

Town of Lakeville  
Board of Health  
April 7, 2021

Present were: Chairman Maxim, Member Spratt, Member Poillucci, and Agent Ed Cullen.  
Chairman Maxim called the meeting to order at 6:00pm. This was a remote meeting and was recorded by LakeCam.

**Board Reorganization** – Chairman Maxim said due to the election on April 5<sup>th</sup> 2021, members may choose to reorganize. Both Members Spratt and Poillucci were fine with the current organization. Chairman Maxim agreed to take one more year as Chairman.

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to make Derek Maxim the chairman from the April '21 to April '22 election.

Two in favor, 1 abstention (Maxim)

Upon a motion made by Member Poillucci, Chairman Maxim stepped down to second, it was:

Voted: to make Chris Spratt member number 2 from now until the April '22 election.

Two in favor, 1 abstention (Spratt)

Chairman Maxim stepped down to make a motion, seconded by Member Spratt, it was:

Voted: to elect Bob Poillucci as third member from April 5, 2021 to 2022.

Two in favor, 1 abstention (Poillucci)

**12 Juniper Road** - meet with Foresight Engineering to discuss local upgrade requests. Darren Michaelis from Foresight Engineering was present for discussion. Mr. Michaelis explained that this is a tight lot abutting a tributary to the surface water supply. The wetlands were flagged and have gone through Conservation and have approval. There is a running tributary within the wetland but it is basically standing water from flag one to flag three. They are asking for a setback within 100-feet and will need to do an I/A system. They are recommending a Fast system. They have a gravity fed ADS chamber system slightly mounded. They are going over the existing system, that's the only spot on the lot. The only variances being requested are to the tributary and there's really no other options. There will be an O&M contract and a deed notice. All members agreed there was really no other place the system could go. Agent Cullen also agreed that this is the best location. Only one variance is being requested but technically there should be two, one for a setback to a wetland and one for a setback to a tributary. Abutter notifications were sent out to New Bedford and Taunton water departments.

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to approve the plan submitted for 12 Juniper Rd. with four variances (one for the tank and one for the leaching field individually), for a setback to a wetland, and for a setback to a tributary.

Unanimous approval.

**Bountiful Farms** – Discuss variance to section 3-502.11 of the Food Code to produce gummy products. Jared Norris from Bountiful Farms was present for discussion. Mr. Norris said due to regulations they can't do anything in animal form, so they are gummy product but not necessarily in the shape of a gummy bear specifically. He is requesting a variance so they can use acid, specifically citric acid to adjust the pH of the gummy products to make sure they are below the 4.6 threshold to ensure shelf stability. Agent Cullen said in the food code if they choose to extend the shelf life, then they can lower the pH using things such as citric acid, per approval of the Board of Health. Member Spratt asked how common is this variance requested. Mr. Norris said that he couldn't speak to how frequently this happens across the board.

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to give a variance to section 3-502.11 of the food code to Bountiful Farms to use citric acid in their gummy products to add shelf life.

Unanimous approval.

**ECF Nutrition** – New Food Establishment located in East Coast Fitness. Danielle Spratt from ECF Nutrition was present for discussion. Member Spratt said he wanted to comment that the applicant is his former sister-in-law and he had contacted ethics and they said there is no conflict but to be safe he did file a disclosure. Agent Cullen said an inspection had been done and no major issues were found. The only condition at the moment is with the current setup, it's for members only but could be expanded with installation of things like a three-bay sink. If the improvements recommended on inspection are done, the applicant can come back and get approval for outside customers.

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to approve the new food establishment license located at East Coast Fitness for ECF Nutrition.

Unanimous approval.

