ATKINSON ZONING BOARD OF ADJUSTMENT

21 Academy Avenue

Atkinson, New Hampshire 03811

Public Hearing Meeting Town Hall

Wednesday, April 15, 2009

Present: Hank Riehl, Vice Chairman; Sandy Carter; Susan Miner; William Friel

Alternates: Sam Zannini; Glenn Saba

Mr. Riehl called the meeting to order at 7:35 P.M.

Approval of Minutes – March 11, 2009

***Mr. Friel made a motion to accept the minutes. Ms. Miner seconded and the motion was approved. Mr. Carter abstained*.**

Correspondence

Incoming

Attorney Bernard Campbell dated 3/18/09 re: ZBA Application for Equitable Waiver.

ZBA Budget printout dated 3/31/09.

E-mail dated 3/30/09 from Tim Dziechowski re: ZBA Site Walk, Gagnon, 16 Industrial Way.

NH DES dated 3/26/09 re: DES Wetland, 9 Lakeside Drive, Map 23, Lot 62.

Building Inspector, Legal Notice for Small Wind Energy System Applications, Map 14, Lot 84 & Map 15, Lot 4.

Selectmen memo dated 3/24/09 re: ZBA application fee increase approval.

NH DES dated 2/5/09 re: 4 Rocky Point Lane.

NH DES dated 4/8/09 re: 4 Rocky Point Lane.

Outgoing

Gene Lagasse dated 3/19/09 re: Home Business Renewal Approval, 40 Academy Avenue, Map 14, Lot 56.

ZBA Legal Notice for meeting of 4/15/09.

PUBLIC HEARING: 8:OO P.M.- Continued from March 11th

Giles Gagnon request for Variance from Article IV, Section 410:8 of the Zoning Ordinance to permit construction of an addition to existing building 68’ from wetland (32’ variance) as opposed to the required 100’ on property located at 12 Industrial Way, Map 16, Lot 50, CI Zone.

Abutters list was read with the following present:

Gilles Gagnon; James Lavelle Associates

Mr. Lavelle explained that this was the second meeting before the Board. There was a site walk conducted by members of the Board. There is a small isolated wetland approximately 4 feet in elevation above the developed area of the lot. This was a suspended trap wetland probably created by initial grading of the subdivision some years ago. It is not significant and he believed the Board would concur. Carter confirmed the building was approximately 68 feet from the wetland. Mr. Riehl believed this was reasonably straight forward. Mr. Zannini asked if the Board had received anything from the Conservation Commission. There was no input from that Board and they had not attended the site walk although they were invited to do so. Mr. Carter concurred the wetland was elevated 4 feet above the lot. There are extensive drainage and retention ponds that were the result of the original site plan. They appear to be functional. The only concern might have been that the footprint of the proposed addition was considerably impermeable a day after heavy rains as it stood. It would appear there is high clay content that does not function as a drain. This is moot because the wetland is elevated above the site and water does not flow uphill. Mr. Lavelle said any drainage issues would be addressed by the Planning Board at the site review stage. The Board agreed.

The Board reviewed the criteria:The Board agreed there was no diminution of value and the wetland was 4' above the site.

The Board agreed based on the discussions and site walk this was met.

This is an area variance. Mr. Friel had indicated there were no abutters. Mr. Wolters said he came into the room late. Mr. Wolters said the hardship was a pretty tall order to meet because the building is very functional and useable as it is. It is hard for him to comprehend how that could be a hardship. There is no green space on the site and it is totally built out. Mr. Carter stated the hardship is somewhat in the eye of the beholder. This is a commercial building that has gone through site plan review and has potentially expanded to the point where he feels he could use additional space. Just because he already has a building on the property does not mean no hardship exists. The hardship is the applicant has the potential to expand his business and the only way to do that is to obtain more space by adding on. There is no other place to expand the building. The Board is only dealing with the granting of the variance for the wetland. This would still have site plan review at the Planning Board level. The Board agreed based on discussions this was met.

The Board agreed this was met based on discussions.

Again the wetland is elevated 4' above the site and is a low value wetland. The Board agreed this was met.

Mr. Carter made a motion to approve the variance as requested based on all of the criteria having been met and on discussions from this hearing as well as the previous hearing and the site walk conducted. Mr. Friel seconded and it was unanimously approved.

