision need not be "implemented by the Town." Instead, this provision limits the ability of the Town to initiate zoning enforcement action against long-established uses and structures. With that said, expiration of the statute of limitations under G.L. c. 40A, § 7, does not render an unlawful structure legally nonconforming; it merely protects the structure against

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enforcement action. Patenaude v. Zoning Bd. of Appeals of Dracut, 82 Mass. App. Ct. 914 (2012) (rescript); see also DeFronzo v. Zoning Bd. of Appeals of Salisbury, 99 Mass. App. Ct. 1103 (2020) (unpublished decision; text available at 2020 WL 7383134).

#### **10. Can Licensing boards issue licenses in zones where they are not allowed?**

Generally, yes. Licensing and permit granting authorities operate under different regulatory schemes. The grant of a license to an individual, however, does not negate their responsibility to comply with the Town's Zoning Bylaws. For example, the grant of a liquor license to a restaurant does not permit the restaurant to operate in a zoning district that prohibits restaurants.

Notwithstanding any other permit or license granted, it is the responsibility of the Building Inspector, as Zoning Enforcement Officer under Section 7.5.1 of the Zoning Bylaws, to enforce the Town's zoning requirements.

#### **11. What are the laws for allowing a subdivision on a non-conforming lot?**

Subdivisions are governed by the Subdivision Control Law, G.L. c. 41, §§ 81K – 81GG. It is important to distinguish that zoning requirements and the Subdivision Control Law govern different aspects of land use.

Endorsement of a subdivision plan does not establish zoning compliance. In fact, case law is clear that a Planning Board may not withhold approval because the lots on a plan do not conform to zoning requirements. See, e.g., Duhaime v. Planning Bd. of Medway, 12 Mass. App. Ct. 907, 908 (1981) (undersized lot); Smalley v. Planning Bd. of Harwich, 10 Mass. App. Ct. 599, 604 (1980) (emphasizing that the board is prohibited from considering compliance with applicable zoning laws and adequate provision of municipal services); Gattozzi v. Director of Inspection Servs. of Melrose, 6 Mass. App. Ct. 889, 890 (1978); Fairbairn v. Planning Bd. of Barnstable, 5 Mass. App. Ct. 171 (1977).

Therefore, there may be circumstances in which the Planning Board may be required to endorse a subdivision plan containing non-conforming lots. However, such an endorsement does not establish or determine any aspect of zoning compliance.



B. Multi-family residential and non-residential structures.

1. A nonconforming multi-family residential and/or non-residential structure may be extended or altered such that the nonconformity is not increased or intensified upon issuance of a special permit by the Zoning Board of Appeals, provided the Board makes a finding that such extension or alteration is not substantially more detrimental to the neighborhood than the existing nonconforming structure, e.g. an addition that does not encroach setbacks.
2. A nonconforming multi-family residential and/or non-residential structure may be extended or altered such that the nonconformity is increased or intensified upon issuance of a variance by the Zoning Board of Appeals, provided the Board makes a finding that such extension or alteration is not substantially more detrimental to the neighborhood than the existing nonconforming structure, e.g. an addition that encroaches setbacks to any degree, whether more or less than an existing encroachment. Note, the mandatory findings for granting a variance provided in §7.3 must also be made.

C. Destruction of structures. Pre-existing non-conforming structures which are damaged or destroyed by accidental cause, including fire, or otherwise damaged or destroyed without the consent of the owner, may be repaired or reconstructed upon issuance of a building permit, provided that:

1. The nonconforming nature of the repaired or reconstructed structure is not increased in any respect (if proposed to be increased, §1.9.2 A or B applies);
2. The repaired or reconstructed structure shall be used in the same manner as the structure being replaced or otherwise used in compliance with the use limitations of the applicable zoning district; and
3. A building permit for the repair or reconstruction is issued within two years from the date of the damage or destruction. Time incurred in resolving an appeal or other court action or insurance claim shall not be counted as part of the two-year limit.

1.9.3 Nonconforming Uses

A. Extension or Alteration. Nonconforming uses may be extended or altered upon issuance of a special permit by the Zoning Board of Appeals provided the Board determines that such extension or alteration shall not be substantially more detrimental to the neighborhood than the existing nonconforming use. The Board of Appeals shall not allow an existing nonconforming use to be changed to a more intense nonconforming use than exists at the time of application, in terms of density or type of use.