**4 Old Powder House Road**- Continued discussion from March 3, 2021 meeting, with Zenith Consulting Engineers LLC to discuss requested variances for their revised septic design. Jamie Bissonnette from Zenith was present for discussion. Member Poillucci said at the last meeting, Jamie took what he said as that he was out shopping engineers to get a letter. He wasn't saying he or his client were shopping engineers. He was saying he didn't want to open that precedent because in all the years he's done this, and in construction in general, you can pretty much find an engineer to write you a letter saying anything you want, so he just wanted to clear that up. It was nothing against this particular client it was just as the practice going forward if we were just going to start that any engineer who wrote a letter saying he didn't agree with a DEP regulation we were just going to accept it. Mr. Bissonnette said they had nothing new to present, just for the record they did reach out to DEP several times and have not received any return messages from them. They were just asking for their consideration. Chairman Maxim asked Agent Cullen if he had reached out to DEP. Agent Cullen did reach out to DEP and they gave a response and Mr. Bissonnette thought there was confusion with the response so they were going to try to meet with them again, but he didn't think they wanted to do that and that they were ok with the response they already gave. The response Agent Cullen received from Brett Rowe was that in Title 5 a minimum setback distance, anything less than the required 100-foot setback distance would be less

protective. Member Poillucci said they've been waiting because they thought they were going to provide something saying that this is how we can meet the same level of protection. Ultimately, the other engineer just said he doesn't agree with DEP and he thinks, in his opinion, that it's the same level of protection. When he said you could go down to 20 feet and it wouldn't matter, Member Poillucci said he didn't agree with that. He continued by saying that DEP didn't say they can give a variance if someone doesn't agree with the regulations, they said if the applicant proves that they can provide the same level of protection. At the last meeting the engineer basically said he just didn't agree. He thought you could get down to 10 or 20-feet and it didn't matter. That was his opinion. Member Spratt said Member Poillucci covered it, and he read through the meeting minutes and he didn't see anything that was going to sway him as far as that particular part. Chairman Maxim said he has read through the file twice, all the previous times he's been in front of the Board, he's read the court decisions, the applicant's argument back in 2001 why it was not built, and why he got transferred in 1986. He has re-read all of Town Council's opinions which go both ways, unfortunately, on all the issues. Chairman Maxim didn't think they could deny that this was a buildable lot back in 1986. It was purchased in 1980 as a buildable lot in Heritage Hill. In 1986 it was permitted through the Board of Health with percs, approved and stamped, ready to be picked up to install. It has an approved well permit issued, a well put in and tested and passed. It has a building permit issued and it also had Conservation approval issued on this lot. He understood the time ran out, but Mr. Wachtenheim stated at one of the previous meetings that he was unaware that the rules had changed until 2001. When he was told the lot next to his had been perked and passed for a septic repair, he came in and applied in 2001. On that first refusal in 2001, he was denied on improper reasons. The motion made to reconsider in 2002 was another motion to deny because it did not meet public health, did not meet the environmental protection, at least equivalent at that time. For those reasons, for manifest unjust, you have to deprive the applicant substantially of beneficial use to the subject property. It does not say anything about monetary value of the lot, it does not say what they paid for it, it does not say that he received it for a dollar from his parents, or that he could sell it to a neighbor for what he bought it for, it's not in manifest unjust. That was Chairman Maxim's reasoning, he thought that was the most important, not on the other ones as far as meeting the environmental protection. If this were a vacant lot, he would not agree, it would still just be a vacant lot, unapproved to do anything on. In Chairman Maxim's opinion they are fighting over wording. From day one, he said this lot needs a treatment system, it's the only way he would vote for it. When this first came in front of the Board a year and a half ago, the Board had asked the former Health Agent and Jamie to go to DEP and ask if they could even approve this on new construction. DEP explained that as a three-person board, they had every right to approve this plan if they feel it meets the requirements for a variance under new construction, they have the authority to approve it. The Board had said they would try to approve it with a treatment system, but on the night of approval, they figured out that DEP says you can't approve a treatment system under new construction with a variance. The Board went back and DEP said if they (which is in writing from DEP) approved the system as a conventional system, as a part of the conditions of that approval, they have the right to recommend and say they need to put in a treatment system. Chairman Maxim didn't agree with that, he thought they should have just said you can't use a treatment system. He believed they all agreed a treatment system will protect the environment as equal as a system at 100-feet. In his opinion, if it was approved it would be subject to a treatment system, with no increase in flow, and the variance which they previously asked for in 2002, to 5-feet to Old Powder House Rd. to get the system further from the wetland. He would also recommend the system have a reserve area (by Title 5 new construction). He understands DEP's