PUBLIC HEARING: 8:25 P.M – Continues from March 11th

Richard & Patricia Haines by Attorney Bernard Campbell request for Equitable Waiver from Article IV, Section 460:2(h) of the Zoning Ordinance to permit an Accessory Living Unit to contain 1,016 sq.ft. as opposed to the required 750 sq.ft. for property located at 6 Indian Ridge Road, Map 5, Lot 54, TR2 Zone.

Mr. Zannini recused himself and Mr. Saba voted.

Abutters list was read with the following present:

Attorney Bernard Campbell; Richard and Patricia Haines; Michael Perras

Attorney Campbell explained they were before the Board in March for an Equitable Waiver request. Some members of the board conducted a site visit. One of the issues was related to gain to the public versus the cost of correction. There was a document book provided to Board members with backup material. This is an additional living unit which

applicant claims has existed in the property since 1992. The Haines' have had a so-called "guest suite" since that time and was occupied by their parents up until they passed away. They are before the Board because the latest assessment card indicates the guest suite is unpermitted. The applicant did some investigation and found the unit was not properly permitted. It had been allowed to be constructed and they were under the assumption it was permitted and in compliance. Attorney Campbell said the unit will meet all of the criteria of an accessory living unit except for the square footage. Attorney Campbell said the violation must have been for 10 or more years. He has presented information at the last hearing and additional information in the book provided, which includes notarized statements from their insurance agents indicating they had made inspections of the property since inception in 1992. There were copies of invoices for materials and pictures of the unit. There are prior assessment cards that all indicate the unit as a guest suite. Most notable is the assessment card from April 1993, which is the first one issued, and which indicates there was a guest suite with kitchen and bath that was physically inspected with the owner by the Town Assessor. Attorney Campbell believed they have submitted sufficient evidence to meet the first criteria. The house represents a single family design with ample parking and does not diminish the value of surrounding property values. The cost of correction would outweigh the benefit to the public. He does not believe there is a feasible way to reduce the size of the area.

Mr. Perras wanted to say they support the Haines' and believe the house looks like any of the other single family homes in the neighborhood. They believe the facts presented by Attorney Campbell are accurate and support the cause. Mr. Kirsch questioned the ten year period because he claimed Code Enforcement did not know about the violation until the letter had gone out. When an applicant goes to the building inspector for an accessory unit is more than 750 square feet they would have been told to adjust their plan. He did not believe it was fair. Another abutter said the regulation for 750 square feet did not come into effect until 1995. Mr. Riehl agreed it was totally illegally before 1995 because it was an apartment. It was permitted as a single family four bedroom home. Mr. Riehl said the tax card had nothing to do with it. Attorney Campbell said the premise behind 674:33A was the fact that code enforcement did not know about it. Attorney Campbell said according to the Haines', when they built this, plans were submitted, and people saw it and it was approved, though no plan exists in the town's file. The problem with Mr. Kirsch's point is it is irrelevant to the law. The law provides that when a discovery is made of a zoning violation, the first two criteria's speak to. Section 2 said specifically, in lieu of the findings required by the Board under subparagraph A1 A and 1B, the owner may demonstrate to the satisfaction of the Board that the violation has existed ten years or more and no enforcement action has been commenced. Attorney Campbell analyzed that if an applicant put a garage up violating a setback knowingly, then it sat there for 15 years the applicant could come before the Board for an Equitable Waiver. Mr. Riehl disagreed and reiterated that an apartment in a four bedroom home in 1992 was illegal even if the inspector went in and saw a finished kitchen with a full size set of appliances. Mr. Carter believed Attorney Campbell was only presenting a portion of the necessary criteria. Attorney Campbell explained he did not need to prove 1A and 1B if he could show the violation had been in existence for 10 or more years and that the Town's application form is set up that way. Mr. Carter asked if there were proof that this all took place when he claimed and that it was known to public officials. Attorney Campbell said the statute does not require that it be known to public officials. He believed the that he has demonstrated to the satisfaction of any reasonable fact finder that this has existed since 1993, which is a total of 16 years, clearly in excess of 10. They still have to prove C & D, which is no diminution of value or nuisance and the cost to correct would outweigh the public benefit to be gained. He believed they met those three criteria. Attorney Campbell noted the Schroeder vs. Town of Windham case, in which he was involved, that case dealt with an equitable waiver. There have only been two cases that have spoken about this issue. Mr. Carter asked if this were a request for a waiver to a dimensional requirement, what was the requirement in 1993. Attorney Campbell said there was not a requirement in 1993, but there was a requirement in 1995, so if the clock started then, they would still be in excess of ten years. Mr. Riehl stated that in 1992 it was considered an illegal apartment. He is having trouble with the fact there is floor space constructed in an illegal fashion from the day it was done. Mr. Riehl stated the difference between a legal 4-bedroom single family home that was permitted and an illegal 3-bedroom home with an apartment is the second fully-equipped kitchen. Mr Riehl was not convinced the second kitchen was put in 1992; documentation such as appliance receipts provided by applicants demonstrated an intent to put in a kitchen, but nothing provided conclusively demonstrated that the kitchen had been put in before the December 1992 Occupancy Inspection It was illegal whenever it was put in and is still illegal today and applicants are asking the Board to make it legal because it has been there for 10 years. That sends a signal to everyone in Town to forget the building permit and just build it and then hope to get away with it. Attorney Campbell said it brings the focus on issues of enforcement, but that is a piece that every municipality deals with. Attorney Campbell alleges it is not illegal because by 1995 this community did

