

TOWN OF DOVER ZONING BOARD OF APPEALS REGULAR MEETING HELD ON WEDNESDAY, May 4, 2011, AT 7:00 P.M. AT THE DOVER TOWN HALL:

PRESENT: Chair Marilyn Van Millon
Member George Wittman
Member Henry Williams
Member Debra Kaufman
Member Anthony Fusco

Also in attendance was Secretary to the Board, Maria O'Leary, and Attorney Thomas Jacobellis for Putnam Steel and Attorney Michael Liguori for Gast, Sherrer and Freshtown.

Chair Van Millon called the meeting to order at 7:03 p.m. and began with the Pledge of Allegiance. She then read the first item on the agenda as follows:

Continued Public Hearing - PUTNAM STEEL, INC – Z 2011-001 - The applicant seeks to appeal Section 145-41(B)(2)(a) of the Town of Dover Zoning Law to permit the increase of the area occupied by the home occupation to the size of the existing structure built for same under an approved site plan from August 5, 1999. This property is located at 6584 Route 55 on tax map #7160-00-451311 in the RU district.

In attendance for the application were Don Walsh of Development Strategies Company, Attorney Timothy Curtiss and Theresa Ryan of Insight Engineers.

Attorney Curtiss: I was at the first meeting; I was not at the last meet. I read the minutes and saw that there was some discussion about whether there were bulk requirements in the ordinance prior to 2002 and I had the opportunity to speak with Town Attorney Jacobellis and I think in his research, there were no bulk requirements as were required after 2000. So it would appear that the applicant, when they came in with a site plan approval, was in compliance; it was a lawful use when it was first erected. I think you know the history of the property and that is that they applied for a site plan, they received that approval, they built the building with a building permit and a CO, there was a fire that occurred in the early 2000's, they went back to the building department, they got a second building permit to repair the damage from the fire and got a second CO, and then they go into foreclosure. The bank then takes it back in the foreclosure proceeding, they go back to the property with the Building Inspector and they find they house is not finished. So, they apply to the Building Inspector for a third building permit which is granted, they finish the house, they finish the septic, they get the Heath Department approval, they get the DOT approval, the project is approved, they then look for a buyer which is my client, Putnam Steel.

We come along, and in the original site plan approval we were required to come back to the Planning Board because the use changed. We go back to the Planning Board, we explain to them that we have all of the approvals and we begin to process it, and then we are told that the zoning ordinance has changed and now there is a bulk requirement that says that the accessory home occupation can only be 1/3 the size of the actual residential dwelling. They then send us to your Board for the area variance at that point. I have provided to the Board my memorandum, which basically sets forth the criteria, and what I would like to do is take you through not only the history, but those criteria because we're in a very unique circumstance and

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I understand, Mr. Wittman, from the last meeting, you were having some difficulty as to whether or not this would set some kind of precedence for someone else to come in and say, "I would like to set up a home occupation for oil drilling or some other type of home occupation that's really an industrial type of use." In reviewing the history of this property, I have to tell you that it's somewhat unique because I don't think there is another parcel like this in Dover where the applicant or the owner has come in, received a site plan approval, received two or three building permits, received two or three CO's for this type of commercial use in a residential zone.

I will tell you that I was involved in a very similar case in Carmel, which Mr. Jacobellis is aware of, which was a cultural center. It had a very similar problem, although it wasn't lawfully created, everybody thought it was a pre-existing, non-conforming use going back to 1958, and low and behold, there's a fire in the Cultural Center and they go back in and pull a building permit and the inspector looks and it was actually a residential zone and there was no pre-existing, non-conforming criteria. They go for a use variance, they get the use variance and there is a neighbor who was very upset by that. The case goes from the Supreme Court to the Appellate Division, all the way along the Zoning Board granted the variance, the neighbor was upset, and what the Court was basically saying in that principal was a doctrine of due process called fundamental fairness. In that doctrine, basically what the Court is looking at is, if the applicant operated and thought that they were lawful, the municipality operated on the thought that they were lawful, you have to do what is called fundamentally fair. When they found out that they weren't lawful and they made the appropriate application, it was within the Zoning Board's discretion to grant them that variance.

We are not in that kind of a hard place because we were lawful when we were created and yet everybody in this process has operated under the statutes that were in the Town at that time, applied for all the building permits, applied for all the CO's and we now find ourselves in a position where we need an area variance because of the size of the accessory structure. I would submit to you that the property really has no value without this variance because if you demolish it, there's testimony from Mr. Walsh that it would cost over \$1,000,000 to demolish this and to use it for any other purpose than what we are seeking to use it for makes it uneconomical. There is testimony in the record from the real estate broker that the number of people and the fact that there were no other buyers for this property other than our use and I think there is also testimony in the record that our use is less intense than the saw mill that was there. We don't have the noise, we don't have the dust, we don't even create any byproduct; any byproduct we have is scrap metal and it gets put in a dumpster and we sell it. There is nothing coming off the site other than the ornamental crafted steel that's being made by Putnam Steel.

It is a commercial use, we understand it is in a residential area, we understand that may give you some pause, but really when you look at the size of the property and the accessory use on the property, it really is one of those situations that was created lawfully and it really has a right under fundamental fairness to continue to exist. We're not changing the essential character of the neighborhood, it's there and everybody knows it. There have been no neighborhood complaints about the former operation or about our operation that's proposed. The only change we're making to the site is to add to the parking and probably to the driveway to improve the surface in accordance with the Planning Board.

You had given it a Type II designation at your last meeting under the environmental requirements which means there are no environmental impacts to it. The size of it is not going to be any bigger, we're operating under the same structure that was originally granted, the building is not changing at all and the house is not changing at all. The only thing we're adding

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to the site is additional parking which was required by the Planning Board. In essence, we are the existing use that's there, we really can't do anything else with the property and the property really has no value unless this area variance is granted.

The owner of the property right now is Mr. Walsh's firm. I represent the contract vendee, Putnam Steel.

Mr. Walsh: The owner of the property, 486 Route 55 LLC, is a single-entity owner that was established by the pension plan. Originally the Putnam Savings Bank was moving into foreclosure but because we were behind them, the pension plan who had the equipment loan ended up buying the bank out and then they had the whole position, otherwise they would have lost their investment. As it turned out, they became the owner of the site when it was abandoned by the saw mill people when there were some legal issues there, which have nothing to do with the Town, and at the same time after a year and a half of the foreclosure process, the pension plan took over and they put a single-entity corporation in; the only thing 486 Route 55 does is own that property. 486 Route 55 is solely owned by the pension plan and that's where the loan came from originally.

