Town of Chebeague Island
Public Hearing of the Board of Selectmen
Thursday, February 12, 2009 at 5:30 PM
at the Chebeague Recreation Center
Re: Frey Appeal of Code Enforcement Officer’s Decision
Town of Chebeague Island
Public Hearing of the Board of Selectmen
February 12, 2009 @ 5:30PM
Chebeague Island Recreation Center
382 North Road, Chebeague Island, ME 04017

Meeting called to order at 5:35PM.

In attendance from the Town of Chebeague Island: Mark Dyer, Chairman of the Board of Selectmen, Herb Maine, Vice-Chair, Leon Hamilton, Donna Damon, Christopher Rich, Susan Campbell, Town Clerk, Paul White Code Enforcement Officer, and Trish McAllister, Town Attorney.

Public in attendance: David Stevens, Schuyler Grant, Ernest Burgess, Donna Colbeth, and Jane Frizzell.

Mark Dyer, Chair introduced Board of Selectmen, Town Clerk, Code Enforcement Officer and Town Attorney. Also introduced was Russell Martin from the Department of Health and Human Services, Maine Center of Disease Control and Prevention, State of Maine.

Amy Visentin, Esq. from Drummond Woodsum introduced herself as the Attorney representing Edwin & Helen Frey. Also, introduced was Albert Frick from Albert Frick Associates, Inc. as the Soil Scientist and Site Evaluator, Consultant representing Edwin & Helen Frey.

Mark Dyer suggested to the Board of Selectmen to consider an Executive Session for no more than a ten (10) minutes to receive legal advisement from our Counsel.
Mark Dyer requested motion to enter into Executive Session.
Leon Hamilton moved for the Board of Selectmen and Trish McAllister, Town Attorney enter into Executive Session to discuss 405.(6) (E) Title 1 of the Maine Revised Statutes.
Donna Damon second.
Vote: Unanimous. Board of Selectmen and Counsel entered into Executive Session.
The Board of Selectmen and Trish McAllister, attorney entered into Executive Session @ 5:37PM.
Mark Dyer requested motion to exit Executive Session.
Leon Hamilton moved for the Board of Selectmen and Trish McAllister, attorney to exit from Executive Session @ 5:50PM.
Donna Damon second.
Vote: Unanimous.
Mark Dyer stated that this is the first appeal hearing of this kind for the new Town of Chebeague Island. We have reviewed the law on how to run this type of hearing. We will be proceeding with this hearing as an appellant hearing.

Mark Dyer referred and read the hearing procedure that would be followed (exhibit attached):
- State the Nature of the Case
- Jurisdiction
- Standing
- Parties to the Action
- Testimony

Mark Dyer asked if all were in agreement.
- Amy Visentin agreed.
- Albert Frick agreed.
- Russell Martin agreed.
- Trish McAllister agreed.
- Board of Selectmen agreed.

Mark Dyer started by discussing the Nature of the Case. The Board of Selectmen for the Town of Chebeague Island has been requested to hear an appeal of a denial of an application for a first time subsurface waste water disposal system. It is the responsibility of the Board of Selectmen to determine if the Town’s Local Plumbing Inspector denied the application in accordance with Maine State law and the Department of Human Services. The options for the Board of Selectmen is to uphold the denial of the Local Plumbing Inspector, reverse the decision of the Local Plumbing Inspector or suggest a continuance at a later date to be determined.

Jurisdiction:
The of the Board of Selectmen is to review requests or denial of requests for a first time subsurface waste water disposal system is established in 10.144 Code of Maine rules Section 241 Chapter 19 Section 190.2.1.

Standing:
Mark Dyer asked the applicant to state their standing. Amy Visentin, Esq. introduced herself as the Representative for the Frey’s (appellant). Amy Visentin stated she had forwarded a copy of the Deed to the Town’s Counsel and can produce a copy if the Board wishes, but that has not been an issue.

Parties to the action:
The parties to the action are Edwin and Helen Frey (Appellants) and the entity hearing the appeal Town of Chebeague Island and it Code Enforcement Representatives.

Testimony:
Mark Dyer asked Amy Visentin if she would like to start the testimony. Amy Visentin stated, yes. Amy Visentin stated her name and that she was the representative for the Frey’s in the appeal of denial of the permit. This is a long story and I know you are all aware of the situation. Amy emphasized that 1) the lot is grandfathered lot of record and is exempt from the Maine lot size law 20,000 square foot lot size and 2) the lot is 16,500 square feet which is under the minimum lot size. Amy advised that this is not the first time the Frey’ asked for this variance and permit. It was previously granted in 2006 for a variety of reasons it was close to expiring and wanted to extend the variance and permit, it did expire and they had to reapply and sc this is not really a first time application. Amy stated that it has a requisite and was previously approved by the State, keeping those issues in mind I will move ahead.

The grounds for appeal are and actually can be found in a letter sent to you from Gary Vogel dated December 12th. Amy stated that Gary Vogel was unable to attend the meeting tonight and stated she is the representative for the Frey’s, but the grounds for the appeal are in that letter. Amy asked to enter the letter and exhibits be entered into record and would like to note that the materials that was sent to you and I may be referring to them this evening. Amy also considers them part of the record as well.
The grounds for appeals are misapplication of the rules. First, we believe a proper reading of the Maine subsurface waste water disposal rules would allow a variance to be issued on this property.

The second ground for appeal is that the revocation of the Department’s earlier decision about the ability to issue is improper under its own rules. I will discuss that later. The third ground for appeal is possibly the decision that’s gone away there were some substations there are some questioning of certain factual issues, if those remain questions than those are still grounds for appeal, but I think have been cleared up. The impact of this decision was that the Frey’s property was rendered virtually worthless. What they thought was a buildable lot, a grandfathered lot, that they thought they were going to put a septic system and build and due to this decision the lot is unbuildable and there is a potential here that if this decision is up held that their property, they would be denied the economically viable use of their property and that is important because as you know the theory behind grandfathering lots is to avoid having to have regulatory taking and so this is a especially important decision with respect to a grandfathered lot. We are going to ask the Town to reverse the Local Plumbing Inspectors decision and allow a variance and permit to be issued based on the application they submitted. This is a very long story and there are a lot of facts involved the whole thing goes back to 1999. What I would like to do this evening, by the way Helen would have loved to come, but is in Florida. Her daughter Elizabeth was going to come, but when the weather looked like it was going to be bad, she cancelled. Amy was asked to read the letter and I will provide copies (see attached exhibit). Amy asked Albert Frick to talk about the technical, permit and administrative summary he has put together. What this does is to lay out step by step what has been done and said over the years. This summary puts everything into sequence. Please keep in mind that I counted seven (7) times up through 2008 the Department could have said, no way that a variance or permit will be issued, it’s too small. That did not happen; this went on from 1999 to 2008. There were seven (7) opportunities to stop this. As late as April 11th is was still okay. Then in August a letter came in from an attorney and after that there were still two more opportunities, still two more correspondences from the Department where they could have this will not happen, but they didn’t. They stated you better hurry up and build. There were two more of those and it wasn’t really until October 22, 2008 that a decision came out that said, no this is never going to happen.

