

**BRIDGTON BOARD OF APPEALS
MEETING**

Downstairs Meeting Room

**January 7, 2016
6:30p.m.**

The Bridgton Board of Appeals was called to order at 6:30p.m. by John Schuettinger, Chair. Those in attendance were: John Schuettinger, Chair; Sharon Smith Abbott, Vice Chair; Gregory Jones; Robert Mawhinney; Deborah Brusini; Marita Wiser, Alternate; Julie Whelchel, Alternate. Absent were: None.

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

Chair Schuettinger reconvened the meeting at 6:30p.m.

Pledge of Allegiance

Old 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

Recessed on December 17, 2015

Recognition of New Regular Members

A. Robert H. Mawhinney

B. Deborah Brusini

Member Mawhinney said I would like to recuse myself from the proceedings. I have been on the fire department for approximately 15 years and I know a property owner on that road. (Member Mawhinney removed himself from the proceedings and left the meeting)

Vice Chair Smith Abbott said I did not attend the previous meeting but I did view the proceedings on Lake Region Television. Chair Schuettinger said are you comfortable staying on the Board as a full member? Vice Chair Smith Abbott said yes.

Member Brusini said I am comfortable taking part in the proceedings. If there is an alternate that would like to participate I would not be opposed to stepping aside.

Attorney Pinette said if Vice Chair Smith Abbott and Member Brusini would like to participate it is important for you to state for the record that you reviewed the record from the Planning Board, you watched the video of the deliberations from December 17, 2015 and you feel comfortable participating.

Vice Chair Smith Abbott said I have read the complete packet and I did watch almost all of the meeting on Lake Region Television.

Member Brusini said I have read all of the material and I watched the December 17, 2015 proceedings in full at least a couple of times. I also watched the September 15, 2015 Planning Board Public Hearing and the Planning Board deliberations.

Attorney Pinette said I would encourage the Chair to ask if the attorney for the appellant and if the applicant have any objections to their participation.

Chris Chandler, Curtis Thaxter, legal representative for Bridgton Bottled Gas and Stone Road Energy, said we do not have any objection.

Rita Tyszka, applicant, said our attorney is not present this evening but I am concerned that if Member Abbott only watched a small portion of the meeting to when deliberations began then you missed the case given by our attorney. Vice Chair Smith Abbott said whatever you are comfortable with is fine with me.

Attorney Pinette said to Vice Chair Smith Abbott did you watch on the video the presentation by the attorneys before Board deliberation began? Vice Chair Smith Abbott said yes. Ms. Tyszka said I am very comfortable if you have seen the whole thing.

Chair Schuettinger said if both parties are in agreement we will proceed.

Chair Schuettinger said before we proceed "I wish to apologize to the members of the Bridgton Planning Board for my ill-considered remarks at the beginning of this Board's deliberations on December 17th. The members of the Planning Board provide a vital service to our community which requires a great deal of their time and effort and often involved very complex issues. Because of their commitment and attention to detail it is rare that any of their decisions come before this Board and it is my hope that both Boards can continue to work harmoniously and in the best interest of our fellow citizens".

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

Chair Schuettinger said we could have one of the alternates be on the Board to equal the five members. Vice Chair Smith Abbott said I would like to suggest that Member Whelchel be re-instated because she was

part of the original proceedings. Chair Schuettinger said Member Wisner also participated. Attorney Pinette said because you have a quorum it would be cleanest that you not invoke the use of the alternates. Therefore, no Alternates were appointed.

Attorney Pinette said the options for the Board are you can uphold the Planning Board's decision as is OR you can vacate the decision meaning the permit is nullified OR you can remand the decision back to the Planning Board which means that you are sending back the decision to the Board with instruction which can include direction to correct factual error that may be in the decision, direction to address review criteria that were not addressed or were not fully enough addressed based on the existing record OR you can remand and instruct the Planning Board to reopen the Hearing record to take in additional evidence on a particular subject matter that was not addressed during the public proceedings or in the materials before the Board when they made their decision.

