

**Zoning Board of Appeals
Lakeville, Massachusetts
Minutes of Meeting
May 17, 2007**

Members present:

Donald Foster, Chair; Derek Maksy, Vice-chair; 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 7:00 p.m.

Roll called. Bills signed.

Markson hearing – continued:

Mr. Foster reopened the Markson hearing at 7:15. Mr. Foster asked Mr. Beneski and Mr. Levitt to participate as voting members. He advised that they were not going to be restarting but that they were going to go back to some of the basics of this petition. He felt that they were facing two questions. The first was the issue of more than one principal structure on a lot. The second was the definition of warehouse or storage facility. He advised that if they ask Town Counsel for an opinion, they get one set of definitions, one set of answers and responses. If they ask Mr. Wagner, they get a different set. Based on that, he felt that one of their responsibilities might be to at least consider recognizing that these are both very grey areas and consider what they have done in the past and what they have looked at in the past.

Mr. Foster said that his impression of the property, which is over 100 acres, is that it does not perc as well as other properties in Town. His point is that in looking at the land and at the use proposed, it is not a bad match as it is a low impact usage. Mr. Foster said that on the issue of the Zoning Bylaw 5.0, which Atty. Wagner discussed, he agreed and felt that the wording of the bylaw was misleading. It leads you to one conclusion whereas the conventional interpretation that they have had over the years has lead them to a different interpretation and use of that bylaw. In recent years, the Board has approved more than one structure on a property.

Mr. Foster thought that they might look at this as a reasonable business use of the property and put aside the question of a storage or warehouse facility. Mr. Foster noted that Atty. Wagner's research team had found a lot of compelling information and although he was not sure how binding it was, it did make one stop and think. He

suggested that they look at this as a project that could be considered under a Special Permit which would give them the opportunity to work with the petitioner to impose reasonable restrictions. Mr. Foster asked what Board members thought. Mr. Maksy agreed and said that in the future if the petitioner wanted to make changes, he would have to come back to the Board. Mr. Levitt agreed. Mr. Beneski said that he would like to hear from the attorney as well as the Building Inspector before he could agree or disagree. He knew that the Board of Health did not vote on it because there was not enough information on the septic system. He would want to see an approved plan from the Board. Mr. Markson responded that the design was approved and the plan was at the Board of Health. Mr. Foster said that it could be made a restriction. Mr. Markson said that he had the building and site plans with him.

Mr. Foster said that they should have those plans but suggested that they continue with the hearing. The Board had received a letter from the Building Inspector and Mr. Foster then asked Mr. Marot to summarize it rather than reading it aloud. Mr. Marot said that he had read both memos from Atty. Wagner and that he agreed with the definition of warehouse and would interpret the described use as permit-able. In regards to the bylaw 5.0 his position, as was his predecessor's, was to allow one principal structure on a lot and this will be his continued stance. He felt the question tonight was what becomes the primary structure and what becomes the accessory structure. Mr. Marot also said that the original application for building and the review of the site plan by the Planning Board did not contain any information relating to retail. This is a clear change in use from the original plan submitted and the only requirement that he would want to see beyond ZBA permitting would be to file back with the Planning Board and show how these buildings will be used in this capacity. There were a few other requirements that the Planning Board looked at and for the most part Mr. Markson met everything that they had talked about. One was a clear division or separation from the roadway to the property relative to screening. There was an area that was clear cut which violated an agreement between Mr. Markson and the Planning Board. Mr. Foster said that if they could move forward on this tonight they could consider that issue among other issues, as a condition of approval, as a restriction.

Mr. Foster said that it appeared that the retail use of the property has been enhanced in the revision and that it more firmly establishes the office building as the primary structure. Atty. Wagner agreed that the office building was always considered the principal structure and the other buildings were used for storage alone. Mr. Beneski asked where was that written as he did not see that in his material and he did not remember the sale of material as being mentioned. Mr. Foster said that he thought they had talked about packing and boxes as an incidental comment. He did not think that specifics had to be listed. Mr. Foster felt that it might be a moot point. Whether they consider one principal structure with four accessory structures or four principal structures with one accessory structure, they have a number of examples where this waiver has been granted.

