

**Town of Bolton**  
**ZONING BOARD OF APPEALS**  
**Minutes**  
**May 18, 2010**

SEQR = State Environmental Quality Review

PB = (Town of Bolton) Planning Board

WCPB = Warren County Planning Board

APA = Adirondack Park Agency

LGPC = Lake George Park Commission

DEC = Dept of Environmental Conservation

**Present:** Jason Saris, William Pfau, Kam Hoopes, Tony DePace, John Michaels, Jeff Anthony, Counsel Michael Muller, Zoning Administrator Pamela Kenyon

**Absent:** David Ray

The meeting was called to order at 5:12pm.

**1) ADIRONDACK PARK AGENCY.** Represented by Brian Grisi – Local Planning Assistance Specialist. To discuss, what the APA suggests, is a lack of understanding on the part of the ZBA as to the APA’s role in the administration of the Agency approved local land use program.

Jason Saris stated that this special meeting was called with Brian Grisi of the APA to discuss their relationship with the Town. He stated that they are trying to gain a better understanding of their roles. The primary purpose of the meeting is for educational purposes for this Board. Although he appreciates the community members present, he stated that they will not be taking comments or questions from the public.

Brian Grisi thanked the Board for having the meeting. He stated that he feels that it is long overdue to have this discussion. He stated that he would be providing some background information and planned to answer questions, but otherwise felt that it would be best to have an informal conversation. He introduced Elizabeth Phillips, APA Attorney who is new to the APA staff but will be working with the local programs and planning issues. He also introduced Robin Burgess who is the lead person who handles referrals of variances to the APA.

Brian Grisi stated that the reason that the APA is involved with the Town is because the Town of Bolton is wholly located in the Adirondack Park. He stated that Bolton has a unique relationship with the APA. In 1973 when the APA act was passed, they made a provision that a certain amount of APA jurisdiction in their statute could be transferred to the Towns with an approved local land use plan. He stated that in 1980 the Town of Bolton developed a local land use plan that was approved by the APA. This includes zoning laws, subdivision laws, sanitary laws and subsequent revisions have been approved by the APA. With this local land use plan it provided jurisdiction to the Town to issue, administer and enforce Class B projects. Along with that jurisdiction, in APA section 806 it says that the Town has jurisdiction for administering shoreline regulations and issuing variances for shorelines.

Brian Grisi stated that as the APA they review the determinations made for shoreline variances. He stated that he and Robin read through the minutes of the record of every decision that comes their way. They know how the Board acts and they have a good understanding of the issues that the Board is facing regularly. Brian Grisi stated that by and large, Bolton has a

great record on their projects; they hit the issues that are important. Although the APA reviews most applications they usually do not concern themselves with front yard or side yard setbacks. He stated that their reversal authority comes into play with shoreline variances and density. He stated that they are very impressed with the job that they are doing and the record that is produced for each application. He stated that the record includes the applicant's plans, any correspondence, the application and minutes. Brian Grisi stated that the ZBA is hitting most of the issues that they would look at. The Agency feels that that the Town is doing a great job on their part and the APA's job is to have the final look at the process.

Brian Grisi stated that from 2008-2010 the Town referred 43 variances to the APA, 30 of which were shoreline variances. He stated that out of those 43 variances the APA only reversed 6, one of which was reversed twice and 2 that were not reversed by the APA. So out of 43 variances in the past 2 ½ years they have only reversed 4 variances. Brian Grisi stated that he feels that the Town is doing their job thoroughly. However, in certain situations they look at the lakeshore in such a way that they think that the review process that was conducted did not account for all of the possibilities of alternative configurations or smaller footprint of the landscape.

Brian Grisi stated that their purpose is to talk about some of those reversals and discuss how they can work together better and answer their questions up front so that they are not in the position of not agreeing on a particular application.

Brian Grisi reviewed the process of the variance review. When a variance is issued, the approval and record, application, correspondence and plans all get sent to the APA. They have 30 days to review and potentially reverse a local decision. For the APA to reverse a local decision is a big deal. The side yard or front yard setbacks are turned around fairly quickly. However with shoreline and density variances they take a close look at them. First, Robin Burgess looks over the applications, then they meet as a team and if they find anything that violates their statutes they get their legal staff and counsel involved. If it is determined that there is a reversal is necessary, it involves every level of the agency from the resource staff to the Executive Director.

Brian Grisi stated Lake George is very special lake. He can remember swimming in Lake George as a child and remembers that even then he knew how special the lake was then. The key is that this is a wonderful lake and it deserves a lot of protections for the quality of the water. He stated that it is important to all of them in this room. It is also important to provide for the development and re-development along the shoreline in a careful and thoughtful process.

