TOWN OF ALTON
ZONING BOARD OF ADJUSTMENT
MINUTES
Public Hearing
September 1, 2011
Approved as amended 10/6/11

I. CALL TO ORDER

Paul Monzione, Acting Chair, called the meeting to order at 7:14 p.m.

II. APPOINTMENT OF ALTERNATES

Timothy Morgan and Lou LaCourse were not present; Paul Larochelle was appointed as a member for this meeting which allows for the Board to proceed in their normal fashion.

III. INTRODUCTION OF PLANNING DEPARTMENT AND ZONING BOARD MEMBERS

Paul Monzione, Acting Chair, introduced himself, the Planning Department Representative, and the members of the Zoning Board of Adjustment:

John Dever, Building Inspector and Code Enforcement Officer
Paul Monzione, Member
Steve Miller, Member
Tim Kinnon, Member
Paul Larochelle, Alternate

IV. STATEMENT OF THE APPEAL PROCESS

The purpose of this hearing is to allow anyone concerned with an Appeal to the Board of Adjustment to present evidence for or against the Appeal. This evidence may be in the form of an opinion rather than an established fact, however, it should support the grounds which the Board must consider when making a determination. The purpose of the hearing is not to gauge the sentiment of the public or to hear personal reasons why individuals are for or against an appeal but all facts and opinions based on reasonable assumptions will be considered. In the case of an appeal for a variance, the Board must determine facts bearing upon the five criteria as set forth in the State's Statutes. For a special exception, the Board must ascertain whether each of the standards set forth in the Zoning Ordinance has been or will be met.

V. APPROVAL OF THE AGENDA

Under New Business, Roger Sample, representing Harold Bell, to see if proposed substantive changes to his building plans require return to the Zoning Board of Adjustment.

Steve Miller made a motion to approve the agenda as amended. Tim Kinnon seconded the motion which passed with four votes in favor and none opposed.

VI. CONTINUED APPLICATIONS

Case #Z11-07 **117 New Durham Road**	**Appeal of Administrative Decision** **Map 9 Lot 53**	**Alton Bay Campmeeting Association** **Rural Residential Zone**

Application submitted by Attorney Arthur Hoover on behalf of the Alton Bay Campmeeting Association to appeal the decision of the Zoning Officer regarding the determination that a 5 unit, multi-family apartment building is an abandoned non-conforming use in the Zone.

Paul Monzione read the case into the record. Attorney Arthur Hoover, representing the applicant; John Taber, the Executive Director of the Alton Bay Campmeeting Association; and Roger Sample, who has an interest as a vested party, came to the table to present this case.

Attorney Hoover explained that they were last here in July and it was requested that he use the intervening month before the August meeting to put together a summation of facts that would show that there was a proven intent to continue the non-conforming use, and also to put together factual documentation that this was a five unit building. That was submitted to John Dever on July 27, 2011; the August meeting was then postponed due to lack of a quorum, so that brings the situation to date.

Attorney Hoover continued. When he was before the Board in July, it was recommended that he not spend too much time going over the old facts because everybody had heard enough of that. Of note, Mr. Larochelle is now here, and he was not at the previous meetings, so Attorney Hoover gave a brief background. He explained that the property is on the New Durham Road and at the time it was a large building and it is their position that it was a rental property with five units. It was an old farm with 60 acres of land. At that time it was a conforming use because it had acreage sufficient to support the number of apartments. The applicant, through a developer working to gain approval to subdivide the property and ultimately purchase the property filed a subdivision plan with the Planning Board; after a number of meetings, that was approved. It was approved for 21 or 22 lots; as a result of the subdivision, the farmhouse with five units became located on a lot that was not big enough. Essentially, the subdivision made that a non conforming lot. As a result of that, it became a non conforming use according to John Dever; Attorney Hoover voiced his agreement with the accuracy of that.

For approximately one year after the subdivision had been approved, the property continued to function as a five unit apartment, even though it was nonconforming at that time; nobody had picked up on the fact that the subdivision had made the lot nonconforming and it didn't seem to matter because physically there was no noticeable difference. As a result of a failed septic system it was necessary that the property be vacated and the property was ultimately vacated in July of 2008. That is the date at which the Code Enforcement Officer determined that the non conforming use had been abandoned. Between January and July of 2008 the applicant pumped the septic system on a regular basis and made arrangements to find other housing; the property was ultimately vacated because they couldn't use it anymore. At that point, it became an abandoned non conforming use.

This past December or early January, Roger Sample requested a building permit to do some work on the property and John Dever then rendered an opinion that it could not happen because the non conforming use had been abandoned and the building permit was to restore the building and renovate it. The basis of that decision was that there had not been proven effort to continue the non conforming use within 18 months of vacancy or abandonment which is a requirement of the ordinance.

The two issues that remain outstanding are whether there was proven intent to continue the five unit use, and was there in fact a five unit structure on the property before the abandonment.

Attorney Hoover continued; when they were before the Board for the June meeting, it was made clear that this appeal is in no way a reflection on the Building Inspector's competency. He has done the right thing and the applicant is not arguing with him; Attorney Hoover stated that if John Dever were to be asked, he would agree that their relationship has been cordial and polite. The applicant is taking the position that John Dever did not have all of the information at the time he rendered his decision, so it is incumbent on the applicant to provide the Board with additional information. Attorney Hoover recalled that P. Monzione had stated at one time that the Town Attorney had indicated also that the Board had the authority to receive new information that there was proven intent. As a result of that, the Board had asked him at the July meeting to put this information together and that is now in front of the members.

P. Monzione clarified with a correction; the Board offered an opportunity for the applicant to submit additional information. They were not necessarily given an assignment to do so. Attorney Hoover stated that it came out the same way, but that P. Monzione was correct.

Attorney Hoover continued; he has put together a covering letter with attachments Exhibit A and Exhibit B. Exhibit A addresses the proven intent; it is pretty self-explanatory and the members have most of the documentation. In summary, the property was determined to be abandoned in July of 2008 by the Code Enforcement Officer. Ten months after that, which is in the 18 month period, the Alton Bay Campmeeting Association (property owner) entered into a Purchase and Sale agreement with Roger Sample to sell the lot upon which the building was located for the purpose of maintaining and continuing the multi-family use. Also submitted with the Purchase and Sale Agreement were some covenants that were going to run with that conveyance that further confirm that it would be multi-family use at that time. That was within 10 months, and they take the position that it was an indication of proven effort to show that was what the Association wanted to do with the property.

At about the same time, in May of 2009, the applicants requested a lot merger, which the Selectmen approved. They merged two lots, 53 and 53-1, into one lot, the purpose of which was to have additional space to accommodate a septic system large enough to handle five units. The lot merger in May of 2009 was intended to make it possible to utilize the property as a multi-family structure, further evidence of the proven intent to continue that use. Due to some clerical issues, the lot merger needed to be duplicated; that occurred in July of 2010; the first lot merger identified the property owner incorrectly and failed to make reference to the subdivision plan. When that determination was made, a second lot merger, merging the same two lots was done; this time they got the name correct and made reference to the subdivision. This is a further indication of the proven intent to continue the use as a five unit, multi-family structure. All of those were within 18 months of the previous action, so they are moving along.

The septic design was submitted to the Code Enforcement Officer for multi-family use – the design is in fact sufficient for 6 units, but they are not ever going to be looking for 6 units. That was submitted in December, 2010, which is still further proof that there was intent to continue the five unit structure.

In March of 2011, there was a construction engineering report from Fisher Engineering that states that the building is suitable to be reconstructed as a five unit parcel; that information is included in the packet. The most recent thing that has happened is the Attorney General's approval of the subdivision which excludes these two lots and says that they can be conveyed separately and are not part of the Attorney General's requirement for registration as a subdivision because it was clearly indicated and accepted by the Attorney General's office that there was a conveyance of this multi family structure on these two lots now merged into one to Roger Sample. That was received today.

That is where it stands as to the proven intent. Complicating this but not really part of the sequence is the fact that as this process was proceeding over the last 2 ½ years, the building was torched by an arsonist which made the reconstruction of it more difficult and led to other issues and some delay, but at each step in the sequence they were within the 18 month period and clearly they were moving forward to reach this decision.

The second piece of evidence the applicant was given the opportunity to produce dealt with information showing that this was in fact a five unit dwelling; that is Exhibit B which has attached some receipts or record keeping from the Alton Bay Campmeeting Association. The first covers the period of January, 2006 through December, 2007 which predates the subdivision approval and then goes a short time after that. That is a full two years, and it is clear that apartments A-D were rented and the main house show no income; the main house was utilized by staff members of the Alton Bay Campmeeting Association so there was no rent collected on it at that time. That indicates that there were four apartments and the main house, which makes a five unit property.

The next attachment, which covers the period of January through December of 2008, it shows four apartments rented plus the main house which makes five. The income is way down because this is the period of time when they had to vacate the property due to the septic failure; the rent ceased in July and even before that it started to decrease.

Those are fairly substantial indicators that the property was a five unit parcel before the subdivision was approved and continued to operate as a five unit parcel after the subdivision was approved. Also, the septic

design in 2010, which was submitted to the Code Enforcement Officer, was sufficient for 6 units (the submitted paperwork incorrectly identified 6 bedrooms rather than 6 units). That is further proof that the property was intended for use as at least five units; they would not have gone out and gotten septic approval for five or six units unless that is what had been on the site before.

Finally, in the staff review from Ken McWilliams on May 5, 2011, there is an indication in the narrative that proves the property was a five unit residential structure. The most significant piece of the evidence is the rental receipts and the accounting from the Association. Mr. Taber is present from the Association and can answer questions concerning the accounting, But Attorney Hoover stated that he thinks it shows that they were there and they continued to be there even after the subdivision was approved.

P. Monzione stated for the record that at the time the application was continued, it is his recollection that the Board had received the applicants' presentation and had received public input and closed the matter to public input. The Board was in the deliberative process when the issue came up of the Board wanting to get further legal clarification from Town Counsel regarding the burden of proof or what it would take to establish a proven intent to continue in a non conforming use. The Board adjourned for that purpose, and when they reconvened a decision was made to suggest that if the applicant had evidence they wished to submit on that particular single point of establishing the intent, the Board would receive that, and that is the point they are presently at. The reason he reiterated that is for the benefit of the Board and members of the public who a present, this case will not be reopened and public input will not be accepted, other than on this one specific issue of the proof of intent. Attorney Hoover added that he had also been asked to provide information that it was a five unit apartment.

P. Monzione agreed and noted that the applicant had separated the intent to continue and the proof of the five unit apartment; he will question that further. He asked Attorney Hoover if at any time in the submittals there had been a copy of the Purchase and Sale agreement; he has Covenants and Restrictions, but asked if there was a Purchase and Sale agreement done during the applicable time period which would contain a description of a five unit structure that was being sold. Attorney Hoover stated that there was a Purchase and Sale agreement provided, but he does not think it says "five units" but it does refer to "multi-family."

