



**TOWN OF NORTH HAMPTON
ZONING BOARD OF ADJUSTMENT
Meeting Minutes
Thursday, November 19, 2009 at 6:30pm
Mary Herbert Conference Room**

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; and Robert Field, Jr.

Alternates present: Debbie Wood, Jennifer Lerner and Chuck Gordon

Members Absent: Susan Smith, Richard Batchelder and Michele Peckham

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

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

Mr. Stanton convened the meeting at 6:31pm.

Mr. Stanton invited the Board and the audience to rise for a Pledge of Allegiance.

Mr. Stanton introduced the members of the Board and members of the Staff.

Ms. Wood was seated for Ms. Smith.

Mr. Gordon was seated for Ms. Peckham.

Ms. Lerner was seated for Mr. Batchelder.

Unfinished Business

Mr. Stanton remarked that there was no unfinished business under the agenda items.

Mr. Field disagreed, and called for a point of order.

Mr. Field said that he notified the Planning & Zoning Administrator on several occasions that he wanted to introduce a motion, that the Board "sua sponte" act to rehear Case # 2009:13 because of several potential breaches of law.. He said that the Board was put on notice that there was a case pending that had time constraints to it, and asked how the Chairman was going to handle it.

Mr. Stanton referred to the rules of procedure, and explained that Mr. Field should have followed the procedure to request a special meeting of the Board to address his issues.

49 Mr. Stanton explained that he exercised his right as Chairman of the Board under Section 5G of the Rules of
50 Procedure, and postponed the October 27, 2009 ZBA Meeting because there were no new applications to be
51 addressed.

52
53 Mr. Field argued that he brought to the Chair's attention a pending matter, to be addressed at the regular
54 October Meeting, prior to Mr. Stanton postponing the October Meeting, that he felt the Board needed to
55 consider at that scheduled Meeting. He said that there is no need for a special Meeting when the matter
56 should be on the Agenda for the Regular Meeting.

57
58 Mr. Stanton said that the Chair has the responsibility for determining the agenda, and he read Mr. Field's
59 unsigned email requesting that the Board review a case that had been decided upon and that Mr. Field
60 disagreed with, and whereas, Mr. Field did not cite any references of law, or improper procedure that would
61 justify a rehearing of that case. Mr. Field said that he was not the party requesting the rehearing, rather he
62 proposed to place the matter before the Board, whereby the Board would have to determine whether or not to
63 rehear case 2009:13.

64
65 Mr. Field said that as an Elected Member of the Board, he requested that the Board place on the October 27,
66 2009 agenda, case #2009:13, to consider the matter for several reasons.

67
68 Mr. Stanton read Section 5G of the Rules of Procedure, *The Chair may cancel a Regular Meeting if there are*
69 *no applications pending for reasons of: (1) no filings, or (2) request(s) to withdraw, or otherwise defer a*
70 *Public Hearing on an Application has been filed by such Applicant.*

71
72 Mr. Field said that there was a matter pending, which was his request that the Board "sua sponte" consider
73 addressing case #2009:13. He asked if it would be discussed at this Meeting.

74
75 Mr. Stanton said that it would not. He said that he was informed of Mr. Field's request to discuss case
76 #2009:13 "sua sponte" at the October meeting by Ms. Chase and that Mr. Field made no reference to the
77 alleged "procedural" and "substantive" errors made on that case; therefore, Mr. Stanton decided not to
78 include it on the agenda. Mr. Stanton explained that a "special meeting" may be called by at least three
79 Primary Members of the Board, and that Mr. Field should have followed that procedure if he wanted to
80 revisit case #2009:13.

81
82 Mr. Field disagreed, and said that a member of the board should be given the opportunity to address an issue
83 at a public meeting, and he requested that the Board meet in October to determine whether or not to postpone
84 the October Meeting, and to also have the opportunity to present the pending case, and let the Board decide
85 whether it was meritorious or not.

86
87 Mr. Gordon commented that case #2009:13 was heard at the September meeting, and three of the members
88 who sat on the case were not present this evening, and because of that he questioned whether or not it would
89 be appropriate to discuss the case this evening.