Member Wittman: And the pension plan got involved because they did an equipment loan? And to start off with, they had no particular interest in the property itself as collateral for the money that they loaned.

Mr. Walsh: That's correct, the property was not collateralized by that originally; it was collateralized by that when part of the equipment loan went bad, they put a second on it. The foreclosure started in 2005 and finished in, I believe, 2006 and 2007. I believe I first came up here in the fall of 2006, and then everything finished and everything went into title in 2007; that's when I went to the Planning Board, that's what the record will reflect.

Member Wittman: Whatever happened to the equipment? That was the collateral for the loan.

Mr. Walsh: That's correct. There was a forfeiture of equipment that had been bought. I don't know if you know the history of the people there, but it was in all the newspapers, it was a family who owned the saw mill. They engaged in a course of conduct over the border in Connecticut that fell under the category of environmental crime in Connecticut, at least that's my understanding. It involved chopping up wood. There were pallets that were creosol treated and they sold them without notice and stamping on them that they were creosol treated. The owner did some serious hard time because of that and there a number of forfeitures of all the equipment and that's where that went, I understand. It was sold to make up for the fines that were levied on them. One family member did serious time in the Connecticut penitentiary and most of the equipment apparently went that way.

Member Wittman: At the point that the pension plan bought the bank out, they had no more collateral because the collateral had disappeared.

Mr. Walsh: Minimal collateral, I believe there were still two trucks.

Member Wittman: But that was the pension plan's original interest in the whole project.

Mr. Walsh: Correct, and that's how they got involved with the project; it was a total loan of about a quarter million dollars.

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Member Wittman: Did they review the problems with the property and the building before they purchased it?

Mr. Walsh: I went to the lawyer to get the file and in there I read the Putnam Savings Bank file and everything was stamped off properly, but all they had in that file were CO's relating to the butler building. I don't think anybody at the bank looked much further. And the buy by the people at the pension plan was done in the courthouse and it wasn't like you might do for a closing. You talk about CO issues when you go to buy a house, you have searches done; they more or less put in a bid right at the courthouse and that's how they were able to buy the bank out. It was at a slight discount, but it was still an awful lot of money; it was over \$400,000 and that money was expended based on a review of the file from that morning.

Again, the CO was in there, but only the CO for the butler building. I don't think anybody there did anything more than what was done here at the Town because I went to the site for the first time with a Town official, and Tom Hearn and I took one look at it and saw that the house wasn't built; it was framed, but not built. You and I walked through that house, and if you can envision it without anything on the inside, except that fireplace, that's what it looked like that day. He and I talked, then I went to the Planning Board with Theresa (Ryan) and they came back to us and said no matter what we do, nothing can be done on this site because it's a residential neighborhood and it's under the home occupation use, you have to finish the house. That was the consensus of the administrative staff. I was a Code Enforcement Officer for many communities, and that's what I would have said, too. There was no argument against that, it was simply yes, you're right, we'll get the house finished then we'll come back.

Of course, that gave the people at the pension plan a stroke, but the procedure was the procedure, you had to follow exactly what that was or else nothing could happen. Their choice would have been not to buy the property. When you do a foreclosure or purchase, you only put 10% down and come back within 30 days. I gave them the report in that period of time, but they made the decision that they don't want to lose everything and they wanted to take a shot. This is their area, they have a lot of construction companies, they finance up and down Route 55 and Route 7, that's what they are, it's a pension plan, and it's an affiliation of a number of small construction company's pension accounts. They pool their money and use it as a loan source or other members for that kind of thing, but that's who actually is in charge of it and is in possession. They do business under the name of Golden Age Mortgage Corp; it's strictly the pension funds of a number of different construction companies.

Member Wittman: It appears to me, and I'm not an accountant or a lawyer, that there were some very poor investment decisions made by the pension plan by not checking out a lot of things before they invested a lot of money on a foreclosed property. Perhaps the bank should have done some checking before they even got as heavily involved as they did.

Mr. Walsh: I saw the letter in the bank file; there was a letter from the Town. It confirmed site plan approval and confirmed the CO's on the butler building, so the bank did that investigation. I can't answer as to what happened because I wasn't there, you weren't there, none of us were there.

Member Wittman: I fully agree with you. One of the first things that came to my mind was how can you have a home occupation if you don't have a home?

Mr. Walsh: I agree with you 100% and like I said, that was the first thing Tom Hearn and I said when we both got up there. That's the reason we went out and finished it. That's the reason

they reached into their pockets and as a result of the meeting, I know this Board wasn't part of, but they couldn't get to this Board. You asked the question last time, why didn't we come to your Board then; because there was no user, there was no one here where I can say here's what they're going to need parking-wise, here's what kind of business, all it was, was where do we go from here? And the consensus of the Town's professional staff and the Town's Planning Board was to finish the house, deal with the DOT, deal with the Department of Health, and then come back and let's see what we can do.

We brought up the issue of subdivision then, but there aren't enough frontages to subdivide, and what would we have done with this building? The building was the bulk of the value no matter what. Every single document the Town had issued, Putnam Savings Bank was in that file, except for the house, but the bank didn't look for the house. Their collateral was really the butler building, they looked at the CO, they had a title search. In fact, we used the same title company, Chicago Title in White Plains and Carmel to effectuate that. When I say we, again, I work for them. Tim (Curtiss) and I had talked briefly before we came in here tonight and I knew he had talked to Mr. Jacobellis. The biggest problem was what happened, what were the regs when they did this because there was some discussion last time at the meeting that no one was too sure if there were bulk regulations when this was approved that were ignored by the Town. The answer which we just received was confirmed with the Town attorney was no there weren't, the site plan was quite proper.

Attorney Jacobellis: I have not been able to verify that there were bulk requirements in 1997. Looking back at the Code, I haven't seen them. If they exist, I don't have them in black and white. I think there's some ambiguity there.

Member Wittman: Under the current zoning which started in 1999, there is a bulk requirement.

