

**LINCOLN ZONING BOARD OF ADJUSTMENT  
REGULAR MEETING MINUTES  
TUESDAY – NOVEMBER 30, 2016 – 6:00PM  
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

**APPROVED**

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**Present:** Chairman Jonathan Ham, Paul J. Beaudin II, Board of Selectman Representative Jayne Ludwig, and Alternate Jack Daly.

**Members Excused:** Vice Chair Don Landry, Jim Martin, Alternate Ray D’Amante,

**Members Absent:**

**Staff Present:** Town Manager/Planner Burbank, Fire Chief Ron Beard, Planning and Zoning Administrator Carole Bont, and Wendy Tanner (Recording Secretary)

**Town Attorney:** Attorney Peter J. Malia (representing Town Manager/Planner Burbank and Planning and Zoning Administrator Bont in their administrative decision)

**Staff Excused:**

**Guests:**

- **Shawn Bergeron, Owner/Manager/Code Consultant/Home Inspector, of Bergeron Technical Services**, 50 Seavey Street, PO Box 241, North Conway, NH 03860-0241, representing Herbert Lahout Shopping Center, Inc. (Herbert Lahout, Principal) located on 165 Main Street (Map 118, Lot 076)
- **Tamra Ham, Selectman**, and resident of 92 US Route 3, Lincoln, NH 03251
- **Gregory J. Moran, President** (since 2004) & Chief Executive Officer (CEO) of Aubuchon Realty Company, Inc., 95 Aubuchon Drive, Westminister, MA 01473-1470, d/b/a Aubuchon Hardware Store, 165 Main Street, Lincoln, NH.
- **William (Bill) Parnell, Attorney** representing Aubuchon Realty Company, Inc., d/b/a Aubuchon Hardware Store, Lincoln, NH 03251 (Principal: President & CEO Gregory Moran)

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**CALL TO ORDER** by the Chairman of Zoning Board of Adjustment; announcement of excused absences, if any, and seating of alternates(s), if necessary.

The meeting was called to order at 6:00 PM.

*Jack Daly was seated.*

**II. CONSIDERATION** of meeting minutes from:

- November 22, 2016

**Motion to approve the minutes of November 22, 2016 as amended.**

**Motion:** Jack Daly      **Second:** Paul Beaudin      **All in favor:** 3-0

*Jayne Ludwig abstained from the vote.*

**III. NEW BUSINESS**

**IV. CONTINUING AND OTHER BUSINESS** (Staff and Planning Board Member/Alternates).**A. 6:00 PM.** Lincoln Zoning Board of Adjustment (ZBA) **Administrative Appeal** per RSA 676:5,ii(b)

- 1. Case #:** **2016 ZBA AA 2016-02**
- 2. Location:** Lahout's Square  
165 Main Street (Tax Map 118, Lot 076)  
Village Center (VC) District
- 3. Petitioner/Applicant/  
Property Owner:** Herbert Lahout d/b/a Herbert Lahout Shopping Center, Inc.  
26 Union Street  
Littleton, NH 03561
- 4. Petitioner's Agent:** Shawn Bergeron  
Shawn Bergeron Technical Services, LLC  
50 Seavey Street, PO Box 241  
North Conway, NH 03860-0241

Petitioner is appealing a decision of the Planning and Zoning Administrator made on March 1, 2016, (then reiterated in a letter from the Town Attorney Peter Malia to the Town Planner dated August 17, 2016, and forwarded to the petitioner) to the ZBA. Petitioner requests ZBA grant an administrative appeal was scheduled to be presented to the ZBA on **Wednesday, October 19, 2016 at 6:00 PM** in the Conference Room of the Lincoln Town Hall on 148 Main Street, Lincoln, NH 03251. Petitioner requested and was granted a continuance until **WEDNESDAY, November 30, 2016**.

The petition was filed in connection with a request by Aubuchon Hardware Store, a tenant of Herbert Lahout Shopping Center Inc., to put in a propane refilling station behind Aubuchon Hardware Store located in the "Lahout's Square" shopping center located at 165 Main Street (Tax Map 118, Lot 076).

Petitioner proposes putting in a propane filling station where is currently is none in a shopping center where there are retail shops and restaurants. The Administrator stated that the Petitioner would need Site Plan Approval for a "change or expansion of use" as defined in Article IV, Paragraph A, subparagraph (d) of the Site Plan Review Regulations. Furthermore, the Administrator stated that the Petitioner would need a Special Exception from the ZBA to put a "Gasoline/Fuel Oil Sale & Storage" in the Village Center (VC) District as required under Article VI, Section B., Paragraph 2, Land Use Schedule, and Business Uses.

Petitioner argues that the Administrator has "mistakenly determined that a propane filling station (PFS) is within the gasoline/fuel oil sale and storage land use category when in fact the PFS is consumer service and retail sale of a product" and therefore no Site Plan Review is required and a PFS is allowed as a matter of right within the Village Center (VC) District.

**ACTION:** Upon a finding by the ZBA that the application meets the submission requirements, the ZBA may vote to accept the application for an Administrative Appeal as administratively complete.

**ACTION:** The ZBA may conduct a public hearing, or schedule a public hearing at some future date established during this meeting.

**ACTION:** The Zoning Board will vote to approve, approve with conditions or disapprove the application. Should a decision not be reached at the public hearing, this application will stay on the ZBA agenda until such time as it is either approved or disapproved.

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*(For the purposes of these minutes, the term “Petitioner” and the term “Applicant” have been used interchangeably.)*

Chair Jon Ham told fellow ZBA members that the ZBA should first discuss if the Petitioner’s appeal was filed in a timely manner. Beaudin said that initially, it did not appear that the Applicant had filed the administrative appeal in a timely manner.

[The Petitioner was Shawn Bergeron of Bergeron Technical Services representing Herbert Lahout the principal for Herbert Lahout Shopping Center, Inc.]

Beaudin continued, however, if the appeal was filed in a timely manner, the ZBA’s Rules of Procedure would allow the ZBA to grant an extension of the deadline for “good cause” shown. If the Applicant would like to have the administrative appeal heard, not only would the Applicant need to tell the ZBA why the ZBA should extend the deadline beyond the normal thirty (30) day period for an appeal, but the Applicant also would need to show the ZBA what the Applicant’s “good cause” would be for not meeting the deadline.

Attorney Parnell stated that for the record his client is Aubuchon.

[Aubuchon Hardware Store is a tenant of the Herbert Lahout Shopping Center, Inc. Aubuchon Hardware Stores are owned by Aubuchon Realty Company, Inc. from Westminister, MA]

*During the hearing, both Aubuchon Attorney Parnell and Shawn Bergeron of Bergeron Technical Services, Inc., who represents Herbert Lahout Shopping Center, Inc., sat at the applicant’s/petitioner’s table together.*

Aubuchon’s Attorney Parnell (who is not the Petitioner’s attorney) said that he was prepared to address both the issue of whether the Applicant is in compliance with the thirty (30) day deadline, and also, tangentially, where the “good cause exception” would come into play.

Aubuchon Attorney Parnell gave copies of correspondence to the ZBA. Aubuchon Attorney Parnell said he would go through the correspondence and chronology that led to his client’s (not the Applicant’s) request to proceed tonight.

1. **March 1, 2016, e-mail from Bont to Bergeron.** An email from Planning & Zoning Administrator Bont to Shawn Bergeron dated March 1, 2016. The email was in response to inquiries that were made by Bergeron (on behalf of Lahout).

