Zoning Board of Appeals Lakeville, Massachusetts Minutes of Meeting March 20, 2008

Members present:

Donald Foster, Chair; David Curtis, Vice-chair; John Veary, Clerk; Eric Levitt, Member; John Oliveiri, Jr., Associate Member, Carole Zimmerman, Associate Member

Regular Meeting:

Mr. Foster opened the regular meeting at 7:05 p.m.

Roll called. Bills signed.

Mr. Foster advised that he wanted to note a copy of the Zoning Board regulations had been distributed. It was time to update these as they were now 20 years old. He wanted to draw their attention to the pages that showed the process for a Special Permit and Variance. They have struggled lately with incomplete and incorrect applications. He noted that the Town Administrator had indicated that applications should first go to the Building Inspector, Mr. Iafrate, who was also present. Mr. Iafrate replied that he agreed that any application that did not meet the Zoning Bylaws should start in his office with a denial and that the Board would then have a letter from him stating why it was denied. Mr. Foster asked if they could also include Special Permits. They could then say that anything requiring a Variance or Special Permit would need to go to the Building Commissioner's office first for either an opinion or a denial. Mr. Iafrate felt that would streamline the process and make it easier for everyone. Mr. Foster said that he would then like authorization from the Board to draft for their approval an update to the flow charts on page 6 and page 9 to indicate the process that takes applications to the Building Department first and second that they use the process to require the petitioner to send the materials to the other Boards. Mr. Foster asked if there were any additional comments. There were none.

<u>Lee hearing – continued:</u>

Mr. Foster reopened the Lee hearing at 7:15. Mr. Lee advised that since the last meeting he had gone back to the Planning Department and the Building Department but that tonight he is asking for a continuance so that he can continue to gather the documentation that is necessary. Mr. Foster stated that Mr. Lee had applied for a Special Permit on a sub-divided lot but that the lot is not sub-divided. This means that he is asking for a waiver on a lot that does not exist. The Board would be completely within their rights not to accept his request for a continuance and deny the petition. Mr. Foster continued that what made this worse was that when looking at the plan, aside from the house that

they do not want to move, this lot could be sub-divided to be conforming. Mr. Lee is asking the Town to create a non-conforming lot and that is against the bylaws. Mr. Foster said that before he asks Board members for consideration of the request to continue he will entertain any discussion if they want to dispose of this petition tonight. He also noted that when this petition had been presented several years ago it had been represented as an existing lot but the lot does not exist.

Mr. Lee said that the lot was subdivided. Mr. Foster replied that according to the Planning Board the lot did not exist so that somewhere there was some miscommunication. Mr. Lee said that the plan was originally stamped and signed by the Planning Board. Mr. Foster then read the March 20, 2008 letter from the Planning Board where it was stated that when he appeared before them, he did not have the linen for signature and that when it was signed it would be for conveyance purposes only as there was not a valid plan on file at this time. Mr. Foster said that unless he was mistaken that meant that the plot of land as presented to them before does not exist and the plot that was presented now is in consideration by the Planning Board. Mr. Lee responded that the Planning Board had sent him to the Building Inspector to apply for a building permit. Mr. Iafrate felt that what should happen here is that he should have this lot subdivided by the Planning Board and he was unsure of why they would not sign the plan. The lot that is created will be designated as non-buildable and he would then be denied a Building Permit which would enable him to then come in front of the Zoning Board.

Mr. Foster asked what Board members would like to do. Mr. Oliveiri said that based on what they had just heard Mr. Lee could always withdraw and then reapply. Mr. Foster said that was a valid option. He asked Mr. Lee to keep in mind that if he asked for a Variance, the implication was the waiver was due to a topographic problem with the lot. As he looks at the plan, his reaction is that what interferes with subdividing the lot in a conforming way is the house which would not satisfy the bylaw requirement.

After further discussion, Mr. Lee requested to withdraw the petition without prejudice. Mr. Curtis made a motion, seconded by Mr. Levitt, to accept the request to withdraw without prejudice. The **vote** was **unanimous for**.

The hearing closed at 7:30.

