



**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Wednesday, February 10, 2010 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, Chair; Michele Peckham, Robert Field, Jr., and Ted Turchan

Members absent: Richard Batchelder

Alternates present: David Buber

Staff present: Wendy Chase, Recording Secretary.

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

Mr. Stanton introduced members of the Board and invited those present to rise for a Pledge of Allegiance.

Mr. Stanton seated Mr. Buber for Mr. Batchelder. Mr. Field argued that according to the Rules of Procedure it was not the responsibility of the Chair to appoint an alternate to sit in place of an absent member. Mr. Field said that he thought it was up to the Clerk to appoint the alternates. Mr. Stanton asked Ms. Chase who the selected Alternate was. Ms. Chase selected David Buber to be seated for Richard Batchelder. (Secretary's note: Stated in Section 5.C. of the Rules of Procedure, *the Chair shall designate one, or more, of the Alternate Members to sit in place of the absent or disqualified Member*).

Unfinished Business

Mr. Stanton explained that according to the Rules of Procedure, any changes to the minutes will be approved by Board consensus, and if there is a disagreement; the Board can discuss and then vote.

September 22, 2009 Meeting Minutes

Line 38 of the printed draft – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

Mr. Field called for a point of order relating to the general Rules of Procedures of the Board, and not specifically the Corbett Case.

Line 47 of the printed draft - Mr. Field made the following amendment. Mr. Stanton explained that Mr. Field's Point of Order was not recognized by the Acting Chair, Ms. Smith. Ms. Peckham said that if the comments were made, then they need to be added to the record.

Mr. Field disagreed, and said he was not out of order. He said that an Applicant, as a general precept of New Hampshire law, reserves the absolute right to withdraw jurisdiction from the Board as to a pending matter which the Applicant has initiated, at any time primarily for the reason that such Applicant may wish not to be prejudiced by an adverse action of the Board. Based on such precept, the proper procedure to follow is for the Board's administrator to "Report" to the Board that a matter has been withdrawn. Such withdrawal effectively removes the matter from the further jurisdiction of the Board. And, the Board would then move on to its next Agenda item of business. The Board's action in the Corbett Case, in his opinion, prejudiced a citizen of our Town, and was improper. The Board agreed with the change.

Ms. Smith explained that the Board was in receipt of a letter, postmarked from North Hampton, dated August 25, 2009, from Mr. Vincent Peter Corbett, Jr., stating that he has withdrawn, without prejudice, his application, case #2009:03. Amendment made by email from Ms. Lermer. The Board agreed with the change.

Line 61 and Line 62 – Mr. Field made the following amendment (shown as underlined). Mr. Stanton argued that Mr. Field was a member of the audience when making the comments and was not recognized by the Chair. He said that the comments should not be included in the Minutes. Ms. Peckham disagreed and said that the Minutes are a record of what occurred, and if Mr. Field made the comments, then they should be included. Mr. Stanton said that it should state that he recused himself and was a member of the audience. The Board agreed with the change.

Ms. Peckham stated that "it is no reflection on you, Wendy, but I think we need to be a little more thorough as to what's on the recording, and accurately represent what is on the recording".

Ms. Smith presented a timeline pertaining to the Corbett Case, and asked the Board to review it. She asked that it be submitted into the record. Mr. Field recused himself from the Board, and was in the public audience, and stated that it was improper for the Case designated Chair to proceed to continue to deal with the Corbett Case, and take any action on same, and he considered Ms. Smith's submittal into evidence of a "pre-prepared" timeline of the Case, authored by her, and that such action constituted a prejudicial error of both procedure and judgment. Amendment made by Mr. Field. The Board agreed with the change.

Line 78 through line 86 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

Mr. Field spoke from the audience and advised that Ms. Smith be sworn in if she were submitting any evidence into the record. He called to Ms. Smith's attention the several difficulties that attendant to her efforts to personally generated photographs of the Corbett property for admission into the Case record. In addition to the concerns expressed above in regard to the "time line", it was called to Ms. Smith's attention that the photographs were not to his recollection taken during the "site walk" as she had no

camera with her. Further, there was no basis on which to corroborate the authenticity of the photographs; and, in any event, it was improper for her, as a member of a “quasi judicial” panel to be introducing any evidence in the Case record, whether after withdrawal or at any time. It was not made clear as to whether or not the Applicant authorized access to the property given the fact that the “Site Walk” had formally concluded, and the Applicant had indicated that he would be moving to New York State for the summer and fall.

