

**BRIDGTON BOARD OF APPEALS
MEETING**

Downstairs Meeting Room

**December 17, 2015
7:15p.m.**

The Bridgton Board of Appeals was called to order at 7:15p.m. by John Schuettinger, Chair. Those in attendance were: John Schuettinger, Chair; Gregory Jones; Marita Wisner, Alternate; Julie Whelchel, Alternate. Absent were: Sharon Smith Abbott, Vice Chair; Two Vacant Positions - Regular Members.

Also present was: Agnieszka A. Pinette, Drummond Woodsum, legal representative for the Town of Bridgton.

Pledge of Allegiance

Appoint Alternate(s) to vote in place of any absent regular member(s), if necessary

Chair Schuettinger appointed Marita Wisner, Alternate, and Julie Whelchel, Alternate, to act in the capacity of absent regular member.

Approval of Minutes - October 29, 2015

Member Wisner moved to approve the minutes as presented.

Member Jones 2nd. 4 Approve / 0 Oppose

Old Business - None

New Business

PUBLIC HEARING

Administrative Appeal - Planning Board Decision

Applicant: Robert and Rita Tyszka

Property Owner - Douglas S. Holt and Todd Perreault

Project: Bridgton Bottled Gas

Location: 4 Raspberry Lane/Portland Road

Represented by Robert and Rita Tyszka

Chair Schuettinger said this is an appellate review and read for the record Article XV Section 4 of the Town of Bridgton Site Plan Review Ordinance regarding appellate appeals.

Mark Bower, Attorney with Jensen Baird, was present representing Robert and Rita Tyszka. Attorney Bower said this is an appeal of the November 4, 2015 site plan approval granted by the Bridgton Planning Board for a bulk storage propane facility to be located on Raspberry Lane which is a dead end residential road accommodating 12 single family homes. This industrial use in a residential neighborhood is inconsistent with the Comprehensive Plan of the Town of Bridgton and it fails to meet several sections of the review criteria set forth in the Site Plan Review Ordinance you are tasked to review. The Chair

has already pointed out that this type of review deals with whether the Planning Board made a decision that is arbitrary and capricious meaning a willful and unreasoning action without consideration of fact for circumstances or has no rational basis to justify a conclusion, or it lacks substantial support in the evidence. The substantial evidence standard requires you to examine the entire record to determine whether if on the basis of all the evidence before the Planning Board it could fairly and reasonably make a conclusion. The appeal filed by Mr. and Mrs. Tyszka raised procedural, as well as substantive issues, dealing with evidence and the procedure followed by the Planning Board in the process. I also see that Attorney Pinette is present and I would like it known for the record that she advised the Planning Board in their deliberation and decision making at the October 6, 2015 meeting. I am not sure if she had any role in drafting the Findings of Fact or not but it seems for the record that this was not uncommon. We would like to preserve for the record our objection to Attorney Pinette's representation of the Board of Appeals. For procedural issues on April 17, 2015 Bridgton Bottled Gas "BBG" submitted an application for a bulk propane storage facility for three 30,000 gallon propane tanks in addition to the existing 3,600 gallon tank. BBG failed to notify all the abutters as required by Article V Section 1 Subsection g of the Site Plan Review Ordinance. This provision allows abutters or anyone else who has interest the opportunity to participate. On April 28th there were certain impact statements from the Department Heads that were issued on the application. May 12 was the first meeting where the application was discussed. On June 23 a new site plan was submitted for approval showing the new entrance off Raspberry Lane. Despite the changes to the Site Plan there were no new impact statements submitted by Department Heads. On August 4 the application was discussed and there were a few changes to the initial proposal. At that meeting the Planning Board did a straw vote on almost all the review criteria. In late August BBG constructed a new entrance without any approval from the Town which resulted in significant removal of vegetation from the side of Raspberry Lane. At the September 1st meeting the applicant acknowledged that they neglected to notify abutters of the application and at that meeting the Planning Board discussed the fact that there was a procedural error regarding the application in the failure to notify abutters and the failure to allow abutters to participate. A Public Hearing was scheduled to remove "the cloud" from the application. Scheduling the Public Hearing does not remove "the cloud", the point of notification is to allow abutters and other interested individuals to participate from the very beginning not just at the end of the process. On September 15 the Code Enforcement Officer issued a stop work order on the new entrance on Raspberry Lane and on the same day the Planning Board held the public hearing. On October 6 the Planning Board deliberated and voted to approve the site plan application with certain conditions. On November 3 the Planning Board voted to adopt a written decision. The end of October the Public Works Director issued a memo stating that Raspberry Lane was

