AB minutes December 13, 2012

Town of Washington Board of Appeals

PO 408, Washington, ME 04574

December 13, 2012

The meeting opened at 7: 35 pm.

Present were: Chairman: Norman Casas; Vice-chair/Secretary: Henry Chapman; Members: Lowell Freiman and Dorothy Sainio; Alternate: Jim Kearney; CEO Bob Temple. Absent: Member: George Carlezon and Alternate:Chris Vigue. Attendee: Henry Sainio.

The minutes of September 8, 2012 were accepted with all in favor.

Old business: none

New business: Review of the Appeals Board section of the Land Use Ordinance (LUO).

Mr. Casas noted that there is a section on powers and duties in Section 3 of our current ordinance that is not folded into Mr. Temple's proposed changes. He and Mr. Casas thought it might be added into Section 4 of the new one. Mr. Temple said the provision dealing with administrative appeals from Section 3 would go into Section 4.1, the one dealing with interpretation would go into 4.3 and the one dealing with variances would go into 4.2. Mr. Kearney asked about section 3.1 in the draft of the proposed changes which said the Board should elect a secretary from its membership. He was confused since the recording secretary is not a member of the Board. Mr. Casas explained that some time ago, when there was a need, the Board decided to elect a nominal secretary from the membership and the Selectmen hired a recording secretary to take minutes. Mr. Chapman objected to the wording of Section 3.4. about an alternate member being able to ask questions or offer comments only when members of the public are allowed

to do so. Mr. Casas asked why that was included. Mr. Temple said it had been in the state's model ordinance, but there was no rationale for it. Mr. Casas thought it was in the By-laws [that an alternate could participate, but vote only when appointed by the chair.] It had not been in the Land Use Ordinance (LUO) before. He asked about hearings. Mr. Freiman thought the alternate could participate but not vote. The phrase "only when members of the public are allowed to do so" was deleted.

Section3.3 referred to a conflict of interest and Mr. Kearney asked whether the town had a conflict of interest ordinance. Mr. Temple said it did not, but the point of this section was that it would be language used for every ordinance that has an appeals provision. As ordinances are amended, the Appeals Board section would be stricken but a note added: see Appeals Board ordinance. That would create uniformity. Mrs. Sainio asked about the terms for Board members and alternates indicated in Section 2.3. Mr. Casas determined that, under current rule, Board members are appointed for five years and alternates for only one. Mr. Freiman said that the members are appointed for five years so that the rotation is always right. Mr. Casas cited the ordinance: the Selectmen shall appoint two associate members for one year terms to serve in the absence of regular members. He said he liked the part in Section 1.B that said the Chair shall designate which associate member shall serve. He thought it would appear again in a later section.

Mr. Chapman noted that 3.6 states that the secretary is responsible for maintaining correspondence and records. These are public records and shall be filed in the municipal clerk's office and may be inspected at reasonable times. If the recording secretary was doing that, he wanted to know why he had a complete file of all proceedings from his earliest time on the Board. Mr. Temple noted that the change was a requirement that the Town have a freedom of information officer who was supposed to have all of that kind of thing available to the public. Mr. Kearney asked about Section 3.7 which referenced evidence and exclusion of immaterial evidence, but allowed for rights of the parties to present the party's case, etc. and conduct cross-examinations. He asked whether the Board really wanted to let those in attendance conduct cross examinations. Mr. Casas felt the Board should ask MMA for an opinion about that. Mr. Kearney explained that he interpreted parties to mean the appellant and those in the audience who might be opposed. He did not think the Board wanted those people to cross examine each other. He thought cross examination was the prerogative of the Board and was controlled by the chairman. He said appellants and opponents were supposed to submit evidence, documents, oral arguments and opinions. Mr Casas asked why that was in the model ordinance. Mr. Temple said it could be removed from ours. Mr. Chapman said they could just strike the line "and to conduct any cross examination." Mr. Freiman did not like the word "party." Mr. Temple added that the word "present" should be changed to "submit."

Mr. Freiman pointed out the error in Section 5.1.1.4 where "Planning Board" should be "Appeals Board." Mr. Chapman noted the error in Section 5.1.1 "must be file with" should be "must be filed within." Mr. Kearney asked why Section 5.1.1.5 refers to a pre application meeting. He thought the Board had always used the term "pre hearing conference" since pre application meant something that is done even before an application is even accepted, and he noted that a later section uses the term "pre hearing." Mr. Temple said he would change it. Mr Freiman pointed out a typo on Section 5.3 where "bnnnn" should be removed. Mr. Chapman asked whether the fee schedule mentioned in section 5.2.4 had been set. Mr. Temple said it had, and Mr. Casas felt it should be available to the Board. Mr. Kearney asked that Section 6.1.1.6 "pre application meeting" be changed to "pre hearing conference." For Section 6.3.1 he asked the meaning of "unique circumstances." Mr. Temple said that phrase was in the state statute, and the meaning was something the Board had to decide. Mr. Kearney then questioned section 6.3.2 which referred to a variance unreasonably affecting the market value of abutting properties since no one on the Board was an appraiser and he did not know anything about market values. Mr. Casas thought the language might be state mandated. Mr. Temple said the Board could make changes in Section 6.3, but not in section 6.4 in which standards in the shoreland zone were specified by the state. Mr. Temple said the wording in all six subsections of Section6.3 were taken from the LUO. Mr. Casas thought the practical difficulty referenced in Section 6.3 had been added so that the Board could actually grant variance from dimensional standards somewhere in town. Mr. Kearney said he understood Section 6.3.3: the practical difficulty is not the result of action taken by the petitioner, but he questioned "or a prior owner." That person could be a long previous owner, so he asked how far back did the Board go to establish a prior owner.

