FILE

TOWN OF EAST KINGSTON, NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT MEETING MINUTES
August 12, 1999

AGENDA

7:30 **Deborah Feather – 14 Main Street–Appeal from Administrative Decision & Variance from Article IV.F.1** (1999-05)

7:45 **Laurie Carbone – 208 Haverhill Road – Appeal from Administrative Decision – (Rehearing)** (1999-06)

Members attending: Chairman John V. Daly, Vice Chairman David Ciardelli, Norman J. Freeman, David C. Boudreau and Alternate Members Peter A. Riley, Richard A. Cook, Nathaniel B. Rowell, Charles F. Marden, and Selectman Donald C. Andolina.

Absent: Edward Cardone and Alternate J. Roby Day, Jr.

Others attending: Richard A. Smith Sr. – Planning Board Chairman, Robert & Sherry Nichols, Sargent Reid Simpson, Curtis & Lucienne Jacques, N. Joe Freeman, Carol Freeman, Mary Carter, Andrew Berridge, Richard Gordon, Donna Martel, Atty. Robert Deshaies, Joseph O'Sullivan, Laurie & Richard Carbone, Kent Shepherd, Susan Jordan, Selectman Jack Fillio, Joseph Conti, Deborah & Gary Feather, Glen & Lauren Wise, Virginia Daly, Gail & Kevin Murphy, Todd Goudreau, Wayne Couture, and other members of the public who did not address their concerns.

Deborah Feather – 14 Main Street–Appeal from Administrative Decision & Variance from Article IV.F.1: Chairman Daly opened the public hearing at 7:35 PM for Mrs. Feathers application for Appeal from Administrative Decision in relation to the June 14, 1999 Board of Selectmen decision to deny a sign permit for a sign larger than 4 square feet in a residential zone. Should the appeal fail, the applicant is also seeking a variance from Article IV.F.1 – sign size provisions.

> *IV.F: On premise advertising signs in the Residential District shall be allowed under the following conditions: (Amended 3/99)*
>
> *1. They shall not be more than four (4) square feet in size.*

He noted that the Board would first hear the applicant's case on the appeal.

Mrs. Feather stated that she would be representing herself in this matter. She said that the reason for appeal is that the building she is currently using as a gift shop is a commercial building in a residential zone and that the town's rules do not directly address commercial uses in a residential zone. There are regulations for commercial uses in commercial zones and residential uses in residential zones, but none for commercial uses in residential zones. She stated that this parcel had been taxed commercial for years and that it is unfair to apply only residential rules. The building has always been used for commercial purposes and that she has obtained copies of the town's property cards from as far back as the 1970's clearing showing the property zoned commercial and used commercially.

She continued to say that back in the 1970's when the town established a commercial district, commercial uses were granted by a special exception by the zoning board of adjustment. Although she could not find a record of this being granted for this property, it would appear that one must have been granted, otherwise the property card would not reflect the parcel being zoned commercial.

She further stated that she feels this property is grandfathered because is was built and used commercially prior to any commercial rules being adopted. She is only asking for a permit to erect a sign larger than what is allowed in a residential zone but smaller than what is allowed in a commercial zone. She is not asking for more commercial rights – just a sign. Signs in residential zones can only be up to four square feet and she is requesting permission to put up a sign measuring 4'x8''x3' made of hand-carved wood (slightly larger that the town's recycling sign located directly across the street from her gift shop). Her sign would be of a country design that would fit into the character of the existing neighborhood.

At the inquiry of Mr. Ciardelli, Mrs. Feathers stated that the sign would be located on the left corner (east side) of the parking lot – a good distance away from the abutting property lines and wouldn't interfere with any traffic. Right now she is currently using vinyl banners until a permanent sign is erected. Again she stated that her proposed new sign would be just over 12 square feet and that the commercial zones permitted sign size of 32 square feet is too big. She said that proper signage is vital to the success of a retail business. She then pointed out on a sketch the approximate location of the sign in relation to the road and building.

Mr. Boudreau asked how Mrs. Feather knew of the commercial use of the property, as she was not a resident of the town. He stated that the property is located in a residential zone and if the Planning Board approved the business, why wasn't the sign size approved at the same time.

Mrs. Feather responded that the Planning Board directed her to go to the Selectmen for a sign permit. Again she stated that the banners are only temporaryuntil the conflict over the sign size is addressed.

Selectman Andolina stated that the Board of Selectmen denied her sign permit request because it was against the current zoning rules. The ordinance does not provide for commercial signs in a residential district. There are no clear provisions for commercial uses located in a residential zone.

Mrs. Feather stated that because of this, the issue is open to different types of interpretation.

Mr. Boudreau asked if there were any issues with the banners.

Selectman Andolina replied that the Selectmen have received complaints about the banners. He stated that there are no ordinances covering signs of that size in a residential district.

