



**TOWN OF NORTH HAMPTON
ZONING BOARD OF ADJUSTMENT
Meeting Minutes
Wednesday, November 19, 2008 at 6:30pm
Mary Herbert Conference Room**

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These minutes were prepared as a reasonable summary of the essential content of the meeting, not as a transcription. All exhibits mentioned in these minutes are a part of the Town Record.

Attendance

Members present: Richard Stanton, Chairman; Richard Batchelder, Vice Chairman; Susan Smith, Michele Peckham and Robert Field, Jr.

Alternates present: None

Members Absent:

Staff present: Wendy Chase, Recording Secretary

Preliminary Matters; Procedure; Swearing in of Witnesses; Recording Secretary Report

Old Business

New Business

I. Preliminary Matters; Call to order, Pledge of Allegiance, Meeting Procedures; Recording Secretary Report; Oath of witnesses

Mr. Stanton called the meeting to order at 6:32pm.

Mr. Stanton called for a Pledge of Allegiance.

Ms. Chase reported that the agenda was properly posted at the Library, Town Hall and Town Clerk's Office on November 7, 2008.

Minutes

Ms. Smith Moved and Mr. Batchelder seconded the Motion to approve the Meeting Minutes of October 28, 2008.

The vote was unanimous in favor of the Motion (5-0).

II. Unfinished Business

Continuation of deliberations for case #2008:03 William A. & Agnes Hawks Estate, C/O Citizens NH Investment Services, Trustee, 875 Elm Street, Manchester, NH 03101. The applicant requests a special exception under Article IV, Section 409.12 to permit the erection of a new home within fifty (50) feet of an inland wetland on a vacant approved building lot of record. Property owner: William A. & Agnes P. Hawks Estate. Property location: Maple Road, M/L 006-040, zoning district R-2. This case is continued from the October 28, 2008 meeting pending town counsel advice.

In attendance for this application:

Wayne Morrill, Jones and Beach Engineers
Attorney Peter Saari, Casassa & Ryan

Mr. Stanton explained that Town Counsel Jae Whitelaw reviewed the sample “rain garden” easement submitted by Attorney Saari at last month’s meeting and she made some recommended changes to it.

Mr. Field commended Attorney Saari for his work on the sample easement he provided. Mr. Field said that he is not clear on liberties the Town has to serve tax easements. Attorney Whitelaw stated in her review that the clause used in the sample easement submitted by Attorney Saari regarding using the tax lien provision of RSA 80:19 for recovery of monies the town spends maintaining the rain garden is invalid because the so-called “assessment” is not a tax assessment. He explained that he spoke to Attorney Whitelaw directly to obtain a better understanding of why she took that position regarding RSA 80:19. Attorney Whitelaw explained to Mr. Field that the authority to impose tax liens is limited, and only granted by Statutes. He said that there are particular statutory authority in putting in sidewalks, roadways and parking garages. Mr. Field opined that the document submitted by Attorney Saari was deficient. He further stated that he agrees with Attorney Whitelaw’s recommendations for paragraph 5 in the proposed easement. He said that they both discussed that the easement is still missing how to get the funding to begin with. Mr. Field suggested that the Board accept Attorney Whitelaw’s recommendation, but to lay over that an amount of money to be kept on deposit at all times so the Town is literally secure from a cash flow point of view in making the effort to correct the situation if in fact the maintenance of the “rain garden” fails.

Mr. Field pointed out that the applicant has asserted that the “rain garden” is designed for a two-year storm event and the State regulation is for a 10-year storm event.

Ms. Peckham suggested that the Board open the public hearing to ask the Applicant what the correct storm event the proposal is designed for.

Mr. Field Moved and Ms. Peckham seconded the motion to open the Meeting to receive testimony from the Applicant on the inconsistency between the State Regulations and the representation made to the Board at the last two Meetings. The vote was unanimous in favor of the Motion (5-0).

Mr. Morrill explained that the “rain garden” was designed to comply with the NH DES 10-year storm, and apologized for mistakenly saying it was a two-year 24 hour storm.

Mr. Field suggested a note be added to the plan stating that it is a 10-year 24-hour storm design, and that it is in complete compliance with NH DES regulations. Mr. Morrill said he would add the note to the plan.