90
91 Mr. Field said that members can be substituted that did not participate in the case if they state that they read
92 the case.

93
94 Mr. Stanton said that a point of order has to reference a rule of procedure that has been violated.

95
96 Mr. Field said his "point of order" is to the rule of procedure that the Chair did not conduct the October
97 Meeting, and there was a matter before the Board.

98

99 Mr. Stanton ruled on Mr. Field’s point of order, and said that his point of order was out of order. He opined
100 that there was no matter pending before the board; therefore he did not place case #2009:13 on the agenda as
101 unfinished business.

102
103 Mr. Stanton suggested that if Mr. Field disagreed with his ruling then he could challenge the ruling and that
104 there must be a second to the ruling, discussion, then a vote. He explained that a yes vote would be against
105 the Chair’s ruling, and a nay vote would be for the “point of order”

106
107 Mr. Field continued to argue his case.

108
109 Mr. Stanton called Mr. Field “out of order” because he was continuing to discuss an issue that the Chair had
110 already ruled on.

111
112 Mr. Field challenged Mr. Stanton’s ruling. There was no second to his challenge.
113 The challenge failed.

114

115 **New Business**

116
117 **2009:14 –Michael & Tricia Tully, 229 Post Road, North Hampton.** The Applicants have applied for a
118 Request for Equitable Waiver. The foundation constructed on the property encroaches into the side setback
119 by approximately 1-foot. Property owners: Michael and Tricia Tully; property location: 42 Walnut Ave.;
120 M/L 014-160-001; zoning district R-2.

121
122 In attendance for this application:
123 Michael & Tricia Tully, Applicants/Owners

124
125 Mr. Stanton explained to Mr. & Mrs. Tully, what the “sequence of events” would be concerning his
126 application.

127
128 Mr. Stanton swore in Witnesses and read the juror caution, asking whether anyone wished to
129 request any regular or alternate member of the Board sitting tonight should be disqualified, and if so
130 to identify the member or alternate and state the reason why.
131 There was no request for disqualification.

132
133 Mr. Tully went over the four criteria required under the Equitable Waiver application.

- 134
135 **1. That the violation was not noticed or discovered by any owner, former owner, owner’s**
136 **agent or representative, or municipal official, until after a structure in violation had**
137 **been substantially completed.**

138
139 Mr. Tully explained that the foundation was pushed back into the required 30-foot side
140 setback at the rear corner of the garage by 1.25-feet. He said he noticed it after the
141 foundation was already in when he had the surveyor, James Verra, draw up the plan for his
142 construction certification. He said he stopped construction after Mr. Verra confirmed that it
143 was 1.25-feet into the setback. He said that the current foundation is estimated to be
144 \$11,000 with the lot and site work.

- 145
146 **2. The violation was not an outcome of ignorance of the law or ordinance, failure to**
147 **inquire, obfuscation, misrepresentation or bad faith on the part of any owner, owner’s**

148 **representative, but was instead caused by either a good faith error in measurement or**
149 **calculation made by an owner or owner's representative.**
150

151 Mr. Tully said that he was not ignorant of the law and that he did all of the lot work himself.
152 He explained that he purposely went closer to the Donais' lot to be further away from Route
153 95. He said that he believes that when they set the measurements for the foundation, they
154 got twisted.
155

156 **3. The physical or dimensional violation does not constitute a public or private nuisance,**
157 **nor diminish the value of other property in the area, nor interfere with or adversely**
158 **affect any present or permissible future uses of any such property.**
159

160 Mr. Tully opined that the 1.25-foot encroachment does not affect the property values. He
161 said that he does not think it creates a nuisance to the current neighbors.
162

163 **4. Due to the degree of past construction or investment made in ignorance of the facts**
164 **constituting the violation, the cost of correction so far outweighs any public benefit to**
165 **be gained, that it would be inequitable to require the violation to be corrected.**
166

167 Mr. Tully opined that by digging up the foundation and moving it 1.25-feet would create a
168 better environment for anyone else.
169

170 Mr. Stanton asked Mr. Tully if the roof eaves would intrude into the side setback once the house is
171 built. Mr. Tully said that the way the house will be situated will not affect the setbacks at all.
172

