



**REGULAR MEETING MINUTES**  
**TOWN OF NORTH HAMPTON**  
**ZONING BOARD OF ADJUSTMENT**  
**September 17, 2003**

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The Town of North Hampton Zoning Board of Adjustment (Board) met on Wednesday, September 17, 2003 at the North Hampton Town Hall. Notice of the meeting had been properly posted at the Library and Old Town Offices/Town Clerk on August 29, 2003 and published in the Hampton Union on Friday, September 5, 2003.

### **Attendance**

**Present:** John Anthony Simmons, Chairman; Mark Johnson, Vice-Chairman; Ted Turchan; Richard Luff; and Robert B. Field, Jr.(5)

**Alternate(s) Present:** Dick Wollmar, John Woodworth and Ken Worrell

**Staff Present:** Richard Mabey, Building Inspector; Krystina Deren Arrain, Planning and Zoning Administrator/Recording Secretary

Mr. Simmons called the meeting to order at 7:05 PM

Mr. Simmons proceeded to the business of the meeting. He noted that each applicant coming before the Board is entitled to have the application/appeal considered by a Board consisting of five (5) members; although Board action may be taken by a unanimous vote of a quorum of three (3) members.

### **Procedure — Swearing in of Witnesses**

Mr. Simmons explained the standard Rules of Procedure that would be applicable to this meeting to members of the audience. He swore in all persons present who would be giving testimony or presenting comment on matters to be considered by the Board. Mr. Simmons announced that the Recording Secretary would maintain an audio recording of the meeting. Arrangements should be made with the Recording Secretary if an individual is interested in listening to the recording of the meeting procedures. Minutes of the meeting shall be deemed to be "preliminary" in form and unofficial until the Board votes to approve it. The Application For Relief form has several requirements as part of the application filing process. Applicants who are in "non-compliance" with prior orders, findings or decisions of the Board, will, in most instances, have any requests for further relief deferred until full compliance is attained or waived by the Board on a showing of good cause by the applicant.

Mr. Field commented that the Town of Rye and/or abutters located in Rye should have been notified in regard to Case #2003:29 and asked Ms. Arrain if that requirement was met. Ms. Arrain explained that she did not have that information available but would check the town files during a meeting recess. Mr. Field made reference to the Spagulla vs. Hooksett decision that requires legal

notice to extend to abutters even when they are located in another municipality.

## Old Business

**Case #2003:27** -- Mr. Simmons noted that Atty.. Pelech, representing the applicant, informed him that he had a conflict and requested that the case be heard later in the evening. Mr. Simmons ordered the case later into the evening.

## New Business

**2003:23 – Request for Rehearing by the North Hampton Planning Board and Phillip E. Wilson, 9 Runnymede Drive, North Hampton, NH 03862** – Regarding interpretation of Section 512.1 during the July 16, 2003, public hearing for Case #2003:23 regarding Servicestar Development, 5760 Greenwood Plaza Blvd, Ste 300, Greenwood Village, CO 80111 requesting a Special Exception to Article IV, Section 405 to operate a gasoline or service station — for Shell convenience store and gas station, and Great American Tire and Auto Service. Property location: NW Corner Lafayette Road and Atlantic Avenue, I-B/R zone district, Tax Map #007-124-000, #013-001-000 and #014-170-002.

Mr. Simmons recused himself because he was not seated at the original hearing and Mr. Johnson assumed the Chair. Mr. Wollmar and Mr. Woodworth were seated. Mr. Field did not recuse and remained on the Board. Since Mr. Field did not recuse, Mr. Woodworth did not sit.

Mr. Johnson read Mr. Wilson's letter of September 4, 2003 [Attachment A]. Mr. Field stated that the July 16, 2003 meeting was noticed improperly regarding the public hearing on the number of gas stations. He further added that the Special Exception granted that evening was not in question.

Mr. Turchan expressed concern that if the applicant did not question the interpretation of Section 512, then what was the purpose of this request for rehearing. Mr. Johnson agreed with Mr. Turchan. Mr. Johnson felt the Board's action was appropriate.

