BOARD OF ZONING APPEALS
TUESDAY July 27, 2010
These minutes are not verbatim

MEMBERS PRESENT: Fred Jay Meyer, (Chair), Dennis Keeler, Jonathan Berry (Associate), Willie Audet, Stan Given, Don Russell (Associate)

MEMBERS ABSENT: Jim Thibodeau

STAFF Present: Amanda Stearns, Community Development Director

Administrative Agenda Items:

a) Discussion and adoption the minutes of the previous Hearing.
   There were no minutes available to approve.

b) Discussion and finding that all applications presented for this hearing are complete.
   The Board discussed the normal agenda items and reviewed them for completeness. The Cuttler application was determined incomplete and the applicant will bring in the material needed for his application.

c) Adoption of Administrative Agenda Applications
   The Administrative Agenda was heard after the item tabled at the last hearing.

1. <u>Kathleen and Zbigniew Kurlanski</u> - Are appealing a decision of the Code Enforcement Officer regarding parking at the Portland Yacht Club, at 40 Old Powerhouse Road, Parcel #U16-083, zoned "RA/SZ".

Mr. Meyer and Mr. Russell recused themselves from the Kurlanski application. Mr. Keeler served as Chair in Mr. Meyer's absence.

Mr. Keeler summarized the past meetings; the Board has already taken two votes and has decided to carry this issue over. No decision has been made yet. The substance of the appeal was addressed at a special meeting last week but the Board deliberation and vote was not held. He said that there is one procedural issue: the process of bringing this to final conclusion in terms of findings of facts and conclusions of law. This case has 3 components: does this Board have jurisdiction; was there an issue of preclusion based on the 1999 decision of the Code Enforcement Officer (CEO); and the substance of the appeal itself, namely whether there is a violation. As the Board deliberates tonight they need to come up with extensive findings of fact and conclusions of law in light of the multiple hearings that have taken place on this and the voluminous evidence brought before the Board. Mr. Keeler discussed with Attorney Michael Pearce, the Board's attorney in this matter, what the best process would be in coming up with findings of fact or conclusions of law as the Board hasn't deliberated yet. Attorney Pearce has said the better process is not to make a formal decision until they have findings of fact which they can review point by point and make a decision. The Board can do one of two things after they deliberate and come to a conclusion: they can come up with findings of fact using notes and minutes from previous meetings, draft them up and vote on them; or as Attorney Pearce has

suggested, they can have a straw vote tonight, and then request that Attorney Pearce, acting as the Board's attorney, prepare findings of fact and conclusions of law based on the discussion, analysis and straw vote. The Board can then vote on those at the next meeting and that would be the Boards' final vote. The straw vote would serve to give both parties, as well as Attorney Pearce, some guidelines on where the Board is. He clarified that tonight's decision is not a final decision. The appeal timeframe does not start running based on the straw vote. That will begin when the Board adopts the findings of facts and conclusions of law. He asked what the Board would like to do.

Mr. Keeler appointed Mr. Berry as a voting member.

Mr. Berry felt that, given the highly technical nature of the legal argument as well as the length of time, he would be more comfortable if the Board directs counsel to draft the findings of fact and conclusions of law from prior records and the Board can then adopt them later. Mr. Audet and Mr. Given agreed.

Mr. Pearce reviewed the process with the Board. He asked them to be as detailed as they can with the straw poll. The Board will actually make the findings of fact in their analysis; he will draft them based on the Board's discussion. They will then be presented to the Board, and the Board will vote on them one by one at the final hearing. The Board can modify them as they see fit. The first thing to discuss is what is being appealed. What is being appealed is Mr. Farris' August 6, 2009 decision letter. The Board should then analyze whether or not there is a violation under Section 9.1.d., specifically whether the Portland Yacht Club established or substantially changed an area for parking. Related to this, the Board should determine what it means to establish or substantially change an area for parking. If the use is an overflow use, how often does the use have to be taken advantage of for the establishment to occur? If the Board finds that the Club did establish or substantially change an area for parking, the next question would be whether or not the use of the Club is a grandfathered use, meaning a preexisting use that became nonconforming as a result of the enactment of the Site Plan and Review Ordinance. The Board may want to focus on the date that enactment took place. Then if they find there was a grandfathered use, the Board would need to determine whether or not that use was discontinued for any 12 month period. In Section 6.6 of the Zoning Ordinance it states if a use is nonconforming and is discontinued for 12 or more months then it is not permitted anymore. If it was a grandfathered use, the Board would need to understand the scope of that use. If it is a grandfathered use, the use cannot be extended or expanded impermissibly. There is a 3 part test, provided by the law court, to determine if the use has been impermissibly expanded. The Board should analyze if the grandfathered use has been expanded or extended in a substantial manner. For each issue the Board should support their analysis with a reference to the recorded facts introduced in these hearings.

Mr. Keeler wanted to point out and clarify that what is in front of the Board is a violation of Section 9.1. The question is whether it is a violation or whether it is grandfathered. He asked Ms. Stearns about the history of Section 9.1.

Ms. Stearns did research and site plan review was enacted in 1983; this did include the establishment of parking. In that ordinance Section 9.1 was as follows: *9.1 Site Plan approval required. No building shall be erected or externally enlarged and no area for parking loading or vehicular service, including driveways giving access thereto, shall be established or*

substantially changed unless the property owner has submitted to and secured approval by the Planning Board of building and site plans. There were exceptions for detached single family dwellings and buildings with less than 100 sq feet of gross floor area. 9.1 has been amended several times. Sometime after 2000 the language as it currently is was established.

Mr. Keeler asked the Board to determine whether there has been an establishment or substantial change in an area for parking, even under the current ordinance language. He hasn't seen a definition of establishment. He asked the Board if there was a violation of 9.1.d.

Mr. Given stated that, after hearing all testimony, he felt the Club demonstrated they had established parking and had a long history of it. Regarding whether it has substantially changed, one could argue that there was an agreement at one point that the area would be used 3-4 times a year, and they have heard testimony that it is used 10-12 times a year now. He would argue that substantial changes would include physical changes to the facility. Last week the Club testified that they had established parking prior to 1965 or so, and the Kurlanskis provided testimony that no parking had occurred on the site. The conflicting testimony makes it difficult.

Mr. Berry agreed with Mr. Given that the testimony from Mr. Vogel and others on behalf of the Club seemed to abandon the idea that they haven't violated 9.1. Their efforts were aimed at establishing that they do park there and have since time immemorial. He believed that the Club conceded that they have established parking. Further testimony revealed that the Club set up gates and chain to exclusively use and control that area for parking. He wondered if, once you gate something, that action qualifies as substantially changing the area for parking.

Mr. Audet said there is a long history of activity on that waterfront. When the Kurlanskis bought this property they protected their rights and had an easement to protect their view. He felt the Club did a good job of demonstrating the existence of activity in the parking lot. He felt there was compelling testimony by Mr. Tolford, who worked in the area from 8 years old through high school and college, that the area was used by the Club. He thought the Club has demonstrated that there has been activity. Mr. Russell testified to its use in 1946 when visiting his great-aunt. The Club went to the Bryants and purchased it when it became available. The Club did the right thing for its members. He said as time went on the use was expanded for certain races. It is the lifestyle that's at stake here. If you buy property next to the yacht club you should expect activity. The Club demonstrated they parked there pre-1964. He thought they have grandfathered status. They gave testimony that the use has increased and decreased over the years.