173 Mr. Field asked if Mr. Tully had a copy of the plan (D-35985) referenced on the foundation
174 certification plan. Mr. Tully did not. Mr. Field commented that the plan shows the foundation
175 being depicted in the septic area.
176

177 Mr. Tully explained that the septic will be located in front of the house and the new septic plan is on
178 file with the Town.
179

180 Mr. Stanton opened the public hearing at 7:06pm.
181

182 Mr. Stanton swore in Mr. Romano.
183

184 Mr. Caesar Romano, 46 Walnut Avenue, spoke on behalf of himself and Ruth Donais, and
185 commented that they are in favor of the Board granting Mr. & Mrs. Tully's request for an Equitable
186 Waiver.
187

188 Mr. Stanton closed the public hearing at 7:08pm.
189

190 Mr. Stanton called for a five minute recess to review the new plan Mr. Mabey made a copy of, and
191 submitted to the Board.

192 Mr. Stanton reconvened the meeting.
193

194 Mr. Field suggested that Mr. Tully confirm that he would like to add the plan, that Mr. Mabey made
195 a copy of, to the permanent record after putting his initials and date on the plan. Mr. Tully obliged.

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Mr. Field Moved and Mr. Gordon seconded the Motion to approve the request for the Equitable Waiver for case #2009:14.

The Board members discussed RSA 674:33-a – Equitable Waiver of Dimension. The Board agreed that the error was an honest mistake; it was a “good faith” error in measurement of calculation; the Board heard from abutters supporting the granting of the waiver; the Applicant testified that the mistake would not lead to diminution of value, and there was no evidence submitted that would be contrary to that opinion; the Board agreed that the cost of correction outweighs any public benefit to be gained, and it would be inequitable to require that the violation be corrected.

Mr. Gordon Moved and Mr. Field seconded the Motion to amend the Motion to include that the Applicants have satisfied all four of the Equitable Waiver criteria stated in RSA 674:33-a. The vote was unanimous in favor of the amendment (5-0).

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

Other Business

The Board discussed the proposed changes to the Rules of Procedure, and the new law effective January 1, 2010 regarding variances.

Mr. Stanton explained that it would take a super majority of Primary Members to change the Rules of Procedure. He said that there are significant changes that need to be made to the applications, and the Applicants need to be aware of the changes.

Mr. Stanton noted that there were only two Primary Members present, and suggested that the Board vote on a temporary change to the Rules of Procedure subject to approval by a Board of four Primary Members to ratify the changes. He said that this would provide the ability to provide the proper instructions and guidance to those Applicants requesting a variance.

Mr. Field said that the State law takes effect on January 1st and will preempt anything in conflict with it. He suggested that Ms. Chase bring to the attention of any applicants the new law so that they would have the opportunity to tailor their applications to conform to the law. He suggested she provide a copy of the new law with each variance application.

Mr. Field said that due to the lack of Primary Members present, the Rules of Procedure could not be amended. He said that the Rules are not required to include the variance criteria. He said that he did not receive a copy of the proposed changes and the Board’s Rules require that notice is to be given to each of the Board Members of what the proposed changes are going to be.

Mr. Stanton said that the proposed changes were included in the Board’s packet of information for this Meeting.

Mr. Field did find his copies of the proposed changes.

Mr. Salomon said that there will be a significant change to the approach in the hardship criteria effective January 1, 2010. Mr. Salomon agreed with Mr. Field that the criteria is not required to be included in the Rules of Procedure, but the fact of the matter is, is that they currently are. Mr. Salomon suggested that the Board have a discussion of the proposed changes and vote to include those changes along with the existing rules until such time that the Super Majority can act on them. He said that the current Rules do reflect the

246 old Statute, and suggested that the Board do something non-binding that can give the Applicants as much
247 guidance as possible.
248

249 Mr. Stanton said those Applicants that filed their request for a variance before December 31, 2009 will be
250 guided by the old criteria and those submitting requests for a variance after January 1, 2010 will be affected
251 by the new law. He suggested that the Board at least change the application portion to reflect the changes to
252 the instructions for the appeal.
253

