TOWN OF FALMOUTH
BOARD OF ZONING APPEALS
TUESDAY, JANUARY 27, 2009
These minutes are not verbatim

MEMBERS PRESENT: Rich Bayer (Chair), Fred Jay Meyer, Jim Thibodeau, Willie Audet, Stan Given (Associate),

Dennis Keeler arrived late.

MEMBERS ABSENT: none

Stan Given was designated as a voting member, while Dennis Keeler was not present.

Meeting opened 6:34 pm.

Administrative Agenda Items:

a) Discussion and adoption of the minutes of the previous Hearing.

The minutes of November meeting were deferred until the next meeting.

b) Discussion and finding that all applications presented for this hearing are complete.

After some discussion, the Board found the applications to be complete. Item 4, Donald Russell, has been withdrawn due to a medical issue.

Regular Agenda Items:

1. **Isaac & Kate Treem** – request Conditional Use approval under Section 6.2a for a deck at 11 Pineview Rd. Parcel #U45-040, zoned "RB".

Isaac Treem testified that he is here to add a 12x12 foot deck to his home.

Public comment period opened; no public comment.

Al Farris said that the application is here due to less than required frontage and square footage, and the dimensional requirements of the lot, but this application meets all setbacks.

Jay Meyer moved to approve the application. Jim Thibodeau seconded. Motion carried 5-0.

2. **Jane Weed represented by Josh Dwinnell** – request Conditional Use approval under Section 6.2a for a dormer at 91 Leighton Rd., Parcel #U45-048, zoned "RB".

Josh Dwinnell explained that the applicant wants to add a dormer to the back of her home.

Public comment period opened; no public comment.

Stan Given moved to approve the application, Jay Meyer seconded. Motion carried 5-0.

3. **John & Jenny Pray** – request conditional use approval under Section 6.2a for an addition to a garage at 10 Hamlin Rd., Parcel #U45-012-M, zoned "RB".

John Pray said he wants to add a bay to his garage and change the roofline of the house.

Public comment period opened:

Charlie Clement, an abutter at 110 Brook Rd., feels that there is a business being conducted in this building that does not conform to code, and that if there were no business being conducted there would be no need for another bay on this garage – there are six bays on this garage already. Also it does not conform to the character of the neighborhood; there are no other properties in the area that have a garage like this.

Willie Audet asked what kind of business it is.

Mr. Clement said it is a masonry and landscaping business.

Al Farris said that he spoke to the applicant today; he conducts his business out of his home and was not aware that he needed a home occupation permit, as the home was previously owned by a contractor. This is an addition to a garage that is attached to the dwelling. Mr. Pray submitted an application for a home occupation today, and will be before the board next month.

Lisa Clement, also of 110 Brook Rd., wondered how a garage with six bays would fit into the character of the neighborhood. She indicated where her home is in relation to the applicant's. She said that Don L'Heaureaux, another abutter, emailed the Code office today with his comments and she wanted to know if the Board had received his email.

Al Farris said it may be in his email account.

Public comment period closed.

Jim Thibodeau asked how many square feet the applicant is proposing to add.

Mr. Pray said it was a 12x26 foot bay.

Jim Thibodeau observed that the plan does not show the square feet, but he estimated it at 312. He asked about height restrictions in this zone.

Al Farris said this zone has the standard restriction; this proposal did not seem to violate that.

Jim Thibodeau asked how Mr. Pray would use this bay.

Mr. Pray said they don't have a main entrance to the home. He is doing away with one bay and replacing it with this new one. There will actually be 5 bays in total in the end, with a new breezeway entrance into the home eventually.

Jim Thibodeau asked if he was expanding the business use of the home with this addition.

Mr. Pray said no, he is expanding the living space of the home. It is his intent to use the former bay as a breezeway. Furthermore, the roofline is a hazard due to the rubber membrane roof. Ice and snow slide off it in front of the entrance door to the house. The proposed conventional shingled roof style won't have that problem.

Jim Thibodeau asked Al Farris if the applicant is required to submit a floor plan as part of the home occupation permit application, and if he is doing this backwards.

Al Farris confirmed that the applicant would be required to do a floor plan for a home occupation permit. If the applicant is testifying that this is a residential use for a garage that is attached to his house the Board has to look at it that way; if he is in violation of the Zoning Ordinance technically the Board can't approve it until he gets the home occupation permit.

Jim Thibodeau asked about the outside finishes for the garage addition.

Mr. Pray said they will be using vinyl shakes and cultured stone. He is planning to re-side the whole house.

Jay Meyer asked about the height of the proposed roof.

Mr. Pray said he did not have it at scale. He provided the board with a scaled drawing, and estimated the height at slightly more than 20 feet.

Jay Meyer asked about the roofline of the home, and whether it is similar to the garage.

Mr. Pray said yes. He chose this roof design to keep it as low as possible.