Albert Frick stated his name and stated he was a representative for the Frey’s. Albert advised that he designed the system. What was handed out is a large packet, but two and a half pages is the summary and behind that are the references to the letters that I site and the subject. What I want to do is to go through the technical and Administrative side of this. The Selectmen do not get exposed to this side of the permitting all that often basically it’s so that you understand how we got to this position. On October 15, 1999 the Frey’s wanted to pursue the development, they hired Don Newbury to do a soil test. Mr. Newbury found it unacceptable due to a high water table, presence of a water table less than fifteen (15) inches and reported it as such. You have copies in your packet. The Frey’s on October 29, 2002, went to seek a second opinion and to engineer an approved drainage and to get a permit. They contacted me on that date for a second opinion. I came to the property for the very first time on December 5, 2002 and did an independent soil review, concurred with Mr. Newburg’s results that the water table was less than fifteen (15) inches and was unsuitable for the plumbing codes. The Frey’s asked, what are the options to go forward to make it a buildable lot. Albert stated that there is no public sewer in the Town so that option was not available; overboard discharge is no longer available to discharge with a sand filter. Suggested a easement onto abutting properties which she pursued and found out that was not possible. The last option was to install a curtain drain, do artificial drainage and monitor the results to see if it was found to be successful. They evaluated that option and chose to go with it. We proceeded with that course. You cannot just proceed with that, you have to notify the Department of Health Engineering and they have to preapprove the concept. On March 17, 2003 I contacted the State Site Evaluator who reviewed the site. He gave a letter to approve the drainage program on December 27th, 2004. The curtain drain was installed monitoring wells, monitoring wells were put in and Carol White a Geologist on the island was contracted to do the monitoring of the project. She did this during the spring of 2005. Carols report is in the record. That happened to be the wettest spring on record and she talks about this in her record. We submitted the results of her findings on August 8, 2005 to the Department. On January 31, 2006 the DEP accepts the ground water results and recommends that the Frey’s property be eligible for a groundwater variance. In Helen Frey’s letter this was referred to as Ken Stratton’s comments. In May, Bill Longley came to inspect the property and looked at all the procedures, specification and gave report on May 30th. We submitted a new system variance July 6th, 2006 to August 3rd, 2006. Russell Martin approved the plan on August 3rd, 2006. Then
again there were some minor changes that Bill Longley requested and once again Russell Martin reapproved the
application on September 13th. Bill Shane the Town Manager emailed me on December 1st, 2006 clarifying the
right of way for Armitage Road. April 11th Doug Coombs emailed me to authorizing the transferring of the permit
to a new applicant. Then on August 1st, 2008 David Stevens’s attorney submitted a letter challenging the status of
the permit. Then on August 13th 2008 Doug Coombs called me and informed me that the Frey’s abutter is
challenging the approval and he recommends that we get started with the construction of the system prior to its
expiration date. August 3rd, 2008 I called Russ Martin about the challenge and Russell Martin advises me with three
(3) options which are in my letter of September 12th, 2008. Then October 22nd, 2008 Doug Coombs reports on his
site review that he did with Paul White on October 17th, 2008. He declares the original approval erroneous. I do
have a letter in the file October 24th, 2008. I objected that the Frey’s were not invited to that field review or their
consultants to review or be part of the discussion. On November 7th, 2008 Paul White issues a report rejecting the
permit application in the attached letter. I have a response in there on December 3rd, responding to Paul’s three
(3) issues for reasons for rejecting the permit. The last correspondence I have is January 6th, 2009; Doug Coombs
issues his final report on the appeal letter and States position. The septic system is as explained had been
approved and it is state of the art. It has a septic tank an advance waste water treatment system that will purify
the water, a pump and its pumps it up to four (4) rows of Elgin in drains. There is a substantial amount of fill that’s
brought in to meet the standards of the code. When you use an advanced waste water treatment system you can
generally down size or reduce the foot print of the leach bed. This is not being reduced all it is being designed
for full flows plus it has an advance waste water treatment system. It is basically state of the art as far as
treatment is concerned. It has been reviewed thoroughly by the State, Russ Martin, Jay Hardcastle, Ken Stratton,
Doug Coombs, Jen Sanborn, Bill Longley, Dick Peterson, and William Shane. Everybody can see there is pages of
review comments of dates that scrutinized the plan and met the standards until that critical time, basically Paul
Whites tenor and the attorneys letter tend to, something happened where the permit was not reissued.

Amy Visinten stated she was going to talk about the legal issues a little more. I will gloss over some of these things
and explain them the best I can. If there are questions either right away or later we can go into more detail. I
would like to outline the legal issues that are coming up. I mentioned earlier, this is a grandfathered lot of record
and under the Maine lot size law Section 4807DB the property is exempt. The property is exempt from the
minimum lot size law because it was shown on a plan that was before recorded before 1970. The lot is shown on a
map recorded from 1898, the lot was not contiguous with the property that was conveyed from the father because
it was across the private way of Armitage Road and if we want to go into those details later we can. My
explanation right now is that the lot is a grandfathered lot of record and exempt from the minimum lot size law.
That’s really important because since the minimum lots size law does not apply, that’s why we are talking to you
know. If the minimum lot size law was in effect for this lot the Department would be required to review this
variance, but since it is exempt the Town has the authority or the Town’s Local Plumbing Inspector under the
subsurface waste water disposal rules the Town gets this opportunity to make this decision. I’m going to talk about
the minimum lot size law even though it’s exempt it is important to understand that the minimum lost size law
which requires the lot to be 20,000 square feet it does have a provision that allows for development of undersize
lots. This is under size lot and another lot that is undersize would be treated as follows: Under 4708B the Local
Plumbing Inspector can grant a permit for development of a first time system, as long as a variance is not required.
If a variance is required than the Department needs to review it. What it says and I refer you to a letter, what that
does approval of the Department of Health & Human Services a lot that does not meet the criteria listed in
Subsection 1 maybe used for a subsurface waste disposal if it is in compliance of the rules regarding it and the
Department approves it in writing. The Departments rules currently say under Table 1500.4 less than 20,000
square feet not allowed. This is what is called a catch twenty-two. The laws says if it needs a variance the
Department can issue the variance according to the rules, but then the Department rules say that you cannot issue
a variance if it’s under 20,000 square feet. It contradicts itself and so the rules have been designed in conflict with
the Statute, everyone knows that the Department cannot do that. At the time Ken Stratton recognized this. He
recognized that know wait a second, you can develop on the lot that is undersized, you can’t have a table not
allowing development on a lot that is undersized and that is why he issued the letter January 2006 saying that is
not appropriate, not allowed as an appropriate so use zero and go ahead and do your analyses. The Table 1900, I
think what we will do is reserve talking about the development of that as I expect the Department in it’s
presentation will talk about that and we will rebut it, so I will reserve some background that AI can provide on
what was meant by that table and why it said not permitted in the first place and we will get to that a little bit later, but the point is the minimum lot size law does anticipate that the Department should be able to issue a variance on a lot smaller than 20,000 square feet. We don’t, the minimum lot size doesn’t apply to this lot so the Local Plumbing Inspector gets to make that decision, but surely the Local Plumbing Inspector can’t really make a decision that contradicts what the law allows, so this is kind of pretzely and it’s hard to follow, but the bottom line is that this is a grandfathered lot it can’t be looked at and development can’t be mixed just for the sake of the fact that it is under 20,000 square feet and this is what is being done here, so with that you may have to come back and review some of this because it’s a little tangled, but that’s the situation. It’s a catch twenty-two in the minimum lot law this is a grandfathered lot fortunately the Town in this situation has the opportunity to look at this and realize that it has the right to grant a variance and go ahead and do it. So, I’m going to assume just for the moment that the Department was wrong in the first place should have never issued the variance of 2006, mistake, well the Department may revoke a decision under it’s rule 101.5 they can change their mind and say nope we are wrong, but they can only do that, they can only do that if there was wrong information given to them or if the Department didn’t follow the it’s proper procedure. There was no wrong information given to the Department and there is no one is saying that there was. The Department followed it’s procedure, so really the Department even if it made a mistake and we do not think it made a mistake, so even if it did make a mistake it can’t change it’s mind know and the property owner has relied on that and it’s taken away five (5) years of her time and effort and stress and money and that’s not right. So, I know that some of this law is convoluted and I know it’s some what unclear and I think that all of us have to put aside our personal feelings about whether or not some one should be able to develop on a tiny little lot. Sometimes people don’t want to see that happen, but at the same time decisions have to be made based on the law on what’s allowed and what’s not allowed and we found and we’ve heard that Helen Frey and Al Frick put together a system that is not going to endanger the health and safety of anybody it’s a state of the art system, yes it an undersized lot, but it’s a grandfathered lot, so there’s really not reason that it can’t be developed provided that it meets all the other requirements and it has, you’ll see and hear that it jumped through all the hoops. They are not asking that the rules be changed and they have a substandard system. They’ve got a good system its state of the art. They did everything they were ask, so it’s only right to give them the use of their property to do otherwise would make the lot unbuildable and what are you going to do with that little piece of property that you can’t develop. So, I’m going to ask you to reverse the Local Plumbing Inspectors decision. They’ve been through an ordeal we think that the variance can issue properly under the law. The Department can’t change it’s mind and you have the authority to do it and we ask it. Thanks.

Mark Dyer asked the Selectmen if they have any questions of Amy or Al who have just presented on behalf of the Frey’s.