Brian Grisi stated that it all starts with a good application. He stated that they consider Bolton as a good example of what should be done in terms of the local review process and the record they get. The application to the APA is incumbent upon the applicant to be sure to justify why they are seeking a variance and the reasons why they should be granted a variance. He stated that these reasons should not be purely based on personal need; they need to be justified in the application.

Jason Saris asked if their criteria to judge applications match. Brian Grisi replied that practical difficulty and hardship will always be an issue. In 1973 when the statute came out it talked

about practical difficulty and unnecessary hardship, it is still in their statute today and it is standard that the agency uses. Brian Grisi read in the Bolton zoning law section 266 Referrals- “If within such a 30 day period, the Agency determines that such variance involves the provisions of land use and development plan as approved in the local land use appropriate statutory basis of practical difficulty or unnecessary hardship, the Agency may reverse the local determination to grant the variance.” He stated that this statute is in their laws and is part of their statute. It is a function from an earlier time in the Agency’s statute. Town law in 1992 changed to a balancing test of 5 criteria plus the minimum variance necessary. Brian Grisi stated that they are bound by Town to use that standard and criteria. They also have a certain obligation in having a local program where the Town is to act on behalf of the APA when they approve a variance. He stated that he hears from both their counsel and legal staff that there is not a big difference in the way Town criteria stands and practical difficulty issues faced by the Agency. He stated that when they reverse a variance, they address Town law criteria and the practical difficulty. He stated that the reversal letters stand alone just on their merit for what they discuss regarding Town law criteria, such as alternatives, adverse impact to the environment or the minimum variance necessary.

Jason Saris asked when it comes to shoreline variances the Town is required to use the 5 criteria as well as apply the Agency’s criteria of practical difficulty and unnecessary hardship. He asked Brian Grisi if he could explain what those terms mean for the Agency or what the applicant should be demonstrating. Kam Hoopes stated that these terms are terms used in the past. He stated that NYS law changed the criteria and precluded them from using the language. Brian Grisi stated that he does not feel that they were precluded from using the language, but it did set out different criteria for the Towns to use. Kam Hoopes stated that in some of the reversal letters the Agency have stated that the reversal was specifically because the Town did not discuss hardship or practical difficulty. Kam Hoopes stated that if the Agency were to read the minutes they would see that they have discussed hardship and practical difficulty that the applicant is facing without using those exact terms. Brian Grisi stated that in more recent years the Agency has tried to use the Town law requirements carefully as one prong of reversal and a second prong reversal being the practical difficulty and unnecessary hardship issue that the Agency needs to account for due to their statute. However they always hang their hat on the Town law standard because they know that is what they face.

Brian Grisi stated that in the past few years, any reversals focused on whether or not alternatives were considered, the environmental impact and if it was the minimum variance necessary. Kam Hoopes stated that he has noted that a lot of the language in their reversals gives them very little to hang their hat on. They raise a lot of questions and end up coming back saying that they do not feel that there was sufficient discussion. It is seldom a specific item or concern, he stated that it is often couched in language that makes it very mysterious. Brian Grisi stated that he wished they could make it clearer for them. The ZBA is making the decision and the Agency is just reviewing their decision and basing it on the record that is before them. The issues brought up are points of consideration particularly in the case of alternatives. He stated that if they do not show consideration of alternatives in the application or record, it is a problem for the Agency because there is uncertainty as to whether or not there are viable alternatives.

Kam Hoopes asked if they ever send anyone in the field to see these applications. Brian Grisi stated that they could do that. However, their statute has a clause in it that provides that the

Agency can provide advisory comments. He stated that they would be happy to do that with any application whether it is to review plans or to have a site visit. Kam Hoopes stated that he and most of the Board members are familiar with or have visited the site. He can understand the Agency's frustration if all that they are looking at is the application, plan and record. Brian Grisi stated that is why it is so important to add all of that discussion and create a good record. If they are ever challenged on an application a court of law, the court will not visit the site, they will look at the record. However, if prior to the determination from the ZBA, the Agency could have a meeting or site visit and provide advisory comments/opinions regarding certain considerations or components of a particular project.

Jason Saris stated that they often deal with pre-existing non-conforming structures that want to replace in kind or add something to the structure that is not out of the ordinary for such a structure. He asked if the practical difficulty is that it is a pre-existing non-conforming structure. Brian Grisi stated that recently the Agency was dealing with an application in Stillwater in which it was a non-conforming lot and the 100 year old house sat wholly within the shoreline setback. He stated that would be considered a practical difficulty because the owner did not create that. This particular applicant wanted to put a deck on his house and needed a variance. The Agency received the application and they decided that this was going to be something difficult to approve, therefore they went to an adjutory hearing to collect information. It was a very formal process and a very thorough record was returned to the Agency for their review. The details provided in this record assisted the Agency in making an appropriate decision.

