

TOWN OF FALMOUTH
Board of Zoning Appeals
Minutes
Tuesday, January 10, 2012

MEMBERS PRESENT – Fred Jay Meyer (Chair), Dennis Keeler (Vice-Chair), Stan Given, Willie Audet, Jonathan Berry, Don Russell (Associate), Rudy Israel (Associate)

MEMBERS ABSENT – none

STAFF PRESENT – Justin Brown, Code Enforcement Officer

1. Call to order:

The meeting was called to order at 6:31 pm.

Jay Meyer changed the order of items, moving the Hall application to before the Russell application.

2. Discussion and adoption of the minutes of the previous hearing(s).

Dennis Keeler moved to approve the minutes; Stan Given seconded. Motion carried 5-0.

3. Applications

- a) 45 Foreside Rd. Hugh Smith, representing St. Mary's Church-** Conditional Use under Section 8.3 & for an addition and renovations. Parcel U07-005, zoned RC.

This item was tabled until the February meeting.

- b) 13 Just A Mere Rd. Jennifer Curran & Carolyn Thomas-** Conditional Use under Section 6.2 for an addition. Parcel U01-133, zoned RA.

Stephen Brann, representing the applicant, said they want to add a small addition on the side of their house. They have worked with a surveyor and an architect to make sure that it meets the setbacks. The lot is short on street frontage and lot size. This will be an 18% increase; the total coverage would be 1544 sq. ft.

Public comment period opened; no public comment.

Stan Given asked if they have a stamped survey; this one isn't stamped. Ms. Thomas said she does.

Stan Given asked about the distance to the side line; it is very close. Mr. Brann said the owner has worked closely with the surveyor; the surveyor will come out when they dig the hole.

Dennis Keeler observed that the setback applies to the overhang as well. Mr. Brann said they will have only a minimal amount of overhang to protect the siding.

Jonathan Berry asked about Sheet D1; he asked if there was any decking going around. Mr. Brann there is no decking. They will shrink it a few inches to meet the setback if necessary.

Jay Meyer asked if they were extending the wall of the existing home. Mr. Brann said they originally thought they had more room. The addition is set back 10 inches from the house.

Dennis Keeler moved to approve the application; Jonathan Berry seconded. Motion carried 5-0.

c) 25 West Circle. Mark R. Lebel Jr. - Conditional Use under Section 6.2 for an addition. Parcel U41-025-L, zoned RB.

Mark Lebel, Sr., representing Mark Lebel, Jr., said they want to build a 21.5 foot addition. It meets setbacks and sq. footage requirements, as well as lot coverage. They will survey the footer and pin it so that their overhang doesn't encroach. They want to get the maximum out of the width of the building but will confirm the placement.

Public comment period opened; no public comment.

Stan Given asked how many bedrooms there are. Mr. Lebel, Sr. said four, but it is on sewer.

Stan Given said the application said septic. Mr. Lebel, Jr. said it's been sewer for 8-10 years.

Stan Given pointed out the overhang. Mr. Lebel, Sr. said they would have a minimal overhang; it is a gable end. They will be very careful.

Jay Meyer said they will only have 6 inches to spare on the side.

Stan Given moved to approve the application; Jonathan Berry seconded.

Dennis Keeler asked Justin Brown about the sketch; he was concerned that this was not a professional drawing and there is only 6 inches of clearance. He asked if Justin Brown would go out and measure the foundation as part of the building process.

Justin Brown said yes, they would go out and measure at the foundation level.

Motion carried 5-0.

d) 279 Foreside Rd. Cyrus & Robin Noble-Conditional Use under Section 6.2 for an addition and replace a sunroom. Parcel U17-053, zoned RA.

Cyrus Noble would like to replace a rotting sun porch with a slightly larger one, and put a second floor on an existing one-story section. The other side of the house is too close to the lot lines.

Public comment period opened.

A member of the public asked for clarification. Mr. Noble explained his application to her. There was no further public comment.

Dennis Keeler moved to approve the application; Stan Given seconded. Motion carried 5-0.

e) 285 Foreside Rd. Martin Meier, representing John & Josephine Marr-Conditional Use under Section 6.2 for an addition. Parcel U17-051, zoned RA.

Brad Gilbert, representing the applicants, explained that they want to add a one-story addition with a full basement for a master bedroom/bath on the first floor. It is 450 sq. feet and meets all side yard setbacks and requirements.

Public comment period opened; no public comment.

Stan Given observed that it is pretty close. Mr. Gilbert said they are aware of the overhang.

Jay Meyer assumed that the governing setback to the addition is the 20 foot side setback. He asked if there was any question that Mariner Lane is the front of the property.

Mr. Gilbert said there is no question of that. They determined that when they did the garage.

Dennis Keeler said there is a dotted line on the plan that wraps around the addition that mirrors the foundation. He asked if that is the overhang.

Mr. Gilbert said that is likely the overhang, yes. Dennis Keeler said that is very close.

Willie Audet moved to approve the application; Dennis Keeler seconded. Motion carried 5-0.

g) 285 Falmouth Rd, Donald Hall, representing Stephen Martin- Conditional Use under Section 6.2a to replace a sunroom. Parcel U50-010, zoned FF.

This item was moved to earlier in the agenda at the direction of the Chair.

Donald Hall, representing Stephen Martin, said they are tearing down an existing sunroom and replacing it at exactly same size, but with a gable roof instead of a shed roof, which will slightly increase the volume.

Public comment period opened; no public comment.

Dennis Keeler asked about the photos. Mr. Hall described what each photo represented.

Dennis Keeler asked if a foundation would be going in. Mr. Hall said no; it was on cross posts, and will be going back on cross posts. The same roofline will carry over from the house.

Willie Audet thought it looked like it needed to be done.

Stan Given moved to approve the application; Dennis Keeler seconded. Motion carried 5-0.

f) 11 Maiden Ln. Don Russell, reconsideration of a BZA decision. U16-071 zoned RA.

Jay Meyer provided the Board with copies of State Statute Title 30-A §2691 in order for them to review the procedures that govern reconsiderations. It is a two step process: first the Board would vote to reconsider and then conduct an actual reconsideration of the application. The Board's denial was 49 days ago; this is the first meeting since that denial was issued and is therefore the first time they could hold a hearing on this item. While they are out of the statutory 45 day timeline since there has been no meeting he didn't feel it was an impediment.