Leon Hamilton, Amy I’ve heard your mention a number of times that this is in fact that this is a grandfathered lot. Do we have any kind of letter or documentation stating that it is a grandfathered lot any kind of documentation that’s it’s grandfathered from the point requirements of the table requirements of 1900.4? Amy stated, this isn’t a legal opinion because it comes from Ken Stratton, he mentions that it is a grandfathered lot. Leon Hamilton asked who grandfathered the lot and does it specify that it’s was grandfathered from the requirements of Table 1900.4. Amy stated that Table 1900.4 doesn’t talk about grandfathered lots at all. There is no reference. Albert Frick stated that a copy was in the packet I handed to you. If you turn back to August 3rd, 2006 when Russell Martin signed the application there is the table that you speak of first time system variance requests and the points were sixty-five (65) and on the second page Russell Martin signs (for use by Department only). The Department has reviewed the variance and does give its approval, August 3rd, 2006. Leon Hamilton, there isn’t a letter? Amy no, no there is not a letter. That is a legal determination and I will show you and your counsel will be able to advised you as well. I can show you why we think it’s grandfathered. Trish you can advise them. Trish stated, yes. I (Amy) sent you the materials and the conversation there was not an issue whether it was grandfathered or not. I can explain why it’s grandfathered. This is the plan that was recorded in 1898. The Pleasant View Park, it shows a whole bunch of lots and it shows this Armitage Street coming through here, as a paper street this is all Leonard’s property; they had all of this that’s not in green. This is Helen Frey’s property. She got three lots and a subdivision; they combined three lots and gave her this one that totals 16,500 square feet. I’m going to read to you the provision of the. Leon Hamilton, not to interrupt you, but normally if a lot is grandfathered who would grandfather it. Would it be the Town, State or who would grandfather it and if so wouldn’t there be some kind of legal letter from the Town or State or who ever does it. Al Frick stated that any lot that was in existence as of
January 1970 per the minimum lot size lot and stands alone is a grandfathered lot. Leon Hamilton, there must be something that says that some, where that states that. Al Frick stated a title search. Amy Visinten stated that the title shows it was a lot of record prior to 1970 than it is a grandfathered lot. There is not document that is issued that says by anyone that says this is a grandfathered lot, it just gets that characteristic by virtue of the fact that it existed before 1970. I was going for the provision that stated that prior to 1970. The thing that is a little bit tricky was this is a piece that came off Leonard’s property and it’s not contiguous because it is across the way, other wise it wouldn’t be grandfathered, but it is grandfathered.

Paul White asked to be noticed by the Chair. Mark Dyer advised Paul White the go ahead to speak. Paul White stated that maybe he could shed a little light on the term. It’s basically a term defined in the ordinance. It’s basically it is a lot of record for a non-conforming lot of record because it is not an acre and a half. The Town of Chebeague Island a minimum lot size if an acre and a half. So, it is a non-conforming lot of record. The term grandfathered is a slang term for it. There is disputing at all that this was a deed that this was created in 1898 on this plan and it is considered a lot of record. Don’t confuse it with a minimum lot size law, when I speak that I’m going to talk about. More to the point is that Amy needs to answer this question, what you asked, was how does it deal with the point system? How is a lot of record exempt from the point system? That’s what he asked you. Amy stated, well the thing is that the grandfathered lot cannot be removed from the point system just by virtue of the fact it’s undersized because yes, the lot is exempt from the minimum lost size law, but if one is looking to figure out how a variance may issue, or how zoning or permitting law how those can issue, it still has to be considered under those rules. So, by writing the rules to exclude arbitrarily under no circumstances can a lot under 20,000 square feet be issued a variance it’s not acceptable because an under size lot that’s grandfathered has to have the opportunity to be developed, yes it has to meet all the other rules but it can’t be excluded by the virtue of the fact that it is undersized. Al Frick, to answer that the Department of Human Resources is the ones that interpret their rules, that’s the Table 1900 is in their rule and Ken Stratton, we asked him on January 31st, 2006, he writes in that third paragraph for the purpose for determining the points for the issuance of a variance I recommend you use twelve (12) inches from the depth of the ground water and use zero points from the sides of the property. Again, the lot is grandfathered so not permitted end quote, not seeing the results, the determination I agree with your value of other categories, so the Department of Human Services is charged to review their table tells us to use zero points because in his opinion it was consistent with what Amy was explaining that the not permitted was inappropriate and back many years ago I work at the Division of Health Engineering with the original table the variance table came to be and before that there was no objectivity to the variance. It was basically, I call it a queen for the day I don’t know if you go back far enough, people would come in with a sob story and literally people would come in kids and sit down in front of the Director and they had camped out on the lot and they would have to do something and that’s how it was decided. So, it’s perceived a little subjective so the Department came up with minimum, came up with this table trying to assign points to objectify how this is reviewed and gave credit for the size of the lot, the bigger the lot the more points because you had more room to work with, the more fill you brought in the higher the points, the grade and design conservative greater points at that time 20,000 square feet not permitted lined up with the minimum lot size way to long. You could not create; again this is for new systems and there was no way you could create a new lot under State law under 20,000 square feet and get a permit so the table was structured and that was prior to 1985 when I worked there and that was developed and that is why we are in the situation we are in today. If that ground water monitoring had been another three (3) inches. This is the wettest spring on record and we droppped it to twelve (12) inches not fifteen (15) but in fact the curtain drain and dropped it another three (3) inches we would not be around this table today. There would be no variance needed and we would be good to go and the house would be built. Ken Stratton looked at the totality how good the current drain performed during the wettest year on record saw this in his review this seems inappropriate, and I needed some kind of interpretation and advice according to go with the first system variance application. That’s the crutch of the matter that you are hearing tonight. Amy that was the point that he made what’s behind table that’s what I was referring to and we will get to it later. So, I wanted him to be sure to make that explanation about were that number came from on Table 1900.
Donna Damon, just for the record. I was a Councilor for the Town of Cumberland when this first came to the Town. At that time I walked this property with the Steven's, Grant's & Frey's and talked to all of them about the road and basically that's were I did some research and I did not receive pay, regarding Armitage Road for the Frey's. Trying to figure out the status of the road and that road is registered in the Registry of Deeds and this was done and then extended in the late ninety's, done first in the eighty's and or in the ninety's as part of the paper streets program and that is still a pending road just for clarification and I wanted a full disclosure and to explain that and another thing I have a question, looking at these maps and I know that some of these have had houses and systems on them for a long time, but it would appear that are under 20,000 square feet that already have houses on them within that same facility, I guess my question is what would happen if one of the hose houses had a system that failed. Paul White advised it would fail under a replacement rules. So they would still be able to replace them. Paul White, that's the difference between a new system and a replacement system. Donna, the other question is with the abutters, I am looking at this plan and in some cases these abutter, the area says the top of the bank and the right of ways are still part of the original subdivisions, how does that work into the square footage when you're figuring. We are looking at the lots, right? I just wanted to clarify in it my own mind. Mark Dyer asked Donna if she was finished. Donna stated, yes for now.