254 Mr. Field said that the Board does not have the capacity to act on the changes to the Rules with only two
255 Primary Members present.
256

257 **Mr. Stanton Moved and Ms. Lerner seconded the Motion that the Board allow the Zoning**
258 **Administrator to change the instructions for appeal, the appendix to the Rules of Procedure to reflect**
259 **the new variance criteria, that will be in effect the 1st of January.**
260

261 Mr. Field suggested that the Zoning Administrator hand out a copy of the proposed changes along with the
262 Application, and to inform the Applicants that the changes are likely to become effective as of January 1,
263 2010..
264

265 Mr. Gordon agreed with Mr. Field.
266

267 Ms. Lerner withdrew her second to the Motion. Mr. Stanton withdrew his Motion.
268

269 **Mr. Gordon Moved and Mr. Field seconded the Motion to have the Zoning Administrator hand out**
270 **copies of the draft changes to the Rules of Procedure and a copy of the new law as defined in RSA**
271 **674:33,I(b) with each variance application and to give the Applicants no advice.**
272 **The vote was unanimous in favor of the motion (5-0).**
273

274 Ms. Chase informed the Board of the possibility that a couple of applications may be submitted within the
275 next couple of weeks. The Board does not usually meet in December.
276

277 Mr. Field said that if the Board receives applications, by law, the Board would need to convene a Meeting,
278 but the Board does not have to conduct business at that Meeting.
279

280 **Mr. Field moved and Mr. Gordon seconded the Motion that any Applicant who applies in December**
281 **and wants the current standards to apply that the Board will accept the case as being timely filed and**
282 **the application will be addressed at the next regular meeting of the Board under the rules of the**
283 **Applicant's choice.**
284 **The vote was unanimous in favor of the motion (5-0).**
285

286 Mr. Field said that this Board is cognizant that as of January 1, 2010 there will be significant changes to RSA
287 674:33.
288

289 Mr. Stanton said that if the Board needs to accommodate an Applicant that insists on being heard in
290 December, they need to be made aware that the Board may continue the deliberation of cases submitted for
291 December to the January Meeting.
292

293 The Board agreed to tentatively schedule a meeting on Tuesday, December 15, 2009 at 9:00am. Mr. Field
294 added that anyone so electing will be entitled to elect the current standards for consideration.
295

296 **Meeting Minutes of September 22, 2009**
297

298 Mr. Field said that he had changes to the September 22, 2009 Meeting Minutes that he had forwarded to Ms.
299 Chase by email on October 2, 2009.

300
301 Mr. Stanton suggested postponing the September 22, 2009 Meeting Minutes to a Meeting where there are at
302 least three of the members present that were present at the September Meeting.

303
304 Mr. Field requested that the Chair postpone any consideration of the minutes to a Meeting where he would be
305 present so that he would be able to present his changes. Mr. Stanton agreed, and asked that Mr. Field have
306 his changes individually written out, because he read through Mr. Field's changes and disagreed with 90% of
307 them.

308
309 Mr. Field asked Ms. Chase to forward the October 2nd email to each Member of the Board, and that the
310 minutes not to be considered until Mr. Field is present at a Board Meeting. Mr. Stanton agreed.

311
312 **Email Correspondence from Robert Field regarding Chair Stanton's September 28, 2009 letter to the**
313 **Planning Board.**

314
315 Mr. Field said that there were three people on the Board that expressed some level of objection to the letter
316 Mr. Stanton sent to the Planning Board; Mr. Buber, Ms. Peckham and himself. He suggested that the letter
317 should have noted such concerns so that it would not have been taken as a unanimous view.

318
319 Mr. Stanton read Ms. Peckham's email into the record, "I have read Rick's letter and I am wondering what is
320 the administrative comment as I did not see it. Perhaps I will understand Bob's comments after reading the
321 administrative comment concerning the definition of church". Mr. Stanton said that he did not receive a
322 letter from Mr. Buber. (Secretary's note: It was determined that, following the Meeting, Mr. Stanton did
323 receive the letter from Mr. Buber).