Jeff Anthony stated that he feels that it boils down to hardship which is difficult to justify in an area variance. It is mandatory in a use variance, but it usually implies a person's absolute inability to use a property for what is was zoned for or a monetary loss/damage. He feels that it is almost impossible to justify this in an area variance. He is concerned that if the APA is going to apply that as a measure in reviewing variances they have stopped the Town from rationally approving an area variance. He asked how they can satisfy the APA hardship criteria.

Brian Grisi replied that out of the 30 shoreline variances the Agency has only reversed 4, which means that there were 26 cases that were reasonable. Jeff Anthony stated that he feels that they provided a fair case in the 4 reversals in looking at alternatives, moving the project site to have the least impact and adding conditions. However, they have never really calculated hardship. Brian Grisi stated that hardship is not the only thing that they look at in their review. For area variances the balancing test does not use the terms practical difficulty and unnecessary hardship. However, the agency still has that in their language. In the process of getting the application the applicant needs to provide some justification for getting that grant of a variance. They just approved a shoreline variance and the reason that they used for hardship was the steepness of the slope. The hardship is applied to the land and not the land owner. Jeff Anthony stated that the one application that received 2 reversals did include hardship which was the steep slope just as he described..

Jason Saris asked if applicants were required to demonstrate both practical difficulty and unnecessary hardship or can they just demonstrate one over the other. Brian Grisi stated that they should get over the practical difficulty part before tackling the hardship case. He provided some examples of their approvals for shoreline variances.

John Michaels stated that it would be helpful to the Board to have a rule of thumb when looking at shoreline variances. Brian Grisi stated that this is why the application is so important. It will provide the details as to what is existing. He stated that what is allowed is based upon the conformity of the lot and what is being proposed. If someone is tearing down a house and re-building, and bringing it closer to the lake, there is no reason for that. They will have to look at the end result and plan for that.

Jason Saris asked if building up higher is considered an expansion. Brian Grisi replied yes. Jason Saris asked if dormers would be considered an expansion. Brian Grisi replied stated that there are modest modifications that can be done to a structure that don't increase the overall structure height by 2 feet, such as minor 200 sq. ft additions to the rear of the property would not require a variance from the Agency. Jason Saris stated that all of this information is important for the Board to know because they need to know when they are creating a record for both the Town and Agency when they are administering the Agency's laws. He stated that if these types of applicants come through the variance process they may not need to apply the practical difficulty or unnecessary hardship criteria. Brian Grisi replied that there is a caveat to that because if they are increasing living space they are required by law to look at the septic system. Jason Saris stated that they do not have anything to do with reviewing septic systems on the ZBA level. He stated that the TB does, but when the application comes to them, the septic should already be compliant so that would not be part of the record. Brian Grisi stated that it should be part of the application and record. John Michaels stated that they recently changed it so that if an applicant is changing the living space, they have to provide a letter from a certified engineer stating that the current system is in proper working order and can handle the addition. Pam Kenyon clarified that this is only for shoreline properties. She stated that the application does not proceed to the ZBA until she has a letter certifying the system.

Kam Hoopes stated that he would like to hear Counsel Muller's opinion on the use of practical difficulty and hardship. Counsel Muller stated that he feels that what the APA and Town are looking for is the same, which is done through Town law. He stated that the Board is required to follow the 5 criteria but he also encourages them to use the APA criteria as well. He stated that the Board almost always has a difficult time with practical difficulty and hardship. The Board members should be commended because they are very experienced; they are more than just your normal volunteer. He stated that even with all of their experience and knowledge they still struggle to demonstrate these additional criteria. Counsel Muller stated that he would like to see the Agency to adopt the Town law standard because they will still be able to achieve what they want to achieve and it would be user-friendly and compatible.

Brian Grisi stated that their only recourse to change the statute is to go through the state legislature. That being said, they do not regularly reverse shoreline decisions and the record has supported them. He provided an example of a recent Agency approval in which it was originally denied but after the applicant provided reasons for the placement, a thorough look at alternatives and practical difficulty the Agency approved the variance. Jeff Anthony stated that he heard Brian Grisi use all the criteria that they normally apply and describe practical difficulty but he did not explain unnecessary hardship. He has seen the Agency operate since 1973 and they interpret their rules and laws fairly liberally at times. He stated that in their applications they have applied every criterion and looked at an application in every way possible. In his eyes he feels that they have done everything that the Agency has asked them to

do and then they turn around with a reversal because they did not demonstrate unnecessary hardship. Brian Grisi stated that he agrees with all of that with the exception the last sentence. He stated that what Jeff Anthony is describing is what is required of them by Town law. The Agency has those additional criteria that need to be considered. In a formal instrument of reversal those terms need to be used. He stated they look to see if all possible alternatives were considered, if there is any environmental damage that could occur as a result of this project and if it was the minimum variance necessary. He stated that if the ZBA does their job with Town law standards they should be going down that path together.