S. Miller asked if during the period of abandonment there was any insurance premium paid on the dwelling. Attorney Hoover indicated that there was fire insurance and Mr. Taber added that after the fire, there was a payout. S. Miller asked the insurance had been cancelled at any time during the abandonment period. Mr. Taber answered that it had not. S. Miller confirmed through questioning that the insurance was in force during the entire time of the abandonment; Mr. Taber reiterated that it had been.

S. Miller asked why it took so long for the filing of the building permit when they knew about the 18 month deadline. Mr. Hoover answered that there are a number of reasons for that, the best of which is that the subdivision was, in his judgment, incorrectly recorded because it should not have been approved for recording until the Attorney General's approval was obtained. As a result, no lots could be sold; that has just been resolved as of today. Mr. Taber added that they also did not realize, knowing that they had already entered into two Purchase and Sale agreements, and there was money down and knowing that Roger Sample was going to take the property and reconstruct it to what it was, that abandonment would be considered. There was always a step being taken so they would never have considered that to be the case. Attorney Hoover added that they could not convey it.

P. Monzione stated that the applicant has the burden; the Board is reviewing this de novo as stated previously. The Code Enforcement Officer's decision was probably correct given the information he had at the time; he does not find that John Dever made the wrong decision. The Board's job is not to review that to see if it was correct but rather to look at this de novo to see if the intent was there. He sees the intent as being a proof of intent to continue with five units, not a proof of intent to continue and then a proof of five units, but rather in one thing – a proof of intent to continue with five units. The reason he says that is because what makes this nonconforming is the five units. A proof of intent to continue a non conforming structure, the non conformance being that there are five units on a lot that under the current zoning ordinances do not permit five units. If the applicant were here saying that the "multi unit" Purchase and Sale agreement was for two units, they would not

have to be here because there is enough land for two. The lot may have permitted two units, but it certainly does not permit five; that is what makes it nonconforming and that is why they are here.

P. Monzione asked, as the applicant goes through their time table and the information provided as a supplement, how many bedrooms were in each unit. Roger Sample answered that there were 3 two bedroom units, 1 one bedroom unit, and the main house has 6 bedrooms. P. Monzione asked about the septic design for 6 bedrooms and indicated that the five units as they were comprised prior to the septic application contained a dozen or more bedrooms. Roger Sample indicated that the septic applied for is for 14 bedrooms and Attorney Hoover again pointed out that the reference to six bedrooms is a mistake; it should have been six units. P. Monzione read through the record to the location of the reference to six bedrooms; Attorney Hoover pointed out that if he read on to the next line, it corrects itself to 6 units. The record is corrected at this point to reflect that the reference to 6 bedrooms should be six units.

P. Monzione asked if January, 2010 was the end of the applicable 18 month period. Attorney Hoover answered that he was unsure because that would depend on how it was calculated. He does not think that is right because the previous effort would have been the submission of the septic design and in January, they did receive confirmation that they could in fact resurrect the building and reconstruct it. P. Monzione asked if, for purposes of the application, the applicant accepts the date of July, 2008 as the so called date of abandonment. Attorney Hoover confirmed that date was correct. P. Monzione went on to point out that if you add 18 months to July, 2008, that brings the calendar to January, 2010; Attorney Hoover agreed and pointed out that there were things going on during that time as discussed.

J. Dever clarified that the proposed septic design has not been approved and submitted to the state because of this action but as designed presently, it is for a total of fourteen bedrooms. It says 4 two bedroom units and 2 three bedroom units. P. Monzione asked if anyone, on behalf of the owner, submitted a septic design to the State of New Hampshire between July, 2008 and January, 2010 that sought to install a septic for fourteen bedrooms. Roger Sample explained that he submitted the design to J. Dever, who would then sign off and send it on to the state; J. Dever wanted to hold off because of the process because he thought there was no sense in sending off a system for fourteen bedrooms if it was going to be a single family home. P. Monzione asked when the plan was submitted to anyone; a septic design indicating fourteen bedrooms and five units submitted any time during that 18 month period may indicate intent to continue with the five unit-building. J. Dever answered that he received the septic design on December 28, 2010.

S. Miller asked if a building is deemed abandoned under this particular statute, if there is anything that can be done after the fact to mitigate that time period or if anything affecting that abandonment has to be done within the timeframe of July 2008 to January 2010. He asked if there is anything that could legally be done after January 2010 to mitigate the time between July 2008 and January 2010. Attorney Hoover answered that the denial of the building permit in January or February of 2011 put them into this situation; they could not mitigate it until they knew. Additionally, they could not convey the land until they had AG approval; that was done inadvertently when the subdivision was approved and recorded before AG approval. The mitigation was to get their ducks in a row so that when the time came that they got Zoning Board and Attorney General approval, they could then take steps because they could not do anything until those things happened.

S. Miller asked questions to gain understanding of the time line; Attorney Hoover explained that other events like the Purchase and Sale agreement and the lot merger are all part of this picture. They would not have needed the lot merger unless it was contemplated that this was going to be a five unit building. P. Monzione stated that they would have needed the lot merger for two units or more; what would be helpful to him is if, in addition to the evidence that shows that the building was being used as five rental units, there was evidence that from July of 2008 to January of 2010 that five units was either being worked on, contemplated being sold, a septic was being designed for it, rent was being collected… Anything that would lock into the five units because he thinks that the burden of the applicant in this case is to establish that there was intent to operate specifically five units from the time of July 2008 to January 2010. If that intent can be proven then there is no abandonment and the non conformity stays in a grandfathered status. If eighteen months expire with no demonstrable intent to keep five units there, then a decision of abandonment may be correct and the grandfather status may be lost.

Attorney Hoover commented that was a more restrictive view than he has, but he is not sure that even going through all of the evidence, he is going to see the number five other than what has been provided; however, both Mr. Taber and Mr. Sample can testify that the intended use was to be consistent with the use at the time of the abandonment, and that was five units. He does not thin it ever occurred to them, and neither of them are represented by counsel, that they had to give it a number. It was intended, and it would be exactly the same as was the plan. Mr. Taber agreed; they know what they had for property and they knew what they had for apartments that were usable. Roger Sample also knew; he was going to rebuild what was there. They wrote in the Purchase and Sales agreements and covenants "multi family" because they did not realize they would have to list out every item; it is a multi-family dwelling.

Attorney Hoover stated that it is also important to note that after the subdivision was approved, and after the abandonment, it was still a five unit structure. It was always a five unit structure; the reason it is not a five unit structure now is because of the fire. Roger Sample made the comment that if he purchased a car, he would not expect to have to push it home because he didn't specify that he wanted the motor.

P. Monzione explained that when there is a property that is nonconforming, you may have plans to tear the whole thing down or turn it into three units; he is saying that the burden of proof is to show that there was an intent specifically for five units.

T. Kinnon stated that on the timeline, it does not indicate the Purchase and Sale agreement of May, 2009. Attorney Hoover understood that it had been submitted some time ago. T. Kinnon stated that his point was that on May 27, 2009, there was a five unit structure there and with the exception of the septic system, it was habitable. Attorney Hoover confirmed that the reason it was abandoned was due to the failure of the septic system. T. Kinnon stated that at the time of the first Purchase and Sale agreement that was signed, there was a five unit structure in place; Attorney Hoover agreed. T. Kinnon added that by no doing of any parties present did the status of that structure change; Attorney Hoover answered affirmatively and added that the fire changed it, but that came later. T. Kinnon stated that at the time of the Purchase and Sale agreement and at the time of the lot merger, there was a five unit structure there. Attorney Hoover clarified that at the time of the first lot merger, there was a five unit structure. Mr. Taber added that it should have been a very simple transaction because all Mr. Sample had to do was put the septic in; that is why they merged the lots and did a very simple Purchase and Sale agreement so Roger sample could do the septic and flip it.

S. Miller asked if the insurance premiums paid were based on a multi-unit structure; Mr. Taber answered that it was based on the value of the entire facility. It was not based on rental because they had to stop renting it until the septic was repaired. P. Monzione clarified the question; did the insurance company view this as a five unit structure in calculation of the premiums, and were they paying insurance premiums during this 18 month period on a five unit structure. Mr. Taber answered that they were paying on each specific structure and every apartment; he does not know how it was written. S. Miller questioned whether there was a premium over a normal residential policy because it was a commercial type structure; Mr. Taber confirmed that there was.

P. Monzione opened the floor to public input only on the issue of intent to continue the non conforming use and the five unit issue. There was no public input either in favor of or in opposition to the application; public input was closed.

The Board members deliberated. P. Monzione stated that what he has been saying all along is that the applicant has the burden of proving the intent to continue with a five unit structure; he does not think multi-unit is sufficient to satisfy the intent to get around abandonment. The intent has to be proven by an objective standard, not just by saying that was the intent. Maybe that would be sufficient, but an objective standard is certainly sufficient. He went on to say that he is glad T. Kinnon asked the questions he did because it points out the fact that throughout this entire process it becomes clear that all of what was going on here was with regard to a five unit structure and he does not think there is any evidence to contradict that. All parties were proceeding with a five unit structure in mind.

T. Kinnon stated that it had been his point that there was no evidence contradicting that they were proceeding with the transaction based on five units because when the Purchase and Sale agreement was signed, there was a five unit structure there, so it is reasonable to assume that the intent was for a five unit structure and seeing no evidence contradicting that, he would feel confident in judging that everybody's intent is as they say. Having said that, he wishes that all the evidence had been presented to Mr. Dever so he could have made this determination, rather than having it get to this point. P. Larochelle agreed; there was a lack of information to the Code Enforcement Officer and now that they have proven what their intent was. T. Kinnon went on to say that maybe this can be a learning experience for some people and he hopes the word will be spread that more information to the Code Enforcement Officer allows him to make better decisions.

S. Miller believes that intent was sufficiently proven because the septic design was within the 18 month period; also, he will take the applicants' word that insurance premiums were paid based upon a rental property which means a higher premium over a normal residential property. This shows sufficient intent that everybody paying the bill assumed this would be used as a multi-family property. He is comfortable, even though he would have preferred to see hard evidence on this, but he does not doubt the veracity of the claimant. P. Monzione corrected S. Miller; the septic was submitted in December, 2010 which was 11 months after the 18 month deadline of January, 2010.

P. Monzione asked members if they were satisfied with the evidence of the Purchase and Sale agreement; all members present voiced that they were satisfied. P. Monzione invited a motion regarding Case #Z11-07.

T. Kinnon made a motion to grant the appeal and reverse the decision of the Code Enforcement Officer. P. Larochelle seconded the motion which passed with four votes in favor and none opposed.

VII. NEW APPLICATIONS

Case #Z11-13 and #Z11-14 **88 Smith Point Road**	**Variance** **Map 64 Lot 2-1**	**Robert L. & Deborah A. Bourke, Trustees** **Bourke New Hampshire Realty Trust** **Lakeshore Residential Zone**

This is a request for a variance to demolish an existing building except the foundation basement and construct a 26' X 40' three bedroom, 2 ½ bath single family home. Also to extend a screened-in porch that will be within the setbacks, and a variance as to the height of the attic space. This property is zoned Lakeshore Residential. The zoning ordinance in question is Article 300 Section 328 B and 327 A-1.

