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**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, January 26, 2010 at 6:30pm
Mary Herbert conference Room**

6

7

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

10

11 **Attendance**

12

13 **Members present:** Richard Stanton, Chair; Richard Batchelder, Vice Chair; Michele Peckham, and
14 Robert Field, Jr.

15

16 **Members absent:** Susan Smith

17

18 **Alternates present:** Ted Turchan and David Buber

19

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

22

23 Mr. Stanton convened the meeting at 6:30pm.

24

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

26

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

28

29 Mr. Field called for a point of order.

30

31 Mr. Field referred to a copy of a written resignation made by Primary Member Susan Smith, and said
32 that under the Board's Rules of Procedures that when there is a vacancy made by a Primary Member it
33 can only be filled by the Select Board until the entire Zoning Board is an elected Body. He asked
34 whether or not the Select Board had delivered a replacement for Susan Smith.

35

36 Mr. Stanton said that he would address his point of order after he made a couple of announcements;
37 the first announcement was that the Zoning Board will hold a forum on February 9, 2010 at the Town
38 Hall at 7:00pm. The North Hampton ZBA, through the Town Administrator, has invited the ZBA's of
39 Greenland and Rye to join us on issues important to the Zoning Board. The main topics will be:

40

41 1. What does it mean for the ZBA to be quasi-judicial, and how do the statutes and case law affect
42 the way ZBA should conduct business?

43 2. What are the limits to ZBA members doing research, and what consideration must be given
44 to expert testimony or evidence?

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45 3. How does the new variance law affect ZBA decisions?
46

47 He said that the LGC will make a presentation and after that there will be time for questions and
48 answers. He said that the Planning Boards are also invited and the forum is open to the public. He said
49 that priority will be given to the ZBA members asking questions.
50

51 Mr. Stanton then announced that the Board was in receipt of a resignation letter from Susan Smith,
52 dated January 26, 2010, addressed to the Select Board, and a copy to the ZBA. Mr. Stanton thanked Ms.
53 Smith for her many years of service to the Town. He asked for the Board's permission to write a "thank
54 you" letter to Ms. Smith on behalf of the ZBA.
55

56 Mr. Field asked that the draft letter to Ms. Smith be circulated to the Board as a courtesy, because some
57 members may wish to supplement the letter.
58

59 Mr. Stanton said that he would send the draft "thank you" letter to members of the Board for their
60 review and comment, but did not want to obligate himself that he must incorporate any member's
61 comments into the letter.
62

63 Mr. Field said that he would like to modify his suggestion that the letter not go out until the Chair has
64 received the concurrence of the five members of the Board.
65

66 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion that the Chair be allowed to write a
67 letter of thanks on behalf of the Board to Ms. Susan Smith.**
68

69 **Mr. Field proposed an amendment to Mr. Stanton's Motion that such letter be circulated to, and
70 approved by, the Members of the Board before it is sent to Ms. Smith. Ms. Peckham seconded his
71 proposed amendment.**

72 **The vote was 2 in favor 2 opposed and 0 abstentions. The motion failed.**
73

74 **Mr. Stanton called the question on the original motion.**
75

76 Mr. Turchan questioned whether or not he was able to vote. Mr. Stanton thought it was up to Mr.
77 Turchan and Mr. Field disagreed and suggested the issue be addressed.
78

79 Ms. Peckham said that she agreed with Mr. Field, that the Board members be given the opportunity to
80 review the letter, and that the letter should be circulated for comment before it is sent to Ms. Smith.
81

82 Mr. Stanton agreed to add to his motion that he would circulate the letter for review and comment.
83

84 Mr. Field asked Ms. Peckham if she meant that the comments be included in the letter, and Ms.
85 Peckham answered that the comments be included if appropriate, and the Chair can decide what is
86 appropriate.
87

88 Mr. Stanton withdrew his motion and Mr. Batchelder withdrew his second to the motion.
89

90 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion that the Chair be empowered by the
91 Board to write a "thank you" letter to Ms. Susan Smith for her years of service, to be circulated to**

92 **Board Members via email for their comment, and with timely comments the Chair will decide if the**
93 **comments are appropriate in the letter that is actually sent.**

94

95 Mr. Field asked Mr. Stanton to define “timely” in his Motion, and Mr. Stanton replied, “one week”.

96

97 Mr. Field asked what an “appropriate comment” was and Mr. Stanton said that he couldn’t answer that
98 without reviewing the “comment”.

99

100 **The vote passed in favor of the Motion (4 in favor, 0 opposed and 1 abstention). Mr. Turchan**
101 **abstained.**

102

103 Mr. Stanton read NH Statute 673:12 III into the record: *The chairperson of the local land use board may*
104 *designate an alternate member of the board to fill the vacancy temporarily until the vacancy is filled in*
105 *the manner set forth in paragraph I or II* (and this would apply to the Select Board as the appointing
106 authority until May). He said that the change to the law was effective August 21, 2009.

107

108 Mr. Stanton commented that Mr. Ted Turchan received “quite a few” votes at the March 2009 Election,
109 and asked him to serve as the Primary Member. Mr. Stanton asked the Board if they would empower
110 him to write a letter to the Select Board notifying them of the appointment. He explained that the
111 Select Board can either fill the vacancy or wait until the May 2010 Election.

112

113 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion that the Chair be empowered to write**
114 **to the Select Board notifying them that the Chair, in accordance with RSA 673:12, has appointed Ted**
115 **Turchan as a Primary Member until the Appointing Authority decides to act on that appointment.**
116 **The vote passed in favor of the Motion (4 in favor, 0 opposed and 1 abstention). Mr. Turchan**
117 **abstained.**

118

119 Mr. Stanton stated that Mr. Turchan is now a Primary Member of the Board and said that Mr. Field’s
120 point of order has been addressed.

121

122 Mr. Stanton explained the Board’s proceedings of the meeting to the audience.

123

124 Mr. Field called for a point of order. He asked if the Board would be following the rules of the Corbett
125 Case with regard to challenging the members serving on the Board or on that Case.

126

127 Mr. Stanton asked which rule in the Rules of Procedure Mr. Field was referring to.

128

129 Mr. Field said that it was the rule Mr. Stanton established in the Corbett Case by being an abutter to the
130 property and then challenging the service of members of the Board sitting on the case.

131

132 Mr. Stanton said that the Board will follow the Rules of Procedure.

133

134 Mr. Field continued to argue his point. Mr. Stanton called Mr. Field’s point of order out of order.

135 Mr. Field called for a point of personal privilege.

136

137 Mr. Field referred to Section 4.F. of the Rules of Procedure regarding disqualification of Board Members.
138 He said that he did not see where it limits the right to challenge the objectivity of the Board to an
139 Applicant.

140 Mr. Stanton said that if any individual had a cause, and recognized by the Chair, the Members will try to
 141 act in a neighborly fashion with the people we are dealing with. He said that if someone spoke out about
 142 a member's affiliation or business association that they think would affect a fair and impartial decision
 143 by the Board, the Chair will hear that objection.

144

145 Unfinished Business

146

147 **2009:15 - Joel & Karen Schofield, 28 Mill Road, North Hampton.** The Applicants request variances from
 148 (1) Article IV, Section 406 for relief from the 35-foot front setback to construct steps to the front door
 149 entry, and (2) from Article IV, Sections 409.9.B.1 and 409.9.B.2 to construct back steps within the
 150 wetlands buffer. The Applicants request a change of use from the special conditions of the July 24, 2007
 151 approved variance request from a two bedroom house to a three bedroom house, and to allow a partial
 152 basement. Property owners: Suzanne, Robert and Harry Savage, 55 Congress Street, Suite 203,
 153 Portsmouth, NH 03801; Property location: 4 Boulters Cove; M/L 001-014; Zoning district R-2. This case is
 154 continued from the December 15, 2009 Meeting.