Mr. Foster suggested that they consider a Special Permit and he had a number of recommendations for conditions and restrictions that he would impose on that. His first thought was that because the biggest objection from the neighborhood was the visibility,

he asked if Mr. Markson would consider moving everything back from the road an additional twenty feet. This would allow for more visual screening in the front. Mr. Markson felt that he could add more vegetation and screening without moving everything back. A fence was also discussed. Mr. Marot noted that a fence had been discussed with the Planning Board. Although the fence is see-thru, it is attractive. Mr. Markson said the fence is wrought iron and it could be either green or black. Mr. Marot suggested instead of moving everything back which would require the plan to be re-engineered, a berm could be constructed. This berm could go all the way across the property for a site barrier. Mr. Markson was agreeable to this. After continued discussion on the height of the berm, Mr. Maksy recommended that, as a condition, they send this back to the Planning Board to get their expertise on the fence and the issue of the berm. Atty. Wagner said that they were agreeable to that.

The next issue Mr. Foster discussed was the sign. He asked if it was to be lighted. Mr. Markson replied that it was not an internally lighted sign. Atty. Wagner advised that lighting had been discussed with the Planning Board and the illumination would not be offensive. Mr. Foster stated that they would probably want to restrict lighting and turn it off at a certain hour. Mr. Marot said that hours had been agreed upon by the Planning Board but that he did not recall what they had been. Mr. Foster said that in the past they have required lights to be off an hour after closing time and not later than 11:00 p.m. Mr. Markson felt that he would not have any lighting on after 9:00 p.m. and that he would be comfortable with a restriction that he not be open after 8:00 p.m. Atty. Wagner said that the illumination plan had been worked out with the Planning Board. Mr. Beneski felt that they should have a copy of the plan from the Planning Board if a decision had been made. How can they sit down and make a decision if other agreements have been made? They should have that in front of them so that they can make an educated decision. Mr. Markson said that if he had been aware of that, he would have gotten the Minutes from those meetings. Mr. Marot recommended that in the future if Mr. Markson decides to increase the size of the building or change the use, he would be required to go back to the Planning Board. Mr. Foster replied that with restrictions if Mr. Markson wanted to change anything, he would be required to come back to the Zoning Board.

Mr. Curtis asked what time would the business be opening. Mr. Markson said he would not be open before 8:00 a.m. and it would probably be 9:00 a.m. Mr. Marot said that he did not remember the hours but the Planning Board had been agreeable to them. After a discussion, it was agreed that hours could be from 7:00 a.m. to 8:00 p.m. but that the hours would not exceed the Planning Board's recommendation. It was also agreed that the lights would go off one hour after closing unless there was an intrusion.

Mr. Foster said that he would like to consider a restriction that the berm and plantings be done before a building permit was issued. Atty. Wagner replied that he would suggest that the berm and the vegetation of the berm would be the first act to take place after the issuance of the building permit. Mr. Markson said that the materials for the berm would be coming out of the retention pond so that he would need the permit to begin construction of that. Mr. Marot suggested that they modify the request and place it on

him to supervise the construction of the project until such time that he would only then issue an occupancy permit. Mr. Foster felt that was a good idea.

Hours of construction were then discussed. It was agreed that construction on Monday through Saturday would not be before 7:00 a.m. and no later than 6:00 p.m. There also would be no construction on Sundays. Mr. Curtis noted that there should be a stipulation that there are to be no engines running before 7:00 a.m. Mr. Marot said that in the subdivisions he sees there seems to be no objection to later work hours and that 7:00 p.m. would be allowable. Mr. Foster then suggested that the hours be 7:00 a.m. to 7:00 p.m. until Labor Day and then work permitted only until 6:00 p.m.

