6 Church Street, Gardiner, Maine 04345

CITY OF GARDINER
BOARD OF APPEALS

EMERGENCY MEETING MINUTES
August 15, 2002

Roll Call: Peter Johnson – Chair - present
Frank Hillman – Vice Chair - present
William Ebert - absent
Deborah Felder - present
Patricia McLaughlin – present

Also present: Jeffrey Hinderliter – Code Enforcement Officer
William Ferdinand

Lynn M. Gerard, Harold Gerard, Carolyn Propst
Teresa Henderson, Charles Nelson Stratton, Alice Brown
Gloria Rogers, Arthur Crocker, William Rogers
Stanley Brown, Judith A. Skehan, John B. Skehan
Heather Hutchins-Beckwith, Lorna Veilleux
Joyce Perry, Keith Edwards, Deb M. Dorion
Louise Burns, Jaye Trimm, Jen Kinnelly
John Goudreau, Erik Stumpfel, City Solicitor
Jim Cohen, counsel to Lynn Gerard
Brian Rines, Mayor

1.) Chair Johnson called the meeting to order at 6:35 p.m. followed by the Pledge of Allegiance.

2.) Roll call taken.

3.) Chair Peter Johnson read the Request for a Reconsideration letter dated August 08, 2002. The request for reconsideration refers to the Gardiner Board of Appeals July 17, 2002 decision to overturn the Gardiner Planning Board's April 10, 2002 decision to deny the Apostolic Faith Ministry a Conditional Use Permit.

Chair Johnson went over the procedure that they would follow for this meeting. He indicated that Attorney Cohen, representing Lynn Gerard would be allowed to make a presentation. Following that, the representatives from Apostolic Faith Ministry would have an opportunity to comment and then he would close discussion.

The Board would then first vote on reconsideration. If the Board goes for reconsideration, at that point they would open the hearing up. He also apologized for the short notice for the meeting, but he was not aware of the letter until 8:00 PM the Friday before this meeting.

6:40 PM Jim Cohen, representing Lynn Gerard, was given an opportunity to make a presentation. He said that they appreciate the Board of Appeals and the City hearing their request for reconsideration. His client, Lynn Gerard and many of her neighbors were disappointed to learn about the end result of the Appeals Board decision back in July. The reason for the request for reconsideration is because of the concern that they have that the standard the Board of Appeals followed when they made their vote back in July was not the correct standard and had the Board applied the correct standard, he believes it would have reached a contrary result.

Mr. Cohen indicated that it was a 5 – 0 Planning Board decision. The Planning Board carefully reviewed all the facts and they heard testimony. Under the terms of the Gardiner City Zoning Ordinance, that is what the Planning Board is tasked to do. They made a site visit and their job was to consider the facts and that's what they did. In considering the facts, based on three standards, they made a determination that the proposed use was incompatible with this particular residential street, a residential street that has just houses on it. His client, Ms. Gerard, lives at the end of that street and owns the driveway through which the Applicant has proposed their use. There is a cemetery at the end of that street. The cemetery crosses Ms. Gerard's land and only occasionally are they allowed to cross. The Board of Appeal's, in it's draft decision that Mr. Hinderliter was kind enough to provide him of, made reference to a nursing home that is nearby. That nursing home is accessed along Route 201 and again, not this residential street. So, within the purview of the Planning Board, they looked at the facts. They made a decision based on the facts under the Ordinance. They decided that on this particular residential street in this neighborhood, that this use was incompatible.

