Town of Seabrook Planning Board Minutes

Tuesday, October 2, 2012
NOT OFFICIAL UNTIL APPROVED

Members Present: Donald Hawkins, Chair; Jason Janvrin, Vice Chair; Roger Frazee, Ed Hess, Ex-Officio; Michael Lowry, Alternate; Paula Wood, Alternate; Tom Morgan, Town Planner; Barbara Kravitz, Secretary; Paul Garand, Code Enforcement Officer;

Members Absent; Paul Himmer, Alternate; Robert Fowler; Dennis Sweeney; Francis Chase, Alternate; Sue Foote, Alternate;

Hawkins opened the meeting at 6:35PM

MINUTES OF SEPTEMBER 4, 2012

Hawkins had no changes or corrections to the Minutes of September 4, 2010, and asked for comments; there being none.

MOTION:	**Wood**	**to accept the Minutes of September 4, 2012, as written.**
SECOND:	**Hess**	**Approved: In favor: Hawkins, Hesse, Frazee, Wood;** **Abstained: Lowry**

SECURITY REDUCTIONS AND EXTENSIONS
There being none

CORRESPONDENCE

Hawkins referenced Morgan's memorandum concerning a problem picked up by the Assessor in re the Case #2012-26 recorded plan. Morgan reported the discrepancy to the Surveyor. Kravitz noted that NextEra would be returning to the Planning Board on October 16 in re the noise issue at the firing range.

NEW CASES

Case #2012-25.09-01 – Proposal by McDonald's and DDR Seabrook, LLC to expand the approval for a proposed McDonald's restaurant from 4,036 square feet to 4,500 square feet, and to reconfigure the drive-thru lanes for property at 700 Lafayette Road, Tax Map 8, Lot 55.

Attending: Tessa Bernstein, McDonald's Corporate Division; Tim Boyle
Appearing for the Applicant: John Kusich, Bohler Engineering: Attorney John Sokul Jr, Hinckley Allen Snyder representing McDonald's.

Kusich explained that McDonald's wants to Amend its 2009 approval (Case #2009-01) by about 450 square feet. This shifts the geometry but works better on the land, and will accommodate an increase in the kitchen size and the dining area from 80 to 100 indoor seating. The remainder of

the site is the same, including the driveway, lighting and the perimeter landscaping, although there is some internal landscaping adjustment. Kusich said they tried to keep the changes from the approved plan to a minimum. Janvrin said the site plan regulations had changed; parking was now in the siteplan, not zoning, and the standard was a "maximum" allocation, with one space per three seats, plus one per employee. He said that the plan calls for 55, while the allowed calculation would allow 52. Morgan interjected that for restaurants the parking criteria was still a "minimum", while for retail businesses, the criteria was a maximum. Wood asked if they met the minimum; Morgan said they did.

Garand said that the Water Superintendent had changed and had not seen the plan. The plan shows two water mains and the curb stop is at the exterior of the building; those regulations had also changed. The 35-foot signage is not within the current 20-foot regulations. Garand said they are talking about a small amount of changes on the site, but asked how much of the current standards, that have changed since the approval, they would be required meet. For example, landscaping, and stormwater regulations had changed.

Hawkins asked Morgan for his comments. Morgan cited the signage, and the lighting grid did not meet the current standards. They submitted a good stormwater maintenance plan in 2009, but not with this application. He thought this could be easily replicated. Janvrin asked if the filtration on stormwater changed since then. Morgan said there were new stormwater maintenance quality standards; a plan would show how they would keep it clean. Garand said that the sidewalks on the site near the facility were ADA compliant, but the sidewalks leading to the DDR site were not compliant. Signage for pedestrian crossing to the front door should be depicted on the plan. There is no raised median or center island at the right in/out, which would create the same problem dealt with at Demoulas south. Garand asked if this would go to the Technical Review Committee. Hawkins said that would be decided after going over the issues. He was very reluctant to go ahead with anything that had a building change without letting department heads review the proposal. First he wanted to know the extent of the changes to see if there was a significant enough impact for the TRC, and asked Morgan to continue his comments.

Morgan noted there had been changes in the allowed signage. McDonald's received site approval in May 2009, although concern had been expressed about the height of the sign. Later that year the Board started proceedings for reducing the allowed sign height from 35 feet. In the past year the landscaping regulations changed a lot. As noted, the lighting did not meet the standards, and there was not a current stormwater maintenance plan. Morgan said that moving from 80 seats to 100 meant there would be more vehicles accessing to and from Lafayette Road. The Board needed to decide whether that increase in traffic was significant enough for the Planning Board's traffic engineer to look at Janvrin asked if a traffic study that had been submitted with the 2009 application would still be relevant because of the changes along Route 1. Morgan said that the 2009 submission was under the auspices of DDR and a mitigation fee contemplating the building of the Route 107 Bridge was acceptable. Only the difference between 80 and 100 seats would be relevant now. The question was whether the increase of 20 seats warranted another traffic review.

Sokul said that Morgan's memorandum raised some good points, but maintained that the original approval was vested against subsequent changes in the zoning ordinance, and that the proposed changes were minor and would also be exempt from changes in the zoning ordinance or other. The regulations in effect at the time of the 2009 approval should apply to the Board's consideration of this project. He had sent Morgan a March 2012 court case concerning a developer, Pike, who had submitted a plan for a 5 story retail building and hotel in Portsmouth, plus some ground floor retail. Later they changed the retail building to a 300-person conference

center, and the court said that was so substantial that it changed the nature of the original project so they would be held responsible for those changes under the regulations. Sokul said that the court also decided that more minor changes, those that did not change the nature of the project, were not material and the developer would have the benefit of the vested protection under RSA 674:39. Sokul said that while some changes had been submitted for this case, they believe the Applicant was exempt from [new] regulations.