Willie Audet was bothered by the business going on there, and how they are being asked to expand a structure in the middle of a neighborhood without knowing what is going on there. He was in favor of tabling the application. The building looks like a commercial garage.

Rich Bayer asked for clarification on the removal of the garage bay.

Mr. Pray said that space will be used for storage; in the future it will be a mudroom/entrance to the home. He testified that, even though it looks like a commercial building, it is a residential use.

Willie Audet explained that the Board has to consider compatibility with the neighborhood.

Rich Bayer asked about the buffering between his home and the neighbors.

Mr. Pray said there is a buffer between his home and the Clements, but it is seasonal, and in the winter he can see the highway. There is sumac in the summer. The structure is only going towards one neighbor, not toward the Clements.

Jim Thibodeau was also in favor of tabling and dealing with the home occupation permit first. He thought the applicant should bring the application back with proof that this can fit into the character of the neighborhood. The Board made some suggestions as to what they would like to see at the next regular meeting.

Willie Audet moved to table the application for the applicant to submit more information; Jim Thibodeau seconded. Motion carried 5-0.

4. **Donald Russell** – is seeking Reconsideration of the October decision of the Zoning Board of Appeals for Conditional Use under Section 8.3 to extend a garage roof at 11 Maiden Ln. Parcel #U16-071, zoned "RA".

Rich Bayer explained that the applicant has requested that his item not be heard tonight, due to an unforeseen medical issue.

Jim Thibodeau moved to table the item, Jay Meyer seconded. Motion carried 5-0.

Rich Bayer took items 6 and 7 out of order.

6. **Dawn Keller represented by Karen Metzger** – request a Hearing under Section 8.2.1 for a mislocated single family dwelling located at 21 Hedgerow Dr. Parcel #U61-018, zoned "RA".

Terry Snow, representing Karen Metzger, explained his involvement with the application. He said there was an error in the documents in front of the Board quoting a 1.4 foot violation; the original variance from 1989 had a plan sketch showing the northerly point was 28 feet from the line and the southerly corner is 29 feet from the line. The order said "would be 29 feet from the boundary, as shown on the plan". If the Board is going to put an actual footage on a variance it probably should say 2.4 feet not 1.4 feet. However, he felt that the Board could say that the building could remain where it is, without listing any specific number, and therefore avoid this type of discrepancy in the future.

Public comment period opened; no public comment.

Dennis Keeler arrived late to the meeting. He joined the discussion but did not vote on this item.

Jim Thibodeau asked about the variance.

Mr. Snow said in 1989 there was a certificate of variance approval signed by Paul Griesbach, the Code Officer at the time, which said "to build an addition to the rear of the house that would be 29 feet from the rear line, as per submitted plan". The survey submitted shows the northerly corner at 28 feet, and the southerly corner at 29 feet. There was a discrepancy between what the variance said and what the plan said.

Jim Thibodeau asked about abutters.

Mr. Snow said the only abutter from whom the applicant could acquire property was the cemetery.

Dennis asked where the error was; on the plan or when the addition was constructed.

Mr. Snow said that the plan submitted with the variance looked like a sketch. There was a surveyor involved, as well as a well-known builder. It looks like an honest mistake when the building was built.

Dennis Keeler asked if the plot plan would serve as the survey.

Mr. Snow said yes. This is lot 10 of a subdivision, whose plan is recorded; the back line is a stone wall which is shown as monumentation with pins in the wall. The surveyor for the mortgage inspection based his measurements on those.

Dennis Keeler asked about the new ordinance; this is the first step for the applicant.

Al Farris said that was correct. They work it out here, and then go before the Town Council.

Jay Meyer asked if this portion of the house is single story.

Dawn Keller the property owner said yes; there is a cathedral ceiling there.

Rich Bayer referred to 8.2.1 c: The setback violation is not the result of a willful, premeditated act or of gross negligence on the part of the petitioner, a predecessor in title or agent of either.

Mr. Snow explained that there have been three owners since this was built. He felt the people who were hired to build it were capable and so didn't think there was any willful intent.

Jay Meyer moved to approve the appeal of Karen Metzger subject to all the requirements of section 8.2.1, finding that the criterion 8.2.1 a-d are met. Jim Thibodeau seconded. **AMENDED TO ADD**: providing that the appeal is contingent on the home in its existing location, with a shown distance from the rear line of 26.6 feet, pursuant to the mortgage inspection plan of Bruce Bowman dated April 10, 2008. Jim Thibodeau seconded the amendment.

Willie Audet asked about the civil penalty.

Al Farris said the Town Council will be responsible for that.

Willie Audet expressed his hope that the Council would have some compassion on the applicant, for something that wasn't her fault. It is due to her action that there is this amendment.

Dennis Keeler supported Mr. Snow's suggestion of approving the existing location of the house.

Jay Meyer amended the motion to incorporate Dennis Keeler's suggestion.

Motion carried 5-0.

7. **Kenneth & Tina Ramsey** – request conditional use approval under Section 5.22.1 for an Accessory Dwelling at 18 Hamlin Rd. Parcel U#45-012-J, zoned "RB".

