



**TOWN OF NORTH HAMPTON
ZONING BOARD OF ADJUSTMENT
Meeting Minutes
Tuesday, January 27, 2009 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; Michele Peckham and Robert Field, Jr.

Alternates present: Marc Lariviere

Members Absent: Susan Smith

Staff present: Wendy Chase, Recording Secretary, and Richard Mabey, Code Enforcement Officer.

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

Mr. Stanton convened the meeting at 6:36pm.

Mr. Stanton called for a pledge of allegiance.

Mr. Stanton introduced members of the Board and staff. Ms. Chase stated that the agenda was properly posted in the January 9, 2009 edition of the Hampton Union and posted at the Town Clerk's Office, Town Office and Library on January 9, 2009.

Mr. Lariviere was seated for Ms. Smith.

Mr. Field asked what the process was regarding the minutes for witnesses that are sworn in. He commented that the Board has to ensure that the testimony is accurate.

Mr. Stanton said that the minutes are not verbatim and are the official record. He said that the DVD recording is the primary record. Mr. Stanton said that anyone participating in the discussion of a case is entitled to submit a letter that can be included into the record.

The Board was in receipt of a copy of an email, signed by Mr. Field, with proposed changes to the December 9, 2008 minutes made by Mr. Field when he was recused from the Board but a sworn witness to Mr. Peter Horne's case #2008:12.

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Ms. Peckham Moved and Mr. Batchelder seconded the Motion to approve the December 9, 2008 minutes, pages 1 through 7 as written. Mr. Field abstained from voting on any portion of the minutes pertaining to Peter Horne's case #2008:12 but voted in the affirmative to the other portions of the minutes.

The vote passed (4 in favor, 0 opposed and 1 abstention). Mr. Lariviere abstained.

Mr. Stanton Moved and Ms. Peckham seconded the Motion that the email signed by Mr. Field as an abutter with his comments on his testimony be admitted as evidence in the case. (Peter Horne, case #2008:12).

The vote passed (3 in favor, 0 opposed and 2 abstained). Mr. Lariviere and Mr. Field abstained.

Mr. Stanton explained the procedure of the meeting to the audience.

Unfinished Business

2008:12 – Peter Horne Trustee, H.T.L.A.E.H. Nominee Trust F.S. 123 Nominee Trust, PO Box 1435, North Hampton. The Applicant requests a variance from Article V, Section 501.2 to allow a subdivision and lot line relocation on two lots containing non-conforming structures which are within the 75' wetlands setback. Property owner Peter Horne, Trustee, H.T.L.A. E.H. Nominee Trust F.S. 123 Nominee Trust. Property location: 110 & 112 Mill Road, North Hampton, M/L 006-147-002 and 006-147-003, zoning district R-2. This case is continued from the December 9, 2008 meeting.

In attendance for this application:

Attorney Bernard Pelech, Wholey & Pelech Law

Peter Horne, Owner/Applicant

Corey Colwell, Ames MSC Engineers

Mr. Field recused himself.

Mr. Stanton reminded the Board that the public hearing was closed. He gave a brief history of the case from the last meeting.

Ms. Peckham said the application at face value is pretty cut and dry but voiced concerns of the unknown and did not feel comfortable approving a variance without seeing a plan of what the Applicant intends to do on the property.

Mr. Stanton reminded the Board that the ZBA was not approving a "subdivision" or "lot line adjustment", the Board is strictly looking at the two lots that are non-conforming only because there are one or more structures that lie within the 100-foot wetland setback and it will basically amount to reducing the size of one non-conforming lot and increasing the size of another non-conforming lot. He said that by providing the variance from the non-conformity of the wetland setback then the Applicant can proceed to the Planning Board for those two items.

Ms. Peckham voiced concerns that if the variance is approved allowing the Applicant to go before the Planning Board essentially what this would do is create a new buildable lot that the Applicant would most likely develop. She said that she is concerned about a house being built on the new lot

and that Board has not seen any plan depicting a structure on the lot. She said that she felt that she would be approving something that's probably going to happen without having all the facts.

Attorney Pelech showed where the building envelope was depicted on the plan. He explained that the existing two-story garage is within the building envelope and it is possible that a dwelling be added to the garage or the garage could be replaced with a residence. It would meet all the requirements of the zoning ordinance and would not affect the wetlands buffer.

