

Members Present: Vice Chairman-Marcella Perry; Charles Westen; Lyndon Avery and Alternate; Timothy Kinnon.

Member absent: Chairman-Richard Quindley and Keith Chamberlain

Others Present: Town Attorneys, James Sessler and Sean Tanguay; Town Planner, Kathy Menici; Building Inspector/Code Officer, Brian Boyers; Secretary, Stephanie N, Verdile and others as identified below.

Call to order: Vice-Chairman- M. Perry called the meeting to order at 7:00 p.m. She introduced the members of the Board, Kathy Menici, Town Planner, Town Attorney James Sessler and Building Inspector/Code Officer Brian Boyers

M. Perry informed the applicant that the Board will take testimony from the applicant on the rehearing and those comments will be for this rehearing meeting only. She said that after the comments are presented that K. Menici and B. Boyers will have the opportunity to respond. She told the applicant that the Board would take all the comments under advisement.

Appointment of Alternates: Vice-Chairman M. Perry appointed Alternate, T. Kinnon to the vacant position in the absence of regular member K. Chamberlain.

Approval of Agenda:

Motion made by T. Kinnon, seconded by M. Perry to approve the agenda, motion carried with all in favor.

K. Menici read the cases into the record as follows:

NEW APPLICATIONS FOR PUBLIC HEARINGS:

Case#ZO5-14

Map 53, Lot 3

**Motion for a Rehearing
62 Temple Drive**

Robert Gayner Trustee

Application submitted by Walker & Varney P.C. on behalf of property owner Robert Gayner Trustee for a Rehearing on Case#ZO4-23 regarding the April 7, 2005 ZBA decision upholding the Cease & Desist Order issued by the Town of Alton Building and Code Officer on September 28, 2004. The property is located at 62 Temple Drive in the: Lakeshore Residential Zone, the Town of Alton Shoreland Protection Overlay District and the State of New Hampshire's Shoreland Protection District. The application was continued from the May 25, 2005 meeting due to the applicant's request.

Attorney Robert Varney, representing Robert Gayner, the applicant gave his presentation to the Board.

R. Varney explained he will address each application in the original order beginning with Case#ZO4-23, Administration Appeal, noted as the re-hearing as Case# ZO5-14.

R. Varney spoke about Section 228 (a) (b) of the Zoning Ordinance and read the requirements into the record. He said at the initial hearing because of the nature of the questioning he never got to make these points. He said it appeared that the then sitting Chairman was more interested

in the Equitable Waiver and the permitting process and the procedures. He said a that time, the applicant would have made the argument, which he will make now, is that the application of Section 228 to the structure is both illogical and does not serve any legitimate public or private purpose. He said the previous section in the ordinance refers to the height from the mean grade of the surrounding land and at that point it was 15' above the mean grade. The amendment to the ordinance in 1992 that clearly applies to structures which extrude structures over the water of the state. He said it is their position that this section, as it is written, does not apply to structures that are dug into the lakeshore or into the shoreline away from the lakeshore as this boathouse is. He said the structure is not visible to abutters and does not affect in any noticeable way, any of the considerations which underlie Section 228. He said obviously the purpose of Section 228 is to preserve and protect the views of abutting landowners and to lessen the impact of structure over the water of the state and the Town of Alton. He concluded his presentation on the re-hearing motion for the Administrative Appeal.

M. Perry asked if the Town Planner or Code Enforcement Officer had comments.

B. Boyers said it is the high water mark not the shoreline where they base the measurements. He said 35' is also a safety issue for fire prevention.

T. Kinnon asked when dredging occurs, has it been the common practice that is the new shoreline.

K. Menici said yes that is correct, that is the state's definition.

R. Varney said he has never heard of such a state definition and he has never heard of it being cited as a regulation or statute or ordinance.