Mr. Foster asked Mr. Markson if he would be open on Sundays. Mr. Markson did not think so but if he was it would be after noon. Mr. Foster did not think there would be objections to that. Mr. Foster asked if the business use should change would Mr. Markson be willing to remove the storage buildings. Mr. Markson replied that he would be willing to do that. Mr. Foster noted that one of the sheds would have a basement and that he could not remove that and then leave an open basement. Mr. Markson replied that there would be a concrete slab over it with a trap door so he could remove it. Atty. Wagner noted that if the business failed and it was desired to turn it into something else, he would still have to come back to this Board and get relief. It could not be changed unilaterally.

Members then discussed the March 15, 2007 letter from Mr. Robert Staples who had also requested some points for the Board's consideration, one of which was a 40 to 50 foot buffer around the facility. Mr. Markson said that it was presently a ten foot line and he was happy to address that. Mr. Maksy said that to take that ten feet and put arborvitaes there and call it a no-cut zone might be an easy solution but not practical. Mr. Markson said that he was not going to cut anything on that side of the fence. He could fill that area up with trees. The other points from the letter had already been discussed and agreed upon.

Mr. Curtis then made the motion, seconded by Mr. Beneski, to grant a Special Permit with the following conditions:

1. The petitioner must return to the Planning Board for their approval on the berm.
2. The hours of operation will be from 7:00 a.m. to 8:00 p.m. but not to exceed the Planning Board recommendations.
3. The hours of construction will be from 7:00 a.m. to 7:00 p.m. from Memorial Day to Labor Day and after Labor Day they will be from 7:00 a.m. to 6:00 p.m. Saturday hours will be from 7:00 a.m. to 5:00 p.m. No construction will occur on Sundays or holidays.
4. If the storage business fails, the storage sheds will be removed.

5. There are to be plantings between the fence and the property of Mr. Staples. These plantings will be sufficient to provide visual screening of the fence and buildings.
6. The signs and the lights will be turned off no later than one hour after closing time.
7. There will be appropriate screening on the North West side of the property that must meet the approval of the Planning Board.

The vote was **unanimous for**.

Mr. Foster said that they must act in regard to the appeal to the Building Inspector's denial. Atty. Wagner said that in light of the Board's action that they would withdraw that without prejudice. For in the event for some reason they had to deal with a legal problem, they would have to return to the Board.

Mr. Curtis made the motion to accept the withdrawal. It was seconded by Mr. Beneski. The vote was **unanimous for**.

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

The hearing closed at 8:25.

J&B Realty Trust/Olivieri hearing-continued:

Mr. Foster reopened the J&B Realty Trust/Olivieri hearing at 8:26. Mr. Curtis advised that he would be abstaining from participation in this hearing. Mr. Foster then advised Mr. Olivieri that because Mr. Curtis felt he could not participate because of a conflict of interest it left only four members who could act on the petition. His petition would then require a unanimous vote. Mr. Olivieri responded that because he had just received the legal opinion he would like to continue.

Ms. Amy Dow of 1 Nelson Grove wanted to go on the record as being a direct abutter. She wanted it 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. She would like the Board do take that into consideration when they made their decision.

Mr. Maksy then made the motion, seconded by Mr. Beneski, to continue the J&B Realty Trust/Olivieri hearing until June 21, 2007. The time would be at 7:15. The **vote** was **unanimous for**.

The hearing closed at 8:33.

Lynn hearing-continued:

Mr. Foster reopened the Lynn hearing at 8:34. He recalled the petitioner had been sent away to do some 'homework.' Mr. Lynn agreed and said that he had dropped off plot plans for the Board. The plan now meets the setback requirements and they are now just requesting a Special Permit. Mr. Foster stated that they would now be considering an accessory structure on a lot that did not have a principal structure. He said that they had done this type of thing in the past.

Mr. Foster asked if anyone present would like to speak for or against the petition. None spoke.