Marzelli hearing:

Mr. Foster opened the Marzelli hearing at 7:30 and read aloud the legal ad. He advised that this was another petition that had been submitted that was incomplete. He next read the February 20, 2008 letter from the Conservation Commission which stated that a filing for the current proposal would be required. The March 10, 2008 letter from the Planning Board recommended disapproval of the petition due to insufficient information. Mr. Foster also read the March 18, 2008 letter from the Board of Selectmen. They could not make a recommendation because the petition was incomplete. The March 11, 2008 letter from the Board of Health stated that based on the limited information provided it

appeared that there were no health issues for denial of the petition but if issues did arise, the Board of Health would not sign off on the Approval Form.

Atty. Robert Mather was present for the petitioner. He was unsure why the brief had not been attached to the petition and could, therefore, understand why there had then been such confusion. He advised that he had consulted with Mr. Iafrate and originally they did not think that they would need to come before the Board. However, they had an unusual situation with the roadways and there is a bylaw that says if you have an easement over your property, you cannot count it in your calculations. They did determine that they still had over 20,000 square feet but further in the bylaw it states that the demolition and replacement of an existing structure is allowed with Board of Appeals approval provided setbacks and coverage requirements are met. They felt that the bylaw was conflicting but that they did need to apply to the Board of Appeals.

Mr. Foster asked how many bedrooms in the present house and the proposed house. Atty. Mather replied that there were two bedrooms in both but that there is a computer room in the proposed house which would meet the definition of a bedroom. He advised that the Board of Health does not want more than two bedrooms. The leaching field requirements of Title V have changed so that the system is not enough for two bedrooms. He has discussed with the Board of Health how they can deal with that issue and there are two ways. They would view this as an existing system and allow it but only for two bedrooms. The computer room could be redesigned or they could put on a deed restriction. He has spoken to Mr. Marzelli who does not want more than two bedrooms and plans to redesign the computer room with either a half wall or an archway coming in. Now they need to change the plan and get Board of Health approval.

Atty. Mather said that they are not asking for approval tonight because they do have to go back and modify the plan to comply with the Board of Health and because it appears that some of the other Boards did not get the proper information he would be willing to send them an additional set of plans with a full brief of exactly what was being asked. Mr. Foster suggested that the package include the brief, the description and plans for the septic system, and an updated version of the first floor with the modifications to the computer room.

Mr. Foster asked if Board members had any comments or questions at this time. There were none. He then asked if anyone present had any questions. Mrs. Connie Bebis of 16 Pine Bluff asked what the footprint would be. Atty. Mather said that it would be 37' x 44'. Mrs. Bebis thought that a house that was demolished had to be rebuilt on the same size foundation. Mr. Foster said that was not true and because this was on the water that their concern was with the environmental impacts especially the septic system and number of bedrooms. Mrs. Bebis also asked what the setbacks were. Mr. Foster responded that the side setback was 21 feet from the side boundary. Mr. Foster suggested that she look at the plan.

After consulting the plan, Mr. & Mrs. Bebis advised that Mr. Marzelli had filled in the road and that there was now a water problem. Mr. Foster asked Atty. Mather if he could

address that concern but before they did he wanted to note that runoff water is the concern of the Planning Board. He suggested that maybe this petition should go back to the Planning Board for their input and they could use that input in a restriction or condition on any Special Permit that might be issued. Atty. Mather said that he had just been made aware today of that issue although he did not think it had anything to do with the subject of the house. He has told his client you cannot change the natural run-off of the water to flow on another property. That is considered a form of trespass.

Mrs. Bebis noted also that the property line had been encroached so much that people have a hard time making the turn for her access road and that road is the only way to her house. Mr. Foster said that technically he did not think that the two issues could be considered but they did want to do the right thing for everybody. He is going to ask Atty. Mather to raise these issues with the Planning Board. Atty. Mather felt that it was a civil matter. Mr. Foster said that Atty. Mather had always been very cooperative with the Board and he was asking him to take this to the Planning Board and ask for their help. If Mr. Marzelli bermed the land to create a run-off problem, he needs to fix that and they could not do that here. Atty. Mather said that he would bring it to their attention.

Mr. Bebis asked if Beech Street was considered an issue also. Atty. Mather replied that Beech Street never existed and has never been on the ground. The Courts have made that issue clearer by finding that if an easement does not specifically prohibit relocation, you can relocate. He is saying that there is no easement there because it has never been there and it has been physically blocked for more than 20 years. Mr. Foster noted that according to the plan the existing deck protrudes into Beech Street by about five feet. Atty. Mather replied that he would maintain that there is no easement but if there is and people feel they have a right to access the water from there, there is plenty of room to do so.

