Zoning Board of Appeals
Lakeville, Massachusetts
Minutes of Meeting
March 15, 2007

Members present:

Donald Foster, Chair; Derek Maksy, Vice-chair; C.R. Canessa, Member; David Curtis, Member; Joseph Beneski, Associate Member; Eric Levitt, Associate Member

Atty. Laura Pawle and David Varga from BSC Engineering were also present

Regular Meeting:

Mr. Foster opened the regular meeting at 7:13 p.m.

Roll called. Bills signed.

Lynn hearing:

Mr. Foster opened the Lynn hearing at 7:15 and read aloud the public notice. Mr. Foster asked Mr. Beneski to participate as a voting member. Mr. Tom Lynn addressed the board and explained that he was a builder and had petitioned on behalf of his client, Mr. Don Christensen. He explained that he wants to put a garage only on a non conforming lot adjacent to the non conforming lot with the dwelling. Mr. Foster explained that Mr. Lynn must submit plans for the lot and construction to the ZBA and to the other boards.

Mr. Lynn asked if they could move the garage closer to the street in order to avoid cutting trees. Mr. Foster suggested that they conform to the bylaws. Mr. Beneski made suggestions about the plans for the septic system. Mr. Foster read aloud letters from Mr. Marot, Building Commissioner. The first letter, dated February 20, 2007 to Mr. Christensen, stated that the plans for work at 302 Pond Street did not meet zoning requirements. The second letter, dated March 8, 2007 to the Board of Selectmen, detailed a number of deficiencies in the request for building permit. Mr. Beneski voiced suggestions about plot plans.

Mr. Christensen and Mr. Lynn asked to continue to April 19, 2007. Mr. Foster asked the public for comments about this petition. None voiced.

Mr. Maksy made the motion, seconded by Mr. Canessa, to continue the Lynn hearing until April 19, 2007. The time would be at 7:15. The **vote** was **unanimous for**.

J&B Realty Trust/Olivieri hearing:

Mr. Foster opened the J&B Realty hearing at 7:30 and read aloud the public notice. Mr. Foster asked Mr. Beneski to participate in the vote. Mr. Foster read aloud letters from various boards. A March 13, 2007 letter from the Board of Health stated that they had no health reasons to approve or deny the petition. A March 12, 2007 letter from the Planning Board stated their unanimous support of the Building Inspector's position. A December 26, 2006 letter from the Building Inspector described his understanding of what Mr. Oliveria wants to do and that the grandfather time period for using an undersized lot has passed.

Mr. Foster asked Mr. Oliveria what he intended. Mr. Oliveria described that he wants to cut one conforming lot into two lots, each of which would be non-conforming due to size. Mr. Oliveria explained the history of ownership. Mr. Foster read aloud a March 13, 2007 letter from the Board of Selectmen stating that they believe that the two lots merged into one conforming lot years ago and cannot now be separated into two non-conforming lots. Mr. Foster read aloud bylaw 6.1.4 about creating non-conforming lots.

Mr. Maksy raised the issue of ownership. One lot is owned by Mr. Oliveria and the other is owned by J&B Trust. Laura Pawle, Town Counsel, said that the courts have made it clear that it is not the names on the deeds but who genuinely controls the properties. Mr. Oliveria agreed that he is J&B Trust.

Mr. Foster read aloud a March 15, 2007 letter from neighbor Stephen Flood of 6 Forest Park Drive, stating his opposition to the petition, because the resulting two lots would be undersized and that creating undersized lots would lower values of nearby properties.

Mr. Foster asked if anyone present would like to speak for or against the petition. Mrs. Jacquelyn Flood also of 6 Forest Park Dive was not in favor of the petition. She stated that they had also had two lots on separate deeds but had not been allowed to build by Mr. Darling, the previous Building Inspector. Mr. Foster said that the point raised by Town Counsel is not what name is on the deed but rather who actually controls the land. Atty. Pawle added that there was a decision in which one parcel was in the name of the husband and one parcel was in the name of the husband and wife but the court found that the control was essentially by the same party although additional facts might have been looked at.