adequate for the project. This memo was not discussed at the November 3 meeting by the Planning Board. **The first procedural issue** we are raising is the lack of notice, the Planning Board although not required, did not conduct a site walk. The Planning Board did not have any firsthand knowledge of the condition of the property especially that a new driveway had been built and a lot of vegetation had been cleared. **The second procedural issue** is the requirement of Department Heads to issue impact statements. The impact statements were issued far in advance of the final plan being submitted. **The third procedural issue** is that the written decision contains no discussion of Article 10 of the Ordinance which sets forth special regulations for industrial institutional and commercial uses which this is. **The fourth procedural issue** is excluding certain information that was submitted after the Public Hearing was held but before the Planning Board reached its decision which includes letters from Tyszka and LaPlante. There is nothing in the Ordinance that indicates a cut off for written comments to be submitted. It allows for a Public Hearing to be closed but there is nothing in the Ordinance that allows the Planning Board to disregard materials submitted in writing prior to deliberation. **And since the filing of the Appeal** by my clients, in between the Public Hearing of September 15 and the deliberations on October 6, Planning Board members engaged in email exchanges which constitutes a meeting outside of the public's view which is in violation of the Freedom of Access Act which is a concern because the emails show a bias against the residents along Raspberry Lane, in particular, one member where she indicates that she had discussion with the applicant outside of the Planning Board context (one at her home and one at the Town Office) and she made those disclosures so the Board would be aware of them but I still believe it is bias against the neighbors on Raspberry Lane. Regarding **substantive issues**, there are significant issues with some of the review criteria that the Planning Board was obligated to apply particularly with the Findings not being supported by the evidence in the record. **The first** is Public Safety and Traffic, Article VII Section 11 "Emergency Vehicle Access" the project is at the start of a dead end road which leads to twelve residential lots. The residents along Raspberry Lane are trapped should an emergency arise. The applicant's proposed evacuation plan states that residents are to shelter in place or be evacuated to the terminus of Raspberry Lane which is approximately 1 mile from the facility. This evacuation plan is not sufficient or adequate and is not what is required to comply with the Ordinance. **Second** there is a conflict of interest regarding the Town of Bridgton's Assistant Fire Chief. Throughout the Planning Board process the applicant offered comments on the state-wide safety issue in which he is the owner of the property to be developed and he is offering comment on the life safety issues as part of that process. The application includes an impact statement from the prior Fire Chief, Thomas Harriman, which is part of the 2005 application, which was approved but lapsed because nothing was done within 2 years. Mr. Harriman recommended an entrance off Route 302 because he recognized

that Raspberry Lane was the only egress for the residents. The current proposal is inconsistent with that advice. The entrance for this application is off Raspberry Lane not Route 302. **Third** there was a filing of the NFPA fire safety analysis which is referred to in the Planning Board's decision but it is a form that is filled out by the applicant, it is not an analysis by any fire safety authority or an objective individual including information which is not accurate. **Fourth**, there is a proposed layout to ensure that pedestrian traffic conditions shall not exceed reasonable limits for the neighborhood. The Public Works Director was supposed to assess the adequacy of Raspberry Lane to accommodate this proposal. In our view this should not have been a condition of approval. They are approving a project before figuring out whether Raspberry Lane is appropriate for the number of tractor trucks going in and out of the facility. The Planning Board should have determined if the road was adequate for use. At the Public Hearing the Code Enforcement Officer stated that the Public Works Director, Jim Kidder, was not qualified to make a determination as to whether or not the road was adequate because he is not an engineer. Instead Mr. Kidder submitted a memo to the Planning Board stating that the road was adequate and an engineer was not needed despite what the Code Enforcement Officer had stated at the Public Hearing. **Fourth** the applicant must demonstrate compliance with the Comprehensive Plan for the Town and this is found in Article VII Section 21. All the Planning Board found was the subject property is in an area designated as a growth area. This finding is not sufficient and is erroneous. Attorney Bower submitted to the Planning Board a map entitled "Town of Bridgton Future Land Use Map" for the record (see attached). The subject lot is located in the beige area on the map and is therefore in the designated rural neighborhood. The Comprehensive Plan states that there is a certain quality of life in rural areas that are cherished by those who live there. Rural designation is intended to provide long term protection of rural resources, important natural features, large blocks of open space and scenic lands. The subject property is closer to Route 302 which is the pink area which is designated as outer corridor which is a transitional area not a growth area. The Dead River facility was recently approved by the Town of Bridgton for the inner corridor which is a growth area and is appropriate. **Fifth** is air pollution which is in the Section IV Item N of the Findings and the Planning Board said no concerns have been expressed. It inappropriately shifts the burden of proof from the applicant to abutters. The finding is unsupportive because there is considerable testimony from Mark Cartonio who operates a green house and he testified that he became violently ill when they were bleeding their 3,600 gallon tank. Chair Schuettinger said I did not see anywhere in the record which tank was being bled.

