

**Town of Cumberland
Board of Adjustment and Appeals
Minutes of Meeting
Thursday, January 14, 2010**

I. Call to Order:

The meeting was called to order at 7:00 p.m.

II. Roll Call:

Present: R. Scott Wyman, Chair, Adrian Kendall, Vice Chair, Matt Manahan, Mike Martin, David Joyce, Andrew Black, Ron Copp

Absent:

Staff: Bill Longley, Code Enforcement Officer, Pam Bosarge, Board Clerk

Mr. Wyman introduced the Board and our new alternate member Christian Lewis who was seated in the audience.

Mr. Wyman welcomed the applicants and gave an overview of the rules of procedures for the meeting. Mr. Wyman stated there would be an opportunity for public testimony.

III. Hearings and Presentations:

1. Interpretation Appeal: Susan and Spence Bisbing of 2 Spruce Lane, appeal the decision of the Code Enforcement Officer regarding the compliance of an existing home occupation at 21 Foreside Road, Tax Assessor Map U01, Lot 26 in the Low Density Residential district.

Mr. Longley stated this is a continuation of an appeal from the October 2009 meeting. Mr. Longley recapped his letter that was sent; this appeal centers around an existing home occupation approved by this Board many years ago and their continuation of that. The Bisbing's the neighbors are of the opinion the business is in violation of their approvals and he hasn't found that to be the case. He is taking no action based on what evidence has been presented to him; and Mr. Longley's letter is in the file and available for referral.

Mr. Wyman stated at the last deliberation of this application in October 2009 there was a question of jurisdiction which the Board will discuss first. The Board gave the following disclosures prior to beginning deliberations.

Mr. Kendall stated as was mentioned at the last hearing he disclosed his law firm was adverse in a case with the Bisbing's. He was not involved in the process, and at the last meeting the Bisbing's felt comfortable with Mr. Kendall participating; he further disclosed he was affiliated with a law firm in which Mr. Hirshon was a partner. He doesn't feel there is any issue with his ability to be impartial.

Mr. Wyman asked Mr. Hirshon if he was employed with the firm Drummond Woodsum.

Mr. Hirshon stated that was his brother.

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The Board concluded there were no conflicts with Mr. Kendall hearing the appeal.

Mr. Wyman stated the first issue for the Board is to determine if the Board feels they have jurisdiction to hear the case. It seems to be very apparent from the Board's last discussions that in the event they continue the Board's decision would be only advisory. The Town's Attorney Ken Cole is present and has been asked to address the issue.

Mr. Ken Cole, Esq. Jensen Baird, Town Attorney stated he understands this item was tabled back in October because of the question raised by Mr. Manahan. Ironically he was the attorney for the town of Waterboro in 2000 and 2001 when a particular case went to the Supreme Court *Herrle vs. Waterboro*. That case came down to a decision on whether the Court would recognize enforcement bodies, in that particular instance the Selectmen had prosecutorial discretion in making a determination on whether or not to go forward; much like a District Attorney cannot be compelled to take an action against someone. The question is whether the Code Officer can be compelled. In that particular case the Court found he could not. From the Court's prospective it would be allowing private litigants to expend public funds on private matters. That basically once the Code Officer had made a determination the question was whether or not they as the representative of the public thought it was appropriate to expend those public dollars. The Town's particular Ordinance does not provide for a specific appeal from a decision made by the Code Officer of whether or not to enforce. The fact that he decides to enforce might be appealed potentially because that applicant could argue that the Ordinance is being misinterpreted. But a determination not to enforce is not referenced in any way in the Town's Ordinance. Given these particular backgrounds it was his opinion, and he did write an opinion back in October 2009 specifically on it that he doesn't have the right to make a decision jurisdictionally. He added a caveat as he did in that opinion the various case law says that the Board could potentially act but it would be advisory only. In other words, it would not be enforceable by the applicant in this case the Bisbing's who brought the appeal. The decision would simply be the Board's advice to the Code Officer that you thought this was a problem; however, you could not compel him nor could the Bisbing's to do anything. The question presented by that, is whether the Board thought it was useful to get into testimony and therefore useful to render an advisory opinion. It is not required; there is nothing in the Ordinance that requires it. In his opinion there is nothing in Maine Law that generally requires it. The Board can simply make a determination that they have no jurisdiction and based on that you don't want to proceed further.