Mr. Temple said the Board could change the language in Section 6.3 if it wished, but Mr. Casas wanted to be sure the language was not the standard language for practical difficulty. He explained that the practical difficulty language here had been added when the Board discovered that the actual hardship variance was too strict. The courts have ruled that, in the shoreland zone, if one can walk on the property one was getting fair use. It was not necessary to be able to put a building on it. Mr. Temple recalled a case in which a Mr. O'Keefe wanted to put a camper on a property but the Department of Environmental Protection (DEP) had said he must still be 100 feet from the water. He noted that DEP would not allow some of the variances today which had been made in the past. Findings such as those might be a matter for suing the Town today. He felt there should be no variances in the shoreland zone as the Board had no choice. He thought in Section 6.3 the aim had to be less restrictive. Mr. Casas said that was when the Board had added "practical difficulty" to the section on variances because it was not as constricted by state law. Mr. Temple noted that if "practical difficulty were removed from Section 6.3, it would still provide for variances. Mr. Freiman said if all other conditions were met, he would have no problem leaving the phrase in since it was defined at the end of the section. Mr. Kearney pointed out that if a practical difficulty were not the result of the person who stood before the Board, then it must be the practical difficulty of a prior owner and therefore he could not be granted a variance. Someone must have done something at sometime to make it a practical difficulty. If it was not the petitioner, it must have been a prior owner which suggested that the Board could not give the person a variance. Mr. Freiman said if the petitioner could not meet all of the conditions, he could not be given a variance. Mr. Temple said the problems would be solved if practical difficulty were removed. The Board still would have the ability to make the decision.

Mr. Casas thought the problem must have to do with the lot having been configured in a certain way at some point in the past. Mr. Kearney said that would have been a prior owner. Mr. Temple cited an example of a non conforming lot, there was a lot of latitude in how the Board could deal with it. He referenced the setback of Mr. Wes Daniel's house which was non conforming because it had been built before the LUO had been put into place. He wanted to expand a first floor bedroom at the same setback. He was allowed to do so since the house is already non conforming, but he could not build it so that it came any closer to the road.. Mr. Temple noted that a permit cannot be given for a non conforming lot cannot be given today, but the Planning Board can allow for it in the case of a lot being divided for a family member. He said that was an example of something being created by a prior owner. Mr. Kearney thought a variance could not be given to anyone even if they did not create the practical difficulty because that difficulty was created at some point by a prior owner, thus the petitioner could not meet the condition of Section 6.3.3. Mr. Casas argued that a practical difficulty could also be the intrinsic configuration of the land. That would not have been the result created by a prior owner. Mr. Temple thought there could be a case in which there was no prior owner. He posited a situation in which land had been taken by eminent domain, and because of that could not meet the road setback. Mr. Kearney agreed that could be a case. He suggested such situations should be listed although perhaps each situation was unique. He said that if Mr. Daniel had come before the Board, the Board could have been hard and not allowed his request because a prior owner created the problem.

Mr. Temple suggested the example of a subdivision from 1930 in which a lot was 10,000 square feet. That lot would be grandfathered because it had been created in a subdivision approved by the Town. Such a lot could be less than the area requirements and might not be able to meet a setback on one side. If the only place for a septic system replacement was where the house would be placed a valid argument for a variance could be made to put the house where it might not meet the setback. If it were just a lot but not big enough for building, there would be no need for a variance, it was only necessary to consult the variance section in the LUO where it referred to setbacks being met to the greatest extent possible. Such cases usually went to the Planning Board. Mr. Chapman asked whether Mr. Temple thought the language should be left unchanged. Mr. Temple felt it could be left for the present and reviewed later to determine what scenarios might apply. He noted that in his time with the Town, he had not had to deal with the variance. It only seemed to come up in the shoreland zone. The language stayed for the present.

Mr. Casas noted that most of page seven dealt with shoreland zoning standards. Mr. Temple said the disability variance Section 6.8 was also in there. He said the variance would normally only come up in the shoreland zone. Mr. Casas felt that variance should have its own section. Mr. Temple felt it should be left where it is because the variance was only temporary. He explained that this format was what had been recommended when the standards were set. This had been a product of the Americans with Disabilities Act. Mr. Kearney raised the issue for Section 6.5.9 where it said "Will reasonably avoid." He did not know what "reasonably" meant. He also asked regarding Section 6.7 whether the Registry of Deeds notified the Town when a deed had been recorded. Mr. Temple said it did not, but the Town now had a link to the Registry and could check to see whether it had been done.

Mr. Casas asked whether the language in Section 6.5 was "boilerplate." Mr. Temple said he knew it was from the shoreland zoning standards, but did not know whether it had been brought in from the variance provision in the shoreland zoning standards. He noted that such variance appeals always went to the DEP in advance of an Appeal board hearing. He said that once they had rendered their decision, the Board had the ability to interpret it as they deemed correct. Mr. Kearney asked what happened if the DEP gave its blessing to something that would cause erosion. Mr. Temple said the Board could do what it wished as long as the standard was at least as restrictive as the DEP decision. They could make it more restrictive if they wished. Mr. Chapman pointed out a typo in section 7.1.2 "width" should be "with." Mr. Temple said he wanted to make one other change. In Section 6.3.6 he wanted to change "Washington Limited Residential District" to "Washington shoreland zone." the Board thanked Mr. Temple for his work on this review.

The meeting adjourned at 8:35 pm.

Respectfully submitted,

Liane Chapman

Recording Secretary.

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