155

156 In attendance for this application:

157 Attorney Bernard Pelech, Law Offices of Wholey & Pelech
 158 Chris Andrews, Builder
 159 Harry Savage, Owner
 160 Karen Schofield, Applicant (purchase and sales agreement)

161

162 Mr. Stanton swore in witnesses.

163

164 Mr. Field questioned which application the Board should be referring to. He said that there was an
 165 application dated November 30, 2009, case # 2009:15 and one application dated January 5, 2010, case #
 166 2009:15.

167

168 Mr. Stanton explained that the application is continued from the December 15, 2009 Meeting with an
 169 added request, which the Board granted, that the Applicant be given the opportunity to modify the
 170 application without further expense except for notification fees.

171

172 Mr. Pelech read from the December 15, 2009 Zoning Board draft minutes *Mr. Field suggested that the*
 173 *Applicant be given the opportunity to request a continuance so that they can address questions raised by*
 174 *the Board.*

175

176 *The Board went over questions they had and would like more information on:*

177 • *Does the Board consider the current foundation to be a "basement" or a foundation that is at*
 178 *"grade"?*

179 • *Question of the size: 22' x 44' or 26' x 44'*

180 • *Question on the use from a two-bedroom to a three-bedroom*

181 • *Question on the size the capacity of the tank. Mr. Mabey explained that that particular system*
 182 *there is a certain size per family. He said he will go "online" and find out.*

183 • *They may need Little Boar's Head approval for the height requirement*

184

185 *Mr. Stanton wished to modify his motion to include that they continue the case so that the Applicant may*
 186 *modify as necessary without any further costs.*

187

188 *Ms. Peckham said that if the Applicant requests another variance they would need to endure the costs of*
189 *abutter notification and public notification in the newspaper.*

190

191 Mr. Pelech said that the Applicant's received Little Boar's Head approval regarding their height
192 requirement last night. He said that it was his understanding that the case before the Board was a
193 continuance from the December 15, 2009 Hearing with the provision that if the Applicant felt it was
194 necessary to apply for additional variances they would have the opportunity to do so.

195

196 Mr. Pelech said that they would be using the "old" criteria (Boccia) because the application was filed
197 before January 1, 2010, when the new law took effect eliminating the Boccia analysis.

198

199 Mr. Pelech explained that Boulters Cove was part of the Fifield Island subdivision, which was approved
200 by the North Hampton Planning Board in 1971, and every lot except for the subject lot was built upon.
201 He said that a building permit was approved in the 1980s but was never acted upon.

202

203 Mr. Pelech went over the plan with the Board:

204

- 205 • Special condition of the property is that there is only a small area to build on the property
because of the wetlands and tidal marsh.
- 206 • The Little Boar's Head District deemed that the Applicant did not need a variance because it is
207 vested by Statute, and all of the other lots had been built on and all the roadways were
208 constructed.
- 209 • Variance was granted by the North Hampton ZBA in 2007 – Ms. Electa Savage was going to build
210 a house on the lot and have a drive-in basement and living space on one floor. Mr. Lavin, the
211 builder, said that the house would have "knee walls" and no basement.
- 212 • The house was built on "grade" with partial a foundation.
- 213 • The foundation was built and septic system installed. The foundation ranges from 4-feet high to
214 6 feet high, and there is no foundation where the drive-in garage will be
- 215 • Living space is on the same level as the garage.
- 216 • Mr. Savage installed a "state of the art" septic system that services a two-bedroom home and
217 also a three-bedroom home. He chose the particular system because it does not have to be
218 pumped out as often.
- 219 • The property has been on the market for quite some time and Mr. Pelech suggested Mr. Savage
220 request an amendment to the condition to allow a three-bedroom home. DES approved the
221 three bedroom system.
- 222 • Little Boar's Head granted a variance to the Applicants, January 25, 2010 to their height
223 requirement and granted a variance to the front yard setback to construct the steps according
224 to the plan presented.

225

226 Mr. Pelech said that the zoning ordinance allows for a single family house; it does not dictate whether it
227 is a two or three bedroom house. He said that the ZBA unanimously granted the variance in 2007 to
228 build the house 19-feet of the wetlands and the septic within 55-feet of the wetlands. He explained that
229 Ms. Savage was going to occupy the house and access it through the garage. Ms. Savage decided not to
230 live in the house, and a new configuration of the house was designed on the same approved foot print
231 with access and egress from the front door and back door. The applicant has requested variances to the
232 front setback and backyard wetland setback to construct stairs to the house.

233

234 Mr. Pelech explained that front steps were not an issue in the original plan because Ms. Savage was
235 going to occupy the house and would not need front steps because she would access the house from
236 the garage.

237

238 Mr. Pelech addressed the criteria under the Boccia analysis.

239

240 • It is a uniquely shaped lot, and needs an area variance to enable the Applicant's proposed use of
241 the property. He said that there is hardship given the configuration of the lot, and there is no
242 reasonably feasible alternative.

243 • Granting the variance relief would not result in diminution of value of surrounding properties
244 because the Applicant's have been before this Board at least three times and before Little Boar's
245 Head ZBA and no abutters have ever spoke in opposition of the variance requests.

246 • The Applicant's would need relief for an additional 1-foot from the approved 19-feet in order to
247 build back steps to meet the building codes. He said there is no other reasonably feasible
248 alternative.

249 • Mr. Pelech referred to Supreme Court case Malachy v Glenn addressing two of the criteria (1)
250 pubic interest and (2) spirit and intent of the ordinance, and the result was "if it violates the
251 basic zoning objective then it is contrary to public interest and contrary to the spirit and intent
252 of the ordinance. Mr. Pelech said that the variance relief requested would not change the
253 essential characteristics of Boulters Cove; a single family dwelling is an allowed use; the
254 foundation has already been constructed; the other lots are developed and access municipal
255 services, and adding this house will not result in excess demand of municipal services.

256 • He opined that it is not contrary to the spirit and intent of the ordinance, the variance for 19-
257 feet was granted and 1 more foot would add minimal, if any, impact to the wetlands. The
258 proposed steps are pervious and open to the weather.

259 • He opined that granting the relief would allow substantial justice to be done because by
260 weighing the hardship of the owner against some perceived benefit to the general public in
261 denying the variance, the scale would tip toward the hardship on the owner.

262

263 Mr. Stanton asked if the foundation was in the federal flood plain. Mr. Pelech said that he did not
264 believe so and that Doucette Survey will be doing the field work tomorrow.

265

266 Mr. Mabey explained that the flood elevation area is nine. He said that 4-feet below the finished grade
267 is elevation nine, which is the 100-year flood event. The plan shows that they are above the floodplain.

268

269 Mr. Pelech went over the elevations on the plan submitted.

270

271 Mr. Pelech did not have a copy of the decision letter from Little Boar's Head. He noted for the record
272 that they granted the Applicant a special exception from the height requirement of 30-feet to allow
273 proposed dwelling height of 34-feet, six inches, and a variance to the front setback requirement of 35-
274 feet to construct front step no closer than 30-feet from the Boulters Cove Avenue pavement.

275

276 Mr. Pelech changed the plan he submitted that showed a two-bedroom home to a three-bedroom
277 home and initialed and dated the plan.