Mr. Keeler thought the Board didn't want to tackle the question of establishment. He wasn't sure they need to get to that because the Club has essentially conceded that they established parking. The next question would then be whether parking was established prior to the effective date of the ordinance and is therefore grandfathered. He was astonished by the conflicting testimony last week. Ms. Snyder gave clear testimony that there were pristine gardens and no parking, and while her presence varied between part time and full time, her recollection and testimony was very clear. Other people testified that parking had been there all those years. Tim Tolford testified to his presence when he was 7 or 8, living right there and remembering his father being part of when the Old Power House Road gave access, and him working at the Club through high school and college. It's pretty persuasive and exact. His testimony was supported by 2 or 3 others as well. Mr. Keeler had a difficult time trying to reconcile both remembrances. He was prepared last week to accept that parking was established prior to 1965. Between people testifying that

they had specifically seen or participated in parking there versus testimony about not seeing any parking, in the end he would have to conclude that Mrs. Snyder simply didn't see it. Mr. Keeler concluded that parking was established prior to 1965.

Mr. Keeler said the next determination the Board should discuss is what the scope of the parking that was established was, whether it is unlimited and whether it can be expanded.

Mr. Berry was wowed by the conflicting testimony. He found the photographic evidence to be compelling. He thought the grandfathered issue became linked to the scope issue. Mr. Kurlanski testified that he was not anchored to the property. He only noticed the parking on a couple occasions a year. The Board has heard that it was only used a maximum of 1 to 8 times a year. If Mr. Kurlanski was away he would see only a couple races a year. Ms. Snyder was away some of the time and she may not have noticed when parking took place. Mr. Berry believed the evidence was compelling that there was some parking down there at some point, and he came to the conclusion that at least some parking occurred there so it was a grandfathered use. Regarding the scope issue he said the Club's own testimony, according to his notes from the witnesses, was that it never occurs more than 8 times in a year with a maximum of 12 – 15 cars per event. Mr. Berry listed the races and parties and how often they occur which came to somewhere between 4 – 8 events a year. He felt that scope is relevant, not only the number of events per year, but also the number of cars per event. 12- 50 cars is a wide range but it's not 150 which he could see as a gross expansion.

Mr. Audet pointed out that the Club went to the Bryants; they negotiated an option for the property when it became available. There are certain times of the year parking does expand; this is what you buy into in this neighborhood. It's the same as property by the Cumberland County Fairground; during certain times of the year the parking expands. The Club has demonstrated that they try to control it and have negotiated parking at Holy Martyrs and the Town Landing parking area. The Club has tried to be responsible neighbors. It would be the same if someone bought property by the Portland Country Club and golf balls were hit into the backyard. There is evidence that the Club and the Kurlanskis have negotiated over the years.

Mr. Berry thought Mr. Vogel's testimony clarified issues with the Griesbach letters. The Club was reserving their rights that the use was grandfathered. There were issues as to what the scope was as a grandfathered use versus what becomes an expansion on that use. 3 events per year was the number they used for a while. They weren't considering 10 events at that time.

Mr. Given's recollection was that the Kurlanskis bought the property in 1983, the same year the ordinance came into play. They used the property prior to 1983 with or without permission. He wondered, if they don't own it but use it, does that allow them to establish a grandfathered use.

Mr. Keeler didn't think they were trying to claim adverse possession; he thought they are trying to establish that the field was used for parking. It could be used for parking under different ownership. Ownership would be irrelevant.

Mr. Given agreed with Mr. Berry regarding the scope; the Club demonstrated through correspondence that 3 or 4 times a year was acceptable. He thought some scope had been established. The frequency today, and for some time, has been between 8-12 times per year. He felt this is a substantial change, to the point where people complained about it. Scope was established at one point.

Mr. Keeler asked Mr. Given what he thought the scope had been prior to 1983, based on testimonies.

Mr. Given didn't recall hearing specific numbers. He had the impression it was a fairly infrequent use. Through the 1980's & 1990's the Club was abiding by the Griesbach letter and now the frequency seems to have increased again.

Mr. Keeler looked at his notes and the Monhegan race kept coming up. Two members of the Club both referred to the Monhegan race happening every year. Both of them referred to one or two other races. They also mentioned the Thursday night races, even back in the 1970's. He thought one gentleman said that not every Thursday night race caused a parking overflow. A Thursday night race was one of the events where parking overflow could happen, in addition to the 1-3 annual races. He thought the Board should provide some guidance as to what they think the permitted scope should be in terms of the number of events, and possibly number of cars.

Mr. Berry thought that if the Board does find the use was grandfathered they are compelled to determine what the scope of the grandfathered use was, in order to guide both parties and the CEO in the future if the issue comes up again.

Mr. Keeler referred to the Griesbach letters which limited the use to 3; he saw this as not what the historic grandfathered use may have been but as an attempt at a settlement between the parties to avoid an ongoing dispute. He wasn't compelled by the number in this letter. It wasn't designed to reflect history.

Mr. Berry didn't think the number was meant to be definitive. He was interested that Mr. Vogel never predicted any number of events in the double digits. Most fell within the 7-8 range.

Mr. Audet thought the Board needs to know the loading capacity of the existing paved parking. They should also look at what the load area for the lawn is, environmentally. He thought the Town should be able to give a limit to the number of cars on the overflow parking.

Mr. Keeler wanted to be comfortable with what the Board ultimately rules. They are looking at whether parking on the field is grandfathered and the scope of what is grandfathered. They have not, nor are they being asked to, do any analysis of what is environmentally appropriate for parking on that field, if anything is.

Mr. Audet asked if Mr. Keeler wants to limit the number of events.

Mr. Keeler said the Board should be looking at the number of events under the guidelines of what is grandfathered for scope not what the right number is. They are not authorizing the number of cars, just giving an analysis of the grandfathering and the scope of the historical use. He asked Attorney Pearce to discuss the test for expansion.

Attorney Pearce stated that the law courts have held on a number of occasions that the mere increase in volume doesn't mean you have expanded a grandfathered use. The law courts made it plain that the expansion and enlargement of a non conforming use isn't something you can calculate with a mathematical certainty. That doesn't mean that you can't put numbers on things, but the law court focuses on the quality and type of expansion. It is also a question of the Board's discretion. There is a 3 part test the law court has. The first question is if the use reflects the nature and purpose of the use prevailing at the time the zoning ordinance took effect, in this case 1983. There is focus on the nature and purpose of the use pre- and post-enactment of the

ordinance. The second question is if the current use is different in quality, character or degree from the former use. The third question is whether the current use is different in the kind of effect on the neighborhood.

Mr. Keeler thought the Board seems to be moving toward accepting that there was parking and now they are trying to grasp the scope, which is tied to the expansion. He wondered if it would be appropriate to go down the path of giving guidance on the scope to determine the allowed use at least in terms of number of events if not the number of vehicles. He asked Attorney Pearce if this is something the Board can do.

Attorney Pearce said they first need to identify what the scope of the use was in 1983. It is important that they make some kind of finding in that regard. Next they need to determine whether, in the context of those three criteria, the use has been expanded. If so, it's permissible. It is fair for the Board to say, if there were x number of events, that would be beyond the original scope and it would be fundamentally different in quality from the original use. He didn't have a problem with the Board saying that if the Club exceeds a certain number then they have exceeded the nature and scope of the original use. He said it is important to compare the two scopes and ascertain whether it has been expanded to such an extent that the Board feels it is a different type of use in its effect on the Kurlanskis and the neighborhood overall.

Mr. Keeler said what is before the Board is an appeal of a decision by the CEO that there is no violation. What they are deciding is that, so long as you don't expand the scope impermissibly there is not a violation.

Mr. Pearce said the question on this issue is whether the use has been impermissibly expanded within the context of the criteria. They don't want to be here again at some time because neighbors feel the scope has been enlarged again.