allow an accessory unit. If they use Mr. Riehl's thinking it was a non permitted use from 1992 – 1995. From 1995 on it could have existed if it met a certain set of requirements in the ordinance. He maintained he still met the criteria for the Equitable Waiver even from 1995. Mr. Riehl said you would have to meet all of the criteria under the Special Exception for an Accessory Unit or it would not be approved. Special Exception applications must be granted if all conditions are met, and must be denied if even one condition is not met, the Board has no lee-way. This floorspace would have been denied in 1995 and it would still be denied today because it did not meet the square footage requirement under the town's Special Exception criteria for Accessory Living units. Mr. Carter said even in 1995 there would have been a set of plans submitted for approval. This is not a mismeasurement and there are no plans in the file. There was no possibility of it being legal when it was built. There is nothing in the record that was signed and submitted to the Town indicating this was a multi-family unit or that it ever existed. Attorney Campbell maintains the photographs are there. Mr. Carter said he had to take the testimony of the official that would have signed off on the occupancy permit and that he never saw the "guest suite". Mr. Haines disagreed and said the building inspector knew it was there, they have affidavits stating it had been there since 1992, they have invoices for two sets of appliances, kitchen materials, flooring, etc. He believes there is plenty of evidence. Ms. Miner said an Equitable Waiver has to do with dimensional requirements and she does not see the link. By even entertaining an equitable waiver then the board would be condoning the use. The Board could spend a lot of time determining when the kitchen was installed, but this is not something she feels she could vote for because it is a use issue and use does not apply to the Equitable Waiver process. Attorney Campbell stated the use is permitted under the zoning with the exception of a 750 square foot limitation. Mr. Friel said they don't meet the requirement for the use either because there is no one living in the unit or there has not been for a few years. This is not something that can be passed on and attaches to the property. Mr. Carter said the Board has not even addressed Equitable Waiver provision IV, which states "This section shall not be construed to alter the principle that owners of land are bound by constructive knowledge of all applicable requirements. This section shall not be construed to impose upon municipal officials any duty to guarantee the correctness of plans reviewed by them or property inspected by them", which he read. The set of circumstances on the table that it was illegal when built and remains illegal up to today do not justify nor should be brought under the provisions for an equitable waiver. Mr. Carter reiterated if this were to come before the Board today as a request for an Accessory Living unit the Board would have no discretion in granting it if it had even one foot more than the 750 square foot limit. You either meet it or you don't. Attorney Campbell believed Mr. Carter was not interpreting the statute correctly. The violation is the use. There is no special exception attached to the unit, there is no one living in the unit, it does not qualify. Attorney Campbell asked if he were supposed to bring a Request for a Special Exception, would that resolve the issue. He needed clarity and did not understand what the Board was looking for. The Board agreed this was an illegal apartment in a single family home and acting on this would give the illegal use status. An abutter asked Mr. Carter about a comment relating to documentation that would have been submitted to the Town for review and approval. He believed there were buildings plans submitted to the Town, in the normal process, that have mysteriously disappeared. Mr. Carter said it was not relevant and the issue before them was the fact that a permit was never issued for an in-law apartment at that property. The Equitable Waiver would be granting a use. Mr. Friel asked if there were a way to reduce the size of the unit. Mr. Riehl said based on the site walk to be compliant it would be brutal and very difficult to reconfigure the unit. The kitchen is located on the common wall.