Kenneth Ramsey presented his application. His mother-in-law will be moving in with them, and they want to put on a 20x27 foot addition for her to live in.

Public comment period opened; no public comment.

Jay Meyer asked about the floor plan of the accessory apartment; the sq footage of 540 feet does not include the mudroom. He thought that space would put it over the expansion limit.

Mr. Ramsey said that mudroom would be included as part of the main house, as common area, and would not be counted.

Jay Meyer asked if they exclude 6" for the walls, and Al Farris said that was correct.

Jay Meyer said when that was deducted and the mudroom added they were within the limit.

Willie Audet asked if they have five bedrooms; the tax card says this is a five bedroom home and the septic is designed for five bedrooms.

Mr. Ramsey said they only use three bedrooms for the four people living there now. They don't use the extra rooms for bedrooms, but they could. The accessory would add another bedroom.

Al Farris said that adding a dwelling unit adds a different septic flow – 110 units instead of the 90 units for adding a bedroom. There will have to be a review of the septic. He further explained that the ordinance says a bedroom is a room typically used for sleeping; the applicant would have to designate on a plan the use of the rooms and a site evaluator would have to look at the plan, evaluate the current design and check it for compatibility of the use. This is part of the building code process, and it can be handled under the building permit. The Board does have to make this a condition, under ordinance section 5.22.1 d.

Rich Bayer asked about the external treatment of the addition.

Mr. Ramsey said it would match the existing home.

Dennis Keeler moved to approve the application subject to compliance with the provisions of ordinance section 5.22.1; Jay Meyer seconded. **AMENDED TO ADD**; subject to submission of evidence to the Code Enforcement Officer of consistency of design on the exterior of the addition. Jay Meyer seconded the amendment.

Rich Bayer thought a condition should be added that the external materials of the accessory should have the same general appearance as the rest of the home as well as the plumbing concern.

Motion carried 5-0.

5. **Craig Jones c/o Archie Giobbi, John & Stacey Ford and Shawn & Shelley Cunningham** – request for a hearing to appeal the Code Enforcement Officer's decision for a violation of a State Subdivision law for 7 & 11 Paddock Way. Parcels #R03-005-A & M, zoned "FF".

The following were present for the hearing: George Thebarge, a land planning consultant, representing Archie Giobbi, who was also present and represented Craig Jones; Don Douglas of Douglas Title representing the Cunninghams, of whom Shawn Cunningham was also present; Attorney Michael Pierce, representing the Board of Appeals; and Attorney Bill Plouffe, representing Code Enforcement Officer Al Farris and Community Development Director Amanda Stearns, who were also both present. John and Stacey Ford were not present at the meeting and did not have any representation present.

Mr. Thebarge described the history of the lots in question. In July 2007 Craig Jones sold two lots, including his existing home with 2 acres of land to the Fords, and another 2 acres to Archie Giobbi, who then sold that lot in August 2007 to the Cunninghams, who applied for a building permit and built their home. In March 2008 the owners each received a letter from Community Development Director Amanda Stearns, notifying them of a violation and recommending that they submit a plan for subdivision approval to the Planning Board. After extensive work on designing a plan, Mr. Giobbi determined that the area would not qualify for a conservation subdivision. Mr. Thebarge drafted a response to the notice of violation which raised a number of concerns, including that the notice had not been properly issued. It should have been sent from the Building Inspector/Code Officer, which violation would then be appealable to the Board of Appeals. On October 8, 2008 a notice of violation was re-issued by CEO Al Farris, listing a deadline of December 12 to submit a subdivision plan or receive staff approval of a resolution. Mr. Thebarge requested a staff resolution, but Mrs. Stearns suggested three options, including appeal to this Board, filing a plan with the Planning Board for a conservation subdivision, or adherence to the plan on record for the private way. He questioned which plan she was referring to, as there are three plans on record with the registry of deeds for Paddock Way: the original plan showing the home lot of Craig Jones, the second plan showing the creation of the Cunningham lot, and the third amendment approved in July 2007 showing the change of area of that Cunningham lot. He suspects that the last two plans were not properly recorded, i.e. within the time limit imposed by the Planning Board. The applicants feel that only two lots have been sold and created and therefore no subdivision violation has occurred – Mr. Jones lived in the home for 10 years prior to the division, and conducted both divisions personally. They do not think it possible to comply with

the other two recommendations of the staff. Also, the town reviewed the existing Cunningham lot and the Planning Board has approved this lot twice, which argues that there was no intent to circumvent the subdivision law. They concede that there is a problem with compliance with section 3.13.8 – allowable divisions of land under conservation zoning. An exemption to conservation zoning allowed all lot owners one lot split of two acres, if the parent lot existed as of April 2005. They contend that the Cunningham lot split qualifies under that exemption. They are looking for an equitable resolution to this issue. He said they would like a determination from the Board of Appeals that the Ford lot is in full compliance with both subdivision and zoning law, and the Cunningham lot is a valid exempt lot under the zoning ordinance. They also want recognition that the remaining lot of Craig Jones is a non-conforming unbuildable lot, but that it could remain, and whatever the town requires to show it as unbuildable is agreeable to them.