Rita Tyszka, appellant, said there is only one tank at the site so that would be the one. Attorney Bower said at the Public Hearing the applicant acknowledged that propane smell is irritating but the Planning Board did not consider this worthy of discussion in making

their decision. **Sixth** is the buffering where landscaping should be incorporated into the plan and shall be designed and planted in such a way to minimize adverse impact on neighboring land uses. The Planning Board did not require any landscaping, however, they did include in Article IV Item I of the findings that the proposed tanks will be set back from Portland Road and Raspberry Lane and existing vegetative buffers along both road will be retained so as to provide an audiovisual buffer. From the driveway it is a straight shot up to the tank from the road and it is completely visible from road there is no screening and no landscaping was required to be installed. **Seventh** on the issue of noise the Planning Board found in Article IV Item T of the findings that although it was proposed that a small increase in truck traffic and associated vehicular noise on Raspberry Lane the proposal would not raise noise levels so that it will adversely affect nearby residents and there is no basis for making this finding. There will be an increase from a 3,600 gallon tank to a 30,000 gallon tank which will increase deliveries, tractor trailers and not just small trucks. **Financial and Technical Capacity**, Article VII Section B Item 24, the Planning Board made this finding regarding BBG which was the owner at the time, however, since that time the property has been sold to Stone Road Energy LLC, so the Planning Board needs to do an amendment to the Site Plan and make findings as to whether the new owner has the financial and technical capacity to do this project. To conclude, this industrial use is inappropriate for this residential neighborhood, it is not consistent with the comprehensive plan, it is not safe where it is, there are a number of procedural issues that require you to send this back to the Planning Board for further proceedings and with that I would like to turn this over to my clients and anyone else that would like to raise the issues with the proviso that only the evidence that was before the Planning Board is appropriate to talk about. Chair Schuettinger said I would like to point out that I am the chair not you and I decide who says what and when. I would like to hear from Ms. Tyszka next.

Ms. Tyszka said Attorney Bower has said everything that needed to be said, because this is the legal side we wanted legal representation. There are serious issues with this application, just in the mere fact that there is no egress even in the event of a minor emergency.

Kevin Ruane, abutter, said we have an issue with the gas that gets released out into the air. Sometimes it is so bad that you can't go outside. The other issue is children will be starting school next year and the bus stop is right at the corner of Route 302 and Raspberry Lane. In the winter snow banks can be at least 3' high and I am concerned with 18-wheelers coming in creating a hazard.

Gary LaPlante, abutter, said I am concerned with safety as it relates to emergency evacuation and the residents being trapped. There is only one point of entry and exit. Having to stage on sight puts people at risk. I am also concerned with property value impact.

Chris Chandler, Curtis Thaxter, legal representative for Bridgton Bottled Gas said this is an appellate review which means did the Planning Board have sufficient evidence to make the decision that they did and whether the decision is in accordance with the law or otherwise capricious or arbitrary. Clearly the decision was not capricious or arbitrary and it was in compliance with the law. There is no zoning so the map that was submitted by Attorney Bower is a future land use map not current. This lot can be used for commercial purposes as well as lots along that corridor such as C.N. Brown. The only evidence submitted at the actual hearing before the Planning Board was submitted by the applicant. The appellants discussed a lot of things that they thought were problems but they did not submit any evidence that supported their concerns. These appellants do have the burden of demonstration so it is not enough that they simply say the Planning Board made a mistake. They have to establish why a mistake was made and they have not done that. They brought up a conflict of interest because Mr. Perreault, Assistant Fire Chief, constructed the NFPA Fire Analysis. This analysis is not just an application but it is a method by which a Fire Department, Applicant or Developer uses to determine the risk and remedies for the risks. This analysis was thoroughly done and a plan was presented to the Planning Board consistent with that analysis such as for safety this applicant proposed a 10,000 gallon tank to service the site. This is a public road not a private road and the Planning Board in its discussion acknowledged that. The Planning Board determines if they accept additional information once a Public Hearing is closed. The evidence of traffic is that the road is a public road which has been built to more than town standards and as a condition of approval we want the Road Commissioner for the Town of Bridgton to look at the road and determine if it is sufficient and give him authorization to hire an engineer to make the determination. As a result, he made the decision that in his position there was no need to hire an engineer. The Planning Board is allowed to rely on its own personal knowledge of the site, its condition, location and access. There was evidence in the hearing that the Board was familiar with this area, they had gone to visit it, regardless of whether or not there had been a site visit. They are not required to have a site visit. The current owner of the property is now Stone Road Energy LLC. They bought the property from Mr. Perreault and Mr. Holt a few weeks after the Planning Board issued their approval. The permit travels with the property not the owners. The question of notification, even though notice is required once the application is accepted, that begins the time period and that was done. It wasn't as if any of the appellants did not have notice. The Tyszkas' had notice earlier than June 5th because they wrote letters to the Town beginning June 5th right up until two weeks ago so it is not as if they did not know what was happening or they didn't have access to the information, they are just now saying that technically because notice was not given to all the abutters you need to send it all back. The problem with that is, they had notice, your charge does not allow