response, but it doesn't give him enough reason to deny it. Chairman Maxim also said their decisions tonight are solely based on the circumstances and facts of this property only, and that is very clear in Title 5 and it was clear from Town Council, and Mr. Wachtenheim's attorney. It is solely to be based on this property and the facts of this property only, it's not to worry about setting a precedent or opening up other lots in town. They have discussed the 20,000 square feet and the word "upland" being added in 2007. It did not say upland prior to 2007. The 2004 denial, that variances aren't allowed on new construction, was appealed. The court did not agree and it was sent back to the Board. Member Poillucci said that was 17 years ago, so 17 years ago before any of the other things changed would have been the time to come back in and try to do it. Town Council said denying is not manifest unjust, whether or not how much we're supposed to factor in what's going to happen with other lots. To say a lot was buildable before so it still should be now, that does apply to pretty much every lot in town. Member Poillucci continued by saying that the unbuilt lots in Clark Shores were all buildable at one time. Every lot at the time they were designed was a buildable lot. People could have gotten a permit at that time and they'd be given a variance for it. The engineering end of it fell apart, to him, at the last meeting when the engineer couldn't show, as DEP said they had to demonstrate, that they could provide the same level of protection. The engineer just didn't agree with DEP's regulations, he didn't show that he was doing anything. When DEP changed Title 5 they didn't send notices out to everybody saying they were changing Title 5 and you have this long to build your house. It's up to the owners to know what their regulations are. There were different zoning setbacks back in the day and now you get people with sheds and garages four feet off the property line and now they can't do it because it's not the law anymore. Title 5 came along and it changed, and if this was 17 years ago when the court sent it back, and he came back in at that time. But you can't say for 17 years that you didn't know about it. So now, 17 years has gone by and we're coming back trying to rehash 17 years ago. After that court case, at that time, everybody knew everything and that to him was the proper time to come back in. Member Poillucci said he can't get past that part. Every lot in town was buildable at one time. It can't be manifest unjust to say it was buildable then, and this much time has gone by and now it's not buildable but it's unjust if the town doesn't let you build on it anymore. Member Poillucci doesn't agree with that and Town Council said that. If you're trying to make the argument that they didn't know, well they knew 17 years ago, so even if they missed the first window, the court gave them a second window, and 17 years went by. At some point Title 5 changed and the rules changed, and a lot of people don't like them. He was still stuck on DEP said we could give a variance if the applicant proved they provided the same level of protection. They didn't do that, they just came in with an engineer that said, after we waited all those months, that he just didn't agree with Title 5. That isn't proving that they're meeting the same level of protection. Mr. Bissonnette referenced the letter from Ray Willis, he talks about the treatment of pathogens, organic nutrients and phosphate, he talks about how on Title 5, because of the perc rate, they're required to have a foot vertical separation from the bottom of the SAS to ground water. The letter talks about the aerobic conditions of the soil, microorganisms, nutrients, and Mr. Willis stated that given that the proposed system will be installed with a five-foot separation, one more than the minimum required vertical separation from the bottom of the SAS high groundwater elevation, the proposed exceeds the level of environmental protection with respect to the removal of pathogens, organic nutrients, and phosphates. Mr. Bissonnette continued by saying that the next part of the letter was on nitrogen removal. It addresses how they're getting or obtaining equivalent level of nitrogen removal. On his conclusion with his analysis, Mr. Willis talks about how he obtained his test data, so he's not just saying he doesn't agree with Title 5, he's referencing a Defeo, Wait and Associates study paid

