

**Alton Zoning Board of Adjustment  
Verbatim Minutes of June 29, 2005**

Marcella Perry: Motion for Reconsideration on the Robert Gayner case and I will introduce Kathy Menici, Town Planner, Brian Boyers, the Code Officer, Lyndon Avery, a Member of the Planning Board, Attorney Sessler, Acting Chairman, Marcella Perry, Chuck Weston, and Tim Kinnon and we will listen to your points on, on Rehearing and then, um we'll confine comments to this Rehearing and um, the Planner or the um, Code Enforcement Officer um if they have comments that they would like to make after you present your Motion, ah, then we'll take the, take it under advisement.

Attorney Varney: Thank you Chairman Perry. Ah, for the record, I am Robert Varney of Walker & Varney in Wolfeboro and I represent the ah, Robert Gayner the Trustee of the Lakeshore Realty Trust whose the applicant and the person seeking the ah, ah, Reconsideration. Procedurally, ah, to keep the record straight, I'd like to take them one at a time and ah, I'd like to start with the Administrative Decision which is Case #Z04-23 and I guess under the Reconsideration, you've got it as Z05-14.

Kathy Menici: Madam Chair.

Marcella Perry: Yes.

Kathy Menici: Do you want me to read the notice into the record?

Marcella Perry: Yes.

Kathy Menici: It's Case Z05-14, Map 53, Lot 3, A Motion for Rehearing, Robert Gayner, Trustee, 62 Temple Drive. Application submitted by Walker & Varney, PC on behalf of the property owner, Robert Gayner, Trustee for a Rehearing on Case Z04-23 regarding the April 7, 2005 ZBA Decision upholding the Cease and Desist Order issued by the Town of Alton, Building and Code Officer on September 28, 2004. The property is located at 62 Temple Drive in the Lakeshore Residential Zone, the Town of Alton Shore land Overlay Protection District and the State of New Hampshire Shore land Protection District.

Attorney Varney: Okay and ah, Madam Chairman, do I understand that everybody has a copy of the Appeal, the Motion and Reconsider that I submitted earlier, the written ones?

Marcella Perry: Yes we do.

Attorney Varney: Okay. Ah, essentially ah, this will be fairly brief on this it's the applicant's contention that Section 228 of the Alton Zoning Ordinance as such ah, which, and I will read it to you ah, Height Restrictions Boathouses/Canopy Boat Slips-A maximum of 15 feet above full lake level. All other, that's Subsection A, Subsection B – all other buildings and structures, a maximum of 35 feet measured as the vertical distance from the average finish grade of that portion of the lot covered by the building to the highest point of the roof. Ah, at the initial

hearing where we had an initial opportunity to speak to this issues, ah, unhappily because, ah, ah, because of the nature of the questioning, we, we, never really got to make these points. We, it appeared that the then sitting Chairman was much more interested in the Equitable Waiver and we got right into the permitting process and, and all those procedures. Ah, ah, essentially the argument which the applicant would have made at that time ah, ah, and wishes to make now is simply that the application of the that provision of the Ordinance to this structure is both illogical ah, and serves no legitimate public or private purpose. Ah, that the, ah and in fact as I read the predecessor to the this Section ah, it spoke in terms of height from the, I think it was the mean grade of, of the surrounding land and at that point it was 15 feet above the mean grade of the surrounding land. Ah, the amendment to ah, to this Section which I understand took place in 1992 clearly then speaks in terms of structures which extrude over the waters of the State and it is our position that this Section as it is written is not meant to apply to structures which are dug into the lakeshore or into the shoreline away from the lakeshore as this one is. Ah, the ah, uncontradicted evidence has been that this structure is not visible from either of its abutters and ah certainly does not ah, affect ah in a, in any noticeable way any of the considerations which underlies Section 228. Obviously the purpose of Section 228 is to preserve and protect the views of abutting landowners, to ah, lessen the impact of structures out over the waters of the, of the State and in the Town of Alton. Ah, that's really it. We ah, I think you can understand the basis of our position and, and ah I won't belabor it and I'm sure you get my point. You may not agree with it but there it is and I stand ready to respond to any questions you have of me on this issue. That would conclude our Request for a Rehearing on this issue.

Marcella Perry: Okay. Do you want to continue on the next case Kathy, if you would read that please?

Attorney Sessler: (inaudible) comment on that, let's get done with one (inaudible) get confused.

Marcella Perry: Okay, um, are there comments from the Board or from Town Planner or Code Official?

Brian Boyers: My understanding on the shoreline is not, it's the high water mark we are concerned, not the shoreline. That's where we get we base our measurements from and part of this 35 feet is also a safety issue involving fire, etc., you are limited to where you can fight these fires from because you've lost one whole side of access due to the lake.

Marcella Perry: Okay, anyone else have a comment?

Tim Kinnon: I would like to ask one question. I asked this at before but I would like to ask it again. When dredging occurs on the shoreline, has it been the common practice that that is now the new shoreline?

Kathy Menici: That is the State definition.

Tim Kinnon: Okay, thank you.

Marcella Perry: Any other comments?

Attorney Varney: If, if I could just respond for the record to that. Is that all right?

Marcella Perry: Go ahead.

Attorney Varney: I've never heard of such a State definition and I ah, I ah, um, I've heard it said but I haven't heard it cited in terms of a regulation ah, statute or Ordinance. Ah, but, you know I'm happy to be enlightened.

Marcella Perry: Okay, um, further comment Kathy?

Kathy Menici: I, I can give you that. Um, I spoke with um, of God what's his name at DES who does the shore land.

Several People: Gary Springs.

Kathy Menici: Gary Springs, thank you to clarify the definition and he referred me to RSA 483-B:4 Roman Numeral 17, which is on page 246 of your handbooks and it defines the reference line and, 246 it's at the bottom of the page and these are the definitions and the one that he used for Lake Winnepesaukee is ah, paragraph B, for artificially impounded fresh water bodies with established flowage rights, the limit of the flowage rights and for water bodies without established water line at full pond it determined by the elevation of the spillway crest. Um, and he said that the reference line when you alter the shoreline the reference line becomes that new shoreline.

Attorney Varney: Well, does the Ordinance state it? Is there, is there a, is there a statutory language which says that or is this just somebody telling you this.

Kathy Menici: That, that's the definition.

Attorney Varney: No, no, is it in the, is it printed there?