Line 346 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

Mr. Turchan said that there is a publishing business that has been in existence prior to 1984, and located in the basement of one of his buildings located near 112C Lafayette Road. The business may fall under Section 416.C.1. of the Sexually Oriented Businesses Ordinance, and located within 500-feet of 112C Lafayette Road. Mr. Turchan explained that the tenant does not operate the presses, and has not for several years, but maintains that address and pays a monthly rent. Mr. Turchan said that material is not sold there, but is stored there, and that there is no interface with the public. Chair Stanton suggested that such testimony might be “hearsay”.

Line 442 – Mr. Field suggested amendments (shown as underlined), and the Board agreed with the following underlined changes.

Mr. Field stated that he questioned the propriety of Chair Stanton conducting “independent homework” of cases coming before the Board in advance of the Meeting. He also stated his concern that it was improper of the Chair (or any member of the Board) to espouse positions on what is, and what is not, proper religious content and practice. Mr. Field further expressed his concern that the Chair, by his comments, suggesting that those who might disagree with him were less religious or respectful of the protective position, and place of religion in our society than he was.

Mr. Field said that he challenged the Chairman at the September 22, 2009 meeting on whether it was appropriate to do “homework” before the Meeting. Mr. Field said that it was reported to him, by two different people who attended the LGC Forum on February 9, 2010, that “homework” should not be conducted on cases before the Board. Mr. Stanton said that he attended the LGC Forum and that was not the case. Mr. Stanton said that Mr. Sanderson from LGC said that “homework” can be done to prepare oneself for a case; it just cannot be presented as testimony.

Mr. Turchan commented that information that you gather on your own should not be used as testimony.

Mr. Field said that the facts are presented by the Applicant, and the Board needs to rely on those facts, not on facts that a member finds on their own. Mr. Field commented that Mr. Stanton has, in the past, introduced cases as fact, and that he has tried to command the opinion of the Board based upon his interpretation of cases he has read on his own.

Ms. Peckham suggested that if Board Members disagreed with each other on what was actually said versus what was written in the Minutes then the video should be reviewed again to verify what was actually said. Mr. Field commented that the email he previously sent to each member with his suggested changes to the minutes was not to be introduced verbatim into the Minutes; it was used to bring up “points” that were omitted, that made the minutes incomplete.

Mr. Stanton said that the Board is looking for the insertion or corrections of words in the Minutes that reflect what people generally said at the Meeting. He said that in his opinion, it would set a bad precedent to go back to the DVD of the Meeting for every “little” thing that was said. Ms. Peckham said that if there are two different interpretations of what was “said” at the Meeting then the DVD of the Meeting should be reviewed and relied upon.

The Board discussed establishing a protocol on submitting suggested changes to the Minutes. Mr. Stanton recommended using the “hard copy” of the minutes to go by and write down the line number and the suggested correction next to it; the Board can address the changes at a public meeting and agree or disagree with the proposed change.

Line 520 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

Mr. Field Moved and Mr. Turchan seconded the Motion to authorize the Chair to write a letter to the Planning Board discussing two zoning issues that have come to the Zoning Board’s attention during the year that the Zoning Board members feel needs attention (1) create a wind powered systems ordinance, and (2) reexamination of the uses section of the ordinance; specifically to look at the lack of a church being included in the I-B/R, and whether or not that is consistent with contemporary community values and principles, and that the proposed letter be circulated prior to sending it to the Planning Board. The vote was unanimous in favor of the Motion (5-0). Amendment made by Mr. Field. The Board agreed to the change.

Mr. Field said discussion on churches took place at the September 22nd, Meeting. Mr. Stanton had asked permission to write a letter to the Planning Board Chair, and the Board agreed, but asked that the letter first be circulated to the members for comment. Mr. Field said that Members responded, but Mr. Stanton ignored the responses, and sent the letter to the Chair of the Planning Board. Mr. Stanton said he did not receive comments from at least three members that did not agree with the contents of the letter.

Ms. Peckham referred to a previous discussion by the Board where the Chair had asked to seek opinions from the LGC on a couple of matters, and asked whether or not he sent a letter to the LGC. Mr. Stanton said that an email was sent to the LGC on his own accord. He asked them if a ZBA can change the conditions of a variance. He said that any member, as an individual, can question the LGC to get information. Mr. Field asked how Mr. Stanton makes the distinction that he is asking questions to the LGC as an individual, when the letter is usually on ZBA or Town “letterhead”. Mr. Stanton said it was by email and he was asking the question of the LGC as an individual member of the Board. Mr. Stanton said that he gets information to help himself, and he does not share all of his information searches, previous zoning records, or information from other sources. He said that it is for his own information.

Mr. Field said that the Members should not be asking questions of the LGC about matters before the ZBA. Mr. Stanton said that it was his “right” to seek information from the LGC.

