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SENT VIA EMAIL ([therichmondrooster@gmail.com](mailto:therichmondrooster@gmail.com))  
The Richmond Rooster  
60 Whipple Hill  
Richmond, NH 03470

Re: Response to December 2023 article by Fran Heap, “ZBA Chair Demands Firing of ZCO”

While Fran Heap’s front page article in the December 2023 Richmond Rooster is titled, “ZBA Chair Demands Firing of ZCO,” neither Fran Heap nor the Rooster ever report why Thomas Tague, PhD, the Chairman of the Richmond Zoning Board of Adjustment, recommended that Dick Drew, the Richmond zoning compliance officer, be fired. As explained in more detail below, this is why:

(1) First, as zoning compliance officer, Dick Drew illegally refused to allow a property owner to replace a failed septic system exactly where it was lawfully placed prior to the adoption or amendment of the zoning ordinance that made it nonconforming. This violated the New Hampshire Constitution, part I, articles 2 and 12; RSA section 674:19; and Richmond Zoning Ordinance, article 10, “Nonconforming Uses,” section 1003.

(2) Second, Dick Drew required the property owner to move the replacement septic system from its lawful nonconforming location to different unlawful nonconforming location and demanded that he seek two variances from the Zoning Board of Adjustment to do so. This not only required the property owner to incur the expense of a new septic design and put the replacement of the septic in jeopardy which would render the house uninhabitable if not approved, but also according to the property owner, delayed construction for at least three months.

(3) Third, at the November 14, 2023 selectmen meeting, Dick Drew was advised by the selectmen that the Zoning Board of Adjustment alone, subject to judicial review, has the authority to interpret the Richmond Zoning Ordinances, including the meaning of nonconforming uses under section 1003. In response, Dick Drew indicated that as the zoning compliance officer he would still not authorize lawful nonconforming uses in the Wetland Conservation District.

(4) Fourth, at the November 14, 2023 selectmen meeting, Dick Drew bragged that sometime after the hearing before the Zoning Board of Adjustment on the septic system variances, he had inspected the inside of the property owner’s house without his knowledge or consent and without any direction by the selectmen to do so.

In nutshell, as he explained at the November 14, 2023 selectmen meeting, Dr. Tague recommended that the zoning compliance officer be fired because his repeated failure to follow the law was exposing the Town of Richmond to serious liability. Since the meeting on November 14, 2023, Dick Drew has announced that he will not seek reappointment of his position as zoning compliance officer when his term expires on March 31, 2024. While that is a step in the right direction, he also holds a position on the Conservation Commission. That, too, should end.

The Rooster article is replete with false statements and errors. Reputable journalists fact check and reach out for comments before maligning people. That was not done by Fran Heap or the Rooster prior to the publication of that salacious article. Only the most egregious errors will be addressed.

First things first.

A. Property owners have a fundamental constitutional right in vested nonconforming uses.

The people of Richmond have a fundamental and inalienable property right that must be protected. According to the New Hampshire Supreme Court, “[t]he fundamental and inalienable property right that vests in a property owner has as its foundation this State’s Constitution. Part I, article 2 of the New Hampshire Constitution guarantees all persons the right to acquire, possess, and protect property. This guarantee has been deemed so specific as to necessarily limit all subsequent grants of power to deal adversely with it. Similarly, every person has the right to have his enjoyment of property protected. N.H. Const. part I, art. 12. These two constitutional provisions are limitations upon the so-called police power of the State and subdivisions thereof, and nullify arbitrary legislation passed under the guise of that power.” *McKenzie v. Town of Eaton Zoning Board of Adjustment*, 154 N.H. 773 (2007).

“The right to maintain nonconforming uses is meant to protect property owners from a retrospective application of zoning ordinances . . .” that would otherwise effectuate a taking by depriving property owners of the continuing use of their land. *Town of Salem v. Wickson*, 146 N.H. 328, 330-31 (2001).

Fran Heap argues that the word “use” as used in the non-conforming use ordinance only “refers to the use of the property (commercial, residential, etc.), not the installation of a septic system.” She’s wrong.

Two examples follow. In *Grondin v. Town of Hinsdale*, 122 N.H. 882, 885-86 (1982), the New Hampshire Supreme Court reviewed two Hinsdale zoning ordinances that regulated the operation of mobile homes. The first provision provided that all preexisting mobile homes would be grandfathered and could continue to operate in substantially the same manner as they did on the date of adoption of the ordinance. The second provision required mobile home owners to obtain a special permit for their mobile homes and imposed a limit of 350 on the number of permits that would be issued. The plaintiffs owned property with 156 sites for mobile homes, all of which had been constructed prior to the enactment of the ordinance provisions at issue. The plaintiffs argued that the 350-permit ceiling, which had been reached before the plaintiffs could obtain permits for all of their mobile home sites, failed to take into account the plaintiffs’ vested property right in the 156-mobile home park sites which had become valid, nonconforming uses under the first provision of the ordinance. The Supreme Court agreed and found that Hinsdale violated the property owner’s constitutionally protected right to use the 156 mobile sites.

In *Dugas v. Town of Conway*, 125 N.H. 175 (1984), the face of a sign was removed from the pole to which it had been affixed, but the pole was left standing for over a year. During that year, the Town enacted an ordinance limiting the number of free-standing signs that could be placed in front of a business. The plaintiff sought a permit to reinstall the face of his sign on the pole, arguing that the Town’s limitation on the number of free-standing signs that could stand in front of a business was inapplicable because his sign was a vested nonconforming use. The Town denied the plaintiff’s application for the permit, relying on another ordinance which provided, in part, “Any non-conforming sign the use of which has been discontinued for a period of one year or that has been damaged 100% shall not be reestablished, restored, or repaired unless it is made to comply with this ordinance.”