John Michaels stated that there are certain things that the APA allows that he was never aware of. Brian Grisi stated that their regulations changed in December 2008 and they made this public in an advisory to all Towns that had an approved local land use plan. He stated that he would be happy to provide the Board a copy of that.

Jason Saris asked if the APA considers aesthetic considerations when making their determination. Brian Grisi replied yes, it is part of the process because it relates to how it will affect the neighborhood. He stated that this speaks to conditions; if they are to allow a bigger taller house and make findings that support it, it is well within their authority to see how to mitigate that larger structure along the shoreline.

Kam Hoopes stated that he is keen on keeping their focus rather narrow. He is not usually comfortable with adding conditions to the applicant's surprise. Jeff Anthony stated that they can only apply reasonable conditions which he feels is what they have done in the past. Kam Hoopes stated that reasonable is also a term that is difficult to define as well. However, he feels that these aesthetic considerations should be reviewed by the PB. Jeff Anthony stated that often the applicants will never have to go before the PB. Jason Saris agreed and stated that it is within their realm to apply conditions and the applicants are responsible for taking these types of things into consideration. He stated that sometimes their discussions are somewhat limited because the applicant has done a pretty good job with taking those things into account.

Brian Grisi stated that it is most important for applicants to realize that a variance is not an entitlement but rather an exception to the variance law that they have to justify in a number of different ways to agree with Town law standards which might mean taking some steps for mitigation. If they can inform the applicants up front it will not be a surprise.

Kam Hoopes asked how much the public has in the way of input for the land owners land use and how much responsibility does the land owner have to the public and Town regulations that they stand by. This is a tough line to follow, since they are the ones maintaining it and paying taxes on it. He tends to be more on the side of the applicant by nature but he does take his responsibility very seriously.

Bill Pfau asked if future reversals will include the terms of practical difficulty and hardship. Brian Grisi replied yes because they are mandated by their statute to put them in there. However, the reasons for a reversal is clearly laid out under Town law and a lot of what is in the practical difficulty section is a reiteration of those particular elements that they didn't feel were covered adequately. Brian Grisi stated that he would encourage the Town to look at all of the variances that have been granted by local ZBA's and how few have been overturned over the years. He stated that he does not feel that they are that far off and if it would make it better

by providing site visits or meetings they would do that. Tony DePace stated that he would like to see someone from the APA provide a site visit before they make the reversal decision. Brian Grisi stated that the Agency would have to look at the project prior to a ZBA decision.

Jeff Anthony stated that they could create that perfect record that the APA is looking for but still get a reversal due to not demonstrating unnecessary hardship. He stated that it is unquestionable authority that they could never challenge. So he finds it strange that they cannot go to a site to look at the ones they are considering reversing. Brian Grisi stated that the ZBA is expecting the State to have some forethought and reason for the whole process. He stated that they are mandated by their regulations which say they have to look at the record and the record alone. The record does not allow the Agency to look at a site after the ZBA makes their decision. Jeff Anthony stated that it really doesn't make sense to have them come and look at all of their shoreline variances before a decision is made, because a lot of time it is not necessary to have the APA input. Brian Grisi agreed that it doesn't make sense. However, he can take a look at plans and tell them which ones are going to be problematic right from the get go before a decision is made.

Kam Hoopes stated that in his 10 years experience, the first reversal he saw was 3-4 years ago, but in the last year there has been a flurry of them. He stated that there was a sea change and the attitude seemed to be dangerously close to zero tolerance for shoreline invasion. Brian Grisi stated that 26 of their shoreline variances the Agency agreed with the Town's record. There were only 4 that they did not agree with.

Jason Saris stated that he agreed with Jeff Anthony about seeing these applications after the ZBA has made their decision. Brian Grisi stated that the Agency is required to follow their statute and they cannot make a decision outside of the record. Jason Saris stated that he feels that it would give the agency a better picture of the situation. Robin Burgess stated that pictures would be perfectly acceptable for the record. She stated that the record consists of more than just the minutes, it is the application and plans as well. Jason Saris asked why a picture would be valid but their presence on the site is not. Robin Burgess stated that it is in the record that they have seen and need to use for their review and determination. Kam Hoopes stated that he personally does not like to accept pictures as evidence because they have been there and they know if the pictures were taken recently or if it is even the property at all.

Tony DePace stated that he would like to see someone come out before it comes to the ZBA and provide an advisory or feedback would be a big help. John Michaels stated that he would like any criteria that the Agency use and apply in Town's where there is not an approved local land use program. Brian Grisi stated that he would provide that as well as an application to show what it is that they are looking for.