P. Monzione read the case into the record. Robert Bourke came forward to present this case and handed out illustrations to the members.

The Board reviewed the application for completeness; there were several compliments to the applicant as to the thoroughness and user-friendly layout of his application.

S. Miller made a motion to accept the application as complete. T. Kinnon seconded the motion which passed with four votes in favor and none opposed.

Mr. Bourke explained that he had been advised by the Code Enforcement Officer to proceed with this as two separate applications. The first application is for a height variance; he called the members' attention to the illustration he had given them this evening.

P. Monzione clarified for the record that there are two separate applications included in this case. The materials presented and reviewed are inclusive of both applications; when the Board accepted the application as complete, they did so for both applications.

Mr. Bourke continued; everything he is proposing in his applications was subject to a Shoreland Impact Permit which he has received and included in the packet. A lot of consideration on this project, and the reason he is before this Board, was to proceed in such a way to generate the least invasive environmental impact and

footprint. That was his first approach to this project. After 34 on a fire department in Massachusetts, he is moving up here and this is his retirement home. He will be building it himself and hopefully, if he is granted these two variances, the Board will see as he goes through the application that he is trying to be friendlier toward his neighbors with this application.

In regard to height, it is his understanding that the concerns in regard to the zoning ordinances are to do with fire safety features. There is a letter on file from the Alton Fire Department; they have visited the site and viewed the plans and they have no concerns about granting the height variance. In reality, it is a very minor height variation. The reason it becomes nonconforming with the zoning ordinance is because of the slope of the land; when you average around the entire building it looks like he is asking for about a four foot variance in height. From the rear of the building, where the fire department vehicle access is, the difference is less than two feet. In consideration of that, he is going to be installing a full automatic residential sprinkler system in the building. That addresses the fire department concerns as to the height of the building.

The other concern with the height of a building is usually abutters – somebody you are going to build in front of. The illustration he handed out at the beginning of the presentation shows the view from neighbor's porch, which is on the first floor level. He is also exposed on three levels, as Mr. Bourke is also trying to do. The photo was taken from the neighbors' first floor level, and it shows that by right, without requesting a variance, he could actually obstruct more of his view. What he is trying to do is help his neighbor out and satisfy his wife; his wife wants a craft room in the attic and that is why he is looking for an extra couple of feet in the attic space. T. Kinnon asked for a clarification with the illustration; Mr. Bourke explained.

Mr. Bourke asked if he needed to go through everything he included in the application; P. Monzione answered that it would be up to the applicant if he thought that would be helpful to the members. He added that the Board is capable of reviewing the application, and they have heard what he has said, so there is no need to repeat the application. P. Monzione asked for further clarification of the illustration; Mr. Bourke explained that there are shaded areas that indicate that if he built the same square footage but went wider instead of higher which he can do without a variance, he would obstruct more of his neighbors' view than he will by going higher. He has enough side yard setback to go wider, but he is going up for square footage instead of out. The only reason he is going out in the first place is because of the Shoreland Protection Permit and a deeded right of way. He can't go toward the back. When he obtained the property 12 years ago and decided he wanted to retire here, his plan was to build back. He can't do that now because of the Shoreland Protection Act and the deeded right of way that goes right behind his house. In order to go back, he would have to relocate the deeded right of way, but it would have taken down almost all of the good trees on the lot. All he is taking now by the way he is proposing this is a little bit of grass.

P. Monzione asked what it is about the Shoreland Protection Act that would have prohibited him from going back. Mr. Bourke answered that he would not have had enough trees left on the lot. P. Monzione stated his understanding that it is because of the number of trees you are allowed to take off the land close to the water that prohibits him from going back and removing those trees. Mr. Bourke agreed and added that even though they do not show on any of the illustrations, both in the proposed and existing conditions, right behind the existing structure you can see that a good number of the trees on the lot are right there. If he went to the expense and got his neighbors' approval to relocate the right of way so he could build to the rear, which was his original plan, he would be taking down too many trees in the eyes of Shoreland Protection. In order to get an approved plan from Shoreland Protection, this is what he is bringing to the Zoning Board. The illustration handed out earlier was further explained with dimensions and measurements added.

P. Monzione talked about the zoning ordinance regarding height and the requirement to go around the structure to get an average height from finished grade on the property. In actuality, it is only two feet above the 35' allowance in some places. In other places it would be around four feet. Mr. Bourke explained that it is actually 1'6" on the rear. The tallest part above the restriction would be 39'9" which is 4'9" above the restriction.

S. Miller referenced the illustration and asked if it had been done by an engineer; Mr. Bourke explained that it had not. S. Miller went on to say that for him as a cynical person to accept this as fact, he would request that the

applicant go over the methodology and how he determined this. Mr. Bourke explained that if you look closely at the illustration you can see the height of the existing structure. He knows the height of the existing structure and he interpolated from there to increase percentagewise overall. S. Miller asked him what number he had used as a percentage; Mr. Bourke explained that he used the existing house as a gage and then measured up from there just like you would do with a ruler. This is not an engineered drawing, but the other one is. The only thing about this is to illustrate how he is affecting the view of the neighbor behind him; the neighbor in question has submitted a letter of endorsement of the application.

There are two abutters; one is across the road, so they are 300' up the driveway and across Smith Point Road. They did not submit a comment. The abutters on both sides of him submitted letters of endorsement of this application.

P. Monzione again referred to the illustration provided at the beginning of the case; he asked if it was to scale. Mr. Bourke stated that it is; because it is a photo the distance can play tricks, but that is a very fair representation of how he is going to be affecting his neighbors' view.

P. Monzione asked if the Shoreland Permit has been received for this project; Mr. Bourke stated that it has been received and added that Shoreland Protection does not care about the height of the building. They had to do with the footprint and the setback of the screened in porch. Mr. Bourke asked if he should proceed to that issue or do them separately. P. Monzione asked the members their thoughts; the overall feeling is that it is two separate applications and two separate decisions.

As there was nothing further to present on the height issue, P. Monzione opened that application to public input in favor of and in opposition to the height variance application. There was no public input; public input was closed.

S. Miller stated that he does not believe he has seen the actual reasoning behind the height requirement; the Board sees a lot of individuals asking for additional height. His question is whether this is the kind of ordinance that is no harm, no foul and if that is how the Board is supposed to approach it, because he does not think so. The reasoning behind it has nothing to do with the Board's decision on the height requirement. His personal feeling is that when someone is building a home, the go to an architect and hand them the zoning ordinance which is the rule book. The rule book says 35'; there are a lot of ways to increase square footage without necessarily going above the height restriction. He believes the choice here was more aesthetic; even that is not as important other than how seriously the Board is supposed to take the height issue of 35'. He really has a problem with no harm no foul.

T. Kinnon explained that he has received testimony from members of the fire department and it is his understanding that the 35' height requirement was in place to accommodate the vehicles and equipment so they could gain access in case of a fire or emergency. One of the things he has noted is that the fire department has no concerns because the building is going to be fully sprinklered. The reality is that with the full sprinkler system, by the time the fire department arrives, the fire will be out. From a safety standpoint, he does not think the extra 4'9" on average is a concern. The applicant did state though that he did take a look at going wider; that is why he provided the illustration showing the difference in the view and he determined that he would be less obtrusive going higher rather than wider. In this particular case, the applicant has looked at what he has to deal with.

P. Larochelle added that the applicant could forgo the extra few feet higher and just go wider and not have to worry about the variance, but in this case he is thinking of his neighbor and is trying to keep it as low impact as possible as far as the width.

T. Kinnon stated that he does agree that this is sometimes viewed as a no harm no foul ordinance, but in this case there is harm and foul if consideration is not taken. The applicant has taken some consideration this time.

P. Monzione explained that a lot of times the height restriction applications come in as Special Exceptions because there is a Special Exception provision in the regs that talk about cupolas and other things. That is not a variance but a Special Exception and those are set forth. Those seem more like a no harm no foul situation, to use S. Miller's term. Those are granted when the criteria are met, and they are not the same criteria as the variance. This is a variance so he suggested that the Board go through the criteria on the worksheet and see if they are met.

P. Monzione asked for input from J. Dever who commented on the 35', in regard to fire access. More and more companies have ladder trucks. Thirty-five feet was pretty much the limit for a ladder, and you actually couldn't even go 35'. That drives a lot of this restriction. There are places in town where someone has asked for a height variance and if the fire department couldn't get there, they would have an objection to a structure like that.

S. Miller asked J. Dever if, in the case of a fire in the home that caused more damage because of the additional feet above the height restriction, the town would be held liable. J. Dever answered that it would be built to code that is acceptable for buildings that height; there would be 2' X 6' or larger down below to accommodate the increased load above.

With P. Monzione's permission, P. Larochelle asked the applicant if this is a year-round home that would have a wet system. Mr. Bourke answered that it will be a wet system and there would be an emergency generator. P. Larochelle commented that the fire would be put out before the fire department arrived; Mr. Bourke stated that to be correct.

WORKSHEET

P. Larochelle stated that the variance **will** be contrary to the public interest. T. Kinnon disagreed and stated that he does not believe the variance will be contrary to the public interest in this case because the applicant has taken into consideration his abutters' view and the public that might be driving through. The applicant has also taken safety concerns into consideration by installing a sprinkler system in his home. P. Monzione stated that the variance will not be contrary to the public interest because of the sprinkler system, which could be a condition if the application is granted, but also because of aesthetic and safety considerations. The fire department has expressed no concern with the additional height and there is no evidence that aesthetics will be damaged in any way for the surrounding properties. In fact, neighbors have endorsed this, so this variance will not be contrary to the public interest. S. Miller stated that the variance will not be contrary to the public interest. P. Larochelle informed the chair that he misspoke; he meant to say the variance **will not** be contrary to the public interest. All members are in agreement that the variance will not be contrary to the public interest.

T. Kinnon stated that the variance **is** in harmony with the spirit of the ordinance and the intent of the Master Plan, and with the health, safety, and character of the district within which it is proposed. As far as being in harmony with the spirit of the ordinance, he believes the spirit of the ordinance lies with safety and the concerns of emergency responders. He believes the sprinkler system goes a log way toward mitigating any additional hazard that might be incurred by the 4'9" variance. Again, he has experience and training with sprinkler systems and has seen the benefit of them; he commended the applicant for proposing to put one in. P. Monzione agreed that the request is in harmony with the spirit of the zoning ordinance; safety and aesthetics are primary to the spirit of the ordinance. That and for reasons previously stated, he does not think this poses a problem in either of those areas, particularly he relies on the fire department who has looked at this very carefully and submitted input that they have no concerns. The intent of the Master Plan, and the convenience, health, safety, and character of the district within which it is proposed – this is lakeshore and the applicant has chosen to add a couple of extra feet to the height; in some instances a little over four feet, instead of going wider, which is in keeping with the ordinance. S. Miller disagreed; the request is not in harmony with the spirit of the zoning ordinance. He was not around when the decisions about the ordinance were made, but he does know that if 40' or 36' were appropriate, the ordinance should say that. Although he does believe that the house is safe, he does not feel it is in harmony with the ordinance. P. Larochelle stated that he does believe that the request is in harmony with the spirit of the zoning ordinance.