Don Russell, applicant, said in his opinion only section 8.3 applies. Section 6.2 implies that enlargement consists of increased volume and applies to habitable space. There is no mention of roof repair. The total volume of the garage is 9228.7 cubic feet. The volume of the proposed 15 foot roof extension is 932.2 cu feet. The complaint was that this obstructed the view of one neighbor, and many other neighbors stepped up to complain. The volume increase of the proposed roof extension is only 3.2% of the total volume. Only one abutter, Ms. Pamela Ryan, has any loss of water view at all. The Board has chosen not to take a site walk to evaluate Ms. Ryan's view. He maintained that her water view loss is much less than 10% and is insignificant. Several people have testified to the meaning of significant impact. He requested that the BZA conduct a site walk. He is willing to abide by their decision on this matter. He felt it was obvious when you look at it, and that a site walk would show them that.

Public comment period opened on the subject of whether the application should be reconsidered. There was no public comment.

Mr. Russell demonstrated to Rudy Israel his proposal to extend his garage roof. Rudy Israel was in favor of a site visit to evaluate the water view.

Stan Given said a number of Board members have gone down to look at the site. He himself went down and looked at it from Ms. Ryan's porch. He determined that the impact to the view was significant based

on that visit. He felt the ruling on 6.2 due to the proximity to the lot line was accurate and didn't find that there was anything new here. He felt comfortable with the decision made in the past.

Dennis Keeler said the State Statute wasn't clear about the grounds for the reconsideration. It is hard to separate the discussion on whether they should reconsider it from the substance of the matter itself. A typical reconsideration would be where there was an error in the process or mechanics, but they don't have that guidance here. The Board spent a lot of time in 2009 on this; while the Board didn't go down all together, a lot of them did go down. When he was down there it was his judgment that there was a significant impact to the view. At the last hearing, Mr. Russell said that nothing has changed since the application in 2009. Dennis Keeler had a hard time identifying what it is he is supposed to reconsider; it wasn't a clear-cut decision, but there is nothing new here to make him change his decision. He had serious doubts about how they get past Section 6.2 to a conditional use under Section 8.3. Section 6.2 is pretty clear that it can't be expanded unless you fit under the categories, and if you do, you still have to meet the standards. This application doesn't reach the Section 8.3 conditional use analysis.

Mr. Russell said there were administrative errors in interpretation. He brought up a number of these items, and was told they are subjective. It is true that there is overlapping and ambiguous language in the ordinance. Two code officers allowed the application to be submitted under section 8.3 "other", and this Board decided that the definition of adverse significant impact under 8.3e was difficult to codify. He felt common sense should apply; he is trying to straighten out a roof so that it is consistent with the rest of the garage. It is a minimal increase in volume. When Dennis Keeler said 6.2 was the proper way to apply this application, he felt the Board breathed a sigh of relief because it got them away from 8.3. He was willing to stand by what the Board says regarding adverse visual impact. He wanted the Board to have a site walk, during the winter when the foliage is down and the water view is at its maximum, from Ms. Ryan's backyard or wherever she would like. He said if they did this, he would not pursue further litigation. He appealed to Superior Court two years ago, and felt the court always sides with the Board's decision. He was not aware of members making a site visit; they did it individually and not as a group, counter to the Board's typical practice.

Willie Audet said they debated 8.3 for some time at the last meeting, but felt as a Board that the application was not properly filed. They took an application that was improperly filed and voted on it. He was concerned that they took an application that was not properly in front of them.

Dennis Keeler observed that it isn't so much that 8.3 isn't the proper place for it; if an application can fit under any of the 6.2 sections, the Board then moves to consideration under 8.3. The question was whether it met the threshold analysis of whether 6.2 would allow it as a conditional use. He didn't feel it was an improper application, he didn't feel it got to the conditional use.

Willie Audet felt they treated the application fairly and gave the applicant his due process. The only way he felt they should reconsider it was if they felt they had done something improper.

Mr. Russell was unclear why they were not agreeable to conducting a site walk. The minutes reflect that it was a public hanging. He has calculated the loss of Ms. Ryan's view as miniscule and he felt he was not treated fairly.

Jay Meyer said Section 6.2d It does not provide for conditional use review of this application.

Jonathan Berry observed that it has taken them 3-4 years to unravel this and it isn't just Mr. Russell's case. Mr. Russell places a lot of emphasis on what the former Code Enforcement Officer (CEO) said. One of the old habits of the former CEO was the placement of applications under 8.3 "other" when nothing else in the code triggered review. The Board is now starting to say that these are not properly before them. He now thinks that if Section 6.2 isn't triggered Mr. Russell didn't need to file an application for conditional use review and section 8.3 doesn't apply. The question then becomes why the CEO is denying his building permit. The Board didn't deny it based on any impact on water view; they

denied it because they couldn't figure out how it got to them under 6.2. This lot has the proper road frontage and square footage; he wondered if the only reason it was denied in 2009 was consideration of the water view impact.

Jay Meyer pointed out that his reasoning in 2009 was that the applicant was proposing an enlargement; the only way to enlarge a nonconforming structure is under 6.2 and the only section of 6.2 that applies to a structure other than a single family or multiplex dwelling is 6.2d. The reason it would be futile for the applicant to apply under 6.2d was that enlargement is only allowed under that section if it is not within the setback, which this garage is.

Jonathan Berry was concerned that it was not clear to either the applicant or the Board why this application was denied.

Mr. Russell felt bad that the Board voted against the site walk. The photos submitted by the abutter were clearly telephoto. He was told to submit the application by both the former and the current CEO. He felt 8.3 was the best fit. He said 6.2 addressed the expansion of habitable space, which this is not. He reiterated that the loss of water view of his abutter was miniscule. He figured it at 1%. He argued that the residents of the neighborhood have interpreted insignificant change to mean no change.

Dennis Keeler pointed out that, if Mr. Russell can't meet 6.2, he can't do anything. The ordinance reads: *"Except as provided in this subsection, a nonconforming structure or use shall not be extended or enlarged in any manner except as may be permitted as a variance."* It's not that he didn't have to file an application and can therefore go and do the work; it is that he cannot do it at all.

Mr. Russell felt fixing the roof was not enlarging the garage.