Mr. Wyman stated we will continue with Mr. Hirshon's (the Bisbing's attorney) presenting why they think we the Board has jurisdiction or based on opinion contrary to what Mr. Cole has informed the Board. The Board will also give the opposing side an opportunity to speak; the representatives will speak to only jurisdictional issues.

Mr. David Hirshon, Esq., representing the Bisbing's stated there are two relevant provisions of the Ordinance regarding this jurisdictional issue; Section 603.2.1 and 607.1 and 607.2. Section 603.2.1 couldn't be any clearer; which states "upon appeal from a decision of the Code Enforcement Officer the Board shall determine whether the decisions of the Code Enforcement Officer are in conformity with the provisions of this Ordinance". We have a decision from the Code Enforcement Officer which is clear; that decision is manifested by a letter dated several months ago. The Board in connection with the appeal "shall" it doesn't have any discretion; the language doesn't say it "might" or "may" or "might consider under an advisory decision". We have a decision and the Board has to hear this appeal, there is no discretion. If you review the CEO's letter of August 25, 2009 which generated the appeal; the Code Enforcement Officer

succinctly states that *“he found no violations or noncompliance with the Board of Appeals approval dated 8-10-2000. This existing use appears to be consistent with the approval and meets all the “Special Exception” criteria. I have attached a copy of the “Special Exception” criteria for your review this section is found in the Zoning Ordinance Section 603.2.3 and 603.2.7.”*

The problem with the letter among other things is it ignores what the Board did back in 2000. When the special exception was granted the special exception stated among other things that “the business is to run in accordance with the business plan presented”. The Board placed this special requirement on the applicant in addition to the special exception standards listed in Sections 603.2.1 and 603.2.7 of the Ordinance. In other words in 2000 the Board granted the special exception with the stipulation that the Brouder’s comply with the business plan submitted. The business plan was not drafted by the Board; it was a plan drafted by the Brouder’s; and that plan which Brouder’s devised said among other things “we will preserve and improve the exterior appearance of our studio and while not invisible we will make our in-home studio as inconspicuous as possible to neighboring properties.” Mr. Hirshon focused on the later two points as those are not components of the special exception standards. The special exception standards in Sections 603.2 and 603.2.7 do not reference anything about preserving and improving the exterior of a home site or making the home occupation as inconspicuous as possible. These were two additional conditions the Brouder’s agreed to have super imposed on their special exception approval. Yet, the Code Enforcement Officer doesn’t even reference those they were ignored; it is as if they didn’t exist. The Code Enforcement Officer focused on the criteria listed in Sections 603.2 and 603.2.7 and didn’t reference the two additional requirements. In any event, regarding the issue of jurisdiction, he disagrees with the opinion of the Town’s Council that there is no enforcement provision. The enforcement provision clearly could not be set forth more accurately than stated in Section 607.1 which states *“it shall be the duty of the Code Enforcement Officer to warn any person, firm etc. of any violations of this Ordinance.”* There is no “may”, or “might”, or do it if you feel like it, it says “shall” and that is a very important distinction; because if you look at the Herrle case the provision of the Waterboro Ordinance states three times it “may protect”, “may order” which is not what your Ordinance states, it is not “may” but “shall”. The holding in the Herrle case is simply that the decision of the zoning board was advisory and therefore you could not take an adb appeal to the Superior Court for an advisory decision. In other words the law court said this should never have been appealed to the Superior Court because the decision that was issued based upon the ordinance in place was an advisory decision. You can’t appeal an advisory decision to Superior Court; and that is not the issue before the Board this evening. The issue is whether or not you are required to hear this appeal and your ordinance says yes, it says you “shall determine”. The Bisbing’s are asking for the opportunity consistent with your ordinance to proceed and present evidence. Mr. Hirshon stated he feels the Board does not have any alternative but to hear the appeal.