P. Monzione stated that by granting the variance substantial justice **will be** done. He added that given the overall architectural design and the safety considerations that are going to be built in as well as the unique characteristics of the lot that by granting the variance substantial justice is done. S. Miller agreed and added that it is going to be a beautiful home that will add to the community and that this is probably just an issue that the people should deal with some time in the future. P. Larochelle agreed and added that the applicant is doing everything he can to accommodate the fire department and the neighborhood and community. T. Kinnon agreed.

S. Miller stated that the request **will not** diminish the value of surrounding properties. There has been no evidence submitted to the contrary. P. Larochelle, T. Kinnon, and P. Monzione all agreed.

P. Larochelle stated that there **is no** fair and substantial relationship exists between the general public purposes of the ordinance provision and specific application of the provision to the property. The proposed use **is** a reasonable one. T. Kinnon agreed and added that it is his understanding that the general public purpose of the ordinance is in regard to emergency responders to a situation at the structure and also with the aesthetics of the surrounding community. P. Monzione agreed and read for the record that "for purposes of this subparagraph unnecessary hardship means that owing to special conditions of the property that distinguish it from other properties in the area, no fair and substantial relationship exists…" The applicant did not spend a lot of time in the oral presentation tonight discussing those special conditions but they are in the application and have been considered and mentioned by the applicant. There are unique characteristics of this property which include sloping and that he could not go back due to the restrictions of the Shoreline Protection Act which caused him to decide on the additional square footage going higher. S. Miller agreed that the proposed use is a reasonable one but he does not believe there are any unnecessary hardships existing. If the height restriction was not granted, the world would not stop and he would probably build out wider. There would be some other alternative. He is trying to be pragmatic about this and is therefore going to say that the proposed use is reasonable but does not meet the hardship criteria.

P. Monzione explained that there are three criteria on which all of the members have found that the requirements have been met; there are two criteria on which one member has found that the requirements have not been met. Therefore, a motion will be needed for Case #Z11-13.

T. Kinnon made a motion to grant the application for Case #Z11-13 with the condition that a full sprinkler system is installed in the structure. P. Larochelle seconded the motion which passed with four votes in favor and none opposed.

The Board proceeded to the second case of this application which is Case #Z11-14. Mr. Bourke reminded the Board that as previously stated all materials submitted in the first case also apply to this one. He addressed S. Miller's concerns stating that it is a juggling act to try to get a Shoreline Permit; for him to go out now he would have to throw his permit in the trash and start over. He does not think that is deemed a hardship, but maybe it should be because it can have severe financial implications.

Mr. Bourke pointed out the illustration that shows the two areas of setback encroachment; one has been existing for over 40 years and that is in the southwest corner. You can see where the shoreline cuts in there, and there is a tiny piece of the southwest corner. This is a screened porch with a roof over it; it is only a one season room. For symmetry and within the Shoreline Permit, the engineers who did that extended the line straight across which created a very minor encroachment at the other edge. When you talk about the spirit of the ordinance and look at how the land goes in front of his property, if you were allowed to average he would be well over the 30 feet. In some places he is over 45' back from the water, but because of the way the lake tucks in on one point where there is an existing porch that has been nonconforming since the ordinance came into effect. He is asking that for the sake of symmetry he be allowed to extend the porch in a straight line along the entire front of the house. When you look at how close it is there, he is just looking for breathing room; he doesn't want to build it and then have someone say he is 6 inches too close to the water. He is probably going to reduce the width of the porch by 2' which will eliminate that encroachment, but he hasn't decided yet so he wants to ask the Board for

the variance just so he does not end up making a mistake and coming in after the fact. Again, this is approved in the Shoreline Impact Permit and this request has the endorsement from both of the abutters.

T. Kinnon recalled that they have had cases where DES has granted up to 12' wide and it is in conflict with the town ordinance. In the past, the Board has followed DES's lead.

P. Monzione voiced that he is having a hard time identifying the encroachments in the setback; T. Kinnon pointed them out on the plan. This encroachment is the town's 30' setback from the lake. Mr. Bourke stated that the larger of the two encroachments is the one that has been there for over 40 years. P. Monzione gained clarification on the illustrations. Mr. Bourke explained that if he builds as the illustration shows, the additional encroachment into the setback will be approximately 6". T. Kinnon noted for the sake of legality that once the structure is removed, the grandfather goes away, so this Board is legally granting both of the setback violations. There was discussion about this concept; J. Dever stated that this can be either way depending on where it is. T. Kinnon asked if this should perhaps be a Special Exception; J. Dever explained that he is not building new, he is adding to and thereby creating the additional encroachment.

P. Monzione asked for further description of the unique characteristics of the lot that might prohibit doing an alternative build. He asked if there is sloping and whether anything stated earlier about not being able to go back and the inability to remove the trees is applicable; Mr. Bourke answered that all of those same issues apply here because he is forced to go in the other direction. In other words, if it were not for the Shoreline Protection Act he would not be here, and if it were not for the deeded right of way down the driveway, he would not have to be here. It is the deeded right of way that is paramount in both of the applications. P. Monzione asked if the deeded right of way, the presence of the trees, and the sloping issue were applicable here. Mr. Bourke answered that the sloping issue is more in regard to the height restriction and does not necessarily come into play here.

T. Kinnon asked if the applicant has calculated the amount of reduction he would need to take to the porch in order to eliminate the additional encroachment. Mr. Bourke answered that it would not be a lot; he is just trying to maintain the symmetry. T. Kinnon explained that the existing encroachment could have been covered by a Special Exception which is generally much more lenient as opposed to a variance for the new encroachment. Mr. Bourke asked if the variance would cover the existing encroachment. T. Kinnon explained that it is going to be difficult to prove hardship; the variance would not necessarily cover the existing encroachment.

P. Larochelle asked what the actual expansion consists of from the existing deck to the proposed deck; according to the drawing it looks like it extends to 11'5". Mr. Bourke answered that it is 11'5" now. P. Larochelle asked if the only thing being expanded is the deck to the right and the left. Mr. Bourke answered that from the water, the expansion is only to the right. Everything to the left is existing; there is a dashed line on the plan and everything to the left of it is existing and everything to the right of it is proposed. The existing footprint will remain existing.

T. Kinnon referred to the orientation of the plan; the dashed line runs exactly north-south. T. Kinnon referred to the southwest corner, which is the existing encroachment and will remain the same dimensions. Mr. Bourke explained that it will either remain the same or become less nonconforming. T. Kinnon confirmed through questioning that the smaller portion of encroachment is new; his point was that if the smaller portion was not there, the existing encroachment could be covered by a Special Exception.

P. Larochelle asked about an existing walkway on the plan that he shows as being 21'7" from the shoreline. Mr. Bourke corrected him; the little point of the lake that comes in closest to the house is 21'7" away from the existing porch. This is not a walkway as P. Larochelle had called it, but the edge of the deck being discussed. It is 33'7" from the point of the lake to the existing building.

S. Miller asked the applicant why he can't build it to code. Mr. Bourke answered that he probably could with the minor one on the other side, but he would lose his access to get around the other side of the house. If he had to pull that over to get out of the encroachment on the southwest corner, he would only have a two foot wide stairway on that side of the house. T. Kinnon asked about the 38'8" dimension; that is to the corner of the house

and then the deck comes down to 26'5". T. Kinnon asked, if the deck was built to conform to the setback, Mr. Bourke would have to cut it down to 7' wide for that small portion that is encroaching. He indicated that spot on the plan.

P. Monzione asked about the provision of Section 320 B 2c which addressed the expansion of nonconforming structures; B is the expansion of the footprint. Mr. Bourke said that he is expanding the footprint because he is extending the porch as well as keeping the existing. Section 327 A-1, which is what this application is under, addressed the setback requirement of 30' from water for lots created prior to 1995, which does apply to this lot. The variance requested is from that section; what T. Kinnon is saying is that under 320 B 2 b or c, this could be viewed as a Special Exception. J. Dever pointed out that the subsection quoted refers to expansion of a nonconforming building, which this is not. The only thing nonconforming is the deck. The footprint expansion will still be within all of the applicable setbacks; the variance is being sought for the screened in porch on the water setback. P. Monzione went on to state that he does agree that the correct variance under Section 327 A-1 is being sought. He spoke about the question that had been raised as to whether removing the old porch eliminates the grandfathering and whether he needs the variance for both sides of the deck.

P. Monzione asked the applicant if, after he removes the porch, he is putting it back in the exact footprint, at least on that corner that is encroaching. Mr. Bourke answered that he is not; it will be less nonconforming. He is not going to build it as wide; the 11'5" shown is going to be 9 feet, but he wants the variance for the breathing room.

P. Monzione asked if, on the portion of the property in the setback, there is anything preventing the applicant from moving the northwest corner out of the setback; Mr. Bourke answered that there is not.

P. Monzione opened the floor to public input; there was none in favor or in opposition. Public input was closed.

The Board began deliberation. S. Miller asked about the hardship criteria and quoted the law which shows that there must be a special condition of the property that distinguishes it from other property in the area. The property must be different in a meaningful way than other properties in the area and must be burdened more severely by the zoning restriction. He must have missed that criterion because he does not see a special consideration for the hardship criteria in this case. P. Monzione explained that he asked some questions about the characteristics of the property during the presentation; he thinks that if the lot were such that it was open and he could move the structure back from the lake and put a 15' deck out there and still keep it out of the setback, then it would be fine. However, what makes this lot have special conditions is that it is wooded in a way that allows less space between the trees and the structure, and because of the Shoreline Protection Act, he can't remove those trees and bring the house back. At that point he is stuck with a lot that is wooded and that makes it unique given where the building is located. If the Shoreline Protection Act didn't exist or if he did not have the trees there, he could back the house off the lake and build a huge deck if he wanted to. He can't move the house back because of the wooded nature of the land. That is one example; there may be others, but those are this applicant's facts.

S. Miller had asked if it could be built to code, the applicant had said he probably could. If it can be built to code it should be, and during the presentation it was clear that the primary reason for the variance is comfort. He is not sure those two criteria take issue with the hardship element of the case. P. Monzione added that the proposed use is a reasonable one; he can't have a useable, safe deck of that size without the encroachment into the setback. T. Kinnon argued that using that criteria anything could be built within the ordinance; if that were the case the Board wouldn't be there. He is uncomfortable with the new encroachment on the shore front; there should be some hardship to show for that. Uniqueness of the property could be that the shoreline itself is a reasonable condition to grant this because the shoreline is unique. If this were done on averages as the height is done on averages, there would not be an issue. While he does view any encroachment very seriously, he does look at the overall picture and notes that the shoreline is very jagged and overall, if it were done on average, there would be no encroachment.