Herb Maine, I also have a disclaimer. Carol White is my spouse and since her name has been mentioned several times. Her part in this was pretty natural in this. I have a couple questions for Mr. Rick. You talked about the options in 2002 and the curtain drain being the only viable option. I wanted to ask a couple of questions about that. Does the curtain drain still remain the only viable waste water system option for this lot? I said there were two what I think are viable (noise covered comment) for a sewer in that area. Right now as it stands it is the only legal option to look at for a system to dispose of waste water. Would you describe the variance that is being asked for in detail under the first time grant? Al Frick advised that there are two standards in the State of Maine and the State of Maine uses right or wrongly uses the plumbing code as a land use tool and it says if your within the Shoreland Zoning which is two-hundred-fifty (250) feet from the high water mark you have to have at least fifteen inches of suitable soil and they define that as soil, fifteen (15) inches between the bottom of the organic material as a limiting factor and that could be bedrock, a seasonal high ground water table. Herb, native soil? Al Frick, yes native soil and if you have that then you can approve it, that's not enough to build a system but you have to have at least amount you can bring in more materials and meet the standards of the rules. If your out side the Shoreland Zoning greater than two-hundred-fifty (250) feet, your only need twelve (12) it's reduced to twelve (12) so that the nuance here that it is this is within the Shoreland Zoning it doesn't need the fifteen (15) inches and it met the twelve (12) inches. Herb Maine asked if that was the only issue for the variance is the thickness. Al Frick, yes we meet the set back to the spring high tide more than one-hundred (100) feet. The only variance requested was to consider a reduction in depth to bedrock, depth to the limiting factor of the water table. Herb Maine, soil thickness or depth to water table aren't they two different things? Al Frick, water table. Herb Maine, so they aren't two different things? Al Frick, no. You need the soil thickness and need the water table you need anyone of those. Herb Maine, the evidence that you meet the requirement of that variance? Is that the table by Carol White? Al Frick, no Carol White gave us the data on how well the curtain drain was working. She monitored she said you have a water table above the twelve (12) inches above the existing soil surface based on my observations. Herb Maine, that's the evidence that you are providing for the variance. Al Frick, yes she provided that data, she did all the observations. Herb Maine, really it only meet that once out of the three (3) months, March, April, May and June, four (4) months. It only met that once? Am I reading that correctly or not? It's in the middle, dated June 12th. Am I reading the right table on the water level measurements? Al Frick, there are a monitoring well "A" & "B" those are two that are inside the disposal area and the other one was a control that was outside. So, you can see the one to the right of the control that was the wettest and that the one without any kind of improvement. Herb Maine, that one is outside the curtain drain area? Al Frick, right that's outside of the drain and the others are there. Herb Maine, so it appears that well "A" met the criteria several times and well "B" met the criteria only once. Is that correct? Al Frick, that is correct and what I did, the State makes the interpretation, they approve the program, in others words they recognize it, they know where it is and they can visit it anytime and concur and look at Carols records and then the data is submitted to them and they do the interpretation of what that means. In other words that means is Water tables go up and down and it's flashy. Carol was relaying what she was reporting what was going on and when Mr. Stratton looked at this he said that to use that a point status value for depth of the water
table. Herb Maine, so Mr. Stratton used this table, Al Frick, right to write his letter of January. Al Frick, right. He used that as the totality of that and said you should use that as your table.

Donna Damon asked to follow up on something Herb Maine had mentioned. Donna Damon stated that some where in here it stated it was the wettest year in 135 years what was that based on? Al Frick, Carol White said that in her letter of June 27, 2005. In the letter she stated that NOAA had stated it was 7.7 inches above the normal rainfall for this time of year and according to NOAA for the twelve (12) month period from June 2004 to through June 2005 this area received we received 52.57 inches of rain giving this period ten place ranking in rain fall amounts over the past 135 years on record. Donna Damon, so am I correct to understand that out of the 135 years the other 125 years would have been less? Al Frick, yes out of the greater than the ten (10) percentile. Donna Damon, so there was no suggestion from the State to do it again and see if it was drier? Al Frick, no. Donna Damon, so there was no discussion at all. Al Frick, no. The reality if you want to put this in context the State of Maine uses soil model. When you do a test for a septic system and you do not observe the water table for a whole year we rely on the soil chemistry and the models in the profile. We have iron in all the Maine soil put simply when it’s under water it makes a camouflage pattern in the soil so a trained person can tell where that is. That doesn’t and we read it as a few faint high elevations but that’s no to say and everybody knows this that during the site evaluator reports you know of fifteen (15) inches to model. That doesn’t mean that the water table doesn’t go above that on rare a occasion that’s the geologic norm of were that coloration is coming. Mr. Stratton looked at this as a soil scientist and also as a site evaluator. He said that was the level we should use. Donna Damon asked if you did this at different time you would get different data? If you monitored those wells at a different time or year? Al Frick, possibly. If I had to do it again with the situation of shallow bedrock, the bedrock is very shallow and what the gentlemen from North Star Landscaping put the curtain drain in he dug down to the bedrock put the stone in tight and did the curtain drain. If one wanted to invest sustainably more money if they cut into the bedrock and got a deeper cut, what happened in my opinion is water got by the curtain drain right on the lip of the bedrock and it was effective, but not one-hundred (100) percent. If it was deeper, but the problem was going deeper would be a significant cost and it’s a risk factor this is no guarantee. It was a substantial amount of money, but in my opinion looking at the science that’s what happened. It doesn’t say in the rules you can’t redo it and look at it. We did everything. Donna Damon asked that system or those pipes that’s all designed on this data here? Al Frick, right. I mean Carol used those pipes many years ago to observe. Donna Damon, has anything else been put in after that? Al Frick, I haven’t been back in many years so I do not know. Herb Maine asked for follow up, staying on the curtain drain so we can understand how this is working. I believe in the correspondence that there was at one point a recommendation to upgrade the curtain drain. I believe that was the term that was used. Al Frick stated they wanted to get it up on the right of way or further onto the property. Herb Maine, so upgrade means to move it physically higher not to improve the design. Al Frick, Helen, I wasn’t part of this but she looked into the part of whether she owned the right of way or go up. I think her relatives own property up slope, a big parcel and looked at trying to move it up further. Where it could be deeper and she was not granted permission so the State considered as high up on the landscape as you can. Donna Damon stated that was a consideration that I know when we had the conversation in the Town of Cumberland that she could not do anything within that (can not remember I do not have the plan) the width that is designated on that paper street. There might have even been a set back, but I do not remember. Al Frick, in my letter of March 17th, 2007. Dave Hardcastle and I spoke on March 17th, 2003. Mrs. Frey was refused access to install an upslope curtain drain on her brother’s land. That’s when she looked at it. Herb Maine, let me just verify a reference in Kenneth Stratton’s letter of January 31st. Finally I also recommend that you upgrade the curtain drain that you outline in your letter of August 8, 2005. So that’s referring to. Al Frick stated what that means when, now that we’re successful and we are putting in the leach bed and upgraded is to make it even better to perform even better to drain for the development part of it. Herb Maine, that’s were I was headed. I suggested that it could be done and going for an easement with the approval of the permit. That should be part of it, to upgrade. Herb Maine, does that include cutting into the bedrock as you talked to us? Al Frick, yes using jackhammer or something else. Herb Maine, that’ what the design calls for now? Al Frick, right. Mark Dyer asked if anyone else from the Board of Selectmen have any questions Amy or Al at this time.
Mark Dyer offered Paul White Code Enforcement Officer of Chebeague Island and/or the State time to speak. Mark Dyer asked speaker to state name and title for the record.