**(Aubuchon Attorney Parnell’s Argument:** Aubuchon Attorney Parnell pointed out the language that starts at about the third paragraph stating “In looking at your plans and at the property we have the following comments”. Aubuchon Attorney Parnell said that the language that was chosen does not say “we have made the following administrative decision”. Aubuchon Attorney Parnell said that the appeal period would have been triggered if there had been an administrative

decision. Aubuchon Attorney Parnell said he did not believe that a document existed that says that “an administrative decision has been made”.)

2. **March 8, 2016, e-mail from Bergeron to Bont.** Aubuchon Attorney Parnell said that the e-mail document Bont generated resulted in a reply from Herb Lahout’s representative Shawn Bergeron to Bont and Town Manager Burbank dated March 8, 2016.

**(Aubuchon Attorney Parnell’s Argument:** Aubuchon Attorney Parnell said that the language in the email indicates that Bergeron was responding to Bont’s earlier e-mail and that Bergeron was “continuing a dialogue”. Aubuchon Attorney Parnell stated the ZBA should consider whether this document – the original correspondence from Ms. Bont – should be reviewed as a “final determination”. Aubuchon Attorney Parnell said “What you have in front of you is the March 8<sup>th</sup> correspondence which is a request for reconsideration.” Moving forward, if this e-mail from Bergeron is, in fact, viewed as a request for reconsideration, and it is because what Bergeron does in his correspondence is to say, “to point a, point b, point c, and he responds to all of that”. Bergeron responds to points that Bont made and to some of the points that Chief Beard made. As of March 8<sup>th</sup> either you have:

- a. An ongoing discussion by email or correspondence, between two individuals who were working on an ongoing project as “active”; or
- b. What may be an “administrative decision” but you also have a “request to reconsider”.

Aubuchon Attorney Parnell said that under the rules that operate if the Town receives a “request to reconsider”, the decision date then becomes the date at which the reconsideration was adopted. Aubuchon Attorney Parnell said “As we go through this process there is nothing that is generated either by Bont or by the Town that indicates that this is the position of the Town until we get to August 29, 2016”. Aubuchon Attorney Parnell said, “And for the record, the appeal or the document that triggered this meeting was filed on September 21, 2016.”

3. **March 30, 2016, Letter from Fire Chief Ron Beard to Shawn Bergeron, Bergeron Technical Services.**

4. **April 2016, Correspondence from Aubuchon’s Attorney Parnell to Fire Chief Ron Beard.** **(WE DO NOT HAVE A COPY OF THIS APRIL CORRESPONDENCE)**

Aubuchon Attorney Parnell said he continued with the next piece of correspondence in the packet which was correspondence from Aubuchon Attorney Parnell’s office.

Aubuchon Attorney Parnell said he was brought into this matter in April 2016.

**(Aubuchon Attorney Parnell’s Argument:** Aubuchon Attorney Parnell said when he looked at everything that was in front of him, he saw an ongoing conversation; he did not see a final decision.)

5. **July 28, 2016, Correspondence from Aubuchon’s Attorney Parnell to Fire Chief Ron Beard.** On July 28, 2016 Aubuchon’s Attorney Parnell said he “generated correspondence” to Fire Chief Beard addressing, point by point, the issues that Fire Chief Beard raised [in Beard’s March 30, 2016, letter], including in that correspondence

a response from Mr. Bergeron that dealt specifically with each point that had been made in the Fire Chief's original determination that he did not like the idea of the tanks being installed there.

**(Aubuchon Attorney Parnell's Argument:** At that point in time the only documents that had been generated were an email that said "these are my comments" and some follow-up communications addressing those comments. The correspondence of July 28, 2016 requested a response by the 19<sup>th</sup> of August which was a little less than a month from when Aubuchon Attorney Parnell generated his letter.)

6. **August 17, 2016, Copy of Letter from Town Attorney Peter Malia to Town Manager/Planner Butch Burbank.** Aubuchon Attorney Parnell said what he got next was a copy of a letter dated Wednesday August 17<sup>th</sup> from Town Attorney Malia addressed to Town Manager/Planner Butch Burbank regarding Aubuchon Hardware, asking Aubuchon Attorney Parnell to "please confirm receipt".

**(Aubuchon Attorney Parnell's Argument:** Aubuchon Attorney Parnell said the letter was not addressed to his client, but to Town Attorney Malia's client. The contents of the letter indicated what Attorney Malia's thoughts were and Attorney Malia made some recommendations about issues that could be discussed, hashed out, and ultimately decided by the Planning Board if it got to that point. Aubuchon Attorney Parnell said he looked at this letter and thought, "I've got an attorney client letter and I don't know if I should have it".

7. **August 26, 2017, E-mail from Aubuchon Attorney Parnell to Town Attorney Peter Malia:** Aubuchon Attorney Parnell said he contacted the Town and also "got a letter off" to Town Attorney Malia, basically saying "what am I to make of this?" Aubuchon Attorney Parnell said he first sent an email to Attorney Malia stating, "I have not received anything from the town formally responding to my letter of July 27, 2016. Please advise whether yours of August 17, 2016 was intended as the town's formal response."

8. **August 29, 2016, E-mail from Town Manager/Planner Burbank to Aubuchon Attorney Parnell:** Aubuchon Attorney Parnell said then he received an email from Town Manager Butch Burbank in which he says, "Attorney Malia's letter of August 17, 2016 is the official response to Aubuchon Hardware's request to install a propane filling station".

**(Aubuchon Attorney Parnell's Argument:** Aubuchon Attorney Parnell said "That is the first definitive statement from the Town that says, 'That is our final determination'." Aubuchon Attorney Parnell said that it was clear to him that if the ZBA goes through all the correspondence that has been generated from "this", it is clear to him that an objective reading of that indicates that there was still a discussion going on and no final determination that has been made. Aubuchon Attorney Parnell said that there is no way that his client would be on notice that he had to do anything. When the email was received from the Town Manager saying, that "that is the decision", we filed within 30 days. Analyzing from that prospective the appeal was, in fact, timely because it was filed within the thirty (30) days as required by the ZBA's Rules of Procedure.

Aubuchon Attorney Parnell said the other way to look at this situation is to look at the “good cause” question. At the best there is confusion here. The Aubuchon side did not view the situation as if they had received a final determination, so the Town’s response did not trigger a response from Aubuchon. The Town may have intended this to be a final response, however, the language used was not consistent with the language that would put somebody on notice that a “final determination” had been made. The “good cause” exception, if the ZBA chooses to apply that, is that one side of this case is working with one set of definitions and the other side is working with a different set of definitions and there is no fault here. That is about as classic a definition of “good cause” that anybody could come up with. That is Aubuchon’s position with regard to the issue and timeliness of the appeal.

Bergeron, acting on behalf of the Applicant who is Aubuchon’s landlord, Herbert Lahout Shopping Center, LLC, said that in the email response that he had dated March 1, 2016, from Bont, the top of that email is marked with the word “draft”. Bergeron said that “In and of itself the word ‘draft’ leaves a level of importance that this is not a final response.” If anything, the word “draft” on the top of the e-mail “led to a continuation of dialogue for a matter of months”. Bergeron said that “realistically, it was not until August when we received a an email from Town Manager/Planner Burbank on August 29, 2017, that stated Mr. Malia’s letter dated August 17, 2016, was in fact the final decision of the Town of Lincoln, that is when we said, ‘Okay, now we need to proceed.’”

Ryan said to Town Attorney Malia, “In the [Fire] Chief’s letter dated March 30, 2016, the Chief says that he has made a decision.” Ryan asked if that Fire Chief’s decision had any weight as far as being an officer of the Town versus coming directly from Planning and Zoning Administrator Bont.