Mrs. Feather then questioned how other commercially grandfathered buildings have larger signs. She stated that this building should be allowed the same privileges. The building was originally built for commercial purposes (to house the post office) – it was built without kitchen facilities or room dividers, clearly a commercial use. When the commercial zone was established, this parcel was left out yet it is only 50 feet from the commercial district boundary.

She went on to say that Glen and Laurie Wise (property owners) were given rights to use the property commercially by the ZBA in 1988.

Chairman Daly stated that ZBA notes from the 1988 ZBA chairman were submitted and that these handwritten notes were not clear.

Mr. Riley stated that there is no residential use of the property, the previous use as the post office reflects that somewhere an exception to use the property commercially was granted. Although there is nothing in the statute that allows larger than a 2'x2' sign here, the property is and has been used commercially yet is not awarded commercial rights.

He went on to say that the Planning Board approved the commercial use of the property and that the ZBA gave permission for the operation of a video store back in 1988 based on the properties existing commercial use.

Mrs. Feather stated that if the commercial rights were to apply here, she would then be allowed the signage she is requesting. This property has been zoned and taxed commercially throughout the years. In 1972 the property card for the property reflects the parcel as being zoned commercial. If the property was zoned commercial before a commercial district was established, it was unfair to leave this property out of that commercial zone when the only use of the property was commercial.

At Mr. Cook's inquiry, Mrs. Feather stated that the only other uses of the property were federal (as a post office), then a video store, and now a craft store. Built in 1955 for a post office, the building is 44 years old.

Mr. Ciardelli noting that he was a member of the ZBA back in 1988, stated that other than Mr. Rowell's concerns about the lighting of the property at night, he has no significant recollection of the meeting.

Mrs. Feather stated that the sign would be of hand-carved wood with no lighting on the actual sign. She may install a small dimly lit light to give a soft illumination to the sign for during early evening hours and during the winter time when it gets dark early. There would be no light on the sign itself. Her hours of operation are Tuesday – Sunday from about 11AM to 6PM (except Fridays when the shop is open until 8PM).

She went on to say that Route 107 is a busy street and she cannot rely solely on East Kingston residents to make her store successful. She must catch the eye of the passerby for patronage. The sign would be double-sided.

Mr. Curtis Jacques of 43 North Road stated that he has been in Mrs. Feather's store and that this is the kind of business the town should encourage. This business needs to rely on through traffic and signage. This type of business and proposed signage blends in well with the surrounding rural atmosphere. He stated that over the past few years he has heard that everything is grandfathered – what's good for one is good for another. This is a beautiful business.

Mr. Nathaniel Rowell of 10 Main Street stated that he is a direct abutter to the property and that he opposes the application. He said that he does not object to the type of sign, he realizes the business needs to advertise, but that if an exception is made for this business then someone else will later ask for more. Any encouragement to the commercial element on that property is just another foot in the door to another change. He said that country store is an improvement over the video store, but that the property is not grandfathered as far as he is concerned. The post office was a federal use and the ZBA or the Planning Board, whoever approved the change to a video store back then, rendered a flawed decision.

He went on to say that he has lived in East Kingston for 48 years and that he doesn't want to live next to something offensive. Every one of these exceptions is a step closer to calling the property a commercial zone. The property is zoned residential not commercial. He said the town has been less than objective as to what is commercial and what is residential – many have made statements in the past about changes. He is not opposed to this business, but this is another "in road" as to what might come back and bite him. This ZBA should not have to live with a flawed decision made by the 1988 board. The courts have stated that towns do not have to live by a flawed decision.

Mrs. Feather stated that Mr. Rowell is worried about other people taking advantage of the property. There is no other piece of property like this one in town. Whether the 1988 decision was flawed or not, this parcel has always been taxed commercial. Her business needs adequate signage to survive. She stated that she would agree to a sign permit that would be restrictive to her tenancy only.

Mr. Rowell stated that for the record he agrees with Mrs. Feather offer. He stated that he wants it on the record that he has gone back to the 1988 resolution, not this signage.

Mr. Joseph O'Sullivan of 1 Depot Road stated that he at one time looked at the property for his own venture. He stated that the building was an eyesore. He questioned which was worse – no sign and no business or its current well-maintained use. If the gift shop is forced to go because of lack of adequate signage, the next business to come in could be worse. The town needs to weigh the best of the situation. He stated that if the sign must comply with the letter of the law, then the 2'x24' sign used by the video store was illegal. Why didn't anyone raise the issue then?

Mr. Richard Gordon of 4 Burnt Swamp Road asked if the post office owned or rented the building. When Mr. Rowell replied it was rented, Mr. Gordon stated that someone built the building to be rented – for profit, and that makes the use commercial.

Mrs. Susan Jordan of 19 Main Street stated that she does not have any problems with the sign Mrs. Feather is proposing.