Paul White stated his name and I am the Code Enforcement Officer and Licensed Plumbing Inspector for the Town. Thank you Mr. Chairman. I find it very hard sitting listening to everything. From the questions you are asking I think you have a pretty good idea of what is going on. It’s good to see. First thing I want to say is, as far as I am concerned that not all lots are buildable. There are some lots even if they are bigger than 10,000 square feet that may not be buildable. Whether you believe that or not it’s a fact. You have to have components on a lot to get a building permit. Just because it is a lot of record it doesn’t mean that they have the right to build on it. I tried to make some notes while we were talking. As the people here charges with hearing this case right now. I think it is important that you understand that you are being asked to find if I made the wrong decision or not. Not unnecessarily whether the State did anything wrong, well actually not that the State did anything wrong in the past, take out the word unnecessarily and just say that you are not here to review what the State did before. I think it’s very fortunate that we have Russ Martin here tonight to talk to you about what happened, but I’m not so sure that it is important to take it in hand because we have a situation that I reviewed what you may call a fresh look at a septic permit and according to the rules I denied it. There seems to be some confusing about the minimum lot size law in the waivers and those kinds of things. Fortunately I know Amy mentioned that Frey Island being one of those cases were it has been used. Fortunately I worked there for four (4) years and I have extensive experience with minimum lot size waivers, all the lots with less there are less than 20,000 square feet. There are very few that aren’t. The key is over there they have good soil. This lot does not have good soil. The reason we are here right now is that this lot did not pass. They asked for a variance to the rule because the soil didn’t pass. That’s really what you need to remember. Once it didn’t pass meaning there wasn’t enough distance between the limiting factor and the native soil that they went this route they had to seek a variance. If you look at the rules and I can quote you on the rules and Russ can talk about it too. It really limits you on first time system. A first time system is really the hardest to make. They talk about the variance itself being applied to a (?) section. I think in Section 1900 refers to, it does apply to first time systems as long as you can make the points. Now one of the factors I said in my letter that under 20,000 was one of the factors. I may not be one of the most popular guy right now, but that kind of what my job is all about really not that’s really not what this is about. You hand me a set of rules and the State sends me a set of rules. I do think I really have the right to ignore those rules, other people can deal with variance issues and all that kind of stuff, but I can’t. I look at it at it a face value. What is presented in front of me what in this case an HH200 form for a first time system and variance that has for the Local Plumbing Inspector only it’s not for the State at this time unless the Town decides that they want to go that route. I do not think we need to go that route. I have a pretty good idea of what is going on and looked at the site on my own. I looked at the design on my own. In fact I looked at it prior to that, I looked at it as I staid in my memo to you folks I looked at it at the request of Helen Frey and determined at that time that there was something that didn’t seem quit right. Eventually I got Doug Coombs on the phone and I asked some questions. I understand from talking to Doug and what AI said tonight I probably should have called AI and had him come too. It was really for me any way, it was really for me another way of looking at what I looked at before I denied it. My point is that I do not have the right to say to the applicant you can Ignore this part. Again, I really do not want to comment on what Cumberland did or the State did before because really what I’m trying to do is look at it right now and see what the rules say and what is in front of me. I did look at the monitoring program and saw it didn’t reach the fifteen (15) I said to myself what is going to here. I talked to the State about it and Brent Lawson about it and they basically said we don’t know either. Eventually they did find out, but as you can see from the letter from Ken Stratton, he did approve it. I don’t think he should have approved it, but he did. As far as the monitoring part itself I think what they have testified here tonight is that, in a letter that was read by Amy pretty well put as far as the history goes is accurate, but the monitoring program was a choice they had in order to determined whether the lot was going to be buildable. People quite often have to thru that step in order to find out if they can do it or not. That was a choice they made on their own. I don’t think you can put any responsibility on the State about the monitoring program it is something that is allowed and when Jay Hardcastle or anyone else at the State sanctions it, it’s really pretty much normal process that you go through. You give the application or property opportunity to lower the water level and there is nothing wrong with that, but financially the burden is on them to do that. All the way along the monitoring program and the Consultant AI Frick that they hired to do all the work is standard procedure. It’s really up to them to go ahead and do that.
Mark Dyer, Chairman called for a five (5) minute recess:
Mark Dyer, Chairman called hearing back to order and asked Paul White to continue.
I wanted to talk to you about my job as a Code Officer. I have already talked about having a set or ordinances to go
by. The other thing that I hold close is the fact is my integrity I think Code Officers have pressures that are placed
on them once and a while you can sway one way or another. I do my very best and been very successful I believe
not be to swayed I look at the rules and I apply the rules as what I read them to be if my interpretation is wrong
they have the right to appeal my interpretation. Any letters that was written, I was not copied with the letter that
was written from the attorney, Dave Stevens’s attorney I was not copied on that I was part of that even if I was it
would not have let it effect my decision. None of that information that went forward legally or otherwise even
Doug Coombs decision and letters I did not necessarily rest my decision on. I think you guys need to know that
integrity of a Code Officer is very important. I can do my job unless I hold my line. I have to look people straight in
the eye and do my job and I want you to do that. I’m here tonight to testify on the merits of my denial of the
decision itself and I think again you folks need to find where I made an error in the rules and I applied them. I think
there is a lot of talk about the minimum lot size law and I am giving you a copy of law itself in Amy’s presentation
she got her things pretty twisted. In fact what she said which I agree with that this lot is exempt from the minimum
lot size law. Minimum lot size law only pertains to a lot created within a certain time frame. When the actual deed
was created and that was after January 1st, 1970 till I would even assume than later sometime in 73 if you were
able to create a lot less than 20,000 square feet. Most, all Town’s in the State of Maine cannot allow you to create
a lot that is less than 20,000 square feet, but there were a period of time that they were being created and if they
ended up on a plan or in a purchase of sale agreement or something like that, well actually that was before, but if
they ended up on a plan or deed there was a way to handle it to come to the sub-surface waste water and what
that was you could have a waiver. Now, prior to 2003 the State all minimum lot size waivers had to go to the State
to get approved. They simplified the process lets let it go to the Local Plumbing Inspector and my experience
at Frey Island I issued a lot of them. Basically there was a protocol involved with minimum lot size waivers, you
have to show you had a first time system and you did not require any variances for that, that was protocol and
that’s in the rules and give a copy of it to the Municipal Officers in Town and a copy to all the abutters. So they had
a chance to weigh in on it if they thought it was a good idea or not. All the time I was on Frey Island I never got a
call back from the call back from the Municipal Officers or the abutters stating that they didn’t think that this
should not go in on the lot. That was their right under the law to do that. I have a minimum lot size waiver. There’s
one right here in the rule book. If you want to look at it we will get it out. There’s a protocol you follow it has to be
a first time system with no variances. That’s the minimum lot size law it only pertains to lots created before 1971
and 1973 I believe somewhere in there. I would have to do my homework on when it was but I know the law says
right here that lots that were created before 1970, January 1st lots that are created before that are not part of the
minimum lot size law. They use the word exempt, I think they probably should have used word, you know it
doesn’t apply to it or that kind of thing it would have been easier to understand, but that’s the essence, if you read
the law and I encourage you to do that it says that these laws do not apply. Now for them to make a case that the
minimum lot law is exempt, but still applies you really shouldn’t listen to that. The real story is in the law. Reading
the law and understanding what they mean by this and Russ is very familiar with this and he will let you know too.
When it comes to the variance itself and whether it is exempt from the 20,000 square foot requirement which is
what they got nine (9) points out of sixty-five (65) whether it’s exempt and whether it’s an error I made in my
decision because that’s what I rested my decision on that it is less than 20,000 square feet. That it did not qualify
for those points thus they did not make the 65 points that they need in order to get the variance. That’s the whole
crutch of this whole thing now again what I said before was the reason that they came to me with this request for
this variance was because the soil was not good enough to get a first time system without a variance. I hope you all
understand that. If they all had good soil like all the lots on Frey Island have and like a whole bunch of lots on this
island might have if they had good soils and they can get it without a variance and they don’t need to prove that
it’s 20,000 feet they can do it at 10,000. As long as I give them that waiver, I still have to give them the waiver if it’s
16,000 square feet and it’s a good soil lot and it doesn’t have any problems I can give them a waiver and let them
build on it. It doesn’t require the waiver if it is before 1970. I can just; there are actually some lots on Frey Island
that were created in 1965 that were less than 20,000 square feet. I gave them a building permit without a waiver
because they did not need it. The law says only lots created after 1970. I hope that’s clear. Donna Damon asked
Paul to clarify something. Donna Damon asked Paul if he was saying that this lot was not created before 1970?