On appeal, the superior court in *Dugas* held that the ordinance resulted in an unconstitutional taking. The superior court, however, denied the plaintiff's request for attorney's fees because it did not find that the Town's enforcement and subsequent defense of the ordinance were frivolous or in bad faith. The plaintiff appealed. The New Hampshire Supreme Court held that a town's power to regulate the use of buildings and land through the enactment of zoning ordinances is circumscribed by Part I, Articles 2 and 12 of the State Constitution, and the Town's refusal to issue a permit for the sign was an interference "with the fundamental property rights of a plaintiff." Therefore, the New Hampshire Supreme Court determined the plaintiff was entitled to attorney's fees.

New Hampshire statutes restrict the applicability of zoning ordinances to protect vested fundamental property rights from being infringed. RSA section 674, et seq. concern local land use and regulatory powers. All zoning ordinances are created using the power delegated by the state in RSA 674:16. Every single zoning ordinance created using these powers is restricted by RSA section 674:19 which provides:

A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration. (Emphasis added.)

The property owner in question had a fundamental right to replace a nonconforming septic system exactly where it had been lawfully placed. The road and Wetland Conservation District setback restrictions were enacted long after that septic system was placed. The zoning compliance officer violated this fundamental property right when he refused to authorize its replacement exactly where it had been, and required the property owner to move it to an unlawful location and seek variances from the Zoning Board of Adjustment to do so. Further, he was indeed being paid by the Town of Richmond as a zoning compliance officer when he did so.

A variance is a request to deviate from current zoning requirements. If granted, it permits the owner to use the land in a manner not otherwise permitted by the zoning ordinance. It is not a change in the zoning law. Instead, it is a specific waiver of requirements of the zoning ordinance. There is no right to a variance. Thus, the property owner did not have a right to put the replaced septic system in an illegal location. For that, he needed government approval, which may or may not be granted.

#### B. Involvement by the Conservation Commission in the Variance Requests

Fran Heap obviously took great umbrage at the fact that the Zoning Board of Adjustment did not consult with the Conservation Commission prior to unanimously granting the property owner the right to either replace the septic system exactly where it had been as a nonconforming use or alternatively granting the two variances authorizing the new location. She emphatically noted that "Both variances were approved without conditions." And she states further, "the purpose of involving the Conservation Commission was because the granting of this type of variance would damage the wetlands, a violation of the Zoning Ordinance." (Emphasis added.) Again, she's wrong.

First, the Zoning Board of Adjustment was not required to consult with the Conservation Commission. Both are independent bodies. At issue were variances, not special exceptions. Richmond Zoning Ordinance, article 6, section 604, "Special Exceptions," never applied. Next, the State of New Hampshire already required the septic installer to use procedures to protect the wetlands, including

sedimentation and erosion control measures, as needed, as express conditions of the septic permit. The chairman of the Conservation Commission also advised the board during the variance hearing that neither the current lawful nonconforming location or the unlawful nonconforming location proposed by Dick Drew for the septic system would pose any risk to the wetlands. His only concern was whether sedimentation and erosion control measures would be used during construction. There was no evidence that the septic installer would not comply with the conditions already imposed by the state for sedimentation and erosion control and the board saw no reason to impose the same conditions twice.

As an aside, in 1998, the New Hampshire Board of Natural Scientists was established to certify and regulate the professions of soil scientists and wetland scientists. This certification is to guard the citizens of New Hampshire and the professions from unqualified practitioners of soil science and wetland science, and to foster intelligent application of the knowledge of soil properties and wetland characteristics in planning and implementing land use decisions consistent with New Hampshire Department of Environmental Services rules or standards adopted by the Board. Although he currently serves on the Conservation Commission, Dick Drew is not a certified soil scientist or a certified wetland scientist. For that matter, neither is Fran Heap.

### C. Other Acts of Misconduct

Fran Heap suggested that only Dr. Tague had an interest in bringing the zoning compliance officer's perceived misconduct to the attention of the selection. That is simply not true. A discussion was held during the last Zoning Board of Adjustment meeting on how to best address the perceived misconduct. Was it better to submit a letter, talk with him, or address the matter directly with the selectmen? Dr. Tague was intent on bringing this matter before the selectmen as they alone have the power to remove him and he invited all members to participate. The November 14, 2023 selectmen meeting was not – as falsely portrayed by Fran Heap – some kind of a “debate.” Dr. Tague and I both attended for the sole purpose of bringing our concerns about the zoning compliance officer to the selectmen. At the start of the meeting, Dr. Tague asked that the meeting be nonpublic since it involved the possible disciplining of a town employee. Under RSA 91-A:3(II)(a), a nonpublic meeting is authorized for: “The dismissal, promotion, or compensation of any public employee or the disciplining of such employee, or the investigation of any charges against him or her, unless the employee affected (1) has a right to a meeting and (2) requests that the meeting be open, in which case the request shall be granted.”

It is true that when his argument that the nonconforming use should not have been granted fell flat at that meeting, Dick Drew resorted to ad hominem attacks. Dr. Tague humorously noted that he had his PhD in chemistry and has published over 100 peer-reviewed papers in quantum physics, and asked, “Are you actually suggesting that I cannot understand zoning?” Dr. Tague also pointed out that I was a retired attorney who had practiced law for almost 40 years, and could in fact teach classes in zoning law. The only finger pointing was by Dick Drew, who was specifically directed to stop doing so.

If your 60 year old lawfully placed septic system is grandfathered, yet to replace it you need to either comply with all the latest zoning ordinances or seek a variance, what's next?

Please bring any concerns you may have about the zoning compliance officer to the Selectmen.

Sincerely,

Antoinette Cincotta

CC: Richmond Selectmen; Richmond Grumbling