Mr. Friel made a motion to deny the request based on the discussions and the findings by the Board that the conditions necessary to grant an Equitable Waiver of dimensional requirements cannot be supported by the facts as submitted to the Board. Mr. Carter seconded the motion and it was unanimous.

PUBLIC HEARING: 9:25 P.M

Daniel and Margaret Osborn submission of an Application to further modify a Variance granted on June 13, 2007, by permitting applicant to finish basement level on property located at 8 Valcat Lane, Map 22, Lot 47, RR3 Zone.

Mr. Saba will be voting on this.

Abutters list was read with the following present:Mr. and Mrs. Osborn for Malborn Realty Trust

Mrs. Osborn said the original variance granted stated the applicant must come back before the Board for approval if they wished to finish the basement. Mrs. Osborn said they sought legal advice on how to approach this and were

advised they should seek a modification of the original variance. Mrs. Osborn purchased the lot with another couple, the Mallons. The Mallons were going to construct a home there. The Mallons came before the Board to seek the original variance. After the market crashed, the Mallons decided to build elsewhere and the Osborns decided to build on the property for themselves. The space in the basement is needed because the house has a very open concept and does not allow for an office space or family recreation area. The basement is a walk out. When they took out the building permit they did not intend to finish the basement then, but realized it was cost effective to rough the basement while the workers were already there. They had insulation put in and dry walled the area. Mr. Riehl asked how roughing, insulating and dry walling wasn't already finishing the basement. Mr. Osborn said there is a concrete floor and they did the same thing in the garage. It would not pass inspection yet and they still have to get the Certificate of Occupancy. Mr. Zannini asked if there were interior partitions. Mrs. Osborn said there were. Mr. Riehl asked about the current status of the conditions associated with the original variance. Mrs. Osborn said all of the sheds and junk have been removed. The bunk house is still in question and they will either be going before the Selectmen or they might take some sort of legal advice on how to proceed. Mr. Riehl said it appears they have taken steps contrary to the conditions of the variance by starting to finish the basement without approval. Mrs. Osborn said it is roughed only and Mr. Osborn said it is no more of a playroom than the garage is. Mr. Carter asked if the fixtures were in the bathroom. Mrs. Osborn said they are not. The wiring is roughed only and it has been inspected. Mr. Riehl said there was no inferred approval of a finished basement in the granting of the variance. Mrs. Osborn thought there was nothing that inferred it would not be approved either. In the minutes of the granting of the variance the Board was concerned only with permeable surfaces with regard to the size of the house. Ms. Miner said the minutes stated the basement was not going to be finished. Mrs. Osborn said at that time it was not intended to be finished, but the applicant never said it would never be finished. Mr. Saba asked if there was a building permit. Mrs. Osborn confirmed there are proper permits and the house in under construction. They do not live in the house. Mr. Jones said the application indicated the basement was to be unfinished. Mr. Friel said the occupancy permit cannot be issued until the conditions of the variance are met. Mr. Riehl asked if the licensed engineer has signed off on the infiltrator chambers. Mrs. Osborn said that phase will be completed when the driveway goes in. All of the best construction practices have been followed. Mr. Kirsch said he was observing what was being done when he saw someone putting drywall in the basement. He told that person the basement was not supposed to be finished and that he should contact the Osborns. Mrs. Osborn said they were not trying to hide anything and that inspectors were coming and going into the space. Mr. Zannini said the work is done and the Town has taken the position that the work in the basement needed to stop. It has and the Osborns are now here to get approval to finish the basement. Ms. Miner asked about the square footage. Mrs. Osborn said the house is 2500 square feet without the finished basement. The basement is an additional 720 square feet. The intensity of use on the lot is only 11% because this was originally 3 lots. Mr. Friel said the only issue before the Board is the finished basement. As far as the Board is concerned the Bunk House is not going away as a condition of the variance. That issue is not before the Board. The minutes do state that the applicant can come before the Board if they wish to finish the basement. Mr. Riehl did not know if he agreed because the removal of the bunk house was a condition and this is give and take. Mr. Friel reiterated that the applicant cannot get a Certificate of Occupancy without the removal of the bunk house and as far as the Board is concerned it is still going away. Mr. Friel asked if there were any benefit to having the applicant rip out the work done, finish the house and come back before the Board and ask to finish the basement. There would be a hardship. Mr. Zannini does not believe you can deny the granting of a variance based on the existing conditions of another one. Mr. Riehl said he was speaking for himself and there was a give and take in order to obtain the original variance. Mr. Friel said the only issue before the Board today is the request to finish the basement. Mr. Carter agreed but said the door was left wide open in the minutes to revisit the idea of finishing the basement. The Board was not sure if this should be another variance or a modification of the original, if such a thing existed. Mr. Riehl wanted to take the more rigorous approach to be safe. This is an area variance.

