

WAREHAM ZONING BOARD OF APPEALS MEETING NOTICE AND AGENDA

Wednesday, June 22, 2011

Time: 6:30 P.M.

**Place: Wareham Town Hall Cafeteria
54 Marion Road
Wareham, MA 02571**

I. CALL MEETING TO ORDER

The meeting was called to order at 6:50 P.M.

II. ROLL CALL:

Members Present:

- Kenneth R. Ferreira, Chairman (Arrived at 7:05 p.m.)
- Michael Martin, (Chairman Pro Tem until Mr. Ferreira's arrival)
- Mary Scarsciotti, Clerk
- Richard Secher
- David Sharkey
- Wilma Engerman, Associate Member

Also Present:

- Myles Burke, Director of Inspectional Services
- Attorney Jason Talerman

III. PRELIMINARY BUSINESS

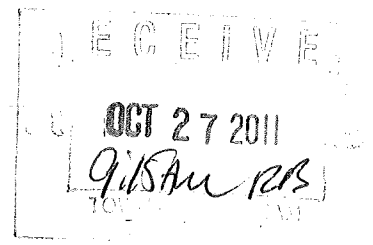
A. Approve meeting minutes: September 8, 2010

MOTION: Mr. Secher moved to approve the minutes of September 8, 2010. Mr. Sharkey seconded.

VOTE: Unanimous (5-0-0)

NOTE: At this time, Mr. Martin informed the Board and those in attendance that the order of business for the evening will be the discussion and final sign off for 815 Main Street followed by a new public hearing for Nazhi Elkalassi and Jay Imad and then the Chiaraluce petition. He advised the Board and those in attendance that he has polled all of the petitioners that have business before the Board tonight and has asked them to wait until the Chairman arrives.

The Board recessed until the Chairman arrived.



Mr. Ferreira, Chairman arrived at 7:05 P.M. and apologized to the Board and those in attendance for his delay. The meeting continued with the next item on the agenda.

B. Discussion – Final sign off/bond release for 815 Main Street.

Present before the Board: Anissa Leon, 815 Main Street

Ms. Leon indicated there are two things to be reviewed by the Board. The first being the change in the landscaping and the second is the final sign off for the project. The as-built plan was reviewed by the Board. Chairman Ferreira asked Ms. Leon if she had the letter from John Charbonneau, Town Planner. Ms. Leon stated that she did not. Mr. Ferreira stated there is a memorandum from Mr. Charbonneau, Town Planner, dated 6-22-11 re: a site visit with David Pichette, Conservation Agent and a representative from 815 Main Street. The details will be reviewed afterwards by the Board. He stated Mr. Charbonneau's recommendation is that the Board vote to release the insurance bond being held, in full, pending an inspection by Hancock Associates. He noted considering the significant amount of work that has been conducted throughout the site, the Board could defer its decision until the new seeding has an opportunity to become more established in the coming weeks. Mr. Ferreira indicated he had a discussion with Mr. Charbonneau by phone this afternoon and he was very pleased that the work had been done in the last two weeks which addressed all the concerns the Board had. In detail, there is a new landscaping plan which the Board has a copy of and this will become part of the file.

Mr. Ferreira stated one issue that arose deals w/ the bollards; the yellow bollards. The question is why the color yellow. He asked Ms. Leon if she would be adverse to change the color from yellow to gray with reflective taping because this is a residential subdivision. He stated in a commercial setting, the color yellow would be fine, however, this is a residential setting. Ms. Leon agreed and stated she would take care of this.

Mr. Ferreira asked re: the status of the basketball court. Ms. Leon indicated they have someone contracted to do it. She stated the management company is not thrilled about doing it. She stated she knows the basketball court is shown on the plans and they have someone contracted to do it. She stated if the Board wants the management company to do it, it is up to the Board. Chairman Ferreira asked the Board for comments. Mr. Martin said he had a conversation with Mel regarding the drainage issues and they have been taken care of. Mr. Secher would like the basketball court. Ms. Scarsciotti stated the landscaping looks lovely and took pictures. She stated the only other question/concern was obviously the yellow posts. She stated there has been discussion re: painting some of the posts that have been replaced in the parts of the pergola that were supposed to be architecturally interesting, but they look like they were not painted. Also, as you come in, on the side closest to the tracks and then take the first turn where the big building is, one of the posts has a severe crack in the first floor, on the very first unit on the first floor. Ms. Leon indicated that this would be taken care of and this is something that

maintenance can take care of. Ms. Scarsciotti stated she is in favor of the basketball court, in as much as the little ones that are under ten years old are going to have the playground and something to do; and the older kids as well, need to have some place to put all that energy. Mr. Sharkey stated he has the same concerns as Ms. Scarsciotti and doesn't think there is anything that can be done about those now. He still thinks it looks like an NCO barracks because the décor of the building is too harsh. He stated if there is any way to soften it up, it would be appreciated. He stated at Union Pond, the buildings are much softer and they don't come out at you.