For the record, Chairman Daly stated that the application reads an appeal of Article IV.F.1-7. The only issue is item number 1. Furthermore, the notice of public hearing regarding this case should read Article IV.F.1. (The notice omitted "F".) He stated that the issue before the Board is an appeal from administrative decision. He stated that he feels this issue should be considered as a variance request.

***MOTION*: Mr. Ciardelli motioned to deny the Appeal from Administrative Decision filed by Deborah Feather in regards to the June 14, 1999 Board of Selectmen decision to deny a sign permit for a sign larger than 4 square feet. Mr. Boudreau seconded.**

DISCUSSION: Chairman Daly stated that this property is very unique and that the selectmen's decision was fair – they had to go by the language of the ordinance which restricts sign sizes in a residential district.

The motion carried 3-0.

Chairman Daly then opened the meeting to the variance request. He asked that members keep in mind that a variance has different standards and that it can be approved with conditions.

Mrs. Feather then addressed the five criteria as follows: (The following responses are in addition to the written responses submitted on her application.)

1. *The proposed use would not diminish surrounding property values because* the hand-carved wood sign would blend in well with the surrounding environment far less than what is allowed in a commercial zone.

2. *Granting the variance would be of benefit to the public interest because* it would provide gift buying opportunities in a rural area and it keeps money in East Kingston. A once vacant building would now contribute to the economic development of the town.

3. *Denial of the variance would result in unnecessary hardship to the owner because of the following circumstances of the property that distinguish it from other properties similarly zoned* because there are no other properties similarly zoned. Commercial rules don't apply and residential rules are unfairly applied. The property is taxed commercial, thus is should be allowed commercial rights.

4. *Granting the variance would do substantial justice because* it is unfair to the applicant as it is not clear these provisions apply to this situation. No laws would be broken because the 2'x2' sign restriction applies to residential properties – this is a commercial property.

5. *The use is not contrary to the spirit of the ordinance because* the ordinance was written to protect abutters. This proposed sign will not offend or diminish surrounding property values.

At the request of Mr. Ciardelli, Mrs. Feather further explained the sign lighting. She stated that the sign itself would not be lit but that a dimly lit light would illuminate the sign for early evening hours. The light would go off when the store closes. She further stated that she has no plans for an additional sign at this time. If the lighting is a problem, she stated that a dimly lit bulb would be used to accentuate the sign during dusk hours and that she could put it on a timer to shut off at 9PM. She would accept that restriction. She reminded the Board that she is not asking for a 32 square foot sign.

Mr. Cook stated that being new on the ZBA, he finds this case most interesting. He said that this situation meets the variance provisions. The Board couldn't grant the appeal because the selectmen followed the letter of the law. He feels it is the duty of this Board to grant this variance request.

Mr. Ciardelli agreed and added that the size of the sign and type could be restricted to Mrs. Feather only for the purpose of her establishment. He stated that he is not sure about the lighting.

Mrs. Feather stated that Maplevale Turkey Farm also shines a light on their sign. The sign itself isn't illuminating.

Chairman Daly noted that it would be within the provisions of the zoning to illuminate the sign (see Article IV.F.2). He stated that the property is unique and that it meets the test required by variance. The property has a commercial use in residential district with commercial history. Reasonable restrictions to the size and hours of illumination could be applied. The Board also has the option to restrict the variance to the operation of a gift shop only.

Mr. Riley stated that it may be difficult for the applicant to adhere to the approximate 12 square foot restriction.

Mrs. Feather stated that she is paying by the square inch and that the sign would not be an inch larger than proposed.

Mr. Boudreau agreed that the Board should grant a variance with the conditions of lighting that would protect the concerns of abutter Mr. Rowell.

***MOTION*: Mr. Ciardelli motioned to grant the variance from Article IV.F.1 with the conditions that 1) the sign measure 4'x8"x3'; 2) it be located on the lot as described by the applicant; and 3) the variance apply only for the purpose of the advertisement for a gift shop on the premises. Mr. Boudreau seconded.**

DISCUSSION: Selectman Andolina stated that all the other signs on the property would be removed.

Mrs. Feather agreed and stated that the banners are only temporary until the sign is completed.

The motion carried 5-0.

Laurie Carbone–208 Haverhill Road–Appeal from Administrative Decision- Rehearing:
Chairman Daly opened the public hearing at 8:35 PM for Laurie Carbone and abutters who have filed an Appeal from Administrative Decision from the May 20, 1999 Planning Board Decision to approve the Site Plan Review application of Chuck Woodlands Realty Trust regarding ADMAT Enterprises. This hearing is a rehearing, which was granted by the Board on the petition of Mrs. Carbone et al citing that one board member may have had a conflict of interest and that another member may have prejudged the case. Although only allegations, they were serious enough to warrant the granting of a rehearing.