The Board reviewed the criteria:Based on discussions, there was a consensus of the Board that this was met.

Mr. Riehl was not inclined to let the basement be finished while conditions for the original variance remain outstanding. Based on the discussions, there was a consensus of the Board that this was met, with Mr. Riehl dissenting.

This is an area variance. Based on discussions the Board agreed these were met.

Based on discussions the Board agreed this was met

Based on discussions the Board agreed this was met, with Mr. Riehl dissenting.

Mr. Carter made a motion to approve a modification to the Variance previous granted by the Board on June 13, 2007 and permit the basement to be finished. The Board used the criteria for an area variance and all of the criteria were met. There will be no additional bedrooms located in the space and this approval does not relieve any other conditions required on the original approval except the finished basement. Mr. Friel seconded the motion and it was approved.

PUBLIC HEARING: 10:05 P.M

Keith Wolters request for Administrative Appeal of Zoning Interpretation by the Planning Board's March 4, 2009 Site Plan Approval of P.J. Murphy Transportation, Inc., Truck Transportation Facility to be located at 16 Industrial Way, Map 16, Lot 59, CI Zone.

Mr. Friel recused himself. Mr. Zannini and Mr. Saba will be voting.

Abutters list was read with the following present:Keith Wolters; Attorney John Ratigan; P.J. Murphy Transportation

Attorney Ratigan explained he represented Mr. Wolters and approximately 10 other nearby neighbors of the property. P.J. Murphy trucking went before the Planning Board approximately 6 months ago. Mr. Wolters raised the question of whether the use was a permitted use under the Zoning. In March the Planning Board approved the application by a 3-2 vote. Attorney Ratigan does not believe the use is permitted and thereby has appealed to the ZBA. The ordinance states that any use not expressly permitted is prohibited. There is no truck/transportation facility listed for the CI Zone. There is nothing approximating a truck/transportation facility in the CI Zone. Attorney Ratigan referred to Peter Loughlan and his treatise on NH Land Use Planning and Zoning. He believed the applicant needed to come before the ZBA to obtain a variance and should not have gone before the Planning Board. He believed the applicant will offer colorations of how this business could fit into a permitted use in the CI Zone. He argued that the use has to be specifically allowed. He believed the law in NH was clear on this issue.

Mr. Riehl wanted to clarify this lot was subject to a Superior Court Decision from 1982 that permitted uses were to be grandfathered or extended to this lot which were in existence at that time. Mr. Wolters thought that was deemed not to be applicable. Mr. Riehl said they would have to explore what was permitted at that time.

Attorney Bob Lavoie was there representing Mr. Murphy. Mr. Wolters claimed there was a conflict of interest because Attorney Lavoie's firm represents him in ongoing matters. Mr. Wolters did not give his consent for Attorney Lavoie to represent Mr. Murphy in this matter. Attorney Ratigan offered a continuance. There was a five minute recess to confer with clients.

Upon reconvening, Attorney Lavoie stated he would no longer be representing Mr. Murphy and that the applicant agreed to have Marc Gross, Mr. Murphy's consultant, represent him at the hearing. Mr. Gross asked the applicant to give the board a snapshot of the business and what was proposed on the site. Mr. Murphy explained that he transports petroleum products and swimming pool water. He has 7 power units and 14 trailers. The drivers start before 4:00 - 5:00 am in the morning. They leave the site, go to Boston and pick up their product and then deliver to service stations throughout New England and then return to the facility 9-10 hours later. These are at different times because they have irregular routes. Then the night shift comes in between 4:00 – 5:00 p.m. and does the same thing, 7 days a week. They don't work on Sunday mornings or holidays, but they do work Sunday nights. They plan on doing the repairs for the trucks in the garages. There is a small office for bookkeeping and dispatch. He chose this location because it was off Route 111 and there are no residences that the trucks would pass. In the summer they deliver swimming pool water. Each truck has two drivers and can go up to 11 hours a shift. The trucks fuel up off site. He said the Planning Board removed the stipulation that he could not repair loaded trucks on site. Although this is not his intention, if a truck breaks down somewhere it may have to be repaired at the facility while it is still loaded. There has been sound testing