Jonathan Berry felt that the code is saying, and no one has made it clear to Mr. Russell, that he cannot do what he wants under the code. He could go for a full Planning Board review; that is his only option. After 4 years, this is the first time that he is being told that.

Jay Meyer said that in 2009 both he and Board member Rich Bayer focused on that very issue and said quite clearly that he couldn't do this unless under a variance.

Dennis Keeler wasn't sure that other applications they have reviewed under 8.3 didn't fit under 6.2 in some way, but this application clearly doesn't fit under section 6.2. If it wasn't clear why it was denied last meeting, he was happy to reconsider it in that context.

Mr. Russell spoke to a member of the Town Council, and a member of the Planning Board, and they felt it had merit. Common sense says that someone should be able to fix a roof, with minimal increase in volume, without having to go through this.

Jonathan Berry didn't feel it was clear to the applicant or staff their position on this particular case that this application should have never made it to the Board. He asked why Mr. Russell was asking for reconsideration.

Mr. Russell was hoping they would look at the facts. He felt they had unduly listened to the packing of the public section whose views were not impacted, but were neighbors and friends of the abutter.

Jonathan Berry pointed out that there were only three people. Mr. Russell argued that there were more than that, and there were letters.

Jay Meyer said the Board received a letter from John Moon, in support of Mr. Russell.

Public comment period closed.

The Board discussed the process moving forward, if they did vote to reconsider.

Rudy Israel felt someone has to make a determination as to what is significant. He was all for the site walk, but something has to be done after that.

Stan Given was comfortable with the 6.2d determination last month. He felt 8.3 ties into 6.2 anyway.

Jay Meyer's view was that section 8.3 provides the process for conditional use; you have to have a conditional use before you get to 8.3. Section 8.3 sets the standards. Enlargement of a nonconforming structure is a conditional use.

Stan Given said 6.2d stops this application and he wasn't sure how they get past that. If they did get past that and get to 8.3e they would have the original issue. He didn't have a problem doing a site walk but didn't feel it would change his mind. They have seen similar cases where they clarify under which section an application should have been applied. He was not in favor of reconsideration due to the issue with 6.2d.

Dennis Keeler thought the determination they have come to in the last three meetings may seem harsh, but this comes in a backdrop of nonconforming uses and structures. Public policy is that nonconforming uses should be eliminated. Any change or expansion of a nonconforming use is looked at very harshly; the Town can't take the current use away, but the owner can't enlarge it. What he has here does not fit under any of the categories of 6.2, and so he can't get around the statement "thou shall not expand". He does not even get to 8.3. He would be willing to go on a site walk if they could get to 8.3, but they can't. Nonconforming uses, like variances, are harsh. He can't get past 6.2.

Willie Audet said that, as an accessory structure, it falls under 6.2d. Connecting the house to the garage would make it fall under a different section.

Mr. Russell said that it was suggested to him that if he connected the garage to the home it could be approved.

Willie Audet said that has happened in the past, where applications were approved in stages to get them to fit under 6.2a or 6.2b and then they could get to 8.3. He personally can get past 8.3.

Stan Given said the structure that they are talking about is within 3-5 feet of the setback, which is triggering the nonconformity there.

Jay Meyer said that, even if Mr. Russell connected it, the garage is closer than 10 feet to the line, so it wouldn't help in this instance anyway.

Jonathan Berry felt 8.3 was a red herring in this case. He felt the Board owes it to the public to be very clear on why they are denying this application. He would like Mr. Russell to be clear on what he can and cannot do on his property and for staff to be clear on how they are going to address these issues.

Jay Meyer felt each Board member has stated their opinions on this application very clearly. 8.3 has never been the deciding factor for him in this case. The impact on the view is small here; he wouldn't chime in on whether it was significant. In his opinion this is an enlargement of the structure: Mr. Russell is raising the height of the roof. He was sympathetic; what the applicant wants to do here isn't huge. But it isn't really necessary; there are other ways to deal with a leaky roof. His reasoning is that this is an enlargement, which Mr. Russell can only do under 6.2, and he doesn't qualify under 6.2.

Mr. Russell asked if the fact that it wasn't habitable mattered.

Jay Meyer said it didn't matter; it was an enlargement, and wasn't allowed under 6.2.

Dennis Keeler moved to deny the request for reconsideration of the prior BZA approval with respect to 11 Maiden Lane; Stan Given seconded for purposes of discussion.

Motion carried 5-0. Request denied.

h) 1 Shady Ln, Brent Nappi-Administrative Appeal of a decision of the Code Enforcement Officer regarding a home occupation. Parcel U59-018, zoned BP.

Nicholas Walsh, representing Brent Nappi, said the applicant has applied for a conditional use. Mr. Nappi is a lobsterman. In 2009 he built 3 lobster tanks: 2 of the tanks are 12x6 ft., and the third is 7x8 ft. The tank building is attached to the garage and is 275 sq. ft. The garage is attached to the house. The doors to the tank building are typically closed, and it looks like a typical garage. Mr. Nappi's original intent was to sell the lobsters retail and hold the lobsters for one wholesale customer. In June 2009 the CEO told Mr. Nappi that retail wasn't allowed in that zone, but holding his own lobsters for shipment to his one wholesale customer was a legal use, much like a farmer holding hay in his barn. Mr. Nappi, relying on that word, ceased all retail operations but proceeded to invest \$10,000 more into his operation on the site. He currently holds his lobsters in the tanks, and twice a week he packs them up and uses his truck to take them to the Portland Fish Exchange. The Fish Exchange then sends them to a customer in Florida. All the lobsters are his, except sometimes he takes some of his fathers' lobsters to make a full load. The current CEO took the position that this operation is a wholesale operation and is not allowed in RA; they appealed this decision. In researching the appeal they discovered that the zoning map shows this property in BP instead of RA. The Town of Falmouth uses the zoning map instead of metes and bounds to determine zoning. One tiny corner of the lot is RA, but that is not the section where the tanks are located. Falmouth zoning allows, in instances where a lot is bisected by two zoning districts, for the lot to be governed by the larger district. His understanding was that this zoning was in error; the intent when this lot was created was to rezone it RA. Warehousing is allowed in BP, and they have applied for a conditional use to allow the warehousing. He didn't feel this was a warehouse; this is a lobsterman with tanks and he felt this was a common occurrence in all areas of the state where lobsterman live. He thought this was a traditional use, and not a home occupation. This was a *di minimis* violation of Falmouth zoning. This use really has minimal impact on neighbors. From the outside it looks like a vehicle garage and it was built to that purpose. There is no odor, lighting, noise, glare, etc. There is a 1.5 horsepower pool pump, which emits a slight hum. He has been to the site to confirm that the hum is very faint. From 20 feet away you don't hear anything at all. There is no pedestrian traffic; the vehicle traffic is minimal. It is Mr. Nappi's truck that leaves twice a week. When the tanks are cleaned, Mr. Nappi takes the water back to the bay; he doesn't dump it on the site. He felt the use is consistent with the land use ordinances. They want to encourage business and traditional uses. He felt the remedy here was for the Board to direct the CEO to withdraw the notice of violation. The Town can choose not to prosecute what it perceives to be a *di minimis* violation. Case law, as determined by the law court in *Salisbury v. Town of Bar Harbor*, states that the Board has prosecutorial discretion.