Mr. Keeler said the Board could say the decision in August 2009 was correct because at that point the scope had not been expanded impermissibly and they would be done. They have discussed whether it is grandfathered, the scope, and they have had guidance on the expansion. What is in front of the Board is the question of whether there was a violation of Section 9.1 in August 2009. If the answer is no because it is grandfathered, it will be no as long as the scope doesn't exceed the historical scope of x number of events based on testimony of events a year and x number of vehicles. If it will not be a violation, as long they don't impermissibly exceed the historical scope, the Board can provide some guidance.

Mr. Berry was concerned about whether or not there was a violation based on the August 6, 2009 decision from the CEO. He was not comfortable, based on the letter that was written, to determine whether or not there was an ongoing violation.

Mr. Pearce states this is a *de novo* hearing which means the Board is hearing all this information fresh. The letter is not important to their deliberations. It is critical the Board determine the scope of this use as of 1983 and the scope of use today. The mere increase in volume and the number of times it is used isn't as critical. The Board should be more focused on the quality. It doesn't mean an increase in number can't affect quality. The numbers may be very important.

Mr. Keeler asked if the Board wanted to take a straw vote on whether parking on this field was grandfathered.

Mr. Given felt, based on the testimony even though it was conflicting, parking was grandfathered.

Mr. Berry agreed that parking was grandfathered and limited in number of events and number of cars.

Mr. Audet agreed with Mr. Berry.

Mr. Keeler concluded that, based on the testimonies, there was some parking established and grandfathered prior to the ordinance.

Mr. Given said that at one point Attorney Pearce mentioned that the Board would have to determine whether there was a period of time of more than 12 months that no parking existed there at all. He didn't think the Board had enough information to establish this. If this were established, grandfathering would go away.

Mr. Keeler did not think this occurred because the Monhegan race took place every year, but there could have been an exception.

Mr. Given thought that should be part of their findings of fact. Mr. Keeler felt that this was implicit in their finding that the use is grandfathered

Mr. Berry thought they should make it part of the findings of fact that no evidence had been presented that the grandfathered use had been abandoned for any consecutive 12 month period of time.

Mr. Keeler asked about the scope.

Mr. Berry said in terms of scope he was comfortable with 8 events. Between the parties and the races that were cited, and given all the testimony, 8 was a number that came up a couple times. 8 was the maximum number for the grandfathered scope of use. In respect to the number of cars, which he felt was relevant, the maximum he heard was 50. Whether the field could handle that number of cars is a separate issue. Mr. Farris' August 2009 response is vague enough that Mr. Berry thought they could find that there is no violation on the premises at this point in time. This Board is not binding the Town; they are determining the scope of use as of 1983 and the maximum scope of use that is permitted now. From the 3 prong test he was not sure the number of cars is germane. It is a qualitative test not quantitative. This doesn't mean a cap of 50.

Mr. Given asked if 8 events was a minimum.

Mr. Berry said, based on testimony, the maximum number he heard was 8. There were other events and parties that were listed with frequency, but he never heard testimony that there were in excess of 8 large events. There may be other events, but there were 8 events that were large enough to create parking in the overflow parking area.

Mr. Audet asked if 8 was a reasonable number the Club can live with. There are all these special events and he was bothered by putting a certain number on the events. He wanted to hear from the Club what the historical number for large events is. As far as the number of cars, he would like to know what the field can hold. This is why the Club bought it and wanted to use it. He wondered what would be allowed environmentally. He was hesitant to put a limit on the number on cars and events.

Mr. Given arrived at the same number Mr. Berry had. He said section 9.1.d says "establishment or substantial change". They have addressed establishment, but he felt substantial change needed to be addressed. If the grandfathered use was 3 or 4 events, he wondered what a substantial change would be that would trigger the ordinance. Anything greater than 50% to him was substantial. He felt they had to determine what a substantial change would be to what was grandfathered. He felt they had to put some sort of limit on it, to show when they have crossed the line. He had hard time putting a number on the amount of cars on the field. 50 is a lot of cars. Environmentally it is determined by wetlands. That is another issue. He researched it and they can't park there. A range must be put on it but he didn't know what the historical use was.

Mr. Keeler reminded the Board that they are not approving an application, but trying to determine the historical grandfathered use. Whatever number they pick must be justified as historical, whether it works for the Club or not. Mr. Keeler heard testimony that 2 or 3 races were routine every year. Thursday night races cause some overflow parking then there are a couple of special events. Mr. Keeler states he is not uncomfortable with the number of 8; he felt the testimony would support it. He is less comfortable going to 50 cars. This may not have been a standard. He felt it may have been closer to the 20-25 range. The Board could make a determination of what they find the historical use to be, 8 events and 25-30 cars, for example. He doesn't think they need to address permissible expansion because they don't know what it will be. It would allow some argument for permissible expansion which is not in front of them right now. If they determine what the scope is by historical testimony, then they don't have to address what the permissible expansion might be.

Mr. Given was going with the lower number knowing there was some level of permissible expansion in this area. He is hesitant to start at 8 and then there are 13 or 14 and people are back in here arguing. Most of the activity is over the very short summers. Eight uses in the summer is a lot and he was inclined to go lower, knowing there will be some permissible expansion.

Mr. Berry though the Board doesn't need to engage in any speculation regarding the future. He thought they owe a summary review regarding the grandfathered scope as of 1983. The question is, since 1983, has the Club unlawfully expanded the scope. He agreed that 50 cars sounds like a lot. However that was the only testimony presented and they've been reminded and advised that this matter has been to the law court. He wanted the Board to be very careful about revising un-rebutted testimony. 50 was the testimony. He wanted them to be careful about what is supported by the record.

Mr. Keeler is not sure about the numbers as much as the overflow. He recalled some testimony that 50 cars was not typical, but a high-end number. He is uncomfortable saying that 50 is the historic scope.

Mr. Berry would be satisfied with a simple finding of fact that said the un-rebutted testimony said there was between 12 & 50 cars. That way they don't have to define it.

Mr. Keeler was comfortable with not coming up with a definite answer on this as they don't have the testimony on it.

Attorney Pearce said the Board is here tonight to decide whether the Kurlanski appeal should be sustained; if there was a violation, whether it was grandfathered, and was it expanded impermissibly as of the time of Mr. Farris' letter and determination. The Board may want to look

at the pre and post numbers, but they should be interested in what the historical use was qualitatively. Ultimately, they are deciding, not an application, but an appeal and whether the appeal should be sustained. They can provide guidance in the findings that will help in the future. The ultimate question is whether or not the original decision should be sustained or the Kurlanski appeal should be sustained. If the Board ascertains what the original scope was and decides it was grandfathered, they would want to ascertain if there was an impermissible expansion or enlargement of the scope of the grandfathered use between 1983 and August 2009 when Mr. Farris wrote his letter. If there was no expansion they don't have to worry about the expansion issue.

Mr. Given said the Club purchased the property in 1983 and it was being used with some frequency for parking at some level. At some point it became an issue for the neighbor. In 1999 the neighbor went to the CEO. Then there are a number of references to use of the area 3 or 4 times a year. He doesn't remember any quantity of cars discussed. But parking was allowed to occur 3 or 4 times a year and seemed to be agreeable to all parties. This was the guidance they followed for a period of time. It appeared the frequency increased again to a point where the Kurlanskis brought it to Mr. Farris' attention. Mr. Given felt there was an expanded use.

Mr. Keeler felt the Board was inclined to say there was parking in existence prior to 1983. They are prepared to state that there were a certain number of events where parking was historically used. He thought they could review their notes to see what number they are comfortable with in that regard. In terms of number of cars, the Board is having a hard time placing a number on that. They can either leave it open without a number, realizing it may come back to the Board, or they could open it up to try to establish the historical scope in numbers.