P. Monzione questioned an issue from the comment portion which reads, "The home will be constructed to code and will be fully sprinklered. The home is presently listed as having four bedrooms on the tax card. There is an exiting septic approval designed for three bedrooms which was installed in 1992. P. Monzione asked Mr. Bourke how many bedrooms the proposed new structure would have; Mr. Bourke answered that there would be three. J. Dever commented that when he had mentioned to Mr. Bourke that the tax card shows four bedrooms, he was surprised and will be talking to Tom (Sargent) soon. Mr. Bourke added that it has always been three bedrooms.

WORKSHEET

T. Kinnon stated that the variance **will not** be contrary to the public interest and added that he does not view this variance as a great or large variance. There is an existing nonconformity that would probably be granted under normal circumstances anyway. There is a small encroachment that no one would even notice due to the small size of it. It is a very small request. The shoreline on this property does have some unique detail. P. Monzione agreed that the variance would not be contrary to the public interest and added that he is not sure he would agree that tearing it down for the purpose of rebuilding it revokes the grandfathering, so he looks mainly at the one additional encroachment which is minor. S. Miller agreed and added that this is going to be the least intrusive environmental impact; there has been a lot of thought to that and he thinks that is an overriding factor. P. Larochelle agreed.

P. Monzione stated that the variance **is** in harmony with the spirit of the zoning ordinance and the intent of the Master Plan, and with the health, safety, and character of the district within which it is proposed. He does not see anything about the request that really does any disservice to the ordinance; it is so minor in terms of the fact that the overall structure is being greatly improved thereby improving the health, safety and character of the district. S. Miller, P. Larochelle, and T. Kinnon all agreed that the variance is in harmony with the spirit of the ordinance.

S. Miller stated that by granting the variance substantial justice **will be** done. He believes it is the right of the homeowner to enjoy his property and that is essentially what the applicant is trying to do. That is ultimately what the ordinance was designed to do. P. Larochelle agreed. T. Kinnon agreed and added that one of the things he was thinking about during the discussion was the size of the deck and reducing it. He feels that the proposed size is a safe square footage where the applicant could have family and friends over and entertain so that everyone has plenty of breathing room and space. Making smaller decks can be somewhat of a safety concern. That in addition to the small encroachment means that substantial justice will be done. P. Monzione agreed for all of the stated reasons.

P. Larochelle stated that the request **will not** diminish the value of surrounding properties. He believes the applicant has taken every precaution in making sure the surrounding properties like the structure they are going to see. T. Kinnon agreed. P. Monzione also agreed and added that given the elevations showing the structure that the values might even be enhanced. S. Miller agreed and added that there is no evidence to the contrary.

T. Kinnon stated that for purposes of this subparagraph unnecessary hardship means that owing to special conditions of the property that distinguish it from other properties in the area, there **is no** fair and substantial relationship existing between the general public purposes of the ordinance provision and specific application of the provision to the property. The proposed use **is** a reasonable one. Again, the proposed use is a deck and screened in porch which is very reasonable. The purpose of the ordinance is to protect the Shoreland; there is no harm being done to the ordinance with this particular application and request. As far as special conditions, the uniqueness of the shorefront and the number of trees behind the structure which prohibit moving the structure back on the lot creates the hardship. If waves had gone in a different direction for a couple of hundred years, that little small piece of shorefront might still be there. It is a very minor request. P. Monzione agreed and added that it is due to the special conditions of the property – that being the inability of the applicant to build in a different direction because of the lack of ability to remove trees. He has no choice but to put a reasonable and safe deck in a minor encroachment on this property. S. Miller disagreed; although he does agree that the proposed use is a reasonable one, the applicant has not demonstrated that there are special conditions of the

property that distinguish it from other properties in the area. It has trees and it has a variable shoreline. That is a description of the majority of properties that are on a lake. The property must be different in a meaningful way; he is not convinced that it has been shown that there is a significant difference to this property from the one next to it or other properties in the area that make it more burdened by the zoning ordinance. P. Larochelle agreed that the proposed use is a reasonable and that there is no fair and substantial relationship existing between the general public purposes of the ordinance provision and specific application of the provision to the property.

All members agree unanimously on all the criteria except the hardship criterion at which point there is one member who does not agree; P. Monzione requested a motion in Case #Z11-14.

T. Kinnon made a motion to grant the application for Case #Z11-14. P. Larochelle seconded the motion which passed with four votes in favor and none opposed.

P. Monzione again commended the applicant on the thoroughness and organization of his application.

The Board took a short break at this time.

After the break, P. Monzione informed applicants and members of the public alike that even though the Board will remain convened after 10:00 p.m., they do not as a rule begin hearing any new cases after that time.

Case #Z11-15 **West Alton Marina, LLC**	**Special Exception** **Map 17 Lot 29**	**West Alton Marina Road** **Recreation Service Zone**

West Alton Marina LLC is requesting a Special Exception to Article 300 Section 328 Height Restrictions to permit the construction of a cupola with a flag pole that exceeds 35 feet in the Recreation Service Zone.

P. Monzione read the case into the record. The Board reviewed the application for completeness.

T. Kinnon made a motion to accept the application for Case #Z11-15 as complete. S. Miller seconded the motion which passed with four votes in favor and none opposed.

Gary Spaulding of Spaulding Design and Brian Fortier, one of the owners of West Alton Marina came forward to present this case.

Mr. Spaulding explained the application; they are before the Board for a Special Exception to allow them the build a cupola with a flagpole that exceeds the 35' height restriction. Included in the packet is an architectural rendering of the building. This building is going to be replacing the existing marina store that has been on the property since the mid-80's. There are some photos in the application as well which will show the condition of the existing building; it is in need of repair and replacement, and that is why they are here is to begin the process to do that and to allow them to add the cupola that is allowed by Special Exception.

Some of the photos show the rack buildings behind the existing store; those are 35' to 37' high and have been in existence since before the 35' rule. This sits in front of them. This building can't be seen from the lake; it is 1,000' down the channel to The Broads and out to the lake. One of the drawings shows where the channel is as well as where the store is.

Additionally, all of the abutting property is owned by either the Marina or people who have rights to or are involved with the marina, so there are no direct abutters other than the marina owners themselves.

Mr. Spaulding went through the facts of the application. First, the plat plan has been submitted in accordance with Zoning Ordinance Section 520 B and a recommendation has been made. Second, the specific site is an appropriate location for the use because the proposed construction is to replace an existing structure that was built in the 1980's. The existing building needs repair; if you look at the architectural rendering you can see that the ridgeline of the building is just under 28'. The 35' mark is almost at the peak of the building, so they are

really only talking about 2' feet of the cupola roof and then the flagpole that will go above that. P. Monzione asked about the total height to the top of the flagpole; it will be 49'7.5" to the top of the flagpole. T. Kinnon asked what material the flagpole would be made of; Mr. Spaulding answered that it would be either aluminum or fiberglass. S. Miller asked why they need a flagpole on top of the building as opposed to beside the building. Mr. Foyer answered that it is nautical looking. S. Miller asked if it is because the boaters can see it. Mr. Spaulding answered that the boaters in the marina can see it, but not from the lake.

Mr. Spaulding continued relating the pertinent facts of the application. His third point is that factual evidence has not been found that there will be a negative impact on property values; the property is located in the Recreational Service zone which is allowed. The proposed building will be used as the marina's office and store and storage. The height of the proposed building fits in with the adjacent buildings as the rack buildings already exceed the 35' height. The location of the building can not be seen from the lake or Route 11 and can only be seen by the users of West Alton Marina. There is no valid objection from the abutters; all of the abutters are either the marina itself or members of the marina, and it can not be seen by the general public. There is no undue nuisance or serious hazard to pedestrian or vehicular traffic because the proposed building replaces the existing building in the same footprint. There is no loss of parking, nor would the proposed building interfere with existing travel ways for vehicles or pedestrians within the marina. The new building does not increase the number of employees so there is no need for additional parking.

S. Miller asked that the Special Exception Worksheet be handed out; J. Dever did so.

Mr. Spaulding continued; there is adequate area for safe and sanitary sewage disposal and water supply because the marina has its own water supply in an existing well. There are two existing bathhouses that both have approved leech fields. The proposed building will be tied into one of the two leech fields and because there is no increase in employees, there is not going to be an increase in flow. The leech fields that are there have already been sized to handle the marina and the existing employees. If in the future there is an increase in use, the marina has plenty of land so they could build additional leech field or parking if needed.

The proposed use of the structure is in keeping with the spirit of the ordinance and the intent of the Master Plan because this is the Recreational Zone and the proposed building fits into the existing marina. They are trying to develop a building that has a nautical feel to it with the widow's walk and the cupola. It does not impact any of the abutters on any parcels, nor can it be seen from the lake at any time.

Mr. Spaulding asked that the Board grant the approval for the Special Exception in order to add the cupola and the flagpole on top.

T. Kinnon asked if any consideration had been given to lightening protection; Mr. Spaulding answered that there has not.

P. Monzione referred to the description of the reason for the construction and use of the new building and confirmed through questioning that nothing is needed for the building itself; they are going to build the building within all regulations and codes. The only thing they are here for is the cupola and flagpole. The department head comments were discussed; the fire department commented about having a second egress from the second floor. Mr. Spaulding referred to NFP 101 exemption which states that as long as the egress travel distance does not exceed 75', they are okay; this building does not exceed the 75' distance. P. Monzione asked about the fire department comments concerning the cupola; J. Dever pointed out that the second floor egress comments were in general because a complete set of plans were submitted. P. Monzione confirmed with J. Dever that the second floor egress comments have nothing to do with the cupola being above 35'. J. Dever referred to the comment about the fire rated utility room, which is also unrelated. The third comment stating that "the third floor space con not be occupied unless the entire building is protected by a supervised automatic sprinkler system," is also irrelevant as there is no third floor; the cupola is open all the way to the top. There is no third floor or any intentions of a third floor.

P. Monzione asked what is going to be in the cupola. Mr. Spaulding answered that it will be open space going out to the widow's walk; there will be a ladder for access to clean windows and put the flag up, but it is not an occupied space. P. Monzione asked if there would be electricity; Mr. Spaulding answered that he thought there would be some type of light in the cupola. There will be no plumbing or sleeping quarters or anything of that nature in the cupola. Mr. Spaulding pointed out that it is shown on the plans as being open all the way to the top.

S. Miller asked if the drawings had been done by an architect and asked if they had asked the architect to build it to code. Mr. Spaulding responded that the building main roofline is under 35' and then with the exception allowing them to go above the 35' is how he designed it. S. Miller asked if the aesthetic portion is what they need the exception for; Mr. Spaulding said that it is. S. Miller asked if they need the cupola; Mr. Spaulding answered that it fits in with the nautical feel of the building. Also, they have two rack buildings directly behind them and they did not want the rack buildings to overshadow the office space in the new building. It is to break up the outline.

P. Monzione asked about the measurement depicted on one of the elevations; it shows 38'1.5" to the top of the cupola. He asked if that is an average from measurements around the cupola at finished grade or if it is a one place measurement. Mr. Spaulding answered that it is a one place measurement, but the photos indicate that this is a very flat parcel and he would be surprised if there is more than a 6' difference in the elevation around the building.