Jay Meyer asked what exactly he was seeking tonight.

Mr. Walsh said he would like to Board to vote and direct the CEO to withdraw his violation letter. If that doesn't occur, he would like them to determine that this is an appropriate land use, and not a violation. In the third alternative, it could be tabled and considered in conjunction with the conditional use application. This might make sense because there is a land use zoning problem here, and it may be that the Board would like to consider that.

Jay Meyer said there are two types of home occupations under their ordinance. One the CEO can approve and the other the Board must approve. The owner has no approval for a home occupation.

Mr. Walsh said that was correct.

Jay Meyer asked if their argument was that this should be the kind of use that they can do as a matter of right. Mr. Walsh said their argument was that, in the generic sense, this is a home occupation.

Justin Brown explained that the definition of wholesale calls out the storage of product on premises to be sold off site in bulk. The problems with zoning cropped up during the research around the appeal. If the

business could be allowed as a conditional use, the dwelling can not be and vice versa. He doesn't feel that this can fall under the definition of a home occupation.

Jay Meyer asked about the zoning issue.

Justin Brown said staff are looking into it. It looks as though the Council considered it a good idea to change the zone, but it didn't go further than that. Staff are trying to determine what can be done. It was approved as a residential subdivision, and it is his understanding that that was the intent.

Dennis Keeler asked if every zone is established definitively by the map. The map is the zone.

Justin Brown said that in Falmouth that is correct. This is quite an old subdivision, and there was no mention of the zone. This was an extension of an existing subdivision. Technically this lot falls under the BP district, along with several other lots in the development.

Dennis Keeler thought there may be other private covenants, but that isn't their issue. He thought it was simply overlooked. Justin Brown agreed.

Public comment opened.

Mike Doyle, a direct abutter, said that Mr. Nappi is not just getting by, but doing quite well, seeing as how he took a trip to Italy recently. He bought his house 25 years ago and wouldn't have bought it if he knew he would be living next to a commercial lobster business. He saw an advertisement in Portland Magazine for a new lobster company on Shady Lane; when he went to Mr. Nappi he was told that Mr. Nappi didn't know anything about it. That lobster company took its name from Mr. Nappi's deceased mother's name. Recently there has been an addition to the property, an expansion to the rear of the middle bay. Mr. Doyle came to the CEO to ask about why a permit was issued for the expansion to the house, when the expansion to the garage for the third bay hadn't been completed yet. After the complaint, that expansion is now shingled. The expansion is to allow more boxes to be assembled, according to Nick Nappi, Mr. Nappi's father, to accommodate a multi-thousand pound lobster shipment twice a week. Between 3-5 am the crew starts to arrive to assemble the boxes. They are working with the doors open, and there is noise. This is an ongoing business operation where lobsters are packed up, loaded on a truck and shipped to the airport. They block traffic with their pickup trucks. His mail was not delivered one day because his mailbox was blocked by traffic. Had Mr. Nappi not done the back expansion, which he alleged would allow them to pack more boxes and ship more lobsters, he wouldn't have filed the complaint. He visited a real estate broker who told him that he would have to disclose this ongoing business to any potential buyer, and the impact on his property's sale price would be \$85,000. He provided the Board with a copy of a police report filed by his mother regarding a traffic incident involving an associate of Mr. Nappi. This affects the quality of his life and the enjoyment of his property.

Dennis Keeler asked Mr. Doyle to identify his home in relation to Mr. Nappi's property. Mr. Doyle identified his property on the plans.

Stan Given asked about the crew that comes to pack. Mr. Doyle said that there are 3-4 more trucks beyond Mr. Nappi's. It is always before sunup, and between 3-5 am, and is almost every day.

Stan Given asked if he has observed a number of trucks leaving with a shipment. Mr. Doyle said one truck leaves with a shipment, but there are 4-5 more trucks beyond Mr. Nappi's.

Don Russell asked if the workers come in one car, or multiple cars. Mr. Doyle said they all seem to come in their own cars.

Willie Audet asked about the real estate broker's assessment.

Mr. Doyle said he submitted it to the assessor, but she told him it wasn't enough evidence to abate his taxes. He didn't bring it tonight. It was done by Linda Flynn of Flynn and Company.

Willie Audet didn't think there was a disclosure requirement on a business next door. Mr. Doyle didn't think she said there was a requirement. He felt he would have to disclose it.

Willie Audet would like to see a copy of the assessment.

Jonathan Berry asked what he knew was ongoing. Mr. Doyle said two years ago Mr. Nappi said he didn't have a lobster business.

Jonathan Berry asked if Mr. Doyle wasn't aware it was ongoing until the ad. Mr. Doyle said the ad was a pre-business announcement; it was before the construction. When he asked about the construction, Mr. Nappi said he wasn't going to have a lobster business. At that point the extra bay was under construction.

Jonathan Berry asked when he realized there would be something going on. Mr. Doyle said this past summer, when they did the back expansion and Nick told him they were going to hire more people to make more boxes and ship more lobsters. This summer they installed the second large tank.

Jonathan Berry said that for a year and a half there was a level of activity that Mr. Doyle was comfortable with prior to this. Mr. Doyle said he was always annoyed by it, but was willing to put up with it when he thought Mr. Nappi was just making a living. It is apparent that he is more than making a living here, since he went skiing in Italy. He was annoyed before the last expansion.