No, I am saying that this lot was, it was created in 1989, 1889. Donna Damon stated she was very confused. This lot, because it was created before 1970 does not require a minimum lot size waiver. It has nothing to do with the minimum size law except being exempt. Donna Damon what criteria does it have to go by? Let me just say this, if you read the law, first of all the minimum lot size waiver says you must have 20,000 square feet and then in "B" 4807B it deals with lots that are smaller than that and it says if you have a lot that is smaller than that you have to go through the Local Plumbing Inspector with a minimum lot size waiver and get approval. Donna Damon, that's from 70 on? Paul White, 70 to a certain date. Donna Damon, let's go the other way, that's what is getting what is getting me confused. The law says in the first part of it if the lot, in "A", 4708A if the lot was created before 1970, "A" is actually the 20,000 square feet, the exempt part it where it tells you it's exempt. This chapter is to the use of a single family residential. Leon Hamilton, where are you Paul? This is actually "D", 4708D. By the way this is taken out of the State Statutes, Chapter 423A; the rules have another version of this and it's listed slightly different but it's till the same laws. The words may be the same, but may not be. It's still the same laws. So under the exemptions it says this chapter as for the use of the lot for a single family residential purpose. Do you understand that part? Shall not apply to any lot which prior to January 1st, 1970 was specifically described as identifiable and separate lot either an instrument conveying such lot then owner or in a valid and enforceable agreement for purchase and sale or was shown on a plan recorded in accordance with the law prior to January 1st, 1970 and then it goes on to talk about the contiguous part of it. This law does not apply to a lot created before January 1st, 1970. Donna Damon, but what does law apply? That's what I'm trying to understand. Paul, what law applies after that is same law that applies to every other lot. Donna Damon, not after it? Paul, I'm sorry I should have said before. If a lot was created before 1939 and it was 40 acres and they came to me for a building permit for that lot. I would give then a building permit as long as they can give me, they can actually, well. They may have a variance requirement on it, but mostly likely it would be a first a first time system on a larger lot like that, but the same thing would have to apply to a lot that's smaller lot. If its 10,000 square feet and it was created before 1939 they would have to go through the same process if it was a larger lot. They would have to meet all the building set backs for the structure that would go on it and meet the set backs in the rules which are taken from the property line. That kind of set backs are described in there, they have to meet the first time system rules for the lot, for the soil part of it. Don't get confused about again, this lot, the grandfathered part of it. There is no mention in a ordinance about grandfathering it’s all mentioned about a record lot. If you look in the ordinance, our ordinance. It says lot’s of record. Donna Damon, so because we are talking about the soil. Where’s the criteria about the soil? Paul, that's in the rules themselves. Donna Damon, so that referrers to rules that were written after. Paul, no, yes those are rules adopted by the State of Maine and are called the sub-surface waste water rules. Mark Dyer, I would like to make an observation, it looks like I’ve allowed questions of the presenter and how close are you okay with that and how close are you to being. I just want to point out that I need to allow Amy and Al, as well as the Board to ask questions of you and we still have Russ Martin to go. Paul, first of all I think that this lot: size, this minimum lot size waiver that they refer to in there rebuttal is a key piece of the information that you folks need to understand it doesn’t apply to this lot at all. Al Frick gave me a design and if you look at the design, did not check off the box. I never considered it until it appeared in a letter from Gary Vogel, it doesn't apply to this lot it has nothing to do with it the minimum size lot anyways. All they look for in a variance table was whether it was more than 20,000 square feet or not and it was not so I kicked it out. I said it can’t be, it says in the rules it can’t be. I don’t have the right to change that. I think some of you know this; Cumberland didn’t want to deal with this and sent it right up to the State right off. I have no problem dealing with this, that’s my job. It’s just like the ordinance; I don’t pass every question off to Trish. I deal with it, that’s my job. I don’t know what you thought when you hired me and again I’m thinking I’m the bad guy here, but I’m just doing my job. Leon Hamilton, first of all we’re not here to think you're bad. Paul, I know. Donna Damon we’re just trying to understand. Mark Dyer, I guess my question is and I’m sorry if it seems like I’m rushing you because it does look that way. It looks like Amy has a question directly related to what you talked about would you rather finish up and then have her ask or ask now. Paul, no I will finish up. I had a whole list of questions when she was talking. Paul, so the burden of proof here is on the applicant. I think you have to ask yourself that during their presentation what did they talk about that I did wrong. I heard a lot they talked about of what the State did wrong, a lot. I’m not really dealing with the State right now, I’m dealing with — , and so in your note pad try to find the things that I did wrong in the denial of the permit. Now, I believe that the original decision in the permit was wrong. Do two wrongs make a right? If you guys decide to overturn my decision and the same the thing that I looked at this decision, at this application before I denied it. Do two wrongs make a right? I think we all know the answer to that and that's the route that I took. They Frey lot, I have somewhere here
in my pile of stuff; I’m looking for some tax cards. Mark Dyer, what point were you going to make with the tax cards, if I might ask? Paul, I made copies of the tax card, says the value of the property is $25,000 and is has been determined to be unbuildable. I think that it’s pretty powerful evidence that all these years that she been paying taxes on an unbuildable lot. I wanted to show that as evidence. Herb Maine, we can keep the record open afterwards. Trish McAllister asked the Chair to ask a question to the Mrs. Frey’s Council, Mark Dyer go right ahead. Trish McAllister asked Amy if she had any objection to Paul White making a copy of the tax card later. Amy, no I have no objection. Trish, add that to the records no objection. Mark Dyer, is that okay Paul? Paul, yes that’s fine with me. I think that Al answered a couple of questions about the options on this lot. I didn’t here him mention any alternatives systems that are in the code itself and it could be that he doesn’t feel that an incinerator toilet or a compost type toilet was not appropriate for this house. There is an option in the code and the rules themselves about alternative systems. So, as far as whether he has any options, it’s not the first choice for what you want to have, but if you want to have a cabin on this lot you could have an alternative system on it. Like I said it’s probably not the most desirable. If you look in the far corner here, and you guys all know I’m a Tax Assessor too, basically what happens here is when a lot is determined not to take a system and it may have happened in 1999 when Mr. Newburg did the test and they went to the Tax Assessor in Cumberland and said I have this test that shows I can’t build can you reduce my taxes. It may have happened before that I don’t know. Basically you place an influence on the lot and most likely the influence is ten (10) percent or ninety (90) percent so you have ten (10) percent left. So this lot would be $259,000, on the real market if it could take a test that would be 100% value as you all that on the Island as you know we have 50% value, but that’s a whole other thing. This I think as far as whether the lot is worth anything, I think they tried to make the lot worth something, by doing all the work that Al was hired to do and it’s understandable if someone wants to go through all that, but nobody has said up to this date that this is a current card that the lot is worth anything other than putting a picnic table on or something like that. It’s been deemed to be unbuildable. The wet spring part of this and always has bothered me. I don’t know how anyone can make a prediction if a parcel of land is going to be dry in the future I would not have made a determination based on that premise that 135 years in the past it hasn’t rained as much as it has rained this year and what kind of rain will come in the future so really the whole argument about what happened in the past I really don’t think is that important. It really doesn’t matter to me. Really what I was looking for is if it meets the fifteen (15) inches or not. They already admitted that it didn’t meet it. I think unless something in the Vogle response on that I have notes on. I noticed that Amy didn’t follow Gary letter. There was one thing in there, it says here on page three on Gary Vogles submission, original submission I’m talking about the last paragraph on page three it appears that the LPI’s decision to deny the variance application relies on the letter from Mr. Coombs to the LPI, October 27th, 2008, a copy of which was attached to the letter revocation letter, rescinded the Department’s August 3rd, 2006 approval letter upon which 2006 variance and permit was based. It also changes the Department’s official interpretation of the rules to not disallow a first time systems for lot fewer than 20,000 square feet in size under any circumstances. Sot what I would like to know and Russ maybe able to answer it when he speaks, what is the Departments official interpretation of this, because if this is an official interpretation about this 20,000 square foot thing then I think we need to see it in writing somewhere because usually an official interpretation is in writing. Finally on page six (6) it gets down to the fact, in the second paragraph down it says if the Department revocation of the 2006 decision is finally determined to been proffered, then the variance can not issue on the property on the other hand if the revocation was decision is determined to be imp offered the LPI cannot rely on erroneous advice given by the Department, now again I don’t want you guys to think I have been given erroneous advice, I looked at the rules just like you guys are being asked to do tonight and I made a determination on my own that it did not meet the lot size requirements for the variance. There wasn’t any advice I looked at whether it was good advice or not Doug’s letters seem to confirm what I was thinking, but that was as far as it went. I didn’t look at it as erroneous or get into the issue of whether the State was right to do what they did before or not I think that’s important to understand. I didn’t get into that issue I looked at the merits of it. I will answer questions. Mark Dyer I am going to ask the Board if they mind if I notice one of the Frey Representatives for a moment. 