Vice Chair Smith Abbott said it has come to our attention in a letter that is dated December 7th that the property has been transferred to a new owner. According to the Maine Municipal Manual when there is a change of ownership in the course of an appeal it should go back to the Planning Board. Therefore, in light of the new information the property under discussion has been sold, I move to remand the appeal back to the Planning Board and require the new owner to offer proof of financial and technical capacity as recommended by the Maine Municipal Association Appeals Board Manual. In addition I think we should recommend that the original application for approval be amended in the following ways; a new safety analysis form be completed by an independent source such as the State Fire Marshal's Office and that such form include material missing from our document specifically form 6-7 to 7-2 and 7-5 to 8-1 and the issue of the proximity of C.N. Brown Storage facility be addressed in the safety analysis. Furthermore, we might recommend that every effort be employed to ensure that all abutters of the property be informed in a timely and legal manner of any further meetings and that signed receipts of such notices be available for review. Chair Schuettinger said is that a motion? Vice Chair Smith Abbott said I guess that is a motion because I don't see any point of discussing anything further given the fact that the property has changed hands. (The motion was not seconded).

Chair Schuettinger said if we want to remand it they will have to reopen the Public Hearing and if so then in addition to any concerns that you have we should make sure that we have reviewed everything that is in the record to see if there are any additional items in the record. We have to specifically identify what things will be reviewed when the public hearing is reopened. Attorney Pinette said it would be helpful if the Planning Board received that type of information.

Attorney Chandler said I would urge the Board to address all of the issues so if it is sent back we don't have to do a "piece meal" situation would be disruptive to this Board as well as the process as a whole. Attorney Pinette said you have no objection to the Board of Appeals instructing the Planning Board to address the issue of financial capacity with respect to the new owner? Attorney Chandler said no objection. Attorney Pinette said what about the right title and interest? Attorney Chandler said we can provide right title and interest at any time.

Ms. Tyszka said I would like to make sure we go through the Appeal which is what we are here to do and cover issues that were brought up in our appeal in particular the Comprehensive Land Use and if it complies with that.

Chair Schuettinger said we need to compare the application submitted by the Tyszka's and the Findings of Fact submitted by the Planning Board.

Chair Schuettinger said **Item D. Parking and Circulation**

Planning Board Findings of Fact:

"The existing parking areas and proposed access driveways create a roundabout within the subject property which reduces the need for delivery trucks to back out of the facility, provides adequate turning capacity for trucks and public safety vehicles, and clearly delineates vehicular traffic patterns. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of providing for safe, convenient and clearly delineated parking and circulation."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item E. Surface Water Drainage**

Planning Board Findings of Fact:

"The proposal adequately provides for stormwater runoff using onsite absorption techniques, including use of wooded buffer areas and installation of an underdrain swale. The proposal will cause the peak stormwater runoff values post-development to be less than the peak runoff values under existing conditions. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of adequate provision for surface water drainage."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item F. Setbacks**

Planning Board Findings of Fact:

"The proposal meets all state and local regulated setbacks from applicable vehicle rights of way and pavement or traveled ways. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the setback standards."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item G. Existing Utilities**

Planning Board Findings of Fact:

"The proposal imposes no additional unreasonable burden on public utilities. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of no unreasonable burden on public utilities."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item H. Advertising Features**

Planning Board Findings of Fact:

"The Applicant proposes no new signage or advertising features as part of the application. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the advertising features standard."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item I. Special Features of the Development**

Planning Board Findings of Fact:

"The proposed tanks will be set back from Portland Road and Raspberry Lane and existing vegetative buffers along both roads will be retained in order to provide an audiovisual buffer. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of minimizing adverse impact of special features of the proposed development on surrounding uses and properties. "

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Member Whelchel said one of the complaints by Mr. and Mrs. Tyszka was that the new driveway was bigger. Chair Schuettinger reminded Member Whelchel that she is an alternate member and cannot participate in these deliberations.

Member Brusini said I felt that the conclusion that the Planning Board made was adequate.

Chair Schuettinger said **Item J. Exterior Lighting**

Planning Board Findings of Fact:

"Proposed exterior lighting will be downward-facing and non-flashing, and will be limited to an area immediately surrounding the LP gas tank. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standards for exterior lighting."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item K. Emergency Vehicle Access**

Planning Board Findings of Fact:

"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."

Mr. and Mrs. Tyszka stated in their appeal application:
"The Board failed to recognize that, when an emergency results in Raspberry Lane being blocked off, there is no ability for emergency vehicles to access existing homes farther down Raspberry Lane or for Raspberry Lane residents to evacuate".