Town Attorney Malia said that question requires the ZBA to look at the definition of an “administrative decision”. What is an administrative decision? The ZBA Rules of Procedure say that an appeal of an administrative decision has to be filed within thirty (30) days of the decision having been made. If it is not filed within thirty (30) days, the ZBA has the right to waive that thirty (30) day filing deadline for “good cause”. So the decisions the ZBA Board will need to make are:

1. When was the administrative decision made? That phrase “administrative decision” is defined in the statutes RSA 676:5 II b.

*A "decision of the administrative officer" includes any decision involving construction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.*

2. If you agree that the thirty (30) day time limit has been exceeded;
3. If the thirty (30) day time limit has been exceeded, whether or not the Board feels that “good cause” exists to exceed that thirty (30) day time limit.

Town Attorney Malia said that in the first sentence when they say “ordinance”, they are talking about a zoning ordinance which is adopted pursuant to RSA 674:16. In Lincoln that zoning ordinance is called the “Land Use Plan Ordinance” (LUPO) because the first paragraph of the

Land Use Plan Ordinance references RSA 674:16. An “administrative decision” is a decision that involves the interpretation of something in the Land Use Plan Ordinance.

Daly asked Town Attorney Malia if the Fire Chief could make an “administrative decision”.

Town Attorney Malia said first the ZBA would have to determine if the Fire Chief was an “administrative official”.

Aubuchon Attorney Parnell said that RSA 676:5: II a. defines what an “administrative officer” is.

*The "administrative officer" means any official or board who, in that municipality, has responsibility for issuing permits or certificates under the ordinance, or for enforcing the ordinance, and may include a building inspector, board of selectmen, or other official or board with such responsibility.*

Aubuchon Attorney Parnell said that he suggests to the ZBA that the definition of “administrative officer” does not include the Fire Chief within its definition.

Town Attorney Malia said that assertion was arguable. The definition of “administrative officer” is right before the definition of “administrative decision”.

Aubuchon Attorney Parnell read the definition of an administrative officer. Aubuchon Attorney Parnell asked, “Is the Fire Chief an official?” Yes. He asked, “Does the Fire Chief have the responsibility of issuing Permits or Certificates under the Land Use Plan Ordinance?”

Town Manager/Planner Burbank said that Chief Beard enforces the State Building Code which is referenced in the Land Use Plan Ordinance. The Fire Chief also is the enforcer of the State Fire Code.

Town Attorney Malia asked Fire Chief Beard if he issues any permits or certificates under the Land Use Plan Ordinance. Fire Chief Beard said that he does not [issue Land Use Permits].

Town Attorney Malia asked Fire Chief Beard if he issues any permits or certificates for enforcing the Land Use Plan Ordinance. Fire Chief Beard said that he does.

Aubuchon Attorney Parnell asked, “In what fashion?” What specific portions of the Land Use Plan Ordinance as opposed to the State Fire Codes do you enforce?

Fire Chief Beard said that he enforces the Land Use Plan Ordinance for rock retaining walls. Town Manager/Planner Burbank confirmed that the Fire Chief is the inspector for rock retaining walls.

Aubuchon Attorney Parnell said that, “Just so we are clear on the record here, the decision that is being appealed from here is the decision of [Planning and Zoning Administrator] Carole Bont. I hope we don’t get sidetracked into a determination of [whether] the Fire Chief [is an administrative official] because that is not the individual that generated the letter of March 1, 2016. I don’t have a copy of the letter that the Chief generated on March 30, 2016 with me, and that really doesn’t speak to the questions of what Bont addressed which was the change of use question and a structure question, which question resulted in Shawn pivoting the Propane Filling Station (PFS) so that it did not impose or create any problems with encroachment.”

Beaudin said to Town Attorney Malia that when he attended seminars and trainings for the ZBA he learned that “generally the time for an appeal of an administrator who offers a decision begins to run when the appealing party knows or should have known about the decision.” Beaudin

asked, if the question was really a matter of when they actually knew or when they should have known that a decision had been made? Beaudin said when he looked at Bont's March 1, 2016, email letter, the email letter "should have sent up all the red flags in the world saying that there is a problem". Beaudin said that he does not know how hard and fast that line is when it comes to an appeal of an administrative decision.

Town Attorney Malia said that the ZBA has to decide when Aubuchon should have known that an administrative decision pertaining to an interpretation of the Land Use Plan Ordinance had been made. From that day forward that is when the thirty (30) day clock started ticking.

Town Attorney Malia gave an analogy of when he was recently up in Bartlett at one of these hearings and there was an "administrative decision". In Bartlett the ZBA had the same argument or discussion. A decision was issued back in 2015. After that, the lawyers went back and forth for about a year exchanging information and making and responding to RSA 91-A Right to Know requests. The ZBA said, "We are going to go back to that 2015 decision because we think that the clock starting ticking back then. You should have known right then and there that you had a problem with our zoning ordinance. I know that you exchanged information with the Town for the next year. Finally you tried to settle it and couldn't. Then you filed an appeal of an 'administrative decision'. But we look back at that 2015 decision and we think that decision triggers the 30 day appeal period."

Town Attorney Malia asked, "So what triggers the 30 days here?"

1. It could be Bont's March 8, 2016 letter, in which case the appeal was filed more than five (5) months late. Bergeron did point out that Bont's email accidentally did say "draft, draft, draft, draft" on it. Is that sufficient in your mind to eliminate this from an administrative decision? If you were them, would you look at the word "draft" and think, "I don't think that is an official Town of Lincoln decision?"
2. It could be Ron Beard's March 30, 2016 letter in which case the appeal was filed more than five (5) months late.

Beaudin said that in Fire Chief Beard's letter of March 30, 2016, the Fire Chief also referred to previous times when Aubuchon made this same application for a Propane Filling Station (PFS). Would it be pertinent to know that Aubuchon came before a Town Board one or two times before with this same issue and the request had been refuted, discussed and "done away with". Would that information also be pertinent even though that was a long time ago?

Town Attorney Malia asked if Beaudin was talking about Chief Beard's letter of March 8, 2016. Paul Beaudin said that he believed that was the letter. The letter states that there have been other Lincoln Fire Chiefs who have refused this project of a Propane Filling Station (PFS) and had issues with it. Bont stated that she believes that the same issue of whether Aubuchon needed to come before the Planning Board for Site Plan Review was addressed in earlier Planning Board minutes.

Town Attorney Malia said that he read the 1998 Planning Board minutes for a meeting at which the Planning Board decided back in 1998 that Aubuchon should file a Site Plan Review application to put in a Propane Filling Station (PFS).



Beaudin questioned Town Attorney Malia about where the ZBA should go with this information, when the clock starts ticking and if it is up to the ZBA Board to make that decision.

Town Attorney Malia said that the pertinence and weight of that information was up to the ZBA to decide. The ZBA could give them the benefit of the doubt on Carole's March 1, 2016, email and on Chief Beard's March 8, 2016 letter and use a third date.

3. Town Attorney Malia's letter of August 17, 2016, could be used as the triggering date for the thirty (30) days, even though the letter was addressed to Town Manager/Planner Burbank, it was emailed to Aubuchon Attorney Parnell on that same day. Aubuchon's lawyer received the email on August 17, 2016. On August 29, 2016, Town Manager/Planner Burbank confirmed via email to Aubuchon Attorney Parnell that Town Attorney's letter of August 17, 2016, was the Town's official response. As of August 29, 2016 at the very latest, Aubuchon should have known that Attorney Malia's August 17, 2016 letter was the Town's official position on this matter. Even though August 29, 2016 is twelve (12) days after Attorney Malia's letter was written. It still gave Aubuchon's attorney seventeen (17) days to meet the thirty (30) day deadline of September 17, 2016. Aubuchon Hardware's appeal came in September 21, 2016 maybe. Even if you give them the benefit of the doubt and use Town Attorney Malia's August 17, 2016 letter as the triggering date, it is still maybe four (4) days late. So the ZBA has to decide whether "good cause" has been shown, if you want to use the August 17, 2016 date, for their filing that four (4) days late.