Mr. Berry thought they could proceed on the number of cars as far as they can, and ask the CEO to go down to the site and address the questions regarding the setbacks from the pond.

Mr. Keeler said what is in front of the Board is what historic number is grandfathered.

Mr. Berry said he is not comfortable picking a number.

Mr. Keeler said this is the discretion of the Board. It's not been presented to them and they do not have to go there. They can establish this based on the record that was provided to them.

Mr. Audet said he would rather focus on the events. That information was provided and can be quantified.

Mr. Given would prefer to put a number on the parking but agreed that the information is not here. It bothered him; he felt that number was a part of this.

Mr. Keeler felt the way the Board is looking at this the appeal is denied because the parking is grandfathered up to a certain number of events. The appellants' argument was that there was no grandfathering at all.

Mr. Given said Mr. Farris' decision on the 1999 CEO decision was that there was no violation. Mr. Given was looking back on 1999 discussions which said 3 or 4 events was permissible and Mr. Griesbach's interpretation of the code at the time was that level of use wouldn't establish parking there. They didn't look at the grandfathered issue at that time, but Mr. Griesbach said you can park there 3 or 4 times a year and not establish parking. There was a decision there. Mr. Farris said Mr. Griesbach had no jurisdiction to make this decision at all. Mr. Given is stuck on

this point. He pointed out that the Kurlanskis' were compelled in 2009 to go to Mr. Farris and say this is out of hand. Based on Attorney Pearce's guidelines, he felt that was a substantial increase to the grandfathered use. Everyone agreed 3 or 4 times a year was ok and accepted the ruling. At some point the Club exceeded that.

Attorney Pearce wasn't sure that going to the CEO would necessarily establish an increase in use. The nature of the appeal is whether there was a violation as of August 6, 2009. The Board is looking at whether there was an established area for parking and substantial change of an area for parking. He advised that they should look at the scope of use in 1983 and determine if there has been an impermissible enlargement or extension of that 1983 use. The ultimate issue is whether the Kurlanskis' appeal should be sustained; was the CEO correct in the 2009 finding that there was no violation, or was he wrong. It is a hearing *de novo*. The Board's findings of fact will be important guidance down the road.

Mr. Berry suggested that they find that the appeal is denied because, as of August 6, 2009, the Board finds that the use was grandfathered and since the use was grandfathered it wasn't a violation. The Board further finds that the scope of that grandfathered use was not impermissibly exceeded. He suggested they define the scope, and mention in the findings of fact that the appellants didn't raise issues of the exceeded scope. Their position was that it wasn't permitted at all. The Board's finding from review of all the record is that the use was grandfathered. They are defining the scope and finding that it wasn't exceeded.

Mr. Given agreed.

Mr. Keeler said they have a letter from the Kurlanskis' dated Sept 12, 1999 that says that the field was used for parking for 53 days during the summer of 1999. It is hard to understand what the violation is alleged to be – the aggregate use over the summer or at one time. They are almost setting the standard moving forward based on the historical testimony. They can deny the appeal and establish what the scope is, which in essence is agreeing with the Kurlanskis if the Club is above the historical analysis. Or they can grant the appeal based upon historical analysis, which essentially is agreeing with the Club if they are below the historical analysis.

Mr. Keeler thought the sense of the Board is that there was an existing use, and there is a historic scope. Below that there is no violation; above that, while one could establish there is a permissible expansion under judicial theories, there would be a violation.

Mr. Given asked if, in the Kurlanski letter, they cited how many vehicles were there.

Mr. Keeler said yes, 50 vehicles.

Mr. Berry moved to table this application until the next meeting. Mr. Audet seconded. Motion carried 4-0.

Mr. Cuttler tabled his application. Mr. Meyer said tabled items will stay in their order for the next meeting.

Administrative Action Agenda

2. Thomas Munroe-Is requesting Conditional Use under Section 6.2a for an addition at 12 Kelley Rd. Parcel U01-212, zoned "RA". Tabled from 6.22.10

Mr. Munroe, representing the Freedmans, said that after the last meeting he and the CEO went to the site and found solid monuments from the subdivision. They did some field measurements and are within the setback requirements.

Mr. Meyer thought this is under 6.2a and the only issue is whether they met the setbacks. The site plan confirms that they do

Public comment period opened. There was no public comment.

Mr. Given moved to approve the application. Mr. Keeler seconded. Motion carried 5-0.

3. Jeff Mason - Is requesting Conditional Use under Section 6.2a for an expansion at 141 Gray Rd. Parcel U42-010 zoned "VMU".

Mr. Jamie Mason, speaking on behalf of his father Jeff Mason, distributed updated plans with more detail. Mr. Mason pointed out where the monuments are. The setback was measured from the property pins. They want to put a garage under the porch. The lines shown are the 15' setbacks. He spoke about problems finding the property lines; the deed references trees that no longer exist.

Mr. Meyer asked exactly what he wanted to do.

Mr. Mason explained that they want to tear down a porch and put a full foundation under it to allow for parking. They will replace the stairs on the outside of the building and move them inside. On the front of the house there will be a deck facing the river. As far as the right of way is concerned, he could not find a legal definition for Mill Road. In cases like this, the DOT recommends measuring from the line that has been traditionally maintained. This would place the corner of the house 8 feet away from the setback. The height of the porch will be 20'- 23'.

Mr. Meyer asked if the left side of the house would be facing Mill Road. Mr. Mason said yes.

Mr. Meyer asked if the height measurements are for the existing porch. Mr. Mason said yes.

Mr. Meyer asked where the wood deck is planned.

Mr. Mason described the location of the wood deck. It will not have a roof and would be at the same level as the kitchen. 1900 sq feet will be the total lot coverage for the building footprint; the maximum allowed is 7,623 sq feet. He measured from where the proposed porch would end to what he considered the high water mark. He measured a straight line to the river using a level. To verify the shoreland zone, he used the online tax maps. They are proposing to build no closer than 182' according to his measurements.

Public comment period opened. There was no public comment.

Mr. Given asked about the original packet; in the sketch submitted with that packet the setback looked like 15' to the side to Mill Road. He asked to be walked through how Mr. Mason found the Mill Road property line, and what the current distance and current setback are from the Gray Rd corner.

Mr. Mason answered the current dimension is about 18' to Mill Road.

Mr. Given asked how Mr. Mason found the setbacks.

Mr. Mason started with the pin he was comfortable with, and picked at point at the water. He explained how he measured the setbacks. He went by the deed, rather than the tax maps.

Mr. Given felt this is a bit uncertain. He said it not so close but it is concerning; he thought they could benefit from a survey.

Mr. Keeler asked about the original application.

Mr. Mason said the dimensions of the porch have changed since the original application. The garage is underneath and the garage roof is now the porch.

Mr. Keeler asked why the application is before the Board; he asked if it is under 6.2a.

Mr. Mason said they are here because they don't have enough lot frontage.

Mr. Keeler reviewed the measurements with Mr. Mason. Mr. Keeler said the deck can be no closer to the sideline than the house. Mr. Mason agreed.

Mr. Keeler asked what the lot coverage would be once the project is complete; it must be under 35%. Mr. Mason said 35% would be 7,623 sq feet; they would be at 1,914 sq feet.

Mr. Given said a survey would be beneficial. He asked how the deck would be accessed. Mr. Mason said there will be a doorway.

Mr. Given asked if that is a flat roof proposed for the garage. Mr. Mason said the porch would be similar to what is existing, but larger.

Mr. Keeler said the plan from the original application showed the garage at 6" from the set back line. The current plan shows the garage at 18' from the setback.

Mr. Mason said he found the deed and took actual measurements from the 3 stone monuments. The first submission was done based on the tax map.