Kathy Menici: Yes it is.

Attorney Varney: Let me see it. Which is the Section you referred to?

Kathy Menici: Right at the bottom, you'll see the definition, I think it's Roman Numeral 17, Reference Line.

Attorney Varney: The natural freshwater bodies without artificial impoundments, the natural mean water level as determined by the Department of Environmental Services.

Kathy Menici: He, He said that Lake Winnepesaukee is an artificially impounded water body and that is the definition that they used B, subparagraph B as the definition that they use for Winnepesaukee.

Attorney Varney: Artificially impounded would be B, artificially impounded freshwater bodies with established flowage rights to limit, the limit of the flowage rights and for water bodies without established flowage rights, the waterline and full pond is determined by the elevation of the spillway crest. How does that change, what does that have to do with, with, with a dug in boathouse slip?

Kathy Menici: Um, he gave me a very lengthy explanation.

Attorney Varney: Well, all right, well, I, in other words, nobody can cite a statute or a reference. This is something that you, you got from some State employee is that right?

Kathy Menici: He is responsible for the ah, Administration of the Shore land Protection Act. That's his responsibility.

Attorney Varney: Well, I would ask then that if the Board is going to consider this, if this is material to your decision, that you state it in your findings so that I, that I can protect our right.

Marcella Perry: Thank you.

Attorney Sessler: I understand the position of both parties.

Marcella Perry: Okay, any further comments? Well, um, would you read the next case?

Kathy Menici: I will. Um, the next case is Z05-15, Map 53, Lot 3, Motion for a Rehearing, Robert Gayner, Trustee, 62 Temple Drive. Application submitted by Walker & Varney, PC on behalf of the property owner, Robert Gayner, Trustee for a Rehearing on Case Z05-05 regarding the April 7, 2005 ZBA Decision denying the property owner's request for an Equitable Waiver from Dimensional Requirements in order to maintain the height of a boathouse in excess of 15 feet as required by the Alton Zoning Ordinance, Article 200, Section 228A – Height Restrictions for Boathouses. The property is located at 62, Temple Drive in the Lakeshore Residential Zone, the Town of Alton Shore land Protection Overlay District and the State of New Hampshire Shore land Protection District.

Marcella Perry: Thank you.

Attorney Varney: Okay, this is the Variance and ah, this is, I think we've all agreed is a what's called a Area Variance under the BOSHA Rule and the Board, there is a five part test that the Board has applied. You, you made a favorable finding on three of the, of the five parts and ah, ah, the first that it was ah, that it was not contrary to the popular interest and you found that ah, the value of surrounding properties would not be diminished and that the Variance would be consistent with the Spirit of the Ordinance. You have made those three findings. You've found against us on the ah, fourth which is that substantial justice would be done and the fifth which is that a hardship exists as a result of the literal application of the language that the of the Ordinance. I only speak to those two items ah, and the first I'd like to speak to is the ah, ah, the so-called substantial justice criteria. Ah, As I read the ah, and I was present during your deliberative session and I heard your comments and um, also read your written findings and ah,

with respect I believe that the Board misapprehends what it meant by substantial justice within the context of these tests. Ah, the Board at the time, I think had reached some conclusions about what Mr. Gayner did or didn't do in connection with this application and I think that what Mr. Gayner did or didn't do is material to the next thing that I'm going to ask you to reconsider and that's the Equitable Waiver. But with respect to the Variance, the project rises and falls based on what it is. Ah, and I think Mr. Sessler will certainly tell you that ah, the behavior, the character, the whatever of the applicant really has nothing to do with that. You have to look at the project ah, you know, ah, with regard to what you think of the applicant and ah, I know that's hard but, but, ah, that's ah, what you're charged with doing. And, I have to tell you that in 30 years of doing this, I have never once seen a Board find that it's consistent with the Spirit and Intent of the Ordinance that without diminishing the value of surrounding properties and that it is not contrary to the public interest and not find that there was substantial justice. Ah, the ah, I just don't, I really don't even know how you can get there having made those other three findings. Ah, the ah, substantial justice means just that. That, that ah, these various criteria have been met and that it's not hurting anybody ah, it's not hurting the public, it's not diminishing anybody property values ah, therefore justice would require that ah, um, the Variance be granted. Ah, I ask you to reconsider again with the assistance of Counsel to guide you on the, on the application and criteria and I'm fairly confident that you will agree with me as to this.

The ah, the second and certainly the most ah, the one that's always the biggest issue, or at least nearly always the biggest issue in my experience on Variances is the question of hardship. With the Simplex and BOSHA decisions as I am sure you know, the, ah, Supreme Court has come up with a new test ah, and ah, that test ah, is um, embraced in your Ordinance ah, your Planner has obviously kept up with these decisions and, and criteria you have written on your worksheets, it's ah, on all fours with the Statue as far as I can see. Ah, so I'll go right to the BOSHA analysis ah, and that is that the special conditions that exist, that ah, literal enforcement of the Ordinance results in an unnecessary hardship. And, where since it is an Area Variance, as opposed to a Use Variance, ah, the first thing that the Supreme Court says that we need to establish is that it is needed to enable the applicant's proposed use of the property given the special conditions of the property. Well the first thing you have to ask yourself is what is the, what is the applicant's proposed use? His proposed use is to integrate a replica train station with his boathouse and make it part of his structure. Ah, that's the, that is the use he wishes to um, um, um, wishes to have and, and um, it's compliant with your Zoning Ordinance in terms of its use. Boathouses are permitted in this ah, in this zone, it's not a commercial use, it's nothing that's inconsistent with the use of the building. However, if you rule against us on the application of Section 228, it certainly would require an Area Variance because it is certainly higher than 15 feet from the lake, lake level. So, that's what we are asking for. Now I, I submit ah, that ah, it's manifest that we need this Variance if we are going to be able to accomplish this use. The second part of the BOSHA test is that the benefit sought by the applicant cannot be achieved by some other method. And again, this is sort of an existential thing, ah, the boathouse is where it is. The boathouse can only be at one place. The boathouse intersects and the boat slips that it ah, embraces intersects the railroad tracks at only one place ah, and the, there is no other location that which Mr. Gayner can integrate this replica station with his boathouse except at the boathouse. I mean it's pretty, it's self-evident but there it is. Ah, so I submit to you that the two prongs of the hardship analysis for an Area Variance are met simply by looking at the plan and the pictures that you have in the record ah, of the boathouse.