Beaudin asked Aubuchon Attorney Parnell, if the ZBA assumes that the applicant did not meet the filing date, is there another "good cause" reason that Aubuchon Attorney Parnell would like the ZBA to consider for filing late.

Aubuchon Attorney Parnell said that he thinks that he has made the argument for "good cause" based on the terminology that was used in the letter; a "reasonable person" would conclude that a final determination had not been made. Aubuchon Attorney Parnell said that the ZBA needs to make a finding, on the record, as to what date triggers the thirty (30) day appeal period.

Aubuchon Attorney Parnell said then if the ZBA makes a determination that the triggering date was a date other than the date of the email sent by Town Manager/Planner Burbank on August 29<sup>th</sup> as argued by Aubuchon, then that would trigger a "good cause" analysis after that point.

Aubuchon Attorney Parnell said he envisioned a two-step process that the ZBA would have to go through in order to answer this specific procedural question.

Town Attorney Malia said that he agreed.

1. First, the ZBA needs to decide what date to use as the triggering date.
2. Second, if September 21, 2016 is not within thirty (30) days of whatever the Board uses as a triggering date, then the Board would need to decide whether to wave that thirty (30) day period for "good cause".

Beaudin said that he was still trying to figure out what "good cause" was. Aubuchon Attorney Parnell said that there have been innumerable treatises and a fair number of jury trials trying to figure out exactly what "good cause" is. In the final analysis, based in all the facts and circumstances, "good cause" is what the ZBA thinks it is based on what they know.

Town Attorney Malia added, for example, if the Board uses the August 17, 2016, letter and believes that the Applicant has a reasonable explanation for why its appeal was a few days late and the ZBA is satisfied with the explanation it received, the ZBA can find that “good cause” has been shown.

Ludwig said that she would use the August 17, 2016 letter from Town Attorney Malia date as a viable date. Ludwig then confirmed that on August 26, 2016, Aubuchon Attorney Parnell emailed Town Manager/Planner Burbank. On August 29, 2016, Town Manager responded by email and told Aubuchon Attorney Parnell that Attorney Malia’s August 17, 2016, letter was the town’s official response. Town Manager Burbank said that the email from him dated August 29, 2016, was based on a question from Aubuchon Attorney Parnell.

Town Attorney Malia said that in the August 26, 2016, email, Aubuchon Attorney Parnell was asking if Malia’s letter is the Town’s official position or is he going to be getting something else from Town Manager Burbank or Planning and Zoning Administrator Carole Bont. Then Town Manager Burbank sent an email saying that Aubuchon Attorney Parnell could consider Town Attorney Malia’s letter to be the Town’s official position on this matter.

Ludwig asked if Aubuchon Attorney Parnell would have arguments against using the August 17, 2016, letter from Town Attorney Malia as the trigger date.

Aubuchon Attorney Parnell said:

- It was clear on its face that, in and of itself, the August 17, 2016, letter does not say that “this is a final decision”.
- The August 17, 2016, letter was not addressed to Aubuchon Attorney Parnell and not addressed to his client. It is addressed to Attorney Malia’s client.
- Aubuchon Attorney Parnell received a copy of what he thought was an attorney – client communication. Parnell’s immediate reaction is to request clarification. If Parnell had understood that letter to be a final determination, his response would have been much different. Parnell would have told his client to start counting the clock now and that his client had thirty (30) days to submit the appeal. But, that is not what the letter says. It is clearly a letter to Town Manager/Planner Burbank, giving Town Attorney Malia thoughts on questions that were asked to him. Town Attorney Malia was nice enough to send the letter to Parnell but that was not enough for Parnell to believe that met the requirements of formal notification of the decision.

Ludwig asked Aubuchon Attorney Parnell what the date of his email was. Aubuchon Attorney Parnell said that his email was dated [Friday] August 26, 2016 [4:04 PM].

Jayne Ludwig said that the email response from Town Manager Burbank stating that Attorney Malia’s letter of [Wednesday] August 17, 2016 [3:44 PM] was the official response was dated [Monday] August 29, 2016 [10:02 AM].

Town Attorney Malia said Aubuchon Attorney Parnell’s email dated August 26, 2016, came nine (9) days later after receiving Town Attorney Malia’s letter dated [Wednesday] August 17, 2016 [3:44 PM]. Town Manager/Planner Burbank took three (3) days (August 29 2016) to respond to Aubuchon Attorney Parnell’s email.

Aubuchon Attorney Parnell said that essentially what his email dated [Friday] August 26, 2016 [4:04 PM].was saying in laymen's terms is "What do I make of this?"

Town Attorney Malia asked Aubuchon Attorney Parnell if he was suggesting that August 29 be the trigger date. Aubuchon Attorney Parnell said that he thinks it has to be. Aubuchon Attorney Parnell said that for the purposes of any argument that he would be making later on that is exactly what it has to be. Aubuchon Attorney Parnell said that was the first formal notification that he received on town letterhead by an authorized town employee who is authorized to communicate these communications on what the decision was. In his opinion, "all the other notifications really don't meet the test".

Town Attorney Malia said that the weakness of Aubuchon Attorney Parnell's argument is that Town Manager/Planner Burbank's e-mail dated August 29<sup>th</sup> told Aubuchon Attorney Parnell that the letter from Town Attorney Malia dated August 17<sup>th</sup> was the Town's decision. So that email dated August 29 still gave Aubuchon Attorney Parnell seventeen (17) days or so to meet that thirty (30) appeal deadline.

Aubuchon Attorney Parnell said:

"In all seriousness, I don't think the court would buy that. I did not know, as an individual, that that [letter from Town Attorney Malia dated August 17, 2016] was a final decision until I got the notification from Butch [Town Manager/Planner Burbank on August 29, 2016]. At that point, I do not know that. The knowledge that I have, therefore, is not transferable to my client and my client does not know that. What my client knows is that I had a question and I generated a response to the correspondence and I got an answer. And that answer is dated August 29, 2016. And that is the first document that is generated that says that this is the official town's position."

Beaudin said to Aubuchon Attorney Parnell, "You are talking about an 'official position', but I think there is a gray area between what an official position is and when you should have known that something was up; they were requesting that you go through Site Plan Review. There may not have been an official letterhead type view, but when someone sends something to you that says they think you should be going through Site Plan Review, even when it is not on an official letterhead form, but you should have known at that point."

Aubuchon Attorney Parnell said that he does not agree. Aubuchon Attorney Parnell quoted the email from Ms. Bont, "Here are my comments." Aubuchon Attorney Parnell said, "Those are her words. Bont did not say, 'Here is my decision' or 'here is my decision pursuant to 676:5-II b'."

Beaudin said to Aubuchon Attorney Parnell that he should have known at that point there was a problem with his client's project as proposed. Not there was an official "decision", but when the Planning and Zoning Administrator makes a comment like that to him, he should have known there was a problem.

Aubuchon Attorney Parnell said that:

- Bont's letter was merely an invitation to discuss; it was not a final determination.
- When the Town makes a "final determination", it triggers certain things. A final determination triggers the appeals process. It triggers the appeal to the ZBA. It starts

certain time tables running with the court system. All of that stuff happens and there is a reason accordingly why a final determination has to be very specific.

- Whether something is a “final determination” can’t be capable of two or three interpretations because you end up with a problem like you have right now.