Mr. Field noted that the minutes for the July 16, 2003 meeting have not been adopted and suggested that the Board act upon them immediately. Mr. Johnson stepped down and Mr. Simmons assumed the Chair. Mr. Simmons offered his proposed amendments to the minutes.

### Minutes of the July 16, 2003 Meeting

**Mr. Turchan moved and Mr. Johnson seconded the motion to accept the minutes as amended. The vote was 3-0 with Mr. Field abstaining because he was not seated during the original hearing and Mr. Simmons because he did not want it viewed that he was voting on the 2003:23 portion of the minutes.**

Mr. Simmons recused himself and stepped down and Mr. Johnson resumed the Chair.

Mr. Field noted that this case was noticed inaccurately and stated that this is not a re-hearing request. Mr. Johnson commented that the notice was proper and the Board was considering a

request for a rehearing. Mr. Luff asked if the applicant could explain his purpose.

Mr. Phillip E. Wilson, 9 Runnymede Drive, responded that the determination of the number of gas stations was a separate and distinct public hearing and it was not posted as such, rather it was posted as a request for a Special Exception. It is on this point that he and the Planning Board took issue. Mr. Wilson claimed that after the Board closed the public hearing; Mr. Turchan requested to re-open the public hearing to determine the number of gas stations. In Mr. Wilson's opinion when the public hearing was re-opened, it constituted a new case and should have been posted separately.

Mr. Johnson commented that the ZBA comes to its responsibility to work toward resolution in a reasonable amount of time. He noted that they had to accomplish a task and did so. He felt it was an appropriate action. The agenda and notice for the Special Exception on Section 512 made it properly noticed and clear about what was to be discussed. Mr. Johnson emphasized that the said meeting was a public hearing just as all ZBA meetings are public hearing. It was appropriate to determine the number of gas stations. He commented that the Board took in information and came to a reasonable decision.

Mr. Wollmar agreed with Mr. Johnson stating that Case 2003:23 leads to Section 512 and the number of gas stations had to be decided before a decision on the Special Exception was made. He further added that the Board has to keep its eye on the big picture. Mr. Turchan reiterated his statement from the minutes that the number of gas stations had to be established before a decision on Case 2003:23 could be rendered.

Mr. Luff inquired of Mr. Wilson if the Planning Board is worried about a precedent being set by the ZBA making a decision on the number of gas stations in 1973. Mr. Wilson responded that they are concerned about the proliferation of gas stations. He cited that the Irving gas station case prompted concerns about environmental issues. He added that it was determined through Attorney Ryan that in 1973 there were only 5 gas stations. Mr. Wilson noted that the recent ProWash Lube Center approval concerned the Planning Board that it had approved over the legal limit of gas/service stations.

Mr. Luff commented that he saw there could be a technicality on the posting but agreed with Mr. Wollmar that we need to see the big picture. Mr. Wollmar questioned why didn't the Planning Board re-write Section 512. Mr. Wilson responded that the Planning Board would address that issue this year. Mr. Field commented that he agreed with Mr. Wilson's concern about the proliferation of gas stations and the resultant environmental issues. He restated that the interpretation of Section 512 was not posted. Mr. Field asked, "Who is the injured party"? He noted that the applicant in Case #2003:23 is not moving forward and as such there is no injured party. Mr. Field commented that he wanted the townspeople to be heard and supports a rehearing.

Mr. Johnson in closing, stated that he believed that the ZBA is qualified in their separate but equal function to act on establishing the number of gas stations operating in 1973. Mr. Field commented that the notice referred to Section 405 for the Special Exception and not for Section 512. He stated it was fatal procedural deficiency. Mr. Johnson responded that it was an evolutionary process and it was not the intention of the Board to set policy at the July 16, 2003 meeting for Case #2003:23. Mr. Wollmar added that Section 405 leads directly to Section 512. Mr. Turchan added that Section 512 uses the term "shall" to establish the count – it does not set any preferences or concerns. Mr. Field

added that his predecessor usually would grant a rehearing. Mr. Field stated that no one would be harmed by a rehearing and is curious at the Board's hesitancy. Mr. Turchan questioned the value of a rehearing when the Planning Board Chairman had indicated its intention to address Section 512 this year.