Marcella Perry: Kathy, Brian any comments?

Brian Boyers: Well, just on that last, he said the intent was for boathouse on a railroad station, I can't find anywhere in our Zoning where we have railroad stations. So that, if it's not there, I don't believe it's allowed.

Attorney Varney: If I could respond?

Marcella Perry: Hold on just a second.

Attorney Varney: But I didn't want to interrupt.

Marcella Perry: Any other Board Members have any questions? Sorry. Okay. A brief comment?

Attorney Varney: I just respond to Mr. Boyers' ah, observations. Ah, this isn't obviously a true railroad station and I never said it was. This, this, this is a structure designed to look like a railroad station. It's not, it's not used as a railroad station. It's not used for anything. This, this is the best description I ah, and, and my client gets upset with me when I describe it this way. The best way to describe this is what Victorians used to call a folly. Ah, you know, they put these things that were designed to look like roman temples out in their backyards. Well, that's, that's basically what he's doing, he's trying to put something that looks nice on his boathouse and in many ways it's not that much different than a very large cupola or a decorative steeple, I mean, that's, that's what he is trying to do. He is trying to create a look. He's not trying to use this as a true train station as I think you would all recognize.

Marcella Perry: Thank you. Kathy.

Kathy Menici: Ah, just one comment that I wanted to make. Ah, one of the requirements for hardship is that ah, there isn't any other feasible way to achieve ah the purpose and the purpose as stated on the Building Permit Application was to create a two-slip boathouse and ah, the packet of information that was submitted by the applicant in support of their case with um, DES, ah, shows a number of different design alternatives ah, at least one of which would be in compliance with the Town's Zoning Requirements for the 15 foot or would have been very close to the 15 foot height restriction. In addition, um, that their saying that they are trying to replicate a train station but there was never a train station in that part of Town. Um, train tracks don't exist out there anymore, the train tracks have been lifted years ago. You can see um, an area through the woods that is like a path, a straight line going through the woods and I assume that that is where the track did lay at one time. Um, but there isn't track there now.

Marcella Perry: Okay, thank you.

Attorney Varney: Ah, again, ah, ah, this isn't a true train station it's simply something a design to create an appearance and as the as the Board knows and has in its file, ah, this has been ah, approved by a State Agency charged with ah, ah, ah, encouraging ah, the preservation and ah,

beautification of historic structures. This is a ah, an old Inn, it's now a private home but ah, in the old days the property that Mr. Gayner owns was an Inn served by ah that very....

Marcella Perry: Was there a station there?

Attorney Varney: Ah, there was a station nearby and..

Marcella Perry: On that property?

Mr. Gayner: On the property.

Attorney Varney: On the property. Ah, and

Marcella Perry: Not in this location.

Attorney Varney: Not in this location and as I said and I want to make it clear, we are not trying to put a train station on this property. We are trying to integrate what looks like a train station with the boathouse. That is the use, that is what we are asking for your, your ah, you to grant a Variance for.

Mr. Gayner: It was Mount Major Station and it's in the Historic, you know in the Alton book on historical ah, you know the old railroad era and so on, it's shown in the book.

Marcella Perry: Kathy.

Kathy Menici: U, I believe the State Agency that Mr. Varney was referring to is the Division of Historic Resources and the Division of Historic Resources does not have approval authority, they have advisory capacity ah, and that is the extent of their authority is that they advise other State Agencies ah with regard to the historic significance of structures ah, they also are charged with um, there's a federal review process, it's federal, it's in the CFR, I think it's Section 106 is what it's referred to and if there is a project that gets federal funding, ah, the Division of Historic Resources is required to go out and inspect that property and make sure that there are not any um, historic structures or historic elements on the property because it's not just structures. Ah, they look at historic gardens, stone walls, things of that nature ah, and any federal funds require, excuse me, that any historic features of the site be protected through the re-development but again, that's simply advisory capacity. They do not have the authority to approve applications. They make recommendations.

Marcella Perry: Okay.

Attorney Varney: Just one, ah, I agree with Ms. Menici in its analysis that that agency ah, merely recommends and they did recommend ah, this structure to the State and that's why the ah, ah, the ah, state agency sent the letter to your Conservation Commission and your Selectmen um, and also to Mr. Gayner telling him that as far as they were concerned he could make these modifications. Um, that ah, nevertheless, he had to square it with the local agency. So, it's

going to be basically, it was up to Mr. Boyers in the first instance, it will be up to you now in your capacity.

Marcella Perry: Any other questions?

Kathy Menici: I'm sorry.

Marcella Perry: Any other questions?

Tim Kinnon: I do have a question. What is the purpose of making it 38 feet in height?

Attorney Varney: Aesthetics. The ah, the ah, it's not, the structure is not 38 feet from the ground, it's 38 feet from the water level. I believe the ah, the structure is approximately 18 or 19 feet....

Mr. Gayner: about 20.

Attorney Varney: 20...he says 20, 20 odd feet, so one and ½ stories. I think you have photos.

Marcella Perry: Any other comments? Thank you and Kathy the next case.

Kathy Menici: It's case Z05-15, Map 53, Lot 3, Motion for a Rehearing, Robert Gayner, Trustee, 62 Temple Drive. Application submitted by Walker & Varney, PC on behalf of the property owner, Robert Gayner, Trustee for a Rehearing on Case Z05-06 regarding the April 7, 2005 ZBA Decision denying the property owner's request for a Variance from the dimensional requirements in order to allow the height of a boathouse in excess of 15 feet as required by the Alton Zoning Ordinance, Article 200, Section 228A – Height Restrictions for Boathouses. The property is located at 62, Temple Drive in the Lakeshore Residential Zone, the Town of Alton Shore land Protection Overlay District and the State of New Hampshire Shore land Protection District.

Attorney Varney: Okay, this presentation will be a little longer. Um, Madam Chairman because it is a more fact driven as opposed to law driven and I would refer the Board to its Notice of Action um, and there were particularly findings two, three and four which were made. The first was these were and I'll read them...Two – the violation was an outcome of failure to inquire. I'd like to take that first. Ah, the and I would just submit to the Board, you've been given a copy of the deposition I took of Mr. Boyers and, and, is that part of, I assume that is part of the Board's file, is that correct:

Marcella Perry: Yes it is.