Mr. Manahan asked Mr. Hirshon if he was saying if the Ordinance says the Code Enforcement Officer (CEO) “shall” take enforcement action if he determines there is a violation; and the Town has no discretion whether to take enforcement action notwithstanding fiscal issues or staffing issues. Are you saying the Town has to take enforcement action?

Mr. Hirshon stated that is correct.

Mr. Manahan continued asking if that was consistent with law court precedent.

Mr. Hirshon stated there is nothing in any law court cases he was aware of that allows you to say we don’t have a lot of money so we are going to ignore our prosecutorial duties. He being the

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Code Enforcement Officer will get direction from the Board if you have a hearing, which he will have to enforce.

Mr. Manahan stated the CEO has determined there is no violation; are you suggesting the Board can reverse the CEO's decision under Section 603.2.1 interpretation appeal and then he shall take enforcement action under 607.1 because he was wrong.

Mr. Hirshon stated that is correct.

Mr. Manahan stated the Herrle and the Pepperman cases as referenced in Mr. Cole's letter states quite clearly that enforcement is discretionary; and black letter law states you can't force a Town to take enforcement action. It is completely inconsistent with all law court precedent. Section 602.3.1 "says upon appeal from a decision of the Code Enforcement Officer" doesn't that mean a decision of the Code Enforcement Officer that is within his prevue in terms of essentially whether it is something we would have authority over. Don't you have to interpret that provision in light of law court precedent in Herrle?

Mr. Hirshon stated he was not sure he understood the second part of the question; the Herrle decision involves an appeal to Superior Court of an advisory decision rendered by the Zoning Board of Appeals in Waterboro. The law court says it is not appropriate for an adb appeal, which is an advisory decision.

Mr. Manahan stated in that case the Board of Appeals rendered a decision of no enforcement action and the court said that the Zoning Board's decision to reverse a non-enforcement action is purely advisory.

Mr. Hirshon stated because of the Waterboro Ordinance which is different than Cumberland's. If you look at the Herrle decision the Waterboro Ordinance states "may".

Mr. Manahan asked Mr. Hirshon if he had a copy of the Waterboro Ordinance.

Mr. Hirshon stated no, he is quoting from the decision footnote # 4.

Mr. Manahan reviewed the Herrle decision. Foot note # 3 says Section 2.05 of the Waterboro zoning ordinance provides in part on finding a violation of any statutorily regulation or condition the Code Enforcement Officer "*shall*". Footnote # 4 says the Board may protect the public interest and may order restoration of conditions. The question is whether enforcement is mandatory, notwithstanding the "*shall*" the Court in Herrle case said the CEO cannot be forced to enforce the ordinance.

Mr. Manahan stated selectman may undertake enforcement action which does not seem relevant to what the Board may do.

Mr. Richard Olsen, Council for the Brouder's stated he is not going to get very deeply into whether you have jurisdiction or not. You have an opinion from Ken Cole, Town Counsel and have several attorneys on the Board; you are well equipped to make this determination. The Brouder's are prepared to go forward at the pleasure of the Board.

Mr. Wyman asked Mr. Cole if he had any further comments.

Mr. Ken Cole, Town Attorney stated it comes down to the Board making the interpretation if the Board wants to make an advisory decision it could. The Herrle case is somewhat different it is a

case decision by the selectman not to enforce and oddly enough the selectman's decision was opposed to the zoning board, and the Court said this is advisory only. In this instance it is the Code Enforcement Officer going to the Board and he believes in every other way the broad stroke of the Supreme Court decision which is we don't want these cases. This is something the municipality gets to decide it's their money to spend or not spend, it is not private money, and therefore municipalities should have the discretion to decide whether or not to expend those dollars.

