

# ZONING BOARD OF APPEALS

January 8, 2007

## MINUTES

The Zoning Board of Appeals for the Town of Philipstown held a work session on Monday, January 8, 2007, at the Philipstown Town Hall, 238 Main Street, Cold Spring, New York. The work session was opened by Vincent Cestone, Chairman, at 7:30 p.m.

<b>PRESENT:</b>	Vincent Cestone	-	Chairman
	Lenny Lim	-	Member
	Bill Flaherty	-	Member
	Robert Dee	-	Member
	Paula Clair	-	Member
	Adam Rodd	-	Counsel

### ABSENT:

some business that we have here first so that these people don't have to sit through the entire public hearing. Jules Bass review for completeness to see if we can place it on the agenda. Have any of the members had a chance to review? I have reviewed it. I think it is complete. Is Mr. Bass here somewhere? Okay. It is complete and place it on, will we make the 22<sup>nd</sup>?

**Kim Shewmaker** - No

**Vincent Cestone** - So the first meeting in February.

**Kim Shewmaker** - February 5<sup>th</sup>

**Vincent Cestone** - February 5<sup>th</sup> okay. Review of minutes of November 20<sup>th</sup>. Any additions, corrections or deletions?

**Lenny Lim** - I have none

**Vincent Cestone** - I will make a motion

**Bill Flaherty** - I have just a very minor correction to make on the very first page and I want to correct one word. To read nonjudgmental rather than judgmental. Other than that I have no further

**Kim Shewmaker** - Who was speaking

**Bill Flaherty** - I am

**Vincent Cestone** - Okay. I will make a motion to accept the minutes as

**Bill Flaherty** - Second

**Vincent Cestone** - All those in favor of accepting the minutes say aye

**All Board Members** - Aye

**Vincent Cestone** - Opposed? Okay. Next item on the agenda I want to handle is the Bump resolution. Mr. Rodd if you would read the resolution into the minutes, we would appreciate it.

**Adam Rodd** - Mr. Chairman you want me to read the entire resolution?

**Vincent Cestone** - That's what we have done previously. Normally do we have to do that?

**Adam Rodd** - I don't think so. I think the resolution really needs just to be made available to anyone who wants to see it. I think it would be sufficient to read the decision as opposed to going through my recitation of the procedural history and the factors, but whatever the board prefers on that

**Vincent Cestone** - What's the boards' pleasure? The whole resolution or just the decision and conditions?

**Bill Flaherty** - Well I think we can abbreviate it by just going over the decision as opposed to reading the entire document in itself. It is rather time consuming and somewhat redundant. That's my opinion maybe other people

**Lenny Lim** - There is no legal reason to read the whole thing, I think we can encapsulate it

**Vincent Cestone** - Okay. Just the decision and the conditions

**Adam Rodd** - Sure. Decision on, the Decision part of the Decision of Findings and Fact on Bump reads as follows. Area variances are granted, pursuant to Section 267-(b)3, in order to permit the applicants to renovate and enlarge their existing home located at 10 Hudson River Lane for purposes of constructing a two-story single family dwelling, with insufficient side yard setbacks. In connection with the grant of this variance, the Board hereby imposes the following conditions: (a) the proposed new structure shall not exceed 35' feet in height; (b) the existing side yard set backs shall be maintained and not enlarged,

with a 7' foot set back from the north side of the dwelling, a 4' foot 9" inch set back from the north side of the chimney, and a 5' foot 3" inch set back from the south side of the dwelling; (c) the gross square footage of the proposed dwelling shall not exceed 2693' feet; (d) the proposed porches, on the east and west sides of the subject dwelling, shall be neither enclosed or heated; (e) no further modifications, enlargement, or reconfiguration of the proposed renovated dwelling, beyond that which has been granted herein, is authorized without Zoning Board approval.

**Vincent Cestone** - Can I just make a change to (a) in saying not to exceed a maximum height of 35' feet

**Adam Rodd** - Fine

**Vincent Cestone** - Okay. I will make a motion to accept the resolution as read. Do I have a second?

**Bill Flaherty** - I'll second

**Vincent Cestone** - All in favor?

**All Board Members** - Aye.

**Vincent Cestone** - Okay now we are going to do a straw poll vote. Lenny?

**Lenny Lim** - I'll vote in favor

**Bill Flaherty** - I vote in favor

**Vincent Cestone** - I will vote in favor. Bob?

**Robert Dee** - I don't have the information on it, so being the first meeting, I will have to abstain.

**Vincent Cestone** - Paula?

**Paula Clair** - I will have to defer to you as well. I guess I will vote in favor.

**Vincent Cestone** - Very good. The motion carries. All right now we move on to the public hearing of David Weinpahl. Is there someone to speak for the applicant?

**Robert Gaudio** - Hi.

**Vincent Cestone** - Tell us what you are here for. I am sure you have things prepared.

**Robert Gaudioso** - I have a ton of things

**Lenny Lim** - I'm sure

**Robert Gaudioso** - I ask for the Boards' patience to go through it. It is somewhat of a long story but I think if I explain it in order, I think it will make it a lot easier for both myself and the board members. I am Robert Gaudioso from the law firm of Snyder and Snyder

**Vincent Cestone** - As long as you don't become voluminous

**Robert Gaudioso** - I will not. I promise. I am from the law firm of Snyder and Snyder. I am here representing David Weinpahl who lives at 88 Foundry Pond Road and he is \_\_\_\_\_ by his neighbors who are in the audience this evening. We are challenging essentially the issuance of two building permits by the building inspector. And in conjunction with that an entire subdivision "as of right" process that went on before the issuance of these building permits. We did outline our position to the building inspector and I am not sure what the board has in the file or does not have in the file. I know there are some new board members. But essentially

**Vincent Cestone** - Can I just interrupt for one second I have to say something to Mr. Bump.

**Robert Gaudioso** - Sure

**Vincent Cestone** - You have to bring in your building plans for us to stamp and sign

**Jacob Bump** - Okay

**Vincent Cestone** - I didn't say that. I'm sorry.

**Jacob Bump** - Okay

**Vincent Cestone** - Sorry

**Robert Gaudioso** - Thank you. This outlines essentially the six points of why we are challenging the issuance of the building permits. And just briefly on those six points, first we believe that there are these existing non-conforming structures on the property that were recently moved and that were required under the code site plan approval. I will talk a little bit about that later. Also that the building permit application didn't show the slopes. The Class 2 and Class 3 slopes. And in fact one of the building permits is now being amended for impact on those slopes. Number 3 is that one of the lots has an old road. And this is going to become

very important later. And because of the existence of this old road, the square footage of that old road is taken out of the lot acreage calculation and therefore that lot is substandard. It is below the required 80,000 square feet. Fifth, there is also we believe a right of way that is not shown on the plans but that in fact does exist and again when I show you the maps, I'll explain it, on lots one and two which again I will show some maps

**Vincent Cestone** - Is that the right of way that the Village of Cold Spring uses?

**Robert Gaudio** - This is the right of way that the Village of Cold Spring has used and which we also believe is being set up to access a lot in the back, lot number 29. And I will show you that on the maps so it will become clear. And because of that, that triggered we believe subdivision approval under your own regulations as a provision that if you create a new right of way, it requires subdivision approval. And because of that right of way, also it comes out of the lot acreage again and those two lots we believe are also non-conforming. And finally, the storm water pollution prevention plan was not properly enacted, not properly putting in place and not properly or procedurally effectuated. So with that let me take a step back. Originally, there were three lots that the developer bought. And these three lots go back to a map from 1939 and I have a copy of that map here and what I have done is I have highlighted the three lots. And these three lots are part of a larger subdivision and these three lots are known and shown in \_\_\_\_\_. First there is the big lot. And that is known as the Club. See it labeled there as the club grounds? Highlighted in yellow.

**Lenny Lim** - Right

**Robert Gaudio** - And there is lot 29 and then there is lot 32. The developer bought these three lots. And if you notice in purple there is the outskirts which are known as the old road. The old road goes up to what is known as the upper dam. The Village of Cold Spring has two reservoirs, they have an upper dam and a lower dam and they use this old road and they have going back almost 100 years to get to the dam and to maintain it.