Attorney Varney: And ah, I would simply refer you to the ah, Mr. Boyers candid admission that ah, he was contacted by Mr. Gayner, you have a copy of the letter of April the 1<sup>st</sup> and you have a copy of the correspondence from ah, ah, the ah, the Office of Historic Preservation. And, I believe, Ms. Menici provided you with copies from the DES file of various drawings which was submitted at various times by Mr. Gayner to the DES in an attempt to get that approval which he



received on April the 1<sup>st</sup>. Ah, Mr. Boyers during his deposition, ah, conceded a number of things. Ah, the first is that apparently nobody told him that the Town had received these letters. Ah, and my review of his file would indicate that he's right. Ah, that ah, ah, ah, the first copy I saw in his file of this ah, was provided to him by the State on September the 2<sup>nd</sup>. So apparently a letter having to do with um, a ongoing Building Permit, to which modification was being sought ah, was not given to the man charged with ah, enforcing this. I don't know why, but it wasn't. Ah, the ah, second thing ah, ah, that he ah, that he conceded is that after April the 1<sup>st</sup> he received a telephone call from Mr. Gayner. Ah, and that during that ah, conversation ah, Mr. Gayner asked him ah, a number of questions about boathouses and, and it was clear ah, throughout that conversation and again, Mr. Boyers was candid in admitting this that ah, it was clear that's what they were talking about was this boathouse. The only permit, the only outstanding permit ah, which ah, ah, stood in Mr. Gayner's name at the time. Ah, I ah, asked Mr. Boyers what he told Mr. Gayner on that occasion. His, his first response is well I don't remember. But when I prompted him, I said, ah, ah, did ah, did you finally say and let me just read this ah, (inaudible) to you.....(shuffling)...I want to make sure I get the right one.....All right, Page 16 of the, of the deposition ah, this is my question...Well, all right so he, you concede that you and he meaning Mr. Gayner had a conversation in which you told him that the regulations were that you could have a building in that district on his property that was 35 feet in height as long as it was more than 30 from the, from the water line. Answer: High water mark, yes. Okay and how do you define high water mark? Answer: I define high water mark as the, it's actually shoreline. There's an elevation at the lake, full lake level. And I want to refer you to page 15.

Marcella Perry: What was that page number?

Attorney Varney: 15.

Marcella Perry: 15?

Attorney Varney: Yes. And would you tell me what the, what the conversation consisted of. This is the conversation between Mr. Gayner and, and Mr. Boyers. Answer: He asked me what the setbacks and height restrictions were on the lakefront residential. I told him it was 15 feet above high water mark and anything beyond 30 feet from high water mark was 35 feet meaning elevation. Did he tell you why he was asking you that question? Answer: In reference to the boathouse, yes. So it's clear that Mr. Gayner is asking throughout, was asking ah, Mr. Boyers, ah, about his boathouse and that Mr. Boyers knew it. The, the, the Board found that this was a failure to inquire. Now, ah, I don't know how a man can make much more of an inquiry than this. You had the uncontradicted testimony of Mr. Gayner, and the representations of his employee, Mr. Russell ah, that they had tried on numerous occasions to get a response from Mr. Boyers on this very issue and that Mr. Boyers did not respond, didn't call them, didn't return their calls, and finally one morning Mr. Gayner was able to get him on the telephone while Mr. Boyers was in the room listening to the conver, to Mr. Gayner's side of the conversation. Mr., Mr. Russell confirms, Mr. Gayner's version of that conversation. How the Board could find that, that was in some way failure to inquire on the one hand and then on your third finding, that it was the outcome of obfuscation, I just don't know. I cannot, I, I, it just puzzles me how you could have ah, how you could have reached that ah, that conclusion and then the fourth one, that the violation was an outcome of misrepresentation, I would like to know what misrepresentation.

What is it, and if the Board still feels this way, I think you owe it to Mr. Gayner to say what that that misrepresentation to Mr. Boyers was. Ah, I know of no misrepresentation, and as far as I know, Mr. Boyers doesn't claim any misrepresentation. The Board then went on to consider a ah, secondhand version of, I believe it was Ms. Menici's version, what she thinks happened down at the State of New Hampshire. Ah, with, and I assume this is based on conversations that she has had with the people down there. Ah, I can represent to this Board that I am in contact with the New Hampshire Attorney General's Office who represents the Department of Environmental Services in this matter and with their agreement we have placed an Appeal of, there is a State Cease & Desist Order outstanding as well as your own. We have placed that on hold awaiting the outcome of this Board's ah, decision, ah, on this matter. Why. That is because the only objective parameter, which is arguably been violated here, is one established by your Zoning Ordinance. That's it. There is no State parameter which is objected to and in fact the State's permit which referenced a height limitation of 519 feet, if you look at that letter of April 1<sup>st</sup>, they are clearly indicating that that height limitation has been waived by the State but reminding Mr. Gayner that he has to clear that with the Town of Alton. I submit to you ah, and I ask you, what other purpose could Mr. Gayner have had in making that telephone conversation to the, to the Codes Enforcement Officer of the Town of Alton? Ah, ah, it just ah, again, I, I, I do not know how you made those three findings which basically were three different ways of saying that he misrepresented something. I just, I, I, he is discussing a boathouse. He repeatedly requested Mr. Boyers to come out to the site to inspect it. Mr. Boyers repeatedly declined to do so, he says because of the press of business and again, I refer you to that deposition, it's very clear, ah, and perhaps it's true, I, I don't know, I don't have his job and I don't, I don't have his responsibilities. Ah, Mr. Boyers does not have or did not, at least at the time that I took his deposition a clear ah, recollection of the ah, of the conversation. Mr. Gayner has a very clear recollection as does Mr. Russell. So, I submit that the weight of the evidence is that an inquiry was made, that no obfuscation can be attributed to Mr. Gayner ah, nor can any misrepresentation ah, to Mr. Boyers be attributed to ah, to Mr. Gayner.

