

**Zoning Board of Appeals
Lakeville, Massachusetts
Minutes of Meeting
August 14, 2008**

Members present:

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

Atty. Laura Pawle was also present

Regular Meeting:

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

Roll called. Bills signed.

Mr. Foster advised that either Mr. Oliveiri or Ms. Zimmerman would be a voting member because Mr. Levitt was absent. It was decided that it would be Ms. Zimmerman.

Marzelli hearing-continued:

Mr. Foster reopened the Marzelli hearing at 7:15 and read the August 11, 2008 letter from Attorney Robert Mather. He was requesting a continuance until the Board's next meeting. Mr. Foster was unsure if there was room for next month but recommended that they continue until then and then change the date if it became necessary.

Mr. Veary made the motion, seconded by Mr. Curtis, to continue the Marzelli hearing until September 18, 2008. The time would be at 7:15. The **vote** was **unanimous for**.

The hearing closed at 7:20.

Stagecoach Village LLC hearing:

Mr. Foster opened the Stagecoach Village LLC hearing at 7:20 and read aloud the legal ad. Mr. Foster said that last month they discussed that Stagecoach was asking for two modifications to their Comprehensive Permit. The first was to reduce the number of affordable units from eleven to ten, which the Board had granted last month. The second request was to remove the age restriction and they felt that because that had an impact on water and septic systems, as well as traffic flow, a public hearing was necessary.

Mr. Foster asked if the plan for the dwellings had changed in any way. Mr. Abbanato replied that it had not. Atty. Gay advised that in regards to the concern of the impact of the removal of the age restriction on the septic systems, the project had originally been proposed and designed for a complex of approximately 60 units. The plans approved had been modified mostly because of Conservation Commission and Natural Heritage concerns. They have been advised that the septic system design can still be implemented without the requirement of them returning to Conservation for changes.

In regards to the water, they do have a water commitment from Taunton and they could go back and modify that. He felt that Taunton would be agreeable as they still wanted the contribution that had been agreed upon. If that did not happen, they would be able to under DEP regulations, use on-site wells. However, they do not have data available for them as that option would require a substantial amount of money to go back to the engineers for a redesign and to be reviewed. They would request, therefore, that the modification be granted contingent upon a successful engineering review. Mr. Foster replied that he felt that had been done in the past and he checked with Atty. Pawle. She responded that it could be a condition of the modification and if it was not satisfied, the Permit would not be issued.

Atty. Gay also noted that his client has been told by the people that he has been dealing with for financing that the over 55 restriction must go in order to go forward because the market has been saturated with these projects.

Mr. Foster asked if the Board had any questions. Mr. Beneski said that with this change a certain amount of children could be expected. Could they put a restriction not allowing children? Mr. Foster asked Atty. Pawle if they could prohibit children. Atty. Pawle replied that they could not. That is a general law and the only exception is age restricted housing. Mr. Beneski then asked how they planned to compensate for children being in the development in regards to safety. Mr. Foster was unsure how much of that was their concern at this point. Mr. Beneski said that he would like to get input on this subject now. Mr. Curtis recalled that there was a rather large change in grade behind some of the houses and he questioned whether fencing would be installed to prevent any accidents. Mr. Abbanato replied that the elevations did not change that drastically from one unit to the next but that rather it was a gradual slope. Mr. Varga had brought up some concerns but they were because of water drainage coming through because of the high water table and the concern was more of water drainage as opposed to cutting into that slope which they do have to do on some of those units. He noted that much of the property will be built up and they will be bringing in 45,000 cubic yards of fill.

Mr. Foster felt that traffic would be more of an issue and he asked other members if they had any additional comments. Mr. Veary and Mr. Oliveiri did not have any problem with the change. Ms. Zimmerman was concerned about additional traffic. Atty. Gay said that the traffic study did not show any serious problems as there is a good line of sight, but that he did recall the issue of excessive speed on Route 79. Some neighbors felt that traffic was a serious concern especially at the speed people come down the hill. One abutter felt that the project had been sold on the fact that it was senior housing and that it

was not right to change it now. Mr. Foster replied that the petitioner did have a valid point that economic conditions are bad and in order for the project to be feasible and viable, they as a community have to look at ways to help them. To at least ask the question is not unreasonable. Atty. Gay wanted to make the point that even though they are not marketing to age 55 and older they could still sell units to people age 55 and older, but the restriction has caused economic issues because there are too many designated age restricted units out there.