Hawkins said that the Board had copies of what had been submitted. He did not necessarily disagree with Soklul, but question was how the Board would define significant change; the Board was not made up of lawyers. One possibility would be to send Sokul's submission to the Planning Board's counsel for comment. He did not want to go down one path and later find out that they did it the wrong way. He thought the Board would recommend that its attorney be given the opportunity to review Sokul's work and comments so the Board would have a clear view of what it can and should do, and what it shouldn't do. Additionally, Hawkins thought there were enough other items, including a larger building, to have department heads take a look. They might say this plan is so close to the original, and that there would be no problems in going ahead. Sokul said they did not object to having department heads review the plan, but wanted them to know that the Applicant believes that the original regulations should apply. He added that perhaps there were some things like in re landscaping, that they could do to accommodate the Board. Hawkins said the stormwater situation now is that the town becomes responsible for the outcome on town land if their system does not work correctly. The Board wanted to be satisfied in this regard, which is a good reason for technical review. It may be what was previously done, or they might be asked for upgrades to meet the new standards even if they were exempt.

Hawkins thought that the Board would also ask for the height of the sign to be reduced to the town's current 20-foot standard. The landscaping did not meet the new standards, but the Board might ask them to have the landscaping reviewed against that new landscaping standard. On the other hand, if they are exempt it may have to be fine as presented. Hawkins said that the Board needed to have an opinion on the legal position presented by the Applicant before making any decisions relative to going forward. He asked if any Board Members had a different view. Janvrin agreed this should go to the Technical Review Committee, and noted that the police, fire, sewer and water supervisors all had changed since 2009. Sokul said that the site drive traffic would be permitted by the NH Department of Transportation under their driveway permit. Hawkins said if the driveway had not changed, the Board might ask the NHDOT if they really didn't want a raised differential at the driveway, because that generally causes a lot more leeway for left turns into the site which the town is trying to avoid. He also thought that when DDR construction is completed they would have a median strip, so there may not be a problem. It may not be an issue, but the Board would like a comment from NHDOT as well. Sokul pointed out that this location will be constructed north of the current McDonald's; both would not be open at the same time.

Hawkins said the question would be whether the added 20 seats would cause enough of an impact to cause an exaction. He thought that for the most part it appeared that DDR would be doing all of the work in front of the new McDonald's. They have contributed to the Bridge work on Route 107 and also to work that would be done on Route 1 south of that intersection. In the future some of Route 1 north of McDonald's may need some roadway work. Hawkins related that the Board's traffic consultant had gone through the whole Route 1 corridor identifying what projects would be needed in the future. The Town and the Planning Board have taken the position that they will ask people to contribute to that and target projects that will be completed in

a short timeframe. He did not think that 20 seats would be a big impact, if it applied at all. Sokul reiterated that the mitigation is part of what DDR had already agreed to do.

Wood agreed with Janvrin that the new department heads should go through the plan. She noted that the proposal is to add another ¼ of the originally approved 80 seats. She said that 20 seats is a quarter of the whole restaurant's sit-down seats, even thought the number sounds like a small amount. The Applicant said that things should stay as they are. She did not see the restaurant increasing by adding another ¼ of the approved seating as a small change. Janvrin noted the May 2009 approval, and asked at what time that approval lapsed if no work had been done if the Planning Board had not extended it. Morgan asked Kravitz to respond. Kravitz said there was an extension, and suggested that Garand might have more information. Garand believed that DDR's attorney requested an extension to run along with the DDR requested extension. Janvrin asked if the Board had approved that. Garand said it did. Morgan said that part of the question was the length of time when the Applicant would be vested. He had not read the case sent by Sokul until a few days ago, so he thought it a good idea to ask the Board's attorney. Hawkins said the Board needs to consider the town's rules as well as what the Court would ultimately allow. The Board would want to know that it is on the right page before making a decision.

Janvrin thought that the regulations specified 24 months. Hawkins pointed out that in working out the Settlement Agreement with DDR there had been a couple of extensions because it had been a long, drawn-out process; the dates were in the Settlement Agreement. He thought they extended approximately to 2015, and the McDonald's project was tied to the DDR project. He thought there was plenty of time without even considering what the Court would say was the minimum, which he thought was changed from 4 to 5 years. Sokul said that the original approval was extended twice. The conditions of approval had all been satisfied. With DDR, he thought they had until 2016 for substantial completion. Kravitz reported that about a year ago DDR provided the security required in the McDonald's case. At that time, it was determined that the conditions had been met, and the security is in hand.

Hawkins said the next step would be to accept the application as administratively complete. Janvrin noted that on the Town Planner's checklist a number of items had not been filled out, and wondered if the missing items had any effect. Hawkins said that would depend on whether this was a plan originally approved in 2009 with minor changes, or considered as brand new. For example, in 2009 the landscape stamp was not required. He asked Morgan about the monuments. Morgan said that in 2009 there was a subdivision submitted that did have the monuments. The Board would decide whether the stormwater drainage analysis and stormwater operations and management manual needed to be redone. Lot numbers and street numbers could be added. Kravitz pointed out that the map and lot numbers as well as the address need to come from the Assessor's office. Hawkins asked if the map and lot number on the plan was correct. Kravitz said that the Assessor was pretty sticky about determining the final map and lot numbers and the street addresses.

MOTION:	**Janvrin**	**to accept Case # 2012-25 as administratively complete for jurisdiction and deliberation.**
SECOND:	**Wood**	**Approved: In favor: Unanimous**

Hawkins thought that most of the plan will not have changed since 2009. Kusich said it all ties into the DDR project. Hawkins said **Case #2012-25 would be reviewed by the Technical**

Review Committee on Monday, October 15, 2012 at 10 AM in Seabrook Town Hall. As the Board generally does not meet on election day, Case #2012-25 would be continued to November 20, 2012 at 6:30Pm in Seabrook Town Hall. Hawkins said that the Board's attorney would be asked for comments during the interim, and the outcome would be available, when possible.