Ms. Cheryl Blanchard asked Atty. Mather to also address with Mr. Marzelli the issue of the trench that has been dug on Pine Bluff. They now have to travel over this because they are trying to divert the water in a different direction from where it wants to go. Atty. Mather replied that he would address both of those issues with Mr. Marzelli and the Planning Board.

Mr. Curtis then made the motion, seconded by Mr. Veary, to continue the Marzelli hearing until April 17, 2008. The time would be at 7:15. The **vote** was **unanimous for**.

The hearing closed at 8:00.

Bourgeois hearing:

Mr. Foster opened the Bourgeois hearing at 8:01 and read aloud the legal ad. Mr. Foster also read the February 20, 2008 letter from the Conservation Commission which stated that there were no Conservation Commission issues with the current proposal. The March 10, 2008 letter from the Planning Board recommended approval of the petition.

Mr. Foster next read the March 11, 2008 letter from the Board of Health who saw no health reasons to deny the petition. The March 18, 2008 letter from the Board of Selectmen recommended approval of the petition if the property was not sharing a well with an adjacent property and if it had been approved to receive municipal water from the City of Taunton.

Mr. Bourgeois explained that 6.1.8 asks that you meet four criteria. You must maintain the setback dimensions, the building height must not exceed the maximum allowed building height, you must not exceed the maximum lot coverage, and you must have approval from the Board of Health. He did apply and receive city water and Board of Health approval. Mr. Bourgeois then distributed pictures of what the house looked like now and what it would look like.

Mr. Foster said that it appeared to be quite an improvement. He asked how long the house had been unoccupied. Mr. Bourgeois thought that it was several years. Mr. Foster said that it appears that all of the requirements of the bylaw will be met. He asked if Board members had any questions. There were none. He then asked if anyone present would like to speak for or against the petition.

Mrs. Patti Keller requested that Mr. Bourgeois be careful with the trees at the back of the property line. Mr. Richard Keller noted that they were concerned about the location of the existing septic system and what happens around the edges of the property which includes a large amount of debris. Mr. Foster noted that he was close to the reserve area but what was going to be put in was going to be an improvement to what was there.

Mr. Dennis Keane of 63 Rhode Island Road said that he welcomed the project but he was concerned that a lot of trash had been buried on the property including tires and oil drums. He had noted a kerosene smell coming from the ground when he had walked over to the property. Mr. Foster asked if he had seen the drums being buried. Mr. Keane acknowledged that the drums had been removed but not buried. Mr. Foster asked if he felt that there was any hazardous material buried in the ground. Mr. Keane replied that he was not positive on that although he had a suspicion of it. Mr. Foster was unsure of where to go with this. He asked Mr. Iafrate what his opinion was. Mr. Iafrate responded that the applicant would have to clear the site when he took the house down and if he did find anything that needed remediation he would have to do it at that time but until he had permission to take the house down, he was not going to know if there was something there or not. Mr. Bourgeois agreed that if he did uncover anything he would have to deal with it at that time.

Mr. Foster asked if there was anything else. Mr. Nelson Pratt of 32 Captains Way stated that the house was an eyesore for the whole neighborhood. He thought it was a great improvement.

Mr. Oliveiri then made the motion, seconded by Mr. Veary, to approve the petition. The vote was **unanimous for**.

Mr. Foster then explained to Mr. Bourgeois the timing of the filings, the appeal period, etc.

The hearing closed at 8:19.

Urbanski hearing:

Mr. Foster opened the Urbanski hearing at 8:20 and read aloud the legal ad. Atty. Drew Hoyt was present for the petitioners. He advised that they were here with respect to what they believed were violations of the Lakeville Zoning Bylaw at 170 Main Street. He distributed the Assessors map and an aerial photo of the property for the record. He noted that the property consisted of two parcels and the Urbanskis lived three parcels down on Old Main Street.