Ms. Leon asked if Mr. Sharkey was referring to the siding or landscaping. Mr. Sharkey said some of the things can't be changed, for example, the way the air conditioning system is installed there, is vastly different & obvious. It's things like that that take away from the gentility of the premises. He stated as the complex continues to be maintained & changes can be made, they should try to keep these issues in mind.

Ms. Scarsciotti asked how many Wareham residents there are at the complex. Ms. Leon said she thinks it is 70%.

Ms. Engerman stated she is pleased about the basketball court and that it is going to be put in. She asked for a date of installation. Ms. Leon stated that it depends on rain and probably next week.

Mr. Ferreira complimented the representatives on how they managed to get all the little changes cleared up. He would like them to understand that the Board is not holding the project up to some kind of standard that the Board does not hold anyone else up to. He stated the Board is just trying to make sure that it is the best the Board can do before they give a final sign off. At this point, he feels the representatives have done everything that has been asked of them. He stated Ms. Leon has indicated the basketball court will be put in and something will be done w/ the bollards.

MOTION: Mr. Martin moved to accept the Town Planner's recommendation to release the insurance bond for 815 Main Street and grant approval as contained in the June 22, 2011 letter. Mr. Sharkey seconded.

VOTE: Unanimous (5-0-0)

NOTE: Mr. Ferreira suggested the Board release the 53G account monies for 815 Main Street. Ms. Scarsciotti stated that verification needs to be made so that anything associated with the project has been taken care of. Mr. Ferreira asked if this refers to invoices. Ms. Scarsciotti said yes. Mr. Martin commented that these funds should be released no sooner than July 30th. He feels to put a date on it will allow for any payments if anything should come in, such as invoices, they can be paid.

MOTION: Mr. Martin moved that the 53G account for 815 Main Street be closed and these funds be returned to the 815 Main Street applicant on 8-1-11. Mr.

Secher seconded.

VOTE: Unanimous (5-0-0)

NOTE: Ms. Engerman asked if the Board could put a date on the release of the bond so the Board will know at least the items the applicant has promised to do have been started. Mr. Martin said that if they do not do what has been promised, the 40B hearing will be reopened.

It was noted the remaining items include: painting the porch columns and pergolas, paint the concrete security posts gray and apply reflective tape, & install the basketball court per copy of the contract as provided.

IV. PUBLIC HEARINGS

**A. #30-11 – Nazih Elkallassi & Jay Imad – 2371 Cranberry Highway –
c/o GAF Engineering, Inc.**

Present before the Board: Nazih Elkallassi
Brian Grady, G.A.F. Engineering, Inc.

Mr. Ferreira informed the applicant that he had received a note from the Department Assistant that the abutters' notifications had not been paid for. There were nine notifications sent out @ \$5.54 = \$49.86. The applicant stated he was not notified of this and it will be taken care of in the morning.

The public hearing notice was read into the record.

Mr. Grady explained the application request to the Board. He explained the site is the former Laconia Auto Body, the parcel behind the property is the Industrial Park, Patterson Brook Road, and across the street is the Wareham Fire District Station. There are also some storage buildings across the street. There is residential property approximately 300' to the north and south. The site has reopened as an auto body shop and the business is in operation at this point. The applicant is requesting a Special Permit to display (5) five more vehicles, which, this property has historically had that license. Mr. Ferreira stated he does not recall anyone selling cars from this property. Mr. Elkallassi stated it was licensed at one time.

Mr. Grady stated the applicant is working with an architect and having discussions in regard to a final site plan. There is talk about an addition and having a state-of-the-art facility there, so, hopefully this will just be an interim site condition as it moves forward and the business becomes operational and successful. The site plan has a central access proposed, resurfacing of the parking area, and adding a handicap parking space. The applicant will pave that space, have a paved sidewalk access to the front door for handicapped patrons, and will provide a total of (8) eight parking spaces with signage in the front. That will be a complimentary use for the auto body

shop for someone to come in and be able to fix their vehicle and decide that they want to display it for sale then move on to another vehicle whereas other conditions may arise. The applicant is looking for (5) five vehicles at this time and then in the future the applicant will come back with plans for the addition and plans to modify the number of vehicles to the site. At this time the applicant is looking to make small improvements to the site, for example, resurfacing the gravel surface. Mr. Ferreira asked if by resurfacing, it means paving it. Mr. Elkallassi explained that he means resurfacing with gravel at this time. He will be paving the handicap space and the sidewalk, but the resurface is gravel and the existing gravel.

Mr. Grady stated the lot size is just over 1 acre, 49,000 sf. For the potential improvements to the property, the applicant has gone before the Planning Board with and ANR. What the ANR plan does is it extends the property line straight to meet the same property line, adding square footage, and that process is complete as well.

Mr. Grady stated the applicant has the approval from the Board of Selectmen for the Class II License, the ANR approval, and the applicant is now before the Board for a Special Permit to display (5) five vehicles.