Case #2012-18 – Proposal by Latium, Tropic Star Development, Scott Mitchell to remodel and expand a gasoline station, and to construct a convenience store, at 663 Lafayette Road, Tax Map 7, Lot 87. Among other pending issues the board will consider is the applicability of Section 14 of the Zoning Ordinance (abandonment) and the proposal's compliance with Section 6 of the Zoning Ordinance, continued from July 17, 2012, July 17, 2012, August 21, 2012;
Lowry recused himself from Case #2012-18.

Attending: Bill Pescosolido, Latium; Scott Mitchell, Tropic Star;
Appearing for the Applicant: Wayne Morrill, Jones and Beach Engineering; Attorney Richard Uchida, Hinckley, Allen, Snyder, representing Tropic Star;
;
Attending: Charles Mabardy, Mabardy Oil; Gregory Michaels, and Attorney Chris Aslin, Bernstein Shur, representing Mabardy;

Hawkins explained that on February 2, 2012, the Planning Board was asked to interpret a zoning provision in re non-conforming property, and particularly in re this gas station property. The Board said that this property was within 1000 feet of other stations, but it was not non-conforming because the ordinance applied to "new" gas stations. Therefore, the Planning Board's opinion was the property could continue as a gas station and did not have to go to the Zoning Board of Adjustment. Hawkins reported that Mabardy had challenged that opinion and had appealed that administrative decision to the ZBA. After consultation with the Planning Board's Attorney, the Mabardy attorneys agreed that as there had not been a case in front of the Board (in February) no public notice to abutters had been required at that time. The attorneys agreed that the Planning Board opinion was not challengeable, and the appeal was withdrawn from the ZBA. Hawkins said that the Planning Board had notified abutters that there would be a discussion at this meeting. In this regard, the Planning Board could reaffirm its February decision, or determine that the matter should be sent to the ZBA.

Hawkins asked for Morgan's view. Morgan affirmed that Hawkins had stated the current situation correctly. The Board needed to listen very carefully to the speakers during this meeting, and then determine whether this proposal complies with the zoning ordinance. Hawkins added that in prior meetings it had been thought that the provision re the 1000-foot limitation had been adopted in 1986, however it actually could be found in the reestablished Seabrook zoning ordinance adopted in 1974. There is some evidence that this property came before the Planning Board on January 27, 1972, but so far the documentation supporting the decision had not been located.

Janvrin presented chronological statistics based on his research at the Library of the University of New Hampshire, pulling up town reports from 1973 and 1974. In 1973 the Seabrook Police Department expended $244.63 at Seabrook BP, now a Getty South or BP station. It expended $4,266.02 at Gulf Oil which is now XtraMart. It expended $39.18 at Red's Texaco which is now Seabrook One Stop Sunoco. They also expended money at Jean's Atlantic Station, now the Richdale. Janvrin said this means that in 1973 Getty South (now BP), XtraMart (formerly Gulf

Oil), Red's Texaco (now Sunoco) and Jean's Atlantic Station (now Richdale) were in existence. The Seabrook Getty north, most recently BP, now before the Board did have a site plan approval in 1972; the Assessor's office places the year of establishment of the business in 1974. Janvrin said that neighbors remember that the property was a Bank from 1967 to 1969, after which it reverted to the gasoline station use. Janvrin said that in 1974 the police expenditures were: Red's Texaco - $1967.37, Seabrook BP - $1197.90; the police also spent money at Jean's Atlantic and Gulf Oil.

Janvrin said the Zoning Ordinance was voted in by the 1973 Town Meeting. The ordinance being discussed at this meeting was voted as an amendment to the Zoning Ordinances reestablished in 1973 by ballot on March 5, 1974 (Article 21) and carried by 701 "yes" to 578 "no". Hawkins asked if the relevant date for the current proposal was March 5, 1974. Janvrin confirmed this, and said this meant that the gas station was in existence on March 5, 1974 with the ordinance stating that …"gasoline stations, but not including the outdoor storage of inoperable and unregistered automobiles, provided that no new gas station shall be located within a 1,000-foot radius of an existing gas station…" Janvrin reiterated that Seabrook BP, Gulf Oil (XtraMart), Red's Texaco (Sunoco) and Jean's Atlantic Station (Richdale) were in existence on December 31, 1973.

Hawkins asked if there was direct evidence that this station was a gas station. Janvrin referenced a January 27, 1970 plan of land recorded at the Registry. Morgan pointed out that the 1970 plan might have been for a subdivision. Morgan suggested that the applicant and abutters might do some homework and dig up the relevant facts. Hawkins said the Board would have to make a decision as to whether this property would be subject to the 1,000 feet. This would probably be determined by whether it was in existence on March 5, 1974. Janvrin said that he had talked with a long-time resident who explained that the reason for that ordinance being implemented in 1974 was that the Cumberland Farms property, now defunct and part of the Market Basket South complex, wanted to put in a gasoline station in 1973, but it was so close to Jean's Atlantic Station (Richdale) that the townspeople decided they did not want "gasoline alley" on Route 1. That application was denied. Janvrin said that was why the ordinance was implemented in 1974.

Hawkins asked if the Applicant had documentation as to when the gas station was built, or if research had to continue. Uchida thought the best evidence about the establishment of the gas station would come from Pescosolido who owned the property since 1971. Pescosolido said he and his wife owned Latium Management which owned the property since 1971; he did not know the exact month and day of the deeds but had checked his records recently. He did not know the date of construction but said the land could not have been left fallow for too long. He was in Maine at the time and did not participate actively in the construction. Pescosolido recalled that during the oil embargo in 1972 they had great difficulty in getting gasoline for this station and others, but were finally able to get gasoline to their great relief and to the benefit of the townspeople who needed it. Hawkins asked if Pescosolido recalled that the station was operating in 1972. Pescosolido's recollection was they were able to get an allocation of gasoline for that station in 1972, so the station had to have been in business in 1972. Janvrin said that his father, a commercial fisherman, remembered buying gasoline for his boat in 1972.