Chair Schuettinger said we discussed this and decided that it was o.k. Vice Chair Smith Abbott said that it was o.k. for them not to evacuate? Member Brusini said I saw on one of the drawings a pull-out area for a fire truck off of Route 302. However, there could be a concern if the entrance were blocked and there was an emergency. Therefore, one of the emergency vehicles would need to make room for the other to access. Chair Schuettinger said this concern is for emergency vehicle access to the site, not to other places. Member Brusini said not to the neighborhood? Chair Schuettinger said correct. There is a *Knox Box* which is a box with a key in it for access by the Fire Department or Police Department. Member Brusini said in terms of municipal access the standard was met. Vice Chair Smith Abbott said shouldn't there be consideration for emergency vehicles being able to access the development past the subject site? Chair Schuettinger said whatever the Planning Board used to decide yes

or no on this particular issue, was it a reasonable thing for them to do. Vice Chair Smith Abbott to consider the safety of their fellow citizens was unreasonable? Chair Schuettinger said whether or not they could get to the site and not what was going on further up the road.

Member Jones said currently that is not in the ordinance but whether or not emergency vehicles can access that site.

Vice Chair Smith Abbott said this is a site with a volatile material and it has unusual access. I can't believe it is not the job of the Planning Board to have a broader view on what might be involved in keeping the rest of the neighborhood safe.

Attorney Pinette said if you are looking at substantive challenges to the evidence, whether there is sufficient evidence to meet the review criteria, you should limit your analysis to that particular criterion and it may be helpful to review the Ordinance and the decision at the same time. Article VII Section B.11 of the Site Plan Review Ordinance states "Provisions shall be made for providing and maintaining convenient and safe emergency vehicle access to all buildings and structures." Vice Chair Smith Abbott said so the question that was being proposed to you was it reasonable for the Planning Board based on the evidence before it to conclude that that standard was met? There may be other places where questions of safety arise and they were placed in the appeal where Mr. and Mrs. Tyszka raised that question not as this particular criteria but other criteria.

Member Brusini said in terms of the emergency vehicle access for the development can we examine the Ordinance and determine that there was a section that was not discussed by the Planning Board? Chair Schuettinger said we could make that part of our decision and that would be up to the Planning Board. Attorney Pinette said if there are review criteria that the Planning Board did not address it is within your purview to instruct the Planning Board to re-visit the evidence on that topic and make Findings and Conclusions on that particular issue.

Chair Schuettinger said **Item L. Municipal Services**

Planning Board Findings of Fact:

"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."

Mr. and Mrs. Tyszka stated in their appeal application: "The Board failed to recognize that the adverse impact on the fire department is unreasonable, and the Board also failed to consider the Fire Chief's personal relationship and the Assistant Fire chief's economic interest in the proposal when accepting their professional testimony as fire department officials. The Board's findings are not supported by substantial evidence in the record."

Chair Schuettinger said Article VII Section B.12 of the Town of Bridgton Site Plan Review Ordinance states "The development will not have an unreasonable adverse impact on the municipal services including municipal road systems, fire department, police department, emergency medical unit, solid waste program, schools, open spaces, recreational programs and facilities, and other municipal services and facilities."

Vice Chair Smith Abbott said we can conclude that the fire department in its current state is capable of handling a major event to a 30,000 gallon propane tank. That is the extent of the site right now but not in the future. Chair Schuettinger said they would have to apply for expansion. Vice Chair Smith Abbott said right now that site is limited to one 30,000 gallon tank. Chair Schuettinger said they are probably going to also keep the existing 3,600 gallon tank which has been there all along.

Chair Schuettinger said you would need to look at this and say that the Planning Board had various pieces of information from Department Heads including the Fire Department. Just because the person proposing the application is an Assistant Fire Chief it does not mean that he is not an expert. The Fire Chief has not been related to them for about 10 years.

Member Brusini said Attorney Pinette was going to review the conflict of interest question. Attorney Pinette said there was some question as to whether or not that was within the Board's jurisdiction. The challenge that Mr. and Mrs. Tyszka is making is not a true conflict of interest issue. A conflict of interest arises when a member of the Planning Board has a fiduciary conflict or some other ethical conflict when they serve on the Board. It has nothing to do with whether the applicant has a conflict. I don't think there is any question that the Planning Board, the applicant and members of the public participating in the proceeding were aware of the various roles and relationships that the applicant had with the fire department which was all part of the record. It is part of the Planning Board's duty to evaluate the credibility of the people testifying and submitting evidence on applications. The appellants were not raising a conflict of interest challenge with respect to the Planning Board members. The question is, rather, was the fact that the applicant had an employment relationship with a municipal provider something that the Board was aware of when it made its decision and if so it is up to the Board to make a credibility determination.

Member Brusini said I was o.k. with the Planning Board's decision in terms of that aspect.