Mr. Beneski noted that if the bylaw changes and increases the size of the lot there is a timeline of the allowance of letting the small lot be a buildable lot. If you don't do anything in that time period, those lots combine to make one. So right now for the purposes of zoning, that lot is set up as one lot. Mr. Beneski asked if some type of notification to the owner would be required. Atty. Pawle responded that there is no notification. It is the responsibility of the property owner to investigate the legal status of their property. This Board and any other Board is not bound to prior comments, decisions, or informal advice.

Mr. Maksy stated that the Board did not set precedent only the Courts did. Mr. Foster explained that if they did grant the petition they would be creating by today's standards two under sized lots.

Mr. Maksy asked for a clarification on the grandfathering clause of a subdivision. Was it eight years or was it five? He did not know if this would have any bearing on this case. Mr. Foster noted that he had read the letter from the Planning Board which supported the opinion of the Building Inspector.

Ms. Amy Dow of 1 Nelsons Grove Road said that she originally did sign in favor of this petition but she had asked if the Floods were in favor it. She felt that if the neighbors were in favor with it, they wouldn't get involved. She noted that when they built their house it was farm land and they were required to take 2.4 acres at that time so they had actually lost a house lot.

Mr. Oliveiri responded that just for the record he had spoken to Mrs. Flood and told her what he was doing and that she had told him that they were moving and that she didn't really care what happened next to her. He wanted to note to Ms. Dow that he was not trying to misrepresent what was said.

Mr. Foster noted that the question before the Board was how they felt about creating two nonconforming lots. If there were no further comments from the public he would like to begin that discussion. He asked Mr. Beneski to be a voting member because Mr. Veary was absent. Mr. Maksy felt that the timeline was very important in this case.

After a discussion with Town Counsel, Mr. Curtis felt that he had a conflict. Mr. Foster then asked Mr. Levitt to take his place and be a voting member.

Mr. Maksy then said that he would like clarification on the three year time period. He was not sure how that could affect this and felt that they should get clarification on that issue. Mr. Beneski felt that the lots had been joined and that they had to decide if they wanted to separate them and that it did not matter that the owner had not been aware of that. Mr. Maksy replied that he understood that but that there had been a seven month window of opportunity in there and based on the facts that he knows about the eight years because this was a subdivision, he did not know if he was addressing it as a subdivision or as adjoining lots. He would like clarification on that. Is it a five year or eight year grace period?

Atty. Pawle said that she would have to research that. Mr. Varga stated that acting in his capacity as a professional land surveyor, the eight year protection for a subdivision is if the plan was approved as part of a definitive subdivision. The characteristics of that would be that the subdivision created a new road used for frontage to create new lots. There is also what is called a division where approval is not required. It still is a subdivision but it has its frontage on an existing road. The significance of that is on a definitive subdivision there is currently an eight year zoning protection. The three year protection is what you would get on an approval not required plan. He was unfamiliar with the five year protection based on a zoning change statute.

Mr. Oliveria explained that he didn't know that the time limit had expired and he felt that he shouldn't be held responsible for the lapse because nobody had told him. Mr. Foster asked Town Counsel to explore the appropriate length of grandfathering for this situation and examine the details and, in particular, if any grandfathering rights (and which rights) pertained. Atty. Pawle said that Town Counsel would have to study the sequence of events and specific situation to render an opinion. Mr. Maksy agreed. Mr. Oliveiri was agreeable to continuing the hearing while this was being done.

Mr. Canessa made the motion, seconded by Mr. Maksy, to continue the J&B Realty Trust/Olivieri hearing until May 17, 2007. The time would be at 7:15.

VOTE –Mr. Canessa, Mr. Maksy, Mr. Beneski, Mr. Levitt, Mr. Foster - **AYE**
Mr. Curtis – **ABSTAIN**

Mr. Canessa made the motion, seconded by Mr. Maksy to request an opinion from Town Counsel in regard to a definition of grandfathering and how it applies to this petition.

VOTE –Mr. Canessa, Mr. Maksy, Mr. Beneski, Mr. Levitt, Mr. Foster - **AYE**
Mr. Curtis – **ABSTAIN**

The hearing closed at 8:09

Markson hearing – continued:

Mr. Foster reopened the Markson hearing at 8:10. Mr. Foster wanted to state for the record that he and Mr. Markson had done business in the past although it had been small in value and at least ten years ago. Town Counsel had not felt that it was an issue. Mr. Foster also asked Mr. Beneski to be a voting member because Mr. Veary was absent. Mr. Foster read the public notice again as Mr. Markson and Atty. Wagner, Counsel for the petitioner, had not been present at the last meeting.