Attorney Jacobellis: And I think the history of this property is important to give context to the Board, but I think the Board has to be cognoscente of the fact that this is an area variance application that deals with 2011. This is an application before us now, there's no argument about pre-existing, non-conforming use and there's bulk requirements now. So, there is some importance in the history that the building does exist and I think the Town Board issued a Special Permit back in 1997, I think a building permit was taken out back in 1999, but the application before this Board tonight that you're going to be deliberating on is for an area variance based on home occupation under today's law.

Member Wittman: One of the reasons I'm wasting everybody's time here with the questions that I ask is the fact that when the pension plan bought into this, the bulk requirements were in effect and I think there were some bad decisions. They bought the property with all the defects that went along with it.

Attorney Curtiss: I would disagree with that in one aspect; there was no way to discover that. If you looked in the file, all that was in the file was a CO and building permits and there would be no way for anyone to be put on notice that there were bulk requirements at that point because all the construction predated your ordinance, it was back in 1997 and 1999. The title companies missed it, the Building Department missed it, everybody missed it. I think that's where I'm going with this fundamental fairness argument; it's not anybody's fault. We're not blaming anybody; I don't think you're blaming us. Could there have been a better search? Probably. Could it have been uncovered? Maybe, but it's clear that everybody in the process missed it. The Building Department missed it, the title search people missed it, the bank missed it, the pension fund missed it, so obviously it was not readily available.

Attorney Jacobellis: I agree with Mr. Curtiss that if somebody went and looked at the Building Department file, you wouldn't see it. The Building Department didn't have the time to put home occupation laws and updates in the file and staple a pink sheet saying, "this is the new requirement," but if they looked at the Town Code or the Zoning Code, that's where you would have to discover it.

Attorney Curtiss: You would have to piece it together; not only would you have to look at the Town Code, you would have to piece it together that this property was constructed after that 2000 requirement and the Building Department records clearly showed that it was before that requirement. So, that's what everybody, I think, went on the premises that it was lawful when it was created because if you had seen a construction date of '01, '02, or '03, it gives you light that something may have changed at some point. But when you look at the documents in the Building Department file, they are '97, '98, you looked at the ordinance, the ordinance is 2000, it has a bulk requirement. I'm before that; obviously they gave me a site plan approval, they gave me a building permit, they gave me one CO, we went back in '03-'04 when the fire happened, they gave me a second building permit and a second CO, and it wasn't until the foreclosure when you see those kinds of documents which were after 2000 and nobody ever raised a red flag. There really wasn't a problem here. If there would have been one CO issued and one building permit in '97, you would say that that may have been missed, but when they came back in '03 and '04 and asked for a building permit, asked for a CO for the fire damage and got it with nobody raising this red flag, I think that's what lulled everybody into a false sense of security.

Member Wittman: One of the things that I think should have raised a red flag or at least a yellow flag for people to check out is the fact that you have a commercial business running in a residential zone, that's pretty easy to determine.

Attorney Curtiss: Yes, but it's under the home occupation use.

Member Wittman: Yes, and the home occupation use says there has to be a house and there was never a CO for the house.

Attorney Curtiss: Yes, that's true.

Mr. Walsh: There's another document in the file which hasn't been mentioned here. It was a regular document that has been regularly renewed by the Town, and that's the Mill Operating permit, which was issued every other year. I believe, they were completely up to date in that file, and that was the one document that was on top of the file that I looked at and again, no one is blaming anybody. What it took was two Code Enforcement Officers to go up there and put two and two together. I went up there looking for fuel storage tanks, and the first thing I did was dig in, check if it was dual wall steel and make sure that was OK. Then I began looking at the house and we came up with these conclusions and at that time I want to put on the record, we didn't find anything that indicated at all that the Town approvals in 1997 or 1998 were in anyway incorrect; everything was fine and all the inspections that went on each year only looked at the butler building and they only looked at the mill operation. Those inspections were to make sure they had insurance, make sure that the road would bare a fire truck, that kind of thing; they didn't look at the house, it wasn't a crime, it wasn't a bad thing, but they had that permit every single year, but in 2007, the Town pulled the mill permit because that's when the two and two came together and made four and Mr. Hearn said, "I have to pull it," but I will give you a building permit right now to start the house and that's when I wanted to come here and start.

I just didn't know what to do; they couldn't walk away from that much money. In the end they're going to lose some money and I'm really respectfully asking all of you to say please don't let them lose everything because it's an awful lot and this is an area variance. You said very clearly, Mr. Wittman, that you didn't like that use; you liked an office, you liked a hairdresser up there and I understand that, but it's not really about what we like and what we don't like here. Putnam Steel can go in there right now if the Planning Board approves it, they just can't use the whole building; that's your area of approval right now, or an area appeal approval if they didn't deal with that here. What we need you to do is look at it because we've met every single one of the criteria that were outlined by Mr. Curtiss originally. I'm sure Mr. Jacobellis can confirm that to you, there is not a scrap of evidence against that anywhere here in the record. One of the first things you open up, and I'm only addressing you, Mr. Wittman, because at the very first meeting you told me clearly that we want to follow the exact law and the exact procedures. People come in and offer their opinion, we discount the opinion, we want to make sure we follow what the law is here, and I agree with that and I urge every single one of you to please follow what the law is here because we do meet those criteria, we meet them dead on.

Attorney Curtiss: In the memo, the criteria for the area variance as you all know has been statutory, it's actually been codified, because there was some case law, there were some issues about what they were. There were five very generic criteria. The first criteria is, "will there be any substantial change in the neighborhood," obviously not, it exists; it has been there for the last 10-12 years. The need for the variance cannot be obviated, the building is there, we can't change it other than demolish it, so that's all we can do, we have to have the variance. The third is, "the requested variance is not substantial." You may have an argument with that; it is a big size building, but we have changed nothing on that site since day one. The building is the same, the house is the same and the only thing we are proposing in the Planning Board is to add additional parking. The fourth criteria is, "the variance would have no adverse effect on the environment" that's already been concluded because you've given it a Type II listing and the Environmental Impact Statement has been accepted at that point and there are no environmental factors that were raised by either the Planning Board or by your Board because obviously it exists, there is no change to the environment whatsoever. The difficulty, and this is the issue we've been discussing tonight, was really not self-created. I don't think anybody is blaming the owners, the bank or the building department. It appears that it was just this kind of perfect storm of circumstances that came about. This building got built, the house was put up but was never finished, and Mr. Walsh didn't discover that until 2007, almost 8 or 9 years after the fact. So, we would submit to you under the ordinance that we are all bound by, we have met the criteria, and other than the use of this area variance, the property without it is economically unusable; it's not feasible to use it any other way. If we demolish it, it's \$1,000,000 and you're never going to get that kind of money back out of the property, so we have an economic hardship. Without this variance they just can't use it at all.