Mr. Cohen said that he had finally had a chance to read through the transcript of the July Planning Board meeting. The City provided the tape, he had it transcribed and he had reviewed it. In the course of that review, one thing that he noted as part of the decision was that the Board of Appeals applied an incorrect standard. The standard is, that the decision of the Planning Board must be clearly contrary to the Ordinance. If the Board of Appeals finds that the Planning Board's decision was clearly contrary, it's appropriate to reverse. If it finds it just didn't like what the Planning Board decided, that on the same set of facts, the Board of Appeals might have decided differently, that's not a basis to reverse the decision of the Planning Board. In reviewing the transcript, the advice that the Board of Appeals received was whether or not the decision of the Planning Board was arbitrary and capricious. That is not the standard by which the Planning Board decision is to be reviewed. As he reviewed the transcript, it was very evident that the discussion revolved around whether or not the particular amounts of cars that would be on the street was or was not incompatible with the residential neighborhood. That's not the basis for a decision. There was discussion about whether or not there would be adequate noise. Again, the factual decision is the purview of the Planning Board, not the Board of Appeals. The reason that they have asked for reconsideration is, that absent the Board of Appeal's agreement and willingness to reconsider the decision and hopefully to revisit and change the result of July 17, 2002, his client and the neighbors are left no option other than to proceed to Superior Court. He said that he thinks that that is not in anybody's interest that that happen and they think that if the Board of Appeals has an opportunity to review the same set of facts and the Planning Board's decision based upon the correct standard, their hope is that as a result of that review, the correct result, which is an approval of the Planning Board decision will be reached. There are many people here and in the event that the Board of Appeals is willing to entertain a reconsideration and to hear from the people who were not heard from at that meeting, that that would be very helpful but he thinks that a lot of the points that he wanted to make are spelled out in his

letter (August 8, 2002 letter to Peter Johnson, Chair of the Board of Appeals) and he won't repeat them here today.

He referred to the points spelled out in the August 8, 2002 letter and went over each point.

Peter Johnson asked Attorney Cohen if he had reviewed the entire tape. Mr. Cohen said he was able to review in a skimming fashion based on the . .. Chair Johnson interrupted Mr. Cohen and asked him if he heard any comments by the Board of Appeal's attorney as a re-clarification because the standard had been changed? Mr. Cohen asked if that was at the very end of the tape? Chair Johnson said it was at the very end and then the Board of Appeal's attorney redirected the Board members that it was improper, because what you are stating is was never said and it was redirected towards them in that manner. So the decision was not made on arbitrary and capricious, but was on the new standard. Mr. Cohen thanked Chair Johnson for clarifying that. Mr. Cohen said he only got to see the tape, due to the time frame, very late in the game. He referred the Board back to the points in his letter, which is, under the standard of "clearly contrary" to the ordinance. He continued, for example – one of the elements that the Board of Appeals decided is that there is a nursing home and there is a cemetery and that those are clearly non-residential uses, therefore a decision to deny a use that was also non-residential couldn't be had because there was already non-residential uses in the area. He said the problem is this, the City of Gardiner decided, when it adopted its Zoning Code, that this particular zone and a use that relates to Worship and Places of Worship, that that use is conditional. It's conditional because the City of Gardiner wanted the Planning Board to have an opportunity to review the facts. If the City wanted, in all cases, this type of non-residential use to go forward, it could have made that decision in the Zoning Code. It did not. It left it up to the Planning Board to review the facts and determine if this particular non-residential use was appropriate. Had any type of use of this nature been allowable, they would not have drafted it that way. The decision of the City was that non-residential uses are not automatically allowed simply because there are others and it is within the purview of the Planning Board to make the decision that this particular non-residential use is not allowed. So, under the standard of "clearly contrary", as long as the Planning Board appropriately considers the facts, they didn't act clearly contrary to the Ordinance - the same with the dust standard and the noise standard and the traffic standard. In the view of the Planning Board, 8 cars, 20 cars, whatever it was, was factually appropriate to deny the permit and it's not the purview of the Board of Appeals to decide, oh we don't think 8 cars is appropriate. That decision is a factual one that should be left to the Planning Board. That, again, is the basis for the request for reconsideration.

Chair Johnson thanked Mr. Cohen for his comments. He then asked if the Appellant has any comments that they wish to make.

Appellant Teresa Henderson said that they have an objection to this meeting because they only received notice yesterday and they only had 24 hours and this was not sufficient time for them to prepare and she wasn't able to get her lawyer here in 24 hours and they are just not ready for this type of a meeting to prepare.

Chair Johnson apologized to everyone and said because by the time he was able to arrange this and in 2 days get all of these people together was very tough and also to meet the guidelines of the 30 days. He asked if everyone was aware of the 30-day notification period.

Chair Johnson asked if there were any other comments.