Mark Dyer advised Amy to go ahead with her questions.

Amy, I really want first of all I want to clarify first of all, I want to clarify this issue about the exemption under the minimum lot size law. Thank you, Doug for having a copy of it. I was trying to get my hands on a copy of it when I was talking about it and I couldn’t find a copy of it, this was exactly what I was trying to point out. Section 4807B is called exemptions, it’s not called waiver its called exemption. It says, this chapter as the use of the lot for a single family residential, for residential purposes shall not apply to any lot prior to January 1st, 1970, blah, blah, blah was
shown on a plan recorded in accordance with law prior to January 1st, 1970 that's our lot, but provided that, we have to look at that, provided that contiguous lot's in the ownership on or after October 3rd, 1973 shall be considered one lot for the purposes here of. That would mean that if Helen's lot was contiguous to her father's than it was one lot, but it was not. So, we met that requirement, so the minimum lot size law does not apply to our lot, it is exempt. It is exempt. Paul White asked if that was a question to me. Amy, no it was a statement. It's exempt, that's what is says, exempt. Know there has been a lot of confusing between an exemption and waiver. Those are legal terms that throw everyone off even lawyers. What we are talking about is the exemptions of the minimum lot size law, that's what our lot size is and because of the way this was defined it is a grandfathered lot as it was created before 1970, so that grandfathered is kind of a term rather than a legal term. Our lot is grandfathered it's exempt for the minimum lot size law. So, the reason I talked about the minimum lot size law is because I wanted to point out the law does allow that lots under 20,000 square feet can be developed and it allows that in 4708B know as I pointed out earlier our lot is exempt from this so it does not apply because its telling you State law allows development of lots under 20,000 square feet. This is how they allow it either by the Local Plumbing Inspector if you do not need a variance or by the Department if you do need a variance. So, State law says you can develop a first time system on a lot under 20,000 square feet with a variance if the Department gives it to you. So, that's the law. Know our lot does not apply to the minimum lot size law, never said it did, and said it was exempt. When it's exempt it falls into the rules that we have discussed several times where it says variances, Municipal review, this authorizes the Municipality to make a final disposition for a first time system request, a soil condition variance through the Local Plumbing Inspector that's what gave Paul the authority to look at this variance and issue the variance if he so chose. When we went through this the first time they went to the State right from the start they new there was problems with the soil they did the monitoring system they got the State involved and they ended up going through the Town as well, because Mr. Longley and Dick Peterson did their review at the Town's level. That's the route they chose at that time but in this case we are talking to you tonight because the lot is exempt from the minimum lot size law it's the Local Plumbing Inspector that makes the decision not the Department. That's what I wanted to point out, know to ask Paul a couple of questions. I don't want to put words in your mouth, but you looked at the rules and have to follow the rules as they are. You have the authority to grant a variance its given to you in these rules. At the time you were aware of the previous approval by the State all that had been gone through by numerous people the professional had reviewed it where we get the waiver it the waiver of the table and that waiver of that table was granted because the waiver it was recognized at the time woops, that doesn't quite fit because this is an small, undersize lot and it doesn't fit that's why that waiver as to the table was granted, but at the same time the lot still had to meet all the Departments requirements. We went through a lot and we talked about that earlier so I guess Paul had suggested that we haven't said what he did wrong, what I just want to submit is that what was over looked was all the effort and review and the professional opinions that had gone into this earlier. The design of the system, the sequence of events over the years was, we obtained the Department approval numerous levels. We got the Town's approval at numerous levels and that was ignored and that's what I have a problem with because frankly those people are a lot more knowledgeable about it, basically the State's previous opinion was ignored in this situation. The tax card issue I just want to point out just the fact that it says unbuildable, doesn't make it unbuildable. I don't think anyone would say that there's any wrong with trying to make a lot stated to be unbuildable, buildable so long as you can get the proper approvals and do the right thing and I think that's what Helen did and I don't think she can be faulted for that. With regard to the wet spring and concerns about the monitoring program. Paul, do you have authority to review a monitoring program? Paul, yes I do. Amy, so it doesn't have to go through the State? Paul, no. Amy, like we did the first time? Paul, I'm approving the actual installing of the program myself. All I'm looking at is if the monitoring program to see if it meets the goal that it set for its self. In granting the permit, what Albert had written at the top of his request is for me to look at the two letters issued by Russ Martin. All he wanted was for me to read those two letters. So again I looked at the information that I was asked to. The first issue I looked at was the size of the lot and stopped, this lot is not big enough to have a house on it and at the same time I realized that's the reason it's coming to me because it didn't meet the soil conditions of fifteen (15) inches which was the point of the program. As far me being able to approve of disapprove a monitoring program, no I do not have that authority, but I do have the ability to use that information to make my decision and that's what I did. Amy, I'm going to defer to Al I think he had a question directly related to this, would you recognize him? Mark Dyer, go ahead. Al stated that he felt Paul clarified when he said initially in his discussion said that he could not approve a monitoring program. That's what he stated. Just to clarify that he does not have the authority, it's beyond him, the State looks at the totality of
Carol White's records, looks at it and makes the decision they apply to the State we showed all the approvals. They inspected it they interpret the results and data and give you points for the water table that's what Paul got. Amy, the last two quick points is, when Paul called Doug Coombs onto the site I think he acknowledged that he should have asked Alfred to come on to the site and let Helen know what was going on and also just acknowledgement the letter that I read from Helen was accurate. Amy, that's it for know.

Paul White, asked the Chair. I have no problem at all acknowledging what went on prior to my decision. I feel very bad about it. This is not an easy decision for me to make, but again I have not choice in making the decision. If I had made a decision in the contrary and they take the Town to court on it and they very well could have. I think the Town is in a good position when they follow the rules and the rules are what I have told you today. I will comment on the minimum size lot rule again, hopefully you guys understand what I'm talking about; actually I will not comment on it again. Would it be okay to bring Russ into this as we do not have much time left. I think Russ can shed more light on this than I'm capable of doing.

Mark Dyer asked Russ to state his name and title.

My name is Russell G. Martin, I am the Program Director at the Subsurface waste water program under the Division of Environmental Health, Department of Health and Human Services. I have been in this position for a little over seven (7) years, before I was working in the private sector. I guess I would like to start off and I will try to be as brief as I can. A number of individual names have mentioned tonight, many of those individuals work for the program. They basically work for me. They have either worked for me today or the have worked for sometime in the past. As State employees we are not expressing our personal opinions, we are expressing our opinion of the Department, so you have heard people say so and so said this or that the intent when you are speaking on behalf of the Department your representing the Department not your personal opinions. Having said that there are basically two (2) things that are being confused here in my opinion. That’s the minimum lot size law and that’s the first time system variance process that’s included in the rules and clearly this lot is exempt from the minimum lot size law there's no question about that, but all that means is it’s exempt from having to have 20,000 square feet. It is not exempt from any other land use ordinances, rules, regulations or statutes that may exist.