Wood commented that she remembered the shortage in 1972, and asked how to go about getting documentation. Hawkins said there was a Registry of Deeds ID number. Janvrin said he went to the Assessor's Office and was told that [old] records could be in the Town Hall basement. He thought the 1970 date was sufficient, but there might be evidence on old assessing cards. Wood had listened to 1970 references, and that Pescosolido said that he had

owned the property since 1971. Given that the Board would have to make a big decision for everyone involved, she wanted to see some type of documentation which could be gotten if it were in the Town Hall without a lot of work. Hawkins asked Garand about building permit documentation. Garand said that would have to be research in files downstairs, but he doubted it. Hawkins noted that there had been a fire, but asked if Garand had access to older files. Garand said some files were lost when the town offices were relocated; he thought the file for this property would be complete. Janvrin said the Assessor's Office noted the current building was constructed in 1977 but had preexisted with a different structure.

Garand understood that the gas station was existing and in place and operating. He thought the question was how the Board would interpret the 1,000-foot radius provision, and not whether the station was existing; it was there. Hawkins wanted to hear from the applicants and the audience, and the abutters about anything they felt would be helpful to the Board in making a decision. In February the Board decided that if a gas station was in existence before the ordinance was changed (March 5, 1974) it would be considered conforming and therefore be allowed to continue without going back to the ZBA for review. This 1974 existence factor was important in considering the current proposal because, if it wasn't, the Board's decision might be very different. Garand said the discussion also was whether the infrastructure of the fueling station and the tanks and pumps were there, noting that a gas station was an allowed use in that zone. The 1,000-foot separation was the question. If the station existed prior to the 1,000-foot provision was put on place, it would be an allowed use. If fuel can be put into the tanks, gas can be dispensed through the license. It would not be a change of use; it would be allowed. Garand said those were the factors discussed in February.

Hawkins said that [the discussion purpose of] this meeting was public noticed and that the Board would take input from abutters to help with the decision. Then the Board would either reaffirm its February decision, or change it based on non-existence before March 5, 1974. Garand agreed. Hawkins wanted to hear from abutters or from the Applicant on in re where they think the process is. Garand commented that if the word "new" were not in the ordinance, whether the property would be grandfathered, or non-confirming, would become a big issue for obtaining a loan. He noted it is still an allowed use in Zone 2. Kravitz reminded everyone to be sure to fill out the sign-in log, and to identify themselves for the record when speaking. Hawkins noted that at the last meeting it was agreed that the Applicant would speak first at this meeting before taking comments from others.

Attorney Uchida, representing Tropic Star, noted that the Agenda had identified the two areas of the ordinance to focus on for this meeting. He recognized that the section of the ordinance dealing with gas stations locations was not intended to apply to a gas station site that preexisted 1974. They will ask Pescosolido to look for any further documents or materials going back that many years to help with the search at Town Hall. They are relatively confident that by 1972 the station was operating and therefore pre-dates the 1974 ordinance. Uchida wanted to speak to statements at the last meeting dealing with Section 14 - non-conforming uses, as well as to articulate their position and the status from their ;point of view. At the last meeting the Board received information that the gas station may have ceased operating in October of 2010, and also about the use of "new" in the ordinance. Some Members expressed concern that since one year had passed the gas station use had ceased. Uchida observed that if it is found that this station predates the ordinance that was meant to protect stations that had never changed uses, then his remarks on that subject would be somewhat irrelevant.

Uchida said the Applicant's position was that the use had not ceased or terminated. There are a lot of New Hampshire cases that stand for the proposition that even if a business closes and

ceases operating, it does not mean that the use was terminated, ceased or abandoned. The Pike Construction Asphalt Batch Plant in Madbury closed in 2005. They returned in 2007 and tried to reopen it as a concrete batch plant. A number of abutters referenced a town ordinance that said if the use was ceased for in excess of one year, whatever non-conforming status there might have been would have been lost i.e. they claimed that Pike had lost its non-conforming status. The issue reached the NH Supreme Court which did not feel, based on the record, that the use was discontinued. The Court looked at the fact that considerable money had been spent on repairs and upgrades, and acquiring plant equipment between 2005 and 2007. They had conducted personnel safety training during that period, and maintained the plant as ongoing even thought it wasn't open and producing asphalt at that point in time. They were advertising the plant in terms of its use as an asphalt producing plant, and solicited bids for the plant. Also they were working with the State to assure that their air emission equipment would continue to be in compliance with the plant operations.

Uchida said in the matter of the gas station, although it had closed in October of 2010, it had continued to be maintained as a gas station site. There were numerous activities and work done to ensure that it would continue as a gas station site. Rather than providing information second hand, they had Pescosolido, the owner, come up from Florida to relate all of the things that went on since October of 2010 on the site to continue to preserve that use. Uchida said, therefore, the use had not been abandoned or terminated. He asked for the Board's permission to have Pescosolido speak about what had been happening.

Pescosolido said the site was leased to Getty Petroleum in 1987 for 25 years to expire on February 29, 2012. Mostly they operated the station themselves, which eventually was called Getty Marketing, and which he understood was an independent but affiliated corporation. Getty Marketing went bankrupt in 2010. The responsibility for the lease was with Getty Properties and they continued to meet the responsibility to pay the rent through February 29, 2012. The bankruptcy complications, which he did not describe, made it very difficult if not impossible for Getty Properties to do anything but suffer without income for the station while Getty Marketing was in bankruptcy. Pescosolido said about a year ago he learned that they would not continue the lease beyond February 29, 2012. He then started the procedures to put the station on the market. His objective was for a new operation at the highest and best use. Based on his 20 year experience serving on boards in three states, he thought this would be a modernized retail gasoline station operation. The site was too small for many commercial applications along the highway, but it is large enough for a convenience store – gas station operation such as had been proposed to the Planning Board.