Mr. Keeler warned Mr. Mason that any approval the Board grants is based on the accuracy of his numbers and if they are wrong he would lose the approval. He may need to submit a survey.

Mr. Audet asked Ms. Stearns if she would be clear on issuing a permit if the application was approved tonight.

Ms. Stearns said she we would need to clarify the exact dimensions of the porch, where the garage and deck are, and how they are attached to the house.

Mr. Audet said he would like to see more detail. This is vague and there are a lot of questions. He pointed out that there are no elevations provided. He didn't feel that it is a complete application; it is missing details.

Mr. Meyer said Mr. Russell would be a voting member for this application.

Mr. Meyer assumed this was a 6.2a until Mr. Keeler brought it up. Under 6.2a one can not go into the setback. In this application, with the porch even with the building, he is 14' from the sideline, which puts him 1' in the setback. Mr. Mason may be fine under 6.2b, but under 6.2b, the Board needs to know if the deck is within 20' of an adjacent building. On the GIS photo it looked like it may be close to the neighbor's garage.

Mr. Mason said the neighbor's garage is 26.8' away from the deck.

Mr. Meyer asked if the 26.8' was to the building or the property line. Mr. Mason said it is to the building.

Mr. Meyer asked Ms. Stearns if it is 100' from the brook for shoreland zoning.

Ms. Stearns said there are two setbacks. The property is affected by two districts - the Resource Protection (RP) district and the Limited Residential (LR) district. Mr. Mason submitted a map but it was the flood plain map not the shoreland zoning map. She said that, without a survey to determine where the elevations are for these districts, there is no way to scale these maps unless you measure off a tax map. When she reviewed this with Mr. Mason she had a sense, measuring the entire width of both the LR & RP districts, that the deck was beyond that but this is based on un-scaled drawings. It seemed to be 40'– 50' from the LR district. If it did fall in the LR district it would have required an approval.

Mr. Meyer asked Ms. Stearns if the applicant was going to have a problem here, based on what she knows.

Ms. Stearns said, from the information she has, she didn't believe it would be a problem.

Mr. Meyer said the Board could approve this with conditions; or require the applicant to come back with more detailed plans.

Mr. Given said he would rather the applicant come back with a more complete application.

Mr. Keeler discussed the need for architectural elevations. He asked if Mr. Mason could have those for next month. Mr. Mason thought he could. Mr. Keeler asked Ms. Stearns if she was comfortable with the whole shoreland zone issue.

Ms. Stearns said she had not reviewed what was submitted tonight, specifically the new boundaries based on the deed. A survey would give a better idea of the location of the districts. Those are based on the elevations, and are not just a straight line.

Mr. Meyer said it would be better if the Board knew what it would look like and what the elevations are and to make sure the applicant is covered on the shoreland zone issue. The Board would like to see how far the new structure is from all the setbacks and from adjacent buildings.

Mr. Mason confirmed that the Board wants to see a survey including the shoreland and flood zone locations and the distances from the property to the river, and an architectural drawing or something showing the side elevation. Ms. Stearns clarified that the Board is looking for a side elevation from Mill Road and a rear elevation from the river. It doesn't have to be an architectural elevation, just a profile.

Mr. Keeler moved to table the application; Mr. Audet seconded. Motion carried 5-0.

4. Daniel Hourihan- Is requesting Conditional Use under Section 6.2a for a deck at 300 Falmouth Rd. parcel R05-27A, zoned "FF".

Mr. Hourihan presented his plans for a deck. The plan is based on an actual survey. There is a total of 2000 sq feet of footprint existing, which represents 9.7 % of the lot; the deck will cover an additional 3.6 % of the lot. It does not extend beyond any other structures, and it meets all the setbacks.

Public comment period opened. There was no public comment.

Mr. Meyer said Mr. Russell was a voting member for this application.

Mr. Meyer asked about the setbacks.

Mr. Hourihan said it is 72' from the rear, 56' on one side, 48' from the other side, and 112' from the front.

Mr. Keeler moved to approve the application; Mr. Given seconded. Motion carried 5-0.

5. Alex and Lisa Agnew- Are requesting Conditional Use under Section 6.2 for the addition of a deck and living space at 4 Avon Rd. Parcel U01-059, zoned "RA".

Monica Dominance explained that the Agnews are out of the country. She presented the plans for an addition to the kitchen. This addition will extend the kitchen 74 sq feet; in between the kitchen and garage will be a 100'sq foot deck.

Public comment period opened. There was no public comment.

Mr. Given asked if the addition extends above the roof line.

Ms. Dominance said no it goes right into the house. It will tie into the shed roof portion.

Mr. Given moved to approve the application. Mr. Russell seconded. Motion carried 5-0.

6. Traynor Family Residence LLC- Is requesting Conditional Use under Section 8.3, 6.11 & 6.2b for an expansion at 20 Burgess St. Parcel U16-044, zoned "RA". **Tabled from 6.22.10**

Mr. Meyer explained that there was a request for Mr. Thibodeau to recuse himself from this application. While Mr. Thibodeau was not able to be present at the meeting tonight, he asked Mr. Meyer to explain that he reviews requests for recusal on a case-by-case basis.

Mr. Meyer said that there were two requests, one from the Greens and one from Katherine Tolford, for Mr. Russell to recuse himself from this application. Mr. Russell doesn't feel he needs to recuse himself. The Board is authorized, under Title 30a Section 2691, to make a determination of conflicts of interest. Mr. Meyer felt that is the appropriate procedure to follow. Each of the parties who have requested Mr. Russell's recusal will speak, and then the Board will deliberate on the issue.

Mr. Keeler recused himself from the application due to a conflict. He left the meeting.

Ms. Helen Edmonds, an attorney from Pierce Atwood was here representing the Greens. The Greens live directly across the street from the applicants' property. Mr. Russell's property was subject of an prior application to this Board on the exact same ordinance standard; the minutes from that proceeding have been used by the Greens as an example and precedent on how the Board should review this application. In light of that, and in light of the fact that his prior application was denied on that standard, as well as Mr. Russell's strong feelings on that standard which he expressed at the last meeting, they have requested that he not be appointed as a voting member on this application.

Mr. Meyer said that, in cases where the Board is down two regular voting members, as they are tonight, the practice of the Board is to appoint both alternate members as voting members.

Mr. Berry understood their request is that Mr. Russell not be a voting member, but that he can participate in discussion.

Ms. Edmonds said that was correct; he is member of the public and so he has a right to comment on any application as a member of the public. She is asking that he not participate as a member of the Board in the determination of the application.

Mr. Berry said it is generally the practice of the Board that if one of the Board members recuses, that member removes himself from the room so as not to carry on a potential conflict. He asked if this is what the Greens are requesting.

Ms. Edmonds said correct; she is asking that he not participate as a Board member in this application.

Mr. Audet said he personally has been denied variances by this Board before; he doesn't believe he is biased on other variance requests before the Board. The Town Council appointed Mr. Russell on his merits, education and background. He became interested in this Board because of his denial. He though Mr. Russell can hear this with a clear mind.

Mr. Meyer said his understanding of this process is that Mr. Russell can't vote on this (the issue of disqualification). He can ask questions to develop the record.

Mr. Russell asked why he can't vote on it. Mr. Meyer explained that the rest of the Board makes a decision on disqualification.

Attorney Michael Pearce, town attorney, explained that Mr. Russell is entitled to weigh in, but cannot vote on the matter of his disqualification. He can state his point of view.

Mr. Given said the Board is advised to avoid the appearance of conflict and abstain from matters where people have a question about it. The Board has a quorum and can vote on the application; he is more concerned about maintaining the confidence of the public. Mr. Given said there is a legitimate request in front of the Board and he felt they should act on it.