**Vincent Cestone** - Okay

**Robert Gaudio** - And as you look on the map in the bottom right hand corner it says that the club grounds are designated by the heavy black lines. And if you look at this map, the heavy black lines exclude this old road. So the developer bought these three lots and then he filed for a four lot subdivision with the Planning Board. This I apologize for, I only have one copy. They made an application to the Planning Board for a four lot subdivision and what he did was he took the outline there and he changed around the lots and proposed these four lots. What you have here to just to draw everyone in, this is the old road that was shown. As you see now the outline is on the outside of the old road. Okay? And then there is one lot here in the front, there is a lot in the back here, and he

proposed a common driveway to get to the lot back here. There is a lot over here and a lot over here, in an odd shape in order to meet all the bulk requirements. And just to get everyone a feel for the topography, I don't know if you've been out to the site, but there is a flat open field here. And this property was used as a camp ground and they have all these little outbuildings, these clubhouses around the camp grounds. And what he proposed to do was to divide this into a four lot subdivision. Take three lots and go to four lots. Well the CAC reviewed the application and they opposed it. They opposed it for a number of grounds. And this is all with the Planning Board. They opposed the number of lots, they said there should be three lots not four lots. They opposed it because of the tree removal and they opposed it because of the drainage issues that were going to be created. And the erosion control measures based on the drainage. It is a very steep winding road just to give you a background. It is a very small community, there are houses that are set back and well dispersed in this area and it is a very nice little portion of the town and that is why I think the residents care so much about it. And the CAC cared about it. Well the Town Planner also looked at it and the Town Planner also noted this old road. And he specifically indicated in his memo to the Planning Board how this old road was shown on the plan and he also indicated that the lots behind this old road would be land locked if it was no longer there. And that becomes very important to the Village of Cold Spring as we will get to. So the Planning Board had a number of issues and they held the matter over and they asked for a couple of things. One of which they asked for was a drainage report. And this was the developer's drainage report that he had submitted. Because again as you see on this map, this original subdivision map here, all of the shaded areas are the slopes, the sloped area. It is a very sloped property and drainage was a big issue. And the drainage report, and I highlighted some of the pertinent sections, but the drainage reports says because Foundry Pond Road has neither defined gutters or any drainage structures \_\_\_\_\_ there are existing drainage issues especially to the southwest. So they can see that there were drainage issues before this property was even developed. And what they proposed as part of the plan was a dry well and a pond, a retention pond. And they conceded in this report that I just handed to you that the pond wouldn't correct the quality of the water only the volume and the speed of which it would come off the property. So there were more drainage issues that were raised and the Planning Board was \_\_\_\_\_. So what happened next? The Planning Board asked the developer to go back and try some different plans and try some different layouts and the community objected to a number of lots and the developer withdrew the application. Everyone thought that this went away. But it didn't. What the developer did instead is he embarked on a multi-stage subdivision. Which he claims is permitted under the Zoning Code. And the Zoning Code has a number of exemptions from what requires a subdivision and what does not require a subdivision. One of which is changing lot lines is exempt. So what he did on the first sheet is he took the three lots and he transferred the ownerships of the lots and he redrew the lot lines. Now on the first page he redrew the lot lines to have two bigger lots in the back and to make the front lot, the club grounds, smaller.

And most importantly if you look along the top, he reallocated the old road to the back lot.

**Lenny Lim - Ah**

**Robert Gaudio** - Okay? Now according to the developer that is permitted under the code because it was a mere lot line change. So what he did was he made three bigger lots. And he took it a step further. If you flip the page, he took the club grounds which is now smaller under his first subdivision and subdivided it into two lots. Lots one and two. Again claiming that if a two lot subdivision in a residential zone on a town road which is permitted under the code as of right, that's the developer's argument. So now he went without going to the Planning Board and he ended up with four lots, which is what this map shows. It is very similar to this map if you look at it. You have one big lot over here which is lot 32, the one big lot in the back which is lot 29, and you have lots one and two. What you don't have is you don't have access to the flat area, lot 29. According to his map that is what he has eliminated and what he has done is that he has got access to this back road over the old old road and he has his lot frontage by going back here. That's how he does that now. Does anyone have any questions on this? It all makes sense? Well the Village of Cold Spring didn't agree. And they wrote a number of letters. And they have been writing letters for a couple of years. And this is, the latest letter I had until this evening and it makes it very clear and again I highlighted portions. And what they claim is they have access to the old road to get to the dam. And they talk about how they have accessed it over the years and they have gone up there with a cement truck and how that is very important for them to maintain the dam. What happened over the years is that this old road as you can see on the developer's map is very steep up in this portion. So what they did, with permission from the camp, is they came across the middle where it is flat and then picked up the old road from here and went up the rest of the way.

**Lenny Lim - How did they do that again?**

**Robert Gaudio** - They came across basically where the developer had proposed this common driveway to get to lot 29, they came across here and then picked up the old road and went upwards where it is a little bit flatter. Down here it is very steep to get to the road.

**Vincent Cestone - I can see by the lines.**

**Robert Gaudio** - The coloring is the different slopes under the town code. Greater than 25%, greater than 15%. It is my understanding the Village of Cold Spring, they just handed it to me, just obtained an opinion letter. That in fact their old road access dates back to the 1800's and that they still own the old road. Not that they own the old road. I miss-spoke. That they have access to the old road. And it really doesn't make a difference whether they only have access or whether

they have something more than that. Because the way the code reads if there is a right of way over a piece of property it comes out of the 80,000 square feet. So the developer had to show his plan with the property boundary going to the other side of the old road. The code changed during this process and it required the developer to submit a plat, and actual plat. And this is what he submitted for the plats one and two, which is essentially that second page that I handed out. This is just a little bit more detailed. And what you see here are lots one and two which is the old club grounds

### **Vincent Cestone - Right**

**Robert Gaudio** - And here is the line down the middle. What I highlighted in orange are the septic fields. Okay? And here is the road down the middle. And if you remember, last time he had lot 29 with an access drive right down across the flat part down to Foundry Pond Road, which made good sense, which is what the Planning Board asked him to do. Now they are not showing that. But curiously they cattycornered the septic field and this spot right through here is exactly 20 feet wide just as it was with the common driveway. And curiously there is no septic field there and as we all know you can't drive across a septic field. So why did they do that? Well it is our opinion that they did it because they know when they come to build lot 29 in the back, they don't want to go down the old road because it was very steep and because it has a terrible site line to Foundry Pond Road. They want to have a right of way across lot 1 and 2 just as they had proposed when they went to the Planning Board. But if they showed that as a right of way, that requires subdivision approval, when you show a new right of way. So we think they need subdivision approval for two reasons. Number one, they just annexed the old road and they didn't have right to and the Village of Cold Spring agrees with us. And because there is this implied right of way here which when you look at the map and you know the history and you know the water department used to come across here and you know the developer proposed coming across there to get to lot 29, and because when you look at the map the septic field is cattycornered and there is a 20 foot wide strip right there, it all adds up to a right of way. Any questions on that? Here are the code sections that we believe need enforcing and just one other point here, they add a note number 7 that says the existing buildings, remember these are those existing cottages which are non-conforming structures, says they will be removed, or moved or altered. They never agreed to remove them from the property. What they have actually done is they moved a number of them and put them in the area of the old road right on the property line which would not meet the setbacks. The zoning code thought of this, the zoning code has a section that talks about non-conforming structures and what it says is that sure you can go ahead and move those, you can alter them, you can amend them, and you deal with this all the time where you have people come in, but it says that it requires a planning board public hearing. Well they moved these accessory structures and they didn't go to the planning board for a public hearing. And yet building permits were issued. So we think the first issue here is that those



structures before they were moved, before moving those structures they have to go to the planning board for a public hearing. The second thing is part of the criteria for the planning board to allow you to move an accessory or non-conforming structure, that you put it in a place where it is less non-conforming. When you look at these maps, these are in the setback area. What they have done is they have moved all them into the setback area. So now they have moved them into a more non-conforming location.

**Lenny Lim** - Do you have a number of how many of them

**Robert Gaudio** - If you look here, there is one, two, three, four, five, six. Looking from the street they are all piled up here. These little tiny you know old campers type bungalows. That's what they look like. So we think they have violated this section of the code. The next section of the code that we think they have violated was what I discussed before. The Code says that any lot that is created has to meet the underlining lot requirements. The most important underlining lot requirement here is the lot area which is 80,000 square feet. But what the code says is that you don't count easements or rights of way in that 80,000 square feet. Now we have two of them here. We have clearly the old road, which they annexed into lot 29. And the Village of Cold Spring says no we still have a right of way over that old road

**Vincent Cestone** - How did they do this, was

**Robert Gaudio** - Magic. They wrote a letter and said that we did a title search and the title company says everything is great. We therefore, and the quote from Mr. Watson is that the old right of way was ineffective. I don't know what ineffective means. The Village of Cold Spring in their letter this evening clearly states that they never abandoned the old road. We did a foil request for the Town of Philipstown, there are no records of the old road being abandoned. Whatever the old road is, we know that it is a right of way for the Village of Cold Spring to get to the dam to keep the dam maintained and to get to the reservoir. So we know there is a right of way. So we know lot 29 if you take out the area of the old road comes up short of the 80,000 square feet. And remember that was the first domino in the line. That was the first lot line adjustment to make lot 29 in the back bigger by adding the old road. But they added it with land they didn't own.