Heather Hutchins-Beckwith representing Apostolic Faith Ministry, referred to one of the points Attorney Cohen made reference access to the property through Gary Street. She said that that had been decided at a previous Planning Board meeting that it was a title dispute. It was said by the City's lawyer that it was a scribers error in the titles and it had to be taken before a title lawyer and it is was something that couldn't be used as a basis for denial. And he did quote within his notes different things and why that couldn't be used as criteria for denial. The second issue is, in talking about areas, it doesn't just automatically mean you can place things in this area, that's true, but again, this is a place of worship and it is allowed in six of nine areas, one of those areas being Moderate Density and this is a Moderate Density neighborhood.

Chair Johnson said if there is no further comments he will close the public discussion. He polled the Board to see if they were all in favor.

6:46 PM public meeting closed.

Chair Johnson asked Attorney Erik Stumpfel if he had any comments.

Attorney Stumpfel addressed a couple of issues for the record. First, with respect to a Request for Reconsideration, under Title 30-A, Section 2691, as the Board of Appeals, you do have the authority to reconsider any decision that you make within 30 days of the original vote that you take on that decision. That period will expire on Saturday. Second, the statute does not provide any specific guidelines as to why you would or would not reconsider your past decision. There is no standard that would be reviewed by the court in your vote whether to reconsider or not. If you do vote to reconsider, you are subject to the same standard of review that you used during the original proceedings. That doesn't change. On the simple issue of whether to reconsider or not, it is within your discretion. He said that he could make suggestions as to why you might want to or might not want to reconsider, but he will not attempt to do that in specific terms. But just in general if the Board of Appeals feels there are some defects in the prior process or you have some belief that your prior decision might have been incorrect, than that would be the basis that you might want to reconsider. If you don't have that same confidence or that same feeling then just as a suggestion it might be appropriate not to reconsider. Beyond that he would defer any further discussion. If the Board does vote to reconsider, again it is not a new evidentiary hearing, it will be up to the folks here to merely present argument as to why the decision you made back on July 17, 2002 is correct or not correct.

Chair Johnson asked the Board members if they understood the Board's roll. He said that the fact is they are, in a sense, as the Board of Appeals, they are the sole interpreter of the Zoning Ordinances. Attorney Stumpfel said that he wouldn't go so far as to say the sole interpreter – the statutes, in Title 30-A, Section 4353 specifically applicable to zoning ordinance appeals does provide that the Board of Appeals has the authority to interpret ordinance that fall into question. Attorney Stumpfel said that probably the discussion here tonight between these parties would be – is what you did when you took your vote on this original appeal. Did you re-determine the facts or were you interpreting the Ordinance.

Chair Johnson asked the Board if there were any questions or any issues for clarification or comments. He said that one thing the Board members want to note is, they made their decision based on 3 points, which they requested the Planning Board to re-clarify in the Findings of Fact. In revisiting it, e & f were unanimously voted down and g was a 3 to 2 vote. He asked, at this point did anybody wish to entertain a vote, then proceed on.

Deborah Felder made a motion to not reconsider. Frank Hillman seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.

Attorney Erik Stumpfel said that there is one more item of business. He said there is a draft decision that has circulated and he understands that several Board of Appeals members have already signed it. It might be useful for you to state on the record – take a vote on the record – as to whether the draft decision that circulated is in fact your written decision. Chair Johnson asked the Planner/CEO, Jeffrey Hinderliter if everybody had signed that draft. Jeffrey said yes. Attorney Stumpfel said if there are any changes to be made to that, this would be the appropriate time to take those up. He said that at this time, since the Board has vote to not reconsider, the question is whether the draft decision that has circulated accurately reflects the Board of Appeals members' action on July 17, 2002.

Chair Johnson gave Board members a chance to review the draft decision. He asked the Board members if it reflected their discussion, vote and rational.

Patricia McLaughlin made a motion to accept the draft. Deborah Felder seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.

3. Adjourn

Deborah Felder made a motion to adjourn. Patricia McLaughlin seconded the motion.
Vote: 4 in favor. 0 opposed. Motion passed.

6:56 PM meeting adjourned.