Mr. Foster asked if there was anything else. Mr. Curtis suggested that once the development was complete, the City of Taunton and the Town of Lakeville could be asked to put up a sign indicating any school bus stop. Mr. Foster asked Atty. Gay if the Board did approve his client's request would he craft a letter to the Police Chiefs of Lakeville and Taunton to alert them to the increased traffic on this road and to pay more attention to this increased traffic, and the apparent excessive speed of vehicles on this road. Mr. Foster asked if there was a motion.

Mr. Curtis made the motion to approve the request to remove the age restriction contingent upon the review and approval of Dave Varga that the plans demonstrate adequate water and septic. Atty. Pawle suggested that a condition also be included that a notification letter be sent to the Police Chiefs of Lakeville and Taunton as had been discussed. Mr. Curtis amended his motion to reflect that. The amended motion was then seconded by Mr. Veary.

VOTE – Mr. Curtis, Mr. Veary, Ms. Zimmerman, Mr. Foster - AYE
Mr. Beneski – NAY

The hearing closed at 7:54.

Morneau hearing:

Mr. Foster opened the Morneau hearing at 7:55 and read aloud the legal ad. Mr. Foster asked what was presently on the lot. Mr. Morneau responded that there was a mobile home and garage, both of which were in poor condition. The property was owned by James Gamache and he had been hired to build another home. Mr. Foster asked how long the mobile home had been vacant. Mr. Morneau thought it was about a year but he had no personal knowledge of that.

Mr. Foster then read the August 14, 2008 letter from the Planning Board. They recommended disapproval of the petition as they felt that the proposed building was excessive for the size of the lot. The July 28, 2008, letter from the Conservation Commission indicated that there were no apparent Conservation issues. Mr. Foster then read the July 24, 2008 letter from the Board of Health. They have approved a three bedroom septic system design with no increase to the septic system for this property. The August 1, 2008 memo from the Board of Selectmen stated that the property has been

assessed as a two bedroom dwelling but based on the proposed plans the possibility exists for the expansion to four bedrooms.

Mr. Foster then asked if anyone present would like to speak for or against the petition. Mr. Cordeiro advised that he had lived there for forty years and the property had been abandoned for at least ten years now. He advised that the lot was approved for a mobile home only.

Mr. Morneau advised that Mr. Gamache had been paying taxes on the property right along. He said that it was the intention of the family for only a three-bedroom home. He said that the second floor could be changed. He said that this lot with the mobile home was totally non-conforming. They paid close attention to the design to ensure that it would meet all setbacks. He felt that this would not be detrimental to the neighborhood but would actually improve it. They were willing to incorporate any changes the Board wanted to make. The neighbor replied that he did believe the mobile home should be torn down but that it should be replaced with something that is smaller and more respectable.

Mr. Foster stated that one problem that they have is that their bylaw says that a non-conforming use that has been abandoned or discontinued for a period of two years shall not be reestablished and any future use shall conform to the bylaw, except in the case of land used for agriculture, horticulture, or floriculture. Mr. Morneau felt that residency was established by the receiving of mail, including a tax bill and that Mr. Gamache continues to pay his electric bill. Mr. Beneski said that he had done the Title V on the property and it was overgrown with weeds. The garage is completely collapsed and there is no way that anyone could have recently lived in the house.

Mr. Curtis asked Atty. Pawle if it was considered abandoned if taxes are still being paid. Atty. Pawle replied that abandonment has an element of intent. It is both discontinuing the use and the intent to abandon or give up the use, but their bylaw says abandonment or discontinued. Mr. Foster said that in the face of that, he felt that they should evaluate the request to build on a 24,000 square lot that is essentially vacant.