Chairman Daly further explained that the same rules apply here as they did at the June 24, 1999 hearing. The same members disqualified then would still be disqualified now (Mr. Riley and Chairman Daly) with the addition of Mr. Cook and Mr. Day (absent). He (Daly) would chair the meeting only and not partake in any voting matters. He then noted that Selectman Andolina and Mr. Rowell (newly appointed alternate member) would participate in this hearing as voting members, thus there is a sufficient number of voting members. The applicant, a direct abutter to the property in question cites that the Planning Board's decision is in violation of:

Article IV.A - *Any use that may be obnoxious, injurious or in the nature of a nuisance by reasons of production, emission of odor, dust, smoke, refuse matter, fumes, noise, vibration or similar conditions or that is dangerous to the comfort, peace, enjoyment, health or safety of the community or lending to its disturbance or annoyance, is prohibited;*

Article XII3.(e)- *Light manufacturing enterprises, except biological and chemical material; service or utility business not in conflict with the public health, safety, convenience or welfare of substantially detrimental or offensive to adjacent zones or destructive to property values, when permitted by the Planning Board; and*

Article XII.5.(g) - *No inherent noise and recurrently generated noise shall be detectable beyond the property line in excess of the average level of street and traffic noise generally heard at the time and point of observation...*

It was noted that at the June 24th hearing that legal counsel represented Mrs. Carbone. For financial reasons she and her abutters would be representing themselves at this hearing.

Atty. Deshaies, representing Chuck Woodlands Realty Trust (Charles Marden, Trustee) stated that he is concerned with the restructuring of the Board based on Mrs. Carbone's allegations. Both newly disqualified members voted in favor of his client at the last hearing. He stated that if the allegations made about the disqualification of members concerns the Board then Selectman Andolina's placement as an alternate should also be a concern as he has previous discussion about this case and has Selectmen history with it.

Selectman Andolina responded that he would not recuse himself from this hearing.

Atty. Deshaies argued that the notion of having this rehearing is as unfair to his client as Mrs. Carbone felt the first hearing was unfair to her. This application has been heard, appealed, reheard, appealed, and now will be reheard again – that's three times on a site plan review. He then noted two more issues:

1. He would like the Board to enforce its policy that anyone not voting removes himself from the board table. Including Mr. Riley and Chairman Daly.

2. At the last hearing it was his belief that the appeal focused on zoning issues, and the Planning Board's interpretation of them –not the site plan review itself. And that the ZBA is not sitting in the place of the Planning Board for a new site plan review, but to determine if an error was made by the Planning Board in their interpretation of the zoning bylaw.

Chairman Daly responded that the ZBA, based on their interpretation of the zoning ordinance, has the power to affirm the Planning Board's decision, in whole or in part, reverse it or send it back to the Planning Board.

Mrs. Carbone stated that at the last hearing she submitted new evidence from the State Department of Transportation showing the road driveway access not being up to code.

Chairman Daly stated to Atty. Deshaies that he understands his (Deshaies) concern for having the same board make up, but that he is not entitled to the same make up on rehearing. There is no law on that that he is aware of. He continued to say that because an objection has been made that non-participating members sitting at the table be removed, he (Daly) will turn over the chairing of the hearing to Vice Chairman Ciardelli.

At his own request, Mr. Riley was excused from the meeting at 8:42 PM.

Mr. Ciardelli then asked the petitioners to present their case.

Mrs. Carbone stated that they are here tonight to rehear the whole argument again that a full and complete site plan review was not performed on Mr. Marden's application to operate a trucking garage/terminal from the MSK Lumber complex. The argument

includes claims that the trucks running in and out of the complex are not light industrial at all, but heavy commercial. She questioned why the ordinance regarding noise, permitted uses, and offensive operations (Articles IV.A, XII.3.(e), and XII.5.(g)) have been ignored. She stated that the more meetings that go on, the more new information comes out. The letter from the NHDOT stating that a new driveway application from Mr. Marden was needed has not yet been submitted.

Abutter Sherry Nichols stated that she has read where in a recent site plan review conducted by the Planning Board for Lewis Dodge's woodworking business, that noise restrictions during specific hours were imposed to protect his neighbors. She stated that they (abutters) are neighbors to Mr. Marden yet, no restrictions of any kind have been imposed. Mr. Marden's neighbors have not been considered and that there has been no recourse for them. Nothing is being taken care of – the driveway, which was deemed illegal by the state has not yet been taken care of. This was to be done in a reasonable amount of time.

Abutter Robert Nichols says that he lives next to Mr. Murphy and the woodlands are behind him. Years ago there was nothing offensive about the neighborhood. He said that a statement made by Mr. Rowell during the Feather public hearing caught his eye. Mr. Rowell stated that he didn't want anything offensive next to him. Mr. Nichols stated he feels the same way. There are still trucks going by at all hours of the day and night, drivers are still using their Jake brakes, and one truck came out of the complex so fast last week that a pick-up truck pulled out to block its way. Nothing has changed.