Mr. Field made the following points in his letter dated October 17, 2003 to Chairman Simmons and these comments were adopted into these minutes on November 19, 2003:

- (i.) Issue. The issue upon which the Request was made did not relate to the Decision made at the July 17, 2003 Meeting to grant the Special Exception; rather, it was an objection to the formal action taken by the Board at such Meeting to conduct a "Public Hearing," without prior notice in the manner prescribed by statute, as to the "proper interpretation" of §512 of the Zoning Ordinance ("Hearing"), including, but not limited to, the taking of evidence from the public.
- (ii.) Publication Error. That an error occurred in connection with the publication of the Notice of the Meeting on or about September 5, 2003, in that the Notice fail to properly identify the issue as not one which challenged the granting of the Special Exception, but rather, one which challenged the action of the Board "sui generis" to conduct a Hearing without proper notice.
- (iii.) Parties Excluded. Members of the public, including but not limited to, the Planning Board the undersigned and Mr. Wilson, who have an interest in participating in the Hearing to "interpret" §512, were adversely affected by the lack of Notice. The public policy debate was important in that issues of ground water source contamination and the public health and safety were being considered by the Board, and yet the general public was procedurally unaware.
- (iv.) Statutory Construction. There are clear legal principles which govern matters of statutory construction. As to the interpretation of §512, the Board should accede to the request of the "legislative body," i.e., the Planning Board, to offer its thoughts and observations on the interpretative issue. The Planning Board best knows what it intended when it architected the ordinance.
- (v.) Comity. Town of North Hampton business can be best conducted by extending comity in a formal venue to other Board(s) in Town when issues of public safety and health are concerned.
- (vi.) Injured Party. There is no party to the matter who would be injured and/or potentially harmed should a Rehearing have been granted. The granting of the Applicant's "Special Exception" was not being questioned; and, accordingly, the Applicant would suffer no harm. Rather, the injured persons are the citizens of North Hampton.
- (vii.) "Big Picture". Contrary to the position of one Board member at the September 17, 2003, Meeting, the "Big Picture" is "citizen participation" and "open and free" discussion on matters of important Town business. To deny the Request is tantamount to obstruction of open and participatory government.
- (viii.) Spirit and Intent of Ordinance. To deny the Request would be to ignore the "spirit and intent" of the Zoning Ordinance.

**Mr. Field moved and Mr. Wollmar seconded the motion to grant a rehearing request as presented by Mr. Wilson individually and Mr. Wilson as the Planning Board Chairman by letters dated August 12, 2003 and verified by a letter dated September 4, 2003.**

***The vote was 1-3. Mr. Johnson abstained.***

Mr. Johnson stepped down.

Mr. Simmons resumed the Chair.

The meeting was recessed at 8:31 PM

The meeting was reconvened at 8:39 PM

*Mr. Simmons announced that future meetings, beginning on October 17, 2003 would be held in the "Craig Room" at the North Hampton Public Library.*

## Old Business

**2003:27 – W/S North Hampton BB LLC, W/S North Hampton OP LLC, W/S North Hampton Property LLC, 1330 Boylston Street, Chestnut Hill MA 02167** requests a Variance to (1) Article IV, Section 406 for relief from front and side setback, (2) Article IV, Section 409.9 and 409.9 B.2.(c. and d.) to allow for an addition to an existing structure within the wetland buffer and (3) Article V, Section 501.2 to allow for the expansion of a non-conforming structure. **Property location: 35, 33-49 and 37 Lafayette Road at Lafayette Crossing**, I-BR zone district, Tax Map #007-052/053/056-000. This is a continuation from the September 3, 2003 meeting.

### Case Presentation

Mr. Simmons swore in the following individuals:

Alton M. Palmer, P.E., Gorrill-Palmer Consulting Engineers, Inc., - Gray, ME

John F. Corbett, W/S Development Associates LLC, Chestnut Hill, MA

Attorney Bernard Pelech, Wholey & Pelech, Portsmouth, NH

Atty Pelech, representing the applicant explained that the reason for the variance requests. He referred to Building A as Home Depot, Building B as Shaws and other buildings connected to it and Building C as the retail store they propose to build. Building C would be located between Home Depot and Shaws and that all variance requests refer to relief sought for Building C. Because the Home Depot parcel property line extends into the parking lot area a great distance, Building C would not meet front and side setbacks even though when looking at the site or the plan there appears to be ample setback space. The encroachment into the wetland buffer refers to the recent extension of the buffer zone as well as the fact that the applicant donated conservation land to the Town and redefined the property line. The expansion of a non-conforming structure refers to Building C viewed as an extension of Building B. Since Shaws is now close to the wetland, it is considered a non-conforming structure and this categorization is now referenced to the proposed Building C.