Atty. Hoyt advised that the parcels did have a long history. There used to be a house only on the property. In the 1970's, was when there was construction of the first greenhouse as part of a business that involved growing and selling herbs and flowers. The next owner added two additional greenhouses for the purpose of storing potted plants and nursery items. The next owner had a similar business and it included a landscaping business. The next owner lost the business in foreclosure and it was then purchased by Mr. Ieronimo. Atty. Hoyt stated that when he visited the property in November there were Christmas trees for sale in the front lot and the one greenhouse that was in use was to cash out and had other holiday items such as poinsettias in it.

Atty. Hoyt advised that they were here today because they felt that the property was being used in ways that are inconsistent with the intended use of the greenhouses which was to grow and nurture plants and the current use of the property is inconsistent with Lakeville Zoning. They contend that the greenhouse is being used as a retail florist business and a garden shop and the items being sold there, for the most part, are produced elsewhere which means that this is a retail business operating in a residentially zoned district.

Atty. Hoyt continued that they believed that there were a number of dimension related zoning violations. They sent a complaint letter to the Building Commissioner on December 21, 2007 and requested enforcement. Mr. Iafrate responded on January 2, 2008 and in this letter declined to take enforcement but indicated that he advised Mr. Ieronimo to seek a Special Permit for the operations at the property. It appears that Mr. Ieronimo has declined to do that.

Atty. Hoyt said that he would like to outline and submit documents for the record that would demonstrate why they believe the use of property is not consistent with zoning. Atty. Hoyt submitted for the record the January 2, 2008 from Mr. Iafrate in which he stated that it was his understanding that Mr. Ieronimo was selling mulch, loam, plants, shrubs, Christmas trees, and perennial and annual plants that were being grown in the greenhouses. In respect to the use of the property, he has a printout for a Teleflora

website which indicates that there is a Teleflora location at this property. The uses that he observed, the uses noted by Mr. Iafrate, and the use evidenced by this Teleflora print out are not uses that are permitted as a right under Lakeville zoning. Section 4.1.1 indicates that farm, garden, greenhouse, or nursery are as of right uses but the uses currently at the property now do not fall within those as of right permitted uses.

Atty. Hoyt advised that when he was doing research, he came across a Supreme Judicial Court Case (SJC) that directly answers the question of what does it mean when a local Zoning bylaw says that you are permitted as a right to have a greenhouse or a nursery. He distributed this material for the record and advised that the decision goes on at some length in describing and delineating between permitted and un-permitted uses.

Mr. Foster asked how many acres the property was. Atty. Hoyt advised it was approximately an acre and a half. Atty. Hoyt advised that you use a greenhouse structure to grow live plants or to nurture live plants. A florist or Christmas tree sales operation where you have cut plants is different and not permitted. Atty. Hoyt said that the decision goes on to address some of the ancillary products that are sold in this type of operation such as you might find in a garden shop which is not a greenhouse. He advised that Lakeville Zoning has to be consistent with case law and if the Town's Counsel looked at it they would agree that this would be the governing case law for Massachusetts.

Mr. Foster said that as they know they are required to follow the bylaws as much as possible and frequently they find that they are not well written. Therefore, it is their job to try to interpret what was intended in a way that is as fair as possible for all parties. Mr. Foster asked Mr. Urbanski how long he had lived in his home. Mr. Urbanski replied that it had been 40 years. Mrs. Urbanski noted that they have previously filed complaints with the Town, some going back 20 years but there has never been a reaction from the Town.

Mr. Foster told the Urbanskis that they have listed a number of zoning violations on the property but he would like to know what the real issues were here so that they could take a look at that big picture and what it is that concerns the neighbors. He would guess that it was not the intrusion into the setback. Atty. Hoyt replied that it was important to note that the Urbanskis were raising fundamental complaints about the use of the property. Mr. Foster asked the Urbanskis the same question. Mrs. Urbanski replied that this is supposed to be a scenic road in a nice neighborhood and over the years they have been harassed and intimidated because they have complained about the cars and the 18 wheelers parking and coming into the neighborhood. Now it has been rumored that Mr. Ieronimo is attempting to start a floral shop but that is not allowed in a residential zone. She also noted that a letter had been sent by Mr. Darling where he stated that greenhouses cannot be used as an office, counter area, or place where customers converge but this was not the case at Christmas time when Christmas trees, wreaths, and decorations were sold in that greenhouse. They do not mind if Mr. Ieronimo has producing products in those greenhouses but they do not want this to generate into a commercial business. They want to keep this as a residential area.