The Board reviewed the criteria for a decision.
Code of the Town of Dover – Section 145-59 D. (2)

- a. Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of the area variance? No; Member Wittman: Yes. It's there, but it doesn't belong in there and I still don't think that it ever should have been there. I don't know exactly how it happened, but it is there.
- b. Can the benefit sought by the applicant be achieved by some method, feasible for the applicant to pursue, other than an area variance? No.

- c. Is the requested area variance substantial? Yes, huge.
- d. Will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district? Not environmentally, but it's a commercial use in residential zone. Member Wittman: While it does exist under the home occupation use, this is a gross extortion of that.
- e. Was the alleged difficulty self-created, which shall be relevant to the decision of the Board, but which shall not necessarily preclude the granting of the area variance? Yes. Member Wittman: Let me explain something that some people may have objection to, but one of the reasons I went through all the nonsense that I did there before is to show that they did not do due diligence when they bought this property in 2005. If you're going to spend \$300,000 to \$400,000 to buy something, I would hope that you would do better diligence than this in order to determine whether it could be used. I also believe that they probably could have come to the ZBA before they invested all the additional money in this property for the house and asked for an interpretation; I'm not saying that you couldn't have anybody in there, but you wanted to use the building as-is for a home occupation. I believe that there's grounds that were sufficient to come before the ZBA and say, "Can we do this conceptually before we spend another couple hundred thousand dollars." Attorney Jacobellis: I think that any applicant can always ask the Zoning Board of Appeals for an interpretation. I think without a particular tenant or owner. I think they would be prohibited most likely in front of the Planning Board because they will determine parking and flow of the property and certain items like that, but an interpretation would be something that... Member Wittman: But an interpretation for the 10,000 square feet would certainly be a matter of interpretation. Mr. Walsh: I asked that question specifically in front of the Planning Board and I asked the woman attorney that was there that night if I should go to the Zoning Board now and she said, "No, you can't." The question was do I need an actual application and site plan to come in here. I asked the question and was told no, deal with DOT, BOH, find a tenant and come back. There's nothing in the Building Department file, there's nothing in the public records that talks about the home occupation. Member Wittman: The problem I have with that is that you could have come to the ZBA and asked to appear. If we turned you down, if our attorney turned you down, so be it, but I really wish you had done that. Attorney Curtiss: I think the falsity in that argument is that you have to have an application. We would come in to your attorney and say we need to come before the Zoning Board, what do we do, we don't know. So, how do you come in for an interpretation without some kind of site plan, some kind of application? Member Wittman: You would be looking for an area variance regardless of who went in there. Attorney Curtiss: We didn't know that, there was no indication. Member Wittman: 10,000 square feet would tell you that. Attorney Curtiss: Not necessarily, because it was built before that requirement, we didn't know. We went to the Planning Board and nobody advised us there. They said once you have a use, then you come before us, then we'll send you to the Zoning Board. Member Wittman: My point is, I wish that you had done that before... Attorney Curtiss: But that is 20-20 hind sight... Member Wittman: That's why we have professionals like you. Attorney Curtiss: I understand that, but...

Chair Van Millon: I'm going to ask at this time if the Board feels comfortable on making a vote whether to grant or deny this variance. Members Fusco, Kaufman and Williams do not.

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Attorney Jacobellis: I just want to advise the Board that the public hearing was closed at the last ZBA meeting and we're on the clock. I believe the public hearing was closed on April 6, so June 1 would be within the time parameters.

Chair Van Millon read the next item on the Agenda as follows:

Public Hearing - GAST – Z 2011-002 – The applicant seeks to appeal Section 145-11(B) of the Town of Dover Zoning Law to erect a pole barn on his property without meeting the 30' side yard setback. This property is located at 87 Dover Furnace Road on tax map #7061-00-485405 in the RU district.

In attendance was the applicant and property owner, Daryn Gast.

Chair Van Millon: We left off that the public hearing was closed and we were waiting to hear from Joe Berger, the engineer.

Attorney Liguori: I spoke to Town Engineer Berger and Joe has some proposed conditions to any variance that would be granted for the installation of erosion and sediment control measures on the site downhill from where the construction is going to occur. The second condition would be to hay and seed no later than seven days following the completion of the site work as to stabilize the soil and erosion down hill to the river. I have it in an email from Joe, and Joe asked me if I would like him to put it in writing and I said let me talk to the Board, I can convey your message.

Member Wittman: If we pass a resolution, the Board and the applicant need to know exactly what to do.

Chair Van Millon: I can actually write it on the variance.

Attorney Liguori: I'll get a letter from Joe, notwithstanding; you can move ahead. Joe reviewed the file, then went to the property,

Member Wittman: Would it be fair to put in the resolution that when the Building Inspector issues the permit that he will then present Mr. Gast with the requirements?

Attorney Liguori: Sure, that's fine.

Secretary O'Leary: I'll just write it up stating that it is granted with recommendations from Engineer Berger and will give a separate document when we issue the permit.

Attorney Liguori: That's fine.

The Board reviewed the criteria for a decision.

Code of the Town of Dover – Section 145-59 D. (2)

- f. Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of the area variance? No.
- g. Can the benefit sought by the applicant be achieved by some method, feasible for the applicant to pursue, other than an area variance? No.

- h. Is the requested area variance substantial? Moderate.
- i. Will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district? No.
- j. Was the alleged difficulty self-created, which shall be relevant to the decision of the Board, but which shall not necessarily preclude the granting of the area variance? Yes.

Chair Van Millon read the variance: The applicant seeks to appeal Section 145-11(B) of the Town of Dover Zoning Law to erect a pole barn on his property without meeting the 30' side yard setback. This variance is granted provided that he complies with recommendations of Town Engineer, Joe Berger.