K. Menici she said she spoke to Gary Springs, at NHDES Shoreland Division and he referred her to the RSA 483-B: 4XVII, page 246 of the NH RSA's. She referred to the definition that the state uses for Lake Winnepesaukee is as follows: paragraph b: "Artificially impounded fresh water bodies with established flowage rights, the limit of the flowage rights, and for water bodies without established flowage rights, the waterline at full pond as determined by the elevation of the spillway crest". She said G. Springs said when you alter the shoreline; the reference line becomes the new shoreline.

R. Varney wants to know if it is a statute or an ordinance or someone telling K. Menici that.

K. Menici gave R. Varney the RSA.

R. Varney asked what does the cited RSA section have to do with a dug in boathouse slip.

K. Menici could not answer the question but said she received a lengthy response from G. Springs and he is responsible for the administration of the NH Shoreland Protection Act.

R. Varney said in other words no one can site a statute or an ordinance. He requested that if the Board is going to consider this information that it is material to their decision and that it is stated in their findings so he can protect their right.

J. Sessler said he understands the position of both parties.

K. Menici read the case into the record.

Case#ZO5-15

Map 53, Lot 3

Motion for a Rehearing

Robert Gayner Trustee

62 Temple Drive

Application submitted by Walker & Varney P.C. on behalf of property owner Robert Gayner Trustee for a Rehearing on Case#ZO5-05 regarding the April 7, 2005 ZBA decision denying the property owners request for an Equitable Waiver from Dimensional Requirements in order to maintain the height of a boathouse in excess of 15' as required by the Alton Zoning Ordinance

Article 200, Section 228A, height restrictions for boathouses. The property is located at 62 Temple Drive in the: Lakeshore Residential Zone, the Town of Alton Shoreland Protection Overlay District and the State of New Hampshire's Shoreland Protection District. The application was continued from the May 25, 2005 meeting due to the applicant's request.

R. Varney said this is the Variance application and spoke about the Area Variance application under the Boccia requirements. He said the Board has to answer the variance criteria in five parts and the Board made a favorable finding on three of the five parts. He spoke about the criteria of the five-part test that the Board voted favorably on as follows:

- 1) "Not Contrary to the Public Interest"
- 2) "Value of the Surroundings would not be diminished"
- 3) "Variance would be consistent with the spirit and intent of the ordinance"

Then he spoke about the criteria that the Board did not vote favorably for the applicant as follows:

- 4) "Substantial Justice would be done"
- 5) "A Hardship exists as a result of the literal application of the language of the zoning ordinance."

R. Varney said he would only speak to those two criteria that the Board did not vote in favor of his applicant.

Substantial Justice Criteria- He said that he listened to the Board's deliberations and read the written decision and he believes the Board misapprehends what is meant by substantial justice within the context of the variance criteria. He said he thinks the Board, at the time, reached some conclusions as to what Mr. Gayner did or didn't do in connection with the application. He said what Mr. Gayner did or did not do is material for the next application (Equitable Waiver). He said with respect to the variance application, the project rises and falls based on what it is. He said that Mr. Sessler will tell you that the behavior and character of the applicant has nothing to do with the variance application. He told the Board they have to look the project without regard as to what you think of the applicant. He said that he has never seen a Board find that something is; within the Spirit and Intent of the ordinance, not contrary to the Public Interest, and the value of surrounding properties would not be diminished and not find that substantial justice would be done. He questioned the Board's decision that was based on finding in favor of the first three and the other two. He said the Substantial Justice Criteria is just that, the various criteria have been met and it is not hurting anyone, it's not hurting the public, it's diminishing anyone's property values therefore; justice would require that the variance be granted.

He is asking the ZBA to reconsider with the assistance of Town Counsel to guide the Board on the application of the variance criteria and he is confident that the Board will agree with his motion for a re-hearing.

He spoke about the Hardship criteria that the Board did not find in favor of the applicant. He spoke about the Simplex and Boccia cases and the criteria of each variance application. He said he knows that the Board is up to date with the regulations from the court decisions regarding the criteria for the Simplex and Boccia cases.