and traffic studies and anything else that was requested of him. Mr. Gross stated that the whole premise of using this site was based on the previous owners of the site, which essentially operated a heavy construction equipment business on the site. He contended they are doing the same type of thing. Mr. Murphy saw this operation and others going on in that Zone and thought it would be a good fit. He received documentation from the building inspector to this issue prior to filing a site plan application. Mr. Gross did not feel the appeal was filed in a reasonable amount of time pursuant to RSA 676:5(i) and should be dismissed accordingly. He believed the applicant's interpretation of permitted uses in the CI Zone is contrary. Mr. Gross believed there were two instances in which the applicant should have appealed this if it were appealable. Mr. Carter asked if he were claiming a jurisdictional issue. He believed the Planning Board makes a decision based on the terms of the ordinance and it could be appealable to the ZBA if it were made by the administrative officer. The applicant is appealing the approval of the site plan by the Planning Board. He believed the Code Enforcement Officer and Building Inspector are the administrative officers and make the decision as to whether a use is permitted or not. The Building Inspector issued a letter to Mr. Murphy, dated October 1, 2008. Mr. Gross read the letter, which he contended gave a zoning determination that this use was permitted and was merely an expansion and would need an amended site plan. Under section 900-2 of the ordinance the Town's Building Inspector is charged with the administration of the provisions of the ordinance. Accordingly the determination by Mr. Jones that the proposed use was consistent with abutting commercial industrial properties in the CI Zone, was an operative decision by the Towns administrative officer and triggered the reasonable time period pursuant to RSA 676:5. Mr. Riehl asked if the decision letter was made public. Mr. Grosse contended it was made part of the application/correspondence to the Planning Board. There were several discussions by Planning Board Members as to the use issue. On November 5th, the Board voted 4-2 in favor that the proposed use was a permitted use. The minutes clearly reflect that. Mr. Riehl asked if that was when they took it under jurisdiction. Mr. Gross believed it was and believed they were accepting the use. A Planning Board cannot or should not act on a plan that requires a Variance. In his experience he has never known of a Board to take up a site plan application for a use that is not permitted. So November 5th was a second opportunity to appeal the decision. Instead they waited until the Planning Board approved the plan. Ms. Miner asked if he were implying that the administrative officer was the Inspector and not the Planning Board. Mr. Grosse said the ordinance states the officer is the Building Inspector. Mr. Gross also raised the issue that the decision is supposed to be attached to the application for appeal and it is not. Mr. Gross referred to Zoning Section 500:6 that the CI district must take into consideration truck and rail traffic. These would be pretty heavy duty operations. They are also making the claim that when the Building Inspector made his determination he based it on what was currently operating in the CI Zone. There is at least one if not two operations that do exactly what Mr. Murphy intends to do and they operate 3 lots down. It appears Mr. Murphy's operation is being singled out. Mr. Grosse believes Mr. Murphy's intended use was blown out of proportion in terms of thinking that oil would be loaded and off loaded at the site.

Mr. Riehl said the Board needed to determine the issue of what was a reasonable amount of time to file the appeal and Mr. Gross believed there were two occasions. The first being the issuance of the letter by the Building Inspector and the second being when the Planning Board took it under jurisdiction. The Planning Board took it under jurisdiction on November 5, 2008 and agreed it was a permitted use according to the minutes of the Planning Board.

Mr. Riehl asked the Board if there was a consensus that that they were willing to hear the appeal even though there is no decision attached to the application. There was a consensus of the Board to hear the appeal.

The Board discussed the letter of October 1st from Mr. Jones to determine whether this started the clock for the appeal. Ms. Miner did not believe this would start the clock because the abutters would have never seen this letter. Mr. Gross said there was a conceptual hearing in September and the abutters would have known. Ms. Miner mentioned that abutters were not notified of "discussions" only public hearings and the September meeting only included discussion. She was confused with the Planning Board minutes because throughout several of the meetings after the November 5th date some of the members were still questioning the use and whether the Board ever took a vote. Would an abutter realize that a vote had been taken and it had to be appealed at that time, when the Planning Board still had yet to rule on the entire site plan? Mr. Riehl agreed that he thought that was "a stretch". Carter said he would want to know what a Court would say and not just what an abutter would feel is right and just. Mr. Carter believed the allegations were in the record. Mr. Grosse said the applicant was on the Salem Planning Board for many years and knows the process and rules and regulations. There are only two direct abutters with legal standing. Mr. Gross contends this Board needs to determine whether you can appeal an administrative decision by the Planning Board. Mr. Riehl believed this is the

right venue for a challenge to interpretation or application of zoning. Mr. Murphy thought this was innovative land use and had to be appealed to Superior Court. Attorney Ratigan said innovative land use does not apply to commercial zoning.