Mr. Martin asked if it was his understanding that the basis of the decision was the actual language of the town that there was no constitutional challenge or statutory challenge it was simply the ordinances of the town.

Mr. Cole stated in part the ordinances of the town and there was a broader public policy argument of prosecutorial discretion. That was the argument that the town made, that it would be much more inappropriate that a decision of the elected officials would be subject to the zoning board, why do we have elected officials. So, in that instance there was a clearer line, but the argument was prosecutorial discretion and as Mr. Manahan mentioned in the Pepperman case which is the other one cited in our opinion it was very much analogous to a Code Officer on whether to enforce or not and whether a zoning board could overturn that decision.

Mr. Manahan asked if he knew the language in Pepperman.

Mr. Cole stated no, he did not have it in front of him.

Mr. Manahan stated he was looking at the discussion of Pepperman in paragraph nine and it talks about the sort of the philosophy of the Zoning Board's role being advisory in nature. Then in regards to Pepperman it cites holding that the Zoning Board's role in an appeal of the CEO's violation determination was advisory in nature and not subject to judicial review when the Ordinance only authorizes the Zoning Board to recommend that the CEO consider his / her violation determination. So it sounds like the language was different, as Mr. Hirshon stated, it continues with although the zoning board's determination and interpretation appeal under 13.2 (Waterboro) is "final" as opposed to merely a "recommendation" as in Pepperman and the CEO has a duty under the Waterboro zoning ordinance to issue an order when a violation is found to exist the Board of selectmen has discretion. It seems to be drawing a distinction based on ordinance language.

Mr. Cole wouldn't argue that but again, you have the same type of duty involving the ordinance here and the same sort of discretion basically has to be there in regards to the broader public policy argument or every time any CEO in a municipality determines there is not a violation the abutters or any other party could bring an appeal. If that appeal to you was indeed enforceable and not advisory it would then be appealable to Superior Court. So, basically every time there was a neighborhood dispute the Code Officer's determination even if he found no violation, no matter what the basis of the no violation was would still be appealable to the Board and any other municipality as this Board is by statute in every municipality and therefore appealable to Superior Court. If you think about that it makes absolutely no sense, and not surprisingly the Supreme Court didn't think so either.

Mr. Wyman closed the public testimony portion of the meeting, stating the question to the Board is do we have jurisdiction and do we want to proceed forward.

Mr. Black asked if the first issue was jurisdictional.

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Mr. Kendall stated we have two issues; the question of interpretation which Mr. Hirshon raised under Section 603.2.1 which is: do we have a decision of the Code Enforcement Officer i.e. a decision not to act; and then is there a right to bring to us that decision for review for conformity. The other question is the question of enforcement of ultimately the privy of prosecutorial discretion and is that something we can review. He sees two phases before the Board, if there is prosecutorial discretion in any case and stops with our CEO does that make any sort of advisory decision a meaningless exercise; or should we engage in it because 603.2.1 allows that right of review before the Board. Is there a right for us to hear it and at least pronounce whether on an advisory basis we should make a decision of whether the CEO made the right decision based on the facts?

Mr. Black agreed we have the first issue of whether the individual has a right or the Board has an obligation to hear that sort of appeal.

Mr. Black would make a motion that the Board does not have an obligation to hear this appeal. The next question becomes do we desire to and if so; does that have any effect on the Code Enforcement ability on prosecutorial discretion.

Mr. Manahan stated to be clear; Mr. Hirshon is arguing that we not only have jurisdiction but we have an obligation and that whatever decision we make is binding on the Code Enforcement Officer. He wondered if we should break it down; do we have jurisdiction and the issue of whether it is advisory.