Mr. Stanton closed that portion of the public hearing and continued deliberations with the Board.

Mr. Field explained that an agreement of a nature of a special assessment unless it is permitted by Statute so there needs to be an alternative way to ensure the Town is protected financially in case needs to “step in” and maintain a failed “rain garden”.

Ms. Peckham said that she contacted the storm center at UNH and received information on “rain garden” maintenance. She explained that when a rain garden is established and installed correctly there is no more of a greater task to maintain it as any other type of garden, and that after five years there is minimal maintenance.

Mr. Field commented on the fact that the mulch has to be replaced every two years or so then after a year it is no more of a greater task to maintain like any other garden.

Mr. Stanton commented that the maintenance guidelines for the “rain garden” is noted on the plan dated 10/03/08.

Ms. Smith suggested that a percentage be retained on the plantings for a certain period of time and asked how the Planning Board handles the landscape sureties they require for certain plans.

Mr. Mabey explained that the Planning Board generally keeps 25% of the total cost of plantings for two growing seasons.

Mr. Mabey was asked to give an estimate of how much it would cost to replace the proposed “rain garden”. He said that the engineers that designed it would be able to give a better estimate.

Ms. Peckham said that the amount should reflect a worst case scenario and cover the cost of the replacement of the entire “rain garden”.

Mr. Field opined that \$10,000.00 is a reasonable amount given all the monitoring fees, and the cost of replacement of the “rain garden”.

Ms. Peckham suggested following the same procedure that the Planning Board uses for landscaping sureties.

Mr. Field reminded the Board that the plantings used in the “rain garden” are not for aesthetics, but rather to perform a function and it is imperative that it functions properly.

Ms. Smith commented that the rocks in the “rain garden” are not going to fail; if anything fails it would only be the plantings involved. She suggested that the bond amount be premised on a percentage.

Ms. Peckham said that the Applicant needs to provide a list of the material needed to build the “rain garden” and the bond estimate is based on that figure.

Mr. Mabey said that he would inspect the site when the garden is completed and then each time the Applicant requests a drawdown of the bond.

Mr. Stanton opined that the Board could come up with the cost and add a percentage to cover legal fees, etc.

The Board discussed whether or not to eliminate the role of Conservation Commission within the proposed easement. It was decided by the Board to keep the paragraph as written because it only gives the Conservation Commission the right to go onto the property and no other role.

Mr. Mabey said as Code Enforcement Officer he is only the catalyst for any legal action; the Selectmen are the ultimate enforcers.

The Board members made the following changes to the proposed easement:

- Paragraph 4 – replace the word Town in the sentence the Town may perform to Building Inspector, the Building Inspector may perform.
- Replace Attorney Saari’s original paragraph 5 with Attorney Whitelaw’s suggested paragraph 5.
- Add a separate paragraph to include the surety amount and retainage terms. Mr. Field volunteered to write the language for the added paragraph.
- Paragraph 7 – replace conservation commission with ZBA

**Ms. Smith Moved and Mr. Batchelder seconded the Motion to reopen the public hearing to determine the cost of the “rain garden”.
The vote passed (4 in favor, 1 opposed and 0 abstention). Mr. Field voted against.**

Ms. Smith asked for a figure for the construction of the proposed “rain garden”.

Mr. Mark West of West Environmental said that the proposed “rain garden” is 25’x 50’ and would cost between 5,000.00 and 10,000.00. He said that the plantings would be about 1,200.00.

Mr. Field suggested using the higher number of \$10,000.00 and adding \$2,500.00 for possible legal fees, and any unused monies would be returned to the homeowner.

Mr. Stanton closed the public hearing.

Ms. Peckham commented that she has been under the impression all along that the Applicant was going to build on the Hawks lot and didn't realize until recently that they were just seeking approvals so they could sell the lot as a buildable lot.

Ms. Smith commented that she realized it a while ago, but mentioned that the information could not influence the Board's judgment.

Ms. Peckham agreed, but said that the Board needed to make sure that it is included in the easement that the successors and assigns have the same responsibilities as the owner if the property transfers.