**Vincent Cestone** - Who was the owner of the land?

**Robert Gaudio** - The Caucasian Society of the Allevery, I think was the name of it.

**Vincent Cestone** - And haven't they

**Robert Gaudio** - Well that's a great question and I am sorry to cut right in.

When they deeded the three lots to the developer, the developer came to the planning board and I showed you the letter from Tim Miller saying what about this old road. Well right around the same time, a year after the original conveyance of the three lots the Caucasian Society quit claim deed the old road to the developer. But even if they owned, even if it was an old road, the most that they could have owned was half way up the old road. And we have people here in the audience that own property adjacent to the old road. You never own the whole road. You own up to the center line of the road and that is what the Village of Cold Spring's letter says tonight in the second to last paragraph they make mention to that. The most they could have deeded over is half of the old road. And they claimed to quit claim deed anything they may have had in the old road, but again it doesn't matter who owns the old road because under your code a right of way is enough to take that lot area out of the calculation of 80,000 square feet. And the Village of Cold Spring has clearly said that they have a right of way across that property and we submitted those letters and they submitted another one tonight which is actually a legal opinion from their counsel. But there is also the second right of way, and it is not shown in their plan because again if they had shown it on their plan, they would have been out of luck. And here is the reason why. Under the subdivision regulations on top of page, and I didn't highlight, but one, two, three and four, okay? One, two and three are the reasons why they tried to pull off this double as of right subdivision. Number four is reiterated down in D and what it says is if you create a new right of way, technically it says, that if a division creating a resulting in a street, highway or easement or right of way for vehicular traffic as set forth in subdivision B of the definition of subdivision in 112-1 above. What that means is if you create a right of way, you have to go get subdivision approval. So if they had said that this was a right of way or an easement to get to lot 29, it would have triggered subdivision approval. It would have also if you take the 20 foot wide by this distance here which is shown on the maps 266.98 feet, and you do the math, these lots just barely make it as it is, you take out the right of way calculation under the section that I previously handed you, and then these two lots are non-conforming. So this subdivision, as of right subdivision, in the first domino that fell was incorrect. It made an assumption that they could take the old road and it made an assumption that that old road was going to give access to lot 29. It doesn't do either. The old road is still a right of way for the Village to get to the dam and it doesn't make sense not to have the right of way to lot 29 through the flat part of the property right down the middle. In fact their own plan clearly shows that. They didn't label it as such. I agree to that. That doesn't mean it is not there. Why do the residents care about this? It is a very small little community back in there and it is very well laid out. It is a very winding road, traffic is very difficult and they are not against the developer using his land and getting a reasonable return on his investment. But what he has done is he has bought three lots, he is magically turning it into four lots by taking over the right of way, the old road which we have access to, and because he hasn't followed the simplest planning guidelines of the Town Code. When he went to the planning board they were concerned about site lines. They were concerned about drainage. Their own

drainage report talked about a dry pond which hasn't been installed. Okay? There is run-off issues that his own drainage report concedes to. Okay? There are access issues. The Planning Board suggested a common driveway which has now gone out the window. It just hasn't gone under any type of review. While we believe the building permits didn't require a proper even simple stuff like an erosion control plan, they started construction and an erosion control plan wasn't installed. \_\_\_\_\_ claims that someone accidentally knocked it down. Maybe that's the case. Then they claimed, when we took the Board's advise and we knew it was a long time from November until now and we went to the Court and we got an injunction. Particularly on the second lot that hasn't started construction. And in those papers they said oh no no we followed the New York State storm water prevention plan and we submitted an erosion control plan to the Planning Board. But they didn't install it. Okay so then they went out and installed it and then said we followed all the regulations. That was in the middle of December. Well at the end of December New York State DEC disagreed with what they said in the litigation and the DEC issues a cease and desist order. It is not easy to get the DEC to issue a cease and desist order. Particularly at the holidays. First they disagreed with the developer. They said that the area of disturbance is more than one acre and therefore it triggered what is called a notice of intent. So they said that they complied with all the requirements and they didn't even do a simple notice of intent to the DEC that they were going to start this construction. So when you go to the page that I highlighted, it talks about some of things. It talks about the erosion sedimentation control that was, where it was installed. It talks about stockpiled soil that had no controls around it. It talked about evidence of cement washing of the soil stockpile area. Most importantly it talked about the construction entrance had not been stabilized in accordance with New York State standards for erosion and control and sedimentation control. So they had trucks going in and out doing this construction, rushing this construction before we were able to get the injunction and as the DEC inspector found, there were tire tracks up and down Foundry Pond Road. There are tire tracks up and down Foundry Pond Road, you can imagine what the erosion has been and what the potential is for storm drainage. There was no stabilization measures initialized in areas where no further disturbance is required. So what we are saying to the board, now we don't want the board to say that they can't develop their property that would be crazy. We want two things. We want the Planning Board to have a public hearing for relocating these cottages because we think it is a bad plan. But more importantly we think there should be a subdivision review. We think the Code requires a subdivision review because a new right of way has been created. At a minimum we also think that the building permits should be halted because the lots are substandard. Because of the existing right of way the Village of Cold Spring has clearly indicated they still use, they still need. They can't get to the property, as your own Town Planner pointed out without having this right of way to maintain the dam. The dam holds back the upper reservoir from the lower reservoir. And the client's property abuts the lower reservoir. That dam should ever fail, his property is completely washed out. So that's why we think it is important. I

would be happy to answer any questions. I apologize that I took so long but as you can see it was a story that was worth telling.

**Vincent Cestone** - Has the Village of Cold Spring filed litigation

**Robert Gaudio** - Not yet. And just to tell you a little bit about the litigation. We received a temporary restraining order initially from the Judge. The Judge took papers from both sides and in our reply because the developer had told us that he had already poured the foundation and had expended tremendous amounts of money on custom materials for the first house, we conceded the fact that the TRO could be lifted on the first house. But we wanted it on the second house so that that construction could not commence. And the Judge upheld the injunction pending this board's review. So quite frankly, this is what this board is, the zoning board of appeals. And as you see those sections of the code and it requires some interpretation and some review by the board. But we think it is pretty clear.

**Bill Flaherty** - Well I for one find this issue to be complicated and confusing and I don't there is any easy way that I can understand all that you just said. I think we reviewed the information that was given to us at the time that this meeting had taken place and I believe the conclusion that there appears to be the most \_\_\_\_\_ and innovated manipulation of property lines that I have ever encountered on this board. By using loop holes and finding gray areas in our zoning code to do what has been done. I don't like what I see to be perfectly honest with you. I think that these people have taken undo advantage of situations that develop as a result of some of the gray areas that we may have in our zoning laws and created four lots out of two. I was up there today and you mentioned the cottages. They are not inhabitable are they? You can't do anything, you can't live in those cottages

**Robert Gaudio** - I think that is why they are non-conforming. I think you are right. I don't think they are residences. I think they are cottages

**Bill Flaherty** - From what I saw those cottages where just moved up to an area and just put there. I don't think they were built specifically in that area

**Robert Gaudio** - They were not

**Bill Flaherty** - And I assume that who ever did this obviously had another plan in mind relative to those cottages. I mean, tear them down, burn them up, throw them away, I don't really know. But nevertheless, that is only one issue. Cold Spring, the Village of Cold Spring has a very serious issue here relative to obtaining egress and ingress to the water source. The old road, I had no evidence of seeing that old road up there today. I don't even know how to traverse it. I didn't know where it was.

**Robert Gaudio** - The bottom half when you come off is where they put some of those cottages we believe.

**Bill Flaherty** - Exactly. I saw those cottages.

**Robert Gaudio** - It is impossible to access it that's why we had no idea how they intend to access lot 29 other than to go across lots one and two.

**Bill Flaherty** - and that's all over grown. It is significantly over grown.

**Robert Gaudio** - But the village has used it, the bottom portion is significantly over grown because what they did is they cut across the flat portion at the permission of the camp and then picked up the old road somewhere in this area. And if you walk up in that area while it is over grown, it is accessible by construction vehicles. And that's what they've done.

**Bill Flaherty** - Now I saw two homes up there under construction I believe.

**Robert Gaudio** - The first home is under construction. The second one should not be because that's what we still have the injunction pending this board's decision on this application

**Bill Flaherty** - Okay. I didn't go in that clearly because I was trespassing on private land

**Robert Gaudio** - Allegedly

**Bill Flaherty** – Whatever. I was very careful about how went in there. But there was construction vehicles

**Robert Gaudio** - We don't concede that the building permit should have been issued on lot one, we still think that should be stayed because the lot is substandard. What we did concede to that we wouldn't go for the injunction permanently because so much money had been spent by the developer on that property. And that is just a matter of legal strategy for my client. It doesn't have anything to do with our position that that lot is substandard based on that right of way.

**Bill Flaherty** - Now of course Foundry Dam Road is a very steep difficult road to traverse under the best conditions. In the winter time, I know I used to jog up there and I had to give that route up because it is too much for me. I pulled back. I don't know how it would accommodate all of that traffic that would be necessitated during construction period and future development of that area.