Pescosolido said that "highest and best" meant something that was comfortable in the area, for the people, and meets the Town's objectives. He believed that this operation as proposed would enhance the town revenues, provide additional employment, fit the area and be comfortable in the immediate neighborhood, and be an attraction and improvement rather than have negative qualities. In his view that made it "best" as well as "highest" which as an owner he liked because it would have more value and be best for the town.

Pescosolido said that once Getty Marketing was out of the way they could proceed toward reconstruction. Getty removed the tanks, and left the canopy at his request. They removed the gas tanks because (i) it made installation of new tanks easier as 20 year old tanks would not be used anyway, and (ii) it gave a better chance to determine what, if any, contamination is in the surrounding soils. Pescosolido said they found some (contamination) and the problem had been turned over to the NH Department of Environmental Services which instructed Getty to make a mitigation plan to get it cleaned up. That plan would be due in about the next 30 days. It will also

conform to Mitchell's new plan so that the equipment needed for the mitigation would not interfere with construction or going into operation. They are in the process of seeking approval from the Planning Board, but know that NHDES will make sure that it is properly cleaned up so they can go ahead. They hoped that the Board would see fit to continue their operation.

Hawkins asked if they don't have the NHDES approved clean-up plan, how would they go about building and operating over the top of then mitigation area that might have to be dug up. Pescosolido said that the removal would be done chemically, and would not require digging. He said that NHDES offered him an informal opinion that it would be an insignificant matter and quite easy to clean up. It can and will be done in a way that will not interfere with the new operation or construction. Obviously the construction would have to wait for a little while. The area where the new tanks would be was away from the planned new building and should not be a problem. Janvrin said when the Richdale location changed hands, they pumped out the groundwater, aerated it, and pumped it back into the ground. The MTBE was mitigated; it was a small operation. Pescosolido said that was a type of mitigation that did not require large equipment or involve a large surface area. The NHDES will approve the method and equipment; it will be compatible with continuing operations.

Uchida said Pescosolido and Getty were continuing to upgrade the property despite the fact that the station had ceased operation in October 2010. This was similar to the Pike situation continuing to ready their plant from 2005 to 2007 to reopen their plant as a batch plant. Uchida said that the Court had determined that the use had never been terminated or "ceased". He commented that this would be relevant only if that section of the town ordinance applied if the Board reaffirmed its February 2012 decision. In that event this information would be interesting, but not wholly relevant. Hawkins recalled the lengthy February discussion, stating that the decision was it was not non-conforming because it had pre-dated the ordinance calling for the 1000 feet between stations. If it pre-dated [the ordinance] whether it was closed for a year or not was not relevant, therefore it was not a new station and was not non-conforming.
If it was not non-conforming, then closure for a year was not an issue. Hawkins noted that discussion was had in February 2012 and again a month ago. He thought those two issues were pretty clear, and asked if there were other issues or points of law that might be cited as the Board makes its decision. .

Mitchell said he'd developed 3 gas stations in Seabrook. He was familiar with the NHDES rules; they would be working hand in hand with the NHDES for small this remediation. NHDES would be fully aware of where the tanks were going and make sure that none of the construction would interfere with what needs to be remediated. Hawkins commented that in a personal situation in Connecticut, he was not allowed to put down hot-top for a driveway until mitigation was complete. It leaked while he waited. He wondered if it would be the same type of mitigation.

Pescosolido said that Getty had requested Mitchell's plan for their engineers that are designing the mitigation system so they could locate the proposed equipment well away. He thought that had been accomplished. Douglas Crow a homeowner on New Zealand Road, expressed concern that the property had not been in good repair for about a year. There was debris behind the building, and he was worried about a potential spill. He was a very close homeowner and wondered if NHDES had something for this and was concerned about anything negatively affecting his property value. Crow also had concern about the Mall and different traffic patterns, and asked if that had been considered in re this service station. Hawkins said the last meeting was about traffic around the site and Route 1. The NHDOT had reviewed the plans as had the Board's traffic consultant. With a 400,000 square-foot mall going in there would be a lot of changes. There would be a traffic signal at New Zealand Road right next to the gas station

location. Since 2009 there had been significant review by the State, DDR, and the Planning Board traffic engineer. The traffic mitigation to be required was still being reviewed. With a 1200 square-foot store and the number of positions at the pumps, they did not expect a significant change in the amount of traffic. Spill containment would have to be reviewed. Crow said his basement sump pump goes into the sewer at the right corner of the station toward the new building across from his house. Spill containment was very important in re contaminating adjacent areas; He did not know the route. Janvrin said it came out onto Rocks Road. The applicant said there would be an on-site water quality unit for surface sediment. What is underneath the pavement would be the jurisdiction of the NHDES. Crow did not want the directional flow from his sump pump to be changed as it goes to the lowest point on the street.

Hawkins said in matters like this the department heads reviewed the plan layout and discussed the corner of the property and method of mitigation. The intent is that abutters should not be affected by development of properties, and recognized Crow's right that his property should not be affected. Problems that might occur as a result of changes had to be mitigated, and noted that the Public Works Department was good at noticing if something like that occurs. Crow wanted to know if the temporary hot-top for the property across the street had ever been completed. He worried that enhancements that had been promised sometimes don't get done. Janvrin said the binder was in and town was holding security. If the work was not completed that money could be used by the town to do this do this if not completed by the applicant. Deborah Crow asked when that would be completed. Janvrin said that applicant had not said the work was substantially complete or asked the Planning Board for the return of the security. Further, if an impact affects an abutter a complaint would first go to the CEO and then to the Board. The Board could not take an arbitrary action.

Hawkins asked for other comments. Attorney Aslin, representing Mabardy, discussed the history and presented a different view of the zoning ordinance issues i.e. the notice provisions and the gas station as non-conforming and the use issues under Section 14 of the and Zoning Ordinance. He said that the information now before the Board may differ from that available in February 2012. They believe that the intent putting "new" into ordinance was meant to grandfather existing gas stations. He did not see a distinction between a new gas station as noted as of the date of the adoption of the ordinance in 1974, and a grandfathered use; the concept was the same. If [a gas station was] in existence as of the date of the ordinance adoption, then it was grandfathered and did not have to comply. A gas station starting today would have to comply.