Mr. Ferreira stated it appears the throat for the opening of Cranberry Highway is a little bit wider than what MA Highway usually requires. He asked what the purpose of 31' is. He feels this is kind of an odd number. Mr. Grady stated it has to be modified. Mr. Ferreira stated he didn't care, however, he is questioning why it isn't 24' which it generally is. Mr. Grady noted his discussion with MA Highway. He stated where the 24' meets on the property, it can be wider. It's not necessarily 24' at the layout, but with this radius' it will be 24' at some point. Mr. Ferreira asked where it will be 24'. He stated if it's 31' where the two radius meet, where is 24' going to happen. Mr. Grady stated he would suggest that this be modified. Mr. Ferreira stated the Board has no control over MA Highway curb cut applications or access permits. His thought is that generally, they want it to be 24' and he sees this looking a little wider. The radius of the 30' with the slope edging looks fine, but it just seems like it should be smaller. Mr. Grady agreed.

Mr. Ferreira expressed confusion re: Mr. Grady saying this is an interim site plan. He stated he is always uncomfortable with approving something that is interim, not knowing what the final is going to be. He sees a lot of piles of dirt brought in, whether it be this site or any other asking for free fill, but there are a lot of piles of dirt all over the place so he is assuming something is going to happen there. Mr. Elkallassi said that this is the reason he is only doing 5 cars on that site. He stated eventually if things go well, he will ask for more and more cars and a bigger license.

Mr. Ferreira stated his point is that it looks like a lot of activity is going on & he wonders when it's going to be done. He questioned why the area in the front for the parking wouldn't be paved because obviously then if you go further, its going to blend in.

Mr. Ferreira complimented Mr. Elkalassi on the Mobil Station. He feels it looks good and it's kept clean, & it is policed. He feels if Mr. Elkallassi creates the same type of situation at the site in question, he would be very pleased.

Mr. Ferreira asked if the applicant could use reprocessed asphalt just to make it a stable surface. He stated gravel is not always stable, it's still dirt, but reprocessed asphalt would be just as good and have a more cleaner appearance for the front of this building while the planning for the expansion is going on.

Mr. Ferreira asked what happened w/ the lot between this lot and the Mobil station as Cedar Village Incorporated. He asked if this is land that Mr. Elkallassi owns in the back. He recalls that Mr. Elkallassi was trying to rezone and do some housing. He stated it seems to be that it is all clear cut between this building and the Mobil station.

Mr. Ferreira asked the audience if anyone wanted to speak in favor or against the application. No-one from the audience spoke.

Mr. Ferreira asked the Board if they had any questions. Mr. Martin stated he is familiar with the site and there are a lot of things he likes about the site & it's very vegetated from the street. He asked when the site plan would be done. Mr. Ferreira stated the site plan would be done when the applicant comes in to ask to display more cars.

Present before the Board: Myles Burke, Director of Inspectional Services

Mr. Burke stated he thought the site plan was triggered by ten cars or more. Mr. Martin stated the site plan is triggered by the change of use. Mr. Ferreira stated there really isn't a change of use because it's still a body shop and they have an existing license to display cars; they just haven't been doing it. Mr. Secher stated he has an issue with the gravel and Mr. Ferreira said he would like to see it paved, but if something is going to happen in the future on the remainder of the lot and just because of the size of the lot, he thinks that this would be a possibility. Mr. Elkalassi stated the proposed new façade, drainage, landscaping, fencing, etc. will look very much like next door in the future, but he is in the process to do this plus he needs to try it because if he doesn't do well, it's going to cost a lot of money. Mr. Secher asked Mr. Elkallassi if he doesn't do well is he going to leave it gravel. Mr. Elkalassi stated if he doesn't do well, it will remain as it is. Mr. Ferreira stated this is why he suggested the reprocessed asphalt; to make it a little nicer. He stated the Board can require anything, but the applicant is looking at selling cars. This is automotive use and there is already automotive use as a body shop. The body shop is an existing entity and it will continue to make money based on the management and what they do. He stated the selling of 5 cars depends on what kind of cars you sell to draw people in. Car sales are car sales.

Mr. Ferreira stated, seeing how Mr. Elkallassi is bringing dirt in, what does he think the time frame will be to make a decision that he is going to go full bore, façade, etc.

He noted there is a new sign and it says A-1 collision. Mr. Elkalassi stated he just changed the plastic, a name change because he just bought the premises. Ms. Scarsciotti expressed concern that there are too many signs.

Discussion ensued re: the site. Ms. Engerman questioned the septic system and whether they had been to the Board of Health. The Title V was done by the bank.

Mr. Martin stated that under definitions in Section 350, there is no question that this is a motor vehicle service area, but there is a separate definition for motor vehicle sales and he feels this is a new use that is being added onto an existing use, therefore requiring site plan. Mr. Ferreira indicated that this question has been raised and asked if Mr. Elkalassi has proof that there was a license at this facility before. Mr. Martin made the argument that the license hasn't been abandoned after a period of time. Mr. Ferreira explained abandonment and that the applicant can speak to the Selectmen who issue the licenses. There either is a license in place for the previous owner before purchase by the applicant or there isn't. Discussion ensued re: car licenses.

