

**TOWN OF ALTON
ZONING BOARD OF ADJUSTMENT
MINUTES
Public Meeting
September 2, 2010**

I. CALL TO ORDER

Paul Monzione, Chairman, called the meeting to order at 7:00 p.m.

II. INTRODUCTION OF PLANNING DEPARTMENT AND ZONING BOARD MEMBERS

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

- Mike Garrepy, Interim Planner
- Stacey Smith, Planning Assistant
- John Dever, Building Inspector and Code Enforcement Officer
- Lou LaCourse, Clerk
- Steve Miller, Member
- Timothy Morgan, Vice-Chair

Timothy Kinnon, Member, was not present at this meeting.

III. APPOINTMENT OF ALTERNATES

There are four members of the Zoning Board of Adjustment present so there is a quorum; they are able to proceed with all cases on the agenda.

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

There were no changes to the submitted agenda.

T. Morgan made a motion to approve the agenda as submitted. L. LaCourse seconded the motion which passed without opposition.

VI. CONTINUANCES

Case #Z10-18 Matthew and Catherine Bell	Map 34 Lot 33-14	Special Exception 75 Mount Major Highway
--	-------------------------	---

Application submitted by Roger Sample on behalf of applicants Matthew and Catherine Bell to request a Special Exception from Article 300 Section 320 B2C and A4 to allow the expansion of a non-conforming structure beyond its existing footprint to add a 9'4" X 16' deck to the rear of the home. This parcel is located in the Residential Zone.

Mr. Sample came forward to present this case. P. Monziona asked if he would refresh the Board as to why he was continued. Mr. Sample explained that the reason for the continuance was because he missed the first Thursday of the month last month; he was a no-show. P. Monziona explained that sometimes an application is continued because something goes on at the hearing requiring additional time; he had been unable to recall what they were waiting for in this case. The reason this was continued was because the applicant was a no-show. Mr. Sample agreed, but also stated it probably would have been continued anyway, waiting for the Shoreline permit.

T. Morgan surmised that the application has not been accepted as complete; P. Monziona agreed. The Board reviewed the application for completeness.

A memo from the Code Enforcement Official was handed to the members by S. Smith.

There is a site plan dated with a 6/25/2010 submission date, color photos, the application, a narrative, a sketch, and a copy of the Shore Land permit, which was just received today.

L. LaCourse was concerned that the location of the building envelope was not depicted on the plan, showing its allowable space. P. Monziona asked the applicant if there is an indication anywhere on the site plan that would show the setbacks. Mr. Sample stated they should all be on there (the plan). P. Monziona asked about the building envelope and asked if it is depicted on the plan. He explained that the question at this point is whether the application is going to give them enough information. John Dever explained that this is located in the Christian Conference Center and that part of the building is in the 25' front setback from Route 11; the rest of the building setback just goes out from there. The rest of it is in the building envelope; there are no side or rear setbacks to this particular structure because of the size of it. This is part of a line of cottages that were built right on the road, so part of it is in the road setback. There is no specific building envelope for each one because this is all one parcel of land. P. Monziona explained that the one owner of that parcel, the Campground, was at the last meeting for a density variance regarding the total number of cottages there. This would be one of those cottages included in the total density of that lot. Now they are dealing with the idea of adding a deck to just that one cottage.

S. Miller made a motion to accept the application as complete. L. LaCourse seconded the motion, which passed without opposition.

Mr. Sample explained that he had been before this Board before concerning prior additions. They had pulled the deck off the project before because they had to get the Shoreline Permit. Earlier this year, in talking with the State, they thought that if they kept the deck under 150 square feet they didn't need a Shoreline Permit; that's why the deck is 9'4" instead of 10'; that keeps it under 150 square feet. They put that up and then John (Dever) said it was over 30" off the ground so it had to come back down. There is a picture of it up; now it is back down waiting to go up. L. LaCourse clarified from the pictures what the difference was between "up" and "back down." One of the pictures looks like it is about 18" off the ground; the color picture looks like it is 6 or 7 feet off the ground. Mr. Sample confirmed that there is one of each.

P. Monziona asked the applicant if he had seen the various reports from town officials. Mr. Sample answered that he may have, some time ago. P. Monziona suggested he take a minute to look at those; there is one from the Code Enforcement Officer, one from the Fire Department, and one from the Police Department. The applicant reviewed the reports from department heads. The applicant confirmed that he had seen the reports before.

P. Monziona asked the applicant if there was anything further he wanted to tell the Board about this, before they started asking their questions. Mr. Sample stated that it is pretty much straightforward; the one question they had before was about the propane tank. It has been moved and the new location is on the map. It's out of the roadway; it will not keep any fire vehicles from getting in, it is not a police issue. It should pretty much be a clean issue.

P. Monziona questioned some handwritten items on the site plan. This is a plan done by Varney Engineering; in addition to what the engineer did, someone handwrote in the proposed deck and propane tank. He asked the applicant if he was depicting where the deck is going to be located on the structure; he has written that in on the site plan done by the engineer. He has also indicated on the plan that he, not the engineer, has put in where the propane tank is going to be. Mr. Sample confirmed P. Monziona's statement.

P. Monziona stated that this structure has been the subject of previous applications for special exceptions; he asked the applicant to clarify what the special exception had been for. Mr. Sample explained that it had been to square off a porch and make it into living space. P. Monziona asked if that made the structure more non-conforming; Mr. Sample answered that it did not. P. Monziona asked if they had stayed within the footprint; he knows it is already granted and he is not trying to relive that. Mr. Sample answered that it made it more conforming because the house is now all hardy board, so it is fire retardant and it is more structurally sound. P. Monziona added that, as John Dever had pointed out, this is a non-conforming structure because it is in the 25' roadway setback. Mr. Sample agreed and added that it is also on the Campground, and any structure on the Campground is automatically non-conforming. Any house built prior to last January could be considered non-conforming because they are not up to electrical codes that change all the time. P. Monziona pointed out that he is just talking about the non-conformity as it applies to zoning regs, not those concerned with building regs.

P. Monziona asked if by putting this deck on this structure, it would result in the structure going even further into the setback in any way. The front of the structure is in the 25' setback; they are building onto the back, so they are not going further into the setback. The applicant concurred. P. Monziona asked what the size of the finished deck would be, what it would look like, and what its purpose would be. Mr. Sample answered that the deck would be 16' X 9'4"; it was framed to be less than 150 square feet. P. Monziona asked if there would be anything on top of it; Mr. Sample answered that there would be just railings; there will be no stairs and no roof. Access to and from the deck is from the house. P. Monziona asked if a deck of that size without stairs is within building code; John Dever confirmed that it is.

L. LaCourse asked if there is going to be only one point of egress from the house. This is from the kitchen door; there is also a main door on the side of the house. The kitchen door will go to the deck. L. LaCourse observed that there are no stairs, so it is not a point of egress. Mr. Sample explained that it is five feet off the ground; there are three exit doors, as there is also a porch off the front of the house. They could go out the front, the side, and off this deck.

P. Monziona asked if the deck goes into the Shoreline setback. Mr. Sample answered that it does, in both directions; it is between two bodies of water. P. Monziona confirmed that in order for the deck to be built, the applicant needed the permit from the DES; that has been submitted tonight. Mr. Sample pointed out that to the top left of the permit it says "Approved."