Mr. Stanton Moved and Ms. Smith seconded the Motion that Case #2008:03 be approved for a Special Exception under Section 409.12 of the Zoning Ordinance subject to the following conditions:

- 1. The "rain garden" be constructed and maintained as proposed on the site plan that was designed by Jones and Beach Engineering the Williams Hawks Trust and modified on 10/03/08.**
- 2. A certification on the site plan by the "rain garden" engineer that the design criteria is the 10-year, 24-hour storm and reflects the best management practices of ENV-wq 1508.08 - stormwater treatment practices vegetated buffer the proposed set of rules associated with RSA 485-A:17 or as amended.**
- 3. An easement be granted to the Town of North Hampton with the continued supervision, management, and if need be the maintenance of the "rain garden".**
- 4. The easement language will be that proposed by Mr. Saari modified by Town Attorney Whitelaw with a subsequent paragraph concerning the escrow account to ensure the building of the "rain garden", such language to be provided by Mr. Field.**

Mr. Field said that there is still a lot of question as to whether or not the Board is taking into consideration the capacity of that site to quantitatively or qualitatively do the job with respect to surface water runoff. He further stated that the Chair of the Conservation Commission has suggested that the Town should hire an expert to educate and inform the Boards on to what the standards are that the Boards should be looking for regarding "rain gardens".

Mr. Stanton said that Mr. West and Mr. Morrill who are experts in soils and plantings in the "rain gardens" who presented expert testimony.

Mr. Batchelder said the testimony presented is coming from the best practices of NH DES, not just a "wild idea".

Ms. Peckham said that the testimony presented did come from the Applicants hired experts, but each member took it upon themselves to educate themselves on "rain gardens".

Mr. Stanton remarked that the burden of proof is on the Applicants.

The vote was unanimous in favor of the Motion (5-0).

Mr. Bob Gosselin, 2 Goss Road, asked who will inspect the “rain garden”.

Mr. Stanton explained that the Conservation Commission and the Building Inspector will be allowed access to the property to look at the garden, and any experts the Building Inspector wants to bring. He further stated that the Conservation Commission will not determine whether or not the “rain garden” meets the standard.

Mr. Gosselin asked why the Board did not take into the consideration what the Conservation Commission members had to say at the last meeting, that they feel a house should not be built on the wetlands.

Mr. Stanton said that the person that represented the Conservation Commission at last month’s meeting did not have the most complete information to make a recommendation; they were making a recommendation on an old plan.

Mr. Field said that he has seriously considered the comments/suggestions of the Conservation Commission. He further said that the Supreme Court declared that if the Department of Environmental Services has established criteria that set forth how a “rain garden” may be implemented and how the best practices are with it, unless there is concrete evidence contrary to that used to create those standards then the Board is obligated to give deference to the State Authority. He opined that there was no contrary evidence and the Board cannot deny the ~~A~~ application because the abutters don’t like it.

Mrs. Buber asked how many members actually looked at the property, and all five members said that they did. She also asked how many members actually walked the property and three of the five members said that they did.

Mrs. Buber commented on the fact that the townspeople were very adamant in their vote as far as distance between wetlands. The townspeople voted resoundingly and with conviction that they wanted a sizeable distance between wetlands and the building of structures.

Ms. Peckham stated that also built into the Town’s Zoning Ordinances is the exception to the rule, and that is part of the Ordinance that passed as well and it is the portion of the Ordinance that this case was proved upon and the Applicant met each of the criteria for the exception. She further stated that the way the law reads is that if the Applicant meets the criteria after the Board deliberates, and then the Board is obligated to vote in favor of the application.

- 2. 2008:06 – William A. & Agnes P. Hawks Estate, C/O Citizens NH Investment Services, Trustee, 875 Elm Street, Manchester, NH 03101.** The applicant requests a special exception under Article IV, Section 409.12 to permit the erection of a new home thirty (30) feet from an inland wetland on a vacant approved building lot of record. Property owner: William A. & Agnes P. Hawks Estate. Property location: Maple Road, Tax M/L 006-040, zoning district R-2. This case is continued from the October 28, 2008 meeting.

In attendance for this application:

Attorney Peter Saari, Casassa & Ryan

Attorney Peter Saari requested to withdraw case #2008:06. The Board granted the request to withdraw.