Member Brusini said I did not see an impact statement for emergency medical personnel. Chair Schuettinger said that is not one that is part of the Town of Bridgton Department Head status. Member Jones said they are an outside agency provider. Georgiann Fleck, Deputy Town Manager, said the Town of Bridgton Department Heads that review and submit impact statements are the Code Enforcement Officer, Fire Department, Economic Development, Public Works, Police Department and Transfer Station. Ms. Brusini said since it is brought up in the Ordinance how is that concern addressed? Chair Schuettinger said it could be an oversight, however, the Fire Department would probably notify the hospital and they send the ambulance. Therefore we would need to determine are our municipal services capable of meeting the needs of this project which we could add to our list of concerns.

Chair Schuettinger said **Item M. Water Pollution**

Planning Board Findings of Fact:

"Water Pollution. The elevation of the property to sea level is approximately 400 feet. The site proposed for development drains toward the west and the Portland Road. Soils on the site are listed as Deerfield loamy sand ("C" drainage class), with 3-8% slopes. Soil disturbance and vegetation clearing will be minimized to that necessary to install the proposed tanks and driveways. The proposal includes adequate phosphorus and stormwater runoff control measures. The proposal will have no impact on the quantity or quality of groundwater. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of protection against undue water pollution."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item N. Air Pollution**

Planning Board Finding of Fact:

"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."

Mr. and Mrs. Tyszka stated in their appeal application:

"A review of the public hearing will show this statement to be completely false. Mark of Mark's Lawn and Garden (an abutter) spoke for several minutes during the hearing about a horrible air quality experience he had with the existing 3,600 gallon tank at this facility. He clearly voiced his concerns about

whether the "maintenance purging" of the much larger 30,000 gallon tank might adversely affect air quality. The Board's findings are not supported by substantial evidence in the record."

Vice Chair Smith Abbott said there seems to be an error of fact. Member Brusini said I agree Article X Section 1.e of the Site Plan Review Ordinance states "Any industrial use which is found by the Planning Board to constitute a public nuisance by reason of the emission of dust, fumes, gas, smoke, odor, noise, vibration or other disturbance shall be expressly prohibited. No such finding shall be made by the Planning Board until after a public hearing has been held." Therefore, I think the concerns expressed should have been followed-up on. Attorney Pinette said it would be helpful if you look at paragraph 14 of the Ordinance to determine where the Planning Board went wrong. Member Brusini said I don't remember seeing that evidence. There was a summary from the applicant that had comments stating that propane is not an environmental hazard.

Chair Schuettinger said **Item O. Water Use.**

Planning Board Finding of Fact:

"The proposed facility will not draw any water from the public water supply and provides for the installation of a 10,000-gallon water tank to accommodate the anticipated needs of the proposal. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of not causing an unreasonable burden on any existing water supply."

Mr. and Mrs. Tyszka stated in their appeal application:

"See evidence comments under previous section (I) Municipal Services. The analysis incorrectly states that, "The plan provides for the installation of a 10,000 gallon water tank to accommodate the anticipated needs of the proposal". The Board is misinterpreting the purpose of the 10,000 gallon tank which is an emergency tank required to initially keep the propane tanks cool in the event of a fire related emergency. Additional water would certainly be necessary and is anticipated to come from the municipal water supply over two miles away. There was never any answer to the public's questions regarding maintenance responsibility of the existing fire pond on Raspberry Lane or its ability to support the homes on Raspberry in the event of an emergency. The Board's findings are not supported by substantial evidence in the record."

Chair Schuettinger said I believe they are referring to the supply for fire protection and not municipal water supply.

Member Jones said I don't have any concerns with this section. Chair Schuettinger said I don't know who would be responsible for the fire pond. Member Jones said it would be the development's responsibility.

Chair Schuettinger said **Item P. Soil Erosion**

Planning Board Finding of Fact:

"The proposal minimizes disturbance to soil and removal of existing vegetation. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of protection against unreasonable soil erosion or reduction in the capacity of the land to hold water."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item Q. Sewage Disposal**

Planning Board Finding of Fact:

"The proposal will not cause any increase in sewage disposal. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of provision for adequate sewage waste disposal."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item R. Scenic and Natural Beauty**

Planning Board Finding of Fact:

"The proposal retains existing vegetative buffers along Portland Road and Raspberry Lane in order to minimize the visibility of the tanks from public roadways and other properties. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of protection against undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said **Item S. Waters and Shoreland**

Planning Board Finding of Fact:

"No part of the proposal is situated within 250 feet of any pond, lake or river. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of no adverse effect on waters and shoreland."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said this is not applicable.

Chair Schuettinger said **Item T. Noise**

Planning Board Finding of Fact:

"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 to 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."