Atty. Wagner advised that he would first give a history to the Board. On January 23, 2006, Mr. Markson received his Order of Conditions from the Conservation Commission. There were some issues that had been addressed and resolved. On January 23, 2006, a site plan review was submitted to the Planning Board and on March 6, 2006 a hearing was conducted. Jim Marot, Brian Hoeg, and Kevin St. George were present. At that meeting an issue of runoff was raised. This was addressed heavily by engineering expertise and the Board was fully satisfied and all conditions were met. In regards to conformity with the Zoning Bylaws, Mr. Marot indicated that the plan seemed to have a stamp on it saying not conforming and that he did not want that to be interpreted that it was not in conformity with the bylaw and a motion was made that the wording be changed to indicate that it fully conforms with the Zoning Bylaws. That was then unanimously approved.

Atty. Wagner continued, on May 15, 2006 Mr. Markson appeared again before the Planning Board for a modification to the plan of the primary building. The primary building is the sole building the public has a right to access. There are four accessory structures of which they could be all one structure but in the course of the site plan review it was decided that the four accessory buildings to the primary building was far more appropriate both aesthetically, for screening purposes, for use purposes, and to satisfy the interest of the Fire Chief. A copy of the letter from the Fire Chief was submitted for the record and read aloud by Mr. Foster.

Atty. Wagner stated that at the May 15, 2006 meeting Mr. Markson had come in to modify the primary building which was approved unanimously. Mr. Markson had not yet filed for a building permit when he received the November 28, 2006 from the Building Commissioner. On December 5, 2006 he filed for a Building Permit and Mr. Markson received the December 20, 2006 letter from Mr. Marot which discussed two reasons why the permit could not be issued which was Section 5.0 and the allowable use.

Atty. Wagner advised that the property is 4.25 acres. It is business zoned. The proposal is a primary structure, an office building, which will control the use of the four accessory buildings. The accessory buildings are in conformity with the Planning Board's desires, screened, fenced, and no public access other than through the primary building. The buildings were separated from being one large monolithic building because it was better aesthetically and in terms of fire protection easier to service. They are approximately 6,500 square feet. Some of the infrastructure improvements that were addressed with the Planning Board were access and egress, landscaping, buffering, drainage, water runoff, parking, and lighting. The degree of sensitivity for the neighborhood, for the community, and for the tax base brought this to an upscale project. The project was found to have a low impact on water consumption, waste water, use of facilities, and resources of the Town with no adverse affect on traffic or maintenance and services of the Town.

Atty. Wagner stated that brings them to the first issue. They feel that they are entitled to number one, which is one principal structure and the accessory structures. Atty. Wagner then read 5.0 of the Zoning Bylaws. He felt that it pertained to a lot that had less than the minimum requirements and that was indicated by the term such which referred you back to the lots that are less than the minimum requirements and not just any lot. Mr. Foster then read the Section out loud again. Atty. Wagner felt that because of the language in the bylaw it did not refer to them as they exceeded the minimum lot requirements. He submitted respectfully that they have complied fully with that aspect of Section 5.0.

Mr. Foster felt that the issues before them were five buildings versus one with a garden shed and the definition of warehouse. Atty. Wagner responded that with the structures they have they meet minimum square footage for those structures as they are laid out on the plan. Mr. Foster asked if anyone disagreed with that. No one did. Mr. Foster said that it was not the footprint or size it was the number of buildings that has raised an issue. The question before them was what is a principal structure and what is an accessory? Atty. Wagner replied that it is one principal structure and four accessory structures. The office is the principal structure. All business is conducted out of that office. Anyone that

goes to the storage facility goes through the principal structure. All of the facilities and records are kept in the office.

Mr. Foster asked what the nature of the business was. Atty. Wagner replied that it was retail. Mr. Foster said that the nature of the business was storage. Atty. Wagner submitted that storage like warehousing was not the same. If you had goods, framing, sale of supplies, receiving of goods, UPS, Fedex, mailboxes, sale and storage of boat supplies and self storage, that is not a warehouse. Warehousing under their bylaw falls in the Industrial section. In this section, that is clearly retail. Retail and services are one and the same. A retail establishment sells and services the public directly.