That's where the confusion is coming. You could not deny this lot simply on the fact that it is 16,500 square feet and that's not what has been done here, that's not what is being considered. Variances for the minimum lot size law as were mentioned are possible, but they are variances for the size of the property not it's suitability. I'm telling you being advised by the Attorney Generals Office that if someone applies for a variance under the minimum lot size law we look at does it met everything else in other words is the soil suitable does it met all the setbacks, plenty room for the system. A minimum lot size variance which is simply a variance to the size of the property can be granted and occasionally are granted and that's basically what Paul did on Frey Island. All those lots were carved out many years ago under common ownership and now they are being sold off. Everyone of them have a passing soil test on them, everyone of them because that's the criteria that the State uses when someone comes to us for a minimum lot size variance so there is not minimum lot size variance needed here because clearly this property is exempt, however because there is not fifteen (15) inches of native soil to the water table the first time system variance process kicks in, there is nothing, really nothing to do with the size of the property. It’s the fact that the soils do not meet minimum criteria, now the code allows a ground water monitoring program to be conducted if you believe either the modeling that the Site Evaluator observed is not representative or if you can somehow you can lower that water table by using a curtain drain or some other feature. It is no guarantee, you take that risk, that was applied for the Department did authorize its production and did review and determined that twelve (12) inches should be used instead of nine (9) inches. Both Mr. Newburg and Mr. Frick recorded that they observed modeling which is normal criteria at nine (9) inches below the ground surface instead of fifteen (15) based on the monitoring program which I believe Mr. Stratton made some judgments as to what an acceptable number would be and came up with twelve (12) inches. That's not what is in question here, what is in question here is the fact that in my opinion as Program Manager that both the Frey's and their consultant's were mislead by former employees of the Department. I've tried very hard in my years as Program Director to have every piece of correspondence reviewed because that's my job, I'm responsible to make sure that we put out factual information. Mr. Stratton's letter May 30, 2006 was not reviewed by me. I never saw it until we were doing the review to grant this August 3rd letter and if you allow me to read two (2) things from that letter and I would encourage you to read this. Based on the advice from the Department in our letter of May 30th, 2006 a point value of zero (0) was utilized a contribution of Table 1900-4 although the table states that first time system variances are not permitted for property less than 20,000 square feet is size. To go on as several program staff dating back to
2004 have given your consultant the impression that because your property is exempt from the minimum lot size requirements that it was also exempt from first time system variance requirements of the subsurface rules we hereby to exercise our authority to waive the point the point requirement from Table 1900.4 in calculating your variance point total. The only reason we wrote that letter, because in my interpretation as Program Director the Frey's and their Consultants were given erroneous information. I believe that they were acting in good faith proceeding in good faith, that they were given erroneous information. We granted that variance because we thought it met the requirements, but because I felt and once again this was my decision as Program Director that they were proceeding in good faith and that were we to deny it and we can set here all day and discuss it, if we were to deny it, it would have been appealed and I'm pretty sure that the Department would have said, you were mislead, you were lead to believe that it could be approved therefore we are going to approve it. So, I simply took that measure of taking that step. What has happened since then is basically of another requirement in Chapter 19, time limit, allow me to just read this quickly. Section 1908.1 Any disposal system variance issued after the effective date of this code which was August 1st, 2005 any disposal system variance issued after the effective date of this code, August 1st, 2005 shall become invalid if the system has not installed in compliance with any conditions established with the variance within two (2) years after issuance of the disposal system variance. That is why the Frey's were advised your time is running out you have a legitimate variance if you do not build this system within two (2) years it expires. It was not rescinded it was not revoked, it expired and there is no provision in here to extend it. They were advised if you do not build it in two (2) you will have to apply all over again and we start from square one again. Because it was approved original not on it's variance, but because in our opinion they were given false information. There is no grandfathering of any property in regards in the standards, the environmental standards with the subsurface waste water disposal rules. The fact that you have an old lot created in the 1800's that's less than 20,000 square feet, you are exempted from having 20,000 square feet, but you are not exempted to having to comply with the current standards. That is basically I guess our position in any advice we gave to Paul would have been along those lines. I think I have hit on most of the things, there is on thing in reviewing the file that I think that troubles me a little bit looking back on what we had in our file in August 3rd, 2006 when issued the letter essentially on the plan there is no topographic information at all, no elevations at all, which is not common. I realize that there was a survey being conducted and they were waiting for that, but if you look at the plan today which we have a copy in our file today and you look at the contours that were not on there is some question in my mind as to whether the foot print of that disposal field is twenty percent (20%) in or less in slope. That's another requirement in these rules; any land that you are going to put a septic system on has to be twenty percent (20%) or less in slope. That's something I think that's something that needs to be explored, because I'm just looking at the contours on there, they're one (1) foot contours to one (1) inch equal ten (10) scale it looks like it's steeper than twenty percent (20%) and that is another issue that was not brought up that may or may not be relevant, essentially our reasoning was they presented us with a variance we thought they were mislead by the Department and therefore the Department had some kind of responsibility maybe to give them a break they had two (2) years to build a system, they did not build it for what ever reason so here we are. We start from scratch again and Paul exercised his authority to make a decision on it instead of kicking it up to us which had been done by the Town of Cumberland. That's why we wrote the letter in August instead of Cumberland. They sent it to us saying they did not want to touch it, we want you to do it. That's basically from our perspective I think what has transpired here. We made a decision in 2006 right or wrong that's what it was based on, based on information that was given by Department employees that was probably not correct. I did a little research on the new system variance process which has been part of the code since 1980 this is nothing new. In 1980 there were a number of tables and the one the one that deals with the size of the property zero (0) to 20,000 square feet DEP approval required, back in 1980 the Department of Environmental Protection was dealing with minimum lot size issues not the Department of Health & Human Services, but in 1982 that table was revised to say less than 20,000 square feet not permitted. So, it has said no permitted since 1982 and that's twenty seven (27) years ago to this date in all the variance that we've had, we do probably on first time system variance we do twelve (12) to fifteen (.5) a year. That will give you an idea on how common they are to the best of my knowledge this issue has never come up before. I can find nothing in the Department records no footnotes, no explanation or anything to say that this only applies to newly created lots of less than 20,000 square feet which if you wanted to create of 20,000 square feet and you could not meet the standards in here you can't do it, we can't approve it. We have been told by the Attorney General's Office that we can not approve it and we wouldn't we would deny it, if everything else was good we would approve it. If everything else was good you would only go to Paul, so in my opinion it's pretty clear that less than 20,000 square
feet, regardless of when the law was created doesn’t qualify for a first time system variance. That’s basically our position.

Mark Dyer advised that we have ten minutes to allow questions of Russ and we will need a couple of minutes to see how the Board wants to handle this after tonight.

Anyone from the Board with questions?

Donna Damon, I have a couple of questions, but will defer to Mr. Frick who has his hand up.

Al Frick is right that this is the first time that this has come up. Many properties have been bought and sold and system variances have been created. They have been sold on the value of the variance approval and many times its gone way beyond two (2) years and it has never triggered a problem. The attorney pointed that out and variance was approved and a permit issued and now that permit was intact and Helen Frey asked for a continuance of that permit and things drag on and it didn’t come to together. There are thousands of systems in Maine that have new system based on new system variance that have expired in a two (2) year time frame that Russ Martin spoke to and if it applies than all those people with systems that would reinstitute the granted variance that would allow that system to exist today. That’s the problem and we discussed Paul & you and Mrs. Frey and Russ are here today because of the administration and wording in horrific. That’s the problem and Russ tried to express it but that’s the issue here. Once those two (2) years was up and permit was issued, the permit takes president. Paul, no it doesn’t. It’s the time of the variance granting. Al, if you go back to systems that have a permit based on a variance would have to be reconsidered.

Paul, I looked high and low in the rules to see if I had the authority to extend it or not. I did not find it anywhere. So I didn’t extend it, I basically told everyone that you need to update it go back to the site evaluator and have them update it and bring it back to me and I will put another permit on it and that’s what I told them. They went back to you and you came to me and I decided not to put another permit on it. I do not know other LDJ’s do, but I followed the rules. That’s what it all about we have rules to go by and Russ said it very well. Russ, we are talking two (2) different things again, we are talking about issuing a permit and a granting of a variance. The code is very clear that if you don’t construction that system within two (2) years of getting the variance it’s gone and, nobody picks up that doesn’t excuse it, if your sat on a variance for three (3) years and then came in for a permit, the Plumbing Inspector will notice that the variance has expired you have to apply all over again. Does that happen a lot, probably not but that doesn’t excuse it. Two years are on the permit and if you issued a permit for a system you can renew a permit, but that’s a separate issue from the variance. Al Frick, the problem is the variance has a two (2) lift span and once you get a permit that’s good for two (2) years to put it in, so what Russ is saying if you get a permit this year and get a variance this year and you wait a year and a half and you go another six months and not put the system in, Russ would say that variance doesn’t apply anymore and that permit would no longer be valid and that’s the issue. Russ, that’s not what I’m saying it’s what the rules are saying. Amy, one point, through this whole process as late as August 2008 you will never get a variance stop wasting your time. They did not say that. Doug Coombs said on April 11th that they could transfer a new buyer could transfer a variance, so Mrs. Frey relied on that. She had not idea she could not get an extend her variance and was told to build and all of a sudden the rug got pulled out from under her. Russ, April 2008 she was still within the two (2) year window. A permit can basically be issued to anybody. Transferring is from one party to another. However the code is clear that if you haven’t built within two (2) years the variance expires and there is nothing in there for a process for extending it. Amy, I think they owed it to her at that time because they knew what was going on and they knew she wanted to re-up it and they knew that somebody was going to buy it they should at that time this is never going to happen instead they let it go on. Russ, if hey had completed the system within the two (2) year window it could have happened.

Donna Damon, I want to look at these three reasons that this was not accepted, after the discussion today to see if they still stand.

1. The applicant does not meet the sixty five (65) points required. Am I right in what I have heard is not applicable because you can not use the sixty five (65). Russ Martin if you can not meet the sixty (65) points because the one category the we have been talking about says not permitted, instead of assigning a point value it says not permitted. Donna, so it mute? Paul, no it still applies. Donna, but you can still get points; I thought you said we couldn’t get points? Russ, Ken Stratton erroneously said use zero instead of saying not permitted. Donna, I thought you said if it was less than 20,000 square feet even getting the variance with 65 points. Donna never mind it’s to confusing. I will not ask any further questions as we are out of time.
Donna Damon asked for a motion to continue this at a later date.
Mark Dyer asked anyone from the public if they would like to make a statement tonight.
David Stevens, I would like to make a statement, but it will not be quick.
Amy, if the Board has questions that they would like to have answered before the next meeting please feel free to contact them.
Donna Damon motion to continue this at a later date.
Chris Rich, second.
Herb Maine, shall we set a date?
Donna Damon, I don’t think we are in a position to set a date.
Herb Maine stated he thinks we have an incomplete record. We received a lot of new things to night and need to review it. We need a complete set of records before we make a ruling.
Vote: Unanimous
Adjourn: Herb Maine motion to adjourn
    Leon Hamilton seconded.
    Vote: Unanimous
    Adjourn at 8:35PM
    Respectfully submitted by Susan Campbell, Town Clerk