278

279 Mr. Pelech explained that back in 2007 one of the Zoning Board members asked if there was going to be
280 a basement and the builder at the time answered that there would be no basement; there would be a

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281 knee wall. He said that they have always proposed that there would be a two-car garage with the front
282 half being living and storage space. Mr. Pelech submitted copies of building permit applications for
283 Little Boar's Head and North Hampton and each application includes the language to construct a rear
284 walkout basement and basement garage.

285
286 Mr. Field questioned how the building permit was approved when the condition of approval was that
287 construction of a basement was not allowed.

288
289 Mr. Stanton commented that there are two conflicting definitions of basement in the zoning ordinance.
290 He read from Section 514, *Basement means any area of a building having its floor sub grade on all sides,*
291 *which means "ground level"*. He said that there is room for interpretation on whether it's a foundation
292 or a basement.

293
294 Mr. Field said section 302 of the zoning ordinance defines basement, *Basement: A story having a*
295 *portion of its clear height below finished grade*. Mr. Field said that Section 514's definition of *basement*
296 is for purposes of an *overlay district* of the floodplain development ordinance and is entirely different
297 from section 302.

298
299 Ms. Peckham read from the first paragraph under Section 514, *if any provision of this ordinance differs*
300 *or appears to conflict with any provision of the Zoning Ordinance or other ordinance or regulation, the*
301 *provision imposing the greater restriction or more stringent standard shall be controlling*.

302
303 Mr. Field asked how the Board could change a condition set by a prior Board. Mr. Pelech said that as a
304 land use attorney, he has experienced many cases where conditions set by prior Boards have been
305 overturned or amended.

306
307 Ms. Peckham said that she is very reluctant to change special conditions set by prior Boards, especially
308 since the Board had no guidance that it could legally be done.

309
310 Mr. Pelech suggested that the Board seek legal counsel regarding authority to change prior Board's
311 special conditions on approvals.

312
313 Ms. Peckham thought it a good idea to seek legal counsel.

314
315 Mr. Stanton opened the Public Hearing for public comment to anyone for or against the proposed
316 project at 7:43pm.

317
318 Mr. Stanton closed the Public Hearing at 7:43pm without public comment.

319
320 Ms. Peckham said that she agreed with Mr. Pelech and that the subdivision is an approved subdivision,
321 and that the lot is "grandfathered". She did not believe he needed to apply for the two variances and is
322 comfortable granting both variances, but is not comfortable with changing the special conditions made
323 by the previous Board. She said that the Board should get a legal opinion, and if it comes back that the
324 conditions can be changed then the Board can act upon it, but if the opinion is that the conditions
325 cannot be changed then it's up to the applicant whether or not they want a variance.

326

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327 Mr. Stanton said that the ZBA's are given a lot of discretion to do things, as long as there is not a law
328 that is contrary to that. He gave his opinion that the Board could modify a condition for such reasons as
329 it causes a "hardship".

330 Mr. Field said that the Zoning Board only has jurisdiction as granted by the State Statutes, and has
331 jurisdiction to attach conditions to variances. He said that he knows nothing that allows the Board to
332 come back years later and change the conditions. He said that it would set a bad precedent to start
333 changing previous year's minutes and conditions of approval.

334
335 Mr. Turchan said that the person, who stipulated the condition not to allow a basement, may have
336 intended that they did not want them to dig down to put in a basement, which they didn't do. They
337 built starting off on grade, they just added fill to the front.

338
339 Mr. Batchelder said that the foundation was built in accordance to what was proposed. He said that the
340 Board is getting "hung up" on the definition of *basement*. Mr. Batchelder said that the prior Board may
341 have erred when using the word *basement*. He opined that the prior Board's intention was to not allow
342 building below grade.

343
344 Mr. Stanton said there is an approved building permit that approves the structure of what is built there
345 today. He said that if there was a mistake in the building permit, wouldn't Government Estoppels take
346 effect?

347
348 Mr. Field commented that he heard no evidence on Government Estoppels.

349
350 Ms. Peckham mentioned the Equitable Waiver of dimensional requirement process as an option. She
351 said that the mistake may have been created by the owner.

352
353 Mr. Mabey said that what is built out there currently is exactly what was proposed to the ZBA in 2007
354 when they granted approval. He said that he did not know why the Board added the condition "no
355 basement", but knew that the Board did not want them to dig below grade because of the water table.

356
357 Mr. Pelech said that if there was a provision in the ordinance that stated "no basement" then he would
358 have applied for a variance from that provision. He said that a variance cannot be applied for to change
359 a condition. He said that if the Board wants him to apply for a variance to change a condition then he
360 will; but opined that the Board cannot grant a variance to changing a condition.

361
362 Ms. Peckham said that the Board may want to determine whether or not what exists at the lot today is a
363 *basement*.

364
365 Mr. Stanton made a motion that the foundation that is currently at 4 Boulders Cove was built according
366 to a permit issued by the Town November 8, 2006, and is in compliance with the conditions laid out by
367 the previous Board's decision in July 2007, and what is currently there is a legal structure.

368
369 Mr. Turchan added that it was built by the site plan and septic plan submitted to, and approved by, the
370 Board in 2007.

371
372 Mr. Stanton moved and Mr. Batchelder seconded the motion that the structure currently at 4 Boulders
373 Cove is in compliance with the site plan and septic plan presented at the July 24, 2007 Zoning Board

374 meeting; furthermore it is not a violation of the basement condition issued as part of the variance
375 conditions issued July 24, 2007.

376

377 Mr. Field commented on the date of the building permit and the date of the meeting. It was determined
378 that the November 2006 date was the date of the building permit application.

379

380 Mr. Stanton called for a five minute recess so that Mr. Mabey could get the actual date that the building
381 permit was issued.

382

383 Mr. Stanton reconvened the meeting.

384

385 Mr. Stanton reread the motion with the corrected date.

386

387 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion that the structure currently at 4**
388 **Boulters Cove is in compliance with the site plan and the septic system plan presented to the Board on**
389 **July 24, 2007, and the building permit dated June 4, 2008 #NR-0844, and furthermore that it is not in**
390 **violation of the basement condition.**

391

392 Mr. Field suggested adding "as basement is defined in the Ordinance".

393

394 Mr. Stanton thought it best to stick to just use the words in the condition of the decision letter. Mr.
395 Turchan agreed.

396

397 **The vote passed (4 in favor, 1 opposed and 0 abstention). Mr. Field opposed.**

398

399 Mr. Stanton suggested reviewing the criteria for both variances.

400

401 Mr. Field said that he was not sure the Board needed to go over the criteria for the requested variances
402 because the Board heard evidence on the criteria of the variances. Mr. Turchan agreed with Mr. Field.

403

404 **Mr. Field Moved and Mr. Batchelder seconded the Motion to approve the variance request for the**
405 **front steps as shown on the plan.**

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

407

408 **Mr. Field Moved and Mr. Batchelder seconded the Motion that the variance be granted for the**
409 **variance requested for the back steps.**

410

411 Mr. Stanton asked to add a condition, because of the proximity to the wetlands that the back portion
412 not be subject to chemicals or pesticides of any kind, or fertilizer of any kind, except of those referred to
413 in the Shoreland Protection Act, RSA 483:B-9 II (d).

414

415 Mr. Field said that there are non toxic chemicals that ought to be permitted. It was determined that the
416 RSA mentioned did not include the word "chemical" and the word limestone is allowed under fertilizer.

