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Town of Southwest Harbor
BOARD OF APPEALS
Draft Minutes of Meeting
January 5, 2010 @ 6:00 p.m.

Southwest Harbor Fire Station Meeting Room

1. Call to order: The meeting was called to order at 6:01 p.m. Present: James Geary, Chair; Ted Fletcher, Secretary, Lunn Sawyer; excused: Gretchen Strong, Charles Morrill

2. Applications:
 - I. Continuation from December 15, 2009: Applicant: Agent: James E. Patterson, for Ruth S. Brunetti, Mark & Sandra Kryder & Craig & Anne Patterson. Appeal of: The decision(s) of the Southwest Harbor Planning Board to approve the Final Subdivision Plan submittal from the Village at Ocean's End on October 22, 2009.

Mr. Geary opened the meeting and reviewed what had transpired at the last meeting. Mr. Patterson asked if the Board was going to receive the December 28th information presented by Hamilton, and asked whether it would be appropriate to continue the deliberation until there are four or five Board members present. In reference to the December 28th information, Mr. Geary said there is not a formal submission period according to the Ordinance. People who wish to submit materials need to submit with enough time to allow all parties to review. If Mr. Patterson would like the meeting continued in order to review materials, the Board will entertain that.

In reference to continuing this meeting with three members present, Geary said this has not historically been a problem, and if the Board

so wishes they will continue. Fletcher asked, if the meeting was continued would it allow Mr. Patterson to submit additional information. Patterson said no, and his main concern was the three affirmative votes. Fletcher said he does have questions and does not believe he has sufficient time to go through the information presented. Mr. Hamilton said it is not new material and would like to review it tonight. Geary said the information is not as much as it appears, and a lot of it is information already reviewed. Sawyer asked why additional information was needed, and Geary said it was his inclination to continue the hearing and without three affirmative votes, the Board would then continue to a future date to allow Mr. Morrill to be present.

Sawyer said he had no particular questions but would like a quick over view. Geary said the questions posed have produced a large amount of documentation. When the meeting was ended last time there was a great deal of testimony on multi-unit dwelling, but the Board was still discussing road/driveway and that relationship to the right of way. Mr. Hamilton said he understood questions were concerned with the road vs. driveway scenario, and was prepared to address that issue. The water run off issue had been thoroughly reviewed. Mr. Hamilton asked to show three slides which addressed the road/driveway. Permission was given. He referenced tab 3 of the new document, asserting that the landscaped boulevard was contained within the lot, and was, therefore, by definition, a driveway. Referencing tab 6, a, it shows that in May 1986 Howard Crafts extended the courtesy of allowing WWC to use a portion of his property as a right of way, which is 234' west of Route 102. This is not a new issue for Southwest Harbor. He said the Planning Board had voted 6 – 1 that this was a driveway. The same as the Western Way Condominium project was determined to have a driveway. Mr. Patterson said there is no question that Route 102 provides access to both lots, but it is their position that there is no reason a lot cannot have two rights of way. Hamilton said the area in question was already deducted from lot coverage at the request of the Planning Board, as they felt there was an argument that the right of way needed to be deducted. He asserted that the ROW does not convert a driveway into a road. Hamilton referred to the LUO Section II which required removing the right of way from the land area calculation. Hamilton said the ROW is the equivalent of an encroachment.

Fletcher said there are limitations to what Crafts provided to WWC, and it provides access to the back part of the Western Way Lot. He has not found any place in the Planning Board records where this particular part of the roadway was discussed. Hamilton said that the May 19 letter, page two to Worcester discussed this point. The principal access to WWC is from Robinson's Lane and not Route 102. Sawyer said the road does not provide access, WWC has the access, and the road is incidental, as VOE happened to run the road through the right of way, and the ROW existed before the road/driveway. Sandy Johnson asked to speak as an interested party. Hamilton said Johnson is not an interested party in the proceeding and is a former Planning Board member. Johnson said the issue of road/driveway was discussed at length, and it was cited as one of the findings of fact to deny the application, specifically that the vehicular way becomes a road because the row which enables WWC to access the rest of their property, lays over the driveway. The road which the easement is now part of, provides access to another lot. Demeo said at the May 19 and May 21 meetings, the vote was 4 – 3 that the access way was a road. Hamilton said Demeo and Johnson make the point for Fletcher that this issue was discussed at length by the Planning Board. He corrected the fact that the vote of 4-3 was taken in June and not May, and that vote was rescinded. Lee Worcester, current Chair of the Planning Board said the Planning Board deliberations after the June vote, and after the vote to rescind, determined that VOE does not have the right to access Western Way, and Western Way does not have the right to access VOE in any way, and the Board considered those to be distinct driveways that overlapped in one section. Patterson said the deed does give WWC the right to access VOE. Hamilton said in the large black book, pages 82, 84 under tab 8, minutes of the meeting of 8/20/2009 provides information that the Planning Board thoroughly discussed the issue of road/driveway. He said there is competent record to support the decision. Hamilton said there is no clear error the Planning Board made. He asked for the opportunity to adjourn this meeting to wait for Member Morrill to be present. Fletcher said the August meeting notes do not necessarily address the issue of WWC to access it's lot with a vehicle. Hamilton asked the Board to look at page 23 of 23 in the Findings of Fact, saying the materials submitted, a letter to chairman Lee Worcester; tab 5, page three of the blue notebook, arguments were presented, that the Planning Board had the information and considered that. Patterson said the appeal is