P. Monziona invited further questions from the Board. S. Miller asked about the present location of the propane tank; he questioned how far it is from this house and how far it is from the nearest neighbor to the north. Mr. Sample answered that it is probably 8 feet from the cottage to the north, 5 feet from the subject cottage, and 10 feet from any electrical source. S. Miller queried P. Monziona; when the Campground was in last week, they stated that because of the issues with tanks at the time of the fire, the tanks would be buried on all new construction. He asked if it is within the Board's purview, but he would like to see that when people come in for a special exception, and there is additional building, that the propane tanks be buried, if possible. By moving the tank further out, it is putting the next cottage in danger. He thinks this is a serious issue for the Board to look at going forward. He does not know if it is within their purview that if a special exception is requested, they have to bury the tank. P. Monziona explained that it is within their authority to impose specific conditions on the granting of an application for either a variance or a special exception. Those conditions, where appropriate can certainly be added to the granting of it. They would have to see. When the applications were granted for the Conference Center, they conditioned it specifically on the plan as it was detailed to the Board. If the applicant told the Board that all new

construction tanks would be underground, and they made the granting of those variances conditioned on that, they have to stick to those plans. As far as the new construction up there, they have imposed that condition, as far as he is concerned, with the granting of the variances they did for the rest of the Campground. As to this dwelling, he asked what is causing the placement or relocation of the propane tank. Mr. Sample answered that it had originally been on the back of the house, but was moved at the request of the Board. They moved it to the side of the house where there is already an air conditioning unit and the incoming power, both of which have a spark, so it had to be 10 feet from either of those. There is another footage for windows; where it is is where it needed to be. P. Monziona restated his question; by virtue of wanting to construct this deck onto this structure, they had to relocate the tank. Mr. Sample answered that they did not; the tank was relocated a long time ago and did not get moved for this deck. Originally it was where the deck is going. L. LaCourse asked Mr. Sample to explain what he considers a long time ago. Mr. Sample answered that it was last year or maybe two years ago. With permission from the chair, John Dever asked the applicant if moving the tank was part of the previous special exception. Mr. Sample answered that the tank was definitely an issue in the previous one, and they were to be moved. John Dever confirmed that it has been moved since the construction for the last time around; this construction was done in 2009.

Mr. Sample stated that the new construction is prime for this (buried tanks), and that is the way to do it; one underground tank and then meter it. They are not putting a 120 gallon tank underground; when they go underground, they are putting in a big tank. P. Monziona commented that they had been told that all the individual cottages that are being built are going to have their propane tanks underground. Mr. Sample agreed; it would be all one tank with lines running off of that. John Dever corrected him; it will be individual tanks. P. Monziona added that they had also been told that they would be 100 gallon tanks, and that when asked, the Board was told that would be sufficient for year round homes.

L. LaCourse added his concerns about the location of the tank; it is up against a retaining wall. If something were to happen, the retaining wall would protect the cottage next to it, but would intensify the blast back at the subject cottage. P. Monziona commented that when they deliberate, they can discuss that in greater detail.

P. Monziona invited further questions from the Board, or comments from the applicant. There were none.

P. Monziona opened the floor to public input, both in favor of or in opposition to this application being granted. There was none. P. Monziona asked if Code Enforcement would like to add anything. John Dever reiterated that the deck had been constructed, and then he had a conversation with the applicant who then realized he would need permits from the town and from the state. His original intent was to have a freestanding deck, which does not require a permit in certain cases; this is not one of them. Hence, he has stepped back and approached the Board. When he got his original Special Exception it was commented by the Shoreline Protection people that if they were to add a deck to the back it would require a CSPA permit. At that time they did not move forward with it. Now they have approached DES and have their permit from them; it would require a permit from the Campground before he gets a permit from the Building department, if he is granted the Special Exception for the deck. The Planner's notes from the original hearing that talks about the propane tanks would be that the deck would involve a point of egress; it could be considered a place of refuge or something to that effect. That was part of the impetus, where they had already moved the tanks anyways. He inspected it several months ago for the CO and the tanks had been relocated at that point as part of the original concern to get it out from the back of the building, where the road goes down through there. The cottage itself is wholly within the Shoreline setback from both sides of the water there. He has not seen what the other Department Heads had to say; he could see that one of the Fire Department's requests would be that the deck not encroach within 20 feet of the next structure in any direction so they could pass through. P. Monziona stated that the Fire Department had provided no comment and the Police Department provided a comment that it would be a safety hazard to have to deck there, and that the Police Department would like to see no further structure added to this, for safety purposes. P. Monziona asked John Dever, to his point of 20 feet of clearance from other structures so that equipment could pass through, if this deck will provide that 20 feet of clearance. John Dever was not certain as he had not measured; Mr. Sample stated that they are parallel with houses

all the way along. The closest house is on the gas tank side. There was further discussion concerning how close the nearest structure is; it was finally decided that the site plan shows the locations of existing structures and with 10 feet added for the width of the deck, it would be 22 feet to the nearest structure.

S. Miller asked how high the retaining wall is; it is 3 feet tall.

Public input was closed.

Deliberations began. P. Monziona clarified that this is a Special Exception that is being sought under Article 300 Section 320 A4, part of which says that the ZBA will not grant such special exception unless the proposed expansion is clearly not a new use; it is not changing use and is still residential. It will not have an increased detrimental impact on the neighborhood and will not increase any existing non-conformance of the building, of setbacks, or lot coverage. He thinks the increase in non-conformance of the setbacks is because of the Campground, so the only issue of setbacks is that it does increase the Shoreline Protection setback, but he has a permit from DES for that. The increased detrimental impact is an issue that Steve (Miller) is talking about with the propane gas tank. If you look at 320 B2C, which is the other, it says that the ZBA will not grant Special Exception unless the proposed expansion will not have an adverse impact on abutters or on other property owners who are located within 500 feet of the subject property; that again addresses the issue of the propane tank, which could possibly have an adverse impact on abutters. Not so much on the value of properties in this case, but on safety. When the issue was raised as to whether a condition be imposed that the tank be underground like all the other new construction that will be up there, he would say that given what the regs say, in order to avoid or eliminate a potential adverse impact, requiring as a condition that the tank go underground, he thinks is completely appropriate, if they get to that point. T. Morgan added that his thought would be to severely limit what can actually be built there; a platform with safety railing, and that there be no roof put on it or sides put on it, and that there be no stairs so as to minimize the impact of this construction. L. LaCourse spoke about the height of the deck; it is less than five feet, so if anyone needed to get off the deck in an emergency, they could do so without serious injury. P. Monziona added that stairs would encroach further into the neighboring structure; at that height it is okay.

SPECIAL EXCEPTION WORKSHEET

1 – T. Morgan stated that a plat **has** been accepted by the Planner in accordance with Alton Zoning Ordinance Section 520B and a recommendation has been made. All members agreed.

2 – L. LaCourse stated that the specific site **is** an appropriate location for the use. S. Miller agreed. P. Monziona also agreed and added that it is a residential building and having a deck is an appropriate structure for a residential unit such as this, and that is what the use is going to be. T. Morgan also agreed.

3 – S. Miller stated that factual evidence **is not found** that the property values in the district will be reduced due to incompatible uses. The use has not changed, and his only concern, if there is any, is still safety. P. Monziona agreed that the use has not changed and they have had no evidence from anyone, abutters or otherwise, that the property values in the district will be reduced. T. Morgan and L. LaCourse also agreed.

4 – P. Monziona stated that there **is no** valid objection from abutters based on demonstrable fact; there were no objections at all. All members agreed.

5 – T. Morgan 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. There has been discussion that there will be a minimum of 20 feet clearance for fire, safety, and rescue equipment to get in there, and it does not appear to impact on the road which runs behind, so he does not believe there is any nuisance or undue hazard. L. LaCourse and S. Miller agreed. P. Monziona also agreed for the reasons given by T. Morgan.

6 – L. LaCourse stated that adequate and appropriate facilities and utilities **will** be provided to insure proper operation of the proposed use or structure. This goes to the question of the propane tank and as long as the propane tank is underground, he feels it will meet this. S. Miller agreed adding that the Board has a responsibility to the abutters as well as to the owners to keep everybody safe; he would stipulate that the tank would have to be underground. P. Monziona agreed that adequate and appropriate facilities and utilities will be provided; this is just going to be a deck and will have no facilities or utilities. T. Morgan agreed.

7 – S. Miller stated that there **is** adequate area for safe and sanitary sewage disposal and water supply; there are no additional bedrooms or living spaces being created, and there is no need for any expansion of sanitary sewage disposal or water supply. All members agreed.

8 – P. Monziona stated that the proposed use or structure **is** consistent with the spirit of the ordinance and the intent of the Master Plan. The use isn't changing; the structure itself is a deck, which is consistent with residential use and consistent with a dwelling structure of this type. All members agreed.