for by DEP. He explains in a four-page letter the detail on how he came to that conclusion. It's not that he just disagrees with Title 5 itself, he believes he has the science in this along with his supporting documents to back that up. Member Spratt said he understands the science that Mr. Willis was talking about, but it seems like it's very tailored to just this lot, and we're supposed to look at this lot, but at the same time, we are supposed to protect public health in general. You do have to look at the entire surroundings of what's going on out there too. It was brought up the different distances and the water levels of the wetlands and when you have co-mingling between water table and when the wetlands are up higher and what those nitrates are going to do when they get into the water. He looks at it as the whole of protecting public health, you look at all the other sources of nitrates that are in the area, and by putting a new system that much closer, even with the advanced treatment, we're adding more of that nutrient to that area. When Mr. Willis alluded to the load is the load on the water, he's talking about the whole water body, and that's Assawompset Pond. Where these water levels change in that tributary and in that wetland, it goes from connected to isolated, connected to isolated. And that concentration is much higher there as far as the total load of that water than it would be in the entire pond. Member Spratt continued that you are going to have adverse effects from that higher load. By adding another house and another septic system, we're contributing to that load with dynamics constantly changing. Mr. Bissonnette said one of the things they looked at during their due diligence was that they had Mr. Willis look at the nitrogen and water quality elevations in the pond. There is no problem from what he's reported to us on the water testing. They did not believe that the effluent that would come out of the system, even a non-treated system would have a negative impact on that wetland system. Mr. Bissonnette added that the professionals they ran it by agreed. He wanted to make sure they were all on the same page with the presentation on what they brought in. Mr. Wachtenheim, the applicant, made some final comments summarizing their presentation. Member Poillucci responded by stating that he didn't want to take an engineer's letter because going forward, anyone could write a letter saying they didn't agree with any part of DEP. He said he did understand these things enough to make an intelligent decision. DEP doesn't allow advanced treatment because it would open up more new construction lots and they don't want that. They want to have their minimums, that advance treatments are for repairs. It's not because DEP's ignorant or they won't follow the science, or that the Board is ignorant and won't follow the science. It's there because that's the standard they set, that's their law. DEP said prove that it meets it [environmental protection]. If the applicant proved to the Board, they could grant the variance. Member Spratt said his synopsis goes beyond the science that the applicant was talking about, that their science was narrow and didn't look at the big picture.

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to deny the request for 4 Old Powder House Rd.

*Discussion: Mr. Wachtenheim asked the reason for the denial. Member Poillucci said they did not show that what he was doing met the same standard and DEP didn't agree either, that the distance wasn't the same and didn't provide the adequate protection. Chairman Maxim said in a denial, they need a decision. So, they will have to read what was proposed by Town Council into the decision, it will also be posted for public viewing for 30 days.*

Member Poillucci amended his motion to include:

I move that the Board vote to deny the application for disposal system construction permit and accompanying request for variances from Title 5 and the Board's local regulations for new construction at the property located at 4 Old Powder House Road; and I further move that the Board vote to adopt the following findings in support of its decision:

1. The subject property is currently comprised of vacant land that is not presently serviced by a septic system, the application is therefore subject to the standards for new construction.
2. The applicant is proposing the installation of a new septic system with a design flow of 355 gallons per day, to serve a three bedroom residential dwelling.
3. The applicant is also seeking three variances: (1) a reduction in the setback of the soil absorption system from wetland bordering a surface water supply from the required 100 feet to 64 feet, a 36 foot reduction; (2) a reduction in setback of the septic tank from wetland bordering a surface water supply from the required 100 feet to 52 feet, a 48 foot reduction; and (3) relief from the board of health's local regulation which requires at least 20,000 square feet of upland for any lot having both a well and a septic system, from 20,000 square feet to 16,775 square feet, a reduction of 3,225 square feet.
4. The Property is located in close proximity to Assawompset Pond, which serves as a public water supply to the Cities of Taunton and New Bedford.
5. Although the applicant originally proposed the installation of a Bio-Microbics FAST Treatment System with Nitrogen Reduction, a conventional Title 5 system is now being proposed.
6. The application is denied because the applicant has failed to meet his burden of proving that he can meet the variance criteria in 310 CMR 15.410, because the applicant cannot show that denial of the variance will be manifestly unjust or that a level of environmental protection that is at least equivalent to that provided by Title 5 can be met without strictly complying with the Title 5 requirements for setback to wetlands and the Board of Health requirements for minimum upland requirements.
7. As to the first issue, the applicant claims that there is manifest injustice because his parents were granted a permit in 1986 to install a septic system on the property prior to the adoption of the requirements contained in the current version of Title 5 and the Board's local regulations. On the issue, the Board finds that the manifest injustice requirement has not been met because the applicant's parents had ample opportunity to develop the property prior to the change in law and they chose not to do so.
8. The Board also finds that the applicant has failed to carry his burden of proving that an equal degree of environmental protection can be met. First, the applicant has submitted no evidence to suggest that the system being proposed will provide the same degree of environmental protection as a Title 5 compliant system on a lot with 20,000 square feet of upland or more so as to provide a degree of environmental protection that is at least equal to that of the Board of Health's regulation. In fact, the applicant's submissions do not address this issue at all.
9. Second, the Board is not persuaded by the analysis conducted by Onsite Engineering and Sabatia, Inc, to the effect that horizontal setbacks from wetland resource areas and water supplies has no environmental benefit because their opinions are based on faulty assumptions and inaccurate data, as explained on the record by the Town's Health Agent. Moreover, these opinions are not based on any site-specific data demonstrating any characteristics that make this property unique compared to other similarly situated properties, but rather, they are simply disputing the science behind the requirements