Mr. Pearce asked that the letters submitted be read aloud. Ms. Edmonds read her letter.

Mr. Meyer asked Ms. Edmonds if there is a claim that Mr. Russell has an financial or pecuniary interest in the outcome of this application. Ms. Edmonds said no.

Mr. Meyer asked if their position was that Mr. Russell is biased and incapable of hearing the application with an open mind.

Ms. Edmonds said that was correct. They feel Mr. Russell has a particularly difficult time with this provision in the ordinance; he has made statements to that effect, based on the unsuccessful application he submitted. They have referenced that Board of Appeals proceeding with this application. This makes it harder for him to rule in an impartial manner in this application.

Mr. Meyer asked if there was any concern about any personal animosity or affinity on the part of Mr. Russell with any of the interested parties.

Ms. Edmonds said no, it was just the bias question.

Mr. Meyer said there is a similar request from Kathleen Tolford. He asked that she read the letter she submitted as well.

Kathleen Tolford of 13 Ayers Court read her letter to the Board. She felt that there was a conflict of interest, because Mr. Russell lives in the area, and has water views similar to the Traynors'. She referenced Mr. Russell's application to the BZA, which was denied. After reviewing the June 22 meeting, she is concerned that Mr. Russell harbors a bias against owners concerned about losing water views. She didn't feel that Mr. Russell could represent the residents of Falmouth in this very important decision.

Mr. Russell said he lives three blocks from the property. He doesn't know any of the neighbors though he does walk down that road. He has no bias. As far as his property is concerned, he felt there is no comparison. His application was for a tiny 15' extension of a garage roof. He is concerned about the neighbors' views. One of his neighbors and all her relatives and friends came to the meeting and were concerned about losing 1/10th of one percent of her view. That is what it rested on. This application is more than that.

Mr. Meyer asked if it was Ms. Tolford's position that Mr. Russell would be personally affected by the outcome of this application, for instance that he has any financial interest in it. Ms. Tolford said no.

Mr. Meyer asked if she knew of any personal bias either for or against any of the interested parties. Ms. Tolford said no.

Mr. Meyer asked if her concern was about a biased viewpoint or fixed opinion. Ms. Tolford said yes.

Public comment period opened on the recusal/disqualification issue only; no public comment.

Mr. Russell said he doesn't know any of the individuals concerned. The construction and claimed loss of view is entirely different from his application. He doesn't feel he is biased. He doesn't feel he should be removed.

Mr. Meyer said there are several bases on which a member can be removed and he referred to the Zoning Board of Appeals manual: under statute 30a, section 2605 if he had some form of ownership or financial interest in the property; under case law if he had a personal pecuniary interest. Case law also speaks to bias: if he was related to any of the parties or if there is bias against a party based on a state of mind. According to the manual, a Board member should abstain if he could not make an impartial decision, thereby depriving the applicant of his/her right to due process to a fair and objective hearing.

Mr. Pearce said that, if the Board felt after asking questions of Mr. Russell, that Mr. Russell was biased to the extent that he wouldn't be able to apply all of the provisions of the ordinance or if the Board thought Mr. Russell would try to make a decision that he could then use as precedence to return with his previous application, that might be something the Board could consider. His advice was to ask Mr. Russell outright, ask the letter writers, and make a vote.

Mr. Russell said there is a statement in Ms. Tolford's letter saying he had no regard for his neighbor's water views in his application; this is not true. The only issue was what is significant. His position was that a 10th of a percent loss of view was not significant.

Mr. Meyer asked Mr. Russell if he thought he could consider those factors, and in particular the fact of the water view, impartially in this case. Mr. Russell thought he could; he has been on the site walk.

Mr. Berry said he has seen judges ask jurors if they could be impartial and has yet to see anyone answer that they would be anything but fair and impartial. He trusted that Mr. Russell has joined the Board for nothing but the purest of motives. He felt that, when there are plenty of Board members, the Board owes it to themselves and the public to err on the side of caution. His first experience on the Board was round 2 or 3 of Mr. Russell's application. He witnessed first hand the emotion on all sides. When the Board is in a situation where, no matter what decision they make it will be questioned, they owe it to themselves to err on the side of caution.

Mr. Russell said he was convinced by Mr. Berry's argument and recused himself.

Mr. Given felt Mr. Russell could rule impartially, but if it were him he would also recuse himself.

Mr. Meyer didn't think having an opinion makes a person impartial. He agreed with Mr. Berry and Mr. Given that, while Mr. Russell may not be required to withdraw, the best practice in this situation is to withdraw.

Mr. Meyer said, according to the request of Mr. Thebarge's client, tonight the Board is to address the issue of the coastal bluffs and where the measurements should be taken from.

Mr. Thebarge said yes. At the June meeting they were confronted with a number of issues on the application and were tabled by the Board. The coastal bluff was identified as a threshold issue. They are requesting that the Board review the issues of the coastal bluffs and setbacks and give a preliminary determination on this issue so they can move forward with the application. They had a geotechnical study done by a qualified professional. Mr. Thebarge distributed two handouts to the Board. The first is the sediment study done for the State of Maine through the Maine State Planning Office. The study, done in 1995, was done through a grant from the EPA. The State then implemented the sand dune law as well as the bluffs. In the study it was determined that the rate of erosion is due more to coastal storms than by a rising sea level. The last point is conclusions and recommendations regarding the two main issues the whole study was focused on. First, they should protect and strengthen the ability of natural systems to adjust to changes in shoreline position and second, the State should prevent new development which would affect the abilities of the shoreline to adjust to changes in the shoreline position. Falmouth recently updated the shoreland zoning ordinance, which is when the coastal bluff regulation came into effect. At the final LPAC meeting on this issue, it was noted that the coastal bluff map, prepared by Judy Colby-George and based on a Maine Geological Survey map, was easier to read by the CEO and public, but that the map was not accurate in various locations. It was agreed the CEO would use this map as a guide and field verification would be needed where development was proposed. At the Planning Board public hearing on this matter Jay Moody, a member of the Board, mentioned the generalized nature of the map. Theo Holtwijk, Long-range Planning Director, said the Town staff was aware of the highly generalized nature of the map, and that field verification would be needed. At the Council, it was presented that the Falmouth map was intended to identify which properties would be affected. Mr. Thebarge contended that the Falmouth map is not the official map; it is an interpreted guide of the official map issued by the State. On the official State version of the map, there is language that states that certified geologists or geotechnical engineers should conduct site specific studies. The map is only an indicator that a property owner may have a problem.

Mr. Meyer asked about the statement in reference to the geologist or geotechnical engineer.

Mr. Thebarge said that is on the bottom of every Maine Geological Survey Coastal Bluff Map.

Mr. Thebarge discussed Section 7.25.e of the Town ordinance. They have provided a report from Stephen Rabaska, a highly qualified geotechnical engineer. Mr. Thebarge met with him on site and went through all of his field observations with him. Mr. Thebarge then prepared a 10 point summary which Mr. Rabaska has endorsed. Those points are: the existence of islands off shore, which shield this section of the shoreline from major storms; the existence of exposed ledge outcrops which indicate a stable environment; the toe of the slope is ok; the slope itself is 35 degrees, which Mr. Rabaska did not consider excessive, and it is covered in vegetation; there was no evidence of groundwater seeps; up the slope there are 5' diameter oak trees which are growing straight; the Town has a sewer collector line and it would never have been located there if there were concerns about stability; Mr. Rabaska obtained soil borings from the construction of the sewer line which confirmed that the soil is dense glacial till, a very stable soil; the proposed construction was light residential construction, the weight and soil disturbance for which does not pose problems to the soil. Based on this report, they felt that the 100' setback should be measured from the normal high water line and the 30% limitation rule shouldn't apply to their application.