Mr. Black stated the term jurisdiction seems to imply it is more than advisory; and we could have an obligation to give an advisory opinion, I don't know.

Mr. Kendall stated that would be the first phase.

Mr. Black stated based on the opinion of Attorney Ken Cole, based on law court decisions we don't have an obligation to hear the case.

Mr. Martin stated we can decide if we can or have to hear the appeal and thought the fact of whether it is advisory or not is a decision of law.

Mr. Manahan stated he doesn't want to get into the business of giving advisory decisions; it makes no sense for the Board to tell Bill Longley what we think he should do. The Ordinance either says we can reverse him or stay out of it.

Mr. Martin stated he thought there was a solid argument from the ordinance language that the Board might have an obligation to issue an advisory opinion. He understands the Herrle case, and Attorney Hirshon's argument is interesting; he doesn't have a clear answer.

Mr. Black asked what Mr. Martin thought was the first issue.

Mr. Martin stated one issue the Board can decide is whether we have to or can issue a decision and decide on the merits and let it stand on whether it is advisory or directive. There doesn't seem to be language in the ordinance that makes it a directive.

Mr. Manahan stated here is the problem 603.2.1 says upon a decision from the Code Enforcement Officer. The Code Enforcement Officer has to warn people if there is a violation; but the decision

of enforcement is a decision of the Council. Section 607.2 says “enforcement actions” (keep in mind this is a non-enforcement action). It says the CEO might give notice of a violation; it is not a decision that is reviewable under 603.2.1 because 607.2 states it is an enforcement action is the duty of the Town Council. The Code Officer is just an initial step in the process. The Code Enforcement Officer in his sole discretion can issue enforcement in all things that are vested in the Code Enforcement Officer such as building permits, setback violations and permitted uses etc. Those are all things that are vested in the Code Enforcement Officer in his sole discretion; the Council doesn’t decide is he right or not, we are clearly the ones who review the decision of a variance, or permitted uses, etc. Section 607 is written to allow the Council to review those decisions. Enforcement provisions under Section 607.2 are clearly vested in the Council; and he doesn’t think the word decision in 603.2.1 means a non-enforcement decision. It is referring to a decision that is vested in the CEO. This decision is vested in the Council it is not his decision.

Section 607.1: It shall be the duty of the Code Enforcement Officer to warn any person, firm, or corporation of violations of this ordinance by them. The Code Enforcement Officer shall notify in writing the party responsible for such violation, indicting the nature of the violation, ordering the action necessary to correct it, and informing the party of their right to seek a variance or other relief from the Board of Adjustment and Appeals.

Section 607.2: When the above action does not result in the correction or abatement of the violation, the Town Council, upon notice from the Code Enforcement Officer, shall institute or cause to be instituted in the name of the Town, any and all actions legal and equitable, that shall be appropriate or necessary for the enforcement of the provisions of this Ordinance.

Mr. Martin stated he doesn’t disagree but it doesn’t address non-enforcement.

Mr. Manahan stated no matter what the Board does it is the Council’s decision on whether to take enforcement action. The CEO makes an initial decision on enforcement which gets referred to the Council; they are the ones that make the decision. All the other matters that come before us in 603.2.1 come to this Board, which is the appellate body.

Mr. Martin asked why non-enforcement isn’t the same thing.

Mr. Black stated the Herrle case is saying the basic principals of prosecutorial discretion apply to the Code Enforcement Officer. Bill in theory allows thousands of decisions of non-enforcement every day and if you allow those non-enforcement decisions to become appealable it will bog down the process.

Mr. Manahan is trying to explain why the “shall” in 603.2.1 although on its face appears to say we have to do it.

Mr. Black says something that is not enforced doesn’t have the same effect if he lets something go or chooses not to enforce similar to a criminal prosecutor who every day decides not to enforce; that decision is not appealable to us. The remedy is to go to the Town Manager or Town Council.