Atty. Hoyt advised that the property was not purchased for residential use but apparently with an eye toward running a commercial business. Mr. Foster asked Mr. Ieronimo how long he had owned the property. Mr. Ieronimo responded that he had purchased it in September of 2007. Atty. Hoyt said that they were asking the Board to do the hard thing and put and end to what has been a long history of the Town for one reason or another not stepping in and holding this property to the Zoning Bylaw. Atty. Hoyt next submitted two building permit applications for the greenhouses which indicated that they were to be used for the growing of plants which is consistent with the definition of greenhouse. Atty. Hoyt also submitted the recent decision of the Board in regards to a Special Permit for a floral shop home occupation. He noted that the Board had established tight constraints when they granted that Permit.

Mr. Foster asked if Atty. Hoyt was finished as he would like to give the property owner a chance to comment. Atty. Richard Manning was representing Mr. Ieronimo, the property owner. He advised that Mr. Ieronimo also owns a landscaping supply business in Middleboro. This property was purchased in September in order for him to get into the retail sales of plants, vegetables, and shrubbery. The operations of this property will probably be five or six months out of the year. At present, one of the greenhouses is filled with seedlings and the other is filled with pots ready to be plugged for later growing. Mr. Ieronimo has started later than normal due to the fuel cost of heating the greenhouse. They did have the intention of selling cut flowers, but when they realized when speaking with Mr. Iafrate that was not permissible, that ceased and the Telefloral account referred to was cancelled as of December 31, 2007. They will not be conducting a florist business at the premises. In the summer, they intend to sell plants for the yard, perennials, annuals, and small shrubs. In the fall, as in the past, they will sell mums, pumpkins, and other fall plants. They will then close and reopen for one month after Thanksgiving to sell Christmas trees, wreaths, and poinsettias which will be maintained in the greenhouses.

Atty. Manning advised that there were many issues that he differed with counsel with in regards to the way he characterized the use of the property. In his exhibit A which he submitted for the record, he noted that this parcel was bisected by a road called Briarby Lane. It is a dead end street that does not go onto Main Street and that is the road that people use to access the lot. There are no parking signs on Nelsons Grove Road and there is a sign on the corner indicating that customers park at the far end of the property so that there are no safety concerns for the residents. He would submit that under 4.1.1 this is a permitted use. It is consistent with a garden or nursery including the display and sale of natural products. This does not mean that every single thing sold there has to be a natural product. If a plant has a bow in it, it is not a natural product, but it is incidental to that use and that is what is going on there.

Atty. Manning noted that as Mr. Foster had indicated, the first issues raised in his memo are procedural issues that he will bypass. What he would like to get to is that the petitioners state that they are personally aggrieved and that they are an abutter to this property. He advised that if you look at the Zoning map in between the Urbanski lot and the subject parcel is Nelsons Grove Road and two other parcels of land. They are

actually an abutter of an abutter to a parcel of land across a road and over 515 feet from the property. There are certain presumptions regarding an aggrieved person giving them the right to bring this petition if they are an abutter to an abutter within 300 feet, yet they don't even fall under that category. The Urbanskis have stated that their property will be devalued but there is nothing specified upon which that is based. When he looked at the Assessors records, the property has actually increased in value. He advised that previously a landscaping business was operating out of the property with several employees, trucks and equipment. He noted that none of that would be happening at the property anymore but strictly the nursery business. Atty. Manning said that even if the Board finds that something about it is not permissible, there is another reason why they should not uphold the issue of Cease and Desist and that is the Statute of Limitations. That provision states if a building or structure is built according to a Building Permit then any limitation or modification to its use or any alteration or removing of a structure have to be brought forth within six years. These greenhouses were built in the 1980's and the use of this property has been consistently made for at least two decades as indicated by the submittal of his Exhibit B, a 1998 article from the Standard Times outlining fall events that were going on at the property.