Mr. Riehl is not persuaded by the issues of the reasonable time for applicants to file an appeal based on what most laymen would consider ongoing proceedings of the Planning Board. Until the Planning Board took a final vote, this would be the trigger for determining a reasonable time to file the appeal. There was a consensus of the Board and they thought they should move on and hear the appeal.

Mr. DiMaggio, Vice Chair of the Planning Board, said that on October 1st when the conceptual plan was heard, there was an additional use that was put forth in addition to the transportation use. The abutters would not know what they had to appeal because it was not fully determined what the uses would be. He was an adversary to this from the beginning. You cannot take a vote on something until after it is taken under jurisdiction and up until the last hearing he questioned whether they ever took a vote. The Planning Board did not see it his way and proceeded. If he, as a long time member, did not know what the Planning Board had approved, how can an abutter know and appeal.

Mr. Gross said Mr. Murphy has spent tens of thousands of dollars based on a letter issued by the Building Inspector determining the use was permitted and based on a vote by the Planning Board to get to this point. It is inconceivable that he would now have to come before the ZBA and risk having it overturned. This is not how the process is supposed to work and is not fair to the applicant. Ms. Killam said this is becoming more complicated than need be. Mr. Gross made the point, correctly, that the Planning Board could not take this under jurisdiction without a determination that they thought this was a permitted use. The vote was a consensus so the Board could decide to either take jurisdiction or not. The consensus in the minutes by a vote of 3-2 was it was a permitted use and the Board took it under jurisdiction and began the proceedings of looking at the details of the plans. It was not a conceptual meeting where the vote took place. If the vote had been the other way, the Board would have stopped and sent the applicant away. You can't proceed on a hearing unless there is a completed application that meets the Zoning. They cannot act on a plan that does not meet the zoning to their best determination. Mr. Riehl understood this to mean by the act of taking it under jurisdiction, it was an implicit agreement that this was a permitted use. Mr. Carter said the ZBA has seen many application for variances referred by the Planning Board because an applicant was told a variance was required before the Planning Board could proceed and it is not unusual.

The Board discussed the issue of permitted use. Mr. Riehl said he would be happy to take abutter comment but wanted to be clear that this was a very narrow topic. The ZBA is not here to rehear everything that took place before the Planning Board.

The Board agreed the appeal was filed in a reasonably timely manner and they could proceed with the appeal.

The Board agreed the Superior Court Ruling did apply to this lot. Ms. Killam said the decision was based on a developer that received an approval on a site plan. The site plan had a condition that it needed to be bonded. He offered a letter of credit to the Town, which is an acceptable form of bonding under the RSA's. The Selectmen refused to accept the Letter of Credit and told him to come back with cash. He did not, so the site plan was revoked. He went to Court to get relief. The Court said the Town had to accept the Letter of Credit and would have to allow him the benefits of the zoning that was in place at the time his original approval was made. Any uses on the site that were allowable in 1981 on Industrial way were supposed to be allowed today according to Town Counsel. Mr. DiMaggio agreed that any uses, even the less restrictive, should apply. Ms. Miner asked if anyone knew what was under EE that was deleted in 1993 and was it allowed in the CI Zone.

One of the abutters asked for clarification on what permitted uses apply. Mr. Riehl stated the Board must permit him the relaxations that have occurred since 1981, but not apply the restrictions. Mr. Riehl asked the applicant how he felt the use falls in the permitted uses. Mr. Grosse said it was pretty clear in the letter issued by the Building Inspector that there was office/garage and parking of numerous vehicles. Mr. Carter believed the Board had heard a lot of what is being proposed. What is before the Board is an Appeal of the Planning Board's Decision and he thought the Board should hear from them?