He spoke about the Boccia analysis as follows: "The special conditions that exist that literal enforcement of the ordinance results in a unnecessary hardship". He said it is an area variance not a use variance and the first thing the Supreme Court said was that the variance is needed to

enable the applicant's proposed use of the property given the special conditions of the property. He said the applicant's proposed use is to integrate a replica train station with his boathouse and make it part of his structure. That is the use he wants and it complies with the zoning ordinance as far as boathouses being an allowed use in the zone. He said if the Board rules against the applicant as far as Section 228 it certainly would require an area variance because it certainly is 15' higher than the full lake level. He said it is manifest that the applicant needs the variance if they are to accomplish the proposed use.

R. Varney then spoke about the second Boccia criteria as; "The benefit sought by the applicant cannot be achieved by some other method." He said the Boathouse is where it is and can only be located in one place because the boat slip it embraces intersects the railroad tracks at only one Place. There is no other location for which Mr. Gayner can integrate the replica station with his boathouse except at the boathouse.

R. Varney said the 2 hardship criteria for the area variance request are met simply be looking at the plans and the pictures the Board has in the file as part of the record of the boathouse.

M. Perry called for any comments.

B. Boyers spoke about R. Varney saying the intent of the applicant's boathouse to replicates a railroad station and there is nothing in the zoning ordinance that addresses railroad stations so he believes it is not allowed in the zoning.

R. Varney responded by saying that it is not a true railroad station it is a structure designed to look like a railroad station. It is not used as a railroad station, the boathouse is designed to look decorative and he compared it to a new cupola design.

K. Menici spoke about one of the hardship requirements is "...no other feasible way to achieve the purpose.." and she said the purpose stated on the building permit application was to create a 2-slip boathouse. She said the packet of information the applicant submitted in support of the case with the NHDES shows a number of different design alternatives, with one at least being appearing to be in compliance with the town's zoning requirements for the 15' height regulations. She also said that R. Varney said the applicant is trying to replicate a train station. She said there was never a train station in that part of town and there are no tracks located in that area but have not been in existence for many years and there is only a path existing that could have been the track at one time.

R. Varney said again, it is not a true train station it has been designed to create and appearance and as the Board knows, the application has been approved by a state agency in charge of encouraging the preservation and beautification of historic structures. He said the property is an old Inn and it was served by the train, but there was station on the property but not in this location. He said they are not trying to put a train station on the property; they are trying to integrate what looks like a train station with the boathouse. He said that is the use and that is what they are asking for the variance.

R. Gayner said it was Mount Major Station and it is shown in an Alton Bay historical railroad book.

K. Menici spoke about the NH Division of Historic Resources being the agency that R. Varney was speaking about. She said they do not have permitting or approval authority they have advisory authority and that is the extent of their authority. They only advise on the historic significance of structures. She said there is a federal review process for projects that receive federal funding that would include an inspection and review by the NH Division of Historic Resources to determine if there are historic structures or other historic features on site that would

need to be protected during development.

R. Varney said he agrees with K. Menici that the NH Div. Of Historic Resources is advisory and they did recommend the structure to the NHDES and it is why they sent the letter to the NHDES and the Town of Alton's Board of Selectman, the Alton Conservation Commission and to the applicant stating their approval of the proposed design and never the less he had to square it with the local agency. He said it was up to B. Boyers at first now it is up to the Board to decide.

T. Kinnon asked what the purpose was to make the boathouse 38' high and R. Varney said aesthetics and the structure is not 38' from the ground, it is 38' from the water level. He said the structure is 20' in height (1 ½ stories)

R. Varney finished his presentation to the Board.

K. Menici read the case into the record.

Case #Z05-16

Map 53, Lot 3

Motion for a Rehearing

Robert Gayner Trustee

62 Temple Drive

Application submitted by Walker & Varney P.C. on behalf of the property owner Robert Gayner Trustee for a rehearing on Case#ZO5-06 regarding the April 7, 2005 ZBA decision denying the property owner's request for a Variance from Dimensional Requirements in order allow the height of a boathouse in excess of 15' as required by the Alton Zoning Ordinance Article 200, Section 228A height restrictions for boathouses. The property is located at 62 Temple Drive in the: Lakeshore Residential Zone, the Town of Alton Shoreland Protection Overlay District and State of New Hampshire's Shoreland Protection District. The application was continued from the May 25, 2005 meeting due to the applicant's request

R. Varney refereed to the Board findings of the NOD from the Equitable Waiver. He spoke about findings 2, 3, & 4 made by the Board in their decision.