T. Morgan made a motion to approve application Z10-18 with the following conditions:

- 1 – The structure is to be nothing more than the deck surface, five feet or less from the ground, with safety railing all around, but no roof, no sides, and no stairwell.**
- 2 – The propane tank that serves this residence is to be put underground in conformity with codes for doing such and in the same manner as residences to be constructed in the Conference Center.**
- 3 – There is to be a minimum of 20 feet of clearance from the nearest residence maintained with the construction of this deck.**

L. LaCourse seconded the motion which passed with all votes in favor of approval with those conditions.

VII. NEW APPLICATIONS

Case #Z10-20 Robert Mueller and Margery Thomas	Map 19 Lot 33-1	Special Exception Drew Hill Road
---	------------------------	---

Application submitted by Robert Mueller and Margery Thomas to request a Special Exception from Article 300 Section 328C Height Restrictions, to allow a cupola on top of a proposed dwelling with a barn-like façade. The height limitation is 35 feet and the total height with the proposed cupola is 41 feet.

P. Monziona read the case into the record. Robert Mueller and Margery Thomas Mueller came to the table to present.

The Board reviewed the application for completeness. T. Morgan asked if there is a plat for this plan; there is a small one that is included in the packet. P. Monziona asked if there are photos or renderings with this application; they are also in the packet. Referring to the copy of the Town of Alton tax map included in the packet, P. Monziona asked if the highlighted area shows the boundaries of the lot; Mr. Mueller answered that it does. It is about one acre or roughly the size of a football field. L. LaCourse asked if the lot is open to the neighbor across the street; Mrs. Mueller explained that the neighbor is not across the street, but next door. P. Monziona asked if there is a depiction of the structure's location on the property in regard to setbacks, rights of way, etc.; it is in the packet.

T. Morgan made a motion to accept the application for Case Z10-20 as complete. S. Miller seconded the motion which passed by unanimous vote.

Mr. Mueller explained that they are building a residence; they wanted to design the residence in keeping with the style of buildings that would represent a barn-look. They are designing this so that the bulk of the living quarters are on the second floor. They are also designing the building to be environmentally correct and with many green attributes. They are using geothermal heat sources with heat pumps; they are also going to use radiant heating. In

all respects, they are going to maximize the use of these sources. The cupola on top of the building is really part of that; in addition to being aesthetically attractive to the building because there is a fairly long roof line that the cupola will sit in the middle of, it will also provide for light and ventilation because the windows in the cupola will be operational.

Mrs. Mueller added that the proportions of the roof structure are enhanced by the height of the cupola; it is all in a geometric form that looks good together. Nothing should look odd. Anything smaller would look like a squat thing sitting on top of it, and that's why the height is designed the way it is, so it can maximize the light and the width.

Mr. Mueller explained that, as noted on the plot plan, they have positioned this building in favor of the far corner of the lot. They also plan to do a lot of planting; they will have several trees and have a fairly attractive driveway and entranceway into the building. The land has been graded, but before they graded they took out a few scrub trees along one edge of the land which is to the far side of the property. The land was entirely open before they started with the grading. They did not knock down a lot of trees or anything.

P. Monziona asked if there was anything they would like to add before the Board started asking their questions.

S. Miller asked about the trees to the back of the property; that is a neighbor's property. The neighbor is to the right; if you go straight back from the property some yards, you will be on Route 28. The land directly behind belongs to the abutting neighbor. The property across the street is just a wooded lot.

T. Morgan asked for a description of the cupola from the inside; he wanted to know if it would be suitable for occupancy. The Mueller's assured him it was not; the cupola is open to the interior. The cupola will be sitting on the roof and will only be accessible by ladder. The windows will be electrically controlled. There is no floor in the cupola; there is a cathedral ceiling in the house. The whole idea of the cupola is to bring light in; it is open to the space below.

P. Monziona asked if there were any comments from the Fire Department; John Dever answered (reading from the Fire Department comments) the roof is within fire department access limits and the cupola will not affect fire access in relation to the main building. They have no basic concerns; they can get to it if they need to.

P. Monziona confirmed that the total lot size is roughly one acre; he asked if they abut Route 28 at all. The parcel next to them goes back and then behind their lot. Their lot is really a subdivided piece of property.

T. Morgan asked what affect construction of this cupola would have on the views of neighboring pieces of property. Mr. Mueller answered that there would be no obstruction of views; as far as the appearance of the building, it will be an enhancement.

S. Miller asked if they had hired an architect to design the plans. The applicant answered that they had. S. Miller asked if, when the architect designed the building, he had a copy of the zoning ordinance available to him. With that, he determined that there was no aesthetic alternative at all, besides this cupola, given their constraints. If it's not just a standard template plan, and it is designed from scratch, why could he not design something to code? Mr. Mueller answered that he has designed the building within code, but they wanted to have the cupola on top because they felt it would enhance the appearance of the structure and also add to the light and ventilation of the structure. They also felt that they could have the same structure and possibly put skylights in the roof, which he thinks is aesthetically less attractive and also skylights tend to generate heat, which they are not looking to do. They felt that the architect was following their instructions, and they were aware that there is a height restriction. They are not attempting to go outside the code; they are attempting to build what they think will be the most attractive and most useful building to them with the utility they want. They appreciate the question. John Dever added that the architect had contacted him; he is based in New York. When they discussed height restrictions he did inquire if there was anything else and they talked about Special Exceptions and that if they meet certain parameters, they are

generally looked upon favorably. There are no guarantees, but using it essentially for light and whatever, not access or living space...

P. Monziona referred to the statement made about having finish grade out there and asked if the structure is in place. The Mueller's answered that it is not; just the foundation is there. P. Monziona explained that some time after the structure is built, they are going to do finished grading around the structure; he is wondering how they came up with the 41 feet because generally the determination of the height of a roofline or in this case a cupola would be based on an average of finished grade measurements taken around the structure. He asked if the 41 feet is based on an anticipated finished grade level; if they bring the grade up higher it might be 3 feet above the height restriction as opposed to 6 feet above. What they are saying in their application is that they anticipate that when the finished grade is all done, the average – he asked if the grading would be all level. Mr. Mueller answered that it will be level; he believes the numbers they are using are correct, but it could be less as a result of the grading they have done. They have had the engineering report from the septic engineer. He is not sure if it will be any less.

P. Monziona asked about the overall dimensions of the cupola. Mr. Mueller answered that it is 9' X 9' square. He asked about the height off the ridge; the roof is 35' and the cupola is 6 feet off the ridge. P. Monziona asked if the elevation they have provided depicting the cupola indicates some sort of spire or structure coming off the peak of the cupola; Mrs. Mueller answered that it is a lightening rod.

P. Monziona invited further questions from the Board or further comments from the applicant. There were none.

P. Monziona opened the floor to public input both in favor of and in opposition to this application. There was none. Public input was closed.

SPECIAL EXCEPTION WORKSHEET

1 – L. LaCourse stated that a plat **has** been accepted by the Planner in accordance with Alton Zoning Ordinance Section 520B and a recommendation has been made. All members agreed.

2 – S. Miller stated that the specific site **is** an appropriate location for the use. It is in a proper Rural Residential Zone and appears to be an aesthetically pleasing home; he finds it to be very appropriate. All members agreed.

3 – P. Monziona stated that factual evidence **is not found** that the property values in the district will be reduced due to incompatible uses. There is no evidence before this Board that would indicate at all that any property values would be reduced because of this cupola at 41 feet; in fact based on the architectural renderings and elevations and the description, this will be a beautiful building that may very well enhance property values. T. Morgan agreed and added that it is not an incompatible use with the other uses in the area. S. Miller and L. LaCourse agreed.

4 – T. Morgan stated that there **is no** valid objection from abutters based on demonstrable fact; there was no input at all from abutters or other members of the public. All members agreed.

5 – L. LaCourse 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. S. Miller agreed. P. Monziona agreed adding that none of those items are impacted by this cupola. T. Morgan agreed.

6 – S. Miller stated that adequate and appropriate facilities and utilities **will** be provided to insure proper operation of the proposed use or structure. The cupola has no bearing on any of these elements. All members agreed.

7 – P. Monziona stated that there **is** adequate area for safe and sanitary sewage disposal and water supply; sanitary sewage disposal and water supply have nothing to do with a cupola. All members agreed.

8 – T. Morgan stated that the proposed use or structure is consistent with the spirit of the ordinance and the intent of the Master Plan. He thinks it is a nicely designed structure that will be pleasing visually and it is within the spirit of the ordinance. L. LaCourse and S. Miller agreed. P. Monziona agreed, adding that the Special Exception specifically mentions cupolas and so it is consistent with the ordinance, and the Master Plan deals with rural character, and this architectural structure is certainly in the rural character.