An abutter asked where the zoning allows the applicant to park a truck filled with ten thousand gallons of hazardous material. He claimed the applicant said the trucks would be empty, but they won't be. There will be times when a truck will be parked with ten thousand gallons of oil or fuel because he could not make the delivery. The applicant denied that. Mr. Riehl said this matter has been dealt with by the Planning Board and ruled on. Mr. Riehl asked what the Planning Board's thoughts were in this when they decided this issue. Ms. Killam said she believed the Board approved an applicant that wanted to repair vehicles, park vehicles and maintain and office. Until she read the Court order from 1983 and the zoning that was in place during 1982 she couldn't get herself past the parking for a fee. Once she read all of that it took them back to just plain parking and she did not see how they could deny it. Mr. DiMaggio submitted a paper to the Planning Board on why this was not a permitted use. The SIC codes are different for transportation. The repair and parking of vehicles are allowed. There are no businesses there that run 24 hours a day, seven days a week. It is a different industry with the tractor trailer trucks coming and going and that is the transportation industry. This is not allowed.

Mr. Zannini said he agreed with the Building Inspector that this was a permitted use and that there was no real change in use from the former owner. The prior business repaired trucks and had rock movers as big as a house and the business is similar to business all up and down Industrial Way. Ms. Miner said she thought it sounded more like a transportation terminal and not three individual types of uses. She would not agree the use is a permitted use. Mr. Zannini asked her if she thought the use was similar to the use that was there prior. Ms. Miner said she did not know what was there before and did not feel it was relevant or before the Board. Mr. Zannini believed the Town took the position that the use was the same when they issued a letter to Mr. Murphy indicting the same. Ms. Miner said she does not think you should compare other businesses to each other. Mr. Zannini disagreed and thought this created a huge hardship for the applicant because the Town took the position this was permitted and believed this would be lost in Court. Mr. Carter believed that when you have exclusionary zoning there are shades of grey. This situation is not unique and the Board has had to deal with the dilemma of attempting to expand a relatively short list of permitted uses into templates. There is judgment and it would be wrong to dismiss out of hand that because it isn't specifically mentioned it is completely excluded. There is not a perfect description of any business and one could make any argument of why it does not fit. In some ways the ZBA is reviewing the authority of the Planning Board. Mr. Saba asked about the harmony of the abutting districts, such as the residential one. Mr. Riehl believed the only issue was that of permitted use. Some of the other elements are for this Board to address. The Planning Board addresses those issues. Mr. DiMaggio disagreed with Mr. Zannini's comparison in that it was similar to other businesses in the district. This proposed use is in no way similar and has 14 trucks operating 24 hours a day, 7 days a week. He believed Mr. Jones made a terrible mistake in issuing his letter. He believed in the gray areas, the Town should lean towards protection of your existing citizens. This Town is a bedroom community and not an industrial one. Another abutter claimed Industrial Way is a disaster and a disgrace and to make a comment like Mr. Zannini did that because one does something another should be allowed to is foolish. It is never too late to make a right decision and this Board should be charged to do this. Mr. Zannini said it wasn't up to the Board to be Code Enforcers. Ms. Killam reiterated the only issue before the Board was an appeal of a Planning Board Decision and by statue the only thing that can be appealed is the permitted use. All of this other stuff is very useful, interesting information that will be heard in Superior Court where another case has been filed on this topic.

Mr. Wolters claimed that the other business in that area is basically dead storage and claimed all of the sites that have been discussed are not in compliance. It is unnerving to hear that the Board says the code enforcement is up to one individual. The Planning Board did not do their job in doing planning. This use is not permitted and the current uses there are not in compliance. Mr. Tomassi believed the use was not permitted under the ordinances. Mr. Grosse claimed there is no permitted use for gas stations in Atkinson, but there is one on Route 111. He questioned how many businesses in Town fit completely in one description. Attorney Ratigan believed they wouldn't be before the Board if people in the neighborhoods thought this was a harmonious use. This business will disrupt and impact lives because of the 24/7 use. He agreed that there has to be some flexibility in ordinances but he believes the issue of being harmonious is the biggest factor because of the impact.

Mr. Carter made a motion to grant the appeal based on the Board's discussions and determining this was not a permitted use under the current zoning. Ms. Miner seconded the motion and it passed by a vote of 3-2.

Motion to adjourn was made and seconded. Mr. Riehl adjourned the hearing at 12:15 A.M.

Respectfully Submitted _____

Minutes transcribed from tape Rebecca Russo

Minutes of April 15, 2009 approved – May 13, 2009