He read finding #2) "The violation was an outcome of failure to inquire"

He spoke about that and referred to the deposition from B. Boyers submitted as part of the application. R. Varney said that B. Boyers admitted candidly that he was contacted by R. Gayner. He said there is a copy of the letter dated April 1, and the Board has a copy of the correspondence from the Office of Historic Preservation. He said Ms. Menici provided to the Board copies of the NHDES file of various drawings that were submitted at various times by R. Gayner to the NHDES in attempt to get the approval from them that he received on April 1.

R. Varney said that B. Boyers conceded a number of things during his deposition. He conceded that no one told B. Boyers that the Town of Alton received the letters and R. Varney said in reviewing the files B. Boyers was right that he did not have information in the files relating to changes in the application that the NHDES had and the first copy in the file was provided by the NHDES to the Town of Alton on September 2. He said the letter that had to do with an ongoing permit to which a modification was being sought was not given to B. Boyers. R. Varney said the second thing that B. Boyers conceded to was that after April 1 he received a phone call from R. Gayner and during that conversation R. Gayner asked B. Boyers a number of questions about the boathouse. R. Varney said it was clear throughout the conversation that they were talking about the boathouse and the only permit issued in R. Gayner's name at the time. R. Varney asked B. Boyers what he told R. Gayner and B. Boyers said he didn't remember.

R. Varney quoted the deposition of B. Boyers from page 16 and read it into the record and page 15. R. Varney claimed that from the deposition it was clear that B. Boyers knew that R. Gayner was asking about the boathouse.

R. Varney said the Board found that this was a failure to inquire. He said he does not know how much more of an inquiry that anyone can do with the un-contradicted testimony of R. Gayner and the representation of his employee and they had tried on numerous occasions to contact B. Boyers and that B. Boyers did not respond. R. Varney said R. Gayner and one of his employees confirmed the phone conversation as to what B. Boyers said.

R. Varney wants the Board to explain how they could find the failure to inquire on one hand and on the other hand that the finding was the outcome of obfuscation. He said he does not understand the Board's decision.

Then R. Varney spoke about the fourth finding "The violation was an outcome of misrepresentation". R. Varney wants to know what the misrepresentation was and he wants the Board to explain to R. Gayner what the misrepresentation was to B. Boyers. He said B. Boyers does not claim there was misrepresentation.

R. Varney said the Board went on to consider a second hand version of what K. Menici thinks happened with the NHDES and he assumes it is based on conversations that she has had with people at NHDES. R. Varney said he has had conversations with people at the NH Attorney General's Office who represented the NHDES in this matter. R. Varney said with their agreement, they have placed an appeal on the NHDES Cease & Desist Order outstanding as well as the Town of Alton's and they are waiting for the final outcome of this Board's decision on this matter. He said that the only objective parameter, which arguably has been violated, is one established by the Town of Alton's zoning ordinance because there is no state parameter, which is objected to. He said the NHDES permit which referenced a height limitation of 519.0' and he said the state is clearly waiving that height limitation in the letter dated April 1 but reminding R. Gayner that he has to clear that with the Town of Alton. He asked the Board for what other purpose could R. Gayner have had in making that phone call to B. Boyers. He said he does not know how the Board could have made the three findings, which basically were three different ways in which R. Gayner misrepresented something. He discussed a boathouse with B. Boyers, he repeatedly requested B. Boyers to make a site inspection and he said B. Boyers was too busy due to the inspection and it was also stated in the deposition. He said B. Boyers does not have a clear recollection of the conversation as R. Gayner and his employee do.