Don Douglas, co-owner of Douglas Title Company represented the Cunninghams in their purchase of this lot in August 2007. He observed that the legislative intent of the subdivision law expressed a preference that a homesteader create two lots while retaining his homestead lot. He argued that the sale of the homestead lot to Ford on July 2, 2007, by virtue of the lot being in the middle of the parent lot, created the first and second divisions by creating the homestead lot and the two lots on either side. This is clearly within that intent. In the decision *Bakala v. Town of Stonington*, the court stated that a lot created out of the middle does not create a three lot subdivision, but one lot in the middle and the two lots on either side remain one lot. He does not agree with the application of Bakala to this case. He argued that the Cunningham lot was created in 2006 when the Private Way was brought before the Planning Board. The creation of this lot in 2006 takes away the Bakala argument, so when the Ford lot was sold there was a lot that was already created. The Giobbi lot was a division by development. The requirement that the subdivider own the property for more than 5 years is satisfied because Jones was the sole person responsible for the division of land, and this was done while he was residing in the homestead. Douglas Title contacted the Code Enforcement Officer on July 30, before the closing, which letter the CEO forwarded to the Planning Department. There was no indication given to them at the time that the facts of these divisions created a Bakala-type subdivision, or that the town considered this to be an issue.

Dennis Keeler said in February 2005 Mr. Jones conveyed a 9.95 acre parcel, indicated as J-3, and retained a 5.47 acre lot (J-1). He clarified that the 5.47 acre lot is what they are considering.

Mr. Douglas said that was correct.

Dennis Keeler asked if these two lots were approved in June 2001.

Mr. Douglas said yes, as part of the Private Way.

Mr. Thebarge explained that the J-3 lot was purchased by Rick Libby and then submitted as part of the Paddock Way subdivision in 2005. J-1 was not part of the subdivision, and is therefore subject to the original Private Way approval.

Archie Giobbi explained further about J-3; when it was sold to Rick Libby, in the P&S agreement there was a stipulation that any future divisions of the land owned by Craig Jones would have to abide by the covenants of the Paddock Way subdivision.

Dennis asked if J-2 was part of the subdivision and subject to the covenants of the subdivision.

Mr. Giobbi said it is not.

Rich Bayer said they are concerned primarily with the October 28, 2008 letter from Al Farris. He wondered about the lack of representation for one of the three parties addressed in the letter.

Michael Pierce, attorney for the Board, thought that if the parties are not represented, and did not respond, that they are not appealing.

Rich Bayer wondered if they can consider an appeal if one party is not appealing.

Mr. Farris said that Mr. Ford is aware of this issue; he attended the meeting in October 2008.

Jay Meyer asked if Mr. Douglas is representing the Fords.

Mr. Douglas thought it was implied that the goal was that the Ford lot be approved tonight; the Fords are aware of the meeting tonight.

Shawn Cunningham, 11 Paddock Way, testified that Mr. Ford is out of town and wanted to be here tonight. He felt that Mr. Ford's feelings on the matter have been represented by the comments already made tonight.

Bill Plouffe, representing Town Staff Al Farris and Amanda Stearns, stated that this is a simple matter. In a letter dated January 22, 2008, he stated his opinion on this matter as an unfortunate and perhaps unintentional violation of state subdivision law. He feels that the letter of the law on homestead exemptions is clear. The Ford lot has Mr. Jones' home on it, the Cunningham lot has the Cunningham home on it, and the third lot is vacant and retained by Craig Jones. Mr. Plouffe would like clarification that Archie Giobbi is in fact representing Craig Jones, who lives out of state. In 2007 the lot J-1 included Mr. Jones' home, where he had lived for more than 5 years. On July 2, 2007, he conveyed out his home, in the middle lot, to Mr. Ford. The Bakala case said that there is only one dividing when you take a lot out of the middle. The two lots on either side remained one lot under one owner. The conveyance out of any of those lots to new ownership would constitute a second dividing, which creates three lots. This happened on July 9, 2007 with the conveyance out to Mr. Giobbi. If the middle lot at this point were still owned by Craig Jones, the homestead exemption would still apply. However the state exemption states the owner must live in the homestead for the five years "immediately preceding" the conveyance. Even though the conveyance was instituted while Mr. Jones lived on the property, the letter of the law states that you have to be living on the property and have been there for the five years immediately preceding the conveyance. Mr. Plouffe felt that the violation occurred when the conveyance to Mr. Giobbi was made. Regarding the argument that the Town didn't notify Mr. Douglas that this was a problem, estoppel is not in play here. The town didn't say that this was fine. When the plan came before the Planning Board, the plan submitted showed only the Giobbi lot conveyed out, and did not show the conveyance to Ford. The plan was prepared before the conveyance to Ford, but it was presented to the Planning Board after that conveyance, and that conveyance was not disclosed. Mr. Plouffe asked Mr. Farris to confirm that he was not in the office in July 2007 when Mr. Douglas's request was submitted.