Mr. Morneau said that Mr. Gamache had worked very hard to obtain financing to do this project. He continues to pay his electric bill, taxes, and receive mail at the property and he has not established a residence anywhere else. Mr. Foster then read the July 21, 2008 letter from the Building Commissioner, who felt that this would be a good redevelopment proposal for the property. Mr. Foster said that in some ways he did agree but that they did have to deal with the abandonment issue and decide if the proposed use of the property is a reasonable use for property that small.

Mr. Foster asked the neighbors if they felt in their opinion, that removing the trailer and garage would be an improvement to the lot. Mr. Cordeiro felt that it would be but that only another trailer should be allowed there. The issue of access to the back lot was also discussed but deemed to be not relevant because the right of way was not on Mr. Gamache's property.

Mr. Foster said his personal concern was the plan had the hallmarks of a four-bedroom house. Mr. Morneau said that could be undone. They could remove the partition wall and closet as Mr. Gamache had no need for another bedroom. They would also agree to a condition or deed restriction. They would be willing to reshape the house to the satisfaction of the Town so they feel that they are building a home that is limited to three-bedrooms. Mr. Foster said they see a plan where there are two rooms labeled bedroom on the second floor, a third room labeled living, and a room on the first floor labeled dining room but which he thought he heard Mr. Morneau say would be used as a bedroom in the future. Mr. Morneau said there is no desire to have a four-bedroom house and they are willing to work with the Board on these plans. Mr. Foster recommended that Mr. Morneau request a continuance to come back with a set of plans that show a reduced scope on the house and also to get rid of one of the rooms. This process may keep the neighbors happy, as well as the Planning Board, who had commented that the house was too large for the lot. Mr. Morneau asked if they were requesting a reduction of the footprint. Mr. Foster suggested a reduction in the scope of the size of the second floor.

Mr. Foster asked what Board members felt. Mr. Beneski agreed that the whole second floor should be reduced. Other members agreed that there should be no possibility of another room. Mr. Foster asked what the neighbors thought. Mr. Cordeiro did not think that the lot was large enough for a house and that the Town had said that there could only be a trailer there. Members advised that trailers were not allowed in Town and they could only be used as a temporary dwelling.

Mr. Morneau asked Mr. Foster to read the letter from the Planning Board again as he did not have a copy of it. Mr. Iafrate noted that he was at that Planning Board meeting and although he did not want to speak for them, he felt that their concern was the possibility of a four-bedroom house. Mr. Foster said that he would like the Planning Board to see the new plans and he would like to see a reversal of their position.

After checking the calendar for next month, Mr. Veary made the motion, seconded by Mr. Curtis, to continue the Morneau hearing until October 16, 2008. The time would be at 7:15. The vote was **unanimous for**.

The hearing closed at 8:35.

Arruda hearing:

Mr. Foster opened the Arruda hearing at 8:35 and read aloud the legal ad. Mr. Foster read the June 25, 2008 letter from Mr. Iafrate who had advised Mr. Arruda that he would need a Special Permit to continue with his application to build a second story addition on a non-conforming structure located on a 15,645 square foot lot. Mr. Foster then read the August 1, 2008 letter from the Board of Selectmen. They had several issues with the petition including that it had not been reviewed by Conservation and that there was the potential for additional bedrooms. They would like to revisit the petition once further

information was submitted and approved. Mr. Iafrate commented in his July 22, 2008 memo that the footprint would not expand but that the applicant should confirm that the use of the area would be as a family room only. The Planning Board recommended disapproval of the petition in their August 14, 2008 memo as they felt the application was incomplete. Mr. Foster read the July 28, 2008 letter from the Conservation Commission where it was noted that they had concerns regarding the possible increase in flow to the existing septic system as a result of the proposed addition. The July 25, 2008 letter from the Board of Health recommended that a new well be installed prior to any action on the property because an analysis revealed the existing well was high in nitrates. Mr. Arruda responded that he had contacted Mr. Perry, the Health Agent, in regards to that and he had since signed off on the approval form indicating that there should be no increase in footprint or flow and that it was for a family room only. Mr. Perry also recommended that the well be tested annually. Mr. Beneski said that Mr. Perry had done that but the problem was that there was no letter or enforcement.