T. Morgan made a motion to approve the application for Case Z10-20 as presented. S. Miller seconded the motion which passed by unanimous vote.

Case #Z10-24 Heidi Beaudoin	Map 4 Lot 21	Variance 141 Tibbetts Road
--	---------------------	---------------------------------------

Application submitted by Heidi Beaudoin to request relief from Article 400 Section 452B Restrictions Governing Use to allow the subdivision of land owned by Robert and Judith Tibbetts; with the proposed new lot(s) not having the required 200 feet of frontage on a Class V or better road. This parcel is located in the Rural Zone.

P. Monziona read the case into the record. Heidi Beaudoin, Robert Tibbetts, and Tim Bernier of TF Bernier, Inc., came to the table to present.

The application was reviewed for completeness. P. Monziona noted that there is an engineered plan, the application itself, a narrative, photos, and a large size site plan.

S. Miller made a motion to accept the application as complete; L. LaCourse seconded the motion which passed without opposition.

Tim Bernier or TF Bernier, Inc. is the surveyor who prepared the plans with the help of Paul Derbyshire. He also assisted in the preparation of the variance request. This application has been going on for a while; they had a few meetings at the Planning Board; an application had been made for subdivision approval by the Planning Board. There were a few meetings there; several months went by and a lot of research was done in town on the status of Tibbetts Road. It was determined by the town that in 1954 Tibbetts Road was discontinued all the way to the town line. This was news to the Tibbetts'; the Town of Alton has done major improvements to the road. The Tibbetts' have lived on the property since the early 1800's. The grandparents lived there in 1953 when the road was supposedly discontinued. There was a residence on the property and the sign that was erected that noted the Class VI road was after the house. The road has been plowed and continues to be plowed in the winter; it is actually plowed by the Town of Gilmanton through mutual agreement. Over the years, Alton has done the maintenance since 1953.

Since 1953 the property has been subdivided twice so there are now three residences; the original homestead lot which they are requesting zoning variance to subdivide tonight, Bob and Judith's house lot which was subdivided in 1974, and another lot was subdivided for Bob and Judith's other daughter 1998.

Mr. Bernier used a copy of the plan to illustrate a discrepancy in the paperwork from 1953 showing the road discontinued to the town line, but it has not actually been discontinued; it has been maintained the whole time. Using the plan he showed the property in relation to the town lines of Alton, Gilmanton, and Barnstead. Gilmanton maintains the road just about to where the end of the proposed lot is. L. LaCourse asked if the point Mr. Bernier had referenced on the plan is where the road is subject to gates and bars. Mr. Bernier answered that it is; that is also where the snowplows turn around presently. However, the paperwork says "at the town line" which is back here (indicated location on the plan). There is a discrepancy there.

He showed the location of the original homestead house. The parent tract is 47 acres and is part of the original Tibbetts Farm; this 47 acre piece is on the north side of Tibbetts Road. Tracie Tibbetts built a house down here

(indicated location on the plan) and lives there now. She lived in the house (the homestead) until 1998 when she built her current residence. At that time a building permit was issued, and this house has been in the family forever and was the original homestead, because the house had fallen into disrepair. They moved a mobile home onto the site; there was a condition on the building permit that only one of these residences would be occupied at any time. The intent was that the mobile home would be the residence while they fixed up the old homestead. That is still the plan today, and what they are trying to get to. L. LaCourse confirmed through questioning that there is only one family in these two houses. Mr. Bernier agreed; the condition of putting the mobile home on there was only one, and that was the intent.

Bob and Judith's other daughter, Heidi, and her husband Jim, reside in this home now. They've come to the point where they want to fix up the house, so they wanted to get a mortgage to get the money to fix the house and buy the property from their parents. They made application to the Planning Board asking for subdivision approval to subdivide the house from the farm, and that is when the research started and they came into this issue. The proposal tonight will not change anything; there are three residences on Tibbetts Road now; there are going to be three residences after tonight's meeting. There is not intent to create another building; the intent is to keep the far whole while allowing Heidi to own her residence, which will allow her to get money to invest in and fix up the house. That was the original intent when they applied to the Planning Board, and that's what they are still trying to accomplish today. L. LaCourse asked what happens to the mobile home; Mr. Bernier explained that when the house is fixed up, the mobile home would have to be removed. There will only be one residence on this lot, ever. S. Miller asked what the timeframe is on this; Mr. Bernier answered that they were roughly 6 months with the Planning Board. The goal had been to start in March with the repairs to the home. L. LaCourse asked for clarification of the location; as he is coming up Tibbetts Hill Road from Route 140, he asked if the house is on the left or the right. Mrs. Beaudoin explained that as you are coming up from 140 it is on the left; Halls Hill Road is on the right.

P. Monziona asked how many lots are there now on these 40 some acres; how many separate lots of record are there currently. Mr. Bernier answered that the original Tibbetts Farm has been there since the early 1800's; it is on both sides of Tibbetts Road. There is a 47 acre lot, and about 50 acres on the south side. The farm consists of about 97 acres. On those 97 acres, there is one residence, which is Heidi and Jim's. P. Monziona asked if it is one lot of record that is dissected by a road. Mr. Bernier explained that this is tax map 4, lot 21 which is a 47 acre lot with one house on it, which is Heidi and Jim's. P. Monziona attempted to clarify that there is one lot of record on one side of Tibbetts Road; in the history given, he (Mr. Bernier) had mentioned that there were a couple of subdivisions that had occurred in the 70's and the late 90's. What he is trying to understand now is how many lots of record now exist since these subdivisions have taken place. Mr. Bernier explained that on the north side of Tibbetts Road there are two lots of record and two residences, each lot having one residence. P. Monziona asked if the two residences were the mobile home and the old homestead. Mr. Bernier answered that one is the mobile home and the other is Bob and Judith's home which was subdivided in 1974 when they were the grandchildren. P. Monziona asked if the original farmhouse sits on a lot of its own. Mr. Bernier answered that the original farmhouse sits on the lot they are proposing. Mr. Tibbetts explained that there is their (he and Judith's) five acres at the beginning of the Tibbetts Farm, on the left side going into Tibbetts Road. Then there is the rest of that parcel, which is part of the farm and is where the trailer is. On the right side, his oldest daughter's home is further down; she has two acres there and the rest of the acreage is still part of the original farm.

P. Monziona asked if these other lots have frontage on Tibbetts Road. Mr. Bernier answered that they do. P. Monziona asked if any of those lots have frontage on any other road, besides Tibbetts Road; they do not. P. Monziona asked if they now want to take the original lot that the original farmhouse is sitting on and subdivide that lot and create two separate lots of record; the applicant agreed. P. Monziona asked if one of those lots would be the proposed lot being dealt with tonight, and the other would be the remainder, with the farmhouse. Mr. Bernier answered that the remainder lot has no houses; it is farm land. The parcel they are proposing to create includes the original homestead house; that is going to be subdivided off from the farm. It is presently not occupied; it has fallen into disrepair since the grandmother died in 1990. L. LaCourse asked if the parcel they have currently exists;

Mr. Bernier answered that it does not; that's the proposed parcel. The remaining 45 acres will stay with the farm. P. Monziona clarified that the lot they are proposing to create would be a lot that would have as its residence the original farmhouse, and the plan would be to fix that up. Mr. Bernier agreed. P. Monziona went on to clarify that they are not trying to put two residential structures on the lot, they are just trying to subdivide off the part of the farm that now has the original house, and to create a lot. Mr. Bernier agreed. P. Monziona asked how large the lot would be as proposed; it would contain the original farmhouse and how much land? Mr. Bernier answered that it would be 2.366 acres.

P. Monziona asked what would happen to the remainder of the farm. Mr. Bernier explained that it has been in the Tibbetts family for ever; Bob and His wife Judith would like to keep the farm. P. Monziona interjected that he did not mean logistically who gets it; does it end up being a land-locked parcel? Does it have road frontage? Does it have a residence on it? He is just trying to note the configuration of what they are creating and what they are leaving as a remainder. Mr. Bernier answered that the remainder has well over 1,000 feet of frontage on the Class VI portion of Tibbetts Road. Technically, after they do this subdivision, the Tibbetts' could go to the Selectmen and get permission to get a building permit on the Class VI or private road. That is not the intent; they talked about this earlier, that this may be a concern that there is an attempt to create another residence. That is really not the intent here. Bob (Tibbetts) would like to preserve the same right here as anybody else has, but he would be willing to accept a condition that, until they figure out – ultimately what is going to happen is that they are going to go back to the town and ask them to reconsider where this Class V road ends because it has been maintained and is nothing new. They can't get that resolved for a while; it is going to take some time – at least until the Town Meeting to get that resolved.