MOTION: Member Wittman motioned to grant the area variance with Engineer Berger's conditions; seconded by Member Kaufman.

VOTE: Chair Van Millon – Aye	Member Fusco – Aye
Member Wittman – Aye	Member Williams – Aye
Member Kaufman – Aye	

Chair Van Millon read the next item on the Agenda as follows:

Public Hearing - SHERRER – Z 2011-003 – The applicant seeks to appeal Section 145-11(B) of the Town of Dover Zoning Law to erect a deck on his property without meeting the 25' rear yard setback for the RC district. This property is located at 1511 Route 343 on tax map #7063-01-401772.

In attendance was Raymond Sherrer.

MOTION: Member Kaufman motioned to open the public hearing; seconded by Member Wittman.

VOTE: Chair Van Millon – Aye	Member Fusco – Aye
Member Wittman – Aye	Member Williams – Aye
Member Kaufman – Aye	

Chair Van Millon: The application is complete and has already been submitted to DC Planning and it's of local concern.

Raymond Sherrer was sworn in. I'm planning on building a deck on the back of my house and it will come around my existing enclosed porch.

Chair Van Millon: Four of us went up to the site and I noticed that in front of your enclosed porch on the part that you want to put on is 6' wide. Is there a specific reason you want it that wide?

Mr. Sherrer: The door is 36" wide, so in order to go to the bigger part of the deck, if the door opens that way, if it were any smaller, it would be hard to walk around the door with anything in your hands.

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Chair Van Millon: The reason I'm asking is if you cut it back by 2' to make it 4', it would be less of a variance needed for that area.

Mr. Sherrer: I would prefer 6', of course.

Chair Van Millon: I know that if it's 4' then the door would be able to open, but you would only have a little bit behind the door.

Mr. Sherrer: I'm just saying that to be able to walk behind the door, I mentioned that I may have a set of stairs on both directions and to go from. If the door were to open to the left, in order to go to the bigger part of the deck, then you would only have 1' to get around the door and if you're carrying a pan or anything, it would be tight.

Member Wittman: The area where I think Marilyn is referring to is 10'.

Member Kaufman: Were all the neighbors notified?

Chair Van Millon: Yes. Is there anyone here who would like to address this variance? There was no one.

Member Kaufman: I just want everybody to know that I do know Raymond.

MOTION: Member Wittman motioned to close the public hearing; seconded by Member Williams.

VOTE: Chair Van Millon – Aye	Member Fusco – Aye
Member Wittman – Aye	Member Williams – Aye
Member Kaufman – Aye	

The Board reviewed the criteria for a decision.
Code of the Town of Dover – Section 145-59 D. (2)

- k. Will an undesirable change be produced in the character of the neighborhood or a detriment to nearby properties be created by the granting of the area variance? No.
- l. Can the benefit sought by the applicant be achieved by some method, feasible for the applicant to pursue, other than an area variance? No.
- m. Is the requested area variance substantial? Yes.
- n. Will the proposed variance have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district? No.
- o. Was the alleged difficulty self-created, which shall be relevant to the decision of the Board, but which shall not necessarily preclude the granting of the area variance? Yes.

MOTION: Member Wittman motioned to grant the variance; seconded by Member Kaufman.

VOTE: Chair Van Millon – Aye	Member Fusco – Aye
Member Wittman – Aye	Member Williams – Aye

Member Kaufman – Aye

Chair Van Millon read the next item on the Agenda as follows:

Public Hearing - FRESHTOWN PLAZA – Z 2011-004 – The applicant seeks to appeal Section 145-39 D(3)(a) of the Town of Dover Zoning Law to allow the existing freestanding sign to remain at its original height of 19'-3". This property is located at 3081 Route 22 on tax map #7063-00-509295.

In attendance was the applicant, Daniel Katz of Freshtown and Engineer Rich Rennia, Jr.

MOTION: Member Kaufman motioned to open the public hearing; seconded by Member Williams.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Aye
Member Williams – Aye

Chair Van Millon: The application is complete; this is a referral from the ARB; DC Planning review is of local concern.

Rich Rennia was sworn in. As was said before, we're looking for an area variance for the height of the existing sign. From the ground elevation at the bottom of the sign to the top of the sign is 19' 3". This whole issue came up from the ARB when we went to them for architectural review of a canopy and change of a clock tower on the building itself and we got through that with them. We got through the site plan amendment with the Planning Board, but the ARB at the same time said the sign is out of conformance and doesn't meet the current regulations of the Town.

I don't know if you are aware of it, but there is a portion of the sign code that does not allow any kind of grandfathering of any existing signs. If you're a non-conforming sign, then by 2004 it had to be removed or brought into conformance. There are a lot of signs all over Town that people don't even know is not in conformance, so this is what happened here. ARB brought it up and we said let's work with the ARB now because they have to approve the sign as part of the process. In that process, we came up with a couple of remedies and one was to repair or upgrade the existing sign in the existing structure that's there. The other would be to take down the entire sign but to get that much signage and keep it to still look pretty good along the road; we all agreed with the ARB that we would need at least two new signs to get the same amount of sign frontage. They are allowed to have that much sign area, but you would have to break it down into additional signage. In discussing that with the ARB, they seemed to like the idea of leaving it in its current location, cleaning it up a little bit and bringing it into conformance with everything else in the sign requirements, which would have us remove all the internal illumination. That's a big issue with that sign because it is internally lit and we would remove that. This is part of the plan that was submitted, to remove the internal illumination. Basically, turn off the lights inside, add goose neck lighting to the outside of it and then to help dress up the bottom and deal with the height issue as mitigation, add a planter at the bottom and shrubbery.

The ARB recommended that we come here because they like that option the best. As far as our thoughts on going further with that option, the first thought that I wanted to talk about was the location of the sign. I have pictures of the sign that were taken back in February. The first item

with the existing sign that I want everyone to notice is that the base of the sign sits 2-3' lower than Route 22 at that particular location. The sign sits in a hole to begin with and the ARB agrees that consideration should be given to that. The other item that the ARB looked at and that we've looked at as well is that stretch where the sign is, that's 280' long. There's 280' between the two entrances in and out of the existing shopping center, so it's not like there's a row of signs there.