Mr. Foster then read a definition for the word warehouse which was a building or part of one for the storage of goods and merchandise or also a place where goods and merchandise are stored, a storehouse. Atty. Wagner said that it was clear in the law of Massachusetts that a warehouse is a singular structure that services one interest not multiples interests. These are interests where singular individuals or entities rent one garage unit or more and store goods, bring goods, ship goods and can service the goods within in the law of the bylaw. The dimension of it is all retail services in the bylaws. The definition of a warehouse as it has been interpreted in Massachusetts is a warehouse. Atty. Wagner said that this could have very easily been that but it was not what the Planning Board wanted and that Mr. Markson could put up one monolithic building and it would fully comply with the bylaw.

Mr. Foster then read the February 1, 2006 letter from the Planning Board. The Board did not recommend approval of the petition as the bylaw allowed warehousing only in an Industrial Zone. Atty. Wagner said that he had no knowledge of that letter. He said that they have the plan that was signed by the Planning Board. Mr. Foster said that just because the Planning Board had approved that it did not mean that the Board of Appeals had to accept that approval. Mr. Foster said that it means only that it has enough land, enough space; it has sufficient coverage, meets the setback requirements, etc. Mr. Foster said that they agreed to that.

Mr. Markson stated that the Massachusetts Self Storage Association and the National Self Storage Association have litigated the issue as to whether or not self storage is warehousing and the Courts have ruled that self storage is not warehousing. A warehouse is a place where goods and services are kept and brought in and out on a regular basis with constant access by people doing the warehouse in a large space with machinery to bring stuff in and out. Self storage is the rental of space for people to temporarily keep personal property. Mr. Foster asked Atty. Pawle to comment. Atty. Pawle replied that the question is whether or not the use is permitted. She asked if it was defined in the bylaws. Mr. Foster said that it was not. Atty. Pawle then said that you would then have to determine what is the intent or the intended meaning of that word and if there are other provisions in the Zoning Bylaws that help you to understand what the intended meaning of the word, warehouse, as it appear in the Zoning Bylaws. Mr. Foster said that the only mention that he could find of the word warehouse in the bylaws was

relative to parking where it was lumped with wholesale, warehouse, or storage establishment.

Atty. Wagner replied that under Chapter 105A, Section 1, self service storage facilities is described as any real property used for renting or leasing individual storage space in which the occupants themselves customarily store or remove their own personal property by self service basis. That has been interpreted to not be a warehouse. Atty. Wagner felt that if something had not been culled out or defined as specific, it then fell under the general definition, in this case Section 4.1, allowable business uses. Atty. Wagner said that he did not have a copy of the Planning Board letter that had been discussed but that their Site Plan had been approved and signed. Mr. Foster said that they agreed but that they had not approved the Zoning.

Mr. Maksy felt that they had to determine what this was and how it fits the bylaw. Mr. Foster said that he was going to ask Town Counsel to help clarify this point by reviewing the things that Mr. Wagner had brought up. If there is a finding by the Commonwealth, they need the benefit of that. Mr. Foster asked if there was anything further on the use. Atty. Wagner said that he was done with presenting the information on the use but that he needed to clarify why they were here. This Board was bound by the reasons why the Building Inspector denied the Building Permit application, in this case, Section 5.0 and the principal structure and accessory structure. Mr. Foster said that they have been told by Counsel that when things get to the Zoning Board they are able to reevaluate everything that is relevant to the petition and that they are not restricted to just what the Zoning Enforcement Officer has said. Atty. Wagner said that he did not mind them doing that in this case, but he did not agree with that opinion. Atty. Pawle clarified that procedurally this was an appeal of the Building Inspector's denial. Mr. Foster noted that it was also a request for a Variance and a Special Permit. Atty. Pawle responded then that there are three procedures here. The appeal is limited to the decision of the Building Inspector and that they also have to decide on the issues of the Special Permit and the Variance. Mr. Foster said that in his opinion, a storage facility was a warehouse but he was open to what Mr. Wagner said and is hoping that Town Counsel can look for some clarity that the Board was not aware of. Atty. Pawle said that they would welcome any cites. Atty. Wagner said that he would provide them with the information that they have.