Mr. Foster asked what the proposed use of the second floor would be. Mr. Arruda said that it would be a family room on both sides. Mr. Foster asked how many bedrooms there were. Mr. Arruda said that they had two. Mr. Foster then asked if he met the setbacks. Mr. Arruda was unsure but Mr. Iafrate did not think that he did. Mr. Foster felt the plans were unclear and Mr. Beneski noted that there was an additional hand out but that it did not show what the existing floor plan was. Mr. Beneski said that he would question as to why they need to put a family room up there because if this property ever sold that would constitute another bedroom area. He would like to see what the house is now and see the footprint cut to match the existing house. Mr. Arruda replied that the reason he had to do the overhang was because he has seven foot ceilings and to get the staircase and the landing in, he did not have enough elevation.

Mr. Foster said that if they had complete properly dimensioned and engineered plans as required, he thought it would show that he was making the non-conforming setbacks even worse. Mr. Foster asked if anyone present would like to speak for or against the petition. Mr. Gordon Santacross felt that the addition would change the whole character of the neighborhood. Mr. Foster said that they try to evaluate each petition on its own merits and weakness and they saw both in this petition. The biggest weakness was having two family rooms upstairs which could easily be converted into bedrooms. Mr. Arruda said that they had a two-bedroom septic system and the house could never be sold as anything more than that.

Mr. Beneski suggested a continuance until they received further documentation. Mr. Veary agreed. Mr. Curtis said that he would want to see an open stairway on the plans. Mr. Foster informed Mr. Arruda that they would be well within their rights to deny the petition because the plans were incomplete, however, they try to work with petitioners to try to reduce the scale of a project or bring it more into conformity. Mr. Arruda has heard the concerns that the Board has would he like to redo the plans? Mr. Arruda said that he would and asked what they were looking for. Mr. Foster replied that the first thing he should think about is reducing the scale of the project and consider one family room instead of two and also coming back with a set of plans that lets them actually evaluate

what is going on at the property. Mr. Foster advised that the September meeting schedule was already full but that he could continue until October. Mr. Arruda said that would be acceptable.

Mr. Curtis then made the motion, seconded by Mr. Veary, to continue the Arruda hearing until the October 16, 2008 meeting. The time would be 7:15. The **vote** was **unanimous for**.

The hearing closed at 8:58.

Martowska hearing:

Mr. Foster opened the Martowska hearing at 9:00 and read aloud the legal ad. Mr. Curtis advised that he knew Mrs. Mary Tribou and that he had worked with her. Mr. Foster asked Mr. and Mrs. Martowska if they had a concern with Mr. Curtis having a past association with the Tribou's and voting on this hearing. Mrs. Martowska felt that there could be an unconscious bias. Mr. Foster then asked Mr. Curtis to abstain from voting and Ms. Zimmerman to be a voting member.

Mr. Foster said that he felt that they had two things to consider with this petition. The first was that a building permit was issued on an undersized lot in late 2006. In the folder there are two sets of plans, one dated before the building permit and one dated after the building permit. They have a building permit that was issued without benefit of review by the Zoning Board even though the bylaws require it and they have potentially some deviations in the construction of the house as shown on the plans that pre-date the Building Permit which he felt should be the plans to which they should prescribe. Mr. Foster said that in the situation where the Zoning Enforcement Officer refuses to take the action you want him to and you appeal, the Board cannot compel him to do that but rather they then become the Zoning Enforcement Officer.

Mr. Foster said that he wanted to confirm with Town Counsel that there is a 30 day period within which to appeal a Town decision. Atty. Pawle replied that was correct. The Building Commissioner was requested to enforce and the Building Commissioner declined to take action on that which triggered the 30 day period. Mr. Foster asked if they could go back one year to when the building permit was incorrectly issued. He did not have any record of anyone appealing that permit when it was issued. Atty. Pawle replied that there was a 30 day appeal period for that as well. Mr. Foster clarified that they could then only concern themselves with any portion of that building that does not meet what was approved, regardless of whether it was approved correctly or incorrectly. If a building permit was issued on a set of plans and the building meets those plans, he did not think that there was a case. Atty. Pawle replied that there was a decision that clarified that there are two separate appeal items. One is when the building permit is issued which triggers a 30 day appeal period. The second is if a person is aggrieved at a later time, seeks enforcement and that enforcement is denied, that triggers another 30 day period. Atty. Pawle said that according to a two month old decision from the Appeals

Court if the party appealing now in that second appeal had notice of the building permit, or effectively had an opportunity, to appeal the building permit when it was issued and did not take advantage of that, then they cannot now at this later date come back and appeal under the second item.