Mr. Stanton allowed Attorney Pelech's comments into the record and gave an opportunity for others to also add testimony. Mr. Stanton swore in Attorney Pelech and Mr. Field as witnesses.

Mr. Field said that he appeared in opposition of this case at the last meeting. He reaffirmed that he has no problem with the underlying subdivision request and encourages the Board that if they choose grant the variance the Board should also stipulate that the lot under discussion is not a buildable lot for a residence. He referred again to the case Fischer v. Dover and opined that this case has been a creeping zoning variance. He opined that the Applicant did not disclose the "full story" at the last meeting. He suggested that the Board reject the Application on the basis that there is no hardship, and feels it is not in the interest of the Town because it is in the wetland zone. He added that the Board should have been told what was going on at the very beginning.

Mr. Stanton said that his understanding of the case Fischer v. Dover is that it's the same application but with slightly different changes, and that it is not a "creeping" improvement to a certain point.

Attorney Pelech said that the case Fischer v. Dover stands for the principle that the Board can't hear the same application twice if it has been rejected unless there is a substantial change to the law or that substantial change in the circumstances of the application, and opined that Mr. Horne's case is not a Fischer V. Dover case. Mr. Pelech said that his client was willing to submit to certain conditions as part of an approval.

Mr. Stanton asked the questions of the variance test and gave the members an opportunity to comment if they so wished.

Is granting the variance in the public interest considering the health, welfare and safety of the citizens as well as the concerns of the abutters?

Will denying the variance create an unnecessary hardship?

Will granting the variance comply with the spirit of the ordinance, which is that it is a non-conforming use because there are structures within the 100-foot setback?

Will granting the variance provide substantial justice?

Will the value of the surrounding properties remain essentially the same by granting the variance?

Mr. Stanton said that there was no evidence presented that was contrary to that. Mr. Field said that he offered that evidence at the last hearing. Mr. Stanton said that he thought it was just Mr. Field's opinion. Mr. Field agreed that it was his opinion.

Mr. Batchelder asked when the original garage was built. Attorney Pelech believed that the building predated the wetland ordinance.

Gregg Sancoff, 120 Mill Road, said that Mr. Horne had informed him that he was going to rebuild his garage and add an office on top of it. He said that the new building is a large intrusive building.

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He said that his concern is that Mr. Horne is creating a situation to rent out the properties to pay for the dam work. He said that Mr. Horne's properties are very close to the pond and he is concerned with the added people renting the properties that may have dogs or canoes and fishing in the pond would overburden the 25 – 30 acre pond. Mr. Sancioff said that he would be satisfied if the property had a deed restriction stating that the property is to remain one property.

Mr. Mabey said that anyone is entitled to rent their property. He said that Mr. Horne is well within his rights to rent out each of his properties.

Phil Wilson was sworn in.

Mr. Wilson explained to the Board why the Planning Board directed the Applicant to seek a variance. He said that he understands RSA 674:19 but stated that Town's can be more restrictive than RSAs. He said that the zoning ordinance says that anyone wishing to make a change to a lot that is non-conforming then a variance is required.

Mr. Stanton closed the public hearing at 7:28pm.

Mr. Lariviere said that he may not agree with what is being done to the property but does not feel that the Board can legally stop him.

Mr. Batchelder suggested adding conditions if approved.

Mr. Batchelder Moved and Mr. Lariviere seconded the Motion to approve the variance request for Peter Horne, case # 2008:12 to allow the lot line relocation between lots 147-3 and 147-2 with the following conditions: (1) no additional structures or increase in the footprint to any structures within the 100-foot wetland setback, and (2) all accessory structure on both lots remain accessory structures. The vote passed (3 in favor, 1 opposed and 0 abstention). Ms. Peckham voted against.

New Business

2009:01 – Peter Horne Trustee, H.T.L.A.E.H. Nominee Trust F.S. 123 Nominee Trust, PO Box 1435, North Hampton. The Applicant requests a variance from Article V, Section 501.4 to allow an in-ground pool, pool deck and concrete pump pad within 100-feet of a wetland. Property owner Peter Horne, Trustee, F.S. 123 Nominee Trust. Property location: 112 Mill Road, M/L 006-147-002, zoning district R-2.