Some of the pictures from the perspective if you look at it from a further distance, they didn't feel that that sign with that amount of distance was jumping out at you as an overly huge sign, and we felt that same way, too. The other item is that the sign is 30' back from the edge of the pavement curb line of Route 22, so it's a little bit different from some situations where you have a sign right on the road. There's more open space there, its set back further. We all agreed that even though we measured it at 19' 3" high, looking at it visually, it doesn't appear to be overly huge.

The other item to look at in the pictures is the power line. The sign sits behind that and those power lines actually dwarf that sign; they're much higher because they're on the higher side of Route 22 and they're much high poles. They're probably 40' poles where you have three phase power; you have the communication lines on that.

The next thought that we had was another reason why a variance would be appropriate in this situation is the fact that the property itself is located in the Highway Commercial district. That's a little bit different than any other district in Town. There's very little Highway Commercial in Town and I just want to read to you from the Zoning Code 145-8 A. (6), "The purpose of this district is to allow commercial uses that rely heavily on automobile and truck access and that would not be compatible with a hamlet mixed-use area." When I look at the Code, the Highway Commercial district was created for the larger retail shopping centers that wouldn't be allowed someplace else. Typically with these Highway Commercial districts, larger shopping centers and retail, it's very common to find a sign like this at this height or a grouped sign. Having a taller sign is nicer in a Highway Commercial area because you can see it better from a car and from moving traffic as opposed to in a hamlet area that you want signs more visible as you're walking on the sidewalks and you want to have people park their cars and walk; you're looking at things a little differently in a hamlet.

We had talked about the height of that sign is very common for a shopping center because you can see it better as opposed to the hamlet area where I would agree, and I think everyone would agree, that a smaller, shorter sign is definitely better for a hamlet area. This brings me to a major point where I think the Code is a little flawed; when you look at the zoning districts, the authors of the Code were very specific when they said we need different districts for different uses and those different districts will have different setbacks and allow different things, but then you jump into the sign regulations, there appears to be one sign regulation for every district in Town. In the Highway Commercial district I believe that it creates a bit of a hardship for those businesses that need a taller sign or group signs. In this particular location, there are five stores who want to have their signs on one group sign, so it gets a little more difficult when we're trying to create signs for five individual businesses as opposed to an individual business. Across the street, Dunkin Donuts has its own sign. I just noticed that Cumberland Farms just put up a nice new sign. They're in the hamlet area. Their sign looks nice but it's only for one business, it's not trying to advertise five businesses.

As an example of the five stores, if we look in the Zoning Code, an example of the freestanding sign, it has a maximum size of 16 square feet and that would be a freestanding sign per

business and you can get sign bonuses on top of that. So depending on how you construct that sign, you can have 16 square feet go up to 20.8 square feet per business, so then when you get into a group sign, the Code then jumps forward and says group signs can have a maximum square footage of 50 square feet. A couple of lines later, it specifically says the maximum area of signs or grouping of signs can be 100 square feet. This is where we were wrestling with the ARB. How do we handle this and this is where we had the issue of having multiple signs or one gigantic sign that would be shorter and would meet the Code. It could go in there, but would it make sense?

If we looked at the 100 square feet and said a 10' high maximum height, and we said we want to have the bottom of the sign about 4' up, that would say that we would have about 6' left of height and with the 100 square feet, that would say we could have a sign that's 6' high of sign and it could be 16.5' wide. A 16.5' wide sign in that location, to me, would seem very out of place and it would look ridiculous there and it would also start to create an issue with traffic and site distances; that's just one example of how the sign regulations, we feel, lack a little bit for the Highway Commercial areas where you're dealing with group signs. We've put a lot of thought into this and we've talked with the ARB and that's why ultimately we thought that this was the best option. I don't want you to think that we just came here to say that it's just easier to leave the sign and just try to get a variance. There was a lot of thought and discussion with the ARB and that's the reason why we are here and we feel that this is a valid option.

Daniel Katz was sworn in. I think Richard put it very well and I don't think I can add much. We want to beautify the plaza, so there's a clock tower going up, there's some plantings and some other improvements that you will see shortly. As part of that process, it was a voluntary decision initially to renovate the outside and then there was an issue structurally as to putting the clock tower over the entrance, so we ended up moving the clock tower location, which will be to the extreme right. These renovations were really voluntary and it triggered this issue with the sign and so we would ask for your consideration in allowing the sign to stay where it is. There is a cost involved, obviously, to take it down and put a new one up. It would probably be about \$20,000, so it is a considerable change and then we would probably end up with being left with two signs that would be smaller and in conformance but probably won't look that great.

What Richard has proposed is a beautification of the existing sign with a nice planter around it and exterior illumination and we would disconnect the interior lights. We would still do some painting of the sign and make sure everything was cleaned up on it so it would look better than it is now. We came to the Town when nobody wanted the store and we kept everybody working and gave them all raises. They're friends and neighbors, most of them are still there and we've been there for almost ten years. We renovated the store and we renovated the plaza. We're a family business so, it's not like we're a major corporation. We put a lot of funds into the store and we're going to do some more work and make it even better and we're just hoping that the sign could stay there because I think that the sign does actually help the tenants the way it is. It's not like we're just trying to get out of something that the Town has in their Code.

Member Wittman: You mentioned the clock tower and something else. Where is that going to be in relation to the sign and the building?

Mr. Rennia showed the Board. The only other item to show to the Board is that the M&T sign will be replaced as well. M&T is doing that and I know that they have gone to the ARB separately from us, but their sign is 13' high now and they're going to bring that down to 10' and into conformance and get rid of the internal illumination. The Subway sign is in conformance

and that's a newer sign and there's no internal illumination in that. M&T is going to reside the whole building, so there is an effort to freshen up the whole plaza.

Attorney Liguori: I'll just confirm for the Board one of the discussions we had with the applicant is, "Where do you measure the height from on this particular sign?" It's kind of an interesting situation because the ground does go down, so what Scott (Daverson) and Rich had discussed is the construction of a planter to kind of off-set that depth. If you're in the parking lot, from the parking lot view, it is lower than the pavement that's going to have more planter than from the road side. But when you take the planter together with the proposed landscaping to be put into the planter, the ARB felt that that would mitigate some of the impacts that go along with having a sign of that height. That's different from the LukOil application. I know the Board is going to consider that. We have just come off the application for LukOil for the freestanding sign. There really was a concerted effort for the ARB to figure out what the best way would be to deal with this particular situation and Rich is correct about the ability to construct the sign less than 10' high and 100 square feet wide. It would look like a billboard and the thought was should they put up more signage and the ARB said they really don't want more signage and that's how the application got here.