Mr. and Mrs. Tyszka stated in their appeal application:

"There was no substantial evidence in the record to support the Board's finding regarding noise. It was pointed out several times by the public that allowing large fuel trucks 24-7 access to this facility via the residential road will greatly increase noise levels on the road and to the facility at all hours of the night. Noise that do not exist in this neighborhood today."

Member Brusini said there was discussion by this Board that had nothing to do with traffic but had to do with when a truck was at the site and noise generated with that.

Vice Chair Smith Abbott said Mr. Kidder said that there was not going to be a major increase in the traffic, however, we have read that trucks could be coming 24/7. Will there not be a significant increase in trucks accessing this site or will there be a major increase? Chair Schuettinger said first we need to consider if the Planning Board had sufficient evidence to make the decision they made or not. In my own opinion I don't think they had any evidence only verbal comments. No one had delivery charts showing frequency. The company did say that they were going to start out with one delivery every other week increasing as the business grows but I don't know if we can consider that. Member Jones said the only thing I would have a concern with is it was stated that the proposal was exempt from Article VII. Section B.20 of the Site Plan Review Ordinance and the sound pressure level limits because Raspberry Lane and Portland Road are public roads, however, there is nothing in the Ordinance that gives that exemption it says that it must meet the decibel levels. Member Brusini said it allows for an exemption. Member Jones said only during certain times of the day. Chair Schuettinger said someone should check on it. Member Brusini said it would be the same if a truck pulls up and the engine is running the entire time it is doing its activity I wouldn't call it traffic or noise but I don't know the

procedure maybe the truck turns off. Chair Schuettinger said I don't know either.

Chair Schuettinger said **Item U. Conformance with the Comprehensive Plan**

Planning Board Finding of Fact:

"The subject property is located within an area designated as a growth area in the Bridgton Comprehensive Plan. The Planning Board affirmatively finds, based on this and other information presented, that the proposal conforms with the Comprehensive Plan."

Chair Schuettinger said I know that Mr. and Mrs. Tyszka had an issue with this but they do not have it listed did not list this in their appeal application as a concern in this section so we will review the submission further.

Chair Schuettinger said I am assuming that is the old Comprehensive Plan that is still in effect because the new one has not been officially adopted, is that right? Member Jones said it has been adopted. The subject property is listed as being in that growth area, it is the property behind the subject property that is not listed in the growth area. Member Brusini said when you refer to the map, the tiny block where the propane place is located is part of the outer corridor which is defined and designated as a growth area and the residential area starts after that. I would be o.k with what the Planning Board decided.

Ms. Tyszka said is it possible to speak to that because it is totally wrong? Chair Schuettinger said no, we will look through your entire submission and see what you had to say.

Chair Schuettinger said **Item V. ADA Compliance**

Planning Board Finding of Fact:

"No aspect of the proposal is subject to the requirements of the Americans with Disability Act ("ADA"). The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the standard of ADA compliance.

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said this section is not applicable to the project.

Chair Schuettinger said **Item W. Flood Zone**

Planning Board Finding of Fact:

"No part of the proposal is situated within a flood zone. The Planning Board affirmatively finds, based on this and other information presented, that the proposal meets the flood zone standard."

Mr. and Mrs. Tyszka did not list this in their appeal application as a concern.

Chair Schuettinger said this section is not applicable to the project.

Chair Schuettinger said **Item X. Adequate Financial and Technical Capacity**

Planning Board Finding of Fact:

"The subject property is currently used by the Applicant as an LP gas storage facility. The Applicant is financially secure and the proposal will not have a negative impact on the financial security of the Applicant. The Planning Board affirmatively finds, based on this and other information presented, that the Applicant has adequate financial and technical capacity to meet all applicable standards."

Mr. and Mrs. Tyszka stated in their appeal application:

"See evidence comments under pervious section (J) Financial Capacity. Without any provision of the economic cost to develop the project (including the costs to provide the trainings to the fire department that area apparently relied upon), it is impossible to know what the cost of the project will be. Consequently, it is impossible to know if the applicant has the financial capacity to construct and operate the project. The Board failed to obtain 'proof' of financial capacity as required and therefore the Board's findings are not supported by substantial evidence in the record."

Chair Schuettinger said Article VII Section B.24. of the Site Plan Review Ordinance states "Proof that the applicant has adequate financial and technical capacity to meet the above standards."