Mr. Markson felt that this was really needed in the community. There are a lot of small homes and small lots in Town and this facility is really needed for their storage requirements and that people are taking their business out of Town. Mr. Beneski noted that was fine but that it had to be put where it was allowed.

Mr. Foster asked what Board members opinion was on the definition of storage versus warehouse. Mr. Canessa noted that although some people do use this as storage some people are using it for their business. Mr. Maksy said that he was having trouble with those definitions and would like Town Counsel to take a look at it. Mr. Levitt said that he did see the difference between the two and did not think storage was warehousing. Mr. Curtis agreed. Mr. Beneski felt that although it was storage with people going in and

out that was warehousing. Mr. Foster felt that because the Board was divided, they should wait for Town Counsel's clarification.

Mr. Markson noted that nobody would be able to run a business out of this facility because the exterior units would not have electricity and the interior spaces would have lights in the hallway but that no outlets would be available. Mr. Foster clarified that the point made by Mr. Canessa was of the contractor who might run in several times a day for materials or tools. Mr. Markson did not agree and felt that contractors would have their own facilities. Mr. Foster felt that although not a big issue, he was glad it had been raised and if the petition was granted they might impose some type of restrictions.

The term accessory building was then discussed. Atty. Wagner said that accessory building is fairly well defined. It is a building that is in conjunction with an accessory to the primary building. As mentioned earlier, all of the control, record keeping, coming and going of the public, etc are all through the primary building. The four accessory buildings serve only one purpose, the use of the individuals who come to the primary building now wish to go to one of the accessory buildings. Mr. Foster then read the definition of accessory building or use which was a building and/or use customarily incidental or subordinate to and located on the same lot with the principal building or use.

Atty. Wagner felt that from that language just read his definition is consistent with that and the accessory building is dependent on the primary building's activities. Mr. Foster said that his view was that this was a storage business and the purpose of the accessory buildings is for storage and that he would also say that if anything those four units were essential to the business and they were more the principal structure than the office building. If eliminated, the business could not exist. Atty. Wagner responded that if those were considered the primary use that invited two arguments. If they were in compliance with 5.0, they could then put up one singular structure which would comply with the bylaw and that would bring them back to the sole issue of use. He noted that in regards to fire protection the engineer had informed them that the Fire Department had preferred the separate buildings because when you are involved in any type of emergency situation if there is a canopy used to connect buildings it is just a structure that has no structural value but it can endanger people who are trying to carry out their work. They preferred the idea of four separate structures.

Mr. Beneski asked if the buildings would have fire protection in them. Mr. Markson responded that the buildings would not be sprinkled but there would be hydrants outside of each one. Mr. Foster asked if the buildings were combined into one building if a sprinkler would be required. Mr. Markson replied that a sprinkler would then be needed. Although there is enough water on site to provide this, he felt it was not in the best interest of people storing merchandise and it was not in the best interest of fire protection.

Mr. Foster said that he was not sure where the hardship was for the Variance. Atty. Wagner said that they fall within the entitlement dimensions of 5.0 and the use. If they felt they were wrong on 5.0 and the use definitions their second option would be a Special Permit. That would be the unique circumstances and the topography of the land.

There are also some wetlands. The Mayflower Bank was a classic example of that. Mr. Foster then read the definition of Variance. He said that they could not authorize a use Variance because they did not have that authority and his interpretation of the bylaw was that they would be within their rights to grant a Variance if it was some kind of unique property of the land such as a rock outcropping or a substantial drop off in the land or something else that would dictate two building instead of one etc. Atty. Wagner said that the criteria that is applicable to this piece of land is the unique soil conditions and the wetland aspect that had been part of the redesign to make this a lot able to have buildable structures. Mr. Maksy said the point is do these wetlands change the layout so much that you have to have five buildings instead of one. Atty. Wagner responded that it may or may not but that he would have to have the engineer speak to that.