R. Varney said that he submits as weight of the evidence is that an inquiry was made, that no obfuscation can be attributed to R. Gayner and nor can any misrepresentation to B. Boyers can be attributed to R. Gayner

R. Varney said there undisputed fact that the building was framed in its present dimensions on August 6, 2004 and B. Boyers was on site on that same day and why if B. Boyers if he was on site and thought it was not in compliance why didn't he tell R. Gayner at that time. R. Varney said there never was an answer from B. Boyers. He said he thought that B. Boyers should have told R. Gayner. He said there was no documentation that the Town of Alton made any correspondence with R. Gayner until September 28 2004. He said during this time R. Gayner was in contact with officials with NHDES and there are faxes in the file that are dated September 2. R. Varney said that they got in the file as a result of discussions with B. Boyers and others that work with him and the NHDES and there was no effort to contact R. Gayner. He asked the Board if they were in the middle of a project and wouldn't they expect that an official from the Town, with the knowledge that B. Boyers had, would contact the applicant and it was not done. He said he does not understand the facts that the Board has, can be interpreted fairly to reach the conclusion they did.

K. Menici responded by asking R. Varney about the April 1, 2004 letter from NHDES regarding

the approval of the boathouse design and that the NHDES waived all height restrictions and she asked him if that was true and R. Varney said yes. K. Menici said there is nothing in that letter that discusses any state height restriction and to her knowledge, that there isn't a state height restriction and height restriction is for the local jurisdiction.

R. Varney said she made his point exactly and that is the only height restriction is the Town of Alton restriction, which is the one that state agency tells R. Gayner to contact the appropriate Town of Alton official to make sure you comply with the height and that is why R. Gayner contacted B. Boyers. K. Menici said that it is the Town's option to enact a standard that is stricter than the state's standard and that is why the height restriction is there.

K. Menici said that R. Gayner had a number of designs that were submitted at different times to Division of Historic Resources. R. Varney said they were sent to both. She said she is going by the dates on the fax copies and they were sent on May of 2003.

R. Gayner said those were faxes from the design company to him.

K. Menici said the fact remains that the owner of the property had the designs completed and sent to him on May 14, 2003 and the building permit application to the Town was submitted October 15, 2003 and the plans that were submitted were for a design that is completely different than the May 14, 2003 fax. She said at that point when the property owner submitted the building permit application to the Town of Alton, he already knew he was going to be having discussions with NHDES regarding a different design than the design he submitted with his building permit application. She said in the winter months of 2003 the concrete walls were poured in the winter and they were the type necessary to support a structure that was different than what was submitted in the Town of Alton's building permit application. She said there was no approval of the new boathouse design by NHDES until April 2004 and the concrete had already been poured months previously.

B. Boyers said as far as the phone conversation he has no recollection of speaking to Mr. Russell and does not know how Mr. Russell (R. Gayner's employee) would know what B. Boyers said and B. Boyers said he never spoke to Mr. Russell. B. Boyers said R. Gayner never called for a foundation inspection that is a requirement of the permit. B. Boyers said there was never any plans submitted to the Town of Alton for any changes to the design and never discussed any new designs with anyone at Town Hall.

M. Perry asked if there were any other inspections required through the building stages and B. Boyers said after foundation inspection a rough framing inspection would be required and he was never called for any inspection for the foundation or framing and electrical and that he was never called for either.

R. Varney responded to K. Menici's comments. He said that the building permit application that was submitted to the Town was to be consistent with the Town's regulations for what Lakeshore Construction deemed to be consistent with the Town's regulations at 15' above high water mark and that is the structure and that is what is designed and that is what appears on the building permit application. He said that while that was going on R. Gayner was trying to get leave from the NHDES to modify the administrative permit that they had granted to construct the boathouse so he could build the proposed design.