He then turned to Mr. Marden and asked if he was aware of anyone dumping anything offensive or toxic on his (Marden's) land. Mr. Marden replied that he was not.

Mr. Nichols continued to say that an offensive smell is now coming from the Marden property and bulldozers are running all the time. He stated that he and other neighbors walked through the property to see what was going on and came across an area where the smell was so bad their eyes burned. He stated that he then took soil samples from the area and sent them off to a lab. The lab report came back that the soil was bad and that the lab technician warned him of a safety hazard. A normal reading is about 300 parts per gram – acceptable. The reading from this soil sample came back to over 13, 100 parts per gram and has since been reported to waste management.

Mr. Marden responded that the Environmental Protection Agency came out to his site today to inspect and the site received a clean bill of health. He stated that the substance on the site is a base for driveways, which he is using for his own driveway.

At this time, Mrs. Carbone submitted jars of the soil sample taken from the site for the board members to inspect. She asked members to smell the samples. The then asked if anyone conducted a proper site plan review and visited the site. She repeated that the guidelines in the town's regulations have not been met.

Atty. Deshaies stated that the samples produced have nothing to do the application on the table. He stated that his client has tried to accommodate his neighbors by removing the entrance gate.

At this time Mr. Ciardelli called order to the meeting as members of the public openly expressed their different recollection of how the gate was removed.

Mrs. Carbone reiterated that a proper site plan review was never performed on Mr. Marden's application. She stated that if Mr. Marden's business was starting from scratch, he would never be allowed in there.

Atty. Deshaies stated that a site plan review was conducted in 1995. He further stated that the Planning Board can determine the extent of the site plan review. There was no need to conduct a full review as the building was already built– it was just a change of tenancy. The Planning Board waived what was unnecessary and that is within their legal right.

Mrs. Carbone responded that when 18-wheelers are running 24 hours a day, 7 days a week, a new complete site plan review should have been preformed – this constitutes a substantial change of use not a change of tenancy. The driveway provisions were not met in 1989 and they have not been met now. At the last hearing a new driveway application was to be submitted to the DOT in a "reasonable amount of time". This still hasn't been done.

Mr. Marden responded that his engineers are still working on it.

Mr. Richard Carbone stated that Mr. Marden spoke falsely of how the gate was removed. A side boom on one of the pipeline trucks tore it down. Prior to this, there has always been a gate there.

Mr. Marden stated that Delta Gulf did in fact knock the gate down but was willing to replace it. He opted not to replace it (at Delta

Gulf's expense) as a courtesy to his neighbors. No gate would eliminate the need for the trucks to stop and open the gate, thus creating less noise. He said he thought this would be easier for everyone.

Mr. Wayne Couture of Rowell Road stated that he is not sure a new site plan review was ever performed when Mr. Marden expanded the buildings on the site.

Atty. Deshaies stated that a site plan review was conducted and that is what the appeal is based on. The Planning Board has said an adequate site plan was performed.

Mrs. Carbone asked if it met all the guidelines set forth in the regulations.

Mr. Ciardelli stated that the ZBA is here to determine whether or not the Planning Board did its job properly.

Atty. Deshaies responded that the question of whether or not a proper site plan review was conducted is appealable to superior court. The interpretation of the Planning Board's interpretation of the zoning bylaws is what is before the ZBA tonight. This is not a complete review of everything the Board did.

Mrs. Carbone stated that there is new evidence that must be considered here as it was not available at the time of the site plan review.

Mrs. Nichols stated that at the last hearing, Mr. Riley said he had problems with Mr. Marden's misrepresentations to the Planning Board and ZBA (Mr. Riley is a member on both boards). She said she is not the only one who heard this. Some things were done wrong during the site plan review process and she would just like to see them corrected. Get the DOT and the EPA to sign off – that is what would make the abutters happy.

Mrs. Carbone stated that no one from the Board has ever been down to the site. All you have to do is stand down there and you can smell the stuff (pointing to the samples on the table). A full and complete site plan review should be conducted now.

Mr. Carbone asked what the definitions of light industrial and commercial are in the town of East Kingston.

Mr. Ciardelli responded that light industrial is in the zoning ordinance and that this is one of the questions the Board needs to answer for itself – there is vagueness in the ordinance.

Mrs. Carbone stated that the NHDOT says that any vehicle authorized to carry over 26,000 pounds is categorized as heavy commercial. The trucks going in and out of the MSK complex are heavy commercial trucks.

Norman J. Freeman, Jr. of 52 Main Street stated that the same trucks have been hauling in and out of the complex for years.