Atty. Manning believed that Mr. Iafrate was correct in not issuing a Cease and Desist on this property because the use has been consistent with the past and they are either permitted uses or they are well beyond the period of time to enforce it. He noted that Mr. Ieronimo did not refuse to apply for a Special Permit but had met with him to discuss his options one of which was the status of Briarby Lane. It is unclear if this is a private or public road. He has discussed this issue with Mr. Iafrate and depending on the outcome if there are any issues left that Mr. Iafrate feels warrant action before this Board, they will come back here as their intentions are to comply with everything that is asked of them. He felt that this was something that they were going to resolve as it is Mr. Ieronimo's intention to be a good neighbor. He realizes that although they have not had success with previous owners in the past, it was unfair to judge Mr. Ieronimo based upon those people. He has been a good neighbor where he is in Middleboro and it is his intention to do the same at this site.

Ms. Virginia Murdock of 171 Main Street advised it was true that a lot of different things had been done at the site but they had never had an owner like Mr. Ieronimo who came to their door to discuss what they liked or did not like. Charles Moynihan of 18 Forest Park Drive said he did not know this gentleman but that they would not be here tonight if the Town had done its job with previous owners. He said that whatever this Board decides to do, they must put it in writing and then let it be enforced.

Mr. Foster said that according to 4.1.1, the second part which nobody has mentioned a stand for the sale of agricultural products less than five acres is all Special Permit and this piece of land is an acre and a half. Mr. Iafrate agreed that it could fall under either of the categories and he tried to resolve some of the issues by asking Mr. Ieronimo to go for a Special Permit. He could then add conditions to that. Everything talked about tonight Christmas trees, pumpkins, flowers, are all natural products which means he meets the intent of the bylaw. Mr. Foster said that still requires some interpretation on their part.

However, Mr. Ieronimo has indicated a willingness to work out some issues and these people have some long standing complaints that apparently precede this owner. They need to try to come to the middle of this. He would suggest that under the interpretation of the second line of the bylaw that Mr. Ieronimo consider coming to the Zoning Board for a Special Permit so that they can work together to structure the way the business runs and allow the neighbors to also have input.

Atty. Manning replied that they had wanted to resolve the road issue but that they could submit a business plan to Mr. Iafrate which would address the issues that Mr. Foster was alluding to i.e. hours of operation, hours or limitations of deliveries, etc. Mr. Foster said it would address it if they came to them so that they could put restrictions on it. Atty. Manning said the issue he was grappling with is if it was a permitted use then there are no restrictions on a permitted use. He needed to clarify with Mr. Iafrate what use at the site requires a Special Permit. If it is just the stand for sales then limitations could be put on that. Mr. Foster said that it could also be a perception of the volume and the size of the business. Years ago it started off as a small greenhouse and nursery. Now there have been complaints that it has gone beyond that and does not match the bylaw. He felt that they needed to push it back toward, collectively as a community project, to support this gentleman's business but also to support the needs of the community and property values. It needs to fit the general concept of what they think the bylaw is intended for.

Atty. Hoyt agreed that a Special Permit was the right way to go but he felt that when they look at what the SJC has defined as the contours of the as the right of use it is narrower than the use described. Christmas trees were a perfect example of a farm stand Special Permit and explicitly ruled out by right, by the SJC.

Mr. Oliveiri said that based on the SJC decision and his interpretation of the bylaw if you are selling what you are growing there, in his opinion, they can operate as it is now. If they want to do additional things such as Christmas trees there, then at that time, they need to come back for a Special Permit. Mr. Foster said that he would suggest that the hearing be continued so that Mr. Ieronimo could apply for a Special Permit which they could consider and depending on the outcome of the Special Permit this petition may be withdrawn.

Atty. Hoyt said that they could agree to a continuance for a short time in which they would expect to see that application for a Special Permit. Mr. Foster said his suggestion was that they ask the property owner to apply for a Special Permit at his soonest opportunity and they continue this until they resolve the Special Permit question and then they can decide whether they need to precede with this or not. After further discussion, it was agreed by all parties to continue until May 15, 2008.

Mr. Levitt asked if Town Counsel could look into the issue of the Statute of Limitations because it is something that could come up. Atty. Hoyt felt that issue would only come up in Court.

Mr. Oliveiri then made the motion, seconded by Mr. Curtis, to continue the Urbanski hearing until May 15, 2008. The time would be at 7:15. The **vote** was **unanimous for**.

The hearing closed at 9:20.

Mr. Curtis made a motion, seconded by Mr. Levitt, to approve the Minutes of the December 20, 2007 meeting. The **vote** was **unanimous for**.

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

Meeting adjourned at 9:30.