417

418 Mr. Field said that he would accept the Mr. Stanton's amendment only if he used the exact wording
419 from the RSA.

420

421 **Mr. Stanton changed his proposed condition to read, that the back portion not be subject to**
422 **pesticides or any kind, nor fertilizer, except for limestone, and those specified in the Shoreland**
423 **Protections Act, RSA 483:B-9 II (d).**

424
425 **The vote was unanimous in favor of the Motion as amended (5-0).**

426
427 **Mr. Stanton Moved and Mr. Turchan seconded the Motion to change the special condition of the**
428 **variance issued on July 24, 2007 from a two bedroom home to a three bedroom home.**

429
430 Ms. Peckham said that she would like evidence that the Board has the authority to change special
431 conditions established by prior Boards.

432
433 The Board discussed seeking legal counsel. Mr. Field said that the Board should not rely on the Local
434 Government Center for a legal opinion; instead seek independent counsel.

435
436 Mr. Field said that it was his belief that a request for a variance from those conditions in which the
437 Applicant has to prove the points so that the conditions can be assessed in light of new information is
438 what is required to change the conditions. The Rules of Procedure state that the Board can impose
439 conditions not change conditions.

440
441 Ms. Peckham said that the prior Board had rationale for adding those particular conditions.

442
443 Mr. Turchan commented that in order to bring a variance back before the Board there would need to be
444 a substantial change, and asked that since the project was totally redesigned, wouldn't that be
445 considered a substantial change.

446
447 Mr. Mabey commented that the Applicant asked for a two-bedroom house back in 2007, and that is
448 what the prior Board granted. He said that if they had asked for a three bedroom house, the Board
449 would have granted that. He said the prior Board granted them what they asked for.

450
451 Ms. Peckham suggested that the Board seek legal counsel.

452
453 **Mr. Stanton called the question on the previous Motion. The vote passed (3 in favor, 2 opposed and 0**
454 **abstentions). Mr. Field and Ms. Peckham opposed.**

455
456 Mr. Field suggested that the Board vote on amending the condition of the basement. Mr. Stanton said
457 that the Motion was made that the project is not in violation of the basement condition.

458
459 Mr. Field suggested they take action on them separately because the previous Motion is not structurally
460 linked to what that Applicant is asking.

461
462 There was no Motion.

463
464 **New Business**

465
466 **2010:01 – Francois Boueri, C/O Wholey & Pelech Law Office, PO Box 395, Portsmouth, NH 03802.** The
467 Applicant requests a variance from Article IV., Section 406.1 to allow a front setback of 28-feet where

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468 35-feet is required to allow a 10' x 18' addition to the front of the existing structure, and a variance from
469 Article IV., Section 409.9.1 to allow a wetlands setback of 15-feet where 50-feet is required to allow a
470 24' x 24' addition to the rear of the existing structure. Property owner: Jean Moran, 862 Jefferson Way,
471 West Chester, PA 19380; property location: 66 Woodland Rd; M/L 006-108; zoning district R-2.

472

473 In attendance for this application:

474 Attorney Bernard Pelech, Wholey & Pelech Law Offices

475 Robert Harbeson, DesteFano Architect

476

477 Mr. Pelech handed out copies of the appraisal sheets to the Members for the purpose of showing them
478 the footprint and size of the building. Mr. Pelech offered the following information:

- 479 • The property is located at the intersection of River Road and Woodland Road, with the driveway
480 coming off of Woodland Road.
- 481 • The house was constructed prior to the wetlands ordinance.
- 482 • Wetlands delineation on the property was done by Jones & Beach in December 2009.
- 483 • According to the ordinance if the wetlands reduces buildable area to less than 16,000 square
484 feet the 50-foot setback applies.
- 485 • The proposal is a 10' x 18' front entry way addition, which brings the front setback at 28-feet
486 where 35-feet is required.
- 487 • The back addition is 24' x 24' which results in the 15-foot setback to the wetlands buffer.
- 488 • The application was filed before January 1, 2010, and will be considered under the Boccia
489 standard.

490

491 Mr. Pelech addressed the criteria under the Boccia analysis:

- 492 • There is no reasonably feasible alternative because they want to live on one level, and any
493 addition anywhere else on the dwelling would still be within the buffer. Mr. Pelech opined that
494 because of this the hardship criterion is satisfied.
- 495 • Mr. Pelech said that it would not result in the diminution of value of surrounding properties,
496 because many of the homes along Woodland have been rehabilitated and expanded, and the
497 subject property is the least attractive in the area.
- 498 • It is not contrary to the Spirit and Intent of the Ordinance because it will not substantially alter
499 the characteristics of the neighborhood. The approval would make it more consistent with the
500 neighborhood. It will not increase the demand for municipal services or require additional funds
501 for fire and police services.
- 502 • Substantial justice will be done because the hardship to the Applicant outweighs any benefit to
503 the general public if it were to be denied.

504

505 Mr. Stanton Swore in Mr. Harbeson.

506

507 Mr. Harbeson explained that the Applicants would like to live in the house and provide a master
508 bedroom and living area for Ms. Moran (the Applicant's mother) to occupy, eliminating the need for her
509 to have to go upstairs. He explained that Ms. Moran has difficulty going up and down the stairs.

510

511 Mr. Stanton and Ms. Peckham asked Mr. Harbeson why the house plan could not be reconfigured, so
512 that they would not need an addition to encroach in the wetlands buffer.

513

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514 Mr. Harbeson said that they are trying to maintain the original house as much as possible. He said that
515 they have only done hand drawings of the proposal for space allocation.

516
517 Mr. Harbeson said that he did not believe the septic system has been tested. He said that they are not
518 adding bedrooms. The septic is designed for three-bedroom, and will remain three-bedroom.

519
520 Mr. Harbeson explained that the proposed master bedroom for Ms. Moran will occupy a large portion of
521 the first level of the home. He argued that without the addition, there would be very limited living
522 space for Ms. Moran.

523
524 Mr. Harbeson did not have a floor plan of the existing structure or of the proposal.

525
526 Mr. Field noted for the record that Little River is identified as a critical area in south eastern New
527 Hampshire, and any incremental attack on it is likely to cause some lessening of its integrity.

528
529 Mr. Field mentioned that the Conservation Commission did not meet in January.

530
531 Mr. Stanton read an email from Chris Ganotis, Chair of the Conservation Commission into the record.
532 *Please be advised that I was away during the week of January 10-17, and with my absence, our*
533 *Commission decided to postpone the meeting scheduled on January 12, 2010. Because of this, we were*
534 *unable to obtain and review the applications for Cases 2010:01, and 2010:02 in your January 26 meeting*
535 *agenda pertaining to wetlands setback variances. It is our intent to deliberate on them at our meeting*
536 *February 9 and with Commission concurrence, provide written recommendations, assuming that the*
537 *cases are still pending after your meeting. Thank you for your Board's consideration. Chris*

538
539 Mr. Stanton responded by suggesting that a member of the Conservation Commission attend this
540 meeting with the caveat that the testimony is not the official Conservation Commission's position. Mr.
541 Ganotis responded, in his email, by saying that he would feel more comfortable having the Conservation
542 Commission deliberate the merits of the case before offering any input.

543
544 Mr. Field questioned why Mr. Stanton did not circulate the email to the Zoning Board Members earlier.

545
546 Mr. Stanton said that he just received the email today.

547
548 Mr. Field said that Mr. Stanton represents the Board when communicating with another Board, and said
549 that the copy of the email should have been circulated to each of the Zoning Board Members.

550
551 Mr. Stanton said that he had every intention of sharing the information during deliberations.

552
553 Mr. Field noted for the record that the email from Chris dated January 22nd refers to two cases before
554 the Zoning Board, and Mr. Stanton responded by making reference to the two cases, the cases are on
555 the agenda for tonight and no one other than the Mr. Stanton knew that.

556
557 Mr. Pelech said that they would be willing to postpone their case until the Conservation Commission
558 had a chance to review the application and respond. He said that they would also be able to provide
559 additional information, such as floor plans and wetlands qualities.