Mr. Foster asked Mr. Iafrate if there was any formal way to notify the neighborhood community when a building permit is issued or if there was any State requirement. Atty. Pawle noted in the decision made by the Appeals Court, it did concern a Town where abutters were given notice of building permit applications. Mr. Iafrate advised that there had been a public hearing at the Conservation Commission meeting in regards to this. Mr. Martowska replied that the issues that they had would have been heard by the Board of Appeals. It was then that they would have expected the Town to follow the bylaws and where they would have addressed their concerns but they never were afforded that opportunity. Mr. Foster said that the Board was aggrieved also and agreed that a procedural error had been made but they could not turn the clock back and he did not think that they wanted to consider asking these people to tear their house down. Mr. Foster noted a lot of time had been spent building the house and that they had a lot of time to raise this issue. Mr. Martowska replied that they did raise issues along the way but that was part of the problem. He went to the Board of Health and raised the issue that the property was a seasonal home with a cesspool but no action was taken. There seems to have been a series of mistakes on the Town's part regarding the septic, the well, etc.

Mr. Foster asked Mr. Martowska what it was that he wanted them to do. Mr. Martowska said that he would like the Board to decide what they would have approved in the first place and from there decide what makes sense. Mr. Foster said that to do that they would need the contents of a petition to them that would show the original house on the plot and the proposed plan on the plot and how they differ. They would need Board of Health approval, Conservation Commission approval, Planning Board approval, and all the other things that they normally look at to raze and rebuild a house on a lot less than 20,000 square feet. Mr. Foster said that he has heard that they do have a well that does not conform and they are working on a temporary emergency well. He understood that they had some work to do but suggested that they focus on what the Martowska's wanted them to do. Mr. Martowska said he wanted them to enforce the bylaws that had been voted on by the Townspeople. Would they have approved an expansion of over 105% on that lot? Mr. Foster replied that they might have.

Mr. Oliveiri asked if there is a time limit on enforcement. Atty. Pawle replied that with a building permit and anything authorized under it, it is six years. Mr. Beneski asked how long after the building permit was issued did it take before construction began. Mr. Falconeiri replied that it was about a month before they began to demo the old house. Mr. Beneski asked in regards to the screened porch on the plan being glassed in was that also completed. Mr. Falconeiri said that it was. Mr. Foster said that the plans in the folder in the Building Department that pre-date the building permit show a deck with a half screened area. There is no documentation to show permission for the fully enclosed glassed deck and that is an issue, but he would like to put that aside for now. What he would like to focus on was what relief they can give that is legal and reasonable for a

building permit that was apparently issued incorrectly. He did not think that they could do anything. Mr. Martowska said that he went to the Board of Health and Mr. Marot, the previous Building Commissioner, and questioned this and now he is relying on this Board to do what is right to mitigate these damages and to do what is right for the Town and the abutters.

Mr. Foster said that they have to do what is legal. He asked Atty. Pawle if they could do anything about a building permit that was improperly issued over a year ago. Atty. Pawle replied that first they need to determine whether or not the appellant today had notice of that building permit and could have appealed during that first thirty day period. Mr. Oliveiri asked what was considered notice, if you could visually see or a written notice. Atty. Pawle said that the Court stated in the recent decision that they were not going to determine what constituted that but in that particular case there was a bylaw that required notice to be sent upon a building permit application. She said she had no guidelines from the Court so the Board would have to determine that. Mr. Foster said that he knew of no formal mechanism for notice of issuance of a building permit. Mr. Iafrate agreed. Mr. Foster said they do have informal notice in that several weeks after the permit was issued, Mr. Falconerri began demolition. Mr. Oliveiri asked Mr. Martowska if he knew what was going on. Mr. Martowska said that it was months before the house was built. He noted that he did not appeal because he relied on Town officials.