**Robert Gaudio** - That was the Planning Board's exact point. That's why they asked for different configurations regarding the lay out of the access drives trying

to combine the driveways as opposed to having four separate driveways. At the developer's whim now because there is no, currently there is no process.

**Vincent Cestone** - About the old road. The old road, is there some deed that shows that this is a right of way? And who the owner is? How long it has been around?

**Robert Gaudio** - The best I have is the 1939 map which shows the old road. And it shows it clearly being separate from the club grounds which I handed up as one of the first maps. But the board's, the Village of Cold Spring's legal opinion letter cites the number of deeds and \_\_\_\_\_. This is Mr. Faust and he has property on the line and he has deeds showing where he abuts the old road and that there is rights to half way out as I previously suggested, which is the common methodology for ownership.

**Vincent Cestone** - This is Mr. Faust?

**Robert Gaudio** - Yes.

**Vincent Cestone** - Can you get copies for us

**Mr. Faust** – they have brought cement trucks in and they brought them up the back road or the old road to work on the dam for the last number of years.

**Robert Gaudio** - So the Village of Cold Spring cites other deeds going back to the 1800's but they also cite to the fact that if for some reason the old road didn't exist, they would have an easement by implication, or by necessity. They have to get up there. It is land locked as your own Town Planner pointed out. So they point out in their letter from today, their opinion letter there are deeds going back to 1843. And that's is maybe where some of the confusion is. A lot of times when you have a title report they go back 40 years, maybe 100 years. But the Cold Spring attorney is saying today is that he went back to the 1800's, the mid-1800's and they cite the deeds and the need to get up there.

**Vincent Cestone** - Any more questions from the board? Any comments from the audience? Stand up and introduce yourself.

**Bill Zutt** - You want me to address who I am?

**Vincent Cestone** - Yes

**Bill Zutt** - Bill Zutt. Attorney for Mr. and Mrs. Al DeVido. They are here tonight. They own the property. Also present tonight Glen Watson their surveyor, Margaret McManus and engineer with the firm of Badey and Watson. Good evening. With due respect to my colleague, much of what he told you though perhaps true is also irrelevant to the issue before your board right now. Let me

start with hand outs and I am not going to ask you to read them tonight because they are a little bit lengthy but I think they may shed a little bit different light on this application and thus far has been created to \_\_\_\_\_. I didn't know there were two new appointments and I have to apologize I am short one copy.

**Vincent Cestone** - Actually you should have one copy for the clerk and the attorney

**Bill Zutt** - Actually I should have a couple of extra copies. Actually Mr. Flaherty why don't I give you mine and I can always run off additional ones at my office.

**Bill Flaherty** - Thank you

**Bill Zutt** - You're welcome. Let's see now. What I would like to do right now is start off by reading from, can I borrow your copy? I want to go backwards if I could because the last topic touched on by Mr. Gaudioso had to do with the action which his client filed in Putnam County Supreme Court. And I would like to read the third to last paragraph from Judge O'Rourke's Decision.

**Lenny Lim** - What page

**Bill Zutt** - Page 7 Mr. Lim. And this was following the submission of lengthy documents including many of the affidavits which I just handed you. And this was a request made by Mr. Weinpahl through his counsel for a preliminary injunction preventing any further construction on either of the two lots in question. And after reading these papers, Judge O'Rourke declared as follows "after reading all the documents submitted, the Court finds the respondent Alfred DeVido Associates LLC, \_\_\_\_\_ Corporation and Ant Ant Corporation, those being the owners of the other two lots, have complied with all requirements for the building project. The preliminary injunction and temporary restraining order issued herein is vacated as to lot number one, that was the lot under construction. Now there is a reason why the Judge ruled as he did. He had an opportunity to review many of the materials that you are being asked to review and that I will give you along the way here. But the point is is that the story here doesn't begin with an application to the planning board. The story here begins with what after that. An effort was made to gain Planning Board approval for a subdivision and was abandoned. The only reason there was an application made to the Planning Board was because the original project proposal contemplated the creation of a shared driveway to service two of the lots. Am I correct? Two of the lots, thank you. That circumstance and that circumstance alone drives the need for planning board approval, as you all know Philipstown unlike many communities does not require planning board approval for each and every subdivision. Only for certain categories of subdivisions including those that create new access, new rights of way for access, subdivisions in commercial and industrial zones and subdivisions of more than three lots, none of which apply here. Having encountered, I am being very candid now, having encountered the

resistance that he did before the planning board, Mr. DeVido reviewed his circumstances and reviewed his holdings and decided that there was more than one way to skin a cat. I use the word loosely. Your zoning code, actually you land use regulations allow an adjustment of boundaries between parcels. And that is exactly what he did initially. And I am going to hand out some drawings, these I have enough copies of, I will walk you through them. The first one is the original holding. And the "old road" about which so much has been said which I will comment on in a minute appears along the upper portion of the site where I am indicating with my finger. The second sheet shows the same land but with a series of contemplated boundary line adjustments. That is the different coloring scheme that you see. The third sheet shows the completed boundary line adjustments. As you can see there are still three lots. On the fourth sheet it shows a new subdivision of the yellow lot at the bottom. Now all of this, I should say none of this involved a creation of any new rights of way. None of this triggered any of the thresholds for which planning board subdivision approval is required. The one circumstance that has been cited as the basis to finding these actions illegal is the inclusion of the acreage represented by the old road along the northerly boundary of that property. Now obtainment of the old road was not done by magic as it has been suggested. It was done by a deed. A traditional deed. And the deed alone might give rise to some question as to ownership and or rights of use so \_\_\_\_\_ title insurance was obtained with respect to the entire assemblage that you have before you. That alone Mr. Gaudioso correctly points out ownership all by itself does not necessarily exclude the possibility of third party use on a portion of that land by a right of way. The title policy, I will give a copy to your counsel, specifically includes the following at the foot of the description "policy ensures that there are no enforceable rights of other to use the old road as shown on the subdivision maps where same crosses the premises described above." So we now have a policy of \_\_\_\_\_ Title Insurance under a deed which includes affirmative insurance against the exercise of the third party rights over the old road.

**Vincent Cestone** - Can I just ask you a question

**Bill Zutt** – Sure

**Vincent Cestone** - Mr. Gaudioso made a valid point that the right of ways are deducted from the total square footage

**Bill Zutt** - Don't disagree

**Vincent Cestone** - And you are getting access to the lot 29 through a common right of way between lot one and lot two

**Bill Zutt** - No. That is incorrect. You are probably thinking in terms of a subdivision plat. That is not the access



**Vincent Cestone** - Then how are you getting access to lot 29?

**Bill Zutt** - By direct access to Foundry Pond Road. If you go to, Mr. Chairman if you go to the fourth sheet

**Vincent Cestone** - This one

**Bill Zutt** - That's it. We have direct frontage on

**Lenny Lim** - That is the old road?

**Bill Zutt** - That is part of the old road correct

**Lenny Lim** - Which part

**Bill Zutt** - The part shown on the map

**Lenny Lim** - No. you said it is part of the old road. Is it the lower part?

**Bill Zutt** - Well if I can indicate for you Mr. Lim with my pen. Let me see if I can help you out here.

**Lenny Lim** - This is the old road isn't it

**Bill Zutt** - The area described as the old road on the old 1939 Alaverty map basically runs along the northerly perimeter of the property. You know by the way I should mention just as an aside, there is not one but two old roads on the old Alaverty map. One of which runs through Mr. Weinpahl's property, that hasn't been mentioned. Not that that necessarily bears on this decision but you should know that.

**Lenny Lim** - This is the old road

**Bill Zutt** - Right. Now ownership of all of that was conveyed to Mr. and Mrs. DeVido and has been insured to them in fee and also insured against the exercise of any third party rights. So there is no right of way burdening if you will. There is no burdening right of way over their property at this point

**Vincent Cestone** - So you are saying that the right of way has been abandoned

**Bill Zutt** - First of all abandonment is probably not the right description. I would say that the, that whatever rights previously existed have been extinguished in so far as they affect lots, the old Alaverty club ground and lot 29. Because there is a portion of the old...

**(Turning Tape Over....may have lost some dialogue)**

**Bill Zutt** - ...northerly portion of the DeVido property. And so what we have here is a bundle of real property rights which others may dispute. Mr. Gaudio's client may dispute it, the Village of Cold Spring may dispute it, but I don't believe with all due respect that the zoning board of appeals has the legal jurisdiction to adjudicate a civil real property rights dispute. And to this point in time no party has stepped forward and challenged by law, by an action of law the rights that Mr. DeVido has had conveyed to him

**Vincent Cestone** - Explain to me why the road that Cold Spring uses to get to the dam that goes through lot one and two is not a right of way?