Jonathan Berry said the activity before the expansion was not enough for Mr. Doyle to lodge a complaint. Mr. Doyle said he should have but he didn't out of courtesy to Mr. Nappi. He was concerned about the activity increasing and wondered where it would stop.

Jonathan Berry asked if there was a level of activity at any time that Mr. Doyle was comfortable with. Mr. Doyle said no, he just put up with it out of courtesy. He tolerated it, but didn't accept it.

Art Batson of Shady Lane lives on the other side of Mr. Nappi's home from Mr. Doyle. He felt they have a bigger issue with the zoning of all the lots; they were sold as residential lots. He developed 12 Northbrook Drive and went through the Planning Board. As part of that process they showed Shady Lane as residential. Someone dropped the ball by not going to the Council to change the zoning. A home in a business zone doesn't have the same value as one in a subdivision. He said the lobster operation has gotten bigger; he didn't agree with the characterization of Mr. Walsh. He felt they co-op; several lobstermen bring their catch there. He questioned whether there was proper discharge there and wondered what happened if there were to be a discharge. There is an improved stream there, and an easement for proper water flow. He leaves his home at 6am; a couple times a week the lobstermen show up, each in their own pickup truck. There is not enough parking there and it can be difficult to get out. He was more concerned with the zoning; the residents have put investment in their homes and would like them to be in the RA zone. The issue is not letting the business get too big, and he felt it probably has gotten bigger than it should. There are kids on the street. There are a number of issues that need to be addressed, traffic, parking, time of day to work, meeting the conditions on whether it is an approved home use. If it is a business zone, and a warehouse use, they still have to go through the property review to make sure it is a safe neighborhood.

At Dennis Keeler's request, Mr. Batson explained the location of his home. This is a cul-de-sac, and that can make getting out difficult. Most of the neighbors on the other side, including Mr. Doyle, bought a strip of land behind the development to give them a buffer to the commercial zone that was behind them.

Stan Given asked if the traffic was all day. Mr. Batson said it was early in the morning a couple days a week. It is mainly a packing operation. He isn't there in the afternoons so he didn't know about traffic then.

Stan Given asked about the drainage and discharge concerns. Mr. Batson said there are a couple thousand gallons of water there, minimum. There is a cleaning process that has to go on. He hasn't observed anything. There is an improved stream that runs through his property and down back. When you have

2,000 gallons, you could have leakage. There are drain pipes that are coming into the area. He didn't know what they are; they might be house drains.

Mr. Nappi said those go from the front of the garage.

Jay Meyer asked if he can see where the pipes come from. Mr. Nappi said they come from the property; he didn't know where they originate. They have had a lot of fill put in, and filled in part of the drainage area. It is all well riprapped and in good shape.

Jay Meyer asked how often other lobstermen come to the property. Mr. Batson assumed that they were other lobstermen and they co-op their lobsters so that they have enough to ship. He thought it was a couple days a week.

Mr. Nappi said it is Tuesdays and Thursdays.

Jay Meyer asked how early they get there. Mr. Batson thought it was around 5-5:30 am, and they pack at 6. It may be a little earlier or later.

Don Russell asked what Mr. Batson recommended. Mr. Batson said get the zone corrected first. Then, if it fits the definition, make the operations safe and proper. He wanted them to do it the right way.

Mr. Doyle said he was told that when Nick Nappi built the house he didn't comply with the proper setback from the street, due to a steep slope at the back.

Mr. Nappi said they have tried to curtail things this fall and winter, in order to address these concerns. This is seasonal; they work more in the summer and slow down in the fall. The packing supply store opens at 7am so they can't pack at 6am. He doesn't have any employees; these are the people who work with him on his boat. His father has helped him with the construction. Mr. Doyle has tried to draw Mr. Nappi in to a joint business where they could sell lobsters online; he said Mr. Doyle doesn't dislike the business, he wanted to profit from it. The tanks are closed system tanks. They pump the tanks out about once a month. They can't remove all the water from the tank because they have to maintain the proper ammonia level. They need to leave 1000 gallons in the tank. The lobsters need to be chilled for 24 hours before they are shipped. They are not meeting anyone at the airport. They put the lobsters in a cargo truck and the truck leaves for the airport. They have to be at the Fish Exchange at noon. They are done packing in 3-4 hours. They have been trying to start between 7-8 am but have to be in Portland at noon. There has never been packing activity at 3-5 am. He is agreeable to what the neighbors would like to see regarding traffic and parking. The garage expansion was to have anything that was in the front and visible covered. When he installed the tanks, he lost his garage space. The expansion was not to get bigger. He discussed the process by which they grade and pack the lobsters. There is no real loud equipment or noise generated by the process. He would love to sit down with the neighbors and see what works. The tanks are solid fiberglass and won't erupt; the water exchange is done once a month down at Town Landing. The drainage tubes that Mr. Batson was referring to are no way connected to the tank systems. You can't pump tanks out when you get the biological system right to store lobsters.

Rudy Israel said Mr. Doyle indicated that activity starts as early as 5am. He asked who the people are who show up. Mr. Nappi said it is his helper; he gets a percentage of the value of the catch.

Rudy Israel asked about the activity starting at 5am. Mr. Nappi said the packing is separate from his job harvesting lobsters. The activity level Mr. Batson was upset about was the traffic and he wants to alleviate that. They only pack two days a week.

Don Russell asked how many employees have to be a family member for a home occupation. Justin Brown said home occupation says not more than 2 employees beyond family members.

Mr. Nappi explained that a fisherman doing work out of the home is part of the job. Shipping the lobsters is a part time part of his work: it increases the value of the catch. Mr. Doyle was well aware of the

businesses and was trying to get them to purchase software from his company. They packed out 1800 pounds today with three people: he and the two people that work with him on the boat.

Justin Brown said the home occupation provision has a standard about being customarily carried out in the home. That was to cover activities like a clerical use. He didn't feel that lobstering qualified.

Mr. Nappi argued that this is agricultural state and this use fit in the fabric of the coast of Maine.

Justin Brown stood by his letter; lobstering doesn't fit under that home occupation standard.

Stan Given asked about the employees. Mr. Nappi said they are paid out of the boat catch. They are sub-employees.

Stan Given said he is paying them to fish for him. Mr. Nappi said yes. They choose to come and pack for him because it increases the value of the catch and therefore the amount they get paid. He stated that people sometimes show up during packing because his home is on the way to the Landing. They happen to stop by. The traffic is not all due to the packing operation.