Mr. Farris confirmed that was correct; he had pneumonia.

Mr. Plouffe asked Ms. Stearns to testify about her communication with Mr. Douglas.

Mrs. Stearns said that Mr. Douglas called the office; the Cunninghams were anxious to close on the property, and Mrs. Stearns raised the issue that the mylar for the private way reapproval needed to be recorded within the 90 day window. Also discussed was the Private Way approval, and it was her understanding at the time that the Private Way was valid as it had been approved by the Planning Board. She did not have any discussion with him whether or not there were any violations of either subdivision or zoning law with any of the conveyances.

Mr. Plouffe stated that the lot retained by Jones is a substandard lot under conservation zoning.

Rich Bayer asked about whether the conversations between Mr. Douglas and staff are of concern to the Board tonight.

Mr. Plouffe explained that if the town brings an enforcement action against Mr. Cunningham, the lot owner, he could raise the estoppel issue that the town did or did not tell him that it was okay.

Dennis Keeler asked for clarification; Mr. Douglas wrote a letter asking for clarification of the issues, and his question was not answered.

Mr. Plouffe did not recall a request in the letter for a determination that this lot was in conformance with the subdivision law. Neither Mr. Farris nor Mrs. Stearns made any representation that this was in compliance with subdivision law, nor do they remember making any verbal statement to that effect.

Dennis Keeler asked if the conveyance to the Fords in 2007 is okay.

Mr. Plouffe said that is the way he saw it.

Dennis Keeler wondered if the conveyance to Mr. Giobbi would not have been a violation if the conveyance to Mr. Ford had included the lot on Winn road that was retained by Mr. Jones.

Mr. Plouffe said that was correct because there would have been only two lots.

Dennis Keeler asked if they were just cleaning up the recording issue with the private way plan.

Mr. Plouffe said no; they were adding the Giobbi lot. They came in with a plan, which had been drafted before the conveyance to Ford, showing the Giobbi lot with the Jones lot entire. Every addition of a lot to a Private Way requires an amendment to the plan before the Planning Board.

Mr. Pierce explained that he was here in case the Board has any questions of law. He wondered if a building permit was ever issued for the Giobbi lot, and if so, when.

Mr. Farris stated that a permit was issued for that lot, but he didn't have a date in front of him. The Code Office did hold up the permit until the revised Private Way plan was recorded in the Registry of Deeds. Both he and Mr. Cunningham thought that was in August of that year.

Jim Thibodeau asked which plan that was.

Mr. Farris said it was the final plan recorded on Paddock Way to date.

Mrs. Stearns stated that there are actually four plans. The original plan showed the 5.47 acre lot retained by Jones. The second was an amendment to the original, due to an error on the acreage of the Brunner lot, which is the lot outside of the subdivision. The third plan, which was never recorded, was the amendment showing the Giobbi lot. The fourth plan was the re-approval of the third plan, and was recorded by Mr. Douglas in October 2007.

Dennis Keeler asked about the Ford lot.

Mrs. Stearns testified that the Ford lot was never submitted to the Planning staff or the Planning Board. They were not aware of the Ford conveyance until Mr. Douglas brought it to their attention. The fourth plan was approved by that Board on July 3, 2007, the day after the Ford conveyance.

Rich asked if that was a regular Planning Board meeting.

Mrs. Stearns said it was a regular meeting. Mr. Giobbi submitted the application on behalf of Mr. Jones, 28 days in advance of the meeting. If the plan had shown the Ford conveyance, it could not have been approved under 3.13.8, the exempt lot provision under the town's conservation zoning. The Giobbi lot had to meet two tests: it had to qualify under the exempt lot provision as well as qualify for access off of Paddock Way. It was the first conveyance as far as the Planning Board is concerned, post conservation zoning. The second conveyance as far as the Planning Board is the Ford lot, and if a plan had been submitted showing that lot would have been stopped, as Mr. Jones was already over his one lot exempt lot provision and he would have had to apply under the full conservation subdivision requirements.

Jim Thibodeau asked for clarification on the final plan; it showed the Giobbi lot and the full homestead lot.

Mr. Plouffe provided Jim Thibodeau with a copy of the final plan.

Dennis Keeler asked about the plan that was never recorded, how much before the final plan was it submitted.

Mrs. Stearns said she would have to check the record.

Dennis Keeler asked if that was essentially the same plan as the one that was never recorded.

Mrs. Stearns said that is what she recalls.

Jay Meyer asked Mr. Pierce about the definition of subdivision divisions under the state statute; the first division creates two lots, and he thought that was the conveyance to Ford, which is the Bakala situation. The next dividing was the conveyance to Giobbi, if you ignore the question of homestead. There would not be another dividing if Mr. Jones had retained the homestead. To qualify for the homestead exemption he would have had to retain the homestead for a least a moment after that second division.