Beaudin asked Attorney Malia if a “final determination” has to have some specific wording when it comes down to a final determination.

Town Attorney Malia said, “Not really.” The ZBA read the definition of administrative decision in RSA 676:5 and it does not require any magic words: “a decision which involves the construction, interpretation or application of the terms of the ordinance.” Town Attorney Malia said Bont’s email did not invite discussion. Town Attorney Malia said he did not see anything at the end of the email saying “I look forward to your response”. It does say “we have the following comments”, and the next sentence reads “your client will need Site Plan Review approval for a change or expansion of use”. Town Attorney Malia said he thought the language seemed pretty direct.

Beaudin said that if we don’t accept this as a reason or good cause to extend the deadline then the Applicant will have to come before the Planning Board for Site Plan Review to further this process.

Town Attorney Malia said, “Or they will appeal the ZBA’s decision.”

Aubuchon Attorney Parnell said,

“Let’s step back a minute and look at what is being appealed here. What is being appealed is essentially a statutory interpretation or an ordinance interpretation, specifically the ‘change of use’ ordinance. [Site Plan Review Regulations] Whether, in fact, this is or is not a ‘change of use’ as that term is used in the ordinance. [Site Plan Review Regulations] That is a different animal. Then they applied for Site Plan Review which was turned down. They went through that whole process. That is a legal conclusion. That doesn’t have to go back to the Planning Board for determination. That can go straight to court. It is a little bit different than the situation where you put the plans. You agreed that your ordinance [Site Plan Review Regulations] applies. If you take a look at the notice of this hearing, the position of Aubuchon is set forth in the notice of this hearing is that they are entitled as a matter of right to put the Propane Filling Station (PFS) in there. It is not a question that the Planning Board abused its discretion when it denied a request for a variance. This is a straight forward legal question. In fact Mr. Moran from Aubuchon is here. I had suggested, why bother? Let’s just go straight to the court. It is going to end up there anyway. Moran wants to work with the Town and be a good partner and try to work things out, which is also the underlayment of this correspondence. It is all a question of trying to get to work with the Town.”

Beaudin said that if Aubuchon really wants to work with the Town, what is so wrong with the Site Plan Review process? The Site Plan Review process does give the ability for Aubuchon to work with the Town as well as participating neighbors and abutters and anyone else who may have concern. Beaudin said in his opinion going through the Site Plan Review process would seem a logical and friendlier step. It would be better to be able to go through the Site Plan Review process to allow abutters and people who may or may not have concern. There may be

people who are in support of a Propane Filling Station (PFS) who come and say whatever they want to say. It allows the Planning Board to make their decision based on everyone's input.

Aubuchon Attorney Parnell said there is a disagreement between Aubuchon and the Planning Department about the interpretation of the language, "change of use". The advantage of allowing this matter to go before the ZBA is to allow the ZBA (not the Planning Board) to answer the question about whether [adding a Propane Filling Station] is a "change of use" or not. And if it is not a change of use, Aubuchon's position is fairly clear that it is not a "change of use". If the ZBA agrees with Aubuchon, "then all of the stuff you are talking about the land use piece doesn't come into play".

Aubuchon Attorney Parnell said that representative Bergeron will talk on behalf of Aubuchon's landlord Herbert Lahout Shopping Center, Inc., and will talk about how he worked really closely with the Fire Chief to make the Propane Filling Station work. Aubuchon Attorney Parnell said that Bergeron and the Fire Chief ultimately did not agree, but he worked very closely with the Chief to address the concerns that the Chief raised. Aubuchon Attorney Parnell said Aubuchon needs that term "change of use" defined. Does the term "change of use" apply to this situation? Is adding a Propane Filling Station (PFS), in fact a change of use, or not?

Aubuchon Attorney Parnell said, "By change of reference, it is simply a sale of propane." Aubuchon already sells propane. Aubuchon Hardware Store is a retail facility. Aubuchon Attorney Parnell said he thinks "there is a fair amount of argument out there and if it isn't, that is a question for another day. But that question has to be asked before we can get into the other stuff that Beaudin is talking about."

Ludwig asked Aubuchon Attorney Parnell, if he went before the Planning Board and did not like the outcome, would he come back before the ZBA again.

Aubuchon Attorney Parnell said, "We could but my question is from a practical matter, what is the point? If we have a forum and can get the answer now, but we can't get the answer here, Parnell thinks it is going to be more efficient from a cost effective matter, just to take the matter to court and file a declaratory judgment and get an answer." Aubuchon Attorney Parnell said, "That is not something that people really like doing but it is what I do for a living. Because of the expense and time involved, all the process you would have to go through to get that, he could get a ruling on a declaratory judgment within three (3) to six (6) months, maybe a year on the outside. Whereas this whole planning process, right now we are standing before you a year into the initial application process and we are still standing here talking about it."

Greg Moran got up and told "a story".

"One hundred eight (108) years ago, my grandfather started with the first store. At the age of 14 my father got a job and worked for Aubuchon's for 77 years and died at his desk at age 91. I worked with him for 32 years. I have been with Aubuchon for 39 years but really 63 since I grew up in the back seat of the car travelling around New England. In the year 2000 I put in my first propane filling station down in Cape Code and worked with the local Fire Chief and met all the regulations. Mr. Aubuchon thought we were going to blow the company up. We have never had a single accident since 2000 and in those 16 years we have pumped five hundred thousand dollars' (\$500,000) worth of propane."

“Our average store today does about \$60,000 pumping propane, which generates around \$30,000 in earnings before tax. Earnings after tax are about \$25,000. Our average store makes \$35,000, so without a propane filling station we are making a lousy \$10,000 earnings before tax.”

“We have 91 stores with propane filling stations and we have 107 stores. We were up to 164 stores and with [competition from] Home Depot and Lowes we just keep chopping stuff. We don’t chop them down, the competition does. So we have to keep transforming, expanding, you know.”

“Whether Herb Lahout is the best loved guy in town or the least, he is my landlord. I have to negotiate with him for expanded space. We try to set up the store the best we can. And then working with the Fire Chief and working with a consultant, then getting the State Fire Chief involved, I just want to meet the regulations because we met the regulations ninety-one (91) other times.”

“I don’t know what the future holds for our store here in Lincoln. I do know not having a propane filling station doesn’t make for a strong viable future. That is not a secret, it is just a fact. Do we move to North Woodstock? Do we pick up our stuff and go down to Ashland or some other place? We only have so much money and so many assets and Citizens Bank owns more Aubuchon Hardware than family shareholders right now. Because we are pushing forward with the fourth generation and we are trying to keep the company going. I’m third generation. The bank is behind us but it ain’t easy. I’m sorry for the song and dance. This has been very procedural, what I have heard and I respect it 100 percent. But I wanted you to hear the rock bottom for us.”

Daly asked Moran, “If someone comes into Aubuchon today and they buy a Blue Rhino [propane] tank, do they pay \$19.00”?

Moran said that he was not sure what the price is. “Let’s say versus \$12.99 on a retail.”

Daly said, “So if I brought in...say you are making \$6.00 dollars for a tank to be refilled, versus buying it off the shelf.”

Moran said “In the margin, if we refilled it for you for @\$12.99, we get to keep \$0.55 for every dollar. If we do the tank exchange for the higher price, we get to keep \$0.24 cents on the dollar. You have to have eight (8) or nine (9) blue rhino exchanges just to catch one (1) propane filling station. So we do it as a convenience to the customer, not to make money, but so when they come to the store we can help them.”

Daly said, “So that you make money on it too, that’s what you are in business for.”

Moran agreed, but said that “It is a very small piece of change”.