Mr. Ferreira deferred to Mr. Burke as to whether he is comfortable with Mr. Martin's interpretation of the Bylaw because the Board is dealing with what was sent to them. The ticket for the applicant to come before the Board tonight was a denial by the Building Inspector. The denial indicated the applicant needed a Special Permit for automotive use to sell cars. Mr. Martin agreed, however, he stated there is a separate definition for motor vehicle sales. Mr. Ferreira asked Mr. Burke what his thoughts are. Mr. Burke noted what he was presented by the applicant. He stated the was directed to the Zoning Board for a Special Permit and not the change of use. He stated the applicant did indicate that the old permit was for some used car sales which he (Mr. Burke) felt was an ancillary business in part due to what they do in most auto body shops; they also sell some of the vehicles that they repair. The point was well taken that he (Mr. Burke) did not feel that site plan review was necessary due to the 5 car license vs. the need for 10 parking spaces. He felt all that would be required initially was a Special Permit. He acknowledged there has been a lot of site work done with respect to landscaping features in the back, but it appears the applicant will go forward in stages. He again stated he thought all that would be required was a Special Permit.

Mr. Martin asked why the Board even needed this plan. Mr. Ferreira stated the Board needs some kind of a plan. Mr. Martin replied that he has no recollection of the Board ever approving a car lot in association with a repair shop or body shop in the 13 years he has been on the Board. Mr. Ferreira and Mr. Sharkey concurred. Mr. Ferreira agreed that if a body shop doesn't have any customers, the body shop picks up something at an auction, has the workers fix it up, and then sell it. It's a common activity, but he thinks Mr. Martin has a good point, although that's not what the petition is advertised for. It is advertised for automotive use. It does have a site plan. He questioned if the Board were to grant a Special Permit for automotive use for 5 cars and with the condition that the gravel area be reprocessed asphalt or whatever to stabilize the surface and make it look nicer, plus granite edging be put in for the

driveway, modify as necessary for the curb cut, landscaping, and the Board gives it to the applicant for a maximum of 18 months and after the 18 months the applicant would come back before the Board with either a full site plan for the entire property for more cars or to come in with a site plan. He doesn't want to do anything else done 18 months later. Something has to be done to re-vegetate and make the site look nice (remove all these piles of dirt in the back, pave the front, and clean it up). Mr. Ferreira clarified that Mr. Elkallassi is saying that this is interim and once he decides to display more cars and hires employees it would kick in full site plan review. For a full site plan review the entire lot needs to be looked at. Discussion ensued re: site plan review. Mr. Ferreira explained that after 18 months, the Special Permit for selling 5 cars expires, unless Mr. Elkallassi comes back with a full site plan. If those 5 cars go away then it goes back to being an auto body shop the way it always was. Mr. Elkallassi agreed and said this was fair.

Ms. Scarsciotti asked how many employee parking spaces did the applicant anticipate. Mr. Elkallassi replied that right now he has two employees. Ms. Scarsciotti stated the paperwork indicates the applicant has four spaces planned for customers and another six that are to be parked while work is being done. There is also one handicapped space plus the five spaces that are going to be used to display vehicles. She stated this is a total of 18 spaces according to what the text is. Mr. Martin stated what the Board is discussing is going way beyond a simple approval to use a 5 car license. He feels this discussion is getting further into site plan. Mr. Ferreira stated the Board has been burnt on every car lot, for example, the one next to Bailey's, Fonzie's, Cranberry Chevrolet, etc. The Board issued one in West Wareham which has not. He indicated if this Board is going to approve this, he is only going to approve on an interim basis or it goes away. The Board can give Mr. Elkallassi a period of time to establish a business, get financing in order, and do something with the rest of this lot to clean it up. Ms. Scarsciotti stated there are less and less trees and more dirt every time she has gone by the site. Mr. Burke stated based on the applicability of 1520, he has not seen a site plan so he did not realize that the combined parking plus the combined cars applied to the license for 5 cars. He feels it's a fair compromise to at least let the applicant go forward for a 5 car license and a Special Permit with conditions and the applicant can come back in 18 months.

MOTION: Mr. Martin moved to close the public hearing for petition #30-11 – Nazih Elkallassi & Jay Imad – 2371 Cranberry Highway. Mr. Sharkey seconded.

VOTE: Unanimous (5-0-0)

MOTION: Mr. Secher moved and Mr. Sharkey seconded to grant a Special Permit for petition #30-11 – Nazih Elkallassi & Jay Imad – 2371 Cranberry Highway for automotive use for a five car license w/ the following conditions:

1. All of the work shown on the site plan presented by G.A.F. Engineering dated 4-28-11 prepaid set and all of the landscaping, curbing, striping and so forth be done

as per the plan and that the resurfacing of the existing gravel area be done with reprocessed asphalt and to adjust the curb cut opening to 24' subject to MA Highway approval.

2. This Special Permit for the automotive use to display and sell 5 car license would be only good for a total of 18 months and only until an additional site plan under full site plan review under Section 1500 be submitted to determine the use of the property.