Mrs. Martowska said that she had to ask the question if they have a well known builder, they have the Building Inspector, who knows the bylaws, and the owner of the property is a real estate agent, what they were aware of at the time that they were building. Did they know of these bylaws? Mr. Foster asked the Tribou's if they had been aware of this. Mrs. Tribou answered absolutely not. Mr. Foster asked the builder, Mr. Falconerri, the same question. Mr. Falconerri replied that first they ask the client what their wishes are, and then he goes to the local Building Commissioner to present them and then ask what he needs to do. He said that we needed to stay on the same footprint. We discussed the overhang and also asked if they could go to a second story and bump it out and square the room off and there was no problem with that either. He then filed for the permit and they went through all the steps. Mr. Martowska had notification of the Conservation hearing. He knew they were going through the process and he was constantly on site. Mr. Falconerri said he did whatever the Town told him to. Mr. Foster said that a mistake had been made but they were not here to go back down that path.

Atty. Pawle agreed that they need to determine whether or not they can even hear this appeal. Did the Martowska's have sufficient notice during that 30 day appeal period that began the day the building permit was issued? Mr. Foster said that in absence of a formal mechanism for notification, they did have an informal mechanism when the house was demolished. Mr. Beneski noted that Mr. Martowska had questioned it and gone to the Building Commissioner. Mr. Foster said that there was no record of that. Mr. Beneski asked Mr. Martowska to clarify that he had gone to Mr. Marot with a letter but that he did not have a copy of that letter. Mr. Martowska said that he did not but had trusted Mr. Marot with that copy. Mr. Beneski said that there is nothing in the folder but he did make

the approach and for some reason it was never carried out by the Building Commissioner to do anything in regards to that letter.

Mr. Foster asked when the roof was framed. Mrs. Tribou estimated it was in July. Mr. Foster asked if it was then that Mr. Martowska approached the Building Inspector. Mr. Martowska replied it was when they saw the overhang. Discussion continued on whether the activity going on at the site could be considered informal notification. Mr. Foster felt that they did know that something was going on. Mr. Beneski felt that they did not have notification and when they took action it was not responded to. Atty. Pawle said that it appeared that the fact that they did go to the Building Commissioner at a later date suggests that if they had sufficient notice earlier, they would have gone to appeal. Therefore, the determination would be that the notice was insufficient. Mrs. Tribou noted that Mr. Martowska was on site quite frequently and in her estimation he knew exactly what they were doing and that they were going up with the house.

Mr. Iafrate said he was unclear as to what they were trying to get to tonight. What is the mitigation they are looking for as it appears they are just going around in circles. Mr. Foster replied that the petitioners have not really said, only that they want the Board to uphold the bylaws. Atty. Pawle noted that there is an issue in front of the Board right now. Mr. Foster said that there is also the second issue of the porch. There is a modification to the porch that appears on plans that are dated after the issuance of the building permit and there is no written approval for that.

Mr. Foster said that they needed to return to the first question which was should they even be considering this appeal. It sounds like to him that the petitioners had abundant information about this building early on and although they did not receive anything in the mail, they knew. Mr. Oliveiri was in agreement. Mr. Foster said that Mr. Martowska did know and that he thought that could be considered notice. Atty. Pawle advised that they have identified several aspects such as the footings and the conversations that were held. The fact is that formal notice does not provide for full description but would require a trip to Town Hall to get more information. The Board has to decide if evidence on the ground and information from the actual owners is equivalent to a piece of paper, or mailed notice.

Mr. Oliveiri said that he did feel there had been proper notification and he then made a motion to deny this first portion of the petition. The motion died for lack of a second.

Mr. Foster asked the Martowska's specifically what action they would like to see. Mr. Martowska said that he did not want to hurt the Tribou's or go against the Town bylaws but, for example, if something were to happen to the house, he would not want it to be allowed to be rebuilt to non-conforming. Mr. Beneski discussed restoring the porch to what the plans had called for. Mr. Martowska noted that the porch was right on the shore line and it was affecting his view. Mr. Foster said that he would like to have a direct answer to his question. Mr. Martowska said he would like the porch removed. Mr. Foster replied that the plans approved show a porch so they are not going to touch the

porch depicted in those original plans and they cannot undo what the Building Commissioner has already approved.