**Bill Zutt** - Okay

**Vincent Cestone** - How come that is not a right of way

**Bill Zutt** - It is not a right of way. Let me put it in another way. I can't prove a negative. If you listen and Mr. Gaudio was very careful in his choice of words, he referred to a right of way between two lots that don't exist. He referred to it in speculative terms. He described it as probably what was intended. Okay? That subdivision plat was never approved, never filed, and isn't being pursued

**Vincent Cestone** - What I am saying is that the Village of Cold Spring has been using that as a right of way for a period of time

**Bill Zutt** - With the consent of the prior owner and they acknowledge that fact

**Vincent Cestone** - Okay

**Bill Zutt** - With the consent. Now when you cross the land of another with the consent of another person that does not give rise to any legal rights. I can allow you to cross my lot to enter your garage if you wanted to and if you have my consent to do it, you can do it for 100 years it wouldn't give rise to any rights. And the Village of Cold Spring acknowledges that the Allevery Society has allowed the Village to cross its property by consent. So no rights have arisen. And let me go back to the principle point here, and that is this, third parties can step up and challenge someone's real property rights. I am not ruling out the possibility that the Village of Cold Spring or some third party might come forward with an action in Supreme Court and say no your title company is wrong. Mr. DeVido, you don't have the rights you think you have. But that is not the role of the zoning board with due respect. I think that once we demonstrated how ownership, particularly when it has been insured in this fashion, it seems to me the zoning board of appeals more or less has to take that as an accepted fact and circumstance and deal with the issues before them accordingly.

**Vincent Cestone** - What's going on with the cottages that have been moved?

**Bill Zutt** - I'm glad you mentioned that. The section of the code, I really am. I'm not being factious

**Vincent Cestone** - Oh yeah

**Bill Zutt** - I really mean it

**Vincent Cestone** - Okay

**Bill Zutt** - Because I had to look at that as part of the lawsuit

**Vincent Cestone** - Okay

**Bill Zutt** - There is a section of the code that was quote has to do with I believe with non-conforming uses. And what it says in substance, and I think Mr. Monroe maybe able to validate this for me, is that if you have a nonconforming use of a site and you wish to relocate one of the structures within which that nonconforming use is being conducted, you need to get permission from the planning board. Either the planning board or zoning board of appeals I forgotten which one. Now the bungalows, the old bungalows to which Mr. Lim made reference, as you know I am sure, are very very old and will either be removed or demolished. If they remain on the site, they are likely to be employed as a storage building or accessory building for one of the residence built there. But there is absolutely no intent to reuse those structures as residences or in any other fashion incompatible with the single family use

**Vincent Cestone** - So what you are saying is is that these structures are either going to be removed or moved into conformance as a storage building

**Bill Zutt** - Correct. As a matter of fact that notation appears on the file subdivision plat I believe

**Lenny Lim** - Have they been moved already

**Bill Zutt** - Oh yes. They had to be. They had to be. They were physically

**Lenny Lim** - Are they pre-existing non-conforming, they are all pre-existing non-conforming

**Bill Zutt** - I am sure they were but there is no effort being made here to retain those structures in any residential capacity

**Vincent Cestone** - But still, you can't go out of conformance for your convenience. And that is what you are doing

**Bill Zutt** - Well I think, maybe I should let Mr. DeVido answer this question, but from my conversations with him what I gathered is they were scattered throughout the site and had been previously used as a summer camp

**Vincent Cestone** - Then you should have demolished them and removed them immediately. Right?

**Bill Zutt** - That may very well be as it winds up. But my recollection of the code section that you are referring to, and oh by the way, that circumstance even if my reading of the code is incorrect, I don't think it would in any way invalidate the building permits. Which is what you are being asked to do here. You are asked to pull a couple of building permits which we think were lawfully issued. For that matter so does Judge O'Rourke. But I am not going to rely on his ruling after all you are the zoning board. But there is one other point that, well several others I made a few notes here, so far as the notice of violation through the DEC, we acknowledge that had it not been remedied it would not necessarily invalidate the building permits but turns out that a notice of intent which is required with the storm water regulations was in fact subsequently filed by the engineer. And I believe the DEC violation has been remedied. My engineer doesn't know, I sure don't know. But in any case that does not invalidate the building process. What you have before you here is an attempt, I don't mean this in any critical way, but an attempt to construct an argument with regard to the validity or invalidity of building permits based on circumstances largely outside the jurisdiction of the zoning board. And that leads to one other point that I want to make and this is a very technical one and I mentioned it in a memorandum. Oddly enough the way the town board wrote the zoning code, they give the zoning board power to vary and review the provisions of this chapter. Chapter 175 which is the zoning code. What is in issue here isn't chapter 175 but the subdivision regulations which is chapter 112. And I looked through chapter 112 to try and find some delegation of authority to the zoning board to review decisions under chapter 112 and the only one I could find had to do with approval for access. Where an application is made to the planning board for access to a lot and the planning board denies it. The zoning board can overrule the planning board. But that is the only one I could find. And so it appears that the town board for whatever reason never gave the zoning board the legal power to review determinations of the building inspector under the subdivision regulations. I mentioned that at the beginning of my memo. But to the extent that you feel you have the power and want to proceed to make a determination, there is no invalidity in terms of what was done here. We were compliant and by the way no, I think Mr. Flaherty used the term loop holes or \_\_\_\_\_, there really isn't any. If you take the time to read the code sections, there really really isn't any. 112-1 defines what a subdivision is and more importantly what it isn't. And this is in the isn't category. And the only reason an application was made to the planning board as I said in the beginning was an attempt to create a shared driveway and when so much resistance was encountered at the planning board, Mr. DeVido wisely stepped back and said is there another way? And sure enough there was.

**Vincent Cestone** - I am going to let the residences speak, if any residences

**Bill Zutt** - There are a couple of other points that I have Mr. Chairman and I don't want to miss them. Class 2 and 3 slopes that were required to be shown I think in Court papers we acknowledged that there was a modification to the plot plan that resulted in a minor encouraging into one of those two slope categories which has since been corrected. Help me out here Ms. McManus

**Margaret McManus** - Yes it was corrected

**Bill Zutt** - Okay.

**Paula Clair** - Can I ask a question?

**Vincent Cestone** - Go right ahead

**Paula Clair** - I wanted to know, Mr. Weinpahl's attorney had mentioned that there were erosion issues that were of concern and I wanted to know what your client has done to address those issues.

**Bill Zutt** - As I understand it the erosion, there is an erosion control plan on the two plot plans for the two houses for which permits were issued. And that the erosion control plan called for as in fact been installed. Mr. DeVido is that correct?

**Mr. DeVido** - I'm sorry I didn't hear the question.

**Bill Zutt** - The question from the young lady was concerning erosion control measures

**Paula Clair** - Yeah, what kind of erosion control measures have you taken since that was decided as problematic?

**Mr. DeVido** - Yes they have, furthermore we have been working with Roger, the Highway Superintendent, and we have in fact improved the drainage along the road with Roger's collaboration.

**Robert Gaudioso** - There are two issues on erosion control. The first is an erosion and sediment control plan during construction. They claim they submitted that to the building inspector but the fact is they started construction, they poured a foundation, they tracked trucks in and out of there before ever installing it. And then they went back after we caught them and installed it. And in their papers to the court they said they complied with all the regulations in their affidavits and then the DEC went out and said by the way what you told the court wasn't true, you didn't comply with all the regulations. Oops we missed that one

too. The second part is even more important. That is the erosion control measures after all this impervious surface is put on these properties. And in the site plan, in the subdivision application they had a drainage report that talked about dry ponds and measures to tie into the system. And I don't think that's been done and I don't think that's been contemplated on the latest plan. So you have the during construction, it wasn't installed and they got caught and they installed it. They said they did it all correctly and they got caught again. And they got a violation for it. Then there is the second issue which is the planning board with good planning practices talked about erosion control measures and site and run off during the winter and people out running and driving and that has not gone under planning board review and in fact I don't see it on the plan that they submitted as the subdivision. So there are two issues here.

**Bill Zutt** - The individual plat plans, stop me if I am wrong Ms. McManus the engineer, do they not contain erosion control plan or no

**Margaret McManus** - You are correct. There are two issues. Issue during construction which is

**Vincent Cestone** - Introduce yourself please

**Margaret McManus** - Margaret McManus from Badey and Watson. During construction which is what is in place now. They put of silt fence, there is stabilized control entrance which is riff raff so that the construction vehicles only enter the site from one place and don't track mud back on to the Town Highway. The areas that have been disturbed along the edge of the road have been seeded and mulched, which considering that it is January, we are lucky that we are having warm weather and that grass will probably be stabilized. The second issue is post construction. Now during the planning board process we did create this drainage report. Now the drainage report since this is a very small subdivision that impacts less than five acres it does not require from New York State DEC any measures of post development mitigation of cleaning the water or holding back the water. During the planning board process we submitted the report which \_\_\_\_\_ before the fencing about the drainage issues that this is a low density subdivision that disturbs less than 5 acres of land, it is located in the highest reaches of both the defined drainage basin and the disturbance is generally on gentle slopes. The increase in the volume of water leaving the site is not significant during even the 100 year storm. There is, this is at the peak of the drainage basin so the water that is shedding off here is at the beginning of the run so to speak. The, most of your issues where you would have problems would be at the bottom of the drainage basin where you already have over burden from everything that is coming from the drainage basin. So we are at the top of the drainage basin and we have very little run off and with even the increase in the impervious area we still have very little run off. The drainage issues that exist on Foundry Pond Road existed before this property was developed. It is because it is a windy town road that doesn't have existing

drainage.