Mr. Chris Vaniotis, representing the Traynors, responded to the argument that, since the property is indicated as an unstable bluff on the coastal bluff maps it must be treated as one, even if it is not. The reality is that, based on a study from an engineer, there is no unstable bluff located on the Traynors property. The ordinance says that field verification is the ultimate determination of the location of unstable bluffs, and if field verification says that there is no unstable bluff on the property then the ordinance does not require a setback from the bluff. They have done exactly what was recommended by LPAC, the Planning Board and the Maine Geological Survey; they started with the map as a guide, and then did the field investigation. They are not saying that the map as a whole is invalid. They contend that the map is an approximation. The coastal bluff map wasn't adopted by the Town Council as a part of the ordinance; it was produced by the Town as a visual aid. What was adopted was the map produced by the Maine Geological Survey. The state map includes language that it is not intended for specific land-use decision; it is intended to be used as a guide. The permitting authority in this case is the Appeals Board and the Board has the authority to make the determination, based on the evidence presented, that there is no unstable bluff in this location. He also discussed the 30% expansion limit under section 6.11a; it doesn't incorporate the coastal bluff setback, but uses the term "normal high water" as it has since 1989. Section 6.11.a was amended at the same time as the shoreland amendments, but still does not refer to the coastal bluff but normal high water. There is some confusion regarding the measuring point for the 100' setback. There are two definitions in the Falmouth ordinance, "high water line" and "high water mark". The Town has always used the high water mark to determine the setback. High water line is a newer definition. Their current plans use the high water mark; they will adjust the plan to use the high water line.

Mr. Meyer asked the attorney for the Greens to respond.

Ms. Edmonds, representing the Greens, said they are seeing some of this information for the first time this evening, so it is somewhat hard to respond. She said they are ready to proceed on all issues. The Town has adopted the Coastal Bluff Hazards Map with language included in section 7.25e. Based on discussions with the DEP it is their position that the Zoning Board does not have the authority to ignore the mapping. She contends that field verification was to be reserved for

cases in which it wasn't clear whether a property is mapped within the stable or unstable bluff area. It is very clear that this property is included in the mapped unstable area. This should decide the issue. The Board has evidence indicating that this bluff is unstable. Exhibit A, provided to the Board previously, is a photo showing vegetation that has slumped in this area in the past. The applicants' expert indicated that it appeared that this area had been stabilized in the past. Neighbors in the area have stabilized the banks with retaining walls. The Yacht Club also has a bank that has a history of eroding. She felt the mapping is correct and is based on historical evidence. She has not had an opportunity to review the historical boring logs from the installation of the sewer lines. She felt the Board should go with the mapping as adopted by the Town. While the applicant contends that the 30% limit only applies to those nonconforming structures located too close to the normal high water line, she felt it was very clear that in the case of a mapped unstable bluff, the water setback becomes the setback from the top of the unstable bluff. She discussed these provisions with Michael Morse with DEP.

Public comment period opened.

Mr. James McGowan, of 8 Ayres Court, which is directly next door to 20 Burgess St, wanted to point out that when he purchased his property it had tearing on the bluff to stabilize it. He is an engineer and he said there was significant erosion on the bluff in 2002. They submitted a permit to Maine DEP to stabilize the bluff; the reason given was shoreline stabilization. They did some extensive drainage and retaining walls. Most of the erosion that takes place is not from the bottom up, so the islands are not an issue; the erosion is from the top down. They are at the bottom of a hill that starts almost at I295; there is tremendous hydraulic pressure that works it way down the hill. It would be simpler if it was winter to see the area when the bamboo is not in bloom; you can see the erosion that has taken place on the bluff. The Town owns an easement on the other side of Burgess St. and they took steps recently to re-enforce the bluff with rip rap. On the tax bill for 20 Burgess St. there is a note saying the bank is eroding in the assessment section. It is clear that the bluff needs to be stabilized.

Mr. Meyer asked if the three retaining walls shown in the pictures are on his property.

Mr. McGowan said yes; he believed there are about 6 tiers each with a retaining wall and terrace.

Mr. Meyer reviewed the photo with Mr. McGowan.

Mr. Given asked if in the winter, when the bamboo dies off, one can see the substructure of the rocks and everything. Mr. McGowan said there are a few rocks and boards that were put up.

Mr. Given asked Mr. McGowen how he would categorize the bluff, when the bamboo is gone and you see the whole general area; is it rocky or a mixture of soils. Mr. McGowan said he would categorize it as eroded soil with attempts to stabilize it with debris like concrete pieces and boards.

Mr. Given asked if there was ice formation on the bluff in the winter. Mr. McGowan said there is ice that accumulates.

Mr. Chris Green, 11 Ayres Court, said the Town spent two days at the end of Burgess St. last fall working on the top of the hill. They were bringing in truck loads of something and filling holes. He suggested checking with Public Works to see what they were working on.

Ms. Edmonds said she spoke with Jay Reynolds at Public Works and he confirmed that, in the recent past, the Town has added some type of rip rap or stabilization to a storm water outfall that comes from the end of Burgess St. and onto that bank. Mr. Reynolds said it was due to some erosion going on in that location.

Mr. Thebarge pointed out that Ms. Edmonds is not an engineer and not qualified to make observations of the stability of coastal bluffs, nor are any of the neighbors who have spoken here tonight. The applicants have provided a geotechnical report done by Steven Rabaska who specializes in this issue. He has reviewed and given an expert opinion based on extensive documentation that this is not an unstable site. Attorney Edmonds suggested to the Board that, because of the lack of substantial evidence, the Board cannot find in the applicants' favor on this issue. He felt this statement is incorrect. As far as the Yacht Club, their property is in red on the map, meaning it is very unstable. Stability varies up and down the coast line. Whether or not the McGowans had an unstable issue on their banking does not determine that 20 Burgess St. also has an issue. The Town's storm drain's outfall being rip rapped is a whole different situation than what is on the property of the Traynors. The storm drain is carrying storm water from Burgess St. down to that banking. Finally, he felt it is disconcerting that when it comes to the interpretation of section 7.25e with respect to the map Ms. Edmonds urges the Board to go by the clear language, but when it comes to the applicability of section 6.11a she abandons that urge of following the clear language and asks the Board to determine that the rule of 30% applies to coastal bluffs.

Mr. Berry said that under 7.25e the applicability seems to be referring to the notion that there is a disagreement between the applicant and the permitting official. Mr. Farris would have been the permitting official and there didn't seem to be a disagreement. He asked if there is a disagreement between the applicant and the CEO as to the location of the top of the coastal bluff.

Mr. Thebarge pointed out that the question is to where the top of the bluff is located. There are two issues: is it stable or unstable, and if it is unstable where is the line we measure from.

Mr. Berry asked if there was a disagreement between the CEO and applicant.