Vice Chair Smith Abbott said is a letter stating that they have proof sufficient or do they need to supply financial data? Attorney Pinette said the Planning Board interpreted that provision that what the applicant submitted was adequate. Chair Schuettinger said it is basically a statement from the accountant. Vice Chair Schuettinger said it is moot since the property has changed hands. Attorney Pinette said the new applicant has agreed to submit information on

financial and technical capacity. I think the Board should feel comfortable making that request.

Chair Schuettinger said we will review the Procedural Errors outlined in the appeal application submitted by Mr. and Mrs. Tyszka. Attorney Pinette said the standard of review is a little different in relation to how you deal with this section. You are not deferring to the Planning Board decision on these items. You need to look at the law and see if there was an error of law related to the procedural challenges.

Chair Schuettinger said Item 1 of Mr. and Mrs. Tyszka's outline addresses the notification to abutters. We know that there were errors made in the notification of abutters and nearby residents. However, I am not sure if it is enough for us to consider overturning the decision. Attorney Pinette said the Board should address this but there is no question that when the application was submitted the applicant did not notify all of the abutters. The question on notice goes directly to the due process rights and with respect to this appeal the only due process rights before you are the rights of Mr. and Mrs. Tyszka as appellants. So you need to consider if Mr. and Mrs. Tyszka were adequately notified of the proceedings and if they were not notified was that lack of notice cured in some manner. Member Jones said they may not have received notice but they did submit letters from July on during the process. The Planning Board remedied the abutter notification issue by reopening Planning Board debate by having the applicant notify abutters and Mr. and Mrs. Tyszka participated and they were engaged throughout the process.

Chair Schuettinger said Item 2 of Mr. and Mrs. Tyszka's outline of procedural errors: it was brought up that the Planning Board did not receive impact statements throughout. It was said that the Department Heads have a monthly round table discussion where they are updated on all pending projects. Member Brusini said does that need to be a written record? Attorney Pinette said this issue is not fatal to the decision. If, on remand, you want to direct the Planning Board to secure additional impact statements that is fine to do. Chair Schuettinger said I have never seen where the impact statements are supposed to cite an ordinance section or state law as applicable to their comments. Member Jones said no, I have never seen it in the limited things we have done. Vice Chair Smith Abbott said the impact statements are usually brief. Member Jones said I think what they want is when they make a comment it cites the law. Attorney Pinette said if there was an error on behalf of the Department Heads to not include a citation it is a harmless error and you can provide a footnote or a request that they do that in the future.

Chair Schuettinger said Item 4 of Mr. and Mrs. Tyszka's outline addresses the supplemental information requirement where the Planning Board asked the Public Works Director for an assessment of the road. He did comment on the road. Attorney Pinette said the question here is whether the condition that the Planning Board imposed on the applicant

was unlawful. As your attorney, I can advise you that it was not because the Planning Board has the authority to impose such conditions.

Chair Schuettinger said Item 5 of Mr. and Mrs. Tyszka's outline brings up a public nuisance by reason of fumes or other disturbance. Attorney Pinette said this is a sufficiency of the evidence issue. I would encourage you to review Article X Section 1.e of the Site Plan Review Ordinance to determine if the Planning Board should have made findings on those standards. Member Brusini said I am concerned with this. The fact that the comments that Mr. Cartonio made, even though he was not sure of the time-frame, he seemed to be clear that he felt nausea and light-headed are symptoms that are consistent with propane inhalation and could be evaluated. Chair Schuettinger said under air pollution it stated that no concerns had been expressed. The definition in the Site Plan Review Ordinance states "Connected with the assembling, fabrication, finishing, manufacturing, packaging or processing of goods or the extraction of minerals." Attorney Pinette said would the Planning Board conclude that this was not an industrial use and determine that the standard did not apply based on the evidence in the record and if you are not clear on that you could direct the Planning Board to make findings with respect to whether or not this was an industrial use and if Article X applies.

Member Brusini said the concern that was brought up by Mark Cartonio apply to Article X as well as Air Pollution? Attorney Pinette said the air pollution standard in the Ordinance is specific and states that the applicant shall consult federal and state authorities and furnish evidence to the Planning Board. I heard the Board conclude that there was no evidence on that topic so your instruction to the Planning Board would be to get evidence on this topic if you decide to remand. The Planning Board did not address in their findings Article X so you would instruct the Planning Board make findings and conclusion on that issue.