The second thing that I ask you to reconsider is the undisputed fact that this building was framed in its present dimensions on August the 6<sup>th</sup> and Mr. Boyers was on-site on August the 6<sup>th</sup> and again, he confirms that ah, in his deposition on Page 11. Ah, I ah, asked him repeatedly why if on August the 6<sup>th</sup> he felt this was a non-compliant structure, which is what he says he thought it was, he didn't tell Mr. Gayner that that was so. Ah, and I, I never did really get an answer from him and I, and I still believe that that is a serious, just, just from common humanity I would have thought someone would have informed the property owner, a longtime resident of the Town, if you see something and you, and you believe it to be non-compliant and you're the man in authority, the least you could do is tell him. Ah, and there is no evidence that any communication was made to ah, Mr. Gayner by the Town of Alton until September the 28<sup>th</sup> of the ah, nor was this all. The record also shows that during this time Mr. Gayner was in contact with officials at DES. This isn't something he forgot about and wasn't, wasn't, wasn't spending some time on. He was in contact with them. There are faxes in his file dated September the 2<sup>nd</sup> ah, and I submit that those faxes didn't just fly into that file, they ah, they came into that file as a result of discussions between either Mr. Boyers or others ah, working with him and the State. None of these discussions, I would submit were communicated to Mr. Gayner. Now I ask you, if you were, if you were ah, in the middle of a project, spending a great deal of money, whatever you think of this project, wouldn't you expect that an official of the Town of Alton, with the

knowledge that Mr. Boyers then had would have contacted you. Wouldn't you have, wouldn't you have thought that that would be the appropriate thing to do? Ah, in any event, it was not done and ah, ah, again, I do not see how the facts which you have before you can be interpreted fairly as you, to reach the conclusions you reached at your, at your earlier ah, meeting. I won't beat it up any more than that. Those are the submissions I have and again, we are ready to respond to any questions that you may have.

Marcella Perry: Kathy, response?

Kathy Menici: Ah, just a couple of things. Um, Mr. Varney, I, I think I understood you to say that in the April 1, 2004 letter from DES regarding their approval of the ah, boathouse design that was submitted by Mr. Gayner, that the State waived all height restrictions? Did I understand you correctly?

Attorney Varney: I believe that's true.

Kathy Menici: Um, because there's nothing in that letter that um, discusses any State height restrictions and to my knowledge, there isn't a State height restriction. That the height restriction is under the local jurisdiction.

Attorney Varney: Well, you take my point exactly. And, and that is, that the only height restriction is the Town of Alton height restriction which is the one which the state agency tells Mr. Gayner, get in touch with the appropriate state, Town officials of the Town of Alton and make sure that you comply with this. That's why he contacted Mr. Boyers.

Kathy Menici: And it is the Town's ah option to enact a standard that is stricter than the State standard?

Attorney Varney: Absolutely, I don't dispute that.

Kathy Menici: And that's why the height restriction is there. Um, a couple of other issues I just wanted to ah, clarify ah, you stated that there were um, and again correct me if I misunderstood. That you stated that um, Mr. Gayner had a number of designs so that he had ah, that were submitted at different times to DES, not to DES but actually to the Division of Historic Resources, I would assume that you would have to go to them first ah, since they have advisory capacity to DES.

Attorney Varney: We even to both.

Kathy Menici: And, um, that they were sent on different occasions and I can only go by the date ah on the fax copies that they were all sent on the fourteenth of May in 2003 from Matarazo Design.

Mr. Gayner: I want to correct you on that. Those are the faxes that came from Matarazo to me. Those are not faxes that....

Kathy Menici: Okay, well it doesn't, it doesn't indicate who they went to so that's why...

Mr. Gayner: That's why it says it came from Matarazo.

Kathy Menici: Trying to clarify.

Attorney Varney: Yeah, those, those, those fax dates are, are totally irrelevant.

Kathy Menici: Um, but the, the fact remains that the owner of the property had these designs ah, completed and sent to him by fax on May 14<sup>th</sup> of 2003. Um, the Building Permit application to the Town was submitted on October 15<sup>th</sup> of 2003 and the plans that were submitted were for a design that is completely different than the ones from the May 4<sup>th</sup>, May 14<sup>th</sup> 2003 fax. So, at that point in time when the applicant, the property owner ah, ah, submitted the Building Permit application he already knew that he was going to be having discussions with DES ah, regarding a different design than the design that he submitted with his Building Permit application and then you go into the winter months and we don't have an exact date, um, and concrete walls for the boat structure were poured during the winter and the concrete walls that were poured were of the type that were necessary to support the um, a structure that was different than that that was submitted with the Town's Building Permit application. And, in fact, there was no approval of the new boathouse design by DES until April of 2004. But those, but those, that concrete had already been poured in the months previously.

Marcella Perry: Okay, Brian.

Attorney Varney: Ah, I'm sorry.

Marcella Perry: Brian.

Brian Boyers: As far as the phone conversation, I have no recollection of ever talking to Mr. Russell. So, I do not know how he knows what I said on the phone all right. I'm quite sure that I never spoke to Mr. Russell on the phone. Foundation, never called for a foundation inspection. It's on the permit. One of three inspections, one is foundation. Building Permit – never saw that septic design. Never had a set of plans brought in to me to show me a new design. Never discussed a new design with anybody.

Marcella Perry: Ah, ah, Brian may I ask you.....did, um, were there any other inspections throughout the stages of completion that are required.

Brian Boyers: The next inspection after that would have been rough framing after the foundation inspection. I was never called for any rough framing or foundation inspections.

Attorney Varney: If I may respond. Let me respond to Ms. Menici's comments first and ah, then to Mr. Boyers ah. First of all, the ah, Ms. Menici ah, points out that the application for a Building Permit which was submitted to the Town of Alton ah, was submitted to be consistent with your regulations. In other words, 15, what Lakeshore Construction deemed to be consistent with your regulation, 15 feet above the ah, high water mark and that's the structure and that's

what is designed and that's what ah, appears on the application for the Building Permit. While this was going on, Mr. Boyers, Mr. Gayner was engaged in attempting to get leave from the State to modify the, the Administrative Permit, which they had granted to him to construct the boathouse so that he could employ that Matarazo Design. This was a lengthy...

Marcella Perry: So he was actively involved in trying to get....

Attorney Varney: Trying to get a different design, absolutely. He was trying to get a different design. He didn't have it, he didn't have, and he didn't know that the State would agree until April the 1<sup>st</sup>.

Marcella Perry: But before that he, he even submitted this permit to the Town.

Attorney Varney: He had submitted it to the Town.

Marcella Perry: He had been in contact with the designer to look at different.....