M. Perry said so R. Gayner was actively involved in trying to get a different design.

R. Varney said yes he was trying to get a different design and he did not know that the NHDES would agree until April 1.

M. Perry before he even submitted a permit to the Town he had been in contact with the designer to look at different designs. R. Varney said yes, he had to have a design in order to get approval from the NHDES and he didn't know he was going to get approval from the NHDES and he

eventually got the approval from the NHDES. He said he contacted B. Boyers as he was told to do by the NHDES. R. Varney said in the letter dated April 1 the NHDES is telling R. Gayner that the NHDES does not care about the height but the Town of Alton does care about the height and he has to talk to the Town of Alton.

C. Westen asked if the building permit application was submitted in writing to the Town of Alton. R. Varney said yes. C. Westen asked if there was a written request to the Town of Alton to change that permit.

R. Varney said no there was no written request made to the Town of Alton.

C. Westen said the assumption being that if you are required to have a written request at the beginning any subsequent change would require subsequently a written request as well.

R. Varney said he understands that is C. Westen's position and C. Westen has made that clear in the past. R. Varney said he is telling the Board that they have taken an extra step on that in making an affirmative finding of obfuscation and misrepresentation. He said they are quite different to say R. Gayner should have done something different with his paperwork.

C. Westen said it gives the appearance of, I did not say that it actually did, I said it gives the appearance of and he said there is a big difference.

T. Kinnon asked if Mr. Gayner was in contact with the state agencies to get a different design why was the building permit applied for, why didn't he wait until his final design approval before applying to the Town of Alton.

R. Varney said because he had no confidence that he would get the approvals to modify the design. He said the design he submitted to the NHDES initially and to the Town of Alton were the same and he was seeking to change it and the first step he took was to go to the NHDES and that was a long process. After he got approval from the NHDES, he tried to contact B. Boyers to see if he could modify his plan.

T. Kinnon said his concerns are that R. Gayner knew this was a complex process and R. Gayner knew there were many agencies he needed to go through and he asked why would R. Gayner start building a structure, that costs a lot of money before getting approvals. T. Kinnon said he began dredging in the fall of 2003 then he poured the concrete in 2003-2004.

R. Varney said the height of the concrete does not exceed the height restrictions of the Town of Alton.

T. Kinnon said the height of the concrete is such that it does not permit a properly pitched roof that is shown on the original building permit.

R. Varney said the pitch of the roof is not a material part of the building permit.

T. Kinnon said the pitch of the roof is a representation of what he was going to build so if it is not what he was going to build then it would be a misrepresentation of what he wanted to build.

R. Varney said he had expectations of being able to do at that point was to be able replicate the tracts above the site.

T. Kinnon asked R. Varney if anyone at Town Hall or the Building Inspector's office knew of R. Gayner's intention of doing that at that time.

R. Varney said no.

B. Boyers said the height of the concrete there is no feasible way you could put a roof on it without exceeding the 15' height limit. The top of the concrete and the boathouse is almost 15' with a flat roof. B. Boyers said he has heard the NHDES does not allow flat roofs on boathouses anymore. M. Perry said no. B. Boyers said you could not even put a handrail on the roof for safety without getting a variance from the Town of Alton because it would exceed the 15' height limit.

R. Gayner gave a history of the property and the timeline of the events that have taken place.

He said he understands where the Board is coming from and how they came to certain conclusions and the reason is that the Board is obviously convinced that this is a grand scheme to try to pull one over on the Town. He said he understands what T. Kinnon and C. Westen are saying but he wants to give the Board the background on the case.