### Board Observations/Comments

Mr. Simmons asked how/why the property line was created that had now created a problem. Mr. Pelech responded that Home Depot required a separate lot in order to sign the land lease. The property line is imaginary and it created the front and side setback and non-conforming issues.

Mr. Field questioned that Building C may have been always anticipated by the owner but it was not brought to the Planning Board's attention. Mr. Corbett responded that during Planning Board

meetings, the applicant talked about a full build-out of the center.

Mr. Simmons asked if the applicant knew they would build at the proposed locations, why did they draw the property line in such a manner as to create this problem. Mr. Palmer responded that the current property line minimized the number of future variances required yet met other requirements for the site plan regulations. Mr. Pelech noted that the 10-foot landscape buffer variance was granted at a previous meeting. Mr. Palmer added that trucks have two access routes to the rear delivery areas, noting that delivery truck traffic is prohibited from Cedar Road.

Mr. Field raised the issue of interest by the public about signage at Home Depot. He asked what was the intent of signage for Building C. Mr. Corbett responded that it is the responsibility of the tenant and not the applicant. Mr. Field countered that it is not appropriate for the Board to render a decision without all the pertinent information. He added that in the Home Depot process the applicant would not reveal the tenant and put the Town at a disadvantage.

Mr. Simmons commented that the ZBA couldn't pre-judge a case on a sign ordinance that is not before the Board at the present time. If an Applicant wants to run the risk of having their sign variance denied even after an entire project has gone before the Planning Board and been approved, that is their business but the variance standard does not change simply because a project has been approved. Attorney Pelech noted that this application should not be treated any differently than any other application.

Mr. Field questioned why there was an excess of abutters. He noted the Simmons name was included on the list. Attorney Pelech responded that it was better to send more notices as a precaution.

The meeting recessed at 9:40 PM

The meeting reconvened at 9:50 PM

Mr. Simmons retired from the Chair.

Mr. Johnson assumed the Chair.

Attorney Pelech confirmed that the abutters' list is overcautious and a continuation of the 1999 project. Mr. Peter Simmons, 29 Ocean Boulevard, was sworn in and gave testimony that although the Simmons' name appears on the abutters list, John Anthony Simmons is not in any fiduciary manner connected with these properties. Exhibits "A" and "B" were included into the record.

Mr. Johnson stepped down and Mr. Simmons resumed the Chair.

Mr. Simmons stated that he does not have any conflict of interest. Mr. Field requested that Ms. Arrain flag any abutters' list for any potential conflict of interest. Mr. Simmons disagreed commenting that if a ZBA member were an abutter, the member would have received notice. Mr. Simmons noted that Ms. Arrain does not need to become involved in any abutter recusal-sensitive issues. Mr. Simmons asked for a non-binding vote according to state law and no objections were raised concerning his continued involvement in the case.

#### Public Comment

None in either support or opposition.

Findings of Fact (RSA 674:33)

Mr. Pelech addressed the five (5) conditions, which must be satisfied to allow the granting of a variance. The Board concluded that the five (5) conditions were met.

**Mr. Field moved and Mr. Turchan seconded the motion to approve the Variance to (1) Article IV, Section 406 for relief from front and side setback, (2) Article IV, Section 409.9 and 409.9 B.2.(c. and d.) to allow for an addition to an existing structure within the wetland buffer and (3) Article V, Section 501.2 to allow for the expansion of a non-conforming structure.**

Mr. Field requested that Attorney Pelech's "Memorandum in Support of the Application" be included in the minutes. (Attachment C)

***The vote was 4-0. Mr. Simmons abstained.***

Mr. Simmons thanked the applicant for their development and tenancy in Lafayette Crossing noting Mr. Field's comments about future signage issues. Mr. Field requested that in the future, Ms. Arrain, supply to members, minutes of projects that have a long history, such as Lafayette Crossing.