Mr. Foster also read the May 7, 2007 letter from Mr. Marot. Mr. Foster said that if members considered the property one lot Mr. Lynn did not have to be here. If they thought of it as two lots, they would then need to consider this as an accessory structure on a lot where there is no principal structure. Mr. Marot said that previously in the opinion of Town Counsel, the right of way clearly divided the parcels of land. In that case, he had no problem with this petition.

Mr. Foster asked what members thought. Member replied that they did not have a problem with the petition.

Mr. Beneski then made the motion, seconded by Mr. Curtis, to approve a Special Permit to build a 30 x 22 accessory structure on M47-B11-L1 with the following restrictions.

1. The garage is to be a single story structure.
2. There may be electricity but there is to be no water.

The vote was **unanimous for**.

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

The hearing closed at 8:39.

Pina hearing-continued:

Mr. Foster reopened the Pina hearing at 8:40. He advised that a similar hearing had been in front of the Board a few years ago and their Decision had been appealed by the Board of the Selectmen. He has found out, however, that a tight tank does meet Title V and that it does have its own list of requirements. He asked Atty. Mather to go through his presentation for Mr. Beneski, who had not been present at the first meeting.

Atty. Mather advised that Mrs. Pina own 5 Shore Avenue. It contains 10,500 square feet. It is a summer seasonal dwelling. It meets that definition as it has a substandard septic

system that does not meet Title V requirements for a year round dwelling. Mrs. Pina would like to convert to year round and the bylaw does have provisions for that. Certain conditions are imposed such as subject to the approval by the Board of Health and the applicant must also demonstrate adequacy of water supply and sewage disposal. Atty. Mather said that they do have approval of the Board of Health for a tight tank and they have conditional approval for a well. He also noted that conditions can be imposed on the Special Permit as to duration or use of the property. They are requesting this for the lifetime of Mrs. Pina only. They are also asking to be able to enclose an existing deck for utilities only.

Mr. Beneski noted that it appeared that there was already a lot of work going on at the property. Atty. Mather replied that Mrs. Pina planned to raise the property up to prevent any flooding and that was the work that he saw out there. That will be completed irrespective of this petition.

Atty. Mather said that one of the issues that they had talked about last time was if a tight tank complied with Title V. Town Counsel has defined that it does. Their engineer spoke with Brett Rowe at DEP and confirmed that. The fact that there is a Variance is not unusual. He feels that they have demonstrated from both what Town Counsel has said and what DEP has said that they do comply with Title V for a year round residence. Mr. Beneski said that Title V says that a tight tank goes in only after all other types of systems fail. It can be used for seasonal property and it doesn't stipulate that it can be used for year round homes. They also need to have contracts in place to have that inspected and pumped out on a monthly basis. It does meet Title V but there are restrictions and limitations. Mr. Foster felt that would belong back in the Board of Health Office. Mr. Beneski noted that although this conversion was to be allowed only for the lifetime of Mrs. Pina he had not seen any stipulations in writing from any of the other Boards in regards to that.

Mr. Foster felt that the real issue was when the house becomes vacant how will it be represented to the world? They can put a restriction on that it reverts to seasonal use but the next owner will be back here saying that this is a year round house. Atty. Mather replied that the Board will then need to pull out the Decision which clearly states that this was only allowed for Mrs. Pina and that it has now reverted to seasonal use.

Mr. Marot said that in his opinion he has looked at the requirements of the tight tank. He felt that provided it is monitored, if everybody in that neighborhood had a tight tank that was regularly pumped out there would be a better environment in that area. He noted that whatever the Board approves becomes a restriction on the deed. Mr. Foster replied that the next owner could come back and demand that they reissue a conversion.

Mr. Curtis asked Town Counsel if they could put in a stipulation when Mrs. Pina no longer resides at the house that the well must be filled. Atty. Pawle said that you could but she didn't know if it was advisable. Atty. Mather said that a seasonal dwelling could have a well.