What they would be willing to do, if the Board is willing to grant the variance, is a condition that the Tibbetts' would not request a building permit on the remaining portion until the road issues get resolved. P. Monziona commented that the state statute allows them to go to the Board of Selectmen and request a permit for a Class VI road. That is a right they have. He is still trying to understand; after they take that parcel out with the farmhouse, the remaining parcels still obviously have their frontage on Tibbetts Road, and then the rest of the farm land that the farmhouse is currently on- there is one parcel that the farmhouse is on. If they take 2+ acres away and leave all the remaining acres, it still is going to have 1,000 feet of frontage on Tibbetts Road. Mr. Bernier confirmed that to be correct. P. Monziona went on to confirm that Tibbetts Road, as they understand it and as the Town of Alton is telling them, is a Class VI road. Mr. Bernier added that, or private; completely discontinued is what the town's attorney is calling it.

P. Monziona asked if any portion of Tibbetts Road right now is a public road. Mr. Bernier answered that is the problem; there is a problem with the written record because the written record says that in 1953 the road was discontinued to the town line. But, the town never stopped making improvements to the road; this residence existed on the road in 1953. The town continues to make improvements on the road, right up until today. They continue to plow the road through an agreement with Gilmanton.

P. Monziona asked if their application doesn't have to make clear what it is they are seeking so that, for example, the zoning regs. require that they have a minimum of 200' on a Class V road in order to subdivide as they wish to subdivide. They are seeking a variance to get out of that requirement to have 200' or better on a Class V road, but in seeking that variance, they probably need to tell...they are not saying they don't want any frontage on any road and they want a landlocked parcel that nobody could ever get to or from. That would be one thing they would consider; he advised Mr. Bernier that he needs to tell them whether, instead of having 200' or better on a Class V road, to have instead 200' on a private or Class VI road. Until they know what the road is for which they are seeking a variance, it kind of leaves a piece of the puzzle missing, at least as far as he is concerned. Mr. Bernier explained that right now town counsel is saying it is a private road because in 1953 it got discontinued to the town line; that is what the warrant says in today's book, so according to town counsel it is discontinued to the town line. So, for the purposes of this variance, they are requesting a variance to subdivide a lot on a road that does not have 200' of frontage on a Class V or better road, but rather the alternative they are seeking is to subdivide a lot that

meets all other aspect of zoning with that one exception. It only has frontage on a private road as the road has been discontinued. The unique characteristic of this land to other roads that have been discontinued is that it is plowed by a municipality, and it is maintained by a municipality, and there are three residences on it, on this section they are proposing.

P. Monziona asked if, as of now, the town is plowing all of the proposed frontage that would be the frontage for the proposed lot. It is not plowing the whole road; he has told them that. Does it plow all of what would be the frontage for the proposed lot? Mr. Bernier and Mrs. Beaudoin both answered that the plow turns around just past the house; it turns around in the driveway. L. LaCourse stated that it is Gilmanton that is plowing the road, not Alton. Mrs. Beaudoin explained that Alton will plow Upper Mountain Road on the back side of Alton Mountain because they are closer, and Gilmanton picks up this (Tibbetts Road). Mr. Bernier went on to explain that in order for Alton to plow this approximately 1,000 foot section of road, they would have to drive all the way around, into Gilmanton and up Tibbetts Hill Road to plow it. There is an agreement; they talked to the Road Agents about this and there is another road similar to this in Gilmanton, so the two road agents made an agreement to plow each other's road. This is a mutual aid agreement, and it happens pretty regularly.

S. Miller asked who owns the road, by deed. Mr. Bernier explained that under the present decision made by town counsel, it was completely discontinued so the center line of the road would revert to the property. S. Miller asked if it was taken over by eminent domain. P. Monziona asked if, when he (Mr. Bernier) says discontinued, is he saying that at one time this was a public road. Mr. Bernier answered that it absolutely had been; it went all the way through and connected, and prior to 1953, this was a town road back 150 years. P. Monziona asked if, when it was a public road, it was a Class VI road. Mr. Bernier answered that it was a Class V road. P. Monziona acknowledged that it was a Class V road at some point and asked if, in 1953, someone was saying that it discontinued being a public road. In other words, the municipality who had charge or ownership of it had the right to abandon or give it up, at which point under those circumstances, it reverts back to the abutting properties from the center line, because it is a right of way.

Mr. Bernier explained that the process to discontinue a road from Class V to Class VI a warrant has to be brought to town meeting and that warrant has to be voted on at town meeting and get a positive vote. In 1953, the Tibbetts' lived on this road; the residence was there and Bob's grandparents lived there. Their understanding was that it was going to be the section of the road that crossed down by the brook that washed out all the time and was costing the town a lot of money. Nobody lived down there anyway. There was not a big to-do about it, but there was an existing residence on the road in 1953. L. LaCourse asked if the brook they are talking about is at the bottom of the hill, next to DeCoff's property; Mrs. Beaudoin confirmed that it is.

P. Monziona asked if they have been able to find any town minutes or any other official documentation to see what indeed occurred in 1953. Mr. Bernier answered that the town did do the research; they did find a report and it talks about all the roads that were discontinued that year. That became the problematic issue in that this report said that Tibbetts Hill Road will be discontinued from a point somewhere "that way" to the Gilmanton town line. So, it's the written description; nobody believed that to be the case.

Mr. Tibbetts asked if he could simplify things here. In 1953, it was voted to make that a Class V or whatever it was. There was a sign put up that says "subject to gates and bars" beyond the farm, or the residence they are talking about. In 1973, they allowed him to build there on the same parcel of land. In 1996 his daughter built further down from the farm on the opposite side; at that time they had to sign an agreement that they would take care of the road from the farmhouse to her residence. That's all he is asking now; just the two acres at the farm, which is plowed by the town of Gilmanton. All he is asking to do is to do the same thing he did in 1973 and 1996, and hopefully in 2010. P. Monziona asked about the permit to build and whether they also gave them a subdivision; Mr. Tibbetts answered that they had – the only thing he had to do was say that they would be responsible for the road going down to his daughter's house. P. Monziona asked if that was the town of Alton; Mr. Tibbetts answered that it was. Using the plan, Mr. Bernier pointed out the location of Tracy L. Tibbetts' lot.

S. Miller asked if there is a cemetery on the property. Mr. Tibbetts explained that there is one; it is at the end of the road and dates to 1808. S. Miller asked if it could possibly be landlocked through their proposal; in other words if anyone got upset. He asked if there is any edifice, building, or special plot of land that could possibly be landlocked based on the proposal. Mr. Bernier answered that there is not. He went on to explain that there are other people beyond here; theoretically, when the town discontinues the roadway, the property line becomes the center line of the road. There are people beyond here who have a right to use this road; they own land, so there is still a right to pass and re-pass there, and that is being preserved. L. LaCourse asked if there are people who have homes beyond there; Tracy Tibbetts lives beyond there. P. Monziona asked if this is a gravel road; Mr. Bernier confirmed that it is, all the way out to Route 140 in Gilmanton. Mr. Tibbetts added that the road, from the beginning at Route 140 in Gilmanton, to just beyond the farmhouse, is all identical as far as how it's kept. From the farmhouse is where it narrows down and they have to be responsible for it. That's where the "subject to gates and bars" is located. P. Monziona asked if they have been maintaining that portion of the road since the 1996 subdivision. Mr. Tibbetts answered that they have, from the farmhouse down.

Mr. Bernier explained that because Tracy was building on a Class VI portion of the road, she needed to go to the Selectmen and get permission. As part of that, she needed to sign an agreement that she would be responsible for maintaining the road from the sign down to her house. P. Monziona stated that as far as the town is concerned, this is private property belonging to the parcel; Mr. Tibbetts confirmed that to be correct. P. Monziona asked if the applicant is taking the position that it could be a Class VI public road; in any event they would be asking for a variance to allow them to create a subdivision on a road that they don't know could be public or private; could be Class VI or nothing.