Atty. Pawle stated that there was a six year period following the issuance of a Building Permit where anything that was improperly authorized could be enforced. That would be anything that is in non-conformance with the bylaws. Mr. Foster said the whole building packet should have come before them but he did not want to entertain that. Atty. Pawle said that they were not obligated to do that, but there is a six year period where that could happen. Mr. Foster felt that the only thing that they could do was ask them to make the porch conform to the plans that were approved. Atty. Pawle said that it then goes to the two aspects of the appeal. The first aspect has to do with what was authorized under the building permit and it was determined, due to the failed motion, that the petitioners were properly before them on that issue. That is where they are right now; reviewing what was authorized by the Building Permit. The Board does have the authority to enforce if there are aspects of that Building Permit that violate the Zoning Bylaws. Mr. Foster asked isn't the question if they determine whether or not they would have permitted it if it had come before them? Had this come before them how would they have acted? Atty. Pawle replied that the Board could analyze it that way. She felt that they did have some latitude and they are not under obligation to order the Building Commissioner. It is the call of the Board in regards to how much enforcement they want to order.

There was a discussion regarding the porch. Mr. Foster asked the Martowska's why they had raised the issue. Mrs. Martowska replied that they have lived there for over twenty years and it is an environmentally sensitive area. The porch is extended further than the plans call for. Mr. Iafrate said that by default, whether or not that particular plan was in the files or not, when the Certificate of Occupancy was issued that roof was allowed. He also felt that before the Board made any decision on any kind of enforcement, they should visit the site and look at the merits of its improvement on what it was before. Mr. Foster said that he was concerned that the As-built did not agree with the plans that the permit was premised on. It appears that the porch does not conform to the original set of plans, which is the basis for the building permit, and neither set of plans show it glassed in. There is a variance on the porch and that could be the basis for a complaint here.

Mr. Martowska advised that the porch has obstructed their view. Mrs. Tribou replied that there had been a tree on the site which they had been forced to cut down and that was more of an obstruction than the porch. It might block their view of the other neighbors but it does not block their water view. Mr. Foster said that they have entertained complaints before about neighbors view scapes and they have dismissed them, as that is based on an individual perception. Mrs. Martowska noted that they are at a higher elevation so the Tribou's would not realize what their view is, however, more importantly is the fact that this Board is endowed with the responsibility of thinking in terms of the bylaws of this Town. This has made a non-conforming lot even more non-conforming. Mr. Foster felt that the Tribou's had acted in good faith when they went to the Building Inspector but for some reason a mistake had been made and they had not been sent to this Board to hash out some of those issues. He did not know how they can undo that mistake

or force them to modify the house significantly. He did feel that they should look for a reasonable compromise.

Mrs. Martowska said that they did not ask to be put in this position, but were in it because Town officials did not thoroughly do their job. Mr. Foster said that for the record he agreed that a mistake had been made, and the Board had not made the mistake, the Martowska's had not made the mistake, but the Tribou's had also not made the mistake. After further discussion regarding the porch, Mr. Foster said that they did have the authority to entertain the variations in the new structure compared to the original structure as best as they can interpret what the original structure was and to entertain variations on the porch even though he felt that the porch was expanded without proper permitting. The bylaw 6.1.3 does allow them to consider preexisting non-conforming structures or uses may be extended or altered by Special Permit when the Board of Appeals finds that such change, extension, or alteration is not substantially more detrimental than the existing non-conforming use. Mr. Martowska said that he hoped the Board would take into consideration, when making a decision, the whole picture. He asked what Mr. Foster recommended as a resolution. Mr. Foster replied that one approach that could be taken that was spoken about earlier was to deny the request and have them appeal their decision. It would then be up to the Court to take action. Mr. Foster said that they could also deny the petitioner's appeal and the property owner could petition the Board for a Special Permit for the non-conforming extensions to that use of the property.