Mr. Maksy said that he agreed with Mr. Marot. They are talking about a Title V approved system, a tight tank. He was not going to sit here and continue with a conversation about what other people might do. Mrs. Pina is meeting all the requirements of the bylaw. If something is done to the system later, he expects the Building Inspector to go down there and do something but they can't just sit here and assume that is going to happen because that is just not fair. He also did not agree with filling in the well.

Mr. Foster thought the correct approach might be the very narrow interpretation of the bylaw, grant with restrictions, and take that chance. Atty. Mather stated that they are spending a considerable sum of money for a tight tank system and a new well for a short term use. That is not a good economical decision and he did not feel that the Board would have a line of people wanting to do the same thing. Right now they have a seasonal dwelling with a substandard system which at some point in time will fail and they will not know that. If the Board grants this limited amount of time, they get a system that is fail safe and will not harm the environment. As an attorney, he does not take a deed restriction lightly and he felt that it would be a difficult thing to remove. He felt that it was not only the correct decision but the right decision.

Mr. Foster said that in his opinion they should grant with a deed restriction and see what happens in the future. He asked if anyone present would like to speak for or against the petition.

Mr. David Rogers, who lived next door, said that he was in favor of the conversion. A letter was also submitted for the record from H. Vee Mahoney who was also in support of the petition.

Mr. Curtis then made the motion, seconded by Mr. Maksy, to grant the petition with the following restriction:

1. A deed restriction will be placed on the property where Mrs. Pina will be the only full time resident and once Mrs. Pina leaves the property it will revert to seasonal use only.

Mr. Curtis then amended the motion to include the finishing of the utility room. The amendment was seconded by Mr. Maksy.

VOTE –Mr. Curtis, Mr. Maksy, Mr. Levitt, Mr. Foster - AYE
Mr. Beneski – NAY

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

The hearing closed at 8:55.

Discussion then began on Stagecoach Village. Atty. Pawle was surprised that Atty. Gay was not present. She advised that they did need to get a final Decision signed within the next week unless they get a written agreement to extend that period. Mr. Foster felt that they could get that. Mr. Varga said that he had not completed his final review but he expected to do that within the next week. Mr. Foster then asked if he could sign on behalf of the Board. Atty. Pawle replied that he could. It was felt that they would be able to obtain the extension but that as a back up they should authorize Mr. Foster to sign the Decision.

Mr. Maksy made the motion, seconded by Mr. Curtis, to grant Mr. Foster the authority to sign the Stagecoach Village Decision on behalf of the Board. The vote was **unanimous for**.

Mr. Foster asked Mr. Varga if he had anything to discuss. Mr. Varga replied that he did. He distributed copies of a list of items that he felt needed further action. The first item was to provide the Board copies of deed and HUD settlement statements for the sale of each unit. Would this be delivered to the Board after each sale or after a group of sales? Atty. Pawle said that it was each sale and that she would clarify that.

The second item was to provide the Board all certified costs, income statements, etc. What was the timing for submission to the Board? Atty. Pawle replied to clarify that it should be stated that anytime a document is provided to the Monitoring Agent that they will at the same time provide it to the Board. A Monitoring Agent was then discussed. Atty. Pawle asked if Lakeville had a Housing Authority. Mr. Maksy replied that it had just started one. She said that sometimes Towns use their own Housing Authority as the Agent but that this did not have to be designated at this time. Mr. Foster said that he would ask Ms. Garbitt about this.

Mr. Varga advised on page 8, item 15, the words “and the Board’s consulting engineer shall have approved said sewage disposal system.” have been added. On page 10, item 27 before the applicant builds one unit they should have the sewage disposal system, at least a portion of the storm water system, including detention basin and all connecting swales in place so that they will have control of storm water runoff during construction. Mr. Foster suggested that they table the issue on item 27 to see if this was a hold over from a previous set of plans and a previous approach. Members also discussed this issue of phases. Mr. Foster recalled that it had been discussed but that it had been some time ago. He felt that they might want to check with Atty. Gay to clarify this.