Daly said that he looked at all the documents that were sent out in advance of this hearing. He has had time to look at the site. Daly asked Moran if he had ever considered putting a Propane Filling Station tank offsite just to do the refilling and then stocking his Aubuchon Hardware Store with the filled tanks. When someone comes in and your store says, “We will take your tank and exchange it for a full tank, it’s \$12.99.” Now you take my tank and put it on the shelf. Now Bill comes in to buy his tank. Obviously there’s numbers that you need in order to make the operation profitable. As a business person I’ve thought it out. Okay, I need a truck to transport the tanks. I need a person to do the transporting, but that is the same point as someone

standing there filling it. Every time someone comes in, you have to take someone out of your store, every single time. That is manpower, that's dollars, so is it cheaper to have an offsite tank to refill your tanks with propane.

Moran said that there are a couple of points that interfere with the profitability of this scenario:

1. Transportation of the propane tank in and of itself. You have to have a safe environment. You can't just throw it in the back of a truck. You have to have a cage and it has to be secured.
2. Then you need the man power to go out and fill the tank at the store. The tank comes out of the customer's vehicle, is filled, and is put right back in the customer's vehicle. Our responsibility toward that tank is minimized. The customer is responsible for safe transportation of his own unit.

Moran said that Aubuchon does not have company vehicles. Moran said they would not expose their employees to company vehicles. They have never looked at doing that.

He has "done these installs". Even though Aubuchon's has ninety-one (91) stations Moran has probably done one hundred twenty-five (125) installs because Aubuchons has closed stores.

Moran said:

- Whether it is a one thousand (1,000) gallon tank or a five hundred (500) gallon tank,
- whether it is jersey barriers or multiple tanks,
- whether it is a fencing system for control and curtesy, or no fence,
- whether locking the cabinet with the hasp, where everything is inside, the valves off

All those controls are in place,

Moran said:

"That is why I can say with confidence that we have never had an accident. Does the blow off valve go (made a quick inhale noise) and the whole system shutdown, and you can't sell propane, of course it does. And then the supplier comes and we are out of business for a couple of days and they replace the valve and everybody is up and running again. It is a viable part of our business and I don't know where we would be today if we didn't put propane in."

Ludwig said that her father was a small time business man and he worked very hard. Ludwig said she shops at Aubuchon all the time because she lives in town. Ludwig asked about the other stores where permission was granted by the Towns to install propane. Did the Fire Chiefs all agree in those towns to do so?

Moran said that the Fire Chief is always involved. Ludwig asked if they always approved the installs. Moran said that they always approved them.

Daly said that every location is different. He asked him if he knew that he had residential property forty feet (40') away.

Moran said that there are very strict criteria that must be met. "If you meet the criteria the answer is 'yes'. And in this case I feel we meet the criteria."

Beaudin said that without a hardware store in this Town we would be a very unlucky town. Beaudin said he understood Moran's desire that Aubuchon's expand its business and grow. Beaudin said that Moran also has to understand that the abutters and residents who live in that area would probably like to hear a lot of what Moran has to say. The abutters and neighbors would like to be able to ask him questions like, what if that thing blows up, is it protected? Are we protected?

Beaudin said to Moran:

"You are a family business so you know about those types of people who come to your business and ask those types of questions. Because they go to your business every day and they say, 'Can you help me find this?' If I was an abutter, I would want to come to a meeting to ask questions to feel comfortable about what is being put in next to my house. If I was two houses away, or if I walk my children by there every day, I would want to be able to have answers to those questions. Site Plan Review is a good venue to do that. I have seen it work well on both sides, for the business person because they get to see what their neighbors think. You learn a lot from it as they do, that's kind of the give and take. We don't always get what we want but we get a little of what we want."

Moran said,

"My only response is going to sound a little nasty, but I don't mind talking straight. There is a concept of "not in my back yard", which is a nasty statement. If you live next to the river or the train track or the shopping center, those were choices that were made. I didn't make those [choices] but they were made. That has to do with zoning and all other regulations. It is hard for a Town, but they have to make all those decisions. Once they are made it is not like you can... That is enough of the nasty side of me."

Moran said,

"The nice side of me says I will do anything that anybody wants. If you want a nice decorative slotted white fence... Propane is a gas. It does not go into the ground. It goes away, so it is never going to be an environmental hazard. And they don't like, if you are going to put up a fence. You put up a fence like this so everything breathes and runs away. But if we want to put up a slightly slotted type [fence] partly that breaths, and visually impairs everything, hurray, I am the first guy that wants to do that. I did it in Hillsborough; I was there this morning on my way up. So the answer is always 'yes', but I feel that, by right, we are meeting all the regulations and, by right, we are meeting all the setbacks. Why would we open up a can of worms of very unhappy neighbors? If that's what it comes to? When we are going to do the best we possibly can, given the existing conditions?"

Town Attorney Malia interrupted and said although it was an interesting discussion, the discussion was getting into the merits of the case. First, the ZBA needs to decide what the trigger point is for the thirty (30) day appeal period, whether or not they met it. Second, if not, whether or not "good cause" is shown for them not meeting the deadline. Town Attorney Malia believes that the four (4) leading candidates for the triggering point are:

1. Planning & Zoning Administrator Bont's March 1, 2016 email to Applicant Herbert Lahout Shopping Center, Inc.'s representative Shawn Bergeron



2. Fire Chief Ron Beard's March 30, 2016 letter to Applicant Herbert Lahout Shopping Center, Inc.'s representative Shawn Bergeron
3. Town Attorney Malia's August 17, 2016 letter to Town Manager/Planner Butch Burbank and forwarded via e-mail to Aubuchon Attorney Parnell; or
4. Town Manager/Planner Butch Burbank's August 29, 2016 email to Attorney Parnell

Town Attorney Malia said that the ZBA needs to decide which of these letters was an administrative decision and should have put the applicant on notice that an appeal needed to be filed within thirty (30) days. The only one that you could choose that would bring them into compliance with the thirty (30) days would be Town Manager/Planner Butch Burbank's August 29, 2016 email. The other three (3) would not, so if you choose any of the other three (3) you would have to go to the "good cause" decision.

Beaudin said he believes that the August 17, 2016 letter from Town Attorney Malia should have been the date at which they should have known that a decision had been made.

**Motion that Town Attorney Malia's August 17, 2016 letter to Town Manager/Planner Burbank and forwarded to Aubuchon Attorney Parnell is the letter to be considered the triggering point when an administrative decision was made.**

**Motion: Paul Beaudin**

**Second: Jack Daly for purpose of discussion only.**

Daly said in evaluating the four (4) triggering options:

- From the applicant's perspective, certainly the March 1, 2016 letter does not count as a final determination because it reads "draft". That email also does not say an administrative decision was made. The Planning and Zoning Administrator made comments to the Applicant.
- If the Fire Chief could make an "administrative decision", his March 8, 2016 letter says the word "decision" in that "I've made a decision", but then it would have to be determined if the Fire Chief has the power to make an administrative decision. Fire Chief Beard also made comments. If the Fire Chief could make an administrative decision, the March 30, 2016 letter would be the one Daly would go by, from a legal point of view whether or not that is counted as the administrative decision.
- Town Attorney Malia's letter was sent to Town Manager/Planner Burbank, not to the Applicant, so he did not know if he would consider that. Town Attorney Malia made a recommendation to Town Manager/Planner Burbank.
- Certainly Town Manager/Planner Burbank's email is the letter that says "We have made a decision."

Town Attorney Malia said that the ZBA can look at the definition as to whether or not the Fire Chief is an "administrative officer" which they looked at a couple minutes ago. Town Attorney Malia believes there is an argument to be made both ways. The Fire Chief is probably an "administrative official", but Aubuchon Attorney Parnell would disagree with that.