**Lenny Lim** - Hold on. Hold on. You are saying to me that the drainage from this will not impact anything further down? I don't quite understand what you are saying.

**Margaret McManus** - Okay. The drainage, the existing run off from this area is very small. It is lets say 6 CFS. So 6 cubic feet per second

**Lenny Lim** - Let's go back to when there are houses on there

**Margaret McManus** - Yeah. It goes from 6.19 to 6.25

**Lenny Lim** - And that is not going to affect something further down the road? All this drainage coming off?

**Margaret McManus** - Minimally. Minimally. There is very little impact from this

**Lenny Lim** - So you are not going to control that drainage at all?

**Margaret McManus** - During the subdivision process we were asked

**Lenny Lim** - After the building are in. How do you deal with the drainage?

**Margaret McManus** - Well all the roofs are going into dry wells. The roof leaders will go into dry wells which will mitigate any of the increase in impervious surface from the roofs.

**Lenny Lim** - How about the driveways?

**Vincent Cestone** - And the trees that are gone

**Lenny Lim** - I am just trying to figure out what you are going to do with the drainage once the houses are in

**Margaret McManus** - Your subdivision is not a subdivision that goes before the planning board.

**Lenny Lim** - This isn't the planning board. I want to know where the drainage go when all the houses are in. It just falls down in to the road and

**Margaret McManus** - Exactly where it went before is where it is going to go now.

**Lenny Lim** - Okay

**Robert Gaudio** - That is exactly the reason why we want the planning board

to simply take a look at this. I will touch on those other issues in a second but while we are on this issue, they were forced to do a drainage report and they first conceded there was a problem and they second proposed a think a dry pond, I could be wrong about that.

**Lenny Lim** - Let her finish her presentation

**Margaret McManus** - Okay. The problem isn't with the subdivision. The problem is with the town road. The existing drainage issues are not Mr. DeVido's drainage issues. The existing drainage issues are the Town of Philipstown's drainage issues.

**Vincent Cestone** - We are not going to debate that issue. Okay? You know you have your opinion, Mr. Gaudioso has an opinion, the zoning board will have their opinion

**Bill Zutt** - I just wanted to make the point that I don't have an opinion on the storm water at all because I am not qualified but I will say is that I don't think it is a dispositive issue or even a relevant issue with regard to the legality of the subdivision itself and the building permits. And again, I respectfully submit to the zoning board

**Lenny Lim** - Are you saying that I don't have a legal right to ask this question

**Bill Zutt** - I didn't say that at all Mr. Lim. I respect your legal right to ask any question at all

**Lenny Lim** - Then what are you saying

**Bill Zutt** - I am trying to keep the discussion focused on what I believe, respectfully, to be the issues before your board and within the prevue of your board. If there is some element of the building permit process having to do with subdivision, having to do with the dimension of the lumber being used to frame, okay, those are legitimate inquiries for the public authorities to look at. For Mr. Monroe to look at. And if it being the DEC or anybody else that is interested. And if they are violated, we need to remediate. But they don't bear on the issue of the legality of the lot itself which with all due respect is what you are being asked to review. That's all I am saying

**Vincent Cestone** – okay

**Bill Zutt** - And I believe I have run out of materials.

**Vincent Cestone** - With that I am going to open up questions to the residents. Sir, stand up and introduce yourself.



**Richard Curals(?)** - Thank you. My name is Richard Curals(?), I reside at 10 Foundry Pond Road. Which is east of the subject properties down a very steep road that Mr. Flaherty used to jog up. And I am glad that you stopped jogging up there because after this project is built you will probably be run over by one of the cars coming out of a blind driveway where it is going to be built. It is a very dangerous road, a very difficult road and this development is really going to make it much more difficult. I am, because of where I am located which is down the steep slope, I am very very concerned not just about the nature of this development with the first house being built much too close to the road and how it is going to change the nature of the community but I am personally very concerned about the water run off issue. And I don't know, I am not an engineer, I don't know about 6.14 versus 6.5, I don't know what that's about but I do know that if you take this property at the top, at the terrace or plateau of this road and strip off the trees which is what four houses, you have to strip out a lot of trees. Except for the open area this is other wise very heavily wooded. There is going to be increased run off. And in particular I will point to the much discussed old road which the old road as I understand it is going to become the driveway for the back lot. I may be looking at this map incorrectly.

**Lenny Lim** - You're right

**Richard Curals(?)** - But it is going to become the driveway for the back lot. And that driveway is going to be simply a river of water flowing down Foundry Pond Road which is all ready a road that is under a great deal of strain from water run off. And during the planning board process, Highway Superintendent Roger Chirico spoke about that and expressed a great deal of concern about the damage that was going to take place with that road. Not just for the road but to the houses on the road as well as Barrett Pond which is already under a great deal of stress. And if you know Barrett Pond over the last couple of years it started to fill in with silt coming down from Foundry Pond Road. We are going to add to that the run off from the old much debated old road. It is just going to be a river coming down on to my property, \_\_\_\_\_ property, and all the way down Foundry Pond Road. So that is my personal rave concern about this project. One of the questions that I as I am listening to these two explanations of the property lines and the easements, etc., one question I have is where are we right now? Right now it seems that Mr. DeVido has claimed the old road, which the Town says that it has access to in order to repair the dam. And that the Town has no rights according to the title company and according to Mr. DeVido. No rights at all to use the old road. And also has no rights to go across the property that it has been using for the last several years, the flat area. So where are we right now? We are in a situation where the Town because of Mr. DeVido's actions has no ability to maintain the dam. There is something wrong here and maybe this is part of the magic, black magic if you will, that has taken away the community's ability to access the dam. I mean that is a very very dangerous situation. And I haven't heard the explanation of how do we wind up well we had

the old road, the Town has no rights to that, the Town has no rights to come across the property, the Town has no rights at all. And I haven't seen the latest Town letter but I suspect that is why the Town is concerned. That is a really bad situation. And whatever the magic is that is taking place here, something is wrong about it if that is what we are left with. And I think Mr. DeVido who I have gone his website and I have seen about how he proudly proclaims that he is an environmentally friendly developer who builds houses deep in the woods. Well that's not what he is doing here. We know, you saw the foundation for the new house, it is right on the road. It is not deep in the woods. And this is a developer who has, who was told by the planning board here is what you should do to control run off, to control traffic, to be a sound developer and he just ignored it. He did more than ignore it. He snubbed his nose at the community. He is not a community friendly developer. We have a temporary restraining order and then after the temporary restraining order was issued, he continued with construction for a few days. Oh, I didn't get a copy of it. I had a copy of it. He's still building. Then the DEC comes in and the DEC says cease and desist. He is still building. Oh I didn't get a copy of it. I had a copy of it and it wasn't even addressed to me. Why did I have a copy and knew he should stop building. He is not a community friendly developer. And the zoning board should be very aware of that, very cautious. Thank you.

**Vincent Cestone** - Someone else wish to speak? Stand up and introduce yourself.

**Al Serack(?)** - My name is Al Serack(?) 15 Foundry Pond Road. I live between Mr. Curals(?) and the \_\_\_\_\_ property. I have two cut outs to contain water which in the past has been a particular problem coming off the top of that hill. With the building of the last brand new home which is I believe is 58, the Uribe property

**Lesli Uribe** - 57

**Al Serack(?)** - 57, excuse me. There is more water coming on to my property that is spilling on to a vacant property that spills around. So my two cut outs on my own property are now being flooded. With the addition of four homes, which in fact was relayed by \_\_\_\_\_ to someone on the road that there would only be two homes. So you can imagine now what would happen with four homes coming down the road on to my property and Mr. Curals(?). If someone were to take a look there are literally cut offs as you are driving down Foundry Pond Road on the left hand side. They were filled in by Roger Chirico to prevent flooding on Mr. Curals(?). That has not been addressed.

**Vincent Cestone** - Someone else wish to speak? Sir. Introduce yourself.

**Ronald Kahn** - Ronald Kahn, \_\_\_\_\_ right behind the property towards the west right on the Foundry Pond. The development as planned is just not friendly

with the environment and the neighborhood and it just doesn't fit in. As Charles said, it is just not friendly. It is just cramming in as many houses as you can get on a piece of property to make back his money and it is not as Charles said, friendly to the neighborhood. I don't want to repeat the other things about the water but that is really the major thing. And also the traffic. When you have one driveway going on to Foundry Pond instead of four, or whatever how many he has, it will be a very dangerous area coming up the hill making the turn and there are four driveways right after each other. And I think that is a real problem especially in bad weather. Thank you.