Ms. Stearns said yes there is. Mr. Farris previously reviewed this but no definitive notes were taken. It does not appear that he opined on the applicability of this section of the ordinance to this application. In preparation of her agenda notes she went to Mike Morse the assistant shoreland zoning coordinator. He was charged to review all Town ordinances adopted under the mandatory shoreland zoning act. She felt he was her best expert in terms of legalities and applicability of the ordinance. After she reviewed it, she spoke with Mr. Morse and represented what she believed to be his position in her notes. She took the same position that Attorney Edmonds took. In addition she spoke with Mr. Morse about the mapping itself. She has the actual map adopted by the Council. The map that was prepared by Judy Colby-George was officially adopted by the Town Council as part of the ordinance package. The State has to review that entire package and sign off on it to ensure it meets the minimum requirements of the shoreland zoning act. That map was reviewed. Mr. Morse indicated to her that the language in Section 7.25e refers to the Town's adopted map, not the Maine Geological Survey map. The Town has the right to adopt this interpolated map; this would make it easier for individuals to make a determination of where the coastal bluffs are. She passed out a copy of Maine Geological Survey map to the Board. If there is a disagreement on the specific location of a slope, from the

State's perspective, it was intended to determine where the line is between two types of slopes, not the stability of the slope or the Maine Geological Survey's designation of the slope. It would be actually where that line between what is stable, unstable or highly unstable, not whether the entire slope is to be reclassified. Mr. Morse believed this would require a legislative act by the Council, and the DEP would have to be consulted, in order to amend the reference map, which would be the Maine Geological Survey map. The Town, in order to reclassify bluffs, would have to initiate that process with the State. Based on the fact that the applicants have prepared a professional report and indicated a legal opinion that is contrary to the permitting official, perhaps Mr. Morse could be called to testify in front of the Board or provide something in writing with regard to his interpretation on behalf of the State regarding the ordinance. Secondly, the Town calls for a peer review to be done to review the technical report that has been submitted, if the Board gets to the issue of stability of the slope.

Mr. Given asked if it is Mr. Morse's position that this relates to the location of the top of the bluff.

Ms. Stearns said there are two pieces; either the specific location of the bluff which Mr. Morse indicated is where the line is between the yellow & green or yellow & red areas on the map; or where the top of the bluff is located. It is the specific location of a designated slope and then where the top of the bluff is located. Ms. Stearns didn't believe, in any of the information she has heard, that anyone is contesting where the top if the bluff is located and how the applicants have presented the top of the bluff.

Mr. Meyer said the Town's map indicates a stable section which is immediately adjacent to this unstable bluff which is below the Traynors residence. One question is where that line lies.

Ms. Stearns said that was correct.

Mr. Given asked if it is clear that someone can employ a licensed professional to determine the stability of the slope.

Ms. Stearns said this is where she hoped the Town could obtain something from Mr. Morse on this; he has indicated that that isn't the case. The classification of the slopes has been determined. A professional will tell you whether the line between the classifications shifts to the left or the right. They will not evaluate the entire slope or determine its classification. It is a fine shift of the exact location of that line. Mr. Morse indicated that any further re-designation would be a legislative act, that is, if an area designated as unstable were determined to be stable, it would require an amendment of the map.

Mr. Given said he had a hard time understanding that the State map is to this level of accuracy.

Mr. Berry said the applicants have submitted these materials directly to the Board. By his reading of 7.25e once the issue was raised by the neighbors the materials should have been submitted to the CEO for an action or decision. If there is an agreement reached between the parties then it is moot. If not, the Board would review the CEO's decision based on this report and the experts. He was concerned about jurisdiction.

Ms. Stearns said the report was submitted as part of this application, which came up as a matter under 6.11. This request for a determination of the permitting official was made in conjunction with an application that was already in front of the Board. One way or another it would get to the

Board. If her agenda notes had come out in agreement there would be no appeal. The first was disagreement with an abutter, secondly with staff; in essence appeal was already prepared. She did not engage a peer reviewer, which may have been a step she would have taken had this question come in confined to being interpreted by the CEO. She would likely have taken other steps to make a final determination.

Mr. Berry wanted to hear from counsel for each party on the jurisdictional issue.

Mr. Vaniotis said this issue was originally raised by the abutters. Under 7.25e it refers to the applicant and permitting official(s); he felt that language refers to whoever is issuing the permit in question. They have an application to the Board of Appeals under 6.2b, which says the Board of Appeals may permit as a conditional use what they are requesting. The Board of Appeals grants conditional uses. So they think the Board of Appeals is the permitting official(s) here. They are asking if they have a disagreement with the Board of Appeals on this coastal bluff issue since it has been raised by an abutter. He agreed with Ms. Stearns that one way or another it would end up in front of the Board for a final determination. His view was that this Board has to make this determination on whether they measure from the coastal bluff as part of the application, with the Board being the permitting authority.

Mr. Berry asked if either party had an objection to the Board dealing with this issue. Neither party indicated an objection.

Mr. Audet asked if it would be appropriate, and if they have the authority, to ask for a peer review on the prepared engineer report. On these issues he felt they have to ask an expert. The Traynors have a finely written report from their engineer.

Mr. Thebarge said in terms of peer review what they may be dealing with is not the technical information, but the applicability of the provisions of the ordinance, as indicated by Amanda Stearns and her testimony. Mike Morse is also not dealing with technical issues, but legal interpretation of the ordinance. He thought the Town Attorney might weigh in on this issue of applicability of maps. In Ms. Stearns' testimony she said to ignore the specific ordinance language, which in section 7.25e said the coastal bluff maps published by the Maine Geological Survey. He thought they should have the Town Attorney review Ms. Stearns' position, the applicants' position and Attorney Edmonds' position on which map is official.

Mr. Meyer said one of the people who can be consulted on this is a qualified individual, i.e. Mr. Morse.

Mr. Given asked about the map included in the report from Mr. Rabaska and where it came from. Mr. Thebarge said that is the State map.

Mr. Given said the legend on this map shows the property as unstable and also ledge. Mr. Thebarge said that was correct.

Mr. Given asked for clarification that professional engineers did a walk thru of the site and did test borings; he asked if a copy of the test borings is available. Mr. Thebarge said they can be.

Mr. Given asked if any engineering software was used for evaluation of slope stability. Mr. Thebarge didn't think so.

Mr. Given asked if he had done any seepage analysis. Mr. Thebarge said no.

Mr. Given said this is basically just Mr. Rabaska's professional opinion based on visual examinations. Mr. Thebarge said yes, as well as the other observations such as the sewer depth.

Mr. Meyer said section 6.11 refers to setbacks from the normal high water line. He asked if it is the CEO's position that, if you have an unstable bluff, section 7.25e would trump the language of 6.11. He wondered if they have to take the measurement from the bluff.

Ms. Stearns read from section 6.11a. The definition of high water line refers out to the definition of coastal wetland. The water body becomes the coastal wetland, which is then defined by NOAA's published tide tables. Section 7.25e specifically states that both the water and the wetland setback measurements shall be taken for the top of the bluff. First you go to the normal high water line to determine how it's identified, and then you refer back to this language. It is her conclusion that 7.25e applies and it is the setback from the normal high water line of a water body or the upland edge of a wetland. The wetland is the line established by the normal high water.

Mr. Meyer said there is the normal high water line established by NOAA, and then they have this defined normal high water line which is considered the upland edge of the normal high water. He wondered if this upland edge is the top of the coastal bluff.

Ms. Stearns said no; you have to go to the definition of coastal wetland. She read the definition of a coastal wetland, section 2.185. The State actually calculates this for each town.

Mr. Meyer observed that the Town's interpretation is that, because 7.25e says that setbacks are to be taken from the water, and wetland setback measurements shall be taken from the top of a coastal bluff, that they have to apply this to section 6.11a. Ms. Stearns said that was correct.

Mr. Meyer asked Mr. Thebarge if he had a large site plan.

Mr. Thebarge said he will bring it next time; it has been updated with the mean high water line indicated. It will go into the home further than what was what they had last time by maybe 10'.

Mr. Meyer asked how the expansion would affect the plans for the home. Mr. Thebarge said they are working on new plans.

The Board wanted to hear the opinions of both Mr. Morse and Mr. Plouffe.

Mr. Audet moved to table the application until the regular August meeting; Mr. Given seconded. Motion carried 5-0.

Meeting adjourned.

Respectfully submitted,

Patrice Perreault
Recording Secretary

Melissa Tryon
Recording Secretary