John Dever referred to the Planner Review, which specifically addresses that it is not a Class VI roadway because it was discontinued in 1953. The whole issue is because the subdivision regs say it has to be on a Class V or better road. In this case, the variance is for having road frontage on a private road. One of the recommendations of the Planner is to consider this application very carefully and note the factors to grant the variance; the uniqueness of the property and the history of the fact that the towns have maintained this roadway despite discontinuing it almost 60 years ago. They have continued to maintain it as a public way. The subdivision in 1996 for Tracy's parcel wasn't researched because the subdivision regs did not come into affect until 2002. At that time, even the Board of Selectmen at the time considered it a Class VI road because they gave the approval to build a home on a Class VI road. Personally, he has been up there, and he was quite surprised to find out that this was considered "not a road." He went up and met with Heidi and she showed him what was going on. It has obviously been maintained for years by the towns. It is a very unique situation; it is not just a private road that somebody just punched through and now they want to create a subdivision or parcel out a lot. This is obviously a town maintained road, despite the fact that it was discontinued.

S. Miller observed that the reason it is getting plowed is because of the agreement with Gilmanton where we do theirs and they do ours. Something could happen on the other end and Gilmanton could pull out of that deal any time. That easement would revert to a private road, and they would have to take care of it themselves, and then it's another issue.

P. Monziona explained that he understands this has been in the family for many years, but the fact is that a variance runs with the land. Anybody could sell this and someone could own it that has nothing to do with the family. What he is hearing is that this is an application seeking a variance on a private road, and that is the way they have to look at it. Whether it's Gilmanton or Alton, and maybe they plow it and maybe they don't, he thinks the application is asking them to grant a variance around the regulation that requires 200 feet of frontage on at least a Class V or better road, instead to allow a subdivision that could be sold to anybody at any time for a piece of property that has no frontage on any public road and has frontage only on a piece of private property. In essence, it is an application that is asking them to grant a variance on a parcel that has no road frontage other than on a private road. In getting the information back and forth, that's how he understands the application.

T. Morgan asked about Lot 21-A and why there is a buffer in between there. Mr. Bernier explained that there is a barn and access road there; the farm road runs through there and connects with another farm road (indicated location on the plan) so it will maintain a physical connection for the farm back to the barn. T. Morgan stated that one of the reasons given in the application for seeking this variance is to help the applicant get financing to fix up the farm; will a lender lend if they grant a variance on a private road? Mr. Bernier answered that they would; private road or Class VI road, it doesn't really matter. If this was a Class VI road, they would still be here asking for the variance. They made the application requesting a variance to subdivide on a private road; they acknowledge the fact of that under the present definition. The point they are trying to make is that it is very unique; this isn't just any old private road. This is a former town road that was discontinued, but continually maintained.

There are some unique issues with this as well. The residence that is there now has been there forever. It is problematic when a town discontinues a road that has an existing residence, because the town still maintains its obligation for emergency service. If the town discontinues the road they can't discontinue their obligation to provide emergency service. It becomes somewhat problematic to discontinue a road that has an existing residence on it.

S. Miller stated that he lives on a private road, and they have to plow their own. There are eight houses down there; if it's not plowed then they have a real problem. If they don't plow, the town is not going to come in and plow it – the never have and never would. Mr. Bernier explained that there are subdivision regulations that allow you to create a new subdivision today on a private road. You set up an association, and the association has to maintain the internal improvements. That's not the case here. This land was a town road when this residence was created. It was the original residence. Somehow, in 1953 they literally discontinued a road that somebody lived on. That is very unusual; the problem is that they can discontinue the road, but they can't relieve themselves of the responsibility to provide emergency services. They then have to go and maintain the road in order to insure that they can provide emergency services, so you can see that they didn't really get anywhere with that.

P. Monziona said that normally, if you are seeking a Building Permit application on a Class VI road, Boards of Selectmen, when they grant those applications, will require the applicant to sign what they call a waiver but technically is not a waiver. What it specifically requires is that the homeowner acknowledges in writing that they are on a Class VI road and are therefore not subject to emergency relief. All he is saying is that if in circumstances where Boards of Selectmen mandate that on a Class VI road if they are going to grant a Building Permit, the applicant acknowledge that they are going to be out there on a Class VI road on their own without emergency relief. That gives him concern about the idea of having a subdivision on a parcel of land that really has no public road frontage. Mr. Bernier acknowledged that this is what is really kind of different about this; that's what happens when you build a house on a discontinued road; in this case they discontinued a road that had a house already on it. There was no signing of a release; it is exactly opposite of what was just described, which makes this a very unique situation. He can not stress enough that it is not the Tibbetts' intent to come in and ask for a Building Permit on a private road; they may not even be able to because they don't know whether a private road is even eligible for the criteria of a Class VI road. They're not asking for a new building permit; the structure is there. All they want to do is be able to own it and get a mortgage on it and make some improvements to it, with fairness to the rest of the family on the historical farm. That is all that is being asked; it's a little unusual and very complicated because it happened in reverse of what they would usually expect. It is the uniqueness of it that makes it a reasonable request for a variance. It is extremely unique; they are not going to run into this situation in town very often.

P. Monziona observed that the bank could take that over in a foreclosure and sell it to a stranger. Mr. Bernier said that this is important because it alleviates a little bit of concern; it doesn't matter who ends up in this house, the Town of Alton is still obligated to maintain the road for emergency access because the Town of Alton will always be responsible to provide emergency vehicles to this house because this house was here when they discontinued the road. As to the Gilmanton relationship, if Gilmanton decides they are not going to maintain this road anymore, the town of Alton has to drive around to it. Then guess what happens on Alton Mountain Road – now Gilmanton is going to have to drive all the way over through Alton to get to it. It's really an agreement by common sense and

logic; they save a tremendous amount of fuel not having to drive their plow truck all the way across somebody else's town to get to a road that is in your town. The people who live on that road in Gilmanton are going to be pretty upset when the Town of Alton says they are not going to plow the road anymore because Gilmanton said they are going to stop plowing this one. He sees this situation in town after town; the road agents have always done this, and it is a very common agreement based on a purely logical approach to deal with these roads that don't see the line drawn on the plan.

Mr. Bernier went on to explain that the proposal is to create this lot; it meets zoning in every way except the frontage. They have state approval; it meets environmental regulations. It meets zoning for everything else – lot size, soil types, slopes, etc. It is capable of supporting a septic system for up to a four bedroom house, which is the standard state subdivision approval. The only thing that is short is this road frontage issue and it's a very unique road frontage issue. There are no building permits for new residences that are part of this; it is really just trying to get the people who live in these houses to own them so they can invest in them and fix them up. This private road – everybody has a right to use it. Technically, the property line on every road, including Class V roads is the center line of the road. We don't show them that way because it is not really practical. The public right to pass and re-pass is so whole that it doesn't make any sense to tell the landowner that they own to the centerline. The presumption of the court is that fee simple ownership extends to the centerline of the road, the public has the right to pass and re-pass, and that right to pass and re-pass is so whole that there is no point in showing that.

Just because the town discontinued the road, there are still people who have to use this road to get to their property. That private right to pass and re-pass through here is virtually the same. Really what went away is the public's obligation to maintain it, which really didn't happen because they still have an obligation to provide emergency services. It's not any easier to make a Class VI road a Class V road than it is to make a private road a Class V road. Once you discontinue it to Class VI standards, the town no longer has the obligation to maintain it; there is a very fine line in there somewhere between a private road and a Class VI road; he can't even think of a difference. P. Monziona added that the right of way is the difference. Mr. Bernier disagreed; this is still the right of way. These people down here have the right to pass and re-pass, and their right extends to the right of way line. P. Monziona said that the only way that people down there would have the right to pass and re-pass would be if they have a deeded right of way on a private conveyance, either by prescriptive easement or right of way, or it's deeded, or a public right of way that creates a road fifty feet wide, typically. When the town discontinues the right of way they give up the right of way and it reverts to private property; he thinks that is what town counsel is saying.