Aslin said he understood the argument that the use was conforming as gas stations were permitted in Zone 2, but once the provision was added in Section 6 the permitted use could not be within 1000 feet of another existing gas station. He noted that other provisions of the ordinance had provisions in re distances in areas within a zone, e.g. telecom facilities in re I-95. They are permitted in the zone but only within a certain area. There are also restrictions for sexually oriented adult businesses within certain distances of other uses. He said these provisions were similar to those in re gas station use not being permitted within 1000 feet of an existing station. While "new" made a difference in the ordinance, he maintained the actual meaning was the same as having a non-conforming use that was preexisting and therefore grandfathered. Aslin said they did not see any reasonable distinction between the two. If it existed before March 5, 1974 it was a pre-existing non-conforming use within 1000 feet of another gas station. It would not conform with the ordinance going forward, but was allowed to continue because of being there before the ordinance was adopted.

Aslin said when setting aside the technicalities, it was a non-conforming use and Section 14 would then apply; he noted there were 2 gas stations within 1000 feet of this station.
He referenced the Applicant's discussion about when a use ceases to operate for purposes of Section 14.2 which says that after one year without operation the grandfathered status is lost and compliance with the ordinance is required. Aslin said this gas station closed in March of 2010, reopened for a couple of days in October of 2010, and maintained that for two years the gas station had been unused; it had been a year and a half since the tanks had been pulled The bankruptcy had been mentioned, but the lease holder did not do anything with the property for a year and a half, although they might have been waiting for the bankruptcy to be resolved. Aslin said they did not make any improvements and did not maintain it, noting that the abutter described it as pretty derelict with trash for more than a year.

Aslin said Uchida's interesting comments about the Pike case indicating that gas did not have to be sold every day to maintain the use. If there is gas in the tanks and operating pumps but no one comes to buy gas for a year the grandfathered status would not be lost. In the Pike situation they were operating as an asphalt facility, maintaining equipment, training personnel , advertising and soliciting asphalt purchases but the economy was not very good. They had plants in other locations that were more efficient for their orders. For two years they did not actually produce asphalt. However, the Court decided that they were ready to go if someone wanted to buy asphalt. Aslin said the Court said that if a store owner wants and operating store they don't just have a building that's empty; there would be lights on and goods on the shelves, and someone to take the money. There is no one operating the gas station kiosk, so no one could buy a pack of cigarettes. There's no gas for sale, pumps are turned off and they do not have permits to use the pumps. That was the case since October of 2010. For over a year there had been no maintenance or use. There may have been some efforts to prepare the site for sale or a future gas station use, but they did not maintain the use under the ordinance to maintain their grandfathered status.

Aslin believed that under Section 14 of the ordinance, because they ceased to operate for over a year, they had lost their pre-existing grandfathered status as a gas station that was within 1000 feet of before 1974. He said the use it or lose it rule applied because they did not use the station for selling gas. In order to reopen, they need to go to the ZBA for a variance because they are within 1000 feet of two existing stations. Aslin said that the purpose of the non-conforming use part of the ordinance is that the ordinance stands for what the town believes is the best use. There's been a provision that [the town] did not want a lot of gas stations clustered together, that's why another provision said that if they stopped using something for over a year they had to make it conforming again as would apply to other businesses in the town. If a restaurant stops operating for over a year in a zone that allows restaurants, it would have to go to the ZBA for a variance to reopen. Aslin said the suggestion had been made that somehow gas stations were different, and had some special status because of the way the ordinance was written. They disagreed and thought that the ordinance could be normally read to mean that a new station simply means after 1974, and not that it was conforming within 1000 feet. It meant that a non-conforming use had been grandfathered until the station use was stopped for more than a year.

Aslin put forth that Section 6 was the same as any other grandfathered use. They think that Section 14 applies and that the gas station had not been in use for over a year and needed a variance. Further they submit that the proposed station by any definition was a new station. It was not a redevelopment of an existing station. It would have new pumps and tanks, and a bigger store. It was not preserving any of the original gas station; it was new and not preserving any part of the Getty north station that had been there for about 20 years. Aslin asked that the

Planning Board reconsider its February 2012 decision with respect to this particular station and proposal, and find that there is a requirement for a variance.

Janvrin looked at Aslin's remarks as being bung up on a grandfathered, non-compliant use. The Planning Board's stance was it was never a non-compliant use, and asked Aslin why that was wrong. Aslin said there could be a non-conforming use that was permitted because it was in existence before the ordinance that made it non-conforming. A house in a commercial district could be non-conforming but allowed to continue. They did not feel that the new language made it a permitted use. Janvrin asked if this meant pre-existing, non-compliant. Aslin agreed it had not been non-compliant until the ordinance was passed; it was a pre-existing non-conforming use. Hawkins said the Board had that discussion in February. However, the Board did put a different weight on "new" by looking back at the intent of what the town was trying to accomplish at the time. The Planning Board at that time did not want Route 1 to become a gasoline alley; i.e. that they did not want to expand the list of gas stations within 1000 feet of another one, but the ones that were there would continue in place. There was no intent to make this gas station non-conforming, because it pre-dated the 1974 ordinance.

Hawkins told Aslin that it is how "new" was looked at. There was not that type of reference in other places, so the intent was that no new gas stations within 1000 feet that did not exist before 1974. The ordinance might have been written in a sloppy way and the ordinance might be interpreted in either of the two ways. But in February 2012, the Board's decided it was not the intent to make all of the gas stations [in that area] non-compliant, so nothing could be done without going back to the ZBA. Hawkins said the Board would address that again in their deliberations. All of the arguments had been heard. The Board would have to decide if it agreed with its decision in February 2012, or if "new" refers to anything that got rebuilt and anything that did not meet the ordinance was non-conforming if it had been closed for a year and would have to go to the ZBA. Hawkins wanted to have in hand a document that said it was in existence before March 5, 1974.