VOTE: (3-2-0)

Mr. Ferreira asked for a roll call vote:

Michael Martin – No
Richard Secher - Yes
Mary Scarsciotti – No
David Sharkey - Yes
Ken Ferreira – Yes

Mr. Ferreira explained that the Special Permit failed to receive the required 40A statutory requirement for four affirmative votes to grant, thus the Special Permit is not granted.

Mr. Ferreira asked if there were any further motions to be made. There were none. He asked if there is a motion to reopen the public hearing to allow the applicant to resubmit the full site plan under Section 1500. Discussion ensued re: the site plan review process and submittal for potential phasing, etc.

Mr. Ferreira stated the public hearing has been closed and the Special Permit will not be granted.

V. CONTINUED PUBLIC HEARINGS

A. #18-10 & #18A-10 – Joseph H. Chiaraluce – 16 Wankinquoah Avenue

Present before the Board: Attorney Richard Serkey
Attorney Jason Talerma, Town Counsel

Mr. Ferreira explained this is a continued public hearing of which the applicant is being represented by Attorney Richard Serkey. He also noted that the Board has Town Counsel present to assist the Board in the deliberations and thought process as the Board goes through the continued public hearing.

Attorney Serkey was requested to bring the Board up to date. Attorney Serkey briefly gave an account of the facts and indicated what his position is on the two key sections of the Bylaw. The prospective facts that are acknowledged are; on September of 2009 the previous Building Inspector, Mr. Misiasek issued a letter stating that a building permit to rebuild got issued to Mr. ----- . In May of 2010, Mr. Misiasek issued a building permit

to rebuild and that was a two-story structure. Mr. Padula questioned whether Mr. Chiaraluce was entitled to that building permit as a matter of right and as a result of that questioning in July of 2010, Mr. Burke issued a letter revoking the building permit stating that Mr. Chiaraluce needed a Special Permit. There was dialogue back and forth after that July 14, 2010 letter between himself, Mr. Burke, prior Town Counsel and also between Mr. Churchill and Mr. Burke. Mr. Churchill was encouraged to submit a one-story amended plan as opposed to a two-story original plan and did so believing that that plan would be approved. In September of 2010, as a result of a conversation between Mr. Burke and former Town Counsel, Mr. Burke issued a letter refusing to reinstate the building permit. In September 2010, Mr. Chiaraluce filed his petition in case #18-10 in which he appealed Mr. Burke's September 2010 decision not to reinstate the building permit and in the alternative, he sought a Special Permit to rebuild under Section -----.

In December 2010, the public hearing opened in that case, Mr. Padula claimed that the appeal portion of Mr. Chiaraluce's petition was untimely claiming that the 30 day period within which to appeal began running in July 2010 and not on September 10, 2010 even though between those two dates Mr. Burke was engaging discussions with Town Counsel and Mr. Chiaraluce's ----- was submitting an amended plan at the request of Mr. Burke. In any event, as a result of that claim, in December of 2010, I indicated that in order to make that issue go away we would file a new and revised building permit application in which the building permit application from the start referred to a one story building and if that building permit application were denied, as I expected it would be, then we would appeal that denial to the Zoning Board and ask that the public hearing in that case which is #18A-10 be consolidated with the first case which is #18-10. So, in September 2010, I submitted the one story building permit application, on January 3, 2011, Mr. Burke denied that application and on January 7, 2011, we appealed Mr. Burke's denial in case #18A-10, both cases were consolidated for a hearing on January 26, 2011, because of the snowstorm that hearing did not occur and those hearings were continued to February 23, 2011. On February 23, 2011, at the request of the parties, we asked that the cases be continued to April 13, 2011, to give the parties the chance to try to work out a settlement and that continuance to April 13, 2011 was subsequently extended to May 25, 2011 to give the parties more time but we were not able to craft a settlement and so on May 25, 2011, the hearing resumed with the respective case #18-10 and it began with respective case #18A-10 and after hearing testimony that night from both parties, the hearings in both cases were continued to tonight, so, that is the chronology.

Mr. Ferreira commended Attorney Serkey for the prompt and excellent job in the chronology. He stated there are two items on the table here. There is an appeal of the Building Inspector's decision and the application for a Special Permit. He asked the Board to deal with the appeal issue first and asked Town Counsel to give comments. The Board received previous letters by Town Counsel, but since that counsel is no longer Town Counsel, Attorney Talerman has brought himself up to speed on this. He asked Attorney Talerman to give the Board some comments on what was heard previously. He reiterated that reference was made to the time limits of the appeal (the first appeal) which may not be good and whether or not a subsequent appeal can be submitted or a subsequent building permit on the same issue in order to start the 30 day period over again so the Board can dispense with that issue and then deal with the Special Permit if

we can dispense of that.

Attorney Talerma agreed with Ilana Quirk's original opinion that the first appeal was untimely. The second one is a building permit for a different structure and the appeal on that. He doesn't have a quarrel with the timeliness of that. What he thinks ultimately is really going to be the issue and garner more discussion is the Special Permit issue.