Mr. Carbone responded that 55-foot box trailers have not then asked Mr. Freeman Jr. if he had a box trailer.

Mr. Freeman, Jr. stated that he didn't but he has tag-a-long trailers the same size.

Mr. Nichols asked if when a thorough site plan review is conducted and things of this nature (contaminated soil) are found, are they taken into consideration? He stated that he is frightened this contamination may get into his drinking water. The smell really bothers him, he doesn't know whether this stuff is being trucked in or what. The bulldozer marks into the wetlands is scary, is it being buried? - All this needs to be addressed.

Mr. Ciardelli stated that the issued before the ZBA now is whether or not the Planning Board interpreted correctly the requirements for site plan review.

Atty. Deshaies stated that at the meeting of the Planning Board, Mr. Berridge spoke of the history of the adoption of that particular zone. He indicated that this trucking use was contemplated for a permitted use. The Fire Chief and Deputy Fire Chief both indicated that the Fire Safety Code categorized this type of business as light industrial, which further supports the Planning Board's approval of the use. The Planning Board made a reasonable determination.

Mr. Andrew Berridge of 127 South Road stated that as a professional fire-fighter, Deputy Fire Chief Carter is aware of the safety code as he described at the May 20th meeting and that the trucking use as proposed by Mr. Marden is categorized as light industrial. He further stated that he is not hearing manufacturing, or industrial uses, but *light* industrial. The permitted uses outlined in the light industrial section of the zoning ordinance include warehousing and light manufacturing. These uses cannot operate without the use of

18-wheelers.

Selectman Andolina stated that he was curious as to how the applicants believe that a full site plan review was not conducted. Was a standard procedure not followed?

Mrs. Carbone stated that several items listed in the provisions of the Site Plan Review Regulations were not addressed, i.e. driveway access, proper buffer zones.

Mr. Kevin Murphy of 201 Haverhill Road stated that several items in the review were neglected and the trucking operation is in constant violation. There is no buffer zone and the trucks are parked in view of the street at all times. Although Mr. Marden claims the buildings were already in existence, they were not. The building currently being used by this outfit has been renovated and the new use is clearly a change of use. The hours of operation, noise beyond the property line, the driveway actually running through a private residential lot, the smell emitted beyond the property line – a clear violation, have not been properly addressed.

He went on to say that Mr. Marden's claims that the EPA gave a clean bill of health is false as the lab technician informed him (Murphy) that the results of the soil test were no where near acceptable. When MSK operated there, very few trucks came through the gate at night. As far as the gate issue, he would much rather see the gate go back up to slow down the trucks that fly through there. He said that a lot of important issues were overlooked by the Planning Board – yes, you can have 18-wheelers, but not parked overnight and running 24-hours a day. Surrounding towns do not allow light industrial trucking after 8PM. The Planning Board would not coordinate hours for this operation but did so for Chip Dodge's woodworking business. He stated that the Planning Board did not follow proper procedure when reviewing this application. The claim of traffic on the main road was brought up by several Planning Board members – that is not the issue. The trucking operation is the issue.

Selectman Andolina stated that he has heard conflicting reports on whether or not the Planning Board followed the standard site plan review procedure. Atty. Deshaies says the Board did, the applicants say they did not. He then stated that he would like to hear from the Planning Board Chairman.

Atty. Deshaies responded that this is not what this hearing is about. Selectman Andolina disagreed. He stated that the appeal is from the Planning Board's decision and on that basis that he is asking what process was used. Atty. Deshaies stated that the process can be appealed to the superior court.

Selectman Andolina stated that he wanted to know the Planning Board's site plan review process. He called upon Planning Board Chairman Richard Smith, Sr. to comment.

Mr. Smith stated that the site plan review conducted on the trucking business was conducted the same as on all site plan review applications.

Selectman Andolina asked if the Planning Board visited the site. Mr. Smith responded that he went down to the site and the problem is the status of Old Route 108 and the Planning Board knows about it. It is still a town road that has never been closed and Mr. Marden has a right to use it to access his property.

Mr. Murphy stated that he and Mr. Nichols are the owners of Old Route 108. Mr. Marden has records that show the road was never closed. The town approved all three lots along the road (Old Route 108) and until the town says it's a town road, the road is owned by him and Mr. Nichols. Mr. Marden does not own the road.

At Mr. Boudreau's inquiry, Mr. Marden stated that a site plan was conducted May 20, 1999 for a change of tenancy. Atty. Deshaies expounded by saying a previous site plan review was conducted in 1995. It is the May 20, 1999 decision that is being appealed here.

Mrs. Carbone stated that the Building Inspector approved the construction of a kiln and now it has changed to a trucking building. At the Feather hearing held prior to this hearing, they were worried about a light bulb over a sign – this is a trucking terminal running at 3AM.