Dennis Keeler asked when the operation began.

Mr. Nappi said 2009. The addition in July 2009 was for the tanks. The extension of the center garage bay to the back was to provide garage space. He built an entryway into the house as well, which combined with the tanks, eliminated his garage space.

Dennis Keeler asked how big the tanks are. Mr. Nappi said they are 6x12, about 18 inches deep.

Dennis Keeler asked about the closed water system.

Mr. Nappi explained the water system, and how they chill and prepare the lobsters for shipping. He explained that you do not remove water from a closed tank system; it would kill the bacteria. They change the filters. He discussed how they maintain the tanks.

Dennis Keeler asked how much water traffic movement there is.

Mr. Nappi said once a month, every two months in the winter. They pump from the holding tank to a tank in the back of his pickup truck. They take the water to the bay, empty and refill the tank, then take the new water back. They pack two days a week. There is no oversize equipment coming in.

Dennis Keeler asked when they became aware of the BP zone. Mr. Walsh said 2 weeks ago.

Mr. Nappi said the former CEO didn't feel they needed a home occupation permit, as other people did this in their home. They couldn't have a retail business, due to the traffic coming in and out.

Dennis Keeler was confused by the time that activity takes place at the site.

Mr. Nappi said meeting his worker and going to work has nothing to do with the parking. They have started early packing lobsters in the summer but the packing place doesn't open until 7. They need to put gel packs in the coolers which they buy pre-frozen from the packing place, and they can't pick those up too early or they would thaw.

Willie Audet asked if Mr. Nappi felt he was good to go based on Mr. Farris' statements.

Mr. Nappi said yes. He discussed the issues that Mr. Farris identified with a retail business on the site. There are 10 criteria for a home occupation in RA; Mr. Farris seemed to think that it fit the 10 criteria and there was no need for him to come to the board. In response to Willie Audet's question, he said Mr. Farris did come out to the site in 2009 when he put out an advertising sign and told him he couldn't have a sign. Everything was professionally done with the expansion and the tank installation. When Mr. Farris left the property, Mr. Nappi thought he was all set.

Willie Audet thought it was similar to a contractor, who might bring home some staging and lean it up against his house to store it.

Mr. Nappi said he has been tracking everything to do with his business that goes on at the property since this issue came up in November to measure the impact.

Jay Meyer asked how many guys are there to help pack on average.

Mr. Nappi said 4 including his dad; he has let other people keep lobsters there at times. The 4 includes him. In the worst case there are no more than 4. Any more than that would cause people to be in each others' way. There are 3-4 trucks on site when they do this, but he will pick people up if it will help the issue.

Jay Meyer asked about the hours.

Mr. Nappi said the earliest they could start, if they got everything the night before and could keep the ice, would be 6am. The Fish Exchange doesn't open until 9, so there is no benefit to starting earlier. The package place doesn't open until 7. The drainage pipe mentioned earlier is a foundation drain and is in no way connected to the tanks.

Stan Given asked if there was a floor drain in the bay. Mr. Nappi said no. For all intents and purposes, if you were to pull the tanks out, this would be a garage.

Stan Given asked how many employees he has. Mr. Nappi said 1; the stern man is a sub-contractor.

Stan Given said he had no full-time employees. Mr. Nappi said no.

Willie Audet asked Justin Brown about the violation letter; he asked if Mr. Nappi is really facing \$6,000 to 150,000 in fines. Justin Brown said yes; that is the base language for the violation letter in case people simply ignore the letter. Fines are not their foremost intent. It is there if it needs to be pushed. Mr. Nappi is working with the Town and not against them. Willie Audet asked if they have the intent to levy a \$150,000 fine. Justin Brown said no, since Mr. Nappi was working with them, but they reserve the right. It is intended to be eye-catching and encourage people to work with the Town and not against them.

Dennis Keeler said the letter was written before the BP zone issue was uncovered, and not after. If it had been written after, he wondered what it would have contained.

Justin Brown said it would be a longer letter. He wrote the letter for the lot zoned as RA. As far as the zoning issue, it would be far tougher to rectify the home in the BP district than the occupational use in the RA district. Whether in BP or RA it is still in violation at some level.

Dennis Keeler thought if it is in BP he could get a conditional use for the business. This is a different analysis than a home occupation. Justin Brown said that was correct.

Dennis Keeler observed that, if they were to approve a conditional use, and the Council then corrected the zoning issue, Mr. Nappi would then have a legal non-conforming use. Justin Brown agreed.

Public comment period closed.

The Board discussed the best way to proceed. Jonathan Berry argued that there was merit in tabling the application to allow for the conditional use application to catch up. The violation letter is based on erroneous information, due to the discovery of the zoning district issue, though the opinion is correct. He is still in violation since he does not have a conditional use approval. In 1972, *Town of Kittery v. Hoyt* the Court determined that commercial lobster storage and sales was not a home occupation under a local ordinance which defined the term as "business customarily conducted from the home". He didn't think fixing the district to RA and then applying as a home occupation will help the applicant, despite what Mr. Farris said. The business is in the BP district. Mr. Doyle's property is in BP entirely and Mr. Batson is

wholly outside BP. Dennis Keeler said they have to deal with the zone that is on the ground today, which is the BP zone.

Dennis Keeler moved to table the appeal; Stan Given seconded. Motion carried 5-0.

i) 358 Gray Rd, John Kelly- Administrative Appeal of a decision of the Code Enforcement Officer regarding a fill permit for the Rod & Gun Club.R06-059-A, zoned FFm.

Willie Audet is recused from this item as he has a personal interest in this item. He left the meeting. Stan Given recused himself as he is a member of the Club and has served on its board.

Rudy Israel and Don Russell were appointed as voting members for this item.

Jack Kelly said he was not satisfied with the walls the Club put up as they don't extend the length of the property line. The Club has a history of shooting onto his property.

Jay Meyer asked if the wall was part of the fill permit.

Mr. Kelly said yes. The Club put cement blocks and then filled along it. They were supposed to put 4 inch crushed rock there but they put sand and clay for fill instead. There is a tree growing up out of it. They didn't do what they were supposed to do and the wall isn't long enough. The Club's rules say all bullets need to stay on the property.

Jay Meyer asked why Mr. Kelly is appealing the fill permit.