R. Gayner originally lived in Chestnut Cove since 1976 and he always wanted to have a boathouse and in the Chestnut Cove area it was too shallow and there was no way to do it and he even got a permit in the late 1970's and they let it lapse because there was no way to construct a boathouse there, it was not feasible because they would have had to keep dredging and it would have kept filling up with sand. He said when he bought the property on Temple Dr. he said it would be perfect for a boathouse because of the nature of the land and the basin and peninsula and it is tucked in. He said he has pictures from the water he would like to provide to the Board. He said the natural spot was initially in the boat basin because there was a boathouse there in the boat basin back when the old rail station was there and it was an Inn. The NHDES came out to the site and said you cannot build over that. It is state waters and it was dredged out many years ago you have to dredge it in. He said so they went about the process of doing the dredging and he said when he first started this project you could put a flat roof on a boathouse, as Bahre's boathouse is in Alton and many others around the Lake. He said when they originally did away with boathouses out over the water they allowed boathouses to be built with flat roofs. He said it is his understanding that someone in Winter Harbor misused that and then the NHDES decided they did not want flat roofs anymore. He said his spot is a natural spot for a flat roof because it is an unusual area with all sorts of shoreline and that the shoreline is extremely high because it is the old rail bed. He said K. Menici said it is a walking path but it is not, it is the old rail bed and it is built up significantly and it's quite high. He said when you dig into it in order to be level with the surface it will be high. The original plans done by Lakeshore Construction required a lot more dredging and it required that there be severe cuts on the sides in order to accommodate that particular design. He said when Lakeshore Construction when they began the excavation, which they do from the shore, they install a coffer-dam and they leave the shoreline intact and the excavate behind it, they found at about 15'-10' or 8'-10' deep it kept filling up with water. He said the reason is when the rail bed was built they used large and small stone and stone graded all the way up and as they dug out behind the water just flowed in and they couldn't stop it. He said he had to come in and build walls out of clay and use a significant amount of clay and build a clay infrastructure around it and put pumps in. He said they pumped continuously all winter with 2 large pumps in order to pump all the water out to be able to pour the concrete for the walls and put in the wood supports. He said it was quite a project and there was a lot of problems. He said as a result of the project as it went along they did raise the pour in the front in order to stabilize it because there was a real serious problem. He said he was away for most of the winter and when he came back he got the letter in April and he immediately called B. Boyers. R. Gayner said that B. Boyers says he was never called to inspect the foundation, R. Gayner said B. Boyers said he doesn't have a good recollection and that he didn't speak with Mr. Russell. R. Gayner said Mr. Russell was standing right next to him and R. Gayner repeated the majority of what B. Boyers said. R. Gayner said that Mr. Russell went to Town Hall twice to try to get B. Boyers to come up and do an inspection and the inspection at that point in time was a foundation inspection. R. Gayner said that he had a framer lined up and he told B. Boyers that and he said he told B. Boyers that he wants to clear it up because he doesn't want to do any framing until this is approved by you because we have a revision of the plan and the plan was on the table and R. Gayner said he begged B. Boyers to come and look at it. R. Gayner said B. Boyers was too busy. R. Gayner said that was the phone call to inspect the foundation. He said if B. Boyers come to

his house, he even asked B. Boyers when he drives by Temple Dr to stop in and B. Boyers said it is a really busy time and if I get a break in my schedule I'll stop in but if you are 30' back you can go to 35' (in height). R. Gayner said if B. Boyers had come down and looked at the foundation and said this is not in compliance and looked at the plans and said you can't go up that high, that would have been the end of it. R. Gayner said he would not have built it and B. Boyers told him go ahead and build it if you are 30' back. R. Gayner said to B. Boyers that this is a unique situation it is the only boathouse on the Lake and probably the only boathouse that will ever be on the Lake, where the first 15' is flat, because that is what the NHDES allowed me to do, and the balance of it is going to be built up to with a replica building to replicate a train station. R. Gayner said that the second instance was on August 6 and from August 6 to the end of September and a lot of the cost is in the finishing work (the siding and the roof and the windows) on the boathouse and that was all done after August 6. R. Gayner said that he did not get any calls from anyone. He told the Board that he did not know what else he could do because he called the guy he was supposed to call, but the fact is that it is R. Gayner's opinion and understanding that boathouses are primarily in the purview of the NHDES and that all the permitting and changes go to the NHDES and they have to go through Governor's Council etc. and he said the original 38' x 38' footprint did not change, the only requirement was the height requirement.