**Vincent Cestone** - Someone else wish to speak? Ma'am please introduce yourself.

**Karen Dunn** - Karen Dunn. I am a Trustee from the Village of Cold Spring. I brought the letter over tonight. Could somebody tell me exactly what or show me on a map where the Village's access is to the dam? I know that in recent years, quite a number of years, the Village has been using with the permission of the previous owner the flat area because it was easier for access but if I read that letter correctly, we do have historical access and historical access from a municipality is extraordinarily important to get to their water supply and to maintain a dam which if it fails is not going to affect just the Village of Cold Spring but it will affect a number of the people in the Town of Philipstown. Is there any access to the Village shown on the map?

**Vincent Cestone** - You mean if construction proceeds?

**Karen Dunn** - Yes

**Vincent Cestone** - Mr. Zutt?

**Bill Zutt** - If you will step up I will show you.

**Karen Dunn** - Sure thing

**Bill Zutt** - This is the old Allevery map. This is where everything started. And I had another copy with me. If I may can I address my comments to Ms. Dunn?

**Vincent Cestone** - Go right ahead

**Bill Zutt** - This is Foundry Pond Road right here. This is the old Allevery club grounds. These two lots and this were acquired by Mr. DeVido and in a subsequent deed conveyed this piece to him. So his ownership runs something like this all the way around here. The old map shows what is labeled as two old roads. One here and one here. If we, the argument is that the Village has a deeded access of some kind to the dam, it could be over one or the other of either of these roads. Without a survey we can't really know for sure.

**Karen Dunn** - Okay. But my understanding is and I know this seems to be a question here. Lets just say it goes over one. Which one? How do we get there? We need to be assured that we can get there

**Vincent Cestone** - You need to be guaranteed

**Karen Dunn** - We need a guarantee and that is what the Village is extraordinarily concerned about. I don't know if it was you Mr. Zutt or who asked whether Cold Spring had started litigation. We don't want to litigate. But if we have to we will because we need to protect the dam.

**Bill Zutt** - Can I repeat the answer

**Vincent Cestone** - Can I just ask a question

**Bill Zutt** - For the benefit of the board members

**Vincent Cestone** - Would you please. I want to ask you a question

**Bill Zutt** - Sure

**Vincent Cestone** - Have you been granted a driveway permit for lot 29

**Bill Zutt** - I don't believe one has been applied for

**Vincent Cestone** - Okay.

**Bill Zutt** - Has a driveway permit been applied for on lot 29

**Vincent Cestone** - So you are going to come around through that flagpole, that thing proposed. What if the town doesn't grant you a driveway permit? How do you get access to lot 29 if they don't grant you a driveway permit?

**Bill Zutt** - That would be a problem

**Vincent Cestone** - And?

**Bill Zutt** - But again Mr. Chairman with all due respect,

**Vincent Cestone** - Can you answer the question

**Bill Zutt** - I don't know. The same remedy that any property owner would have who applies for a driveway permit and is denied. You come in with a driveway permit application and an improvement plan. Which is dictated largely by the terrain and the location with slope and grade of the driveway. And you bring in

an improvement plan and either it is acceptable or it is not acceptable. If it is not, you try to work through to an acceptable conclusion. And if you are denied, your ultimate remedy is to challenge the administrative action in court. I am not suggesting that is going to be done here. We are so far up field, with due respect, what is the issue here

**Vincent Cestone** - The issue, well let me tell you what my thinking is. Okay. This is a what if. You get denied access to a driveway permit on the flag that you have created. What do you do

**Bill Zutt** - On which

**Vincent Cestone** - On the flag that you did to come out to the main road. The little thing that you created

**Bill Zutt** - On the fourth sheet

**Vincent Cestone** - On lot 29 here. You are denied access through here.

**Bill Zutt** - Right

**Vincent Cestone** - This is a what if. May or may not happen. What are your remedies? You need to sue the Town or you can come to the zoning board and ask for a variance to cut through lots 1 and 2. And then we are back to where we started from. And you don't have lots that are of the right size. And what do we do about that? You see where I am heading with this?

**Bill Zutt** - I think you are putting up what an old professor of mine used to call the march of the judicial horrors. What you do is take a piece of legislation and push it to its logical extreme and then say it is no good. All right? The issue before your Board Mr. Chairman with all due respect is whether or not my client broke the law. And he didn't. I demonstrated that. It is entirely possible and I will be the first one to concede, that he may find himself in the very situation you described. I don't concede that. In which case he will have a problem. But you know what, that's his problem. That's his problem. This is the direction in which he has chosen to go. And he is a big boy. He understands that. Now I did want to get back if I could because I know there was some interest in the part of the other board members

**Vincent Cestone** - Before you

**Bill Zutt** - The question that Ms. Dunn had

**Vincent Cestone** - Okay

**Bill Zutt** - And it seems to me, and I saw some interest on this gentleman's part

**Robert Dee** - This whole thing is very interesting in all honesty but it can't be digested in five minutes.

**Bill Zutt** - No it can't. This is the old Allevery map and the property that was acquired by Mr. DeVido is this area generally here. And the additional deed conveyed this area here. So the sheets that I have shown you embrace all of this here. And as you can see there are two roads on the old map other than Foundry Pond Road. This old road here and what is labeled as an old road here. DeVido now owns all of this and it has been insured against any third party rights. I have no idea who owns this portion here. I believe that this is Faust Court although I am not certain. But it certainly provides an access to the reservoir and to the dam every bit as much as this old road here. So it is not as if the Village is without access by any means.

**Robert Gaudioso** - Can we respond to that point.

**Vincent Cestone** - Let me just ask the representative of Cold Spring. Is there a reason why you don't use that other road?

**Karen Dunn** - The one, the old road that, the one that goes around

**Robert Gaudioso** - No. You have been coming up this way and going across to the dam that way. Now there is a road right here that does the same thing. Is there a reason? Do you know if there is a reason?

**Karen Dunn** - I don't know. I honestly don't know. And I believe the information that was faxed over by the title search people that we used today indicates that we, the Village, has I believe some sort of a historical title on one of these roads. I don't know which one. But if it is, this is my question, if it is over any of the property in question today, as a zoning board I would think it would affect what you would be able to say yes or no to. I don't know. As I said, my concern as a representative of Cold Spring is that we are guaranteed access to that dam. Okay? thank you.

**Vincent Cestone** - Mr. Gaudioso you were saying something

**Robert Gaudioso** - Yes there are a number of residents here that can dispel the theory of the second old roads. There are reasons no one has used that old road. I don't think it's relevant because the relevance which we will get back to later is whether there is an old road on the developer's property. I think that is all that is relevant for you. But it is worth hearing the explanation why that second road

**Vincent Cestone** - Yeah because

**Adam Rodd** - Can I ask one question with respect to the Village of Cold Spring's what has been referred to as the right of way. Is the issue as to whether that right of way is enforceable or exists now pending before any Court?

**Robert Gaudio** - No I think that is, I think you hit the nail on the head with that. That is not pending any place because their own surveyor showed it as an old road on the map. That the material in front of the zoning board, the zoning board does not have to adjudicate that point. And until Mr. DeVido comes to the Court and tries to get a way to extinguish the Village's right of way, it is there. It has always been there. It is shown on their own survey. He says its been extinguished. Where was it extinguished? The Court has not extinguished it. The Village has not extinguished it. The Town has not extinguished it. So the record before the board is simply that there is a right of way. And if they believe it has been extinguished, the burden is on them to take it off their property. Their own surveyor showed it exists.

**Adam Rodd** - I understand their position, I don't mean to paraphrase you, your position is that in fact it is property that was deeded

**Bill Zutt** - Absolutely

**Adam Rodd** - To your client and it is not in fact a right of way.

**Bill Zutt** - That's correct

**Adam Rodd** - Or an enforceable easement of access

**Bill Zutt** - Wait wait, I'm sorry. Go ahead

**Adam Rodd** - So we have a conflict as to the legal status of this right of way.

**Bill Zutt** - Here's the problem. We got the deed. We've got title insurance. Other folks are saying

**Vincent Cestone** - Title companies have been noted to be wrong.

**Bill Zutt** - With all due respect Mr. Chairman it is up to the folks who claim it is wrong to make their case in the proper form. And not before the zoning board of appeals. If somebody wants to say the Village has rights that are not being respected by DeVido, then you know what, then they have a right to buy a ticket to Carmel and file an action in Supreme Court. But right now today, a legal survey of this property, correct me if I am wrong Mr. Watson, would embrace all the lands conveyed to Mr. DeVido including the acreage embraced by the old road and that is free and clear of any third party rights. We can do no more and I don't suggest with all due respect neither could any of you with your own property, than what was done by DeVido in terms of this acreage

**Robert Gaudio** - Let me, I have to respond

**Vincent Cestone** - One last point and then I am going to ask questions of the residents and the board and then we are going to continue this on to the 29<sup>th</sup>.