Attorney Varney: Absolutely. And that's never been disputed and I don't see....He had to have a design in order to get an approval from the State. He didn't know that he was going to get that approval from the State. That they like you could answer in one or two ways....yes, or no. In the long run, after a lot of effort, they answered yes, so he was able to get that design. Now did he just sit on that design? No, what was the next thing he did? He contacted Mr. Boyers as he was told to do. I, I, and if you look at that letter of April the 1<sup>st</sup>, what you will see in that letter is she is telling him implicitly, we don't care about the height at the State of New Hampshire, but the Town of Alton does and you've got to go down and talk to them.

Marcella Perry: Yes, he had to go down and talk to them, okay. You have another question.

Mr. Weston: Yes. The, the permit was submitted, the application for the permitted was submitted in writing to the Town is that correct.

Attorney Varney: That is correct Mr. Weston.

Mr. Weston: Okay. Was there in writing a request to change that permit?

Attorney Varney: No, as at the first hearing you asked me that question and, and as we told you, there was no written request.

Mr. Weston: Okay. The assumption being that if you required to have a written request at the beginning any subsequent change would require subsequently a written request as well.

Attorney Varney: I, I understand that's your position and, and, ah, you, you made that clear in the past. But what I'm telling you...

Marcella Perry: I think that the Town....

Attorney Varney: But what I'm telling you is that, you, you have taken a, a, an extra step on that in making an affirmative finding of obfuscation and misrepresentation. That's quite different from saying he should have, he should have done something different with his paperwork. Quite, quite illically.

Unknown: Madam Chair.

Mr. Weston: I, I would like to respond to that. I believe that I said it gives the appearance of. I did not say

Lyndon Avery: Right.

Mr. Weston: I did not say that it actually did. I said that it gives the appearance of and I think there is a big difference.

Marcella Perry: Okay.

Inaudible talking in the background

Tim Kinnon: No, that's okay. Um, if Mr. Gayner was in contact with the State agencies to try to get a different design, why was a building permit applied for period. Why didn't he wait until he had his final design and then apply for a permit with the Town, with the final design rather than just having what he had.

Attorney Varney: Because he had no confidence that he would get approval to modify that design. The design that he submitted to the State and the design that he initially and the design that he submitted to the Town of Alton initially were the same and he was seeking to change it and the first step he took could have gone to one or the other. He went to the State first to see if they would (inaudible), he had to get Governor and Council approval, I mean, you know, it's a big deal to get a boathouse and after much effort, much back and forth, a lot of phone calls, a lot of writing, work with people like Rainie Pelletier, he was able to get the State to acquiesce and they said fine and it was at that point he turned to the Town of Alton and tried, tried to ascertain if he could modify his plan as the State had told him to do and that's what he tried to do and that was, there is nothing nefarious about this. You may say it was too informal.

Tim Kinnon: I wouldn't say informal but my concern is that Mr. Gayner obviously knew that this was a very complex process. There were many agencies that he needed to go through to get approval to build this and why start building something that obviously costs significant amount of money when he's not sure what the end result is going to be.

Mr. Gayner: Let me explain.

Attorney Varney: No, no, when you say why start building, I'm not sure when your talking.

Tim Kinnon: Well, he, he commenced building.

Attorney Varney: He commenced dredging.

Tim Kinnon: Right, in the fall of 2004,

Attorney Varney: 2003.

Tim Kinnon: 2003

Attorney Varney: Correct. He always knew he was going to dredge, it was a question of what he was going to put in the hole.

Tim Kinnon: Right, and then he poured the concrete over the winter.

Attorney Varney: Correct.

Tim Kinnon: In 2003-2004.

Attorney Varney: And the concrete, the height of that concrete does not exceed the height restrictions of the Town of Alton even if you read them the way.

Tim Kinnon: No, no it doesn't but it does, the height of that concrete is such a height that does not permit a proper, properly pitched roof as is shown on the original building permit.

Attorney Varney: And, and I would submit to you that the pitch of that roof is not a material part of that permit.

Tim Kinnon: Well, I believe that the pitch of the roof is a representation of what he was going to build so if it's not what he was going to build then it would be a misrepresentation of what he wanted to build.

Attorney Varney: No, what he, what he had expectations of being able to do at that time was to be able to replicate the tracks above the ah, above the site.

Tim Kinnon: And, and did anybody at, at the Town Hall, at the Code Official's Office know his intention of doing that at that time?

Attorney Varney: I don't, I don't believe that he had any contact with Mr. Boyers about that until he contacted him in May. That is the first, so, so the answer to that would be no.

Tim Kinnon: Okay, thank you.

Marcella Perry: Thank you.

Attorney Varney: Could I have Mr. Boyers, Mr. Gayner, he wants very much to speak, will he be given an opportunity to explain this?

Attorney Varney: Okay.

Marcella Perry: Brian.

Brian Boyers: The concrete at the height it is now, there is no feasible way you could put a roof on it without exceeding the 15-foot height limit. The top of the concrete now and the boathouse, I believe is almost 15 feet and it's a flat roof whether, I've heard the State doesn't allow a flat roof, I don't know on a boathouse but you couldn't even put a handrail on it for a safety issue without getting a Variance or approval from the Town to be over the 15 foot.