P. Monzione asked for comments from J. Dever who stated that both his department and the fire department reviewed the initial plans to offer suggestions. His question had been how they were going to gain access; that will be via ladder. The railings will be of appropriate height for code, and the rest of the building will be constructed the same as anything else.

P. Monzione opened the floor to public input both in favor of and in opposition to the granting of this application. There was no public input; public input was closed.

S. Miller asked if the new standard for Alton is 35' roofline and a cupola is okay. T. Kinnon stated that his experience being on this Board since 2004 shows that this provision has always been in there. After the initial 35 foot restriction, they realized that because of the area we are in and for aesthetic purposes, cupolas were in fashion and have been in fashion for some time. His understanding is that from a safety aspect there is no elevated risk because of a cupola. His concern with this particular application is with the height of the flagpole and he would like to see that it is of some non-combustible material.

S. Miller commented that it is not the job of this Board to create new law; T. Kinnon explained that it is a safety valve to afford relief on a specific case by case basis when an ordinance does adversely affect a landowner. P. Monzione added that the application is being brought under 328 C which does say that the Board may issue a Special Exception to the height restriction in any zone provided the structure is any of the following and does not constitute a hazard to any established airport: church towers, belfries, monuments, tanks, water and fire towers, silos, cooling towers, etc. and then at the end it specifically mentions flag poles and cupolas. The regs themselves anticipate that the height is 35' but the Special Exception allows it.

WORKSHEET

P. Monzione stated that a plat **has** been accepted in accordance with the Town of Alton Zoning Ordinance Section 520B. All members agreed.

S. Miller stated that the specific site **is** an appropriate location for the use; there is nothing like having a marina near the water. All members agreed.

P. Larochelle stated that factual evidence **is not** found that the property values in the district will be reduced due to incompatible uses. All members agreed.

T. Kinnon stated that there **are no** valid objections from abutters based on demonstrable fact; there was no objection at all from abutters. All members agreed.

P. Monzione stated that there **is no** undue nuisance or serious hazard to pedestrian or vehicular traffic including the location and design of access ways and off street parking. He understood and appreciated the comments regarding employees and parking which were more for use of the building; this Board is focused more on the cupola itself, and the cupola is not going to in any way interfere with vehicular or pedestrian traffic or off street parking. S. Miller stated that significant evidence was presented that it met all criteria; there is no undue nuisance or serious hazard. P. Larochelle and T. Kinnon also agreed.

S. Miller stated that adequate and appropriate facilities and utilities **will be** provided to insure proper operation and proper use of the structure; the septic system was specifically addressed. All members agreed.

P. Larochelle stated that there **is** adequate area for safe and sanitary sewage disposal and water supply. T. Kinnon agreed. P. Monzione agreed and added that as far as the cupola goes, there are no bedrooms or rest rooms in the cupola so therefore the cupola has no impact on this. S. Miller agreed.

T. Kinnon stated that the proposed use or structure **is** consistent with the spirit of the ordinance and the intent of the Master Plan. He believes it is consistent with the spirit of the ordinance because there is language in the ordinance to allow the granting of cupolas and flagpoles. As far as the intent of the Master Plan, he believes the structure that is aesthetically pleasing and fits in with the marina is following the intent. P. Monzione agreed. S. Miller agreed, especially since the cupola was specifically addressed in the ordinance. P. Larochelle also agreed.

S. Miller made a motion to approve the Special Exception as requested. P. Larochelle seconded the motion.

T. Kinnon asked for a condition that the flag pole be constructed of non-flammable material.

S. Miller amended his motion to approve the Special Exception with the condition that the flagpole be constructed of non-flammable material. P. Larochelle seconded the amended motion which passed with four votes in favor and none opposed.

Case #Z11-16 **Bernard and Elizabeth Lucontoni**	**Equitable Waiver of Dimensional Requirements** **Map 54 Lot 29**	**74 Rogers Street** **Lakeshore Residential Zone**

Suzanne McKenna, Esq. of Martin, Lord and Osman P. A.*, on behalf of owners Bernard and Elizabeth Lucontoni is requesting an Equitable Waiver of Dimensional Requirements (as provided by RSA 674:33-a) from Section 327 A-3 to permit a setback of less that ten feet (10'). This property is located in the Lakeshore Residential Zone.*

P. Monzione read the case into the record. P. Monzione explained that he is in the process of completing a case in which Attorney McKenna was opposing counsel. Even though it is the prerogative of any member to recuse himself for cause, he does not feel that it is necessary in this case as he and Attorney McKenna had a professional, courteous dealing. He feels that he can be impartial under these circumstances; the decision to recuse is his alone but he will defer to the applicant and their counsel and recuse if they feel it is necessary. Attorney McKenna thanked P. Monzione for his consideration but they do not feel there is a need for P. Monzione to recuse himself.

The application was reviewed for completeness.

T. Kinnon made a motion to accept the application for Case #Z11-16 as complete. S. Miller seconded the motion which passed with 4 votes in favor and none opposed.

Attorney McKenna, along with Bernard and Elizabeth Lucontoni, came forward to present this case.

Attorney McKenna stated that this application is before the Board pursuant to RSA 674:33-a, for an equitable waiver of dimensional requirements based on a legitimate mistake of the prior property owner as to the side setback of the property. A portion of the house and the deck attached to the house, based on a subsequent survey of the property, appear to be within the 10' setback. In their status as successor owners of this property, which was previously owned by David and Lois Warner; Mr. Warner, now being deceased and Mrs. Warner offering anecdotal information, at the time the house was built it was based on plans that were in place that had the setback at the appropriate distance. Given the fact that they are successor owners, Attorney McKenna wanted to clarify information submitted in the packet. In the packet, she had indicated that the setback was in conformance with the town requirements based on recorded plans; in looking at the recorded plans, there is nothing on record that indicates the setbacks distance, but in reviewing the Town's file, there was on file a septic plot plan not included in the packet that appears to indicate the setback distance and is likely what the applicant for the building permits and the town looked at for establishing whether the setback was met. Copies of the septic plan were distributed to the members by Attorney McKenna.

Attorney McKenna continued with her presentation; the second item she wished to clarify from what is presented in the packet is that she had stated that the deck was included in the plan that was submitted and received a building permit and certificate of occupancy; both of those items are included in the packet. Upon further review of the town's file and as noted in the staff review, the deck that runs the length of the house does not appear to be in the plans that received the building permit, but it was in place at the time the certificate of occupancy was issued in November, 2009. S. Miller asked what proof there is of that; Attorney McKenna pointed out that the tax assessment cards indicate the deck. J. Dever added that it is on the tax assessment cards and also there is a certificate of occupancy in the file that was issued by the previous building inspector.

Attorney McKenna continued; the setback is established by Section 327 A-3 of the Alton Zoning Ordinance, that it be 10' from each boundary. The boundary at issue is a side boundary; in the packet there is a full size plan as well as a reduced size plan that gives a copy of the new survey that was done in conjunction with the marketing of this property. The construction, the building permit and the certificate of occupancy were all issued in 2006; the Lucontoni's recently purchased the property in the summer of 2011. The house has been built and lived in from 2006 to 2011 without objections. In 2011 there was a survey conducted by DMC Surveyors; the impact of that survey is that the easterly boundary, rather than being a straight line as depicted on the septic plot plan, moves at an angle thereby bringing the boundary line closer to where the house was actually sited. The deck, which is 8' wide, is about 1' from where the boundary line is now; it is clearly within the 10' setback. At its closest point, the house also reaches within that 10' setback.

Attorney McKenna went on to say that what they are asking for this evening is an equitable waiver based on the legitimate mistake, based on the plans at the time relative to the plan that is now on record with this conveyance. The application for permitting and construction were done in good faith in calculation of the wetbacks that were in place at the time.

S. Miller asked when the house was purchased; Attorney McKenna answered that the house was purchased on August 3, 2011.

Attorney McKenna stated that relative to the application standard requirement #2 discusses how the nonconformity was discovered, and shows an explanation of how it was not out of ignorance but from a legitimate mistake; that is the situation she described with the subsequent survey. S. Miller asked what the legitimate mistake was; Attorney McKenna explained that the legitimate mistake was that the house and the deck were constructed in 2006 based on the plot plan that showed the 10' setback whereas the survey that was subsequently conducted in 2010 placed the boundary closer to where the house was constructed. This was five years later that the survey was done that puts the boundary closer to the house. S. Miller asked if the survey was done after the purchase; Attorney McKenna answered that the survey was done prior to the purchase in February of 2011. S. Miller asked if that was when the mistake was discovered; Attorney McKenna answered that it was. S. Miller asked if that was prior to the actual purchase; Attorney McKenna stated that it was.

P. Monzione asked why the survey was done. Attorney McKenna answered that it was done for the marketing of the property (this is anecdotal information from the widow of the previous owner). From looking at the description of the property that was contained in the prior deeds, the subdivision was done in 1945; this was the Mount Major Park of Alton, NH, owned by Paul Hobbs and G. Vinton Jones. This parcel was parcel #2 in that subdivision; the property description for the waterfront of lot #2 gives a meets and bounds description and then goes on to say that in addition to the meets and bounds description, together with that property, would be "together with all land between the southeasterly projections of the side lines of that initial parcel." What you can see from that initial subdivision plan is that lot #2 is located next to the water; what gives the best depiction is in the packet on the reduced size plan with the dotted line down the side of it. That was the surveyors' sketch at the time before he recorded the plan; this is attachment 1C. What that shows is that the waterfront parcel, and for the Warners, the waterfront parcel is parcel #2, that older deed extends the boundary line up toward what is now Rogers Street, which was described then as the street heading toward lot #6. On the picture overlaying that with the current plan, basically the sidelines extended out to Rogers Street. That was the description that was given, so to answer the question of why the survey was done, Attorney McKenna thought it was for a more accurate description of the property. The property owners were probably looking for a meets and bounds description rather than just an extension of the sidelines toward the street.

S. Miller asked if there is title insurance on the property; Mr. Lucontoni answered that there is. S. Miller asked if the title company asked for a survey of the property; Mr. Lucontoni answered that he does not think so.

P. Monzione asked about the dotted line on the plan; he asked if it depicts the lot line now. He asked if when this was built, the contractor or whoever built this thought that was the property line. Attorney McKenna answered that she misspoke; the mistake was in reliance on the septic plot plan to site the house on the lot, which shows it to be more than 10' from the boundary line. Again the description of the property was an extension from where the front parcel had a meets and bounds description, and an extension of that line up to the roadway. That is what the septic plan shows; it is a straight line extension. The surveyor, using more precise instruments, calculated a line that put the setback closer to the house than was thought to be the case at the time the house was constructed and the permits issued.