In attendance for this application:

Attorney Bernard Pelech, Wholey & Pelech Law
Peter Horne, Owner/Applicant
Corey Colwell Ames MSC

Attorney Pelech said that he was in receipt of a copy of the letter from the Conservation Commission addressed to the ZBA dated January 30, 2009 requesting the Board to table the application to give the Conservation Commission ample time to engage the services of a wetlands specialist to review the application. Mr. Pelech said that his client has engaged the services of New

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Hampshire Soils Consultants (NHSC) to do a report on the affects of the pool on the wetlands buffer. Mr. Pelech submitted a letter from Mr. Daniel Fenno, Senior Hydrologist from NHSC addressing the concerns of the Conservation Commission; he also stated that he forwarded a copy of the letter to the Conservation Commission Chair, Chris Ganotis.

Mr. Stanton recessed the meeting at 7:45pm to give the members a chance to read the letter submitted by Attorney Pelech.

Mr. Stanton reconvened the meeting at 7:55pm.

Attorney Pelech gave a brief history on the Horne property regarding the in-ground pool:

- An in-ground swimming pool was constructed in 1980.
- A demolition permit was applied for August 15, 1996 to fill in the pool.
- The owner had the pool was “dug out” and relined in 2008.
- The Building Inspector was informed by the Tax Assessors that the pool was rebuilt without a building permit.
- The Building Inspector asked the owner to fill out a new building permit and then denied it based on the wetland buffer setbacks and the fact that the pool was abandoned for over a year causing the loss of the “grandfathered” status. He explained to Mr. Horne that he was entitled to apply for a variance to the wetland buffer setbacks.
- Mr. Horne would like to build the pool in the exact spot that it originally existed.

Attorney Pelech went over the variance test under the Boccia analysis:

- Granting the variance will not be contrary to the public interest: He said that the 100-foot setback was put in place to protect the wetlands from pollutants, and ground water recharge. He said that Mr. Fenno has explained in his report that discharge and drainage of pool water will not affect the existing wetlands provided that the discharge is outside of the wetlands buffer and into a dry well.
- Special conditions exist such that literal enforcement of the ordinance will result in unnecessary hardship: He said that the Mill Pond wraps around Mr. Horne’s property on two sides. He said there is no reasonable alternative to the proposed location. It does not make sense to put the pool far from the house, and placing the pool where it once was would cause minimal impact.
- Granting the variance is consistent with the spirit of the ordinance: He said that any chlorinated water would be pumped into a dry well. Mr. Horne is willing to abide by conditions suggested by Mr. Fenno of NHSC.
- By granting the variance substantial justice would be done: He said that the Board needs to take under consideration that the hardship of the owner is not outweighed by the benefit to the general public.
- Granting the variance will not diminish the values of the surrounding properties: Mr. Pelech said that the pool is not visible to surrounding properties other than Mr. Horne’s properties.

Mr. Pelech commented that Mr. Field said at a prior meeting that he had no problem with Mr. Horne replacing the in-ground pool.

Mr. Fenno addressed to the Board the potential issues the pool would have on the wetlands. He said that the potential problem is the chlorine in the pool used to keep the water sanitary that would have an adverse affect on plant and animal life if it were to get into the wetlands or the pond. He

explained that by avoiding chlorine from entering the wetlands or pond the discharge of the pool filter backwash a dry well be installed or a leaching structure to capture it. He said when draining the pool the chlorination system should be shut off for at least a week, which would allow the chlorine to naturally dissipate prior to discharge. In summary he said that potential impacts to the wetlands and surface water adjacent to the proposed swimming pool are low and can be controlled using standard and acceptable maintenance and waste water handling procedures. NHDES has set up standards based on toxicity levels; the acute criteria for protection of aquatic life for chlorine in surface water is 0.019 parts per million (ppm) and chlorine concentrations in swimming pools are generally maintained between 1 and 3 ppm.

Mr. Fenno referred to the Conservation Commission letter and said that the soils information that they seek is available on the HISS map that was included in Mr. Horne's application to the Planning Board.

Mr. Stanton asked if Mr. Fenno agreed that the grassy area between the pond and the pool is of sufficient depth to mitigate the water runoff from impervious surface of the pool. Mr. Colwell addressed that question.

Mr. Colwell said that with respect to runoff from the deck; grass is one of the best treatments for water runoff. He said that grass treats the contaminants and stays alive; it is deemed one of the best treatments for contaminants. He said that most of the chlorine dissipates into the air then goes in the grass and by the time it reaches the pond it is treated by the grass. Mr. Colwell said that Mr. Horne has hired an expert (Mr. Fenno) and opined that having the Conservation Commission hire another expert is unnecessary and redundant. He further stated that the area where the pool is proposed has been recommended as a replacement septic area so that indicates that the area has decent soils.