Janvrin thought that it would be flawed if the Board determined the station was non–compliant and, therefore, grandfathered, and the use ceased when the operation ceased. The NHDES still had an active permit file on the underground storage facility which, whether pumping gas or not would still be considered as a gasoline station. He asked if the Applicant had applied to NHDES to reinstall the tanks with the mitigation plan due within 30 days. Uchida reminded that the mitigation work needed to be done by Getty, and not Pescosolido. Getty had 120 days to submit all of the material and had about 30 days to that deadline. The NHDES would sign off on the final work plan. Even if the Planning Board granted approval at this meeting, they could not go onto the site until having a NHDES approval. Janvrin asked what would happen if Getty did not do the mitigation. Uchida said the state had strict; liability provisions and there would be ramifications to Latium as well as Getty. Aslin thought it important to remember that the Planning Board and the Town were not beholden to the NHDES. The town ordinance determined uses not a NHDES file. It would be like a restaurant having grease-traps had some contamination and the NHDES were looking into it. He thought there were distinctions among state permits, and the use under town ordinance.

Wood commented that she lives nearby and goes by the property every day. Her opinion was that there were no pumps, tanks, or electricity, and the building was in disrepair. When the tanks came out she thought it would be some other use, and not another gas station especially with so many stations in the town. She thought that "new" meant that something new would be opening, and noted that a nearby, small dry goods store that had not been open for a year had to go through the whole procedure before the Planning Board and became a new item. The only

changes were different shelving and locks on the door. She thought that when [a business] closed its doors and took out everything including the equipment that would allow it to run as a business, that is when it closed its doors or is gone. Uchida had referenced the Pike case to show that even when doors are closed it did not mean the use ceased. Even if that were the case here, the tanks did not come out until May 2012; they were well within a one year period now. Wood asked when the pumps and electricity were gone. Uchida did not remember about the electricity, but had been referring to the items Wood referenced as coming out of the store or the ground. The tanks came out lonely a few months ago.

Uchida said that when a tenant was in bankruptcy and the rent was continuing to be paid although the doors were closed, the station could not be touched and was considered as in use. Once it was known that the lease would not be renewed, something had to happen to the site. They could not get onto the site and they were maintaining the right to continue that site as a gasoline station by paying the rent. When it became obvious in February 2012 that Getty was not going forward (less than a year ago), Pescosolido decided that something had to be done to get the tanks out of the ground and get some new tanks. Uchida said that was the point at which Tropic Star said it would like to go forward.

Uchida said that Mabardy's attorneys are asking that "new" be ignored i.e. did not exist kin the ordinance. A rule of ordinance interpretation was that every word had a meaning and could not be ignored. There was a reason that "new" was in the ordinance and could not be set aside, and agreed with the Board's interpretation. Even though the doors were shut and the pumps came out in 2011, the tanks came out in 2012 so the year had not passed. Also because the rent was being paid, Getty was reserving it s rights to continue the station going forward, and they were not able to get on to the station to do anything. They believe that under the Pike case, the use had not ceased. Mitchell clarified that the tanks were removed when the pumps were removed. Mitchell added that the Mabardy gas station had been Red's Texaco which was less than 1000 feet from across the street from where the Getty station was then operating. If Mabardy's reasoning was correct, he should not have been able to rebuild his station without going to the ZBA. Janvrin recalled that Red's Texaco had ceased for more than 3 years, and Jean's Atlantic ceased operating for more than a year.

Hawkins thought the issue had been well discussed, but asked if Board members had any other comments. Janvrin asked if there were anyone else that wanted to speak to the issues; there being none Hawkins said the date of the original existence of the station was one outstanding issue. Further, the Planning Board attorney was in support with the Board's February 2012 decision based on the interpretation of a "new" gas station. He asked for Morgan's recommendation as to how to move the questions, and asked if it were appropriate to make a decision without having information in hand about when that station was in existence. Morgan believed that some Board members had said that their comfort level would be greater with all the available information. Janvrin said that the Assessor would be willing to search further. Hawkins said if there was a difference in whether the station was in existence prior to March 5, 1974 the Board's decision could be different. Also, whether the station had been operating or closed down for a year could also become an issue. He agreed that the supporting documents should be in hand.

Janvrin felt that if the gas station was in existence on March 5, 1974 and someone wanted to have a flower shop it would not be non-compliant because the zoning ordinance never applied to that lot. All of the other four gas stations in the area were never non-compliant because they existed prior to March 5, 1974. Whether they closed for six months or for ten years, if there was activity on the site, the use had not ceased but it did not matter because they were compliant.

There could only be grandfathering if they were non-compliant. But gas stations that were existing before March 5, 1974 would always be compliant. Janvrin commented that the Board's attorneys said the Board's interpretation was defensible. He agreed that with something that proves the date it was existing with the gas station use was needed, he would be comfortable saying that the ordinance did not apply to that lot because it was conforming and would always be conforming. It's not grandfathered unless it had ever been non-compliant. If it's been compliant since the date of the ordinance, there was not an issue.

Hawkins asked if Frazee believed a decision should be made at this meeting, or the case should be continued. Frazee had already settled on being opposed to the station itself, but would follow the legal issues first. Hess agreed that the dates should be gotten from prior records. Wood wanted documents in hand to have something to go on either way. Hawkins continued Case #2012-18 to October 16, 2012 at 6:30PM at Seabrook Town Hall. Attorney Michael asked if the public part of the meeting had been closed. Hawkins said it would be open until the information was concluded and the Board knew what had been found. Janvrin explained that everything was welcome to comment at the next meeting.