Jason Saris thanked the APA for their meeting. He stated that he feels that he has a clearer picture of the process and what they are doing for the APA. Brian Grisi thanked the Town for the opportunity and stated that if there was anything that they wanted review, to give them a call.

**The regular meeting was called to order at 6:36 p.m.**

Jason Saris asked if there were any changes or corrections to the April 20, 2010 minutes.

## **RESOLUTION**

**Motion by** John Michaels to accept the April 20, 2010 minutes as written. **Seconded by** Jeff Anthony. Tony DePace abstained. **All others in Favor. Motion Carried.**

**2) FUND FOR LAKE GEORGE & LAKE GEORGE WATERKEEPER.** Represented by Thomas A. Ulasewicz, Esq. To discuss Atty. Thomas Ulasewicz's letter dated March 25, 2010 RE: Oberer Subdivision (Application No. SD06-05)/ZBA – Petition for Appeal. Section 171.00, Block 1, Lot 6, Zone LC25. Property Location: Edgecomb Pond Road. This item was tabled at the April 20, 2010 meeting at the applicants' request.

Tom Ulasewicz stated that he is representing the Fund For Lake George, the Lake George Waterkeeper, as well as petitioners Gerald and Myron Tolchin, Edward and Jane Caldwell and the Hawkins Investments, LLC, two of which are adjoining land owners and the third is in close proximity. He stated that this subdivision is located off of Edgecomb Pond Road. Locally the subject property is called the pinnacle, which is a very prominent ridge line in the natural mountainous view shed of this community. It is especially visible from Cat Mountain, which is a popular hiking area. The proposed driveway which is approximately 1 mile long; 8 acres of land associated with this ridge line will be clear cut to service 3 homes all in close proximity to the highest most prominent point of the ridge line.

Tom Ulasewicz stated that there are 4 critical documents for the Board to review when deliberating the petition before them; 1) the petition that was filed on January 19, 2010, 2) a supplemental petition filed on February 9, 2010, which added parties and minutes that he was unable to use in the original petition, 3) March 8, 2010 letter to Pam Kenyon, entitled Request for Interpretation by the Zoning Administrator and 4) March 25, 2010 letter to Pam Kenyon.

Tom Ulasewicz stated that this appeal involves 2 issues: 1) As of today, isn't the Oberer subdivision restricted to a cleared width not to exceed 24' for the entire length of 1 +/- mile of shared driveway based upon the waiver granted by the PB and 2) separate and apart from the 24' waiver, doesn't the applicant need a variance from ZBA pursuant to the clear cutting regulations Section 251 of the zoning code. He stated that there are subdivision regulations, design standards within those regulations and the PB has jurisdiction to issue a waiver, under the proper criteria to those design standards. The PB did that and his clients are not challenging that. However, they have a zoning code that has clearing regulations in it. If they want to change that 16' clearing road surface to some other figure they have to get a variance and the only body with variance jurisdiction under the zoning code is the ZBA. ZBA cannot issue a waiver under the subdivision regulations and the PB cannot issue a variance under the zoning code. Tom Ulasewicz stated that it is his clients' position that the applicant is legally bound to get both a waiver from the subdivision regulations and a variance from the ZBA under the zoning code. The applicant got the waiver from the PB but never applied for a variance from the ZBA.

With regard to the first issue, Tom Ulasewicz stated that in October 2007 the PB determined that the approximate 1 mile access road for the subdivision would be considered a shared driveway and not a road or street. As a result the shared driveway, excluded from compliance with the Town road design standards, the slope restrictions would not have been met. He stated that his clients take no objection to this. The PB stated in the waiver by unanimous vote,

with one recusal, as follows: “The roadway will be considered a shared driveway with a 20’ driving surface and 2’ shoulders on each side for stormwater control.” He stated that the clearing for this shared driveway under the current project proposal significantly exceeds 100’ in several locations. In addition, information from the application and public hearing, show that some areas of this share driveway will traverse slopes in excess of 25% grade, while even more areas of shared driveway will have slopes in excess of 15% grades. Under the subdivision regulations section 150-17 all streets and roadways shall have a maximum grade of 12% for marginal access. Tom Ulasewicz stated that this is where they find the inconsistencies. Under the current process that has taken place, this is a driveway for purposes of being exempt from the 12% slope restriction design criteria under the subdivision regulations, but it is isn’t a driveway for purposes of meeting the clearing design standards under the same subdivision regulations. He stated that it either is a driveway or it isn’t a driveway.