you to do that because notice is not any of the criteria for determining whether not this application fits the standards. This is an existing business, the access at the end of that road is not going away, what is changing is this business has been there since 1998 and it is going to be expanded. This is a large lot that is well wooded and the claim that the driveway has been cleared of all the brush, in the record is a photo which you can see exactly what has been done, it is a driveway, everyone has to have a driveway, you don't have trees in the middle of your driveway. The applicants submitted an application which the Planning Board vetted carefully, they held a public hearing, took testimony from many witnesses, took testimony from Town Officials, analyzed the material before them which they found to be satisfactory and approved the application. All of those steps properly followed the Ordinance and were properly supported by the evidence. When this Board looks at the information in its totality, viewing the same evidence, was it substantial given the standard, if it was then the appeal should be denied.

Ms. Tyszka said part of the evidence was the NFPA application which is riddled with errors. It has incorrect information, wrong tank sizes and the address of the facility is wrong, the application was filled out by Mr. Perreault who is the applicant in conjunction with the Fire Chief. There are sections which ask if there are two entrances to the facility and it is filled out as yes, there is a section that asks if there is another facility nearby of this type that could cause an issue if there were a fire and C.N. Brown is mentioned a few times. In the NFPA application it seems that that is not a good idea to have something like this in close proximity and they have gone so far as to say that there is not a facility close by that has gas or oil. If this is what the Planning Board was relying on it is inaccurate. Chair Schuettinger said I have read it and understand your concerns.

Attorney Chandler said the problems that the Tyszkas' are identifying were corrected on the record. The original application was for three 30,000 gallon tanks and it was reduced to one 30,000 gallon tank and that was anticipated as part of the fire prevention program that the Fire Chief approved. One of the things that has been brought up is the relationship between the Fire Chief and Mr. Perreault and the reality is this safety program was over designed from what NFPA requires.

Member Whelchel said I am missing pages from the NFPA report. The Board members concurred that they also did not receive all the pages. Chair Schuettinger said it is a large report and the missing pages may have been irrelevant. We could ask Mr. Perreault to explain the document. Member Whelchel said I am not asking for an explanation but pages 4-3 to 5-17 were not part of the report. Mr. Perreault said all of that had to be updated before we ended up with the final packet. It was brought to my attention and a lot of that material, risk analysis, was an explanation of how to fill out the application and

why it is required to do so. It basically guides fire departments as to what they have to have for fire protection or what they need to install one or more tanks so before you can even start you have to have a risk analysis. A lot of the tanks now have internal valves so when there is a fire they automatically shut off the supply of propane to everything in the whole facility. Attorney Pinette said we are getting into extra record information/testimony and to answer your question if those pages were omitted that was erroneous. Member Whelchel said did the Planning Board receive those pages? Attorney Pinette said yes, we can arrange to have you review those during intermission. Attorney Pinette said I would like to correct my statement pages in between 4-3 and 5-17 of the fire analysis were not part of the record and the Planning Board did not see them, they were not submitted, so it is not part of the evidentiary record.

Attorney Bower said regarding the notification and Attorney Chandlers comment that the Tyszkas' were aware of the application, the fact is they were not properly notified. Mr. LaPlante said I notified them by chance. When I found out about this project from one of the other neighbors, who happened to be exiting Raspberry Lane, they informed me and I informed the Tyszkas'.