Mr. Ferreira asked Attorney Serkey what matter he wanted to argue first. Attorney Serkey stated he wishes to speak about case #18A-10. He stated one of the arguments that has been raised by Mr. Padula has been that there has been abandonment on the part of Mr. Chiaraluce. Attorney Serkey pointed out the section in the Zoning Bylaw that talks about abandonment. It talks about abandonment of uses. It does not talk about abandonment of the structures. Also, in case law re: abandonment, the courts require that there be an intention to abandon. He stated if anything is evident to him on the 20 year history of this case, it is that there was no intention to abandon on the part of Mr. Chiaraluce or on the part of the previous owners. Mr. Ferreira stated the fact is that the lot remained vacant for a long period of time.

Attorney Serkey stated there have been appeals from decisions by this Board up and down the judicial ladder. Mr. Ferreira agreed, but going back before that, he asked when the initial structure was destroyed. Ms. Scarsciotti said 1991. Mr. Ferreira stated the structure that existed on the lot was destroyed in August of 1991. So, in 1991 whomever the owner was, had their home/cottage destroyed. He questioned when was the first attempt to rebuild that home by someone. Attorney Serkey stated in 1995, there was a judgment from the Superior Court that an injunction was issued prohibiting Mr. Padula from obstructing Mr. Chiaraluce's use of the easement of the lot and further ordering Mr. Padula to remove so much of the chain link fence as is necessary to allow Mr. Chiaraluce ingress and egress over that portion of Mr. Padula's lot necessary to make use of the right of way. Mr. Ferreira agreed and recalled these issues and agreed with the judge's decision that if there is an easement to get to your property, you are entitled to use it. It didn't vanish, but it could be to sit on the beach or sit on the land. He questioned if there was there any intention to rebuild within a 2 year period by any owner since August of 1991. Mr. Martin recalled, from the history of the case, that they did apply, however, did not exercise it. Mr. Ferreira assumed that sometime before August of 1993, someone was issued a building permit and did not use it. is that fair. *(*Discussion ensued and the conversation was difficult to hear with more than 3-4 people speaking at once).*

Attorney Serkey made the point that the deed is dated July 30, 1993 (Chiaraluce). Discussion ensued re: the term/definition of abandonment of the use and structures relative to the Town of Wareham Zoning Bylaws with input from all parties involved. Attorney Serkey discussed the section of the Zoning Bylaw pertaining to Section 1335 involving reconstruction of a single family structure. In that section, it says there is a need to go before the Board of Appeals if there has been a substantial increase in the non-conforming nature of the structure and that there will be no increase at all in the non-conforming nature of this structure. If the reconstruction will be substantially more detrimental to the neighborhood than the existing nonconforming structures... Attorney

Serkey stated none of those apply if the beginning language is looked at. It states, as provided for in Section 6, a non-conforming single or two family dwelling structure may be reconstructed provided that the proposed structural change itself conforms to the requirements of the present Bylaw and does not intensify any existing non-conformities or result in any additional non-conformities. In which case, the Building Inspector may issue a building permit and an application with the Board of Appeals need not be made and that is the section that he feels allows (the applicant) to have a building permit as a matter of right. Mr. Ferreira asked how this conforms to the requirements of the present Bylaw. Attorney Serkey answered the present Bylaw grandfather's structures that are pre-existing, non-conforming. Discussion ensued. (**Conversation amongst Board members and others started and discussion was hard to understand*).

Attorney Talerma advised the Board and all interested parties (inclusive of Attorney Lanza and Attorney Serkey) that there is a threshold determination that needs to apply to 1335 before it can be determined if it applies at all in this particular context. He stated this has to get passed first to go into the analysis that Attorney Serkey suggests in which case he would have further commentary. He thinks Attorney Quirk, a former partner, indicated that this bylaw could not apply to this particular construction, if he is correct on the intent of 1335. He stated 1335 appears to be some effort to incorporate into the Town's zoning bylaws the general provisions of Chapter 40A, Section 6, with or without modifications. He feels this is the determination the Board has to make. Under Chapter 40A, Section 6, the provisions of not more nonconforming apply only to instances where there's an existing structure that someone may want to tear down immediately and replace; lawfully in existence. The language in 1335 doesn't track the statute word for word. It never said that same thing. It doesn't unambiguously state that this only applies to instances where someone has a structure that they want to tear down and replace. There are some clues in this provisions where it says and does not intensify any ----- mainly someone to believe that this could only apply to a situation where there is an existing house. Someone pulls an application to tear down a cottage and build something larger, but there is not enough information for him to say definitively as counsel that this is exactly what was intended. Discussion ensued and questions were asked re: the section of the bylaw and the meaning thereof.