Tom Ulasewicz stated that they should be questioning why 8 acres are being clear cut for this shared driveway, why its width is 160’ or more in many locations and why when the design standards in the Town subdivision regulations consider 12% as marginal access there are slopes that exceed this in many areas. The answer to these questions were summarized by Counsel Muller at a public meeting of December 17, 2009 as follows: “When one goes to the code book and looks at that section (Supplemental Regulations- Clearing Regulations) it pertains to single family home construction. As he understands the process and procedure, when someone does come for a single family residence they do follow the limitation. When the applicant is applying to have driveway accessing multiple dwellings, the interpretation of the Zoning Administrator has been that she does not apply the single family home 16’ wide limitation for the right-of-way. She makes the interpretation that what is offered is different and allows the PB to make the determination of width or latitude that is allowed.” Tom Ulasewicz stated that as he understands it, these spurs that come off of the shared driveway to access each of the homes is restricted to the 16’ standard, and not the shared driveway and they are appealing that interpretation.

Tom Ulasewicz stated that the dilemma in this situation is that the ZA has stated that she has never made such an interpretation. After a meeting with Counsel Muller and Pam Kenyon, he wrote the March 8, 2010 letter asking for such interpretation. He did so under the most clear understanding that this was what Ms. Kenyon and Counsel wanted him to do. He stated that they both indicated that he may not like the interpretation he gets but at least he will get the issue out there. Tom Ulasewicz stated that he was surprised to receive Pam Kenyon’s letter from March 19<sup>th</sup> declining to give him an interpretation. He stated that the Waterkeeper also asked for her interpretation on 3 different occasions as well. No response has even been given to any of those requests either. Therefore they are appealing the interpretation of this being a shared driveway attributed to the ZA as articulated by the Town Counsel.

Tom Ulasewicz stated that this appeal does not involve the waiver that was given by the PB back in 2007. They do not challenge the default subdivision approval that the applicant claims legal right to by failure of the PB to reach a timely and majority decision on any of its motions. They are not appealing the refusal of the PB to vacate earlier overtures of conflict by 2 of its members.

Tom Ulasewicz stated that the appeal seeks 1) a rejection of the interpretation that a shared driveway serving more than one residence does not have to meet the design standards of the subdivision regulations with regard to width and grades or the clearing regulations of the zoning code or any waiver or variance to those ordinances respectfully and 2) that no further review of this application by the PB will take place until the applicant applies to the ZBA for a variance to the clearing regulations in the Town's zoning code.

Jason Saris asked Pam Kenyon if she has made these determinations. Pam Kenyon replied no she has not made any interpretations. Jason Saris asked if this is still proposed and no actual work has occurred. Counsel Muller replied no work has been done.

Jeff Anthony asked for clarification of the waiver issued by the PB. He asked if they were implying that the waiver was for 24' clearing width under the subdivision regulations, and not for just the driveway. Tom Ulasewicz stated that the minutes from 2007 constantly talk about the access driveway shared in excess of 3,000'. He stated that they feel the waiver was applied to the clearing width. Jeff Anthony stated that there is no way to grade a road into a site when they have a 20' road bed and 2' shoulders on either side and not do any further work beyond it. He asked if the PB was limiting the total clearing width to 24' or if that was just for the driveway and shoulder width. Tom Ulasewicz stated that he is not sure but what he read earlier is what he feels has become the determination.

Jason Saris stated that he is not sure that they should be dealing with this as an appeal because the Zoning Administrator has indicated that she has not made an interpretation. Pam Kenyon stated that this item is not on the agenda as an appeal. Counsel Muller advised that they should hear from Mike Hill, who represents Ernest Oberer before dealing with the procedure.

Mike Hill, representing Ernie Oberer, stated that their opinion to this appeal is that this is the wrong place and wrong time. He was glad to hear that Tom Ulasewicz knows that the ZBA has no jurisdiction over the PB. He stated that the ZBA is able to hear appeals from determinations made by the ZA and they do not have any authority over any action or interpretation that may be taken by the PB. The appeal is based on an alleged determination by the ZA. The ZA did not make any determination and the PB in considering the driveway, acted according to the procedures and customs that it has always used with respect to shared driveways. There is a body of decisions that the PB has made in the past with regard to shared driveways and there is no contention that the PB has the authority to issue waivers. He stated that the PB was provided the same plans and driveway proposal that Tom Ulasewicz used tonight. It showed the same clearing limits and they approve the driveway at a 20' width for the driveway with 2' shoulders and they were fully aware and cognizant of what the clearing limits would be. As Jeff Anthony pointed out, it is impossible to build a road with a 20' driving surface and 2' shoulders and have only a 24' clearing width.