Mr. Gayner: Ah, I understand where your Board came from, how you came to certainly these conclusions and I, and I, the reasons is that you are obviously convinced that I, that this was a grand scheme to try to hoodwink the Town or whatever. But I want to give you just a little bit, just a little bit of a historical prospective, a little chronology on this cause your questions are good questions Tim, I mean, they make sense and also Mr. Weston you know, I understand what you are saying. But let me give you a little bit of background. Ah, I lived originally in Chestnut Cove since around 76, I always wanted to build a boathouse, I always had a thing about I wanted it to have a boathouse. Over there the water is very shallow, there was absolutely no way, I mean, we looked at, I had a permit actually, I had a permit for a boathouse back in the late 70's I think and we let it elapse because it was just not feasible. We would have had to dredge in and it kept filling up with sand and so on. When I bought the property on Temple Drive, I said boy this is a neat place for a boathouse because of the, the nature of the peninsula and the fact that the basin goes in and it is tucked way in. Um, I even have some pictures that we took from the water that I have on the computer that I would like to show you before the Hearing is over. Ah, and the natural spot for that was initially we thought from the boat basin because there was a boathouse in the boat basin and when the old rail station was there and it was an Inn. Ah, the State came out took a look and they said no. You can't, you know, state waters, it was dredged out many years ago, a hundred years ago and its, its, you can't build over that, you've got to dredge it in. So we, went about the process of looking at dredging it in. Ah, when I first started talking originally about the boathouse and as you all know, these projects take a long time. Ah, you could put a flat roof and as Behre's boathouse is, you know, over in Alton and many other boathouses on the lake in fact when they did away with, originally did away with the boathouses out over the water, they allowed boathouses to be built with flat roofs. Um, it's my understanding that someone in Winter Harbor misused it in some fashion and whatever but the State decided that they didn't want anymore flat roofs. Ah, this was a natural spot for a flat roof because it's, it's and unusual, I mean you know, there's all kinds of shoreline here, this happened to be an unusual piece of shoreline in that it's extremely high because it is the old rail bed. Now Ms. Menici says it's a walking path, you know, it's the old rail bed that's where the train went through and it's built up significantly and ah, quite high. So when you dig into it, ah, you, you know, and in order to be level with the surface, your going to be high. The original plan that was done by Lakeshore required a lot more dredging number one, number two it required that there be severe cuts on the sides in order to accommodate that particular design. Ah, Lakeshore Construction when they began the excavation, which they do from the shore, they leave a, you know they have the coffer dam and they leave the shoreline in tact and they excavate out behind



it, ah, found that as soon as they got down to about 15 feet, 10 feet, I mean about 8-10 feet, the thing kept filling up with water. The reason is is that the rail bed was built back, you know, 18 whatever, hundred whatever, with large stone and smaller stone and it was you know, graded stone all the way out and as they dug out behind it the water just flowed in and they couldn't stop it. They ultimately had to come in and actually build walls out of clay, they had to bring in significant amount of clay. Build walls out the clay and, and essence build a clay infrastructure around it and then put pumps in and Art Russell will tell you, he was there all winter. They pumped continuously with two large pumps to keep the water out of there in order to even put in the ah, put in, you know, the ah, pour the walls, you know, ah and put in the other wood supports and so on. So ah, it was quite a project, I mean they ran into all kinds of problems and you know, Lakeshore can certainly confirm that. Ah, as a result of that, as it went along they did raise the pour in the front in order to stabilize the thing because I mean, it was a real serious problem. So, there's a chronology. This was, this was, nobody planned this. Now I was away a good share of that winter ah, when I came back, ah, I got the letter (end of side 1).

The letter, the letter we've been speaking of...that April letter. Ah, when I got back I received the letter and I immediately called Mr. Boyers. Now Mr. Boyers sits there and says that, you know, he was never called to inspect the foundation. He says he has not doesn't have a good recollection and he said that he didn't speak with Arthur Russell, well Arthur Russell was standing right next to me when I was on the telephone. I didn't have the phone here so that he could listen to every word but I repeated the majority of it. The fact is, is that Mr. Russell went to Town Hall twice to try to get Mr. Boyers to come up and do an inspection. The inspection, at that point in time, was a foundation inspection and I told him specifically that before I could hire, I have a framer lined up his name was John Dube, and I don't want to lose him because he's got a slot in between two large houses that he's framing and I want to clear this up with you because I don't want to do any framing until you approve this and we've got a revision of the plan, the plan was on the table and Art will confirm everything that I am telling you and I practically begged Mr. Boyers to come and look at it. He say's in his deposition, he was too busy. Ah, the fact of the matter is is that that was the call to inspect the foundation. So he did get a call to inspect the foundation. Had Mr. Boyers come to my house like I had asked him umpteen times, I even said Mr. Boyers, you know, I said, you drive by, you must drive by Temple Drive numerous time on 11D, could you please just stop down. His answer was, well, I'm really busy, it's a busy time of the year, if I get a break in my schedule, I'll try and stop down, but if your 30 feet back, you can go to 35 feet. Ah, if he had come down there, looked at the foundation and said, you know, this is not in compliance, looked at the plan, said you can't go up that high, that would have been the end of it. I mean, I would have, no way I would have built the thing but he, he wouldn't come and look at it and he specifically told me go ahead and build it if your 30 feet back and I said to him, and I can remember like it was yesterday, I says, Mr. Boyers, you got to understand, this is a unique situation. It's the only boathouse on the lake and probably the only boathouse that will be on the lake where the first 15 feet of it is flat because that's what the State allowed me to do and the balance of it is going to be built up with a replica building to, to replicate a train station so it's unique. So he says is it, is the building 30 feet back? I said yes, he said you can go to 35 feet , I'll try to stop down if I get a chance.

Marcella Perry: Okay

Mr. Gayner: All right, now that was the first instance, I would have stopped. The second instance, as Mr. Varney brings up was, was the August 6<sup>th</sup> and from August 6<sup>th</sup> until the end of September ah, you know, everyone knows that, that, a lot of the costs is in the so-called finishing, you know, the siding, the roof and the windows and so on and so forth. That was all done after August 6<sup>th</sup>. I got zero calls from anyone. So, I just wanted to make it clear to the Board, I mean if you really look at the facts and if you put yourself in my position. First of all, why in the world, I mean if you think of it logically, you know, was I, was I remiss perhaps in not, I don't know what else I could have done, he's the guy you're supposed to call. But the fact of the matter is, is that it was my opinion and understanding that boathouses are primarily in the purview of the State. All of the permitting goes through the State, all the changes go to the Governor's Council, etc., etc., and I was under the impression that, and that 38 x 38 is the same footprint that we you know, put in the original design so we didn't change that in any way, shape or form. That the only requirement was the height requirement.

Marcella Perry: Okay, Mr. Gayner, we've heard this, we've heard this before.

Mr. Gayner: All right, well I think it's important you hear it, that you heard it from me that's all.

Marcella Perry: Yes, okay, thank you very much. Any other comments? Okay, then we will take this under advisement.