Mr. Ferreira indicated the Board should take votes or at least a polled vote within the context of the hearing because it's not a final vote to determine these kind of issues because otherwise, they are going around in circles. He stated the Selectmen established a Zoning Rewrite Committee to consist of several members. Mr. Martin was a member of this committee. He stated he himself attended a few of the hearings at the library, but he was not a member of that committee. He explained when Mr. Martin was assigned back to active military duty, he (Mr. Ferreira) was appointed to take Mr. Martin's place. He stated eventually the committee was sun-set. He explained during the course of the hearings a lot of discussion centered around site plan review. One issue he was very protective of was property owner rights. He wanted to show that the ZBA is looking to protect zoning for people and people's rights. He had asked at that time if the Zoning Rewrite Committee was using Attorney Witten to assist. He stated he told the committee that one of the biggest problems Mr. Misiasek has as a Building Inspector is

trying to determine non-conformities. He had asked if something could be written in a bylaw that would help determine when the ZBA can allow someone to put an addition on, add on, and so forth, when they don't meet the setback requirements, special permit vs. variance allowances, etc. Thus, Section 1335 was written. Whether it can be used for vacant lots, that is something to discuss, but it was not intended for vacant lots.

Discussion ensued re: hurricane destruction and rebuilding by right. Mr. Ferreira explained the issues pertaining to the issues that the Board and the Building Inspector were having related to nonconformities and loss of structure(s) to a hurricane or a fire and the revamping of Section 1335 of the Zoning By-Law. Mr. Churchill indicated that as long as he has been working in Town, this Board and Mr. Misiasek have sent him to this Board because there are two options for a vacant lot. If there ever was a structure constructed on the lot (and if that is the case), Section 6 is followed. The sentence Mr. Ferreira talks about and his interpretation of those zoning regulations in 1335 was going to allow to rebuild on those lots as long as it meets the setbacks and all the requirements so that we did not have to come before the Board on those vacant lots that had a structure at one time on them. There are many for example, one on Blackmore Pond Road, one in Onset, two on West Street, etc. where structures were gone longer than 20 years and this Board issued. The previous Building Inspector, Mr. Misiasek issued a building permit, perhaps went to Court on another issue, however, this Board upheld the Building Inspector's decision to issue it under Section 1335.

Ms. Engerman stated it was twenty years ago, there is no foundation. A week ago, even six months ago, this foundation would still be there to build a house on. There is no foundation. A statement was made previously that there is no foundation, no markings on where this house was, & the Board does not have the footprint.

Mr. Ferreira informed the Board that they have two cases before them. One is the appeal, based on Section 1335. The other case, which is the Special Permit to rebuild, would be under Section 1332. Counsel has decided to go with #18A-10 first, which is 1335. He feels the Board should vote on #18A-10 first and then let counsel make arguments on 1332 and then the Board can take a vote on that. He asked all legal representatives if that sounded reasonable.

Attorney Mark Lanza (who represents _____) asked to be heard. He presented his case to the Board and counsel and gave his opinion re: the pending case. He showed pictures of the property after the hurricane. In his opinion, Attorney Lanza stated with respect to Town Counsel and Attorney Serkey's opinion, this was untimely and explained to the Board the history of his client and the property in detail. (****Due to background noise, coughing and talking, transcription is limited***).

Attorney Serkey read a memorandum to the Board that was written by Mr. And Mrs. Chiaraluce in July 2003 which lead to the Superior Court case that resulted in the injunction preventing Mr. Padula from blocking access. Mr. Martin read a footnote from the judge, although the Board might choose to consider a Special Permit for Lot 5A under the current Zoning By-Law. It specifically lists 1320 ----- 1333, so therefore, he is going

to say even back then on this decision, 1335 is probably not considered.

Mr. Ferreira entertained a motion to close the public hearing on case #18A-10 which is the appeal of the Building Inspector's decision. He stated for the record, Attorney Serkey has withdrawn the appeal, but the Board has an appeal on #18-10 which in December requested a new building permit application. He feels the only way the Building Inspector's decision could be overturned is to say that the applicants are entitled to a permit under 1335.

MOTION: Mr. Martin moved to uphold the Building Inspector's decision re: Joseph H. Chiaraluce – 16 Wankinquoah Avenue. Mr. Secher seconded.

VOTE: (3-2-0)

POLLED VOTE:

Mr. Ferreira – Yes to uphold

Mr. Martin – Yes to uphold

Mr. Secher – Yes to uphold

Ms. Scarsciotti – No to not uphold

Mr. Sharkey – No to not uphold

NOTE: Town Counsel informed the Board that it would take four votes to overturn the Building Inspector's decision.

Mr. Ferreira indicated that this takes care of the appellant part of #18A-10. He asked if the attorney would withdraw the request for a Special Permit for #18A-10 so #18-10 can be dealt with. Ms. Scarsciotti stated #18-10 is the appeal for the denial of the Director of Inspectional Services and to reinstate the building permit to construct a single family dwelling.

Mr. Ferreira read the language for #18A-10 into the record, indicating that #18A-10 has nothing to do with a Special Permit. Attorney Serkey agreed that #18A-10 could be disposed of.

Mr. Ferreira pointed out that as an engineer, he would agree that under this section height is more of a function of the type of structure, one-story, two-story, three-story and not necessarily the height above the ground because the height above the ground is dictated by FEMA and by the type of lot. If the applicant were asking to put a two-story structure he would say no because it doesn't meet the requirement. The height is now different. So, he is reading height in this case as stories. Height is not something that can be controlled and this Board cannot control.