With regard to the driveway, Mike Hill, procedurally speaking, the PB worked on the driveway issue from the time the application was submitted in 2005 until they made their decision in October 2007 with regard to the driveway. The application had been pending for well over a year and they worked very diligently with the PB to conform to all of their requirements that they gave them with respect to the driveway. He stated that the driveway exceeds the 16' width per the code because the PB, in the interest of the health, safety and welfare of the

community, specifically asked the applicant to widen the driveway to allow passage of 2 emergency vehicles.

With regard to the slopes, Mike Hill provided a driveway profile. He stated that the driveway is less than 15% in grade throughout its entire length. It was designed to follow an existing old jeep or logging road to minimize new disturbance. He provided a drawing which shows how much of the site will remain vegetated after the proposed development. He stated that there are 75 acres total; 8 acres will be cleared, which is minimal disturbance on a large site. He also noted that although there will be clearing to construct the driveway initially, all of the area beyond the driven surface and shoulders will be re-vegetated with grass, shrubs and trees, a complete mix of native trees. He stated that they should be familiar with how quickly an area can re-vegetate because the area that had the fire is re-vegetating quickly with fast growing trees.

Mike Hill stated that this is a procedural issue and there has been no determination by the ZA. The PB followed its usual customs and practices in dealing with the driveway and did a very diligent job and put the applicant through a long process to be sure that they have the best driveway possible. He stated that the appropriate action in this case would be to dismiss the appeal.

Jeff Anthony asked Mike Hill if they were misinterpreting or misunderstanding the PB waiver. Mike Hill replied that the PB was fully aware of the clearing limits when the proposal was before them. He stated that he is not sure how it ended up being worded like that but it was an unfortunate mistake. He stated that clearly the Board members understood and that is what they voted on and approved.

Bill Pfau stated that Mike Hill indicated that the ZA did not make a determination and therefore there is nothing to appeal. He asked what the applicant feels was the determination by the ZA. Mike Hill stated that it appears that the appellant understands that Pam Kenyon did not orally make a determination, the fact that she didn't speak up is an implicit decision or determination. He stated that he respectfully suggests that the ZA made no determination, the PB independently followed the procedure that it had always followed and her silence does not constitute an appealable decision. Mike Hill stated that all of this went on in 2006 and 2007. If the appellant had an issue with respect to anything that the PB or ZA was doing or not doing the proper time and place was at the PB in the fall of 2007 when it was going on. He stated that they are trying to appeal it now just to cause further delay.

Jason Saris stated that it seems that the one issue they can all agree upon is the issuance of the waiver from the PB. With regard to the appeal, he asked if there is a statute of limitations for an appeal of a ZA decision or lack thereof. Counsel Muller replied that there are some that say there are 30 days, some that are 45 days and some that are 60 days. In this case, if there was a determination, an appeal would have to be filed within 60 days. He read the section 267A as follows: "Filing of an administrative decision and time of appeal. (a) Each order, requirement, decision, interpretation or determination of the administrative official charged with the enforcement of the zoning local law or ordinance shall be filed in the office of such administrative official, within five business days from the day it is rendered, and shall be a public record. Alternately, the town board may, by resolution, require that such filings instead be made in the town clerk's office. (b) An appeal shall be taken within sixty days after the

filing of any order, requirement, decision, interpretation or determination of the administrative official, by filing with such administrative official, and with the board of appeals a notice of appeal, specifying the grounds thereof and the relief sought. The administrative official from whom the appeal is taken shall forthwith transmit to the board of appeals all the papers constituting the record upon which the action appealed from was taken.” Jason Saris stated that this seems to have expired in the time frame and it does not matter whether it happened or not.

Counsel Muller explained the waiver. He stated that he remembers meeting with the ZA and asked her how they normally handle these types of situations. She indicated that a waiver is the typical path that the PB has taken in the past. He stated that if they had to decide whether or not that was considered an interpretation, he does not feel that it is. It was not a specific question posed to her by the applicant nor was it an issue that came up as challenge before the PB.

Jason Saris stated that whether or not the applicant can build this project is not of their concern. Counsel Muller stated that the only concern that they should be dealing with is whether or not they have something to properly handle as an appeal. He feels that this is not the appropriate time and had a decision been made the time would have run, based on Section 267A of Town law.

Counsel Muller stated that this is not a complete process for the applicants. At the request of the applicant, the Town allowed the applicant to proceed with the subdivision application before the stormwater application was done because of the time and expense that they would incur. However, they also did not feel that they would have been in this situation of a default subdivision. Counsel stated that he does not feel that this is not properly before the Board tonight.

Jason Saris stated that part of the appeal is that this is still the maximum amount of area that is allowed to be cleared and the applicant’s proposal is going to exceed that. Yet they clearly haven’t done any work so there is no violation. He stated that they really don’t have anything to talk about. In the future, if they proceed, no one has granted them any relief to cut more than the allowed maximum clearing. If they were to clear more than the maximum allowed, then they would be in violation and if action was not taken, it would be appropriate for them to come back then. Counsel Muller replied that if section 200-51 Clear Cutting Regulations C-3 applies, then it would have been appropriate to have all things perfect with the ordinance including the variance in hand before the applicant proceeds to subdivision approval.