Ludwig said that she also believes that Fire Chief Beard is in an administrative position because it is a safety issue, however, in Aubuchon Attorney Parnell's opinion, the way the Fire Chief's letter is worded it does not meet his "needs of understanding".

Aubuchon Attorney Parnell asked Ludwig if she was talking about the letter of the March 30, 2016 from the Fire Chief. Aubuchon Attorney Parnell wanted to make it clear that the decision that is being appealed here is Planning and Zoning Administrator Bont's decision that a Propane Filling Station (PFS) requires Planning Board approval for a "change of use" under the Site Plan Review Regulations.

Aubuchon Attorney Parnell said that "they" are not dealing with the correctness or lack thereof of the Fire Chief's order, nor is that issue before the ZBA. "Just so we don't create some sort of procedural morass we have to make sure that the vote is on the right thing. What is being appealed here, or what we hope to appeal here, specifically, is the determination that a change of use is required in order to allow the project to go forward. That was the decision that Carole characterized as her initial decision on March 1, 2016, but we have already heard the arguments, at least from Aubuchon's perspective that it is suggested that is not sufficient notice."

Town Attorney Malia said that now that he has re-read the March 30, 2016 letter from Fire Chief Beard. He said he agrees with Aubuchon Attorney Parnell and would rule that letter out as a triggering notice because the letter gives Fire Chief Beard's opinion, that he is not in favor of the propane tank going in, but his decision is not based on an interpretation of the Land Use Plan Ordinance, which is really what needs to happen in order to trigger an appeal of administrative decision. The letter is more based on the rules and regulations that he has to consider as a Fire Chief. So it is not really a decision involving the interpretation of any particular provision of the Land Use Plan Ordinance. Consequently, Town Attorney Malia would probably rule out the March 30, 2016, Fire Chief Beard letter.

Town Attorney Malia said that if Aubuchon Attorney Parnell is suggesting that Planning and Zoning Administrator Bont's decision is the decision that they are appealing, then their appeal was actually filed more than five (5) months after her email was written.

Aubuchon Attorney Parnell said that he would like to clarify the record:

"What we are appealing is a final determination and his position is that the 'final determination' was not communicated until August 29, 2016 and it referred back to the March 1, 2016 letter. But it said, essentially, that as of August 29, 2016, the official position of the Town is that which was initially outlined in the draft email from Carole dated March 1, 2016. Were this to go forward as an appeal, then the argument that we would be making is that the interpretation that this is a "change of use" is an incorrect determination of the zoning ordinance. However, that issue is not before the ZBA right now, depending upon how the ZBA votes on this, it may be before you in fifteen (15) or twenty (20) minutes."

Beaudin said that when he looks at Town Attorney Malia's letter dated August 17, 2016, to Town Manager/Planner Burbank he sees nothing on the letter that indicates this is a letter subject to attorney client privilege because there is nothing in the letter that refers to that. Beaudin asked Aubuchon Attorney Parnell why he thought it was letter subject to an attorney client privilege.

Aubuchon Attorney Parnell said,

"In my business, trust me, you have to be very, very careful. I have had stuff inadvertently sent to me. There are rules now in the court that specifically address the kinds of situations where there is 'inadvertent disclosure'." I do not know when I receive a letter that it was intended for me. All I know is that I got a copy of it and it was a letter

which was addressed to a client from an attorney in which the attorney is communicating an opinion to the client. At first blush, that is an attorney client letter. It does not have to say ‘personal’ and ‘confidential’ across the top in order for it to be attorney client privilege. There would be a presumption, say you were to attempt to introduce that [letter] in court and would there be an objection raised on the basis of the attorney client [privilege]. The initial perception of the court would be that was a privileged communication and the issue would have to be clarified by counsel in the courtroom. So it doesn’t have to specifically say ‘personal’ and ‘confidential’. It is a letter that was addressed from Attorney Malia to his client. And it does not say anywhere on it something to the effect of ‘this is intended, Attorney Parnell, to let you know what the decision is’ or ‘this is intended, Attorney Parnell, to let you know what the decision with regard to your clients position is’. None of that is in there. All it is, is here is the problem, this is my view of it, this is my recommendation, and then he also makes some suggestions about some ongoing dialogue in his last paragraph, which again is something that would be appropriate with an attorney client letter.”

Beaudin asked Town Attorney Malia if he received any correspondence from Aubuchon or anyone else about the letter of August 17, 2016 that he sent to Town Manager Burbank. Town Attorney Malia said that he did not print all of his emails pertaining to this matter so he would have to check to make sure. Town Attorney Malia said he intentionally emailed the letter to Attorney Parnell because that is what Town Manager Burbank and Attorney Malia had decided should be done. Attorney Malia’s secretary would have sent the letter to Attorney Parnell because Attorney Parnell had been waiting for an opinion from the Town. The attorney client privilege was waived.

Beaudin asked Town Attorney Malia about the line on the bottom of his letter. Town Attorney Malia answered that the line on the bottom of his letter indicated the location of the letter on his computer.

Beaudin said that he was hearing a lot about Town Attorney Malia interacting with Town Manager Burbank, so was Town Manager Burbank the administrator who was leading or giving direction as to what was finally done or not? Aubuchon Attorney Parnell said he is appealing Planning and Zoning Administrator Bont’s decision. Beaudin asked if it was Bont’s administrative decision or Town Manager/Planner Burbank’s administrative decision that was being appealed. Was Town Manager/Planner Burbank the one who made the last decision on August 29, 2016?

Aubuchon Attorney Parnell responded:

“First of all, the issue before the ZBA right now is the timeliness of the appeal. When we are dealing with time limits, the issue is when notice of the actual decision was given. Ultimately what the appeal intends to bring before the ZBA is the determination that Planning and Zoning Administrator Bont made that the Applicant is required to obtain Planning Board approval for a ‘change of use’. Right now that specific question is not before this body. The only question before this body is the question of the appeal. The question is what is an appropriate notice? In reading Town Manager/Planner Burbank’s August 29, 2016, email, Burbank, in essence, said that Attorney Malia’s letter of August 17, 2016 was the official decision, which in turn incorporated by reference the original comments of Carole going back to March 1, 2016. That is what is being appealed. The

appeal is whether this is a “change of use” or not. The question before us is: When was Aubuchon on notice, that this was a final determination or that this was a ‘administrative determination’ as that term is used in the statute?”

“The only piece of paper that is out there that makes it clear that this is an official communication on that specific subject is the communication directed to Aubuchon Attorney Parnell from Town Manager Burbank on August 29, 2016.”

Daly said that Aubuchon Attorney Parnell was emailed a copy of Town Attorney Malia’s letter on August 17, 2016.

Aubuchon Attorney Parnell said that he got a copy of the letter and that prompted his response of August 26, 2016 which read:

*I have your letter of August 17, 2016. I have not received anything from the town formally responding to my letter of July 27, 2016. Please advise whether yours of August 17, 2016 was intended as the town’s formal response.*

Aubuchon Attorney Parnell said “That it is about as clear as day there that at that point, I don’t know. Aubuchon Attorney Parnell said that he needs a formal response because a formal response triggers certain events that come after that. Obviously the appeals period, any court filings, that sort of thing.”

Beaudin said to Aubuchon Attorney Parnell that you say you need a formal response, there is nothing in the Land Use Plan Ordinance that speaks to “formal”. There is nothing in our Land Use Plan Ordinance that says “formal” and nothing that we have heard from counsel that states there is a “formal process” by which you are notified.