Attorney Bower said I recognize there is no zoning in Bridgton but the Ordinance does require consistency with the Comprehensive Plan which this project is not. Testimony is evidence and they provided as much feedback as they could without short notice of the meeting and this is why notice is supposed to be provided so abutters can view the information and hire an expert if they need to. The first meeting in May my clients did not attend so the "tone" was set and all the information was given out which is problematic because the next meeting after that was the August 4th meeting which they went through and the Planning Board conducted a straw vote on the review standards. The conflict of interest issue is important to us because it undermines the reliability of the evidence and the Planning Board should have sought a more objective point of view. The overbuilding of the 10,000 gallon tank is simply an indication that they are going to expand. If individual board members are visiting the site, it is problematic, which jeopardizes the due process because they may not have been visiting the correct property. A site walk would have been appropriate in this instance. There is an existing business there but what is being proposed is a greater scale and is inconsistent with the Comprehensive Plan.

Attorney Chandler said credibility is up to the Planning Board and they make that determination, they all had notice, they were involved in the application process, the email traffic between the Planning Board members was generated as a result of Findings of Fact that I submitted and there was a lot of discussion as to whether or not they wanted to accept them or not and they ultimately rejected them. There was no substantive discussion, it was not an illegal meeting.

Attorney Bower said I understand that the board members have a copy of the emails in your packet, however, the one email I want to point out is the one that was written by Dee Miller, Planning Board member, on September 18 where it exemplifies a bias against the abutters where it states "Much of the extended frame occurred because he had not taken new, more specific application requirements into account. When the Raspberry people had been properly notified of the application, they presented arguments that should have been made in 1998 during the original application period. To the credit of our chairman, the raspberries were given much time to present arguments that might otherwise be considered out of order. The Board has not "wasted" time, the assertion that can be inferred by the attorney offer to "expedite" our deliberations." This is going to the substance of the application, to the abutters, and whether to believe them or not, if they should have raised issues so that is why I raised the issue and the meeting outside of the Planning Board context and showing bias against the abutters.

Chair Schuettinger closed the Public Hearing at 8:25p.m.

Member Whelchel said I think we need to address each item individually. Chair Schuettinger said I concur, it is a mess, and I am disappointed in the Planning Board. I would like to discuss this with Attorney Pinette, but what I am thinking of doing is send this back to the Planning Board, and tonight we should address each of the 24 review standards and determine in the case of each one whether they had evidence to support their decision.

Attorney Pinette said the Board can uphold the Planning Board's decision if you agree that the criteria has been met, it was not arbitrary or capricious and the Findings of Fact are supported by substantial evidence **OR** you could reverse the decision if you found that any of the three items were not met **OR** you could remand the decision for additional Findings of Fact if you feel that the decision was correct but you need additional findings from the Board to substantiate the decision.

Chair Schuettinger said if we decide to grant the appeal can the new owner immediately submit a new application to the Planning Board? Rob Baker, Code Enforcement Officer, said I believe they can.

Member Jones said I am concerned with the lack of information and the missing pages from the study that the Board was using to determine safety, we don't have that information to determine if they were correct in their assessment. Chair Schuettinger said so you are saying that the evidence does not support the conclusion on that particular item? Member Jones said correct. Member Whelchel said that is one of my concerns but in fairness we should go through each item.

Chair Schuettinger said we will review each item of the Findings of Fact and Conclusions of Law to determine if they had substantial evidence to support their decision. Attorney Pinette said substantial evidence means, the Maine Supreme Court has been helpful in this respect and has told us what this means. If you are focusing on the sufficiency of the evidence the question is whether the Planning Board's findings are not supported by substantial evidence and the Court has told us that substantial evidence exists when a reasonable mind would rely on that evidence as sufficient evidence for a conclusion and that the Court has directed you to look at the findings of the Planning Board with deference and not substitute your own judgement or that of the Board and the Court has also said that the decision is not wrong because the record is inconsistent or a different conclusion could be drawn from. So what you need to ask yourself as you go through this exercise is whether there was no confident evidence in the record to the support the Board's decision. In other words, did the Board offer an implausible explanation that runs counter to the evidence that is in the record, did the Board fail to consider an essential factor and/or did the Board rely on factors that the Ordinance does not refer to. These are the kinds of questions that the Court directs appellate Boards to review.

Chair Schuettinger began review of the Findings of Fact and Conclusions of Law.

The Planning Board shall approve or approve with conditions a submitted application if there is an affirmative finding based on information presented that the application meets the standards set forth in Article VII of the Bridgton Site Plan Review Ordinance. The Applicant shall have the burden of establishing by demonstrable evidence that the application and project is in compliance with the requirements of the Ordinance.

After reviewing the application materials and supporting documents, public comments and testimony, and other related materials on file, the Planning Board affirmatively finds that:

John said let's review A. Preserving and Enhancing the Landscape. The proposal minimizes disturbance to soil and removal of existing vegetation during construction so as to largely screen the facility from view from public roadways. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of preserving and enhancing the landscape.