Member Wittman: The 2' high planter is a visual improvement, not actually reducing it.

Attorney Liguori: But the variance actually contemplates the height of the planter from the bottom of the sign. I guess what could have happened is that Rich could have said, "We're going to build a 5' planter and we'll count the height of the planter from the area of the parking lot and count the height of the sign from above." The thought was ask for the 19' from the Zoning Board and explain it.

Rich Rennie: Plus, there is about 5' of blank sign space, it's not being used for the sign, it's just part of the structure.

Chair Van Millon: To me, the sign is high; we do have a sign ordinance in this town. 19' is a big variance. When I drive past it, the planter, I just see shrubs on the bottom. To me, the difference between the shrubbery and the planter would be no different. I know it is down deep, but it never gave the appearance of being down that low because of how high the sign is. I know that Subway has its own sign.

Rich Rennie: The Subway one is on here and we didn't mess with the ARB because the ARB asked us to take the M&T sign off because they have their own sign. I guess that would make sense too because Subway has their own sign.

Chair Van Millon: Also, Freshtown is there twice.

Member Wittman: I would suggest that if you do have businesses that you want to put the business's name on there, since they already have their own signage, than at least reduce the size which would give you more room for the people who need their name on the sign. Instead of giving equal billing to every single one that's on there, if Subway and M&T have their own sign but they still want them on the main sign, at least reduce that so you can increase the height of the other sign.

Rich Rennie: These other signs are smaller. Typically, with a commercial shopping center, the anchor gets a bigger sign and that's why Freshtown is the biggest and then CVS. But with this type of retail, stores go in and out and ten years from now there could be four or six stores

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instead of five stores; it's just the nature of the business. Even if we have blanks, we can make them blanks for the signs that are there, but I wouldn't want to lock into an exact number. We could make blanks, but they may need those blanks.

Member Wittman: I don't know how the other members of the Board feel, but I would like to see the sign lower, but I do hear what you're saying about the 3' and the other things. I would like to give you as much as you would like to have along with what the ARB has suggested.

Member Williams: I concur with what you're saying. I think the thing I can't seem to wrap my head around is the fact that it's below ground, but it's still a huge sign. So, it's not like it's below ground and it's deficient below everything else in the area, it's pretty big even though it's below ground.

Chair Van Millon: It still looks big even though it's low. I think my concern is we do have laws in this town for signs and if we give large variances out, everybody's going to want a variance, then there's no use for the laws governing signs.

Member Williams: You made very good reference when you said that there are different rules for different districts for different things, but there's only one rule for signage and it doesn't apply to every district and I think at some point it will; unfortunately, it doesn't now.

Member Wittman: Notifications were sent out long ago to all of those folks along Route 22 particularly and we all know who they are and some of them have come before the Board and some of them haven't. Apparently, nobody came into compliance because for whatever reason, nobody was enforcing it and as a result, we have been dealing with that lately. We have a couple of people who have gotten into compliance. One of the signs has rotted through at the base and fell over. I hear what you're saying and I do think you have a case to ask for more than 10' and I certainly have an open mind about the fact that you're starting off in a hole of about 3'. It's just that I can't really go with 19' 3", so I think that for the reasons you stated were very well put, I think we should probably entertain some sort of compromise agreement if that's something that you would be willing to talk about.

Rich Rennia: What are you thinking as far as a compromise? What you're saying is that the Board may have an overall height in mind, something more than 10' because you understand the situation?

Member Wittman: Yes, that's what we're talking about, over 10'. My feeling is that if it came down 5', than I would feel a little better about it.

Member Williams: I on line with what you're saying, I'm looking at 12' 5" in signage.

Member Wittman: And that would comply with a couple of things that you had pointed out. The fact that you're starting off down by 3', the fact that it's a group sign for other highway businesses. I'm looking at what we have done in the past and what other people are going to have to do because a lot of them are going to be held to that 10' max, so I feel comfortable with giving Freshtown a little bit of a height advantage. Do you feel you can work with the signage with that?

Mr. Katz: I appreciate trying to reach some middle ground, but I don't think that the sign can be chopped. According to my sign guy, I had him look at it and basically it would just require that the whole thing come down at that point. It's not a new sign so maybe if it were brand new it

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could withstand the cutting and pasting that would be needed but basically it would not survive the surgery, so to speak. The problem is that we're starting down in a hole, so you might want to say that we've been digging ourselves out of a hole. I appreciate you trying to strike some middle ground there, but it's probably going to just wind up having to come down then, it's going to be a pretty expensive proposition.

Member Williams: From the road to the top of the sign, what is that distance?

Rich Rennia: 16' in height and horizontal distance is about 30' from Route 22.

Member Williams: So that dip is 3' down?

Attorney Liguori: There's no place in the Code, aside from common sense, what the base elevation is to measure, so the 19' 3" captures the 3' dip that the sign starts in. We were trying to figure out with the ARB what the best way to deal with this, and that's when Rich suggested putting in a planter so that the bottom of the sign appears to be even with the road.

Member Williams: So, we're really talking about 16' from the road.

Rich Rennia: That's why I gave you pictures, so you can get a feel of what it looks like from the road, I think it's important. When I first looked at it, I didn't think it was so bad, but when I went to physically measure, I noticed that it was almost 20' high, I didn't perceive it to be that high. We're adding 2' to the planter so if you want to measure from the top of the planter, you can subtract that 2' so it's 16' or 17' high.

Member Williams: The extenuating circumstances of the dip sort of changes my view a little bit. I don't see it as 19' 3", I look at it as a 6' variance and given the fact that if we're asking for 5' and we're looking at 6', then we would have to chop the sign or put up a new sign for a 1' variance difference.

Member Wittman: From what I understand from what Mr. Katz says, regardless of if we reduce the sign by 3", it would still require a whole new sign, so it's either the way it is now or it's a new sign.

Member Williams: I'm fully aware of that, I'm just saying that for a sign to be taken down for a 9' variance as opposed to a 6' variance in my eyes.

Rich Rennia: I see what you're saying, if the Board is willing ... if you look at the sign from the road or from the planter, you're looking at an extra foot.