Mr. Kendall clarified whether it was a referral to act or a decision not to act in either case there wouldn’t be a right of appeal to this Board.

Mr. Manahan stated it is the Town Council that makes enforcement decisions.

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Mr. Kendall asked Mr. Manahan if the Code Officer had found a violation of the terms and conditions that there wouldn't be right of appeal to us either because he refers that to the Town Council to act.

Mr. Manahan said yes.

Mr. Kendall asked if a failure to act is the same as an act for our purposes and I see your analysis that distinction doesn't have to be grappled with because in either of those situations would it be his decision.

Mr. Manahan said some ordinances allow the CEO to take enforcement action on his own, and in that case you might have a distinction between enforcement and non-enforcement; because it would be his final decision. However, in our ordinance enforcement has to go to the Town Council. Our ordinance states enforcement is vested with the Town Council and not the CEO which is consistent with the law court decision.

Mr. Kendall stated there is not definition of "decision" and the word decision does not appear in Section 607; but he is leaning towards the common definition which is some action based on some finding. The CEO's letter of August 25, 2009 states they have the right of appeal at the Board of Adjustment and Appeals.

The Board discussed whether the appeal should have been taken to the Town Council for enforcement action.

Mr. Martin asked Mr. Manahan if he was saying on an appeal where there is no appeal or redress to the judiciary branch other than talking with your legislator.

Mr. Manahan agreed.

Mr. Kendall asked if the motion should be was there a decision.

Mr. Joyce agreed you have to reach that question initially because 607.1 has no role whatsoever for the Board unless the CEO does take action, then the party has the right to seek a variance from this Board. Section 607.2 enforcement action makes no reference to the role of this Board. The Board only gets to the word "shall" in 603.2.1 if in fact it is a decision; he agreed that is a threshold question they have to decide at the outset.

Mr. Kendall moved that the term decision as used in Section 603.2.1 includes a non-enforcement decision by the Code Enforcement Officer.

Mr. Martin seconded.

VOTE: 2 in favor (Martin, Kendall)
5 opposed (Manahan, Black, Wyman,
Copp, Joyce)

Discussion:

Mr. Martin stated the CEO's action is clearly a decision unless there is some statutory interpretation that defines it otherwise or a law court case.

Mr. Black disagreed stating we are not suppose to read these in a hyper technical manner, he takes the Herrle case to say it is prosecutorial discretion and the focus on decision of to enforce or

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not enforce. You would like to also look at the intent of the Town Council, and every time the CEO decides to not enforce it could be appealed to the Board.

Mr. Kendall stated if they are talking public policy to his mind there is a very valid element that we could glean from the words that as citizens and taxpayers there should be a process for a right or redress, and for property owners in this Town that there is an error in a use. We may find that we can hear this and it is advisory in nature, he understands the argument for a slippery slope for the flood gate of appeals, but in reality we don't meet that often.

Mr. Manahan understood the right of redress but the questioned whether the Board of Appeals was the proper forum. It seems in any of these issues regarding enforcement, the Town Council is the forum. Section 607 is clear that the forum is the Town Council.

Mr. Kendall asked if the decision was a violation would that go straight to the Town Council.

Mr. Manahan stated if the Code Officer tells someone that they don't meet the ordinance it would be an interpretation appeal.

Mr. Joyce asked if they were acting under section 607 and the enforcement action; which appears to clearly state the procedure. We are trying to read decision to give the Board an avenue to get involved in this type of decision when in fact section 607 is quite clear. He agrees with Mr. Manahan this is a matter for the CEO and Town Council. We are looking at a term and when you look at the ordinance as a whole and Section 607 he is uncomfortable expanding the definition in 603.2.1 to cover what is expressly not provided in Section 607.

Mr. Kendall stated he finds value in an advisory decision in that it provides redress for citizens and opportunity to be heard.