Atty. Deshaies responded that the difference is the zoning. The sign and light bulb was in a residential zone and the trucking business is in a light industrial zone. The Planning Board determined the trucking use was a permitted use in a light industrial zone and by taking jurisdiction over it, they agreed that this was an appropriate use for that zone. The use of the entire parcel as light industrial has an impact on the neighborhood.

Mrs. Carbone stated that the town should enforce what is written.

Mrs. Nichols stated that ordinance gave perimeters to the light industrial zone, the abutters should not be exposed to noise and dumping. These are just thrown in her face and they are burying it just as fast as they are dumping it.

Mr. Boudreau stated that he has understands the concerns of the abutters. Pointing to the contaminated soil sample on the table he said that this doesn't have anything to do with the site plan review that was conducted in 1995 and that this board is not the board to handle it. He suggested the abutters go back to the EPA about the soil.

Mrs. Nichols asked if they have to police the town boards to assure proper procedures are being followed.

Mr. Boudreau responded that site plan reviews are conducted by the Planning Board and that they (Planning Board) are expected to go out on a monthly basis and inspect what is going on. He said that he has seen Mr. Smith do site walks before but they are done at the time of the application. This contaminated soil issue was discovered after the application was approved. The Planning Board says they did the site plan review correctly whether the appellants think so or not.

Mrs. Carbone asked the Board to show her the buffer zone, the new driveway and all of the guidelines that were supposed to be followed. She said that the guidelines were not followed. She asked why this application was not getting the same rigorous review that new business goes through. The town got a big broom and just slept this whole thing under the carpet.

Atty. Deshaies stated that it is unfair to the applicant to have all these unproven allegations and name calling and so on. They eliminated two members of the board by making allegations and assaulting their character.

Mr. Ciardelli reiterated that the reason for the rehearing is because of the seriousness of this case and to make sure everything got heard in an open forum.

Mr. Nichols stated that he wanted to address the statement made about getting members kicked off the board. Mr. Cook owns light industrial land behind his house and this case may have an impact on his future plans to develop his land. This is the appearance, not allegations.

Mr. Ciardelli responded that members were removed from this hearing so there would be the appearance of complete fairness.

Selectman Andolina inquired about the driveway. He stated that the appellants say the driveway was not included in the site plan review.

Mrs. Carbone stated that the driveway was to be updated in 1989 per the DOT, which was never done. The Planning Board did not consider this as that information was not available at the time of the site plan review.

Mr. Boudreau asked if it was this application that prompted the letter from the DOT.

Mrs. Carbone replied that the ZBA approved the site plan review with the condition that the driveway be brought up to code. Mr. Marden has not even filed for a new driveway yet. This was never done.

Atty. Deshaies stated that this was brought up at the last meeting and that Mr. Marden has hired an engineer to do so.

Selectman Andolina asked about the buffer zones. Were they considered and are they a part of the site plan review?

Mr. Smith replied that the buildings involved in the site plan review were not in the 200 foot required buffer zone.

Mr. Murphy stated that the ordinance requires a planted buffer zone be installed.

Mr. Smith stated that the Planning Board didn't think that was necessary in that area.

Mrs. Carbone responded that a planted buffer zone is in the guidelines. Why aren't the guidlines being followed?

Mr. Rowell stated that in clearing up the interpretation of the site plan review he would like to bring the meeting's attention to a letter dated May 13, 1999 from Town Counsel John Daly to Planning Board Chairman Richard Smith. The letter discusses the site plan review application of Chuck Woodlands Realty Trust. He read aloud:

The Planning Board should take up the Site Plan Application of Mr. Marden/Chuck Woodlands Realty Trust only if the Board believes that the proposed use of the Property is allowed as a proper use in the Light Industrial Zone. Site plan review is required *whenever there is a change or expansion of the use to which a property is put. Although the East Kingston Zoning Ordinance also requires site plan review whenever there is a change of tenant, it is likely that this may be enforceable only if the new tenant's use of the property differs from that of the prior tenant. In addition, site plan review is* required *before there can be* any *commercial use of the property in a Light Industrial Zone.*

The Planning Board should subject Mr. Marden's site plan application to the same level of scrutiny given to other site plans of the same general size and scope.

The Planning Board may consider the neighbor's concerns about the level of noise generated by the trucking terminal and the noise restrictions applicable to the Property.