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that the Planning Board got it wrong, and that the access way is a road.

Recess at 7:25, reconvene at 7:31 p.m.

Mr. Geary asked Mr. Fletcher his opinion, which had not changed. Hamilton said if there are areas where the Board can reach findings: multi-unit, or storm water, he would ask them to do so, and the Board proceeding, when member Morrill comes back, could focus on road/driveway issue only. Patterson said if the Board is going to wait on a 4th member, it would be wise not to make findings on other issues, but to allow Mr. Morrill to take part in those votes. Hamilton said in the interest of his client, he would like to see some progress. He said access and vehicular way were discussed before the Planning Board, and those definitions were not discussed at the meeting tonight. Patterson said that if the Board is reconvening to hear evidence with Mr. Morrill present, those arguments should be heard then. Geary questioned Fletcher's contention that the Planning Board did not discuss road vs. driveway in relation to the right of way. Mr. Geary said the meeting will be continued until Mr. Morrill can be present. Hamilton said that the record should reflect that the sole discussion tonight was road v driveway. This appeal will be continued. It was Moved Geary and Seconded Fletcher to continue this appeal hearing to January 19, 2010, at 6:00 p.m. at the Southwest Harbor Town Office. Vote in favor: 3 – 0.

- II. Request for Reconsideration: Applicant: Agent, Lynne Williams, for Mark Kryder & Craig Patterson. Denial of Administrative Appeal of: The decision made by the Southwest Harbor Planning Board on July 16, 2009 to rescind the decision made by the Southwest Harbor Planning Board to deny the Subdivision Permit application of the Village at Ocean's End on June 18, 2009.

Williams presented to the Board asking for reconsideration. A previous appeal was submitted, and the submitters then are not the applicant in this appeal; she referenced the Finding of Fact from the previous meeting that indicated the appeal was untimely and might set a bad precedent. Williams argued that her clients appealed within the time limit and therefore no precedent was set. The third issue is

Roberts Rules stating that a motion to rescind is a final action. It is Williams' argument that this is not a final action, but one vote in a long fluid stream of votes culminating in the final vote in October. The motion to rescind opened up the administrative process to continue to receive information and proceed with the application for three more months. It created the opportunity for the applicant to continue. In summary, this elevates a procedural rule over and above a whole series of cases which have come before the Supreme Court, which says a decision in a land use case is not a final action.

Hamilton replied: the Findings of Fact do not indicate that the application of the prior appeal does not appear in the findings. There is no question that the former Board Members, if they had had standing, would have been making a timely appeal. Point two: finding this to be timely would expand the possibility of other untimely applications having to be heard; Robert's Rules should not be regarded, contended Williams. Hamilton said there are 3 issues raised: the final action on the June 2009 decision of the Planning Board when the Board in July voted to rescind. What was left to decide? The 2nd possibility: VOE wanted the PB to take all the information available. Hamilton pointed out that the scope of this appeal was narrowly drawn, solely focused on whether as a procedural matter the Planning Board did something improper. There is no other appeal before this Board other than that of the vote to rescind. Roberts Rules of order is very clear on this point. This is a jurisdictional appeal. There is no conflict. This appeal does not raise any question that the Board of Appeals has to address.

Williams said what is before the Board at this time, is whether or not the Board will grant the request for reconsideration. Fletcher asked whether the attorneys found that the Finding of Fact issued from the original hearing were adequate, and both Attorneys agreed the Findings of Fact were adequate. Hamilton said there is a great difference between the motion to reconsider and a motion to rescind. He said there was proper notice and there was majority of attendance by the Planning Board. Geary asked if the Board would make a motion to reconsider. No member made a motion. The Board did not reconsider the application.

3. Adjournment The Board adjourned at 8:30 p.m.