Mr. Manahan disagreed with Mr. Kendall because the Board is not in the business of issuing advisory decisions, if we agree with the appellants we would be telling the Code Enforcement Officer we expected him to follow our decision.

Mr. Kendall stated at that time it would be between the Code Enforcement Officer and the Town Council.

Mr. Black agreed with Mr. Manahan and Mr. Joyce if we are under the Section of 607 for enforcement we clearly do not have jurisdiction. In terms of an advisory opinion I don't think that is what the Town Council intended for the Board to do, which could be very costly. He thinks there would be more appeals that would cost the Town money; it doesn't cost an applicant anything to come before the Board.

Mr. Longley, CEO stated there is a \$100.00 application fee.

VOTE ON THE MOTION:

VOTE: 2 in favor (Martin, Kendall)
5 opposed (Manahan, Black, Wyman,
Copp, Joyce)

Mr. Manahan moved to dismiss the appeal.

Mr. Black seconded.

VOTE: 5 in favor (Manahan, Black, Wyman,
Copp, Joyce)
2 opposed (Martin, Kendall)

2. Special Exception: Time Warner Cable of Maine requests a Special Exception for construction of a 20' x 20' addition to an existing 400 sq. ft. concrete block building for use as a local distribution hub at 197 Blanchard Road, (Cumberland Fairgrounds); Tax Assessor Map R07, Lot 8, in the Rural Residential 2 (RR2) Fairground Overlay districts, J. T. Hayman, Electrical Contractors, Representative.

Mr. Longley presented background information as follows: Time Warner Cable currently has a concrete building located at the fairgrounds, and Mr. Hayman is representing Time Warner with the request of adding a 20' x 20' addition to the existing structure. If Mr. Hayman is granted a special exception he will proceed to the Planning Board for site plan review.

Mr. Hayman stated he is representing Time Warner Cable who would like to add a 20' x 20' addition doubling the size of the existing building.

Mr. Wyman asked if the fence was already up.

Mr. Hayman stated yes, it will be moved.

Mr. Wyman asked if the design of the addition will be similar to the existing structure.

Mr. Hayman stated yes, identical.

Mr. Wyman asked the reason for the addition.

Mr. Hayman stated for more communication equipment, his company just finished building one in Windham and Sebago, as back up for Portland.

Mr. Wyman asked for testimony from the public in support of the application. There was none. He asked for testimony that was opposed. There was none. He asked for testimony that was neither for nor against but on a neutral basis. There was none. The public portion of the meeting was closed.

Mr. Black asked why the request was a special exception.

Mr. Longley stated the use requires a special exception approval, and his interpretation was that an addition would exceed the current intensity of use. Public Utilities will be reviewed for Site Plan.

Mr. Copp asked the size of the fence.

Mr. Hayman stated 50' x 150' it will be moved towards the rear parallel with the pole line.

Mr. Black asked if there would be additional impact to the property.

Mr. Hayman stated no, there would be no increase in noise, no smoke, and no traffic increase.

Mr. Black asked how often the building was accessed.

Mr. Hayman stated as often as once a day or more depending on equipment.

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The Board then reviewed the Special Exception standards, Section 603.2.3 with the following findings:

.1 The proposed use will not create hazards to vehicular or pedestrian traffic on the roads and sidewalks serving the proposed use as determined by the size and condition of such roads and sidewalks, lighting, drainage, intensity of use by both pedestrians and vehicles and the visibility afforded to pedestrians and the operators of motor vehicles;

The Board found this requirement to be satisfied.

.2 The proposed use will not cause water pollution, sedimentation, erosion, contaminate any water supply nor reduce the capacity of the land to hold water so that a dangerous, aesthetically unpleasant, or unhealthy condition may result;

The Board found this requirement to be satisfied.

.3 The proposed use will not create unhealthful conditions because of smoke, dust, or other airborne contaminants;

The Board found this requirement to be satisfied.