Chair Van Millon: If we grant the variance, it goes with the property and this sign will stay up forever.

Attorney Liguori: Variances run with the land, not with the owner.

Chair Van Millon: That means that if Freshtown and CVS move out and there are just small little businesses there, this sign will remain.

Member Wittman: Essentially what I think they're asking for is the point that this highway business area should probably have a separate sign paragraph within the definition.

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Rich Rennia: That's my opinion; you should be able to have a little bit higher sign and a little bit more flexibility.

Member Wittman: You have a good argument with that but unfortunately, it doesn't exist right now. So, essentially, whatever we do here, we're sort of in a backdoor way of writing the future zoning for Highway Commercial.

Rich Rennia: Fortunately for you there's very little Highway Commercial. There's another shopping center across the street and there's McDonald's. At some point, I'm sure that you're going to have two other signs over there that are going to have to be wrestled with as well. We want to be seen; we're in this zone we need to attract customers.

Member Wittman: Just out of curiosity, just how tall are those other signs?

Rich Rennia: I don't know, I've never gone over and measured.

Mr. Katz: I don't think there is a solution to keeping that sign and it's probably just going to have to come down and I don't want to have anyone say that I got some kind of exception. There are 30 businesses up and down Route 22 and everybody is going to come to you for a variance. You have your Code. It was a big problem in LaGrange because we have that store and they went ahead and changed the Code because they wanted a walk able town right by the school, so they reduced the size way down. We have a shopping center there and the concern was that if we had put this signage as per the Code there, there is very little square footage and would have accidents on Route 55 because people would be looking at the center. You don't really have that here because you can still see the businesses on the building. I appreciate the fact that you were struggling to make some compromise here, but if we chop off the part where it says Freshtown, I was told that the sign would fall apart. I think what we're going to have to do, coming to the Zoning Board, if you grant this exception to me, then basically what you've said earlier, Marilyn, is that the whole floodgate opens and have blinking lights up and down and that's not what you want; you wouldn't have changed the zoning if you didn't want everyone to be in conformance. Having other people coming into conformity is not something that is not my concern or my business, but what I don't want to have is somebody say to me that I got some kind of exception and why did they not do it for me, so I can respect the fact that you want to be consistent with this. I don't think there is much to do except take it down.

Member Wittman: What would you propose then?

Mr. Katz: I think Rich is going to have to design something that satisfies the ARB and if it's in compliance, then I don't think it has to come to the ZBA.

Attorney Liguori: Can I suggest something? Why don't you come back to the next meeting and think about it and if you decide that you want the freestanding sign more than 10' then your application would just be amended as submitted which is just when you're mitigating the impact of a variance, so you wouldn't have a new notice of public hearing and the Board would just be able to take action. That would give you some time; do it within the next 30 days.

Chair Van Millon: Come back next month and if you need a 2' or 4' variance, it's a little bit easier to deal with.

Attorney Liguori: Even if you think about it and analyze it and you decide 19' 3" is the number, just take the time to analyze those business decisions.

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Member Wittman: Was there a violation notice that you've been given?

Rich Rennia: No, it was the ARB that said our sign is out of compliance and we can either work to get this into compliance or...

Mr. Katz: 145-39 states freestanding signs shall not exceed 10' in height. So when we start kicking around some options, if we make the planter a little higher than the 2' suggestion, let's say 3', would that then mean that we can go 13' from the bottom of the planter?

Attorney Liguori: That's what we couldn't figure out; the Code is unclear as to where to measure the bottom of the sign.

Mr. Katz: The planter isn't the sign, the sign is the sign. We certainly wouldn't want the 10' to start at the bottom of the ditch. What we would probably have to do is build up the planter to the point where it's say 3' above the road level then to 10' above. Because we're in a ditch, we want to bring it up with use of the planter to eliminate the ditch, but then even go 3' higher, so if you were to drive down Route 22, what you would really see is just a 3' planter. If you went in the parking lot, you would obviously see a bigger planter because it would have to make up that difference, so we would have 3' from let's say the bottom of Route 22 is, 3' above that then we start with the 10' above that and would end up with essential 13'. We would be in compliance if you define sign as sign instead of sign plus planter. I think a reasonable interpretation would be sign is a sign, it's not from the ground to the top, and it's from the bottom of the sign to the top, so I don't think...

Attorney Liguori: I would just have a quick discussion with the Building Inspector. For LukOil for instance, there was a 1' concrete base or island.

Chair Van Millon: No, it's right on the asphalt.

Member Wittman: They have not come into compliance. Even though we have given them a variance, they have not reduced the height of the sign yet.

Attorney Liguori: In response to Mr. Katz's suggestion, I would say I need to talk to the Building Inspector to see what he does consistently because if that's not consistent with what Mike (Segelken) does, and then we can advise the applicant. I'll give Mike a call tomorrow and will coordinate with Rich.

Mr. Katz: In a case like this, Mike is going around doing a great job that he does, but maybe it wasn't ever close enough where the measuring of the bottom made a difference, so I don't know if we talk to Mike if there is some sort of narrative which we are willing to achieve here given the fact that I'm willing to take the sign down. At least it gets me up to something that's in compliance if you can accept the sign being a sign but also satisfying this issue that we're trying to grapple. Again, the context of his response may just be without complete consideration to try to grapple with everything that we're doing. Once he makes his decision based on all the information, we'll have to live with it.

MOTION: Member Wittman motioned to continue the public hearing until June 1, 2011; seconded by Member Fusco.

VOTE: Chair Van Millon – Aye

Member Fusco – Aye

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Member Wittman – Aye
Member Kaufman – Aye

Member Williams – Aye

MOTION: Member Kaufman motioned to approve the April 6, 2011 minutes; seconded by Member Williams.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Aye
Member Williams – Aye

All ZBA members would like to attend the ZBA Overview class on April 26, 2011.

MOTION: Member Fusco motioned to adjourn the meeting at 8:47 p.m.; seconded by Member Wittman.

VOTE: Chair Van Millon – Aye
Member Wittman – Aye
Member Kaufman – Aye

Member Fusco – Aye
Member Williams – Aye

Meeting adjourned at 8:47 p.m.

Respectfully submitted by:

Maria O’Leary
Secretary to the Zoning Board of Appeals