560

561 **Mr. Turchan Moved and Mr. Batchelder seconded the Motion to postpone case 2010:01 to the March**
562 **23, 2010 Meeting to give the Applicant a chance to meet with the Conservation Commission for their**
563 **review and comments.**

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

565
566 **2010:02 – Peter Horne, Trustee F.S. 123 Nominee Trust, PO Box 1435, North Hampton, NH 03862.** The
567 Applicant requests a variance from Article IV., Section 411 to allow a body of water to be used to satisfy
568 minimal lot area requirement; in the alternative, the Applicant requests a variance from Article IV.,
569 Section 406 to allow lot areas of 75,000s.f. and 68,480 s.f. where 87,120 s.f. is required. Property
570 owner: Peter Horne, Trustee F.S. 123 Nominee Trust; property location: 112 Mill Road; M/L 006-147-
571 002; zoning district R-2.

572
573 In attendance for this application:

574 Attorney Bernard Pelech, Wholey & Pelech Law Offices
575 Peter Horne, Owner/Applicant
576 Corey Colwell, LLS, MSC Civil Engineers & Land Surveyors, Inc.
577 Jamie Long, NHSC Environmental

578
579 Mr. Field recused himself.

580 Mr. Stanton seated Mr. Buber for Mr. Field.

581
582 Mr. Field was given the opportunity to exercise his rights as an abutter to request certain members step
583 down from the case. He cited the following cases: (1) Eugene Winslow v. Town of Holderness Planning
584 Board (July 26, 1984) 125 N.H. 262, and (2) appeal of the case of the Seacoast Anti-Pollution League (NH
585 Public Utilities Commission) (1984) 125 N.H. 465.

586
587 Mr. Field asked for a series of Members to step down from the Board, and noted that one of those
588 persons has resigned.

589
590 Mr. Field asked Mr. Richard Stanton, Chair of the Board, to step down for the following reasons:

- 591 • Mr. Field referred to an incident concerning his reluctance to state the Pledge of Allegiance, that
592 was not part of the Board's procedure, nor rule of the Board, and said that Mr. Stanton
593 intentionally and maliciously subjected him to public ridicule by allowing the American Legion to
594 speak against Mr. Field's constitutional right to reflect how he felt about the circumstances in
595 that case.
- 596 • A couple of months ago a case before the Board involving a church, Mr. Stanton, in Mr. Field's
597 judgment, impugned his right in the freedom of religion by stating that Mr. Stanton's
598 preference as to religion in this Town and implied that his preferences were "closer to God"
599 than Mr. Field's.
- 600 • Michele Peckham has made a statement before the Board that there is obvious animosity
601 towards Mr. Field from Mr. Stanton that she has observed.
- 602 • In connection to the Corbett Case, Mr. Stanton asked Mr. Field to step down because Mr. Field
603 is a member of North Hampton Forever and there may be a conflict, which Mr. Field honored
604 and felt Mr. Stanton should honor his request and step down from this case.
- 605 • As a Realtor Mr. Stanton adheres to the Code of Ethics of the National Association of Realtors,
606 and Mr. Field said because he has taken that oath he is placed in a position where there is
607 difficulty in objectively ascertaining whether or not it is right for a building lot to be developed
608 when there may be no need for it to be developed at all.

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- 609
- 610 • Mr. Kierstead made a casual remark that he thought that one of the reasons he should be
 - 611 appointed to the Zoning Board was because he would take a real interest in the preservation of
 - 612 wetlands. Mr. Field said that Mr. Stanton told Mr. Kierstead that because of that remark that
 - 613 he should step down on all cases involving wetlands issues. Mr. Field said that Mr. Stanton
 - 614 intimidated Mr. Kierstead into stepping down.
 - 615 • Mr. Field read from the minutes May 27, 2008, regarding the Hawkes' case 2008:03, "Mr.
 - 616 Stanton said that he is also concerned with the wetlands, but opined that implementing certain
 - 617 conditions, such as reducing the foot print, and using impervious material for the driveway, the
 - 618 lot could be made buildable for a family to enjoy in the Town of North Hampton", and said his
 - 619 statements indicate a bias to develop lots in North Hampton.
 - 620 • Regarding the Smith Case on Old Locke Road, Mr. Stanton made a statement that he would be
 - 621 willing to step down because he had dental work from the Applicant's former husband, where
 - 622 there was no direct relationship.
 - 623 • Mr. Field felt that Mr. Stanton does not fulfill the standards of Winslow v. Holderness.

624 Mr. Stanton said that he would not respond to each of his points because he is not on trial. He said that

625 there may be animosity between himself and Mr. Field because he has disagreed with him on occasions,

626 and admits that they do not see "eye to eye" on every issue. He said that animosity on some issues

627 does not obviate his oath to the State of New Hampshire and the laws of New Hampshire and to the

628 people of North Hampton to be fair and impartial in the job that he does on the Zoning Board. Mr.

629 Stanton said that he would be able to give the Applicant a fair and impartial hearing and will not step

630 down.

631

632 Mr. Field requested that Mr. Batchelder step down because he was an abutter to the Corbett's and

633 requested that Mr. Field step down in that case, in which he did. Mr. Field said that Mr. Wilson

634 overheard Mr. Batchelder make a statement at a meeting that he was in favor of anything Mr. Field is

635 against. Mr. Batchelder has stated for the record that that comment is not true.

636

637 Mr. Batchelder respectfully denied Mr. Field's request to step down from the Horne case.

638

639 Mr. Pelech gave a brief history on the case:

- 640 • Mr. Horne was before the ZBA on January 27, 2009 to allow a subdivision and lot line relocation
- 641 because the Planning Board determined that they needed a variance from Article V, Section
- 642 501.2 because the lots contained nonconforming structures. The variance was granted.
- 643 • Mr. Horne went back before the Planning Board and agreed to have an environmental impact
- 644 study done, which they did, and the Town hired Dr. Leonard Lord to do a peer review on the
- 645 study. Dr. Lord discovered that there was a violation to Section 411. Wetlands **excluding**
- 646 **bodies of water** may be used to satisfy minimum lot area. Mr. Pelech said he researched the
- 647 Town records in 1979 and only found one Planning Board meeting minutes, so he does not
- 648 know the rationale behind the change to the ordinance. He said that he research subdivision
- 649 from the early 1970s through 1979 that included bodies of water. He said that the only large
- 650 body of water in Town is Mill Pond on Mr. Horne's property. He said that there is a section of
- 651 the ordinance that defines *Inland Wetlands* that includes ponds and rivers. It was determined
- 652 that the Town's website was not updated, and the definition of Inland Wetlands is no longer
- 653 part of the definitions.

654

655 Mr. Pelech said that the proposal is to subdivide the lot with 4.2 acres, including a portion of the pond,
656 into two lots. If the Applicant is allowed to include the body of water in the subdivision, one lot would
657 be 2.14 acres and the other would be 2.74 acres.

658

659 Mr. Pelech said that Mr. Horne has the ability to control the level of water in the Dam. He said that Mr.
660 Horne spent \$250,000.00 to build the dam, so it would not be reasonably feasible to lower the level of
661 the water in the pond.

662 Mr. Pelech said that he would argue the case under the Simplex Criteria or the Boccia Criteria; it was up
663 to the Board. He commented that he filed the application prior to January 1, 2010, before the new law
664 took effect.

665

666 Mr. Pelech said that there are a lot of special conditions to the Horne property, and there is a hardship.
667 He thought that the Simplex criteria should be use because it is the *use* of the pond in question.