**Robert Gaudio** - Thank you. They submitted a map. He claims that they went to the original subdivision because they wanted to do a double driveway. I have the original map here. It shows four driveways. Then he said that they have title insurance. I completely agree with you. Title company, they haven't even provided a title policy, they provided the insurance one page endorsement. That is worthless. Title companies are always wrong. The surveyor showed it as an old road. The Village claims they have access to it and they provided citations to the deeds. You have testimony here this evening saying that that old road has been used historically and as recently as about a year ago. He counters with well we have a survey. But the surveyor's own note says on right on it that the property may be affected by instruments which may not have been provided to these surveyors. Users of this map should verify title with a competent title examiners. So what you have is, I think we have an overwhelming weight of evidence that there is this right of way. But I am not asking you to decide that. I am not asking you to be a Court. I am not asking you to judicate the matter. I am not asking you to decide the Planning Board issues or Court issues. I am asking you to simply determine two sections of the code. The first section is the one that I handed up and it says that if you move these cottages, you have to go to the planning board for a public hearing. And it was by convenience. Because when you look at the map the cottages are in the same exact spot that he is building the first house. So it is clearly by convenience you are absolutely right. And the second section of the zoning code not the subdivision regulations, which clearly says that you have to take rights of way out of the lot acreage. It is not a subdivision issue. That is a lot acreage issue. That is under the zoning code. And you also have authority under the subdivision regulations pursuant to New York State Law, that's besides the point. You don't have to act like a court. You don't have to interpret the subdivision regulations. You don't have to do planning. All you have to do is look at the two sections of the zoning code and send it to the planning board for a thorough review. If they disagree, or if they believe that that old road has been "extinguished", then the burden should be on them to prove that it has been extinguished. Not by a third party title company. They should go to Court. That shouldn't be on the Village's dime to go to Court to prove something they've had since the 1800's and that testimony shows that they used it as recently as last year. That burden should be on the developer. That's all I have to add Chairman. Thank you.

**Bill Zutt** - I have to respond to that.

**Vincent Cestone** - No you don't



**Bill Zutt** - Mr. Chairman there are two things

**Vincent Cestone** - I'm sorry

**Bill Zutt** - I need to make

**Vincent Cestone** - No

**Bill Zutt** - Will get an opportunity later

**Vincent Cestone** - Yes you will. Anyone in the audience wish to speak? Sir please stand up

**Neighbor ??** - \_\_\_\_\_ and I live on Highland Road and \_\_\_\_\_ sometimes it seems like the legal language and technical language miss the point. For example the engineer said the run off is actually the Town problem. It doesn't matter how much more water, or how many more trees come down, for those of us who live up there know how much sediment, stones and everything else wash down on those roads, Barrett Pond Road and Hustis Road from there. It is a school bus road. And then the legal things, the legal matters. Hey, access to the dam, no access to the dam. And they kind of dismiss it. But it does, this thing will have an affect on those of use who live up there and there is a much larger developer in the area that paid a lot of attention to these kind of issues to see where people can circumvent the existing laws. Thank you.

**Vincent Cestone** - Any other resident wish to speak? Ma'am

**Eileen Rockhardt** - Eileen Rockhardt, Garrison. Not anywhere from here. If there are steep slopes o the property doesn't that automatically give you the authority to have discretion on any subdivisions or developments? I'm not sure how it works

**Vincent Cestone** - That is one of the things I am going to be looking at. Anyone else wish to speak? Sir?

**John Faust** - John Faust again. The old road that he mentions, two old roads. One which became Faust Court evidently was never developed. It was never used because there were trees there. The other old road that comes up the back side of my property through the Caucasian Allevery Society was always used. So it is like, it has been used, it was used. That's why, the only other personal thing that I have to say is that they don't seem to care about anybody. They don't care about the Town. They don't care about the neighbors. They just don't care. That's the water supply for our Town.

**Vincent Cestone** - Anyone else wish to speak? Anyone from the board have

any questions?

**Bill Zutt** - You said I could

**Vincent Cestone** - You can wait. After the board finishes its questions. Does the board have any questions?

**Lenny Lim** - I have a lot of reading to do.

**Vincent Cestone** - Now it is your nickel.

**Bill Zutt** - Mr. Gaudio said look at this map it shows the right of way. Well it ought to. It was made before the deed conveying the old road to DeVido. The date on this is July 2004

**Vincent Cestone** - So you are saying that this is a right of way which has been extinguished?

**Bill Zutt** - I am saying that Mr. Watson mapped what was shown on the old Allevery subdivision plat. It is July 2004. Unless I am mistaken the deed to DeVido of the old road postdates this. Am I correct

**Glennon Watson** - Yes

**Bill Zutt** - So as a result, this map was superceded. It is old news. The second point I want to make goes to having ownership. If I came before you tonight with an application for a variance for a setback for a deck, you would want to see my deed. That is your right. That is my obligation. I give you my deed. Here it is. My neighbor stands up and says no he doesn't own it. Now am I obligated to go to Carmel to get a court order to say oh yes he does? I don't think so. But that is \_\_\_\_\_ what this applicant is saying **(Fire Department Alarms going off in background...hard to hear conversation)**. We've given it to you. We've got title insurance **(CANNOT HEAR)**

**Vincent Cestone** - That might be it (referring to the alarm)

**Bill Zutt** - You've just been given this description and the endorsement page to the title policy. I would be happy to provide the entire policy. But specifically as I said earlier it insures against the exercise of any third party rights over the premises being conveyed. There can be no stronger documentary evidence of legal ownership clear of third party rights than this

**Vincent Cestone** - This is only an insurance policy.

**Adam Rodd** - Aside from the characterization it doesn't determine the Court issue as to whether there is an enforceable easement or not.

**Bill Zutt** - But from my perspective it doesn't. I am not disagreeing with counsel. The fact is that right now all you have before you is evidence of ownership free of any third party rights. Now if there is a third party, and I am repeating myself but I have to apparently, if there is a third party out there who says you're wrong,

**Vincent Cestone** - You are repeating yourself. Can you get to the point

**Bill Zutt** - Okay. Then they've got the remedy. The remedy is Supreme Court. The remedy is an action in Supreme Court. The remedy is not to come before you and say it ain't so. That's my point. Thank you.

**Vincent Cestone** - This will be carried on to the 29<sup>th</sup>.

**Paula Clair** - Can I just ask one question

**Vincent Cestone** - Sure

**Paula Clair** - The lot 29 which is the lot which is in dispute, that was purchased as a lot initially

**Bill Zutt** - If you go back to the first page

**Paula Clair** - Right. At that time, it doesn't, it looks smaller on the first page

**Bill Zutt** - It should

**Paula Clair** - Okay

**Bill Zutt** - The boundaries were adjusted between the three lots

**Paula Clair** - Alright

**(Putting in new tape...may have lost some dialogue)**

**Bill Zutt** - ...the point is this. The purchase of this land was made in the context of a known set of rules and regulations. And so when one goes in and buys land they look at it in the context of what the subdivision laws and the zoning laws say.

**Paula Clair** - Okay. So it was bought I guess with the idea of perhaps it could be supplemented

**Bill Zutt** - Oh sure. Right. And the lines can be moved as I said and the code allows that

**Paula Clair** - Okay. And so the old road that we are talking about, without that old road it doesn't have enough land to build on right?

**Bill Zutt** - Mathematically I believe that is true. Am I right Glen?

**Glennon Watson** - That is correct

**Paula Clair** - Is there any excess land

**Bill Zutt** - Something extra we can move around to make up for it? Not that I know of.

**Paula Clair** - All right. Okay. So that is all I really wanted

**Vincent Cestone** - With that,

**Neighbor ?** - Mr. Chairman, a question

**Vincent Cestone** - One quickly

**Neighbor ?** - Yes very quickly. Tonight is an example of why I love this community. I love this community because \_\_\_ exactly the right questions. Mr. Chairman when you focused on what is going to happen when they don't get the back door driveway and they come back and ask for a right of way across, you got it exactly. You nailed it. And I just think this community is terrific. And to protect our rights and you guys are great. Thank you so much.

**Vincent Cestone** - With that we are continued on for the 29<sup>th</sup>. There is a lot of reading for us to do.

**(Everyone talking at once)**

**Vincent Cestone** - People can we take it out side. There is still a meeting.

**(everyone talking)**

**Paula Clair** - Are we adjourned?

**(everyone talking)**

**Vincent Cestone** - old business and then we are going to adjourn

**(everyone talking)**

**Vincent Cestone** - I entertain a motion to close

**Lenny Lim - Second**

**Vincent Cestone - All in favor**

**All Board Members - aye**

**NOTE:** These Minutes were prepared for the Zoning Board of Appeals and are subject to review, comment, emendation and approval thereupon.

**DATE APPROVED:** 1/29/08

Respectfully submitted,

Kim Shewmaker  
Secretary