Aubuchon Attorney Parnell said:

“The word ‘formal’ is certainly not used, but it says ‘communicated administrative decision’. That is what it says. Inherent in that language is ‘communicate’. You convey a concept to somebody else. It is clear from my letter of August 26, 2016, that nothing has been communicated to me or to my client. I do not have that understanding. There has been no effective communication. Whether your standard is ‘formal’, there is nothing.”

Town Attorney Malia said that the question is, should Aubuchon Attorney Parnell have had that understanding on August 17, 2016? In looking at the copies that Planning and Zoning Administrator Bont made for us, you actually do have a copy of the letter and my secretary’s email to Aubuchon Attorney Parnell confirming clearly that there was not an attorney client privilege being asserted. Clearly it was meant to be sent:

*Good afternoon Attorney Parnell,*

*Attached please find a letter from Attorney Malia to Butch Burbank regarding Aubuchon Hardware. Please confirm receipt.*

Town Attorney Malia said that the e-mail with the attached letter was from his secretary to Aubuchon Attorney Parnell, copied to Town Attorney Malia. There was obviously no attorney client privilege going on.

Aubuchon Attorney Parnell said, “With all due respect, the issue is communication. There was nothing in that letter from your secretary that says ‘this is the final decision of the Town’. What

is there is, here is a copy of something that Attorney Malia asked to be sent to you, and a copy of the letter that went to Butch Burbank. Take a look at the last paragraph of that letter. There is a strong suggestion there that some sort of communication – dialog taking place. I do not think it was unreasonable to conclude that [there is] still, at least potentially, an open question that is inviting some ongoing discussion.”

Beaudin said to Aubuchon Attorney Parnell, “It took you ten (10) days after receiving the letter to get back to [Town Attorney] Peter [Malia], you couldn’t email or a phone call or anything back, [to ask] ‘Is this official?’ You waited ten (10) days to get a letter off!”

Aubuchon Attorney Parnell said, “Absolutely! That is exactly what happened! I got a letter and I made a determination that I don’t know what this means. Obviously I’m going to be consulting with my client in the interim to get instructions from my client as to how we want to proceed. When I have an opportunity to discuss with my client, I then proceed with the appropriate response which is essentially, ‘What the heck does this mean?’”

Beaudin said, “It just seems like a long time. That it took you ten (10) days after you received this letter with no attorney client privilege. To have that type of question, ten (10) days seems very long.”

Aubuchon Attorney Parnell said, “Again, that is what happened. Any protocol and procedure here is bound to what the language actually says. Unless you’re suggesting somehow that I deliberately delayed in order to obfuscate this in order to make it confusing.”

Beaudin said that he suggested no such thing.

Aubuchon Attorney Parnell said, “It is apparent that I did that in good faith and I responded. It is not like I waited six (6) months or a year to do anything.”

*There was a 2 minute break.*

Daly asked Town Attorney Malia, “If the triggering date is determined as being August 17, 2016 with no extenuating circumstances, therefore, then there is no appeal process, is that correct?”

Town Attorney Malia said that if the ZBA determines the triggering date is August 17, 2016, then the ZBA should next vote on whether or not “good cause” was shown for not having the appeal filed by September 17, 2016. If that is not found in Aubuchon’s favor then this case would be over. The Applicant could appeal to the Court or they could go to the Planning Board for Site Plan Review. They could appeal the ZBA’s decision to Grafton County Superior Court.

Bergeron, representing the Applicant Herbert Lahout Shopping Center, Inc., questioned whether they could appeal back to the ZBA one more time. Town Attorney Malia said that with a motion for a rehearing first, yes.

Daly asked Town Attorney Malia what happens if the ZBA determines that the triggering date is the August 17<sup>th</sup> date and not August 29<sup>th</sup>. Town Attorney Malia said that the Applicant could appeal the ZBA decision to Superior Court, or the Applicant would have to file a motion for rehearing or reconsideration, just to give the ZBA one more chance to take a look at it to see if there is anything that they want to take a closer look at before the issue goes to Superior Court.

Daly said that this case has not been determined as the merits at this point in time. Town Attorney Malia agreed; the ZBA is deciding whether or not to even reach the merits.

Bergeron, representing the Applicant Herbert Lahout Shopping Center, Inc., asked what the motion on the floor was at this time. Chairman Ham said that the motion on the floor is whether to accept August 17, 2016 as the trigger date for the 30 day appeal process.

**Motion: Paul Beaudin Second: Jack Daly**  
**Two for (Beaudin & Daly). Two opposed. (Ham & Ludwig).**  
**Tie. Motion fails.**

**Motion to accept August 29<sup>th</sup> as the trigger date for the 30 day appeal process.**

**Motion: Jack Daly Second: Jon Ham**  
**Two for (Ham & Ludwig). Two opposed (Beaudin & Daly).**  
**Tie. Motion Fails.**

**Motion to accept March 1, 2016 as the trigger date for the 30 day appeal process.**

**Motion: Jack Daly Second: Paul Beaudin second for conversation.**  
**None for. Three opposed. (Ham, Ludwig, Daly).**  
**Motion fails.**

Town Attorney Malia said he does not think Fire Chief Beard's letter should be considered an "administrative decision" but told the ZBA that they could make their own decision. If the ZBA disagrees with Town Attorney Malia, they could make a motion to use Fire Chief Beard's letter date.

Town Attorney Malia said that the ZBA voted on the other three possible dates and they are deadlocked. One possible resolution could be to delay this matter until the next meeting in hopes that there will be a fifth member to break the deadlock on this situation.

Beaudin said that it takes three concurring members to reverse a decision. Aubuchon Attorney Parnell said that it is not a reversal because it is a deadlock decision.

Beaudin said that we are reversing what appears to be Planning and Zoning Administrator Bont's administrative decision.

- Aubuchon Attorney Parnell said that he had to interject as that issue was not before the ZBA. Before the ZBA is simply the question of what date to use as the trigger date for the thirty (30) day appeal. The merits of Bont's decision is not before the panel at this point.
- Town Attorney Malia said that Beaudin was correct; the ZBA decision has to be by three (3) people.

Beaudin said that if the ZBA gets six (6) people here, the ZBA still needs to have three (3) who agree.

- Town Attorney Malia said that Jack Daly is an alternate but he was appointed to sit on this matter in the absence of two regular members. Don Landry and James Martin are regular members who were unable to attend. Often times when we get to ZBA meetings and there are only three (3) members, we are given the opportunity to come back another month when there is a full board present.

Aubuchon Attorney Parnell said that they did consider that question at the beginning of the evening – not to go with a panel of four (4). Aubuchon Attorney Parnell said that the Town should be sure to have five (5) members.

There was a discussion that Alternate Ray D'Amante would have to recuse himself from this case.

They decided to reconvene on Thursday, December 8, 2016.

**Motion to recess and reconvene the meeting until December 8, 2016 at 6:00 PM.**

**Motion: Paul Beaudin      Second: Jayne Ludwig      All in favor: 4-0.**

**V.      OTHER BUSINESS – ZBA members/alternates, Zoning Board Staff**

**VII.   PUBLIC PARTICIPATION AND OTHER BUSINESS:** Public comment and opinion are welcome during this open session. However, comments and opinions related to development projects currently being reviewed by the Zoning Board of Adjustment will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate.

**VIII.   ADJOURNMENT**

**Motion to adjourn at 7:30 P.M.**

**Motion: Paul Beaudin      Second: Jayne Ludwig      All in Favor: 4-0**

Respectfully submitted,

Wendy Tanner,  
Planning and Zoning Recorder

Date Approved: \_\_\_\_/\_\_\_\_/\_\_\_\_



Jonathan Ham, Chairman