Chair Schuettinger said was there evidence in the record to show that that was true? Member Whelchel said the only thing I saw in the record was seeding the old driveway to regrow. Chair Schuettinger said there was oral testimony that they were going to keep the area forested. There was no landscaping plan submitted.

3 approve / 1 oppose (Marita) that there was sufficient evidence.

John said let's review B. Relationship to Surroundings. The proposed facility is surrounded by a mixture of residential and commercial structures and uses of compatible scale, size, and style. The construction will minimally disrupt slopes, soil types, and drainage ways. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of providing for a harmonious and compatible relationship to surroundings.

Member Jones said the map that was presented was for future growth. Chair Schuettinger said there is also a current map. Anne Krieg, Director of Planning and Economic and Community Development, said the subject property is noted in the Comprehensive Plan as outer corridor, it is a transitional zone that allows for commercial

development. Chair Schuettinger said that is in the existing plan? Ms. Krieg said that is in the plan that was recently ratified. It has not been implemented as of yet. The Board of Selectmen have appointed a zoning committee that are diligently working to create zoning to implement that land use plan. The Comprehensive Plan itself is not a regulatory document until the zoning goes in. The Town Meeting of November 2014 approved the Comprehensive Plan. Member Whelchel said does the requirement to comply with the Comprehensive Plan become non-existent because an Ordinance has not been written to address a certain element? Ms. Pinette said the Comprehensive Plan is a policy document which sets forth a vision for the Town and mechanisms to obtain the vision. Therefore, you cannot review this application under the mechanisms that have not been implemented, however, the policies that are within the plan are within your right to consider. Under this particular standard that is not going to the Comprehensive Plan this is related to a specific provision in the Site Plan Review Ordinance and it may be helpful for you to refer to both documents. Chair Schuettinger said they did analyze the slope and drainage there was a set of plans from Sawyer Engineering.

The Board concurred that that this section has been met.

John said let's review C. Vehicular Access. The proposed layout of access driveways does not exceed reasonable limits for the neighborhood, considering the placement of access points, traffic flow, and MDOT entrance/driveway permit conditions. The proposal relocates the existing access driveway on Raspberry Lane away from existing residential dwellings and toward Portland Road. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of providing for a layout of vehicular access and pedestrian traffic conditions that do not exceed reasonable limits for the neighborhood.

Member Jones said they said that there would only be a couple of vehicles. Chair Schuettinger said they expected one every other week to make deliveries but they did not ask how many vehicles would be arriving to pick up the gas or how much extra traffic would be created by having a larger tank or how much traffic there is currently. Member Wisner said I was wondering about pedestrian traffic. Chair Schuettinger said it is a gravel road, there are no sidewalks but there will be people walking on the road.

Chair Schuettinger said there was something in there from MDOT that they could not have access off Route 302.

Chair Schuettinger said I do not believe that there was enough evidence to meet the criteria. Attorney Pinette said are you saying that no evidence was presented, that the standard was met or that the Findings of Fact were not clear enough in respect to the Planning Board's decision which makes a difference on whether you remand or deny?. Member Whelchel said we need to determine if there was evidence? Attorney Pinette said you need to ask yourself whether no competent evidence exists to support the Board's decision so if there is any evidence in the record that supports the Board's decision then you have to affirm that standard, you can remand and ask the Board for more clarification.

Member Jones said there is evidence but not enough evidence. Attorney Pinette said would a reasonable mind be able to rely on the evidence in the record to reach the conclusion that the Planning Board reached? Chair Schuettinger said there was no evidence on pedestrian traffic. Member Whelchel said there was data regarding traffic flow. Chair Schuettinger said do we want to send it back to the Planning Board for more evidence? Attorney Pinette said if you think there is competent evidence in the record to support a conclusion you can remand it and instruct the Planning Board to clarify in their writing how they reached the conclusion with respect to pedestrian traffic, however, if you find that there is no competent evidence in the record, and you don't remand, you uphold the appeal and you reverse the decision.

Chair Schuettinger said so basically out of all of the items to decide on if there is even one that has no supporting evidence then we have to grant the appeal? Attorney Pinette said if you find that one of the standards that applies to this proposal has no demonstration of any evidence that can support the Board's decision then you need to uphold the approval and reverse the decision of the Planning Board.

Member Jones said so in this section "vehicle access" we say that we see some evidence here but there is information missing or lacking we can remand it to the Planning Board? Attorney Pinette said if you think there is record evidence that is not reflected in the decision you can remand it and ask for further Findings of Fact based

on that record. If you think that there is nothing in the record that can lead a reasonable person to believe that the standard has been met then a remand won't help you.