668

669 **1. Would granting this variance not be contrary to the public interest?**

670 Mr. Pelech said that the test for whether or not a variance will be contrary to the public interest
671 is whether or not it would "unduly, and in a marked degree conflict with the ordinance's basic
672 objective" *Chester Rod & Gun Club v Town of Chester, 152 N.H. 577 (2005)*. The Supreme Court
673 then set forth two tests to determine whether an ordinance's basic objectives would be
674 violated. (1)Would the essential character of the locality be altered? and, (2) Would granting the
675 variance threaten the public health safety or welfare?. Mr. Pelech said that granting the
676 variance would not alter the essential characteristics of the locality, nor would it in any way
677 threaten the public health, safety or welfare. It would have no effect on the characteristics of
678 the neighborhood, or endanger the general public.

679

680 **2. Would granting this variance be consistent with the spirit of the ordinance?**

681 Granting the variance would be consistent with the spirit of the ordinance because nothing
682 being proposed by the Applicant would have any affect whatsoever upon the ground water
683 quality or the aesthetics of the Mill Pond area. He said no new construction will occur within the
684 wetlands buffer, and no changes of use are contemplated within the existing structures.

685

686 **3. By granting this variance, would substantial justice be done?**

687 The lots would meet all of the requirements of the Zoning Ordinance if the Mill Pond area is
688 included. There would be no benefit to the general public in denying the Applicant's request;
689 however, the hardship upon the Applicant would be substantial.

690

691 **4. Would granting this variance result in diminished values of surrounding properties?**

692 The creation of an additional lot will have no effect upon surrounding property values. Once the
693 variance is granted, any structure to be erected on the new lot would be outside of the wetlands
694 buffer and meet all the requirements of the Zoning Ordinance. If the Applicant were to lower
695 the water level of the pond to achieve the required square footage, it would have an adverse
696 effect upon surround property values.

697

- 698 **5. Would not granting this variance create an unnecessary hardship because there are special**
699 **conditions of the property that distinguish it from other properties in the area because either**
700 **i. The zoning restriction as applied interferes with the landowner's reasonable use of the**
701 **property considering the unique setting of the property in its environment**

702 The lot is abutted on two sides by the Mill Pond. The Pond is manmade, the size which is
703 controlled by a dam on the Applicant's property. The fact that the size of the property and
704 water level of the pond can be altered by the Applicant creates special conditions.

- 705 **ii. No fair and substantial relationship exists between the general purpose of the Zoning**
706 **Ordinance and the specific restriction on the property.**

707 The Ordinance allows an Applicant to include the area of wetlands up to one acre in the
708 calculation of lot size, but does not allow the inclusion of water bodies. The Applicant could
709 transform a portion of the Mill Pond from a "waterbody" to wetlands by lowering the water
710 level behind the dam. Thus, there is no fair and substantial relationship between the general
711 purpose of the Ordinance, and the restriction on the property. Granting the variance would not
712 affect public or private rights of others.

713

714 Mr. Pelech said that two septic systems can be supported on the property and they meet all the
715 requirements except for Section 411.

716 Mr. Pelech said that if the variance to Section 411 is not granted by the Board; the Applicant would need
717 a variance to Section 406 to allow lot areas of less than the two-acre requirement. He said that without
718 using the pond, lot 6-147-2-1 would consist of 1.57 acres and lot 6-147-2-2 would consist of 1.72 acres.

719

720 Mr. Pelech said that the second request would be argued under the Boccia test. He addressed the
721 "hardship" criterion.

722

- 723 **1. The benefit sought by the Applicant cannot be achieved by some other method reasonable**
724 **feasible to pursue, other than an area variance.**

725 Mr. Pelech said it is not feasible to purchase land on the other side of Mill Pond because it's not
726 contiguous. It is not reasonably feasible to lower the level of the water by six feet in Mill Pond
727 to expose the additional land needed to be used in the lot size calculation. He said that in doing
728 that it would diminish surrounding property values, it would reduce wildlife habitat, and negate
729 stormwater retention capabilities. It would also impair the ability of the Applicant and abutters
730 to utilize the Mill Pond for fire prevention and recreation, and diminish groundwater recharge in
731 the area.

732 Mr. Pelech said that it was the Applicant's position that the five criteria of the Boccia case are met.

733

734 Mr. Buber commented that the "handout" given to the Board on the definition of Inland Wetlands was
735 inaccurate because the Zoning Ordinances were changed in 2005 eliminating the term and definition.

736 Mr. Oles said that he downloaded the information off of the Town's website before the meeting. It was
737 determined that the website was incorrect.

738

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739 Mr. Buber read the definition of *wetlands* into the record: *Pursuant to RSA 482-A:2 and RSA 674:55,*
740 *“Wetlands” means an area that is inundated or saturated by surface water or groundwater at a*
741 *frequency and duration sufficient to support, and that under normal conditions does support, a*
742 *prevalence or vegetation typically adapted for life in saturated soil conditions.* He commented that
743 ponds and rivers are not part of the definition of wetlands, and opined that it was very germane to
744 Section 411.

745
746 Mr. Buber said that the plans were absent of a signature and seal from the Engineer. Mr. Colwell
747 commented that there is no requirement under the ZBA regulations that the plans need to be signed
748 and stamped by the Engineer, but gladly signed and dated a copy of the plan for the permanent record.

749
750 Mr. Jamie Long from NHSC Environmental said that they did the wetland delineation, and soil mapping
751 of the site. Mr. Long said that Mr. Buber was correct regarding the definition of wetlands, but the
752 definition refers to open water to a depth of 6.6 feet, and after that depth it becomes *deep water*
753 *habitat*. He said it is defined by the US Fish and Wildlife Service Classification of Deepwater Habitats of
754 the United States. He said that the reasoning behind 6.6 feet is because the sun light does not go
755 beyond that to reach the soils. He said that there can be vegetation growing within the depth of 6.6 feet
756 in those saturated conditions.

757
758 Mr. Colwell said that the definition includes *surface waters* which are what the Mill Pond has. Mr.
759 Colwell argued that within the Town Ordinances wetlands can be used to satisfy minimum lot sizes, but
760 bodies of water cannot. He said that the inconsistency lies where wetlands are bodies of water in the
761 definition. Mr. Colwell said that a wetland is inundated with surface water, such as a pond, river, and
762 lake.

763
764 Mr. Colwell said that State and Federal Government states that the distinction between a *body of water*
765 and a *wetland* is the 6.6 foot depth level. Mr. Colwell showed the Board a copy of the Mill Pond and
766 shaded the area of the Mill Pond light blue where the depth was 6.6 feet or less, and if the area were
767 considered a wetland they could use it in calculating the acreage, and it would satisfy the minimum lot
768 size for the subdivision (lot 2-1 would be 2.14 acres and lot 2-2 would be slightly over 2 acres). He said
769 that the Ordinance allows 50% of wetlands to be utilized, and they are using far less than 50%. Mr.
770 Colwell said that the State has a formula in determining how many structures, wells and septic systems
771 can fit on a lot (lot loading). He said that a certain amount of square feet of certain soil types are
772 needed on each lot. Mr. Colwell explained that they submitted the data to the State regarding the
773 Horne lots and the State has approved the proposed subdivision, exclusive of the wetlands.

774
775 Ms. Peckham asked for evidence that the State of New Hampshire has adopted the Classification of
776 Wetlands and Deepwater Habitats of the United States.

777
778 Mr. Oles produced copies of emails from Collis Adams, Wetlands Bureau Administrator, NH DES that
779 states that they use the perimeters outlined in the Classification of Wetlands and Deepwater Habitats of
780 the US.