P. Monzione asked if that was done by Warner and that the mistake was made to Warner; Attorney McKenna answered that it was. P. Monzione went on to say that if there is an equitable waiver argument, it belongs to Warner because he is the one who was adversely affected by the mistake and by the fact that a town official granted a building permit based on the wrong information, and a certificate of occupancy based on the wrong information. He asked Attorney McKenna if she is thinking that the equitable waiver runs with the land or goes to the next owner; he asked if the next owner comes in under a completely different set of circumstances where a subsequent purchaser has a responsibility to do due diligence and discover these things. In other words, when you look at an equitable remedy, you look at the situation, who was adversely affected by it, who got hurt by it, and that was that owner. Now, another owner comes along at a subsequent time and has a completely different set of opportunities to survey, look at deeds, and do any number of things to determine if it is appropriate, and then to buy or not buy. His question is how the equitable waiver argument would extend to a subsequent purchaser.

Attorney McKenna answered that the house and the deck had already been constructed and the equities in this case involved where the house was sited and in the balancing of the equities. A fact not included with this is that this discussion was part of the Purchase and Sale agreement, and the seller's knowledge that the purchaser would be pursuing an equitable waiver in order to have this happen. This information did not come to their attention in the sales process until the closing had already been set and their house they were moving out of had been put on the market and finally had a buyer; they were feeling the need to move forward with the closing and pursue the equitable remedy after. The widow of the deceased who had contracted for all of the work agreed with that.

S. Miller asked about caveat emptor; the buyer is supposed to be aware of this issue. If he has title insurance, then the title insurance would be the remedy. It will cost $132,000 to make this right; the title company signed off on it on a bad survey. Attorney McKenna stated that she would have to see what the title insurance policy

provides; she did not conduct the closing but was brought into the transaction after. As far as title insurance, she would imagine that they took an exception, as there is typically an exception for zoning matters. In addition, if there were an issue with the survey, that was taken as an exception as well so that title insurance would not provide a remedy and the owner is left to his own device to deal with it.

S. Miller clarified through questioning that the owner closed knowing that they needed an equitable waiver to live in their house. Attorney McKenna answered that it was a possibility that it was out there and that given the equities of still being completely on their own parcel, not encroaching on the neighbors' parcel, and knowing that parcel was vacant land that could not be built, yes. Mrs. Lucontoni added that they paid for the regular title insurance and then the insurance on the title insurance; they paid extra to find out any information whatsoever. Mr. Lucontoni added that they do not cover any known, existing problems. S. Miller asked the applicant if they closed knowing about this problem; Mr. Lucontoni answered that they did know there was something with the property line.

J. Dever stated that it appears that part of the discussion is discovery of the issue. He stated that the first paragraph on the equitable waiver sheet asks if the violation was/was not noticed or discovered by any owner, former owner, owners' agent or representative, or municipal official until after a structure in violation had been substantially completed, or until a lot or other division of land in violation had been subdivided by conveyance. It addresses owners, former owners, municipal officials, and whoever else. P. Monzione paraphrased that what gives rise to a claim of equitable waiver is the fact that everyone has gone ahead and built this thing – put all the money, time, and effort in – and the structure exists on the lot. The people who are building it don't know that they're in the setback; a town official doesn't know they are in the setback and allows the building permit and provides the certificate of occupancy, and then after all of that is done, it comes to light that it is in the setback.

T. Kinnon asked when the structure was originally built, who placed it on the lot. J. Dever answered that the lot is unique; there is only one place to put the house and this is it. It is sitting on a ledge; it is sloped drastically away; they have the right of way for Lantana Lane that comes down next to and takes up a decent portion of the setback on the left side of the property as it comes down and crossed between this house and the lake house. There really is not much other place for this house to go in regards to where it is sited. T. Kinnon asked if at the time the house was placed on the lot, the code official for the town should have done a foundation check; at that time he should have seen where the lot line was delineated. J. Dever pointed out that if the lot line was laid out exactly, or if he was relying on the strength of the septic plan, it shows the edge of the proposed house 10' away from the lot line, which is very close. T. Kinnon also noted that it has been on the tax record since 2006; the deck was there and it was there when the certificate of occupancy was issued. At that point, the proposed structure, according to the septic plan, does look like it's 10' away. The addition of the deck caused it to encroach. J. Dever explained that when you talk about the proposed structure, you have a box just to locate it. T. Kinnon agreed; the septic design is not going to have exact dimensions, and this one certainly doesn't. In this particular case, he can see where there was a mistake created by a survey company, compounded by a less than perfect inspection.

Attorney McKenna continued her presentation. In addressing the equities of the situation, they are asked to explain how the nonconformity does not constitute a nuisance or diminish the value of interfere with future uses of other property in the area. The dictionary defines nuisance as an activity that arises from unreasonable, unwarranted, or unlawful use by a person of his own property. She would submit that this was a legitimate mistake and not any purposeful activity intending to impinge on any neighbor or property owner. The same dictionary defines reasonable as synonymous with rational, honest, and equitable. This lot is adjacent to a vacant lot that is less than 30,000 square feet, does not contain 150' of road frontage; by zoning standards it would not be permitted to be buildable. In addition, given the title history of the adjacent property, there is a limitation of use for construction on the back parcel; the back parcel and the front parcel have been merged into one parcel. Therefore, she would submit that while it is closer to the boundary line than the setback of the zoning ordinance, it is not right on top of what could potentially be someone else's home.

Attorney McKenna went on to say that in the balance of equities, the cost of having to remove the house and the deck, relative to being adjacent to a vacant lot, that the equities favor granting the equitable waiver.

P. Monzione asked when the house was built; Attorney McKenna answered that the certificate of occupancy was issued November 29, 2006.

S. Miller asked if the applicant could get equity relief from the title insurance company; Attorney McKenna answered that she would have to review the policy, but she does not believe so. Mr. Lucontoni asked if S. Miller meant money-wise; he stated that he would not get any relief. Mr. Lucontoni explained that he retired and he and his wife moved up; they are going to be year round residents. When you approach the property, you come up the driveway, and then there are 8' and a stone wall. To the right are the septic and then a drop off of 20' and then the right of way. The deck is on the side of the house which is their front door; this is where they are going to live. They are either on the deck or in the house; the property drops down and is a rock climber's heaven. The only outdoor area for them is this deck, or they are in the house. The deck is important to them; they would not be able to get into their front door, and this is the only outdoor spot where they can go outside. That is how tight this footprint is.

T. Kinnon asked if when the survey was done and it was discovered that they deck was within the 10' setback, how the town became aware of this. Attorney McKenna answered that it was by the filing of this equitable waiver request. T. Kinnon asked if they voluntarily came forward to the town when they were in the process of buying the house; Attorney McKenna answered that they did. Mr. Lucontoni commented that they could have just kept quiet, but they didn't want this hanging over their heads. They're retired and he is too old to have something hanging over his head. That is why he wants it out in the open – to resolve it.

P. Larochelle asked if the problem had been discovered at closing or before closing. Mr. Lucontoni answered that it was right around that time; it was either they don't buy the house or they buy the house. He closed August 1 on his other house and August 3 on this one. They fell in love with the house; they are not on the lake but they have a view of the lake.

P. Monzione asked for department head comments; there were no comments from any of the other departments. P. Monzione asked J. Dever if his concerns had been addressed. J. Dever commented that it is there; it has been inspected and passed. It looks like one of those cases where the building inspector went with erroneous information.

P. Monzione opened the floor to public input in favor of granting this application; there was none.

P. Monzione opened the floor to public input in opposition to granting this application.

Madeline Minehan came forward; she is an abutter. While she is sympathetic to the Lucontonis' she feels that maybe they have been misled. She had the property surveyed in 2008; she has a copy of the survey. Between herself and her in-laws, they have been at this property for almost 50 years. She felt that something wasn't right and that they were pretty close to the Minehans' properties, so she had it surveyed. There is more to this, she thinks, than what is being said here. She has been told by her surveyor "I have read this deed and feel that it conveys a single lot and has sufficient detail and restrictions to limit the property to not more than one dwelling.' In the deed, it says that on this property there should be one house; now there are two. Mrs. Minehan stated that a few years ago she did come to the Town Hall and spoke with the gentleman downstairs, and he could not figure it out. She does not have his name; it was the gentleman who gave the permit but he said he had no idea about the deed restrictions. Mrs. Minehan stated that there is a paper road between the two pieces, but it is supposed to be one lot.

T. Kinnon asked if the two structures are on the same lot; Mrs. Minehan answered that Mr. Warner's structure and the one that the Lucontoni's bought are on one lot, according to her surveyor. P. Monzione stated that it is probably important for the Board to hear that; he is not sure how that plays into what they are allowed under the law to consider when they are being asked… What the applicant is basically coming in and saying is that somebody built something in a setback, and the town permitted it to happen by the Code Enforcement Officer or Building Inspector going out and giving the permit, looking at the plans, seeing what they were doing, allowed them to do it, came back out, inspected it and gave them a certificate of occupancy and said everything was fine.

Then the owner, to his detriment, finds out everything was not fine, and in the meantime everything has been built. Mrs. Minehan pointed out that he knew this in 2008; her surveyor says "I have recently been contacted by the abutter, Mr. Warner, and he has expressed a desire to modify by boundary line adjustment, a division between these two pieces." P. Monzione stated that the house was built in 2006. Mrs. Minehan agreed but added that he built the house knowing that the deck should not be there; her question is how the town could allow this to happen. Can anyone just build wherever they want in the town of Alton? It doesn't seem to her that happens here; it seems to her they are all very investigative and interested in what is happening to the properties in Alton. She asked again how something like this happens and added that she is strongly opposed to this variance. P. Monzione explained that how something like that happens is not a subject of this Board's inquiry; they have no jurisdiction or authority to make rulings of findings and fact of how things occur like that. What they are being asked to deal with at this time is what they are going to do in the consequences of the fact that it has happened to those people who did not have a role to play in why it happened but who may suffer because of it; that is why they call it an equitable waiver. Mrs. Minehan stated that they bought the property knowing that. P. Monzione stated that he understands that; he is just pointing out what they are going to need to consider as they make their decision. He does not want her to think that what she is pointing out is being ignored; it just may not play into the criteria the Board needs to look at.

There was no further public input; public input was closed.

P. Monzione offered the applicant an opportunity to answer the points made during public input. Attorney McKenna stated that she felt P. Monzione had spoken well; what they are here about today is what is within the purview of the Zoning Board to decide what they feel is a mistake that has happened and dealing with the consequences of that. In dealing with surveyors, she would say that the surveyor who conducted this plan clearly felt there are two separate lots and they had been conveyed into separate ownerships and could survey it by meets and bounds to provide the survey he did. She is not at the benefit of knowing what other communications may have happened, so today the Zoning Board must limit to what is within the purview of the equitable waiver request.

P. Monzione asked if the issue of whether this is one lot or two lots been determined finally or adjudicated in some way, or whether there is still an outstanding question as to whether this is one or two lots. Attorney McKenna does not know of any; in looking at the deed, the lot 2 was described by meets and bounds and the description says it is together with the area that goes back, essentially having a parcel 1 and a parcel 2 described within the same instrument, but being two discrete parcels. The tax records support that they are taxed separately and have been for many years. The ownership of the two is in two different entities.