Mr. Foster asked what other Board members thought. Mr. Oliveiri said the builder and the property owners had done what they were supposed to and this was the result of the Building Inspector's error. He did not see at this point penalizing them for that error. Mr. Beneski said that one issue that has not been spoken about is the garage which is another error on the part of the Building Inspector. He felt that they could discuss this all night. Mr. Foster agreed that this is a Town administration error but how can they unravel it to the best of everybody and not just one party? After further discussion, Mr. Foster asked Mr. Falconeiri what kind of approval he had gotten for the change to the porch. Mr. Falconeiri said it was verbal approval and as long as they stayed within the footprint they could enclose it. After winter was over, Mrs. Tribou then wanted it glassed because of the wind. After there was a complaint, they stopped. The Building Commissioner went out and investigated and wrote a letter and ruled in their favor as he saw there was only a difference in the material. They then completed the job.

Mr. and Mrs. Martowska then both spoke regarding how the bylaws should be for everyone and that they should be upheld. They did not feel that ignorance of them should be used as an excuse. They also spoke of their frustration when trying to get information from the Town officials. Mr. Foster responded that he felt that the plea they were making was a good one and that it should be made to the Board of Selectmen, two of whom are former ZBA members but that this Board could not turn the clock back. Mr. Martowska could, however, carry this fundamental message which appears to be how the Town administers its laws to the Board of Selectmen and the Town needs to be held more accountable in how scrupulously it administers certain things.

Mr. Foster said that the facts that they have are the porch was modified from the original set of plans and the builder received written permission from Mr. Iafrate for that modification. That decision has been appealed. Their challenge is to try to decide on the suitability of Mr. Iafrate's action in approving the change that has already taken place. Mr. Foster said that they did have two choices. They could agree with the petitioner's request to enforce the bylaw and ask the home owner and the builder to restore the porch to what the plans show, or they can deny the request for enforcement. If they agree with them the property owners will probably appeal, and if they deny the petitioners will probably appeal. However, the property owners could come to them for a Special Permit. In that case, they could put restrictions on it such as no electric, no insulation, no heat etc. Mr. Veary asked for a clarification of that. Mr. Foster replied that if they agreed with the Martowska's and they find the porch has to be restored to a screened porch as shown on the plans, before that was enforced, they could petition them for a Special Permit to fully enclose the porch. They may or may not grant that request. If they did grant, they could then impose restrictions on the porch.

Mr. Foster said they first have to decide if they agree with the Martowska's that the porch infringes on the bylaws and it needs to be changed, or they need to disagree with them and agree with the Building Inspector and say that the porch is okay the way it is. They could also continue the hearing. Mr. Martowska asked if they had the option to look at the big picture and have the porch torn down. Mr. Foster said reasonably and realistically they need to enforce it to what the plans, dated October 2006, show. Mr. Martowska felt that they were still not looking at the big picture. Mr. Foster asked again what it was that he wanted to happen to the property. Mr. Martowska said that he was asking for no porch and if possible to restrict the house if something should happen to it, that it could not be rebuilt. Mr. Foster felt these requests should have been raised months ago. He noted that if this had come before them as it should have, they would have reduced the scope of the project but the Board would not have said they could only rebuild what they have there now.

After further discussion, Mr. Veary made a motion, seconded by Ms. Zimmerman, that the porch should conform to the approved set of building plans, upon which the Building Permit was issued.

There was discussion questioning if there was a letter from the Building Inspector authorizing the change and if they should make a motion contingent upon that but no further motions were made.

VOTE – Mr. Veary, Ms. Zimmerman, Mr. Foster, Mr. Beneski - **AYE**
Mr. Oliveiri – **NAY**
Mr. Curtis – **ABSTAIN**

Mr. Foster asked Mr. Martowska if he understood what they had just done. He responded that he believed he did. Mr. Foster clarified that they have asked the Tribou's to restore the porch so that it conforms to what is shown in the plans that predate the building permit which is a half screened porch, fully roofed, but half screen. He advised the

Tribou's that before action takes place, they can petition for a Special Permit for modifications to an existing non-conforming structure.

The hearing closed at 11:15.

Mr. Foster asked if they had other business to conduct.

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

Meeting adjourned at 11:20.