781
782 Mr. Colwell said that *water bodies* and *wetlands* have the same local buffers and State buffers for
783 building purposes and for septic systems, and opined that by not allowing the area of a water body, but
784 allowing wetland areas for lot sizing, goes against the spirit and intent of the North Hampton Zoning
785 Ordinance.

786

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787 Mr. Stanton asked if there was a definition of *open body of water*. Mr. Long said that there was not a
788 definition of *body of water*, but there is a definition of *surface water* under RSA 485-A. A pond would
789 be a *body of water* and a *wetland*.

790

791 Mr. Stanton calculated that lot 2-1 would have 78.6% of the 2-acre requirement and lot 2-2 would 86%
792 of 2 acre requirement.

793

794 Mr. Stanton suggested postponing the case in order to hear the next case on the agenda.

795

796 Ms. Peckham suggested continuing the case to give the Conservation Commission a chance to review
797 and comment on the application.

798

799 Mr. Field spoke from the audience and disagreed with postponing the case to hear the next case. He
800 agreed with Ms. Peckham to continue the case to the next month.

801

802 **Mr. Stanton Moved and Mr. Buber seconded the Motion to continue case 2010:02 – Peter Horne, to**
803 **the March 23, 2010 Meeting for the purpose of receiving input from the Conservation Commission.**
804 **The vote was unanimous in favor of the Motion (5-0).**

805

806 **2010:03 – Sylvia Cheever, 264 Atlantic Ave., North Hampton, NH 03862.** Appeal of Decision of
807 Administrative Officer. The Applicant requests an appeal from a decision by the Code Enforcement
808 Officer for a notice of violation on Article V, Section 508 – farm buildings shall not be erected within 200-
809 feet of a neighboring property. Property owner: Sylvia Cheever, 264 Atlantic Ave.; property location:
810 264 Atlantic Ave.; M/L 014-034; zoning district: R-1.

811

812 In attendance for this application:

813 Sylvia Cheever, Owner

814 Richard Clark, Attorney representing Ms. Cheever

815 Robert Battles, Attorney representing the Abutters

816 Phelps Fullerton, Abutter

817 Robin Reid, Abutter

818

819 Mr. Field rejoined the Board.

820

821 Mr. Batchelder announced that he and Ms. Cheever had a conversation regarding the proposed
822 violation, prior to her filing an appeal of Decision of and Administrative Officer. He asked if anyone
823 wanted him to recuse himself from the case.

824

825 Mr. Field said that it may be considered ex parte communication.

826

827 **Mr. Stanton Moved and Mr. Turchan seconded the Motion to suspend the rule not to hear any new**
828 **cases after 10:30pm with the exception of this case.**

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

830

831 Ms. Peckham disclosed that her son is in Ms. Cheever's son's class, and that their sons are friends.

832

ZBA Meeting Minutes

833 Mr. Field said that he cannot demand that Mr. Batchelder step down, but noted that he did not think it
834 appropriate for members of the Board to discuss case material with somebody coming before the Board
835 in advance of the hearing.

836
837 Attorney Battles said that he represents Ms. Cheever's abutters in the Appeal and asked Mr. Batchelder
838 the nature of his conversation with Ms. Cheever.

839 Mr. Batchelder said that he gave Ms. Cheever a general opinion of what she should do.

840

841 Mr. Battles asked Mr. Batchelder if the conversation he had with Ms. Cheever has biased his ability to sit
842 impartially on the case. Mr. Batchelder answered, "No".

843

844 Mr. Battles said he had no objections to Mr. Batchelder sitting on the case.

845

846 Mr. Stanton swore in witnesses.

847

848 Mr. Clark spoke on behalf of his Client, Ms. Cheever and said that there have been many complaints
849 made by Mr. Fullerton and Ms. Marston against Ms. Cheever in the past. He said that he would be
850 referring to documents provided by Mr. Fullerton and did not want to give the impression that he was
851 attacking his character, because Mr. Fullerton has always been polite to him.

852

853 Mr. Clark said that there is an ongoing case before Superior Court between Phelps Fullerton & Jamie
854 Marston v. Sylvia Cheever. He handed out copies of Superior Court case for background information.

855

856 He said that there is a nuisance complaint before Superior Court against Ms. Cheever because of her
857 chickens.

858

859 Mr. Clark addressed the following violations brought forth by the Code Enforcement Officer:
860 Section 508.1, "Agriculture" of the North Hampton Zoning Ordinance, which states: "Farm buildings,
861 other than a dwelling, shall not be erected within two hundred (200) feet of a neighboring property.
862 Section 508.2 Feed lots, fenced runs, pens and similar intensively used facilities for animal raising and
863 care shall not be located within two hundred feet of a neighboring property.

864

865 Mr. Clark addressed Section 508.2 and said that it is his client's position that 19 chickens on two acres
866 does not constitute intensive use. He said that the UNH Cooperative website has information that
867 states that one chicken requires 4-square feet of space. He did not have a copy for the Board. Ms.
868 Cheever said she read it off of the University's website.

869

870 Mr. Clark addressed Section 508.1 and said that there is an exception to Section 508.1 with Section
871 508.4, which states: *Farm buildings that house four or less animals that are not raised or kept*
872 *commercially but are for family use or pleasure, shall be exempt from the provisions of paragraph 508.1,*
873 *but shall not be erected within 50 feet of a neighboring property.* Mr. Clark submitted pictures of
874 chicken coops on the property for the record. Mr. Clark said that Ms. Cheever has 5 coops, or farm
875 buildings, and 19 chickens. He explained that each coop is individual and share no common wall. She
876 keeps 4 chickens in each coop. Ms. Cheever puts them in their coops each night and keeps the doors
877 closed.

878

879 Mr. Clark said that Ms. Cheever's chickens are family pets and are not raised or kept commercially.

880

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881 Mr. Clark said that each coop is located more than 50-feet from neighboring properties. Mr. Clark
882 depicted the coops on the site plan presented.

883
884 Mr. Clark said that there is a threshold of having too many coops when it would be considered intensive
885 use of the property.

886 Mr. Clark referred to RSA 437:15 – Sale or Gift of Small Quantities. *Chicks, ducklings, goslings and*
887 *rabbits younger than 4 weeks of age shall not be sold or offered for sale; raffled; or offered or given as a*
888 *prize, premium, or advertising device, in quantity of less than 12 birds or animals to an individual person.*
889 He claimed that if Ms. Cheever were forced to keeping just 4 chickens, she would be violating State Law.

890
891 Ms. Peckham asked why the barn would not be grandfathered because it was there before the
892 Ordinance was established. Mr. Mabey said that it would be “grandfathered” if there was a continuous
893 use. The property has not been used as a farm for many years.

894
895 Mr. Field asked what constitutes an *animal*.

896
897 Mr. Mabey said that it is an agricultural ordinance so he looks at it as all “agricultural” animals, such as
898 chickens, pigs, and horses.

899
900 Mr. Clark referred to RSA 674:26 – Agricultural Use Under Interim Zoning Ordinance that distinguishes
901 animal from poultry, and referred to RSA 674:32-b – Existing Agricultural Uses.

902
903 Ms. Cheever built a pen on the property to house the chickens so that they would not roam onto
904 neighboring properties. Ms. Cheever has made numerous efforts to keep he neighbors happy.

905
906 Mr. Mabey said that he does not consider chicken coops as farm buildings and does not require a
907 Building permit for chicken coops.

908
909 Mr. Stanton opened the Public Hearing to public comment.