Hawkins said that a discussion about parking on the site was necessary in re the potential for a variance. The Board's attorneys had been consulted as to whether the Board should be involved in re the 9 parking spaces at the rear of the site and whether they should be shared in any way. The Applicant was allowed a maximum of 5 parking spaces i.e. 4 per 1000 square feet. If the Applicant claimed the use of any of the 9 spaces in the rear, they would be over that limit. He asked Morgan about the options to deal with that matter. Morgan wanted to defer to the Board's attorney's advice; technically it would require a waiver request with a rationale for a claim on any of the 9 spaces in the back. Hawkins asked if Morgan's recommendation was that if the Applicant wanted to continue a claim on the 9 spaces, it would require a waiver for the parking section of the ordinance. Morgan agreed, relying on the advice of counsel. Janvrin said they could relinquish claim to the 9 back spaces to be in compliance with the regulation. Crow commented that in Seabrook they could not park on the street. Janvrin said this was a town ordinance and the police would enforce that. Crow said at this time there was no reason to park there, but there could be in the future.

Hess acknowledged the 5 space limit, and thought a customer would have to run into the store after pumping gas. He asked if they could park in one of the 9 spaces if it were open. Hawkins said for the site plan review, the ordinance said that 1200 square feet was entitled to 5 spaces. Counting any of the nine would be non compliant. That is why if the Applicant wanted to use those spaces he needed deal with the other parties and to submit a waiver. The Board could not force an outcome; it is an issue based on the parking regulation. Janvrin said an alternative would be to relinquish all rights to those spaces.

Hawkins asked if there were other items to discuss. Morgan asked Morrill for a letter explaining the recent revisions. Morrill will provide such a letter; the drive area had been adjusted the refueling notations had been rewritten. Janvrin noted a waiver request. Hawkins preferred to deal with all of the waivers at the same time. He noted that the avenue for challenging the Planning Board's decisions to the ZBA was still open. If that were the case the Board would have to decide how far to go, or to wait for that decision.

Hawkins continued Case #2012-18 to October 16, 2012 at 6:30PM at Seabrook Town Hall.

OTHER BUSINESS

Review of Ordinances
Janvrin reminded that he had deferred certain administrative items to October 16, 2012. Hawkins called attention to the upcoming deadlines for working through zoning changes. He asked that members and Garand to bring their list for any zoning items to the next meeting so they could be prioritized for Morgan to draft the language. The public notices would be for December meetings, prior to which the language had to be agreed. He did not want to carry over into January in case a meeting would be missed because of snow. Hawkins priorities, although not for zoning, were a sharp review of application fees and clarifying the exaction methodology. He was considering bringing in the Board's traffic consultant for the working discussion re the Route 1 corridor. There was a good idea as to how it would work, but the specifics on the Corridor needed to be worked through, and the formula simplified. Janvrin suggested that Lowry see if the ZBA had suggestions for warrant items. Hawkins wanted to have discussions about items that the ZBA felt should be changed. Garand wanted the Board to create a policy allowing him to apply fines for offences. He thought offences must be specified, researched, and authorized by the court. Hawkins said there was not a major zoning ordinance change, so this would be a good time to take care of other items.

Wood wanted to see some bite behind ordinance compliance, for example, signage. Without a fine, there is not much that Garand could do. She wondered if that could be addressed in revamping or creating new ordinances. Garand said his counterpart in Portsmouth said the fineable offense had to be called out in the zoning. Hawkins thought that such items could be defined. It would be for the troublesome items often repeated. Garand said a lot of people comply but some feel the economy is tough and they should have an extra sign. Janvrin noted That the blade signs are out on the weekend when Garand is not on duty. Morgan noted reference to being subject to a civil penalty not to exceed $275. Garand said that had to go to Court to enforce. Janvrin said the authority to issue a fine comes from the Board of Selectmen, but the fine had to be set as an administrative action. Garand said everything should be laid out e.g. two warnings before the fine. This should be applicable consistently to all. Wood said that Garand had to have clout behind his actions. Garand said a notice of violation was one thing, but a cease and desist requires substantial research and paperwork. It costs more money to go into court. Janvrin said that the police department could be agents. Hawkins thought the police were the only agents for compliance.

Seabrook North Village - NHHFA Challenge Grant
Hawkins said that the Master Plan update had been completed, and that effectively the Steering Committee was dissolved. He recommended that a Planning Board subcommittee take on the Seabrook North Village grant work, and ask for volunteers to participate. Most of the work would be done by the consultant working with the subcommittee, which would report to the Planning Board. The Board would decide what to recommend to the Board of Selectmen. Janvrin said he would be glad to deliver invitations to residents and business people who are in that part of town to serve on the subcommittee. He also encouraged Board members to sit in when they have the time. Most of the work is done by consultants but the committee reviews everything and makes the recommendations to the Board which will ultimately decide if they like it. Then it can go to town meeting. The next meeting would be October 11 at 9 am in the Selectmen's Meeting Room.
Janvrin offered to deliver invitations to potential members. He asked if the area had been defined. Hawkins said defining the geographic area was part of the assignment. For example,

the east side of Route 1 was pretty filled, so the question was if this area should be part of the grant area. How to integrate the east and west side is a question. Janvrin noted there were some historic federal buildings in the area. Hawkins thought there might be someone from the Historical Society that would participate. Hess thought Eric Small would be a good participant. Kravitz said that Small had been very helpful during the Smithtown Village work.

Wood said that the Smithtown Village project had worked very well - she had had doubts. By way of example, she liked the upgrade and colors used in the LoanMax auto loan store, stating that he Applicant had been very cooperative. She commented that the Verizon rehab was also very nice. She was willing to get involved. Hawkins noted this was a big change. Kravitz said the North Village subcommittee would meet on October 11, 2012. At 9 AM in Seabrook Town Hall.

Hawkins asked if there were other business; there being none.

Hawkins adjourned the meeting at 9:02 PM.

Respectfully submitted,

Barbara Kravitz, Secretary
Seabrook Planning Board