Mr. Pierce said those statements were correct. He has always read the statute that the homestead must be retained and he felt it must be read literally.

Dennis Keeler thought it would not be a subdivision if Jones had first conveyed the lot to Giobbi and retained everything else. He asked if, under that scenario, Mr. Jones could have conveyed the center lot out at that point without triggering subdivision.

Mr. Pierce said yes, due to homestead exemption.

Dennis Keeler observed that the appeal was filed by Mr. Douglas on behalf of the applicants, and it appeared to him that the Fords are safe here. He wasn't sure they have anything to appeal here.

Jay Meyer thought that at the time the Fords bought their lot, there was no subdivision.

Jim Thibodeau referred to the letter of October, requiring they submit a subdivision plan by Dec. 12, he asked if they did that.

Mr. Pierce said no, they filed the appeal instead.

Jim Thibodeau asked if there were any case law that the unbuildable lot would revert back to any of these lots.

Mr. Pierce said that could be a method of relief if they determined there was an illegal subdivision.

Jim Thibodeau asked if there was any other reason why these plans were not recorded within the deadline.

Mrs. Stearns didn't remember any conditions that the applicants had to conform with; they simply missed the deadline. There was only one plan that was not properly recorded, and that was the original submission of the configuration showing the Giobbi lot.

Rich Bayer asked about the notice of violation letter; he asked if this is a mistake that Ford was being asked to comply with this notice.

Mr. Pierce said there were three lots in an apparent illegal subdivision, and Mr. Farris sent out a letter to all the property owners affected.

Mr. Farris said that he feels the responsibility to notice all parties of interest, but he agreed that the Fords were the first lot out, and have a free pass.

Rich Bayer asked about any legal significance to the approval of the Giobbi lot.

Mr. Pierce said that was subject to a determination that the Planning Board had all the right information. You don't create a lot simply by the creation of a Private Way plan.

Mrs. Stearns said that Private Way plan created the Giobbi lot, but the Planning Board's intent was to create a private way lot not a subdivision lot.

Mr. Pierce said the issue of the subdivision was not before the Planning Board that night.

Mr. Thebarge stated that the representation by staff that the applicants concealed information from the Planning Board is not accurate. He referred to Page 5 of his letter to Mrs. Stearns on September 26, 2008. He said the plan was not submitted 28 days before the Planning Board, but in May of that year, and was held up by the Planning Board process. The Giobbi lot was not created by that plan, but by the plan approved by the Planning Board in 2006. The May 2007 plan was only to correct an error on the 2006 plan which showed the Giobbi lot at 87,000 sq feet; it was changed to 80,000 sq feet. The Planning Board was not considering the creation of the Giobbi lot at the time but the correction of the lot size. Also, regarding the Douglas letter, the letter showed the sequence of events and asked for the staff position. The parties involved thought they were following the requirements. The building permit was held up pending the recording of the amended private way plan. The reason the conveyance to Ford predated the conveyance to Giobbi by 7 days was because Mr. Jones was doing Mr. Ford a favor by moving up the closing on the home because Mr. Ford had sold his home quicker than expected and needed to move. He felt the town has discretion on what violations it chooses to pursue, and he didn't feel that this warranted it.

Jay Meyer asked about the intent of the brief conveyance of the lot from Jones to Giobbi.

Mr. Thebarge said that Mr. Giobbi's intent was to sell it.

Dennis asked when the Giobbi lot was created according to Mr. Thebarge.

Mr. Thebarge said it was in either August or September 2006. It was an amendment to Paddock Way and was approved as an administrative action item. Whether it was recorded within the 90 day deadline is still a question. The intent of the submission in May of 2007 was not to correct the recording problem; it was to correct the surveying problem of the Giobbi lot.

Dennis Keeler asked for clarification about the 2006 plan.

Mr. Thebarge said it was an amendment to the 2005 private way plan, which showed the Jones lot.

Dennis Keeler asked if their representation is that a division for subdivision purposes occurred in September 2006.

Mr. Douglas said that there is no question to him that a lot was created in 2006. A distinguishable lot was presented and approved by the Planning Board and recorded in the registry of deeds. This takes out the Bakala argument, since the creation of that lot made a sufficient distinction between that lot and the corner lot, and it was done by Craig Jones, the lot owner. Therefore the conveyance to Ford would be consistent with the homestead exemption.

Rich Bayer asked if it was a problem where that lot was created in 2006 but not conveyed out.

Mr. Douglas said the recognition and approval of the creation of the lot by the Town was sufficient under subdivision analysis.

Willie Audet said the 2006 plan lists it as a "proposed lot split".