Chair Schuettinger said lets continue to review and not consider just one item, we will review the items that have been brought up by the appellant.

John said let's review N. Air Pollution. No concerns have been expressed regarding the proposal's impact on air quality. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of protection against undue air pollution.

Chair Schuettinger said there was one witness, an abutter, that brought up the issue that he became ill from the fumes that were coming from the site which no one refuted. Member Whelchel said there was a comment throughout the proceedings that said that propane has no adverse effect. Chair Schuettinger said you would need to figure out which meeting it was at. Member Jones said at the Planning Board meeting of October 6, 2015 it was moved and approved that the standard had been met. Chair Schuettinger said no documentation was provided. Member Whelchel said the Planning Board is saying that no concerns were expressed regarding the proposed impact on air quality when there were concerns expressed. Member Whelchel said Maine Municipal Legal Services that when an original approval is based on financial and technical capacity the original applicant, the Board, should require the new owner similar proof to complete the project under the original approval. Attorney Pinette said I would have to look into that because this is a unique situation where the property has transferred but for purposes of this appeal the question of sufficiency of the evidence consider the evidence before the Board which was the applicant that was before the Board and whether or not the new applicant needs to submit additional information is a separate consideration.

John said let's review T. Noise. Although the proposal is expected to generate a small increase in new truck traffic and associated vehicular noise on Raspberry Lane, the proposal will not raise noise levels so as adversely affect nearby residents. The proposal is exempt from the sound pressure level limits set forth in the Bridgton Site Plan Review Ordinance because Raspberry Lane and Portland Road are public roads. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets all applicable noise limit standards.

Chair Schuettinger said they did discuss the business being exempted because it is on a public road but they did not discuss or provide any evidence as to whether or not the activities on the property would create any kind of noise. No one discussed how much noise it would create by pumping from the truck to the tank, would the truck engine have to run constantly, and it is about 50' from the neighbors. Member Whelchel said it is stated that the proposal will not raise noise levels so as to adversely affect nearby residents. Chair Schuettinger said how can they know that it will not do that? Member Whelchel said they set decibel limits for the facility. Chair Schuettinger said that is in the decision? Member Whelchel said they are setting it but they are saying that the proposal won't raise noise levels to adversely affect nearby residents so if the proposal does not raise noise levels why did they set time limitations and noise decibel limitations? Chair Schuettinger said that is the standard in the Ordinance. Attorney Pinette said you are not raising concerns about the noise generated by truck traffic on Raspberry Lane but noise generated on the property arising on the property by the activity being proposed and are there particular activities being proposed that raise concerns for you? Chair Schuettinger said there was no discussion. Member Whelchel said the applicant agreed to maintain the limits and is that sufficient? Attorney Pinette said yes, the burden is on the applicant, he had to submit evidence to the Planning Board to support each standard. There was discussion about noise impact and it is up to you to decide whether that discussion and if the evidence provided by the applicant was adequate to reach a reasonable conclusion.

Chair Schuettinger said do we want to consider the **conflict of interest with the Fire Chief** doing his own analysis? Attorney Pinette said that is a procedural challenge to the procedure and you are allowed to evaluate that but I would recommend that you consider the procedural issue separate from your assessment of sufficiency of the evidence. You have decided to tackle the evidentiary portion of this

first and I would suggest you continue to do that and after that address the procedural questions.

Chair Schuettinger said there is brief discussion at the Planning Board meeting of September 15 where Mr. Tyszka asked if there will be a study done to determine how loud the trucks are that will be on that road? Mr. Perreault said one of the exceptions, number 3, is traffic noise on public roads.

John said let's discuss L. Municipal Services. The proposed facility will not draw any water from the public water supply or use the municipal sewer system. Impact statements submitted by Department Heads did not present any concerns with respect to impact on the municipal road systems, fire department, police department, emergency medical unit, solid waste program, or other municipal services and facilities. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of no unreasonable adverse impact on municipal services.

Chair Schuettinger said they did get impact statements from the Department Heads. We know that they are not going to draw from the public water supply and they will use a tanker to fill up the cistern. There is no sewage involved. Member Whelchel said the fire safety analysis is not a complete record for evaluation purposes. Chair Schuettinger said it seems like they discussed that at length. Member Jones said how did the Planning Board base their decision? Chair Schuettinger said so you feel that the Planning Board based their decision on incomplete information? Attorney Pinette said that is not a sufficient basis to find an insufficient evidence to reach that conclusion. There is always going to be incomplete information in these kinds of situations. Just bear in mind that the question you have to ask yourself is given what is in the record is there enough for a reasonable person to conclude that the standard has been met. You have to confine yourself to this record to reach your conclusion. You can't demand the Planning Board to go beyond what was in the record, all you can do is assess what was in the record was adequate. Member Whelchel said the fire safety analysis evaluates where the water is coming from and states that there is a public water supply available and takes into consideration the distance from the containers to the hydrant.