- *In the Light Industrial Zone, "no inherent and recurrently generated noise shall be detectable beyond the property line in excess of the average level of street and traffic noise generally heard at the time and point of observation". East Kingston Zoning Ordinance Article X.II.5.(g); and*

- *Article IV.A of the East Kingston Zoning Ordinance prohibits" any use that may be obnoxious, injurious or in the nature of a nuisance by reasons of...noise, vibration, or similar conditions or that is dangerous to the comfort, peace, enjoyment, health or safety of the community or lending to its disturbance or annoyance".*

Mr. Rowell went on to say that the letter includes a checklist for Planning Board members to refer to in determining the process of the application. In observing the meeting this evening he stated that it appears they are getting no where. Discussion could go on until Christmas or it could go on to court. The Board needs to determine whether Mr. Marden is right or Mrs. Carbone is right, or as suggested by Mrs. Carbone a compromise could be made. He asked if counsel representing both sides could come up with some solution to use the land as the landowner wishes but is fair to the abutters. Many allegations were stated yet none were etched in stone.

He further stated that two new ZBA members were recruited because of technicalities. We are dealing with people who are trying to live their lives or make a living.

Mr. Ciardelli stated that this issue has gone on for a long time at this meeting to make sure that all views were expressed. He asked if any member wished to make a motion. The appeal is that Mrs. Carbone alleges the Planning Board erred in the site plan review and that she feels the Board should agree with that.

Mr. Boudreau stated that there are some real concerns over at the MSK site but is not sure where to get help on them. On the letter of the appeal and the process of the site plan review, it is his opinion it was handled the way is has always been handled. Maybe a new procedure needs to be adopted or maybe something needs to be changed to correct the process.

Mr. Couture asked if the site plan review was checked for noise, smells, etc.

Mr. Boudreau replied that those things couldn't be decided here. Some of the allegations may not have been in existence at the time the site plan review was considered by the Planning Board.

Mr. Murphy stated that the Planning Board says Old Route 108 is town property, it is not. That is a grave error for the Planning Board to assume that. That only shows an error in the Planning Board's belief.

Atty. Deshaies stated even though this has nothing to do with anything, he would like to correct for the record Mr. Murphy's claim of Old Route 108. He said that Mr. Murphy has a deed to property that runs down the centerline of the old road (the subdivision line was the centerline of the old road). The research that he (Deshaies) has done contradicts Mr. Murphy's claim because the old road originally part of the town, was discontinued, but it still owned by the town. There has never been a judicial decision to one way or the other. His plan does not show the entire road.

Mr. Smith stated that road was never closed. It was an old state road and when the state straightened the road out Route 108) the old road (Old Route 108) was deeded to the town. Because there was a house down on the road, they did not close it.

Mr. O'Sullivan stated that the role of the Board is to decide on the information in front of them. They have gone through three meetings and there is still stuff being thrown on the table.

Mr. Ciardelli stated that the Board must decided whether the Planning Board made an error in their site plan review consideration of Chuck Woodlands Realty Trust application.

Mr. Joseph Conti of North Road stated that he has dealt with the problems of a closed road. In his situation he found out that the town never officially closed the road. If you want to know about Old Route 108 go to the Registry of Deeds.

Mrs. Carbone stated that the town approved the subdivision with the road, thus the town approved the conveyance of the land to the landowner.

Selectman Andolina stated that the town has on file in the Selectmen's office that the west side of Old Route 108 was discontinued, but the eastside was not. This information is official until someone disputes the information and goes to court.

Mr. Murphy responded that he pays taxes on the road.

Mr. Couture stated that the road must be closed the same way it was created. If the state deeded the town, then maybe the town would convey it to the landowner. It would appear that when the land was subdivided, the road was conveyed to the landowner.

MOTION: **Mr. Boudreau motioned to deny the application for Appeal from Administrative Decision thus affirming the June 24, 1999 Planning Board decision to approve a site plan review for Chuck Woodlands Realty Trust. Mr. Freeman seconded.**

DISCUSSION: None

The motion failed 2-3. (Mr. Ciardelli, Selectman Andolina and Mr. Rowell opposed.)

MOTION: **Mr. Ciardelli motioned to approve the application for Appeal from Administrative Decision thus overturning the Planning Board's June 24, 1999 decision to approve a site plan review for Chuck Woodlands Realty Trust. Selectman Andolina seconded.**

The motion carried 3-2 (Mr. Boudreau and Mr. Freeman opposed).

Selectman Andolina stated that he wanted to go on record that he was not convinced a complete site plan review was conducted properly.

Mr. Rowell stated that along with Mr. Andolina's reasoning and in addition to the evidence quoted earlier he voted to approve the appeal.

Mr. Ciardelli stated that there is enough gray area in this case where a clear decision may not have been made by the Planning Board.

Mr. Ciardelli closed the public hearing for Laurie Carbone's Appeal from Administrative Decision and Chairman Daly resumed his position at the Board's table.

OTHER BUSINESS

Minutes: The Board reviewed the minutes dated July 22, 1999 and without any objections approved them for the record.

Rules and Procedure: Chairman Daly noted that the final reading of the Board's Rules of Procedure would be postponed until the next schedule meeting.

With no further business the meeting adjourned at 9:56 PM.

Catherine Belcher
Minutes completed and on file August 14, 1999.