Mr. Kelly said they put up a cement block wall. To reopen the range they had to be safe; he isn't safe on his property because the wall doesn't extend the length of the property. They couldn't fire onto his property if the wall went all the way. There is a 300 foot area in one section where they could shoot onto his property. Any member can go and shoot at any time, without supervision. Once the fill was in, the Chief of Police certified that this was a safe range and there was no danger to the neighbors once the fill was placed. Without the fill permit they couldn't open the range. They did not do the wall the way they were supposed to. He provided the Board with photos of the wall.

Justin Brown said the issue of safety is a major factor; the fill permit is a huge step in the right direction to make the property safer. Every range, with the exception of the skeet range, has been modified under the fill permit. The fill amount is under the maximum that is allowed without Planning Board approval.

Don Russell asked if there was any signage on the property.

Justin Brown said there is signage in relation to safety issue and club rules. None of it is in relation to the permit. There are some signs with warnings.

Rudy Israel asked if the construction inconsistent with the permit that was issued.

Mr. Kelly said they were supposed to build to DOT standards and they did not. The wall appears to be the right length, but the fill is not done the right way. They didn't put the loam on it, which means that it will wash away. They ran 4 inch pipes under the wall. They were supposed to install 4 inch crushed rock around it; they didn't do that. There is supposed to be a 2 foot shelf that comes down at a 45 degree angle; there is no shelf. They were supposed to compact the fill every 8 inches; they did not compact it. They didn't build it according to the engineer's plan and the engineer says he isn't responsible. He was concerned that the fill would wash down into the intermittent stream and damage his property. There is supposed to be a remediation process for a neighbor's property. He spoke about a recent article published in the Forecaster regarding the stream.

Dennis Keeler asked if he was appealing the fact that the permit was issued, or that it didn't go far enough. Mr. Kelly said both really. He thought he would have further discussion with the CEO before the permit was issued.

Dennis Keeler wondered if Mr. Kelly wanted the permit rescinded. Mr. Kelly said he wanted the wall extended the way it should be.

Dennis Keeler asked about the agreement mentioned earlier, that the range wouldn't reopen without a fill permit. Mr. Kelly said it was an agreement between the Club and the Chief of Police.

Justin Brown said the fill permit was necessary to take care of the safety issues; there was no formal agreement written out. The Club worked with the Police and Codes Office on what specs needed to be met and comments from the Police were considered in drafting the fill permit.

Dennis Keeler thought Mr. Kelly was saying that there was some agreement that was violated. Mr. Kelly said the CEO gave him his word that there would be further discussions and there weren't.

Dennis Keeler asked about Mr. Kelly's contention that the wall was supposed to be 4 inch rock and that wasn't done. Mr. Kelly said that was in the specs.

Justin Brown said those specs are in the fill permit. They have gone out and inspected and everything seems to be well done.

Dennis Keeler thought Mr. Kelly was alleging that the permit was not being followed. That is an enforcement issue and doesn't include the Board. He thought Mr. Kelly's concern was that the fill permit should have required them to do more. He wasn't sure that this Board could address that.

Mr. Kelly said the permit was not issued properly because it was issued under the assumption that it would be safer, and it isn't.

Dennis Keeler thought Mr. Kelly felt that the resolution did not address his safety concern. He asked if Mr. Kelly wanted them to revoke the permit. Mr. Kelly wanted the Board to say the range could not be opened until it was safe.

Dennis Keeler said the Board's role is to determine whether the permit was issued properly and lawfully.

Jonathan Berry thought a fill permit is to allow dirt to be moved, not to address the safety concerns. The Police department's role is to determine if it is safe or not.

Justin Brown said Codes has not been out to do a formal, final inspection. The fill permit is technically to address safety, but it is a stand-alone permit. The Police Department could come out and say that, while the work was done according to the fill permit, it isn't safe and can't reopen.

Jonathan Berry asked if Justin Brown weighed in on whether that amount of dirt was enough to stop a bullet. Justin Brown said no, that was up to the Police department.

Public comment period opened.

Adrian Kendall from the Rod and Gun Club said the appeal was issued more than 30 days after the issuance of the permit. He said the safety issues have nothing to do with the fill permit. They have a safe range. They are willing to listen if there is any finding by the CEO that more work needs to be done on the fill permit, but that is not an issue for this Board.

Rudy Israel asked who inspected the construction for them. James Conrad, current president of the Club, said he was on hand every day to inspect what was going on and answer any questions the contractors might have. A structural engineer did the design work for them. He can personally vouch for the work.

Rudy Israel asked if the engineer inspected it. Mr. Conrad said no, nor is he an engineer. Rudy Israel asked how he can certify that the work was done properly. Mr. Conrad said the construction workers are professionals. He is in construction and knows how to read plans.

Don Russell asked who at the Town is overseeing this to make sure that it is built to the plan. Justin Brown said the Codes Office has been out and done a walk around of the whole site. There are three ranges that have been modified with fill. It is not unusual for an engineer to not be on site to inspect.

Rudy Israel said that typically an engineer files plans with engineered drawings, and the DEP issues a permit based on the drawing. No one from the engineers' office is there to certify that it was built as he drew it.

Mr. Kendall said they do have a DEP permit by rule. He felt the issue of quality control was addressed. His understanding was that this had no connection to the issue before the Board.

Tom Schwarm, a Maine certified geologist and a member of the Club spoke as an independent expert. An engineer designs a house, but a contractor builds it. An engineer does not come out to inspect it. The level of construction in these walls is relatively minor. The spec for the fill around the base of the safety wall was for all fill to pass a 4 inch screen; there was a gradation. 25% is supposed to be greater than ½ inch, and all of it had to be less than 4 inches.

Rudy Israel asked if he inspected the gradation to make sure it was within spec. Mr. Schwarm said no.

Rudy Israel asked what plans the Club has that show the work was done as permitted by the DEP.

Mr. Schwarm said there are two permits; the DEP permit by rule and the Town's permit. He was in charge of making sure the DEP permit work was done correctly. As part of that, if it was reasonable, he would make sure the other work was done properly as well. Justin Brown the Police Department and the DEP are all looking at their work.

Rudy Israel asked if the range has been opened. Mr. Conrad said all the ranges have been permitted by the Police Department and opened.