Chair Schuettinger said Item 6 of Mr. and Mrs. Tyszka's outline addresses the two written letters from members of the public (Tyszka and LaPlante) and that the Board is obligated to accept all public comment on a matter that is submitted before a decision is made. I don't believe that that is true. Attorney Pinette said this was a question that was presented to me by the Planning Board when this issue arose and I explained that my view was when the Planning Board Public Hearing ended it closed the record. It is standard practice to not admit any additional evidence, whether it comes in the form of letters, testimony or any other public comments, once the public hearing record is closed. So unless the public requests permission from the Board and receives that permission to supplement the record that additional information must be excluded. Member Brusini said so there was no legal error by the Board? Attorney Pinette said no, I don't believe so. Chair Schuettinger said so if we instruct the Planning Board to reopen the Public Hearing as part of the remand then

they can. Attorney Pinette said to the extent that those letters fall within the category or subject matter that you instruct the Planning Board to open the Public Hearing on then anyone can submit evidence. Chair Schuettinger said can we say only those two letters? Attorney Pinette said you could not restrict it to those two letters. You would need to provide opportunity for the applicant and other parties to comment. I would advise you to identify the review criteria that you feel were not sufficiently addressed and limit reopening of the record to those subjects.

Chair Schuettinger said Item 7 of Mr. and Mrs. Tyszka's outline addresses the oral commitments made by the Applicant to the Planning Board. The conditions of approval have a notation regarding oral commitments. Attorney Pinette said this is standard language which was recommended by Maine Municipal Association. There is nothing unlawful about this.

Chair Schuettinger said Item 1 in the Substantive Errors of Mr. and Mrs. Tyszka's outline has already been discussed. The Board concurred.

Chair Schuettinger said Item 2 in the Substantive Errors of Mr. and Mrs. Tyszka's outline is in reference to the conflict of interest which we have already been discussed. The Board concurred.

Chair Schuettinger said Item 3 in the Substantive Errors of Mr. and Mrs. Tyszka's outline is in reference to the existing conditions.

Attorney Pinette said it would be helpful to think about what your role is as an appellate Board. These are not substantive challenges only requests for additional findings of fact that the Board did not make. I would suggest that if you determine that a substantive review criterion was not supported by substantial evidence you can remand and instruct the Board to get more evidence to refine their analysis but I don't think it is necessary or helpful to go through the point by point in this section. I would suggest that if you know of any aspects of the summary of the facts that the Board laid out that were incorrect, those should be corrected, but otherwise this section is where the Planning Board summarizes the evidence as a whole and determines what the proposal is and what the impact will be. It is up to the Planning Board to determine how lengthy or short the summary should be. I think the one factual issue that the Board raised is the 1 mile vs. $\frac{1}{2}$ mile distance to the end of the road.

Chair Schuettinger said I believe the NFPA statement was that they wanted to have a $\frac{1}{2}$ mile evacuation route, then it was discussed as to whether it should be $\frac{1}{2}$ mile or 1 mile. Member Brusini said they had discussion to start at the entrance to the development, lot line, and an option was to evacuate in place. Chair Schuettinger said we are also going to ask that they clarify the NFPA report.

Attorney Pinette said for the benefit of the new members it might be helpful to review the first three review standards to see if you have anything to add for clarification.

Chair Schuettinger said A. is "Preserve and Enhancing the Landscape". Did the Planning Board interpret it correctly? Vice Chair Smith Abbott said the Planning Board does state that the proposal minimizes the disturbance but is it enough? Chair Schuettinger said they are planning on re-seeding the old driveway and are going to let it revert to its' natural state. The new driveway is closer to Route 302 than the old driveway.

Chair Schuettinger said B. is "Relationship to Surroundings." Is there supposed to be some evidence to support that? Attorney Pinette said Article VII Section B.2 sets forth specific factors to consider. Chair Schuettinger said how can you compare a gas tank to a house? Member Jones said and you are also comparing a gas tank to one that is already there. There are also other various businesses along that corridor. Member Brusini said the Planning Board also made a judgment on "surrounded by". Chair Schuettinger said if you are driving up Route 302 you are not going to see this facility at all but you do see the C.N. Brown facility. Member Brusini said also surrounding it is an existing 4,000 gallon tank and this tank is going to be much larger but it was agreed upon that it would be shielded from the neighborhood and Route 302, however, the entry off Raspberry Lane will not be but they have to have a driveway. Therefore, I feel that they did make a reasonable judgment. Attorney Pinette said in a situation like this where there are competing and conflicting evidence, the Maine Supreme Court has been clear that the appellate board's role is not to pick and choose but to defer to the Planning Board. Therefore, what you would be telling the Planning Board is even though there is conflicting evidence at testimony on this topic there is sufficient evidence to support your view that this standard has been met.