Mr. Bob Doherty of County Street said that he was at the meeting where this was discussed and Mr. Markson said that he did not want to spend the money on a sprinkler system. Atty. Wagner said that Mr. Doherty left the meeting before any in depth discussion. It was true that there was a discussion that this made economic sense to his client but the controlling issue was the site plan review committee felt that those were more desirable for the reasons of aesthetics, the screening aspects were easier to address, and the Fire Department had weighed in with a letter where five buildings were more accessible.

Mr. Doherty then read what had been printed in the paper regarding this. Mr. Foster said that he has asked Town Counsel to explore if a storage facility is the same as a warehouse or does it fall in the category of retail business as a shoe store or a candy store. That is the question that needs to be answered.

Mr. Beneski felt that they were going in circles and that they were just going over the same material. Mr. Foster said he understood but that with the question of accessory use before the Board, they needed to rely on the definition that was in their bylaws which he then read aloud. He felt that all the buildings were central and key to the business and that the business did not have accessory buildings. Atty. Wagner said that the bylaw makes it clear that these buildings have no authority and are one dimensional. The office building is completely dimensional as it controls access and egress from the public to the site and the use of the buildings. The four buildings operate in a subordinate position to the front office building.

Mr. Foster then asked for opinions from the Board members. Mr. Beneski thought that it was the main part of it. Mr. Curtis was not sure. Mr. Levitt agreed with Mr. Foster that the buildings were not incidental or subordinate. Mr. Maksy said that without the buildings you have nothing. Mr. Foster said that it appeared that they were in agreement.

Mr. Foster then read a March 15, 2007 from a Mr. Staples, who lived adjacent to the property. He was concerned about this proposal and made several points that he felt should be addressed with the issuance of any Variance or Special Permit.

Mr. Foster then asked if anyone present would like to speak. Mr. Wallace McCarroll of 147 County Street was concerned that different people had different visions of what the Town should be and if what was proposed was allowed it could devalue their properties and the whole neighborhood.

Ms. Yeatts then noted that the Board of Selectmen recommendation had not yet been read. Mr. Foster then read that letter in which they recommended denial due to Section 4.0. Mr. Foster said that personally he would not have said it that way as just because it is not mentioned does not mean it is not allowed.

Mr. Foster then questioned what they should do procedurally. Atty. Pawle replied that procedurally they should first address the Building Inspector's decision which is being appealed. Mr. Foster advised that Mr. Marot sited 5.0 and no more than one principal structure. Mr. Foster thought he took that from a different section of the bylaws. Atty. Wagner said that there were two sections mentioned 5.0 and what is an accessory building use. He said that he could provide Town Counsel with the definitions that have been accepted either in Court or administrative interpretation within Massachusetts jurisdiction.

Members then discussed 5.0 again. Mr. Foster stated that it says what may not be done but that it does not say what may be done. Atty. Pawle agreed with Mr. Foster's interpretation. What may be done depends on the balance of their bylaws. Mr. Maksy did not agree with what the Building Inspector sited and felt that it did not fit this case in respect to 5.0 only. Mr. Foster felt it was difficult to interpret but it was accurate. Atty. Wagner disagreed and said that the word such was the word that made it refer to those lots that don't meet the minimum square footage. After further discussion, Mr. Foster asked if Board members would like to continue and get clarification.

Atty. Wagner said that if Town Counsel agreed with the position they had taken, he could then come back and argue the Variance of Special Permit issue. Mr. Foster noted that they would not get there unless procedurally they upheld Mr. Marot's decision. He asked the petitioner if they would want to continue. Mr. Markson agreed to continue.

Mr. Maksy made the motion, seconded by Mr. Canessa, to continue the Markson hearing until May 17, 2007. The time would be at 7:15.

The hearing closed at 9:58.

Stagecoach Village LLC hearing – continued:

Mr. Foster reopened the Stagecoach Village LLC hearing at 10:00. Atty. Gay advised that they needed to continue because the architect had been unable to stay because of a health issue.

Mr. Curtis made the motion, seconded by Mr. Maksy, to continue the Stagecoach Village LLC hearing until April 19, 2007. The time would be at 7:15.
The hearing closed at 10:07.

Mr. Curtis made the motion, seconded by Mr. Canessa, to adjourn the meeting. The **vote** was **unanimous for**.

Meeting adjourned at 10:07.