Mr. Schwarm explained that the DEP is regulating them for erosion, siltation and stream flows. The DEP is not looking at the site work unless it is within 75 feet of the drainage between them and Mr. Kelly's land. At Dennis Keeler's question on the specs, Mr. Schwarm explained that the structural engineer was David Price of North Yarmouth, and the civil engineering was done by Steven Down. Will Savage of Acorn Engineering did the stormwater work.

Dennis Keeler said these specs came to Justin Brown and were the basis of the permit. Justin Brown said that was correct.

Mr. Todd Kelly thought the safety and the fill permit went hand-in-hand. He distributed pictures to the Board and discussed what each represented. One showed bullets that came onto his property in 2008; another showed the end of the wall and how someone at the range could shoot onto his land. He thought the wall should go behind the range roof and encompass the 100 yard range. Skiers, snowmobilers and snowshoers use his property in the winter. He doesn't feel safe. He thought there should be more fill. He wants them to do it right. He had a surveyor come down and check and said 4 more feet on the wall would take care of the safety issue.

Don Russell thought it was an engineering and design problem with the plans more than an issue with doing what the plan said.

Mr. Todd Kelly agreed. He thought the wall needed to be a little bit bigger. His surveyor said he can still be shot on his property with the wall as it was built. He felt they need to increase the permit and do it right.

Tazewell Mumford lives due east of the rifle range and has safety concerns. This is a non-conforming property. He wants the Gun Club to remain open, but it should be safe. The question is whether the permit should have been issued. The permit allowed 870 cu yards of fill to be moved, as well as allowing concrete blocks to be piled up along the various firing ranges. He pointed out that a solid concrete wall will cause echoing, and this should have been addressed. There should have been an open forum to address these issues, and there wasn't. Adding these berms has channeled the noise out. He felt the permit shouldn't have been issued and should have been brought into open discussion. He disclosed that he was a member of the Club for 20 years. He suggested that the permit be revoked and that it should be returned to the Planning Board for open discussion.

Don Russell thought the overall issue was that the engineering plan was no good to start. He asked if Mr. Mumford agreed with that. Mr. Mumford said he wouldn't disagree with that.

Justin Brown explained that Sgt. Soule was present at the meeting since he was in charge of the safety issues. He and Jon Berry discussed the fill permit and that it solely addressed the movement of dirt. The safety issues are not under Justin Brown's jurisdiction.

Sergeant Frank Soule of the Falmouth Police Department discussed the process with Jonathan Berry. He explained that the ordinance states that the Police Department is the issuing authority for a range permit, with the Police Chief as the ultimate authority, whether for a private club or someone's backyard. The heights of the walls were determined based on safety standards. The ordinance does not provide for a hearing as part of the range permit process. They permit ranges based on the experience of the inspecting officer, the Chief and the authority of the ordinance.

Jonathan Berry felt it was that process that was being challenged here. He asked if the police will be inspecting annually.

Sgt. Soule said yes. He explained the oversight that led to the range not being re-permitted annually as it should have been. The side walls that were constructed are 10 feet in height; the NRA standards for side walls for ranges are 8 feet. Short of having a dome over it, or an indoor range, he can't guarantee that someone isn't going to shoot off a gun in the parking lot. While there is a 200 yard shooting station, the range has not been permitted for 200 yards, but only for 100 yards. The wall meets the safety standard, both by the NRA and by his extensive experience as a firearms instructor. The impact berms are all at a minimum of 20 feet, the NRA standard. The lowest point of the impact berm is 23 feet above ground level; highest point is 27 feet.

Jonathan Berry asked if he determined the content of the walls as well as the height.

Sgt. Soule said no. He's never seen ballistic tests on earth. He said he most outdoor gun ranges rely on earth for impact berms, because earth absorbs bullets. While he can't be out there to make sure that no one fires toward the Kellys' property, the Gun Club has given him their list of rules and specific yardage on how each range is to be permitted. The lower pistol range is permitted for 25 yards, the upper pistol range for 40 yards, the rifle range for 100 yards and the trap and skeet range was permitted with the presence of the nearest abutter. Violations of those would be investigated by the Police and the permits are revocable.

Dennis Keeler said the Police department is the issuing authority for the range permit; they have determined that the ranges are safe and have issued the permits. Sgt. Soule confirmed that is correct. It meets every standard that it needs to meet and there is nothing to prevent them from issuing these permits.

Jay Meyer asked if there was anything in the berms or the fill that is deficient in safety terms. Sgt. Soule said no; he's never seen any bullet penetrate anything they have down there for barriers.

In response to questions by Jay Meyer, Justin Brown said section 5.34 Placement and Removal of Fill Material sets the standards. He confirmed that he reviewed these standards and this permit satisfied those.

The only condition on the permit was that DEP approval was necessary on that section closest to the drainage soil; this was received by the Code Office on 12/13/11. It was a DEP permit by rule. In his opinion the proposed fill activities had adequate erosion and sedimentation controls. The closest they came to placing fill near a drainage way was 25 feet; that was the section permitted by DEP.

Public comment period closed.

Dennis Keeler moved to deny the administrative appeal of John Kelly. Don Russell seconded.

Dennis Keeler said that while there are many issues, few of them are under the authority of the Board. He thought the fill permit addresses whether someone can move dirt, and whether they moved it properly. It isn't for Justin Brown to determine whether the berm was high enough, deep enough, etc. He urged the applicants to keep in touch with the Police Department. Jonathan Berry agreed; while the issues are legitimate, the Board has no authority to review a responsibility given to Chief Tolan by the Town Charter.

Don Russell wondered if the property was posted to prevent people from trespassing onto the property. Sgt. Soule said the Club is posted every 50 feet or less; they don't get complaints of trespassing on the property very often.

Jay Meyer pointed out that the Board and Justin Brown are not in charge of the safety of the range; that is the Police Department's responsibility. He felt it was a proper permit.

Motion carried 5-0. Appeal denied.

Jay suggested the Board draft a simple finding that the permit satisfied Section 5.34 of the ordinance

Dennis Keeler moved the finding that the issuance of the fill permit by the Code Enforcement Officer satisfied Section 5.34 of the Ordinance. Jon Berry seconded. Motion carried 5-0.

4. Other business

There was no other business before the Board.

Adjourn

Meeting adjourned at 11:27 pm.

Respectfully submitted,

Melissa Tryon
Recording Secretary