Mr. Douglas referenced the letter to the Town prior to the conveyance to Cunningham, in which he listed the history of each conveyance and the dates of each deed. In that letter he specifically asked if the division of lot J-1 by Jones required planning board approval or if it was exempt . He felt that there was sufficient inquiry raised at the town level as to whether a subdivision violation had occurred.

Jay Meyer asked Mr. Douglas if Jones had to retain the homestead lot to qualify for the homestead exemption. Jones sold off the homestead lot.

Mr. Douglas said Mr. Jones retained the homestead lot long enough to create the lots. The lots were created while he lived in the homestead.

Jay Meyer thought the questions raised in the letter showed that there was an awareness of a potential problem and the buyers proceed at their own risk.

Mr. Plouffe stated that Mrs. Stearns was checking on the status of the 2006 plan, whether it was recorded or not. 5.27 f of the Town's Zoning Ordinance states that the plans shall be recorded within the 90 day window and if not the approval shall be null and void. Mrs. Stearns does not believe that the plan was recorded. Even if the Board does recognize the Giobbi lot as being created in 2006, if Jones had sold the corner lot and retained the home lot, he would be okay. Instead he sold the homestead, which is not allowed.

Willie Audet asked if the law allows for the homesteader to construct a new home, or must he remain in the homestead.

Mr. Pierce read from the state statute, which says the single family residence that is the homestead must be retained. He said they are talking about the division of property and for division to occur there must be the splitting off of the legal interest to another person and the separation of the parcel into lots. In this case there was a splitting off of a lot by virtue of the approved plan, but he wasn't sure there was a splitting off of the legal interest to another person. He said regarding the estoppel issue, the law court has held that municipal boards do not have the authority to utilize equitable powers and to apply equitable doctrines unless the statute or local ordinance specifically coveys that power. Estoppel belongs before the Superior Court.

Rich Bayer asked for clarification that there should be a splitting off of a legal interest to another party for there to be a division, and that even though on this plan it is labeled as a separation of property, a division has not occurred.

Mr. Pierce said that for a division to occur, under Bakala, there had to be a legal separation to another. The court was not focused on the creation of lots. He has not researched this issue.

Mr. Farris said that when he meets with people about division of their land, they are cautioned to have surveys done, and when the lot is created put it and the original lot into separate entities. Putting the line of a plan does not create the lot, just the ability to create the lot.

Mr. Pierce was interested in the effect of the approval of a building permit for Cunningham.

Mr. Douglas says that in the Bakala case it states that a division may be accomplished not only by conveyance but also by lease, development, building or otherwise.

Willie Audet asked if his contention is that, due to the review and approval, it became a lot.

Mr. Douglas said that was correct.

Mr. Farris said that with a lease or building there is a conveyance of rights, not unlike a deed transfer.

Rich Bayer wondered if that portion of statute quoted in Bakala and read by Mr. Douglas is still in effect.

Mr. Giobbi testified that in April 2006 Mr. Jones requested that he sell the Giobbi lot. They went to the Town Hall to see if there was anything they needed to do and staff said that they should obtain an amendment to the private way, which they received in September 2006. Their notice of decision did not reference a 90 day requirement on the recording of the mylar, so that was not done. They realized an error on the plan relative to the lot size, and went back to the Planning Board for approval of the new lot size, and that was approved on July 3, 2007. On October 2, 2007, Mr. Giobbi was notified by Ethan Croce that he had to record the mylar within one day and return it to the town office. He recorded that plan on October 3. If the 90 days started on the approval date, he missed the 90 day window.

Mr. Plouffe stated that, even if you contend that the lot was created on the 2006 plan, since the plan was never recorded that plan was null and void.

Mr. Giobbi asked what do to with the Giobbi/Cunningham lot. The intent was always to split out that lot and sell it.

Jay Meyer asked what the change was with the lot size of the Giobbi/Cunningham lot.

Mr. Giobbi said that he isn't sure who made the mistake, him or the surveyor. He told the surveyor he wanted a 2 acre lot, and maybe didn't specify 80,000 square feet.

Mr. Thibodeau said that would have been a common mistake; 40,000 square feet is called a "short acre".

Jay Meyer asked if the boundaries of the lot between the 2006 plan and the 2007 plan approved were different.

Mr. Giobbi said he believed so. He testified that there was no ill intent, and they have tried to rectify their errors. He was hoping for a no-action decision, which would allow for Ford and Cunningham to remain as they are, and the remaining lot would be unbuildable unless additional land were added to it.

Rich Bayer questioned who the appellant is in this case; is Mr. Giobbi the appellant, or representing the appellant.

Mr. Giobbi said that he has the right to represent Craig Jones.

Mr. Farris said that the town has authorization from Mr. Jones to that effect on file.

Mr. Farris said that Town staff does not consider this to be intent to avoid subdivision and has never alleged so. The staff found out that the Ford conveyance preceded the Planning Board approval long after that approval, probably not until August or September of that year.

Dennis Keeler asked what the Board is being asked to consider tonight and whether they consider a solution.