Mr. Varga asked members to return to page 7 and in terms of the review of the Final Construction plans and the forty-five days allowed for that. He would like it specified if there are revisions that there also be forty-five days allowed for that review. Mr. Varga noted that page 8 items 13 and 14 are one time things that need to be done. He is just bringing it to the Board’s attention. Item 16 was another checklist item of what documents should be submitted. These should be fully engineered plans. Item 17 was to confirm that they do have water to the site.

Mr. Varga continued with his review with item 20 which he also just considered as a checklist item. Item 21 needed to be reworded so that the Board could approve the location of the affordable units. Item 22 was also a checklist item regarding the Monitoring Agent for the Town. Item 23 was another checklist item for Town Counsel. Mr. Varga advised that there were a couple of elements that are referred to in Item 24. The existing house is supposed to be a Historical Building. Atty. Pawle then explained how a Preservation Restriction worked. Mr. Varga said that this should be resolved before any Building Permit could be issued. After a discussion it was agreed that they had come up with some items that needed to be addressed before a Final Decision.

Item 25 was another checklist item. Atty. Pawle advised that Item 26 was a 40B requirement. Mr. Varga pointed out that the last sentence in Item 27 would prevent a repeat of LeBaron and controls the timing of the construction of the affordable units. Item 28 was added and is one way to address that the sewage disposal system and the stormwater systems are up to standard. Mr. Varga said that he is combining item 36 and 38 together. He wanted to make sure that as-builts were submitted in order to address any construction issue that might not be right. Members discussed how this could be approached. It was discussed that the as-built should be submitted before the occupancy permit could be issued.

Item 41 was a checklist item. Item 42 adds in that the Town has the right to enter into the property to repair the stormwater management system and the sewage disposal system, if needed, and backcharge the condominium association as these could become public health issues.

The Landscaping Plan was also discussed. Mr. Foster felt that they needed something in this area. Atty. Pawle asked if the Board wanted to review the final plan. The Board agreed that they did want to see the final Landscaping and Lighting Plan and this would be in partnership with Mr. Varga.

Mr. Beneski also questioned the waiver on the Building Elevations to allow for a slope of less than 1:12 around the building foundation if that should be allowed. Atty. Pawle asked if this is something that could be addressed on the final approved plan. Mr. Varga thought that they could do it that way as it was one of the grading issues that he was looking at. He suggested that #6 be modified to read, "to be less than three feet but it shall be at least one foot above the high ground water table. Groundwater levels shall be determined using Title V methodology for each proposed dwelling on the uphill side of the road."

Mr. Beneski felt that they should not grant any waiver in the perc test regulations. This has not been granted to any other subdivision. Mr. Foster felt that they could take it out and then they could argue them if they needed to.

Mr. Varga advised that on the top of page 16 item A.2.a & b he had asked for this addition. He wants a minimum of six observation holes in the primary and reserve areas. A specific distance between the holes was discussed. Mr. Varga recommended 50 foot

grid spacing. This should be in the primary and reserve areas. Atty. Pawle clarified that the primary and reserve soil absorption system area shall be tested in fifty foot grid spacing for both the deep observation holes and the percolation tests. A3 was now eliminated. Mr. Varga said item 50 was the last item and it was only a checklist item.

Mr. Maksy asked if they wanted to act on the letter from the Town Administrator and try to get some more members on the Board. Mr. Foster said that they did need to do that.

Mr. Maksy made the motion, seconded by Mr. Curtis, to approve the Minutes from the February 15, 2007 meeting. The vote was **unanimous for**.

Mr. Maksy made the motion, seconded by Mr. Curtis, to approve the Minutes from the March 15, 2007 meeting. The vote was **unanimous for**.

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

Meeting adjourned at 11:19.