S. Miller asked if any action has been initiated against the Warner estate; Attorney McKenna is not aware of any.

The Board went into deliberation. P. Monzione stated that when you seek equity, you have to show that through no fault of your own – you need to be an innocent party – and the abutter brings up the point that the owner purchased with full knowledge of the problem; that gives him concern whether that constitutes somebody who is fully in a position to seek an equitable remedy. As he looks at the criteria, he notes that the Board has to focus their decision on each of the criteria on what was going on at the time this was built. That is the violation. The violation in this case is building a structure into a setback. There may have been other violations of Warner knowing something and not telling the buyer or the buyer maybe not looking as much as he or she should have and due diligence or whatever, but he does not think those are the violations, if they are violations that the Board is allowed to be considering.

T. Kinnon agreed, to a point. What causes concern for him is that testimony has been given that the Warners knew of this violation in 2008; there has been no evidence presented other than testimony that the Warners know of this in 2008 and decided to do nothing about it. The question that comes to his mind is whether they also know about this in 2006; if they knew about it in 2008 and did nothing about it, they could have known it in 2006 and done nothing about it. This is a case he feels very perplexed about because they have new owners of the property who are very honest; very forthright. They discovered the problem and brought it forth to the

town's attention. If they didn't bring it up, they wouldn't be here right now. Do they get penalized because the previous owners are not as forthright and honest? That is a very tough question because in 2008 the Warners know about the violation and did nothing about it; now he questions their integrity.

P. Monzione explained that they do not know with a lot of evidence; someone has told them what the Warners knew. For someone to say what the Warners knew either requires that person to know what is in the mind of another or to present some documentary evidence or something the Board can rely upon that would demonstrate what the Warners knew. It is very difficult to have evidence of someone's state of mind or knowledge, and for one witness to say what was in the mind or head of another individual back in 2008 without substantiating it with documentary evidence is important to him. He knows there was reference that they had it surveyed. But, these criteria require the Board to determine what went on at the time of the violation; the violation being the building into a setback. That is what violates the regulation. Maybe they're right; the Warners may have known about it in 2008. He is not sure if the evidence tells them that or doesn't, but what did the Warners know when it was being built? He does not know that you can rightfully extrapolate from what has been determined they knew in 2008 to what they really knew in 2006. Where is the evidence of what they know in 2006? That is what troubles him. As he looks at this, they have to look at 2006 when they determine the criteria.

WORKSHEET

P. Larochelle stated that, after reviewing the application and hearing all the evidence and testimony regarding the appeal request before us, the Town of Alton Zoning Board of Adjustment has determined the following:

1- The violation **was not noticed** or discovered by any owner, former owner, owner's agent or representative, or municipal officer until after a structure in violation had been substantially completed or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value.

T. Kinnon agreed; he believes the violation was not noticed any owner, former owner, owner's agent or representative, or municipal official until after a structure in violation had been substantially completed. He is some basing that on the strict guidelines of evidence they have been presented with; they have had some testimony that there could have been some thing discovered in 2008, which is 2 years after the certificate of occupancy. If there was hard evidence submitted, he might feel differently, but with the evidence that has been presented here right now, he does not think it was noted or discovered until after it was substantially complete.

P. Monzione asked P. Larochelle for clarification on his determination of this criterion, as P. Larochelle had gone back and forth on this. P. Larochelle asked if they were talking about 2006; P. Monzione stated that they were. P. Larochelle declared that in 2006 he feels that the violation was not noticed.

P. Monzione agreed that the violation was not noticed by any owner, former owner, owner's agent or representative, or municipal officer until after a structure in violation had been substantially completed. The only reason he says this is because there is nobody in the room, and there is no evidence that has come forward that would show that Mr. Warner as the owner knew that the deck was in the setback prior to the time it was substantially completed. He has to feel that if the Code Enforcement Officer knew that, then he would have stopped it; he certainly would not have been permitted to issue an occupancy permit. The evidence supports the fact that neither the code enforcement officer nor the owner knew until after the deck was built that it was in violation.

S. Miller stated that the violation was noticed and it was discovered by the owner, by his own admission, prior to the closing. Prior to the closing, it may not have been the economically right thing to do, but he had the legal ability to walk away from a property with significant legal concerns. He in fact did have other alternatives; he could have rented; he could have taken legal action against the Warners; he could have negotiated with the Warners at the last minute for some type of equity relief. P. Monzione clarified by questioning that S. Miller is talking about the closing. S. Miller stated that the violation was noticed by the owner Lucontoni, prior to the closing.

P. Monzione asked S. Miller if the violation was noticed by any owner prior to the structure being completed; S. Miller answered that there is no way of determining that. The original owner Warner may have known that; there is no evidence to the contrary. The Board does not know if everything was totally above board on the original construction. P. Monzione explained that the only reason he is questioning S. Miller is because the criteria and the statement the Board has to make on the finding of fact is asking the Board to determine whether the violation was noticed or discovered by any owner or former owner until after a structure in violation had been substantially completed. S. Miller answered that he does not know about the first but they know about the second.

2 - T. Kinnon stated that the violation **was not** an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation or bad faith on the part of any owner, owner's agent, or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owners' agent, or by an error in ordinance interpretation or applicability made by a municipal office in the process of issuing a permit over which that official had authority. He went on to say that he feels this was not an outcome of all the reasons stated because of the evidence that has been submitted this evening. When the error was noticed by the present owners it was brought forward to the town's attention. This is not something the town went after or looked for or somebody had presented to the town to look for. There was testimony to that, but again there is no hard evidence. There is no documentation that has been submitted to prove that there was actually an attempt made to have this error looked at by the town. As far as the Building/Code Inspector, he was relying on information provided by the owner at the time – the Warners. The error on that part he is not sure if that is clear or not – it is hard to know what people are thinking back in 2006. Based strictly on the evidence that has been provided, he does not believe it was an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, or misrepresentation.

P. Monzione shares S. Miller's concern and thoughts about a lack of evidence and how the Board can make some of these findings based on what little evidence they have. He thinks they have to go by what is in front of them, and what is in front of them shows that this thing was built in the setback based on drawings and plans. He does not think the person who built it knew he was in the setback; there is no evidence that the owner knew he was in the setback; there is no evidence that the Building Inspector know it was in the setback, all until after the thing was built. He is going to find that the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation or bad faith on the part of any owner. The reason he is going to find that is because no one has given evidence to establish that. Instead, this was caused by a good faith error in measurement or calculation; he heard some evidence of that; the people who built this were relying on the wrong determination of where the lot lines were based on descriptive language in a deed rather than on a surveyor's plat. He thinks the Code Officer also was in error when he allowed a building permit on this and allowed a certificate of occupancy, and therefore he was not aware of the violation either.

S. Miller asked if when they are talking about this second item, they are talking about the current owner or the prior owner; P. Monzione stated that he wishes he could be more definitively helpful on that. His interpretation of this is that they have to look at when the violation was done; when he looks at the criteria they seem to be putting this at the time the deck got built. What was aware of what? He thinks they have to look at the evidence and say, "When they built this deck and put it in the setback, did they know they were doing it?" If they did, no one is entitled to any relief. But if they didn't and it was an accident and the town let them do it, that is what the Board needs to determine.

S. Miller stated that he is going to do this – for the Warners, the violation was an outcome of ignorance of the law or ordinance. The reason is the very fact that the mistake took place, unless you can prove they did it on purpose, one will assume ignorance. The violation for the Warners, he does not believe was a failure to inquire; he is going to have to assume someone did a survey when they subdivided the property at some point. There had to be a survey done at that time. The Warners - the violation was by obfuscation; he believes they had to know at the subdivision whether a house could be built there at that time and representation, he has no idea. In terms of the current owners, the Lucontoni's, the violation was not an outcome of ignorance of the law or ordinance – that came from testimony. The violation was not failure to inquire – they know about it prior to

closing. The violation was not by obfuscation – they're honest people. The violation was not by misrepresentation – they're honest people. He believes there was bad faith on the part of the original owner.

T. Kinnon made a motion to continue this case in order to seek legal advice; the Board is all over the place and this is a far more complex case than it appears to be on the surface. Because of the multiple owners; because of the time line; he feels the Board would be doing all parties involved a disservice if they do not seek some legal counsel on this. S. Miller seconded the motion.

P. Monzione stated, in discussion of the motion, he would say that they have to confine themselves to the evidence as it was presented. He is not sure that is going to get any better by continuing this. He does welcome the motion and the opportunity to get some additional legal guidance for the members of the Board on how to deal with the evidence they do have. He has to say that the criteria require the members to make some very specific factual determination based on events that occurred a while ago, and based on very limited evidence that is in front of them. He thinks it is a good motion and a great idea that they do that.

The outcome of the above motion was four votes in favor and none opposed; motion passed.

P. Monzione explained to the applicant that the Board has ruled on a motion that will continue this matter; this typically continues the case to the next ZBA regularly scheduled meeting which would be October 6, 2011. If that is a problem, the applicant would typically have an opportunity to choose a date. There is a procedural rule that grants two continuances upon request without any consequence to the applicant of having to reissue fees or whatever, but those are usually continuances at the request of the applicant. When something like this is granted it is usually with the understanding that it will not count as one of the two continuances and asked T. Kinnon if that would be part of his motion. T. Kinnon agreed that this would not be one that would be counted against the applicant. P. Monzione asked Attorney McKenna if October 6, 2011, would be agreeable to her; she stated that she would say yes preliminarily, but will check her calendar to confirm and inform the Building Office by close of business September 2, 2011.

P. Monzione stated for clarification to the applicant and for the record that when the Board does come back, at least as of this moment, they will remain at this status where public input has been closed, and the Board will be in the deliberative process. However, it may be, after advice of counsel, as they have in other instances, they may make a suggestion to the applicant to provide more information. Officially, when they come back, the Board will not be receiving any public input but will be in the deliberative stage and will try to make a decision.

Case #Z11-16 was continued to October 6, 2011.

VIII. OTHER BUSINESS

A. Previous Business: None

B. New Business:

1. Tyler Phillips for Robert H. Carlton, discussion of proposed changes to site plan.

After discussion, members agreed that proposed changes to the site plan are substantive enough to require that the applicant come back before the ZBA for possible changes to the Conditions of Approval.

2. Roger Sample, representing Ronald Bell, to see if proposed changes to building plans requires return to Zoning Board of Adjustment.

After discussion, members agreed that proposed changes to the building plan are substantive enough to require that the applicant come back before the Zoning Board of Adjustment

C. Minutes: July 7, 2011 – Acceptance was postponed to a future meeting.

IX. ADJOURNMENT

S. Miller made a motion to adjourn. Tim Kinnon seconded the motion which passed with four votes in favor and none opposed.

The meeting adjourned at 10:53 p.m.

The next regular ZBA meeting will be held on October 6, 2011, at 7:00 p.m.

Respectfully submitted,

Mary L. Tetreau
Recorder, Public Session