Mr. Bernier acknowledged that the public's right to pass and re-pass might be in question; he does not live in Alton, so does he have the right to just come up here on a Sunday drive and cruise down this road? The argument might be that he doesn't, because by discontinuing that public right, you have discontinued that right. The private right of people who actually own land on this road – the public can't discontinue their right to ever have access to their property. Implied easement is a private right that they had when that lot was created; all land was once combined and subdivided to get to their property, so they continue to have the right to pass and re-pass, albeit a private right to pass and re-pass and it's the same right of way lines that were in the original road. P. Monziona agreed that those property owners do.

P. Monziona asked if there were any more questions from the members. There were not at this time. He also asked the applicant if they would like to add anything. Mr. Tibbetts stated that he thinks this has become a major issue mainly because of a recording error; that's basically the whole thing. The older generations have lived here for years, and they know that road was subject to gates and bars beyond the farmhouse. Any of the older road agents from this town knew that. He thinks they are in this turmoil mainly because of a recording error. Mrs. Beaudoin added that they marked it wrong in 1952; that's what it boils down to. Mr. Tibbetts added that it is a shame they have to go through this to try to keep the land in the family; seven generations, and they want to keep it going. That's all he's asking. Mrs. Beaudoin and Mr. Tibbetts both talked about the sign; it is still where they put it, down by the stone wall where it has always been. P. Monziona asked if it is past the farmhouse; Mr. Tibbetts confirmed that it is. He also referred to the statement made earlier (by John Dever) that if you look at the road it is very

obvious where the road stops. Mrs. Beaudoin asked if the members had seen the pictures she had taken; they have. She also clarified that they (the plow trucks) turn around in her driveway. Mr. Tibbetts explained that they pull into the field, then back into the old farmhouse driveway. P. Monziona asked what the road looks like where there is good weather and no snow. Mrs. Beaudoin explained that it looks like a road; people think they are on North Road and they go 40 miles per hour past her house. Mr. Tibbetts added that the road does narrow down a bit because they maintain it. L. LaCourse added that he knows the road; it is fairly well maintained all the way down to the brook, but when you come up the other side of the brook, it is washed out. It comes out on DeCoff property and it is not kept because they don't want people driving down there. Mr. Bernier added that the brook is a good 1,000 feet beyond where this is proposed.

Mr. Bernier offered to go through the criteria if the Board wished, but everything there is part of what he has already gone through in the presentation. P. Monziona stated that it would be up to the applicant; the Board would give him that opportunity if he chooses to do it. Those of them who have read it and can see it probably know the arguments. Mr. Bernier reiterated that what they have said are really the arguments; the uniqueness of it and the fact that it is really capable of supporting emergency vehicles.

Before opening up to public input, P. Monziona raised a procedural question. From his perspective, this is one where it would be helpful to him to have a consultation with town counsel on some of the legal issues involved in this. If they do that, he wonders if the appropriate time is prior to opening up to public because he doesn't want to do it when they are in deliberations, so procedurally this might be the appropriate time, and if they did, they would have to come back and have public session after getting advice from town counsel. He and Tim are both lawyers, but they follow their lead from town counsel on an issue like this. He for one is recognizing some legal issues that he thinks would be good to have advice of town counsel on before they do this entire application. That would be his suggestion.

S. Miller asked what the specific questions would be to the town attorney. P. Monziona answered that one thing would be that the applicant has made representations through an engineer and he has no reason to question the sincerity of the statement, but he thinks it is a statement that would come from town counsel rather than from the applicant's engineer and that is that the town is legally obligated to provide emergency services because at the time the town discontinued the road, the houses were already there. He understands that statement; he has litigated road issues representing clients. He is not prepared as he sits there now to accept that as being the absolute statement of the law and it's important to him in deciding this if they create a subdivision on a private road that could end up in the hands of someone else, if the owner decides to sell it the next day – he knows this is a long standing family and the intentions are good – they are creating something that is going to go on and on forever and part of this land forever. He would also like to know what happens to the right of way when a road is discontinued; maybe there are deeded or prescriptive easements to the other parcels such are required similar to adverse possession where they have been going back and forth for 21 years or more, and this is back to 1953. He would rather not rely on his own knowledge to determine, and they have the benefit of a town attorney who assists them when they get to these legal questions. That way he and Tim do not have to be the lawyer; they can go to the town's lawyer and get answers. S. Miller asked if it is just the two issues then; P. Monziona answered that something else could come up in those discussions. Part of what they have heard tonight is that town counsel for Alton has taken a position on this already as to the fact that it is a private road. There may be an issue that it isn't a private road; maybe it still is a Class VI road, and that would have a bearing on this. He would like to hear that straight from town counsel; it would be helpful to him to have some legal assistance on this so he is not making those decisions on his own.

L. LaCourse asked if there could be a reversal to return this to a Class V road. P. Monziona answered that he has been listening to the arguments here and thinking this would be a wonderful legal case to take to court and fight over whether it is a public road or a private road, and whether to turn it back over to the town, since they have been plowing it. That is a whole different story. Right now the application is being presented to them and he thinks the only proper way to view the application is that the application is seeking a variance in order to create a subdivision for a parcel that is not going to have any road frontage on a public road. That is what they are being asked to do,

and if you are being asked to do that he thinks they better understand what that means legally in the long term; not just for this family, which would be very nice for them to be able to have this. He understands this, but these decisions go on forever.

S. Miller stated that to be fair to the Tibbetts' too, they have a right to bring in a position statement from their legal counsel as well. What he is not trying to do is create time and expense. He is just saying they have the same opportunities that the Board has. They don't know, so they're going to counsel. It may be something they want to look to. He explained that this is his first year on the Board, so he is asking the question if there are two opposing views, two defensible positions, do they (the Board) always take the town attorney's advice. P. Monziona answered that in the past his experience has been, and that is why he does not substitute his own opinion for town counsel's opinion, he thinks whenever an application presents a legal question, that any member feels should be answered first before they can decide on the application, they usually go to town counsel, and whatever town counsel tells them is the law, whatever explanation they get, they accept that from town counsel as opposed to deciding it themselves. T. Morgan added that this does not mean town counsel decides the issue or votes on the variance; town counsel gives them advice with regard to the questions. The decision still remains with the Board as to what should be done, and what is an equitable and proper and legal solution to the issue. He added that partway through the presentation he had commented to Paul (Monziona) that this sounds like a question on a final exam in a real estate course in law school. There are all sorts of very interesting implications and a very interesting question of equity that seems to lie with the Tibbetts', but they have to be careful what they are doing from the counsel perspective as well.

Mrs. Beaudoin explained that they allowed them to put the trailer there under the condition that they renovate the house, but now this Board will not let them renovate the house. P. Monziona explained that renovating the house is not something the Board handles. Mrs. Beaudoin went on to say it is the town. P. Monziona added that what happens in a situation like this is that it is important that the Board is working with the applicant; that the taxpayer and resident is being worked with and that the Board is doing what they are supposed to do for the applicant, as well as to their obligation to the town. They have had decisions in the past that, if they are complicated legally, they have rendered decisions and had those decisions challenged in court and when they go to court, they go on for a long time and the lawyers make lots of money and the town spends lots of money, and abutters spend money. They as a Board try to make sure they are getting the decision absolutely correct so that whatever happens down the road is supportable by what they do. They usually try to give reasons for their decisions for the record; they go out of their way to make sure what they do is legally correct so it holds up and doesn't end up costing everybody, including the town, more time and money down the road. They just had an application for the Campground in Alton Bay that burned down; they just postponed that because many of them felt they wanted to go see it. They hadn't taken a site walk of it, so they actually went up there and walked the property and they learned quite a bit of information. Sometimes it takes a couple of nights to get through some of the more complicated ones and sometimes they get help from their lawyer. They always work hard and try to get to the right decision and the reason he is suggesting they do that in this case is because he thinks it would be helpful to all of them at least to know exactly what they are dealing with. This is a little more complicated than the usual application.

Mrs. Beaudoin told this Board that the Planning Board had told her they were doing her favor by rejecting her twice; it really doesn't feel that way.