in the Title 5 regulations. The Board is also not persuaded by the claim of additional vertical separation to groundwater for the reasons discussed by the Town's Health Agent.

10. Third, when the Board requested DEP to comment, whether a 65 ft setback provided the same degree of protection that a 100 ft setback would, their response was *"The setback requirements listed in Title 5 are "Minimum Setback Distances" and anything less than the required 100-foot setback would be less protective."*

11. Therefore, because the applicant has not met the criteria for a variance, the application should be denied.

Two in favor of denial (Poillucci, Spratt), one opposed (Maxim).  
Motion passes to deny 4 Old Powder House Rd.

Chairman Maxim read from Title 5 that a denial of the variance shall also be in writing and shall contain a brief statement of the reasons for denial (which were read into the record). A copy shall be conspicuously posted for 30 days following the issuance and shall be available to the public at all reasonable hours in the Board of Health office, at the City or Town Clerk or Board of Health while in effect.

**Water test regulations for septic repair or upgrade** - Chairman Maxim said there are local regulations on water testing that the Board will be discussing whether to keep as a local regulation or remove it. These are not State regulations, they were put into effect by prior Board members. Regulation 18.1 states: *Any septic repair or upgrade permit must have a current water analysis (up to two years old) can be submitted to show water adequacy, provided they include all potability parameters including nitrates and volatile organic compounds and arsenic provided they have been collected objectively by a DEP certified lab employee or certified water operator.* Chairman Maxim said the Board of Health recommends residents test their water every year. The Board will review the regulation requiring residents to test their water at the time of septic repairs or upgrades. This is a local regulation for Lakeville, and surrounding towns do not require water testing. Member Poillucci asked if a public hearing is required. Chairman Maxim responded that it would be required to remove a regulation. This meeting is just discussion. There was a brief discussion about regulation 18.1. Member Poillucci said he remembered the discussion about no as-built on file, a Title 5 would be needed to locate the septic components in relation to a proposed well. He believed it was clarified that it would be for location only and not functionality. He agreed that if the property is for sale, the well should be tested. He also agreed with locating the components for a well permit if there is no as-built so they know the distances. He said if everyone agreed he would make a motion to make a blanket variance to anyone who comes in until they can have a hearing. Member Spratt thought for a well it could be more specific. For a well going dry, he agreed. But, if someone needed to replace a well because it's contaminated, wouldn't you want to find the source of the contamination? Maybe a contaminated well would need a Title 5, not necessarily a dry well. For a septic repair where there's no transfer of the property, he agreed with what's been said so far. For a sale, there should be a well test to protect the new homeowner. Chairman Maxim was in agreement with the other Board members, as far as the septic repair and upgrades, it should be removed from the local regulations unless it is under 100-feet, which Title 5 makes you test. The question would be how the Board would reword the well only permit. It made

sense you would not need a Title 5, you just need to show where the septic components are or a stamped and approved as-built on file. There was a discussion about the regulations.

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: that if anybody comes in, until we actually find out if we need a hearing and post it and actually do the hearing, ask for a waiver for repair only on their own properties that the wells are outside 100-feet and the property is not being transferred, that the Health Agent can just sign and give the variance.

Unanimous approval.