Jeff Anthony stated that he doesn’t understand why the PB allowed the applicant to segment the project. He stated that subdivision and stormwater are critically related and he feels that is where the problem lies. Mike Hill replied that the PB permitted it because the applicant made a specific commitment which has been articulated repeatedly in the record; the applicant would provide a compliant stormwater management plan or they would not be allowed to develop the subdivision. They allowed for the segmentation because for a project of this size would have been enormously expensive. Kam Hoopes stated that officially they do not have a complete subdivision approval because they do not have an approved stormwater plan.

Tom Ulasewicz is asking if Counsel Muller is advising the ZBA that the waiver of the subdivision regulations by the PB negates the need for a variance from the zoning code. Counsel Muller stated that he has not given that consideration but that is something that could be raised. However, it cannot be raised in this appeal, but it is a fine question if there is an Article 78. He stated that it is their impression that it does apply. However, he is not stating that the PB can grant a variance. Once he saw this project coming he talked to the ZA because it is hard to distinguish between a waiver and a variance. They followed the normal procedure that they have done in the past which was to apply the waiver.

John Michaels stated that although this is an enlightening discussion, the issue before them is an appeal of a decision of the ZA who has indicated that she has not made a decision and he feels that they should just move on. Tom Ulasewicz stated that there are 2 issues to the appeal. First, the issue that we have been talking about and second, the fact that they can require the applicant to apply for a variance now before Site Plan Review for the clearing. John Michaels stated that they can deal with the first issue, but he does not want to touch the second issue because this is something that the PB is dealing with right now. They are not going to dictate to the PB the terms by which to review an application. Kam Hoopes agreed. He stated that although he is not in favor of referring things to the PB, there have been times where they have had the PB review something before a variance is reviewed. He stated that the essential thing is that no work has started, therefore there is no violation. If it is determined that a variance is required then their procedures will follow that path and the applicant will be required to apply for a variance.

Jason Saris stated that the important thing to remember is that this is the procedure that the Zoning Office has followed. The place to appeal improper procedure by a Zoning Office is an Article 78 and not with the ZBA. Counsel Muller agreed and stated that it would need to be at the final determination.

Tom Ulasewicz asked if they could sell lots. Counsel replied that they probably could. However, if they look at the final map, all of the conditions including the need for stormwater are listed on it so he does not feel that it would necessarily be marketable. He stated that the buyer would not be able to get a certificate of compliance.

Jeff Anthony stated that as a ZBA body they rule by the zoning code and not by the subdivision law. Counsel Muller stated that the ZA interprets the code, which is appealable to the ZBA. The ZBA then makes a determination based on the interpretation of the zoning code. Jeff Anthony asked if the 16' wide driveway is part of both the zoning law and subdivision regulations. Pam Kenyon replied that it is in both. Jeff Anthony asked what the difference is between the two. Counsel Muller replied that in the subdivision law section, there is an area that allows the PB to apply waivers. Jeff Anthony stated that he feels that it is odd that it occurs in both and that the zoning law is sitting here with no one paying attention to it but they are paying attention to the subdivision law and letting the PB do what they want with the criteria in the subdivision law when the zoning law has a regulation too. John Michaels stated that is what Counsel Muller is stating that it is an interesting question to ask after a final determination has been made. He stated that they cannot get involved with requiring applicants to get variances. Counsel Muller stated that it has happened on many occasions that when an application is being presented to the PB that they realize that something is not right and that the applicant needs a variance and they do that.

Mike Hill stated that it is also clear from the history of decision making here that the PB has repeatedly granted waivers in the past without any need for a variance. Since this is the practice, the Oberer's would look to be treated in the same manner and not be subject to having to return for a variance.

Tom Ulasewicz stated that the criteria for granting a variance under the zoning code that they would have to apply and the criteria of granting a waiver under the subdivision regulations, are very different from each other. Jason Saris stated that he understands that is a good question and if they are procedurally doing it wrong and it ends up in an Article 78, a judge will make that determination.

### **RESOLUTION**

**Motion by** John Michaels to deny the appeal for the following reasons: 1) it was not done in a timely fashion, 2) there is no proof that a determination has been made by the Zoning Administrator and 3) the ZBA is not in the position to usurp the PB authority regarding this subdivision. **Seconded by** Kam Hoopes. **All in Favor. Motion Carried.**

The meeting was adjourned at 7:42pm.

Minutes respectfully submitted by Kristen MacEwan