Ms. Peckham asked if there was other plant life besides grass up to the pond. Mr. Horne said that it was grass that was mowed.

Mr. Pelech submitted six letters from abutters to Mr. Horne that were favorable to Mr. Horne putting in the in-ground pool.

Mr. Stanton opened the public hearing at 8:35pm.

Phil Wilson, 9 Runnymede Drive, said that he was present at the Conservation Commission meeting when Mr. Horne's application was discussed. He said that the Conservation Commission mentioned the advice they received from the ZBA that they seek expert advice and testimony to back up their recommendations concerning wetlands applications to the Board. He commented that each time so called little projects that do not make a huge impact to the wetlands get approved they eventually add up and cause detrimental impacts on the wetlands. He further stated that he did not have an opinion on the Horne case, and was neither for nor against his application for a variance to rebuild the in-ground pool.

Robert Field spoke from the audience and said that he did not say he had "no problem" with the pool. He said that Mr. Pelech was incorrect, and that he never said that.

Mr. Field asked if Mr. Horne filled in the wetlands. He said that he was advised by someone that it was filled in.

Mr. Colwell said that the wetlands were not filled in and that the flags shown on the property were a result of the wetlands being delineated.

Mr. Batchelder asked Mr. Mabey if he received any complaints of anyone filling in wetlands in the Horne area. Mr. Mabey said that he has not.

Mr. Field commented that many of the letters submitted into evidence from Mr. Horne's abutters had some kind of relationship with Mr. Horne.

Mr. Field said that the Conservation Commission should be allowed to retain an independent expert to examine the work done by NHSC. He further requested that Mr. Fenno explain what the affect chlorine has on wells.

Mr. Fenno responded by stating that chlorine is used to "shock" wells to remedy the water when contaminated by bacteria, and also used to treat drinking water.

Mr. Stanton closed the public portion of the hearing.

Ms. Peckham said that due to the proximity of the pool to the Mill Pond it might be in the best interest to have the Conservation Commission hire an expert to get a second opinion.

Mr. Stanton suggested that the case be tabled to the February 24, 2009 meeting to allow the Conservation Commission to take a site walk on the property on a date mutually agreed upon that would be properly noticed. He said that it would be helpful to receive a surface runoff water mitigation plan to be discussed next month. He further commented on the letter sent from the Conservation Commission and said that it was the most meaningful letter they have received so far.

Mr. Pelech said that he would have attended the Conservation Commission if he had known the Horne application was going to be discussed.

Mr. Stanton said that he will write a letter to the Conservation Commission notifying them of what the ZBA has agreed to, and will advise them to get in touch with the Applicant for a site visit and to get the soils samples from the Applicant and then next month their testimony will be included for deliberation.

Mr. Batchelder commented on the fact that the property will probably be under snow.

Mr. Stanton Moved and Mr. Batchelder seconded the Motion that case #2009:01 be tabled to the February 24, 2009 meeting to give the Applicant time to get together with the Conservation Commission or their designated representatives and their hired expert for a one time visit to the site and to present any plan or suggestions at the next meeting. The vote was unanimous in favor of the Motion (4-0).

Mr. Field was reseated at 8:55pm.

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2009:02 – Jonathan & Sandra Pinette, 108 Post Road, North Hampton. The Applicants request a variance from Article IV, Section 406 to erect a “farmers” porch on the left side of the building within the required 25-foot side setback. Property location: 108 Post Road, M/L 014-111-000, zoning district R-1.

In attendance for this application:

Sandra and Jonathan Pinette, Owners/Applicants

Ms. Pinette explained her proposal. She said that she and her husband wish to build a “farmers” porch on the left side of their property at 108 Post Road. She further explained that they own the adjacent property at 106 Post Road where the proposed porch would abut. Their request is for relief to the side yard setback and that the proposed porch would be 10.9 feet from the property boundary line on the front corner and 3.4 feet from the boundary line on the back corner.