B. Discontinuance, Abandonment, and Reversion to Nonconforming Use

1. Any nonconforming use of a structure or land which has been discontinued for a period of two years or more, or which has been abandoned, shall not be reestablished, and any future use of the structure or land shall comply with the provisions of this Bylaw.
2. If a nonconforming use of a structure or land is changed to a conforming use, it shall not thereafter revert to a nonconforming use.

**4.4.2 Business Accessory Uses** (these apply to Categories B, C, D, and E in §4.2, Use Table)

- A. The rental of automobiles, light trucks or trailers, light construction vehicles, and similar light motor vehicles provided that such rental is secondary to a use permitted under §4.2, Table of Uses.
- B. Truck or trailer cleaning and washing provided that the trucks or trailers are necessary for the conduct of the principal use.
- C. Drive-up facilities in a bank or retail store may be authorized by special permit from the Planning Board.
- D. Storage building, truck trailer used for storage, mobile storage unit, fenced storage area, shed, garage, or other accessory building or use when located in a non-residential or mixed use district is allowed provided all buildings and storage areas comply with the minimum dimensional requirements of Article 5 and the minimum buffering requirements of Article 6, do not adversely impact available parking on the site, and are shown on a site plan approved by the Planning Board.

**4.4.3 Industrial Accessory Uses** (these apply to category F in the Use Table)

- A. Uses necessary in connection with scientific research or scientific development or related production may be authorized by special permit, provided the SPGA makes a finding that the proposed accessory use does not substantially derogate from the public good.
- B. Truck or trailer cleaning and washing provided that the trucks or trailers are necessary for the conduct of the principal use.
- C. Rental of heavy trucks including truck-trailers and industrial equipment provided such rental service is secondary to a permitted heavy vehicular sales establishment.

**4.5 Temporary Uses**

- 4.5.1** *Temporary housing unit on parcel with a damaged home or on a vacant parcel.* A manufactured home (including a mobile home) may be placed on the same parcel as a residence which has been rendered uninhabitable, for the occupancy of the property owner during construction of a new or reconstruction of a damaged home or on a vacant parcel when a new home is to be constructed. The manufactured home shall not be occupied or left on site for a period greater than 12 months, with no option for renewal or extension. The manufactured home may be placed within required setback areas but not closer than five feet from the property line if absolutely necessary to avoid conflict with the construction or reconstruction of the permanent residence. The manufactured home shall be in compliance with all applicable regulations for water supply and sewage disposal. The manufactured home shall be removed from the property within 30 days of

the issuance of the Certificate of Occupancy for the permanent residence, or at the end of the abovementioned 12-month period, whichever comes first.

4.5.2 *Temporary housing unit on another parcel.* A manufactured home (including a mobile home) may, upon the granting of a special permit, be placed on a site other than that on which a damaged residence is located, when that damaged residence is destroyed by fire or natural disaster and the parcel is of insufficient size to reasonably place the temporary housing unit (manufactured home) and complete repairs to or reconstruct the permanent residence. The following criteria shall apply:

A. The application must include a written statement by the property owner where the manufactured home will be located, consenting to the location of the trailer.

B. There shall be sufficient space on the property for parking to serve the needs of the temporary housing unit as well as all other uses on the property, without necessitating on-street parking.

C. The temporary housing unit shall meet setback requirements to the greatest extent possible, and in no case shall the unit be placed closer than 10 feet to the side or rear property lines or 20 feet to the front property line.

D. The temporary housing unit shall be subject to the provisions of the State Sanitary Code.

E. The temporary housing unit shall be removed within one year of the issuance of a building permit for said temporary unit. The SPGA may, upon written application and for good cause, grant an extension of up to three months.

F. No more than one temporary housing unit shall be permitted on a lot.

G. A plan shall be submitted with the special permit application showing the location of the existing buildings, the proposed location of the temporary housing unit, and all access points from streets into the property. A copy of the Assessors map with these features shown, with dimensions written in, shall be acceptable.

4.5.3 *Occupancy of an existing single family dwelling during construction of a new single family dwelling* on the same parcel is allowed by special permit for a period to be determined by the SPGA based on a construction schedule to be submitted with the application for the special permit. The special permit shall specify the timeframe within which the existing single-family dwelling shall be removed.

4.5.4 *Any use associated with a temporary event*, such as a fair, shall not be subject to the restrictions of this Article provided the use has been duly permitted by the appropriate authority.

4.5.5 *Wind Monitoring Towers* are permitted in locations where wind energy facilities are allowed, for a maximum of one year, for the purpose of determining whether winds at a given location are sufficient to operate a wind energy facility. A wind monitoring tower