.4 The proposed use will be compatible with the uses that are adjacent to and neighboring the proposed location, as measured in terms of its physical size, intensity of use, visual impact, and proximity to other structures and the scale and bulk of any new structures for the proposed use shall be compatible with structures existing or permitted to be constructed on neighboring properties;

The Board found this requirement to be satisfied.

.5 The proposed use will not create nuisances to neighboring properties because of odors, fumes, glare, hours of operation, noise, vibration or fire hazard or restrict access of light and air to neighboring properties;

The Board found this requirement to be satisfied.

.6 The proposed location for the use has no peculiar physical characteristics due to its size, shape, topography, or soils which will create or aggravate adverse environmental impacts on surrounding properties;

The Board found this requirement to be satisfied.

.7 The proposed use has no unusual characteristics atypical of the generic use which proposed use will depreciate the economic value of surrounding properties;

The Board found this requirement to be satisfied.

.8 If located in a shoreland zone, the proposed use (i) will not result in damage to spawning grounds, fish, aquatic life, bird and other wildlife habitat; (ii) will conserve shoreland vegetation; (iii) will conserve visual points of access to waters as viewed from public facilities; (iv) will conserve actual points of access to waters; (v) will conserve natural beauty and (vi) will avoid problems associated with flood plain development and use. [Amended, effective 12/2/86]

The Board determined the property is not in a shoreland zone.

In addition, Section 603.2.7 was reviewed with the following findings.

In addition to the standards contained in Section 603.2.3, all special exceptions must conform with the performance standards set forth herein. No use already established on the date of adoption of this ordinance shall be so altered or modified as to conflict with or, if already in conflict with, to further conflict with these performance standards.

.1 The volume of sound, measured by a sound level meter and frequency weighting network (manufactured according the standards prescribed by the American Standards Association), inherently and recurrently generated shall not exceed a maximum of 60 decibels at lot boundaries, excepting air raid sirens and similar warning devices;

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The Board found this requirement to be satisfied.

.2 Vibration inherently and recurrently generated shall not exceed a peak particle velocity of .01 inches per second at lot boundaries;

The Board found this requirement to be satisfied.

.3 No materials or wastes shall be deposited on any lot in such form or manner that they may be transferred beyond the lot boundaries by regularly recurring natural causes or forces, and all materials which cause fumes or dust, constitute a fire hazard, or are edible or otherwise attractive to rodents or insects if stored out-of-doors shall be in closed containers;

The Board found this requirement to be satisfied.

.4 The emission of noxious, odorous matter across lot boundaries in such quantities as to be offensive to persons of ordinary sensibilities is prohibited; and

The Board found this requirement to be satisfied.

.5 No discharge into any private sewage disposal system, or stream or into the ground of any materials in such nature or at such temperature as to contaminate any water supply or otherwise cause the emission of dangerous or unhealthful elements is permitted, and no accumulation of solid waste conducive to the breeding of rodents or insects shall be allowed. [Amended, effective 12/2/86]

The Board found this requirement to be satisfied.

Mr. Kendall moved based on testimony to approve the request of Time Warner Cable for a special exception to construct a 20' x 20' addition to an existing 400 sq. ft. building at 197 Blanchard Road, (Cumberland Fairgrounds), Tax Assessor Map R07, Lot 8 in the Rural Residential 2 (RR2) and Fairground Overlay districts.

Mr. Joyce seconded.

VOTE: Unanimous

IV. Administrative Matters:

Mr. Longley stated that Mr. Martin and Mr. Wyman had been reappointed to the Board; and that Mr. Christian Lewis is the Board's new alternate member.

V. Adjournment:

Mr. Kendall moved to adjourn.

Mr. Martin seconded.

VOTE: Unanimous

The meeting was adjourned at 8:20 p.m.

A TRUE COPY ATTEST:

R. Scott Wyman, Board Chair

Pam Bosarge, Board Clerk