Attorney Talerman gave his interpretation to the Board. He discussed modifications, height, & regulation of bylaws. The height is related to the number of stories, not so much, the overall height. Further discussion ensued re: three interpretations and what the Board could and should do and what the Board's interpretation is.

Discussion ensued re: Section 1332 & what the position of this Board was under 1332 A. as a matter of right and B. under Special Permit. Attorney Serkey feels that two votes are needed for the record. Mr. Ferreira added he thinks the real problem is that under 1322, the intent was to allow for the reconstruction of a similar structure, forgetting about the flood plain issue. The flood plain issue he is interpreting because he feels it is an equitable and material change. The Board has voted on this before and he cannot quote which cases, but since he has been on this Board, a house has been destroyed in a fire, there is very little left, it has to be razed, everybody had pictures, everybody knew it was a colonial or ranch and now the person is going to put the colonial back in, but they are going to add a dormer. So, the dormer is a change in the exterior appearance because it did not have a dormer before, now it will have two dormers on the front, but it's still going to be a two-story, three bedroom colonial and that is what existed. He feels that is what the intent of this bylaw is. He feels then the Board needs to look at this abandonment issue and see if the Board wants to say categorically that abandonment applies because it has been so long. Then the Board may say 1322 does not apply. He feels the intent of 1322 was for something closer in time frame and not this far apart. He would agree that for whatever reason there have been so many court cases, there has been an intent to try to get a building permit, the wait is two years, three years and now the fact is we are now in 2011. It has been 20 years since 1991. He has heard this case and feels people have property rights; both the abutters and the current owner. Everybody has a right. The Board has heard all of the arguments.

Discussion ensued re: case law. Mr. Ferreira stated when the Board closes this case and vote, the Board's vote should be whether it should be by right or by Special Permit as Attorney Serkey asked us to do. The decision, under 1322, has to be based on the fact whether the Board has deference to saying that abandonment has occurred based on case law or the passage of time even though the time issue was a length of time and well over the 2 years and that would be the Board's basis. If someone wants to vote yes to a building permit it's because time doesn't matter. If someone wants to vote no to the building permit under 1322 they have to consider that abandonment has occurred.

Discussion ensued re: 1322 and alternatives and whether or not a Special Permit was needed or whether it is a matter of right between Counsel and Board members.

Mr. Ferreira indicated that under #18-10 the applicant asked for an appeal to overturn the Building Inspector's decision, so, to overturn the Building Inspector's decision would be to grant a building permit by right and then, in the alternative, grant a Special Permit under 1322.

MOTION: Mr. Secher moved to close the public hearing for petition #18-10. Mr. Sharkey seconded.

VOTE: Unanimous (5-0-0)

MOTION: Mr. Martin moved to uphold the Building Inspector's position that a Special Permit is required relative to petition #18-10. Mr. Sharkey seconded.

ROLL CALL VOTE:

Mr. Martin – Yes
Mr. Secher – Yes
Ms. Scarsciotti – No
Mr. Sharkey – Yes
Mr. Ferreira – Yes

VOTE: (4-1-0)

It was stated the first half of the appeal, a building permit, is not allowed as a matter of right. Thus, the matter goes to the second request which is to issue a Special Permit under 1322. It was noted there was a typo in the legal ad that it was 1332 and we clearly understand that it was 1322.

MOTION: Mr. Martin moved to grant a Special Permit in accordance w/ Zoning Ordinance #1322 referencing the Site Plan dated September 2, 1010 so labeled as Exhibit A & additional plan revised on August 27, 2010, both plans by J.C. Engineering, Inc. considered to be architectural plans. Mr. Sharkey seconded.

MOTION: Mr. Martin moved to amend the motion to approve the Special Permit w/ the finding under Section 40A, Section 9 in accordance w/ the requirements.

ROLL CALL VOTE:

Mr. Martin – Grant the Special Permit
Mr. Secher – Grant the Special Permit
Ms. Scarsciotti – Grant the Special Permit
Mr. Sharkey – Grant the Special Permit
Mr. Ferreira – Grant the Special Permit

VOTE: Unanimous (5-0-0)

It was noted that Town Counsel will prepare and write the decision.

VI. ANY OTHER BUSINESS

Mr. Ferreira informed the Board that they have a decision written by Attorney Jon Witten for Bartlett Pond Village, of which, the Board had voted on. He understood everyone received a copy, but apparently only the Chair and the Clerk received a copy. It is a well worded decision and he indicated he thought the Board should sign tonight and that all Board members should sign.

VII. ADJOURNMENT

MOTION: A motion was made & seconded to adjourn the meeting at 10:05 P.M.

VOTE: Unanimous (5-0-0)

Attest: Mary Scarsciotti

Mary Scarsciotti, Clerk

WAREHAM ZONING BOARD OF APPEALS

Date signed: 10-26-2011

Date copy sent to Wareham Town Clerk: 10/27/11 (b/s)