M. Perry told R. Gayner that they have heard this before and thanked him and continued on with the hearing. She asked if there were any other comments, being none she said the Board will take this under advisement.

J. Sessler explained to the R. Varney and R. Gayner what the process will be. He said the public hearing portion of the meeting is now closed and that means that all evidence to the Board has ended, from all sources and any person, including Towns people and the applicant and agent, unless the Board wants to re-open the case to hear other evidence. They are going to take everything under advisement to discuss legal issues and possibly procedural issues with him and they are going to address all issues, point by point, so they do not miss anything that has been raised by the applicant and address his concerns. J. Sessler said he will discuss the legal issues with the Board in private and he has the right to do that. He said the only other person that may be involved is J. Sessler's associate, Mr. Tanguay. J. Sessler said he does not bring new evidence to the Board and he doesn't tell them how to decide the case or how he thinks they should decide the case he lets them decide and helps them address the issues in accordance with the law. He said he will tell them what he thinks the law says and what they should do in accordance with the law and principally and primarily the new Supreme Court decisions which are hard to understand. He said the legal and procedural issues will be done in a non-public session with him only and there will be no decision made by the Board from the non-public session. Then the Board will give public notice of when they will reconvene and it will be a public meeting, not a hearing, they will not take new evidence, unless they decide to. The applicant will have the right to hear them deliberate and hopefully they'll make their decision and if the Board wants new evidence they can open the public hearing part and ask for it. He said the applicant does not have the right to participate or speak. He said again there will be no new evidence from any source and the Board knows not to talk to anyone about the case.

They discussed when they will have the meeting and they will try to schedule a hearing specifically for this case and try to have it before the August meeting.

R. Varney said they first appeared in front of the Board, the Chair at that time K. Chamberlain specifically admonished the applicant to not do any work below 519.34' and they took that as an order from the Board and they have not worked on the building since. He said in the interim they have received correspondence from NHDES that they have no problem with R. Gayner finishing off the work below 519.34 part of the boathouse, not the part that is deemed offending. He said B. Boyers has said that he has no objection to finish the work at that level, as long as there is documentation from the NHDES. R. Varney said he sent a letter to B. Boyers from the NH State Attorney General's office stating that they approve of the work being finished.

B. Boyers said it is probably in the file.

R. Varney said he can't get any action and he said whatever the Board decides about the boathouse above 519.34, at least let R. Gayner him finish the boathouse.

J. Sessler said the Board will not decide that because it is out of their jurisdiction but J. Sessler will talk to the Board of Selectman about it but it is not the ZBA's decision.

R. Varney said if the Selectman approve it, he wouldn't have to come back to the ZBA and he wouldn't be defying the ZBA's order.

J. Sessler said no matter what his recommendation is to the Selectman or what they decide, that any work done by the applicant will be done without prejudice and if they are found to be wrong they have to tear the whole thing down and it will be at their risk.

R. Varney said he understands that.

Motion made by L. Avery, seconded by, C. Westen to adjourn at 8:10pm,

Discussion on the motion: J. Sessler asked T. Kinnon if he wants more evidence and T. Kinnon said yes wants more evidence. T. Kinnon wants K. Menici to contact the person she talked to at the NHDES defining the shoreline and have it put into writing for the definition and have copies provided to R. Varney and the Board.

K. Menici said she was going to do that.

J. Sessler said K. Menici cannot do that unless the Board agrees to it because it would be considered additional evidence.

T. Kinnon wants that included in the motion because he would like that to happen prior to them meeting to discuss the case.

J. Sessler said that if it is a persons opinion he does not think it is relevant at this time. He said if they have a regulation or a statute that they can point to and it is a matter of law and can be recognized and judiciously observable then they can take it. He said he thinks that R. Varney doesn't disagree, but any opinion or testimony they should not take at this point because technically the hearing is closed and all evidence should have been presented.

R. Varney agreed with J. Sessler for the record.

M. Perry called for the vote on the original motion and the motion carried with all in favor.

Respectfully submitted,

Stephanie N. Verdile
Secretary