Attorney Sessler: I want to explain now what's going to happen Mr. Gayner and Mr. Varney. I think Mr. Varney knows but the public hearing portion of the meeting is now closed okay. So all evidence to the Board has ended from all sources and any person. That includes the Town people and it includes you unless the Board decides they want to re-open the case to hear other evidence. They are going to take it under advisement to discuss legal issues and possibly maybe procedural issues with me. I am going to try make sure that we address all the issues and all the issues you raised point by point, that we don't miss anything so we, we address your concerns and I am going to discuss the legal issues with them and I have the right to do that in private and I will do that in private. The only other person that may be with me, may be my Associate Mr. Tanguay but I don't bring new evidence to the Board and I don't discuss, I don't tell them how I decide the case or how they, I don't tell them how I think they should decide the case. I let them decide it and then I help them address the issues and do that in accordance with the law but I will tell them what I think the law says and what they should do in accordance with the law, principally and primarily the new Supreme Court Decisions which are hard to understand and they are relatively new. That will be done. The legal issues and procedural issues will be done in non-public session with me and with me only and no decision will be made by the Board in non-public session. They will come, they will reconvene and give notice to everybody when they are going to reconvene. They will reconvene in a Public Hearing, a Public Meeting, I'm sorry, Public Meeting. They will not take new evidence unless they decide to but you will have the right to hear them deliberate. That's something that you don't get to hear a jury do but you will get to hear them deliberate with all their good points, their bad points, their warts, their pimples, whatever but they will deliberate and hopefully they will make a decision um, and as I said, if they want new evidence they can re-open the public hearing part of this and ask for it but beyond that you don't have a right so if you sit there and you hear them saying something you don't like, you just have to sit there and you can't raise your hand and say I want to say

something about it. But that is procedural so you know, there will be no new evidence from any source and they are pretty good about not talking about this ah, with anybody other than themselves and in public hearings. So that's the way it's going to go, we are going to try and do it quickly, um, the next regular meeting is in August.

Marcella Perry: The next, in August.

Attorney Sessler: In August, but we would like to try and do it quicker. I am going to try and meet with them well before that. The only time I know I can't meet with them is the rest of this week and next week because I know I am on vacation but we'll try to meet with them shortly after I get back from vacation and we try to schedule a hearing night especially for this case um, possibly when we have a work session in July so that you don't have to wait until August. If we can.

Marcella Perry: There isn't one in July is there Kathy?

Attorney Varney: Could I raise one collateral issue?

Attorney Sessler: Go ahead.

Attorney Varney: Ah, when we first appeared here, ah, the then Chairman, then Chairman, Mr. Chamberlain specifically admonished us not to do any work below 519.34, not to do anything, not to touch it and we have adhered to and we took that as an order of this Board, we took that as required and we haven't. Ah, in the interim, I have received correspondence from the State of New Hampshire that says they have no objection to Mr. Gayner at least finishing off the below 519.34 parts of this boathouse. Not the part, not the part that deemed offending. Mr. Boyers has indicated that he can think of no reason why we can't do that from the Town of Alton's perspective and asked me to produce for him a letter from the State saying they had no objection, which I have done, correct?

Mr. Boyers: It was on your letterhead. It wasn't on the State's.

Attorney Varney: I sent you the copy of the letter from Attorney Brooks, from the AG's office, you must have that.

Mr. Boyers: It's probably in the file.

Attorney Varney: All right and, and you said that that you, if you got that, that you would okay it but I can't get any action and I just think what whatever you decide on the above 519 feet at least let this man finish the thing.

Attorney Sessler: The Board will not decide that issue, it's out of their jurisdiction, but I will talk to about it with the Selectmen and I have a meeting with them, you know, shortly. I'll talk to them about it but it's not the Board's jurisdiction to say that. Until they make a decision on the....

Attorney Varney: So I, I don't have to come back to this Board if the Selectmen give me the okay, I won't be in defiance of anything this Board said.

Attorney Sessler: No, but my suggestion to the Selectmen would be no matter what I do or what I recommend to them and what they decide to do, it's going to be without, your going to do it without prejudice then, you know, you not only have to tear the whole thing down, you have to tear the (inaudible)

Attorney Varney: I understand.

Attorney Sessler: You do it at your own risk. I'm not saying that's my recommendation but I have to ..... Thank you.

Unknown: Is this meeting closed?

Marcella Perry: Um, I'll entertain a Motion.

Lyndon Avery: I motion that we adjourn the Meeting.

Marcella Perry: Thank you.

Mr. Weston: I will second the Motion.

Marcella Perry: All in favor.

Mr. Kinnon: I do have one thing I'd like to, I'm still.

Unknown: The meeting is over.

Mr. Kinnon: No it hasn't closed yet, we haven't voted to close it have we.

Marcella Perry: Well we did.

Attorney Sessler: Well, do you want more evidence?

Tim Kinnon: Yes, I do and I wished we had slowed down just a little bit and somebody had asked. I do want more evidence. I would like for, for the Town Planner to contact the person that she contacted at the State to find the shoreline and have it put into writing and have it sent to Mr. Varney's office and a copy sent to us.

Kathy Menici: I was going to do that.

Attorney Sessler: Well, you can't do that unless the Board and the, the Board agrees to it because that will be additional evidence.

Tim Kinnon: That's, that's my Motion, I would like that to happen prior to us deliberating on this. I'd like to see better clarification of this of the definition of the shoreline.

Attorney Sessler: Well, okay, if it's a person's opinion, I don't think it's relevant at this time. If they have it in regulation or a statute that they can point to, that is a matter of law and the Court can take judicial notice, I think you can take judicial notice so I think Mr. Varney would disagree that we could see that. If it's just somebody's opinion, or somebody's interpretation of something that's not clear then I don't think we should take it

Tim Kinnon: Right.

Attorney Sessler: IN fairness to the applicant's but if it's a regulation that they say says what they say it says, or a law or something that would be recognized in, in, judicially observable, I think we can take it and I think that Mr. Varney doesn't disagree, but any opinion or any testimony from somebody we shouldn't take at this point because the hearing is technically closed and everybody should have presented all of their evidence tonight now, not at a later date.

Tim Kinnon: Right.

Attorney Sessler: Is that agreeable...and I see Mr. Varney shook his head yes so, is that okay Tim?

Tim Kinnon: Great, thank you.

Marcella Perry: Okay, the meeting is closed.

Attorney Sessler: Okay, now we need a Motion.

Lyndon Avery: We already did.

Attorney Sessler: Okay, then you need to vote on the motion then.

Marcella Perry: He seconded it.

Attorney Sessler: I thought he objected to it, I'm sorry.

Marcella Perry: He may have objected to it.

Attorney Sessler: All right.