910
911 Attorney Battles said that he represented some of the neighbors of Ms. Cheever. He handed out
912 information to the members. Attorney Battles said that he shared Mr. Mabey’s interpretation of the
913 Ordinance. He said that the Notice of Violation that was provided was sufficient, lawful and not in error.

914
915 Mr. Field asked Mr. Clark if his client understood that she was served a Notice of Violation, and Mr. Clark
916 answered, “Yes”.

917
918 Mr. Battles referred to Court Case Trottier v. City of Lebanon 117 N.H 148. He read from the case that
919 the proper inquiry is the ascertainment of the intent of the enacting body where an Ordinance defines
920 the term and issue that definition will control, when there is no definition provided you must look to the
921 Ordinance as a whole in attempt to discern the intent and meaning. Mr. Battles said that the Board
922 should not be considering prior disputes with Ms. Cheever and the neighbors or the Superior Court case;
923 the Board should limit the determination tonight based on the Board’s interpretation of the words as
924 they appear in the Ordinance.

925
926 Mr. Mabey stated that he went to Ms. Cheever’s home at 264 Atlantic Ave and asked Ms. Cheever how
927 many chickens she had, and she told him she had 19 chickens. Mr. Mabey verbally informed her that
928 she was in violation of the ordinance that allows 4 chickens.

ZBA Meeting Minutes

929
930 Mr. Stanton read letters from the abutters into the record:
931 Letter dated December 23, 2009 from David and Chris Chevalier – *To Whom It May Concern, Chris and I*
932 *live at 283 Atlantic Ave, which is diagonally across from the property of Sylvia Cheever. She presently has*
933 *a bunch of hens and with a few crowing roosters. She is supposed to have only 4 hens. I am opposed to*
934 *the roosters crowing and disturbing the neighborhood. I strongly opposed to all that goes on over there,*
935 *and hope something can be done. Signed David & Chris Chevalier* (the letter was notarized by Phelps
936 Fullerton).
937 Letter dated 1/25/2010 from Barbara Kierstead – *As an abutter to the above captioned property (264*
938 *Atlantic Ave) I agree with the decision of Code Administrative Officer for a notice of violation on Article V,*
939 *Section 508 Agriculture. I don't object to four hens on the property however, would object to any in*
940 *excess of four. My property experienced damage from a flock of Ms. Cheever's chickens digging my*
941 *lawn. Reported incident to Police Dept. and they responded. Respectfully, Barbara Kierstead.*
942
943 Mr. Clark said that Ms. Cheever bought her chickens at Agway and he called them to find out that they
944 would not sell chickens, 4 weeks and younger, in quantities less than 12.
945
946 Ms. Reid, an abutter to Ms. Cheever's property, said that there is not one abutter to Ms. Cheever that is
947 in favor of her keeping 19 chickens. She said that Ms. Cheever's property has not been a "farmstead"
948 for many years.
949
950 Phelps Fullerton, spoke against Ms. Cheever's appeal, and said that they are not objecting to Ms.
951 Cheever keeping 4 chickens, preferably hens; not roosters.
952
953 Ms. Cheever said that she cannot sustain her household on 4 chickens. She said that 4 chickens cannot
954 produce enough eggs to support her family, especially in the winter months. She said that she has five
955 members in her family, and her children love the chickens; they are their pets. She said that she has
956 made a conscience effort to satisfy all the abutter's complaints.
957
958 Ms. Cheever referred to RSA 672:1 III-b, "Agricultural activities are a beneficial and worthwhile feature
959 of the New Hampshire landscape and shall not be unreasonably limited by use of municipal planning and
960 zoning powers or by the unreasonable interpretation of such powers".
961
962 Mr. Stanton closed the Public Hearing at 11:59pm.
963
964 Mr. Stanton commented that the issue before the Board is whether or not the Code Enforcement
965 Officer interpreted the Ordinance correctly.
966
967 Mr. Field commented on the RSA 672:1 III-b that Ms. Cheever introduced, and asked Mr. Mabey if he
968 was aware of that law. Mr. Mabey said that he was not, and that if he was, he would have advised the
969 Planning Board of it.
970
971 Mr. Field said that the State Laws preempt local Ordinances.
972
973 Ms. Peckham commented that the Board does not have guidance on what a "farm building" is.
974 Mr. Turchan commented that the Board was not deciding if the Ordinance is "good" or "bad", they were
975 to determine whether or not Mr. Mabey interpreted the Ordinance correctly.
976

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977 Mr. Field clarified that the case before them is not a variance and that the Board is not denying Ms.
978 Cheever anything, and not preventing the her from coming back to apply for a variance.

979
980 Mr. Field suggested that the Board give the Applicant a chance to file an application for a variance, and
981 to suspend the fines while the Applicant is seeking the variance.

982 Mr. Battles referred to Mr. Field's suggestion to the Applicant, and asked if the suggestion would
983 essentially present a biased Board to her variance request in the future. Mr. Field said that he was not
984 biased about it.

985
986 Mr. Field asked if the Applicant would be able to submit a variance application by the application
987 deadline date of January 29, 2010. Mr. Clark thought it would be possible.

988
989 Mr. Field said that the Board could always suspend its rules to allow the applicant another week to get
990 the application together, and submitted. Mr. Battles said that, that would be going a little too far.

991
992 Mr. Field said that the Board is able to vary its procedures.

993
994 Mr. Field moved that the Board finds the Building Inspector's notice of violation is in order, and the
995 Board supports that, however acts on the hearing of the matter we were introduced to other sections of
996 the RSA's particularly RSA 672 would suggest that the Applicant be given time to file an appeal and
997 request a zoning variance and that because of the inconvenience to the neighbors and other abutters if
998 Ms. Cheever is going to file an appeal that she do so in a manner that will have it heard at the Board's
999 February Meeting, and in the meantime fines will be suspended and we will have an answer for her
1000 then. Mr. Battles asked what time period. Mr. Field said until the February Meeting.

1001
1002 Mr. Field made another attempt at the Motion. Mr. Stanton suggested one Motion on the ordinance
1003 itself, and another motion on providing the applicant the opportunity to submit a variance and suspend
1004 the fines at that time.

1005
1006 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion that the actions of the Code**
1007 **Enforcement Officer relevant to case 2010:03 were proper and his order for Notice of Violation is**
1008 **supported.**

1009 **The vote was unanimous in favor of the Motion (5-0).**

1010
1011 **Mr. Stanton Moved and Mr. Field seconded the Motion, that relevant to case 2010:03 Ms. Cheever be**
1012 **permitted to submit a variance to whatever appropriate sections of the Zoning Ordinance, and that**
1013 **during such time that the fines are to be suspended until the next meeting, February 23, 2010.**
1014 **The vote passed (4 in favor, 1 opposed, and 0 abstentions). Mr. Stanton opposed.**

1015
1016 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion to table the Minutes of September 22,**
1017 **2009, November 19, 2009, and December 15, 2009 to the February 23, 2010 Meeting.**

1018
1019 Mr. Stanton said that the September 22, 2009 Minutes will not be addressed without Mr. Field's input.

1020
1021 Mr. Buber suggested holding a special meeting to address the minutes.

1022
1023 The Board agreed to hold a special meeting to address the minutes and other business before the next
1024 meeting. Ms. Chase will inform the Members when a date is confirmed.

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1025

1026 **Mr. Batchelder Moved and Mr. Turchan seconded the Motion to adjourn the Meeting at 12:23am.**

1027 **The vote was unanimous in favor of the Motion (5-0).**

1028

1029 Respectfully submitted,

1030

1031 Wendy V. Chase

1032 Recording Secretary

1033

1034 Minutes approved 02/10/2010

1035 The original meeting minutes, and a copy with annotated changes are available at the Town Office.