3. **2008:07 – William A. & Agnes P. Hawks Estate, C/O Citizens NH Investment Services, Trustee, 875 Elm Street, Manchester, NH 03101.** The applicant requests a variance from Article IV, Section 406 to permit the erection of a new home with garage 24 ½ feet from Maple Road on a vacant approved building lot of record. Property owner: William A & Agnes P. Hawks Estate. Property location: Maple Road, Tax M/L 006-040, zoning district R-2. This case is continued from the October 28, 2008 meeting.

In attendance for this application:

Attorney Peter Saari, Casassa & Ryan

Attorney Peter Saari requested to withdraw case #2008:07. The Board granted the request to withdraw.

Mr. Stanton referred to the letter to the Zoning Board from the Conservation Commission referring to “rain gardens” pertaining to the Hawks case but unfortunately came to the Board after the public hearing was closed. He asked the Board if they think a response letter should be written to the CC Chair explaining this.

Mr. Field said that the Conservation Commission is very useful resource, and would always welcome their comments and recommendation on ZBA cases involving wetlands issues.

Ms. Peckham said that she would email the Conservation Commission members the upcoming EPA watershed academy webcast regarding “rain gardens” scheduled for December 3, 2008 from 1-3pm.

New Business

None

Discussion of draft revisions of Rules and Procedures

The Board discussed meeting in December. Ms. Chase informed the Board that there is an application has been submitted and that the Applicant is aware that by law the Zoning Board must hear the case within 30-days. Mr. Field discovered that the Applicant is an abutter to him and he will recuse him from the case. Mr. Field asked if the Chair wanted him to leave the room so that the Board could discuss meeting to hear the particular case. Mr. Stanton did not see that that was necessary.

Ms. Smith stated that she would be unavailable for the month of December.

Ms. Peckham suggested that Ms. Chase inform the Applicant that they will meet in December but that there would be a three member Board to hear the case. The Applicant should receive the option to request for a continuance in lieu of a five member Board.

Mr. Stanton Moved and Ms. Peckham seconded the Motion to hold the December meeting on Tuesday December 9, 2008 at 6:30 in the upstairs conference room. The vote passed 3 in favor 0 opposed and 2 abstentions. Ms. Smith and Mr. Field abstained.

Mr. Stanton Moved and Mr. Batchelder seconded the Motion to direct Ms. Chase to inform the Applicant that there will be a three member board to hear the case. The vote passed 3 in favor, 0 opposed and 2 abstentions. Ms. Smith and Mr. Field abstained.

Mr. Field asked that the Board rescind their vote to omit the Heritage Commission as an automatic abutter to all ZBA applications and explained why it was included in the first place. He said that it was a way to inform the Heritage Commission so if they held an easement or had an interest in the property they would be notified that there may be a change to the property.

The Board decided to add to the application inclusion check list that the Applicant is obligated to include any restrictions, encumbrances or easements of record. Mr. Stanton revised the check list.

A discussion on disqualification ensued. Mr. Field said that it occurred to him that members of this panel can be disabled from acting while sitting in deliberation on a case by virtue of family member, employee/employer or subordinate standing up and making a statement. He said the Board needs to be very careful of that, so when the Board recognizes somebody standing up to speak that may disqualify a member as being a juror on a case, they need to address that issue before tainting the whole proceedings on that case that evening.

Ms. Peckham said the Board should rely on the integrity of the Board members.

Mr. Field suggested that the Chair should address it when swearing in witnesses, and ask them whether or not their testimony could cause the hearing to be tainted, and/or otherwise invalidated. ~~he could ask at that time; and to furthermore as to not potentially~~

~~taint anything, do any of you either work for or are a subordinate to one of the members of this board and if you are consider very carefully.....~~

Mr. Stanton agreed and said that he would come up with some language and pass it by the Board.

Ms. Peckham liked the thought of addressing the issue prior to hearing the cases.

Ms. Smith referred to a “hand out” she received a couple of years ago and it said that when a member is disqualified that member should not only recuse themselves, but they should actually leave the room.

A motion was made and seconded to adjourn at 9:15pm.

Respectfully submitted,

Wendy V. Chase
Recording Secretary

[Approved 12/09/2008](#)