Chair Schuettinger said C. is "Vehicular Access". This is a paved road with no actual sidewalks. Member Brusini said there was a point made that there would be a school bus that would stop on the corner of Raspberry Lane while there was other activity. Attorney Pinette said you don't have to decide how to deal with the issue. If you conclude that the Planning Board did not address that topic you can instruct the Board to reopen the record on that subject matter, take in evidence and make a specific finding and conclusion on that issue.

Chair Schuettinger said I believe we have addressed all of the concerns set forth by Mr. and Mrs. Tyszka in their appeal application. I have five items of the review criteria that need to be addressed. Attorney Pinette said I would suggest that you take a "straw poll" of the Board as to the direction you want to go remembering vacate, uphold, remand with instruction and given this is a complex appeal I think it would be helpful for the Planning Board to make a written order. Therefore, I would suggest you instruct your staff, with legal counsel assistance, to draft the order and present it to you for final

approval at which point you would take a formal vote and then it would be sent to the Planning Board. I heard you identify several factual errors that need to be corrected, I heard you identify several review standards that were not addressed and I heard you identify parts of other review standards where evidence had not been submitted and so, if you decide to remand, the Planning Board should be directed to reopen the record on those items and then after the closing of the record make additional findings and conclusions.

Chair Schuettinger said if they reopen the record is that different than reopening the Public Hearing and how are they going to get the evidence from the applicant unless they open the Hearing? Attorney Pinette said most likely the Planning Board will hold another Public Hearing but they have the authority to open up a public comment period where they receive written submission on those topics which would be a procedural matter for the Planning Board chair to decide.

Chair Schuettinger said are we going to remand or what? The Board members each concurred to remand with the following instruction:

Chair Schuettinger said the items I have listed are "**Vehicular Access**" and we want them to address the issue of pedestrian traffic. Member Brusini said the Site Plan Review Ordinance lists traffic flow, sight distances, turning lanes and lastly pedestrian-vehicular contacts. Chair Schuettinger said would that require a professional traffic study. Member Jones said that would be up to the Planning Board to decide probably they would open up the Hearing to review the information they had. Attorney Pinette asked, specific to pedestrian traffic? The Board concurred.

Chair Schuettinger said the other item I had listed is "**Municipal Services.**" There was no impact statement regarding emergency medical units. Member Jones said there is someone that does it but the Town does not provide those services so I don't know if we can direct a private company to provide that information. Attorney Pinette said it is not up to the Planning Board to direct who submits the information: they would reopen the record and the burden would be on the applicant to submit information on that issue. Member Brusini said there are impact statements that were submitted but no information regarding medical.

Chair Schuettinger said the other item I had listed is "**Air Pollution**" which ties in with **Article X** of the Site Plan Review Ordinance. Attorney Pinette said no those are two separate issues. For air pollution the applicant did not consult with federal and state authorities to determine applicable air quality laws and regulations and did not furnish evidence to the Planning Board of compliance with the required consultation so there was no evidence submitted.

Chair Schuettinger said the other item I had listed is "**Noise**" pollution and we determined that there was no evidence submitted as to what noise would be generated by the facility itself. Member Brusini

said also the normal traffic going in and out was not assessed? Member Jones said no, just the site, they stated that there would be access 24 hour and the exemption is after 8:00. Attorney Pinette said I need clarification, the Board could not find evidence on Article VII Section B.20.a of the Site Plan Review Ordinance which states "Excessive noise at unreasonable hours shall be required to be muffled so as not to be objectionable due to intermittence, beat frequency, shrillness, or volume (referring to table in item b.) Member Jones said the applicant is saying that the sound pressure limits are exempted within a specific time frame. Attorney Pinette said are you asking the Board to reopen the hearing record on this subject or make finding on it? Member Jones said I would say reopen for evidence.

Chair Schuettinger said the other item I had listed is "**Adequate Financial and Technical Capacity**" which needs to be addressed by the new owner.

Member Brusini said there were two questions concerning "**Article X**" that fumes did not cause a nuisance but that standard applies to industrial use. Chair Schuettinger said they have to decide if a facility of that size is industrial in nature. It might classify as commercial rather than industrial. Chair Schuettinger said L.P. Gas has no smell normally but there is an additive.

Attorney Pinette said I think I have enough instruction to proceed, therefore, when would the Board like to reconvene to review the written order?

Chair Schuettinger scheduled the Board's consideration of the written order and recessed the meeting to reconvene on Thursday, January 28, 2016 at 6:30p.m.

Respectfully submitted,

Georgiann M. Fleck, Deputy Town Manager
Town of Bridgton