L. LaCourse said that he does not think anyone is saying they can't renovate the house; everything is in position to renovate the house. This whole thing is about separating a piece of property so someone can get a mortgage to get the money to do it. There is nothing stopping them from renovating the house. Mrs. Beaudoin asked if they could have had it renovated and be in there by now. P. Monziona stated that they can not give advice on any of that, but what they are being asked to do is grant a variance so that a subdivision can be created. That is all they really need to focus on; whether it is appropriate to grant this variance to create a subdivision under these circumstances. Normally a subdivision requires at least 200' on a Class V or better road; here they are being asked to allow it

under these circumstances and they are looking at the road and feeling that it would be nice to have a little bit of guidance on what this really is going to do.

Mr. Tibbetts' gave the opinion that the whole trouble with this is the sign; where it is recorded that it is subject to gates and bars and where it actually was. If they could simplify this at all by taking a look at it; that is one of his problems, and he is very glad some of the members know where it is. Half of the problem is that nobody knows where they are. Mrs. Beaudoin added that when they had to call 911 because their barn was burning down, Alton didn't know how to get there, but Gilmanton came right along.

P. Monziona explained that after talking to town counsel, which they plan to do, the members of the Board may at that point decide to take a site walk. Procedurally, if they do take a site walk they do it as a public hearing or meeting; it gets noticed and they all go up there and walk through it. If they decide that would be useful to them, they will let the Planning Department know that and they will schedule it the correct way procedurally. He is not sure they will decide to do that; Mr. Beaudoin said if they do, he would appreciate it.

John Dever said there is an existing structure on an existing lot; in this particular case when they are talking about a building permit they are talking about a new non-preexisting structure on this Class VI road. It is not to renovate something that is out there, it is to create a new dwelling. Where there is an existing dwelling, he could issue a permit to renovate the existing dwelling; the matter is subdivision, it is not fixing the house. Mrs. Beaudoin acknowledged that she know that; they can't get a loan if they don't own anything.

Mr. Bernier explained that advice to them had been to seek attorneys, but there are a lot of expense issues. He added that, interestingly enough, this is very similar to questions on a surveyor's exam. He asked if it would be timely enough that they get town counsel's opinion so that the Tibbetts' can look at town counsel's opinion and make a decision as to whether they need to go to the expense of getting an attorney. P. Monziona answered that the timing of this and how they want to proceed is something they can lay out for the Board; they will consider it and work with them so they have every opportunity to do that. They try to move quickly, too. They've scheduled special meetings in trying to work with the applicant so they don't tie anybody up longer than they have to be. This is one that in his opinion is a little trickier than the usual application. It's an interesting request, and he thinks town counsel would be useful.

S. Miller stated that hypothetically, the variance is granted. The worst case scenario takes place; the subdivision is either foreclosed or sold to a developer. What is the worst case – now that the developer or the bank owns it, they essentially can't do much with it because you can't sell something that is essentially landlocked. What he is saying is, practically speaking and beside the legal issue that is nice to have precedent for the future, because this is a family that has been on the land since 1830, if you take the worst case scenario, how is the public harmed. P. Monziona answered that the only thing is that once you create a separate lot by allowing a subdivision then you are allowing a total stranger to occupy that home and to be on a road that is deemed by the town to be private property which means that unless the applicant's engineer is correct, and let's say the town says that town counsel has said that is private property and they are not spending any more money plowing or doing anything. These folks have no legal obligation any longer to plow up in front of the farmhouse because it's a private road and someone else lives there not connected with the family so those people are sitting out there snowed in, in the middle of winter and somebody has a heart attack and nobody can get there with the ambulance. S. Miller stated that is him. P. Monziona agreed that is him; the reason he brought this up earlier about when Boards of Selectmen grant building permits on Class VI roads, they usually have the applicant sign a waiver and acknowledgement that they will not provide. The town is concerned with the liability issues. These are the kinds of discussions they can have with town counsel so that as they go through the criteria on the worksheet, and they talk about hardship and substantial justice and whether anyone would be harmed, they can have a better understanding of how they analyze that. These are good discussions.

Mr. Bernier stated that sometimes the issues they run into with disagreements between applicants and counsel is because of the way the question is asked of town counsel. If they could get a copy of the questions that is posed to him that would help them out a lot. Sometimes they don't get that and they get the opinion and don't understand how he could possibly get that. Every attorney you talk to thinks this guy is out to lunch, but after everybody has spent a ton of money you realize that the way the question was posed to him meant that was the only answer he could give. P. Monziona agreed; procedurally they could probably have a motion to continue this application at this stage, prior to finishing the presentation so they will have an opportunity to present further information if they choose. They also have not gone to public input for or against, which they will have a chance to do at the next session. He would entertain a motion to continue this to afford the Board an opportunity to seek advice of town counsel regarding the legal issues, which are whether the town is legally obligated to provide emergency services because the road was discontinued after the homes were already there, and whether, when the town discontinues a road, what becomes of the public right of way, and any other legal questions that would stem from there, such as what the worst case scenario would be if someone outside of the family ended up owning that subdivided parcel – what protection does that family have to assure that there will be a safe road that will provide emergency access to someone who may not be related to the family. Mr. Bernier added that whatever determination they make regarding the status of the right of way, how that affects whether or not the property is accessible; he may come back and say this is completely private with the property line down the center line, but that doesn't answer the question of whether anyone can drive down there. How does it actually affect the people that use the road?

P. Monziona explained that the concerns he would have as a member of this Board is what ability that anyone up there, if the subdivision is granted, has to receive emergency services if they are needed, and whether by creating this subdivision they are creating a potentially very dangerous situation. Maybe they are, and maybe it doesn't matter to them as a Board and maybe they will grant the variance anyway. Maybe it does matter and it will affect the way they go through the criteria.

T. Morgan made a motion to continue Case Z10-20 pending an opportunity to meet with town counsel and to reschedule accordingly, and that this continuance does not count against the applicant.

S. Smith reminded T. Morgan that she needs a specific date to continue to; otherwise re-noticing has to be done. After discussion, it was decided to continue to October 7, 2010 at 7:00 p.m.

Continuance to October 7, 2010, at 7:00 p.m. was added to the above motion. L. LaCourse seconded the motion which passed by unanimous vote.

Mr. Tibbetts stated that getting into legal fees would about do him in. He asked if they could just focus on the recording error. If he provides facts about what has happened since 1953 and present it to the selectmen and Mr. Sessler or whoever, would that help? John Dever explained that this Board can not revert it (the road) back to a Class V. Mr. Tibbetts said that was not what he was asking; he is asking if during the conversation with the town attorney, they can focus on the recording date of 1953 to see if there could have been an error. P. Monziona felt that it would be fair for them to raise that issue with town counsel when they have that discussion; he has no problem raising that issue. He will also say that to the extent that issue may be relevant to their argument or their presentation, when they reconvene they will have the right to bring that up and argue it within context and to the extent that it affects their decision making, they will take it into consideration. Mrs. Beaudoin asked if they would come over; P. Monziona stated that in regard to the site walk, they will have the right to discuss that as a Board when they meet with town counsel and if they decide that a site walk is something they want to do, they will notify the Planning Department, and they will send out appropriate notice. Mrs. Beaudoin also asked if the people who had come to speak would be heard; P. Monziona explained that Public Input had not been opened in order to give the applicant an opportunity to have public input after they had a full appreciation of the issues. They will be able to come back and finish their presentation, and Public Input will be opened.

VIII. OTHER BUSINESS

1 – Previous Business – There was no previous business.

2 – New Business – The ZBA has received a letter from Stacey Smith notifying them of her resignation as Planning Assistant, effective September 18, 2010. He thanked S. Ames for her notification to this Board and for all her help in the past as well as her support during the Planner Search.

John Dever requested that he be asked for his comments separately of Public Input; he does not want it to appear that his comments are part of any for or against situation. P. Monziona agreed; hearing from town enforcement should go before Public Input.

3 – Minutes – Due to the lateness of the hour and the temperature in the meeting room, approval of minutes was tabled until a workshop at 6:30 p.m. on October 7, prior to the next regular meeting. Minutes of the August 5, 2010 Regular Meeting, the August 12, 2010 Workshop, the August 12, 2010 Special Meeting, and the September 2, 2010 Regular Meeting will be addressed at that time.

4 – Correspondence – There was none.

X. ADJOURNMENT

S. Miller made a motion to adjourn. L. LaCourse seconded the motion which passed without opposition.

The meeting adjourned at 9:32 p.m.

The next regular meeting will be October 7, 2010.

Respectfully submitted,

Mary L. Tetreau
Recorder, Public Session