## **New Business**

**2003:29 – PD Associates, 5 Dartmouth Drive – Suite 101, Auburn, NH 03032** requests a Variance from Article IV, Section 405 (District Regulations), permitted uses in the R-3 District to allow the development of an Adult Manufactured Housing Park, on a parcel of land split by the zoning, where the use is a permitted use on the front portion of the parcel zoned I-B/R but a non-permitted use on the rear of the parcel which is zoned R-3. Property location: 223 Lafayette Road, Tax Map #020-008-000, 020-009-000, 020-011-000 and 021-001-000.

Case Presentation

Mr. Simmons mentioned the concern that Mr. Field raised earlier in the evening, regarding the issue of proper notice of abutters in Rye regarding this case. Attorney Christopher Boldt, Donahue, Tucker & Ciandella, Exeter, NH, representing the applicants explained that the applicants own the abutting property in the Town of Rye and both they and the State of NH were given proper notice. Atty Boldt stated that the applicant requested a variance for a "use" for a retirement housing project that is bifurcated by different zones. The front end is located in the I-B/R zone that would permit this project and the back end is located in the R-3 zone in which it is not permitted. Atty. Boldt emphasized that this project would yield a benefit of \$271,000 of tax income to the Town with no education costs. He added that the soils are appropriate referring to a letter from Ambit Engineering reporting on test pit results. Attorney Boldt provided new information to the Board.

Meeting recessed at 10:21 PM in order for Board members to read the handouts they had just received.

Meeting reconvened at 10:26 PM

Mr. Simmons swore in the following individuals:

Elmer Pease, PD Associates, Auburn, NH

Ed Huminick, PD Associates, Auburn, NH

Mr. Turchan asked about a wetlands map, specifically about test pit locations. Mr. Pease displayed a wetland map commenting on a wetland area. Mr. Turchan noted that he was aware of other test pit locations and a stream on the property. Both Messrs. Simmons and Field agreed that certain, pertinent information was not available.

Atty Boldt emphasized that the applicant was before the Board only for a use permit, nothing else. The applicant needs a variance approval before he can apply to the Planning Board. Messrs. Turchan and Field stated that they believe wetland issues are of concern to the ZBA. Mr. Field further commented that he wanted all issues brought before the Board all at one time, not in a piecemeal fashion. He felt the Board needs more information and possibly should ask the Conservation Commission for a review of the application. Mr. Field continued that the information submitted is incomplete for a project of this size and should be continued.

Atty Boldt re-emphasized that the issue is “will this use be permitted at all?” He stated that without the variance, the project would go no further. The applicant cannot assume the expense of a site plan, wetland delineation and other tests and reports without approval of their use request. Mr. Pease explained his project in more detail and emphasized the necessity for approval of this preliminary phase of his project. Mr. Huminick commented that Joseph Roy, 203 Lafayette Road who manages the manufactured home park supports the project.

#### Public Comment –In Support

Robert Shaines, 81 Garland Road, Rye, NH, explained that he owns a 61-acre farm that abuts the property and was delighted with the proposed valuable, legitimate use of the property. Currently the property is used as a paintball location and he stressed that the “weekend commandos” have wrecked havoc with his horses and the rural character of the farm. He asked the Board to approve the variance application.

Dick Robinson, 205 Lafayette Road, commented that he has been a resident of the Town since 1949 and he believes the project will be an asset to the Town.

#### Public Comment –In Opposition: None

#### Board Observations/Comments

Mr. Luff agreed with the applicant’s argument that assuming additional development expenses without the variance approval is not feasible. Mr. Johnson noted that the project lends itself fairly well and he does not see a problem with approval. Mr. Field inquired if every tenant of Mr. Roy’s manufactured housing park was notified. Ms. Arrain and Mr. Huminick confirmed tenants were notified. Mr. Turchan suggested landscaping along the property lines for appropriate privacy and sound coverage.