Chairman Maxim said they should post a public hearing so they can have public input. They will open the meeting and then open a public hearing and a discussion before removing a local regulation, just for the Town's input on it before the Board actually removes it. Member Poillucci said now that they've kind of resolved the issue for a few weeks, public hearings need to be put in the newspaper. Chairman Maxim said they will continue the discussion to the next meeting but won't post a hearing yet for it. They will keep local regulations on for discussion for the next meeting to be posted and if there's anything else the Board would like to discuss in changing at a public hearing along with these two that we have discussed tonight.

#### **Discuss recent Board of Health pending items –**

Agent Cullen said there was someone who had arsenic in their water and the Board was requiring a whole house filter. He wanted to know if they felt that was necessary or is it just on the kitchen sink. Chairman Maxim said from his recollection he thought it was on the whole house. Member Poillucci said that's something that he'd be open to discuss. He explained that the issue for him on arsenic was you don't get poisoning from it just from drinking it. It goes through your organs and you're more likely to get sick from it by bathing in it and sitting in a bath and having it go through your skin than drinking it, so they were told by water specialists. At that time, they said that should have a whole house system because little kids are the ones who take a bath in it. The problem is, after a year, if they don't maintain the filter, they just spent all that money for nothing. If it's in the deed, so when people buy a house it's pointed out to them and it's in writing, he'd be comfortable with letting them decide how they want to deal with it. But currently, it needs to be a whole house system. There was a discussion about water testing. Chairman Maxim said they don't allow just the kitchen or just the bathroom, the entire house must be filtered on a filter system for anything that needs a filter per our regulations. Chairman Maxim said if someone wanted to come before the Board and ask for a variance on that regulation and ask for just a sink filter, it could be discussed at that time.

#### **Review and approve meeting minutes as typed-**

- 43D Public Hearing minutes (December 3, 2020)

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to approve the 43D public hearing minutes from December 3, 2020.



*Discussion: Member Spratt said every other Board continued but us. Member Poillucci asked if he was sure they didn't continue. Member Spratt said they had an adjournment, the Planning Board continued, the Conservation Commission continued, and then it goes to all the adjournments. Chairman Maxim said they should probably not approve this one and clarify.*

Member Poillucci withdrew his motion.

- 43D Public Hearing minutes (January 7, 2021)

Upon a motion made by Member Poillucci, seconded by Member Spratt, it was:

Voted: to approve the 43D Public Hearing minutes from January 7, 2021 as typed.

Unanimous approval.

- Board of Health meeting minutes from December 16, 2020 –

Member Spratt said he had one question on 16 Fourth Ave. The deed on the house is not a seasonal deed. Didn't they have summer water? Chairman Maxim said correct, but it wasn't deed restricted. It's actually not on the deed, it's just intended. Member Poillucci said those houses didn't have deed restrictions, because they only had seasonal water so they never required a deed restriction because if you didn't have potable water all year, they weren't considered year-round, but they didn't have deed restrictions. Chairman Maxim clarified that at first, they did not think there was a well on that property, but he went back to the meeting minutes when the septic was approved by the previous Board, and the well was denied. He found on the plan that there was an existing well, clearly marked and it was in the meeting minutes that there was an existing well on that property which would have made it year-round. Chairman Maxim said they should hold off on these to have them amended to clarify.

- Board of Health meeting minutes from January 6<sup>th</sup> 2021-

Chairman Maxim said that 16 Fourth Ave. was on this set of minutes as well. Member Poillucci said he thought they should continue that too, in case they feel they need to clarify anything tying the two together.

**COVID-19 Update** – Agent Cullen said cases in Lakeville and the State are increasing. Lakeville is in the red so that is a high-risk community. There are no additional restrictions. Homebound residents are being vaccinated as of a couple of days ago. Member Poillucci asked which vaccine we were giving. Agent Cullen said it would be the Johnson & Johnson. The advantage of this is it's one shot.

**EEE** – Agent Cullen said residents should be aware of Triple-E once again. We are back in that season. There will be aerial spraying by low flying planes or helicopters. If we can control the multiplication of mosquitos it will have a huge effect on what is going to happen 2-3 months from now.

### **Adjournment** –

Upon a motion made by Member Spratt, seconded by Member Poillucci, it was:

Voted: to adjourn.

Unanimous approval.