John said let's discuss K. Emergency Vehicle Access. The proposed driveways are sufficiently sized and designed to provide access to the facility by emergency vehicles. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of providing and maintaining convenient and safe emergency vehicle access to all buildings and structures.

Chair Schuettinger said they did discuss providing a Knox Box to the Fire Department and the driveway at the Route 302 location that a tank would be available.

Chair Schuettinger said how important is the notification procedural history? I know that everyone knew about the application fairly soon but not at the very beginning. The first time you bring an application to the Planning Board they review it to figure out what may be missing then you go back and do it again. Attorney Pinette said the procedural challenge are important and you should discuss them before you conclude deliberations. You do have the ability to pause if you need to and reconvene your deliberations. Chair Schuettinger said I think we will have to do that because it is 9:45p.m. and we are only halfway through the process. Attorney Pinette said I would suggest that you have "flagged" some review criteria in your straw vote that you feel have not been satisfied and maybe you can review those and if you feel confident that you understand what is in the record and you know that those standards have not been met then you can direct the staff accordingly. If you are not sure and you want some time to review it then you can do that. Before you complete your deliberation, whether that is today or at another meeting, you need to

address the procedural issues that have been raised and whether you do that now or later it is up to you. Chair Schuettinger said the procedural issue is that they did not do it? Attorney Pinette said are you referring to the notice? Chair Schuettinger said yes, when they did their first notice they only notified direct and not the 100' radius as required. It was brought up at a subsequent Planning Board meeting and they decided to hold a Public Hearing which would give them the ability to notify everyone and put it in the paper twice so it was not done properly. Member Whelchel said so is the best way to handle this is to look at the Tyszka appeal and review each item. Attorney Pinette said the best way may be to go through the issues that were raised by the parties this evening and reach a level of satisfaction.

Member Jones said we should also discuss the relationship between the Fire Chief and the Assistant Chief because it was part of the record. Attorney Pinette said you can address the conflict of interest issues and I can speak to your jurisdiction on that point and we can also talk about the notice issues. I can address both of these issues this evening if you would like. Member Jones said I don't feel that it is an issue. The question is would the Fire Chief render the same opinion with a different applicant. Attorney Pinette said I think for purposes of his application it does not matter who filled out the form, the application materials were submitted by the applicant and the Board reviewed that and understood the role that the applicant had with respect to his own self-interest with respect to his other positions in town. There is nothing that prevents somebody in town from applying for a permit. Member Jones said I agree but working on the paperwork while on duty or off duty? Attorney Pinette said as far as conflict of interest, I have serious doubts about this Board's jurisdiction over that issue. I don't want to make a determination about that right now but I would like an opportunity to research that further and to see if that goes beyond the scope of this Board. I do think that there may be some issues that have been raised by the appellant that are beyond this Board's purview, that being a central one. The other point to bear in mind is fact finders like the Planning Board are tasked with making credibility determination and they see the applicant, the public testifying, they receive information in writing from members of the public from Department Heads and it is really within their purview to make a credibility determination and this Board cannot do that in its appeal capacity so when you are looking at the sufficiency of the evidence you have to be deferential to who the Planning Board believed. Member Whelchel said from a procedural error standpoint do you consider the abutter list. Attorney Pinette said to Mr. Chandler do you have any case law or citations as to why that would be outside this board's authority. Attorney Chandler said I don't have anything on me it is just because it is not within the actual description of what the Board reviews and the basis for reversal. The Ordinance has a specific list of criteria that the Board reviews and a basis for reversal and it does not

include insufficiency of notice. Attorney Bower said this is a legal error, an error of law, and that is one of the reasons for reversing the decision. Attorney Chandler said it is not a legal error because they did receive notice. Attorney Pinette said what about the jurisdiction? Attorney Chandler said I don't think the provision of notice is within the scope of the legal error that they look at, they look at compliance with the Ordinance in terms as whether it satisfies the standards and if there is legal error in that application not legal error if the neighbors received adequate notice. Attorney Pinette said I would advise the Board that you give me an opportunity to review and report my findings back to you on these two procedural issues on legal background.

Chair Schuettinger recessed the meeting at 9:45p.m. to reconvene on Thursday, January 7, 2016 at 6:30p.m.

Respectfully submitted,

Georgiann M. Fleck, Deputy Town Manager
Town of Bridgton