#### Findings of Fact (RSA 674:33)

Atty Boldt addressed the five (5) conditions, which must be satisfied to allow the granting of a variance. The Board concluded that the five (5) conditions were met.

**Mr. Turchan moved and Mr. Luff seconded the motion to approve the Variance to allow use in the R-3 zone portion of the property for an adult manufactured housing park in compliance with the following criteria; that at least one resident must be 55 years or older and no**



**occupants under 18 that complies with NH RSA 356-A:15 and Title 8-USC 3601.**

***The vote was 3-1. Mr. Field objected and Mr. Simmons abstained.***

Mr. Field commented that in his opinion the application is grossly incomplete.

## **Preliminary Matters/General Correspondence**

Mr. Simmons noted that the NHOSP Annual Fall Planning Conference would be held on October 25, 2003 at Plymouth State College and information had been supplied to them. He commented that the Board would be meeting at the Craig Room in the Library and Ms. Arrain should note the location change prominently during the posting procedure as well as posting a re-location notice on the Town Hall door.

**Mr. Simmons moved and Mr. Johnson seconded the motion to move the regularly scheduled Wednesday, October 15, 2003 meeting to Thursday, October 16, 2003 to the Craig Room in the North Hampton Public Library.**

***The vote was unanimous (5-0).***

### NH OSP Technical Bulletin #5 (Revised Fall 2001)

Mr. Simmons made reference to the following text under the subtitle: Relationship to Other Local Boards – “**Planning Board:** *The board of adjustment and the planning board should meet periodically to review the zoning ordinance to keep it current and maintain administrative efficiency. By analyzing the types of cases that come before it, the ZBA can advise the planning board about weaknesses or inconsistencies within the ordinance itself that might otherwise not be recognized. An amendment to the ordinance might be appropriate where the problem is a function of the wording of the ordinance or where an alternative procedure might eliminate the need for action by the board of adjustment.*”

Mr. Simmons brought this information to the Board's attention, stating that meetings are encouraged and writing letters are appropriate. Mr. Turchan commented that joint meetings could involve setting policy. Mr. Field asked Mr. Simmons to check if recent case law would change the NH OSP standing. Mr. Simmons commented that he had sent Mr. Field the updated Rules of Procedure document for his review.

## **Minutes from Prior Meeting**

### Minutes of the August 13, 2003 Special ZBA (Work Session) Meeting

Since this meeting was continued until September 10, 2003, the minutes for this meeting must be considered at the time of the review of the September 10, 2003 minutes. The item is continued.

### Minutes of the September 3, 2003 Meeting

Mr. Field expressed concern that the minutes as prepared are inadequate and incorrect in many instances and insisted that the Chairman is responsible for editing them. Mr. Simmons firmly stated that all Board members have the right to present amendments during the review of minutes. He stated that editing or re-writing the minutes is not the Chairman's job and no future discussion

regarding this matter will be in order. Mr. Simmons offered to have the Recording Secretary provide a diskette of the draft minutes' file to any member to use the "Track Edits" feature on word processing software that would display their proposed amendments. Mr. Simmons deferred review of the minutes until the October 17, 2003 meeting.

Mr. Field expressed concern about the sufficiency of the draft minutes of September 3, 2003. Mr. Simmons requested that Ms. Arrain send a letter to the Board of Selectmen expressing Mr. Field's and other members of the Board concern about the accuracy of the draft minutes of September 3, 2003. Additionally, the request includes that future minute takers are briefed on proper format and expectations of the finished product.

**Next meeting**

The next meeting of the North Hampton Zoning Board of Adjustment will be held on Thursday, October 17, 2003, at 7:00 p.m. in the Craig Room, North Hampton Public Library.

**Adjournment**

**Mr. Luff moved and Mr. Johnson seconded the motion to adjourn.  
The vote was unanimous (5-0).**

Meeting adjourned at 11:53 PM

Respectfully submitted,

Krystina Deren Arrain, Recording Secretary

*Attachments:*

- 1) Exhibit A: Property Line Location Map, regarding Case #2003:27*
- 2) Exhibit B: Abutters List, regarding Case #2003:27*
- 3) Exhibit C: Memorandum in Support of the Application, regarding Case #2003:27*