324
325 Mr. Stanton did not see a need to change the letter after reading Mr. Field's comments. He said that he
326 reviewed the video of the September 22nd Meeting several times and the only request Mr. Field made was to
327 be able to review the letter before it was sent to the Planning Board, which he did have the opportunity to do
328 so.

329
330 Mr. Stanton said that he was given authority by the Board to write to the Planning Board, a letter about the
331 wind systems, and churches in the I-B/R, and had made a comment about churches, and the lack of a
332 definition.

333
334 Mr. Field read his letter of September 24, 2009 into the record.

335
336 **From:** Robert Field, Jr. [rfield@cfbpa.com]
337 **Sent:** Thursday, September 24, 2009 4:20 PM
338 **To:** 'Rick Stanton'; 'Chuck Gordon'; 'David Buber'; 'Debbie Woods'; 'Jennifer
339 Lermer'; 'Michele Peckham'; 'Richard Batchelder'; 'Susan Halliday Smith';
340 'Ted Turchan'
341 **Cc:** Wendy Chase
342 **Subject:** RE: Proposed letter to the Planning Board

343
344 [Dear Mr. Stanton-](#)

345
346 [This is in reply to your request for comment on the contents of the "draft" letter, dated September 24, 2009,](#)
347 [authored by you and addressed to the Town of North Hampton Planning Board.](#)

348

349 Comments follow-

350
351 Paragraph Two (2)- I am in agreement with the content of your proposed Paragraph two (2). However, I am
352 led to understand that the Planning Board may have already addressed your concern. You may wish to
353 check the Minutes of past Planning Board Meetings to ensure that the request is not a redundancy.

354
355 Paragraph Three (3)- I am in agreement with the text of your letter as to proposed Paragraph three (3) up
356 through the phrase "...or the special exceptions of the I-B/R district..." I disagree with, and withhold my
357 consent from, including the final two sentences of your proposal. My reasons are as follows- The Current
358 Planning Board has no capacity or standing to speculate on the "rationale behind... the Ordinance". The
359 Ordinance stands as it is written and the only material which can be used to help explain the rationale is that
360 which accompanied the material when it was addressed by the "voters" at the time of its adoption, and/or
361 archival materials which were generated by the Planning Board at the time it collected evidence and public
362 input on the ordinance.

363
364 Also, and as I expressed clearly at the time of our ZBA Meeting on Tuesday, September 22, it would be
365 entirely improper to selectively create a "Definition" for the word "church". Such action, if taken at all, would
366 be selective and possibly discriminatory if it failed to also define the other categories of permitted houses of
367 worship, such as "temple", "synagogue", or "mosque", or any other buildings, as such terms appear and
368 are used in Section. 416.3.

369
370 Once again, in a manner analogous to your insistence that the Pledge of Allegiance be recited as a predicate
371 to the conduct of business at a Board Meeting, you appear to have a desire to generally impose your
372 personal standards, beliefs and mores, as to "church", "worship", and "patriotism". I believe that such
373 standards are individual rights, protected by the Constitution of the United States, and have no place being
374 selectively introduced as part of a Zoning Ordinance, and or the procedures adopted to conduct business
375 there under. I continue to find objectionable the implication that, as to "church" matters, persons who might
376 disagree with the constitutionality, interpretation, and/or reasonableness of your pronouncements are
377 somehow less "faith oriented" than you. It is a discussion which, in my opinion, is both demeaning of the
378 contrary minded person and one which has no place before a Zoning Board of Adjustment.

379
380 Accordingly, please note my objection to Paragraph Three (3).

381
382
383 Mr. Stanton said that he did read Mr. Field's email and did consider it, but was given authority by the
384 majority of the Board to write the letter, and he felt that Mr. Field's comments did not necessitate him to
385 change the letter. Mr. Stanton also said that he is upset with Mr. Field's comments about reciting the Pledge
386 of Allegiance at the meetings.

387
388 Mr. Field expressed concern that over the past six months a process that misapplies the law has crept into the
389 Board's proceedings. Mr. Field referred to a 1984 case Appeal of Seacoast Anti Pollution League (125 NH
390 466) regarding quasi judicial law. Mr. Stanton asked that Mr. Field provide him with a copy of that case.