Ms. Pinette went over the five criteria:

- Granting the variance will not be contrary to the public interest: The proposal will not infringe on the current use or enjoyment on property abutters land. It will not impede upon public safety or traffic patterns.
- Special Conditions exist such that a literal enforcement of the ordinance will result in unnecessary hardship: The shape of the lot; it was subdivided prior to Article IV, Section 406 of the Zoning Ordinances and the benefit sought by the Applicants cannot be achieved by some other method reasonably feasible for the Applicants to pursue, other than an area variance because of the current layout of the structure in conjunction with the septic tank.
- Granting the variance is consistent with the spirit of the ordinance: The proposed porch would not have a foundation or be built as a four-season porch and would not be a significant encroachment on the abutting property.
- By granting the variance substantial justice will be done: the Applicant’s response was that substantial justice will be done in granting this variance to the property owners as it will “grandfather” the property lines as subdivided in 1961 vs. the current setback requirements.
- Granting the variance will not diminish the values of surrounding properties: They stated that they are committed to refurbishing the appearance of 106 and 108 Post Road and that the variance and proposed overall property investment would aesthetically add to the area.

Mr. Field commented that the presentation was well done by the Applicants.

Mr. Stanton opened the public hearing at 9:07pm.

Richard Shea, 112 Post Road, spoke in favor of the application and added that the porch will help absorb the noise from the intersection.

Mr. Stanton swore in the Applicants and Mr. Shea.

Mr. Stanton closed the public hearing at 9:09pm.

Mr. Field asked what materials will be used to construct the columns.

Mr. Pinette said that they would use non-rotting material.

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Mr. Stanton agreed that the presentation was well done.

Mr. Field Moved and Ms. Peckham seconded the Motion that all five conditions have been met, and that case 2009:02 be approved as requested. The vote was unanimous in favor of the Motion (5-0).

Mr. Stanton reminded the Applicants of the 30-day appeal process.

Mr. Stanton called for a recess.

Mr. Stanton called the meeting back to order.

Rules of procedure

Mr. Stanton informed the Board that it was Mr. Lariviere's last meeting as an alternate to the Board.

Mr. Field asked if were at all possible if Mr. Lariviere could stay until the continued cases before the Board were finalized. Mr. Lariviere said he would take the request under consideration.

Mr. Stanton said that he would like to write a letter to the Select Board requesting the opportunity to appoint five alternates to the Board. He reminded the Board that they agreed that they were satisfied with three alternates when the Select Board last asked them what their preference was. It was agreed to have Mr. Stanton write the letter.

Discussion ensued regarding some of the responsibilities of the Chair.

Mr. Wilson suggested that duties such as writing the yearly town report on behalf of the Board be included in the Rules of Procedure.

Mr. Field brought up the subject of the pledge of allegiance and reiterated his thoughts that it is not appropriate for the Zoning Board to cite the pledge of allegiance at the ZBA meetings, even though it is on a voluntary basis.

Changes to the Rules of Procedure¹ and ZBA forms²

Mr. Stanton Moved and Mr. Field seconded the Motion to approve the rules of procedure and forms effective March 1, 2009.

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

Mr. Field said that he was in receipt of an email sent by Chairman Stanton stating that Mr. Lariviere resigned as an alternate to the Board.

Mr. Stanton said that Mr. Lariviere did not put his resignation in a letter.

Mr. Lariviere said that he was informed that he needed to put his resignation in writing, and that he has not done that.

Mr. Stanton opined that it was the Select Board's requirement to have resignations in writing, not the ZBA's requirement.

Mr. Field disagreed and posited-“What if somebody were to become physically or mentally disabled?” He suggested that under these circumstances it would be impossible to fulfill the Select Board's requirement.

Mr. Field commended Mr. Stanton on the hard work he did on the updated rules.

Mr. Batchelder Moved and Ms. Peckham seconded the Motion to adjourn at 10:40pm. The vote was unanimous in favor of the Motion (5-0).

Respectfully submitted,

Wendy V. Chase
Recording Secretary

¹pg 1, sec 2-A other RSA added
pg 3, sec 3.B "only" deleted
pg 4, sec 3.C sworn testimony and member comments
pg 8 sec 5.M.7 note added
pg. 9 sec 6.B.6 rebate of recording fee
pg 9 sec 6.C.1 added Hampton Union
pg 9 sec 6.C.6 replaced land w/premises for sign
pg 12 sec 6. G. 2 voting and abstentions
pg 12 sec 6.G.5 reference to RSA 673:16 (II)
pg 13 sec 7.D ConComm interests
pg 14 Record of changes relocated to appendix

²pg A-1 changed fees structure - total is same
pg A-2 Wetland data waiver
pg A-6 Types of appeals, added other NH Statutes
Form 1 modified to serve as the 'other' request.