Mr. Pierce said that the Board should first consider the appeal of the CEO's decision; it is not the Boards purview to determine whether there should be any enforcement action. Section 8.2 of the ordinance discusses appeals – the Board can modify, reversed or affirm the decision of the CEO by a majority vote.

Public comment period opened; no public comment.

Dennis Keeler asked about the options expressed in the letter from Mr. Farris

Mr. Pierce said that it is required to notify people how to return to compliance, and a deadline to respond. He said the ordinance allows the Board to modify the decision, but when it comes time to fashion relief that is more of an enforcement issue and not a Board issue.

Rich Bayer thought that the decision of the CEO was that the applicants were in violation and that the methods of returning to compliance were not for the Board to discuss.

Mr. Pierce recommended that the Board draft formal findings of fact and conclusions of law to be written up and approved at the next meeting. He discussed the details that should be included with those findings, and suggested that the Board vote on each finding separately. In consideration of the late hour, he thought they could draft up findings and vote on them at a subsequent meeting. The Board's vote would not be finalized until then. He raised a question as to what exactly is in the record – there has been testimony about four different plans, but he has only seen two.

The Board discussed how best to proceed; discuss the issues but not vote tonight, or vote tonight and adopt formal findings of fact at a later date. Mr. Pierce said that the applicants would have the right to appeal beginning when the notice of decision is issued, which could be delayed until the final decision is made. They could make the decision effective when findings are adopted.

Jim Thibodeau moved to uphold the action of Code Enforcement, set out in the October 28, 2008 letter, ~~based upon~~ conditional on approval of findings of fact yet to be determined. Jay Meyer seconded. **AMENDED**: Language was amended to replace the words "based upon" with the words "conditional on"; Jay Meyer seconded the amendment.

Jay Meyer felt that there were two divisions, creating three lots. The first was the July 2, 2007 conveyance from Mr. Jones to the Fords, and the second was the July 3, 2007 conveyance from Mr. Jones to Mr. Giobbi. Since Mr. Jones did not retain his homestead lot, there was an illegal subdivision. The 2006 plan fails since the boundaries of that lot were not the same as those of the lot that was conveyed, and further that plan was null and void since it was not recorded. Even if the 2006 Planning Board approval was upheld, that would still not take this out of subdivision since Mr. Jones did not retain his homestead when the third lot was created.

Dennis Keeler didn't think they have to vote on the facts, just the conclusions drawn from those facts, but Mr. Pierce said that they should vote on the facts, as facts are sometimes in dispute.

Willie Audet said some of the conveyances are confusing; he didn't know if the law provides any special circumstances recognizing that Mr. Jones went out of order in the conveyance to the Fords. He wished that there had been some type of resolution before it came before the Board. He asked about the possibilities of coming into compliance on that front lot.

Mr. Farris said they are not exempt from conservation zoning, and it is an undersized lot.

Willie Audet said he was struggling with the conflict of opinions between Mr. Plouffe, Mr. Pierce, Mr. Thebarge and Mr. Douglas.

Dennis Keeler didn't believe that there was any intent to deceive; there was a lot going on. On the other side, he didn't think they could say the town was estopped due to the fact that the plan didn't show the conveyance to Mr. Ford. On the Bakala case, the court made it very clear that a conveyance of any of the two bookend pieces would be a second division and would constitute a subdivision. He felt that there was a technical violation of the subdivision, but he didn't know what kind of solution there would be to that.

Jim Thibodeau agreed that there was no malicious intent on anyone's part in this situation. It is a technical violation, which happened primarily due to the timing of the conveyances. The dimensional change in the lot, in

his opinion, nullified any previous planning board approval that might have happened in 2006. He hoped that this could be resolved somehow. He thought a reasonable resolution would be to merge that front lot, which is un-buildable anyway, back into one of the other two lots.

Stan Given agreed with Jim Thibodeau; he hoped for an equitable solution for all parties.

Rich Bayer agreed with the majority opinion to uphold the CEO's decision. He gave a lot of thought to the homestead exemption argument, but when it comes to the Bakala decision, the ordinance and statute have to be followed. The 2006 plan was not a division of the real estate, but just a labeling, and since it was not recorded within the deadline it cannot be considered a division. The homestead exemption can only apply if the conveyor retains the home upon which the homestead is based.

Jay Meyer agreed that it is a technical violation and there was no intent to circumvent.

The Board discussed the writing of the formal findings of fact. They decided to request that Mr. Pierce draft those for them to approve. They discussed the items they felt should be included in the findings.

Rich Bayer clarified that the vote tonight was not the final decision of the Board; that decision would not be issued until after findings of fact were adopted.

Motion carried 5-0.

Other Items:

The board discussed when to hold the meeting originally scheduled for tomorrow night, which has been postponed due to anticipated inclement weather. The Board agreed to reschedule it to Wednesday, February 4, 2009.

Meeting adjourned 10:48 pm.

Respectfully submitted,

Melissa Tryon
Recording Secretary