391
392 Mr. Stanton gave Mr. Field two minutes to speak on the subject of the 1984 case to which he made reference.

393
394 Mr. Field explained that when working in a quasi judicial capacity the Board is obligated to conduct itself by
395 the same rules that govern judges. He said that the Board is neither allowed to introduce evidence, nor seek
396 out evidence on its own and introduce it into a matter. He said that the Board must rely on evidence
397 submitted by the public, or applicant.

398
399 Mr. Field referred to the 1984 Court Case Winslow v. Holderness (125 NH 302). He said that if one person
400 taints the discussion on the Board, sitting in its judicial capacity, and that it taints the entire discussion and
401 the case should be thrown out. He said that individual information is being presented by the Board and it has
402 happened in the Horne case, the Salomon case, the Corbett case, the Hawke case, and the Tully case.

403
404 Mr. Field requested that he be able to continue his discussion and to add the matter to the next agenda.
405

406 Mr. Stanton suggested that if Mr. Field had proposed changes to the Rules of Procedure that he write them
407 up, send a copy to the Zoning Administrator and a copy to each of the Board Members so that they may
408 review them prior to the Meeting, and they can be addressed under Rules of Procedure changes.
409

410 Mr. Phil Wilson, Planning Board Chair asked to address the Board on a certain matter. Mr. Stanton allowed
411 him to do so.
412

413 Mr. Wilson explained that he is Chair of the Planning Board but was not speaking formally for the Planning
414 Board. He referred to ZBA Case #2009:13 – Church Alive, where a variance was approved to allow a
415 church in the I-B/R district where churches are not permitted. The Applicant was referred to Planning Board
416 for site plan approval.
417

418 Mr. Wilson said that he watched the September 22, 2009 ZBA Meeting on channel 22. He referred to the
419 Board's comment that it would be helpful for the Planning Board to define the word "church". Mr. Wilson
420 opined that it would be difficult to define the word "church". Mr. Wilson said that the obligation of the ZBA
421 is under Statutory Law and Case Law, and that decisions must be based on the five criteria and nothing else.
422 He felt that the reasons for approving the church in the I-B/R district from some of the members had nothing
423 to do with the five criteria. Mr. Wilson said that Mr. Batchelder voted against the position taken by Mr.
424 Field. Mr. Wilson opined that the approved variance for Church Alive was flawed both procedurally and
425 legally. He commented on the fact that the appeal period for the decision made by the ZBA had not expired
426 when the Applicant went before the Planning Board for site plan approval. Mr. Wilson asked that the ZBA
427 try to be more rigorous and careful when exercising the Board's quasi judicial function.
428

429 Mr. Stanton said that Mr. Wilson's comments were appreciated and duly noted. He said that RSA 677:3
430 does specify the procedure for "rehearing" and who is allowed to do so up to 30 days after the Board's
431 decision. He explained that any person directly affected by the decision has the right to appeal the decision.
432 He said that there was no appeal of the decision made on case #2009:13 – Church Alive. Mr. Stanton opined
433 that when there is a close decision on a case there are two sides and two opinions on trying to apply the law.
434 He said that the ZBA's real issue when dealing with the Church Alive case, was putting that church in that
435 location, and the traffic and other issues were Planning Board issues. He said that the Zoning Board does its
436 best to use common sense and apply the law to the best of its ability.
437

438 Mr. Field began to comment on what he felt were procedural defects that have crept into the proceedings.
439

440 Mr. Stanton opined that Mr. Field was merely continuing on as a personal attack against him about the way
441 he does "homework" and "evidence gathering".
442

443 Mr. Stanton Moved and Ms. Lerner seconded the Motion to adjourn at 8:18pm.
444 The vote passed (4 in favor, 1 opposed and 0 abstention). Mr. Field opposed.
445

446 Respectfully submitted,
447

448 Wendy V. Chase
449 Recording Secretary
450

451 Minutes approved 02/10/2010

452 The original minutes and a copy of them with annotated changes are available at the Town Office.