Mr. Buber said he read the LGC’s “Legal Services for Municipalities” section on the LGC’s website. He said that Members cannot go to the LGC and look for information, facts of law or case law from the LGC as a private citizen. He said that once a member seeks information from the LGC, they do so as a representative of the municipality, and not as an individual personally.

Mr. Buber commented on the September 24, 2009 letter that was sent by Mr. Stanton, on behalf of the Board, to the Chair of the Planning Board regarding their consideration of proposed zoning amendments. He referred to the last sentence in the letter, *Also, we have an administrative comment that it may be helpful to have a definition of churches in Section III, since there currently is none.* Mr. Buber said that the Board did not have an “administrative comment”. He said that no one on the Board asked for a definition of “churches”. He said that he rebutted the letter on September 28th and did not support the idea of seeking a definition of “churches”. Mr. Stanton apologized, and said that he did not intend to upset people. He said that he received comments from Mr. Field and Mr. Buber and did not think the comments were sufficient to not ask for the definition of “churches”.

Mr. Field Moved and Mr. Turchan seconded the minutes of September 22, 2009 as amended.

Mr. Field made a friendly amendment that the final draft of the September 22, 2009 will be approved subject to confirmation that the Minutes conform to what was discussed. Mr. Turchan accepted the friendly amendment.

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

November 19, 2009 Meeting Minutes

Mr. Field called for a Point of Order.

Mr. Field said that in regards to the October Meeting, he wrote a letter to the Board, as a Member of the Board, requesting whether or not a matter that was heard at the September Meeting would be reconsidered, and explained that it would have to have been considered in October to comply with the 30-day appeal period. He said that Chair Stanton cancelled the October Meeting due to the fact that there were no new cases before the Board. Mr. Field asked that the rejection on his effort to have the matter heard at the October Meeting be noted for the record. Mr. Field said that in his opinion Mr. Stanton had no authority to cancel a regularly scheduled meeting that had pending business that was time sensitive.

Mr. Stanton explained that he did not “see” that any individual Member of the Board had “standing” to request such a review. He said according to the Rules of Procedure, a “special meeting” can be held at the request of at least 3 Primary Members, and it would be scheduled. He said that lacking a request for a “special meeting” and lacking any cases to consider, as Chair he cancelled the October Meeting, as stated in the Rules of Procedure.

Mr. Field said that there is no need for a “special meeting” because there was a regular meeting scheduled.

Ms. Peckham said that Mr. Stanton should have communicated with the members to explain that they needed three members to request a “special meeting”.

Mr. Field said it is basic law in New Hampshire that it is encouraged for Boards to reconsider cases when there is a suggestion that there is an error of law or facts. Mr. Stanton said that a motion to reconsider can only be made by one who voted in favor of the motion. Mr. Field said that that was wrong. He said a motion to reconsider is made by the Board. Mr. Field said that a Chairman who does that is denying justice, and is violating his or her Oath.

Line 41 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

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.

Line 59 – Mr. Field made an amendment (shown as underlined). The Board agreed with the change.

Mr. Field argued that he brought to the Chair’s attention a pending matter, to be addressed at the regular October 27, 2009 Meeting, prior to Mr. Stanton postponing the October Meeting, that he felt the Board needed to consider at that scheduled Meeting. He said that there is no need for a special Meeting when the matter should be on the Agenda for the Regular Meeting.

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

Mr. Field noted for the record of this meeting (February 10, 2010) that the Chair does not have the power to determine or control the content of the agenda, rather the Chairman has the capacity to modify the order of the agenda; Section 5M of the rules of Procedure; the public controls the agenda content.

Line 156 - Mr. Stanton made the following amendment (shown as underlined). The Board agreed.

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

Line 199 – change the spelling of diminution. The Board agreed with the change.

Line 281 – change to *the Board is cognizant*; the Board agreed with the change.

Line 258 – add rules of the applicant’s choice. The Board agreed with the change.

Lines 284 & 285 – Mr. Stanton made the following amendment (shown as underlined). The Board agreed with the change.

Mr. Stanton said that if the Board needs to accommodate an Applicant that insists on being heard in December, they need to be made aware that the Board may continue the deliberation of cases submitted for December to the January Meeting. Amendment made by Mr. Field. The Board agreed with the change.

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

Line 311 – Mr. Field made the following amendment (as shown as underlined). The Board agreed with the change.

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

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

Line 381 - Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

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

Mr. Field made the following amendment (shown as underlined). The Board agreed to the change. Mr. Stanton gave Mr. Field two minutes to speak on the subject of the 1984 case to which he made reference. Amendment made by Mr. Field. The Board agreed with the change.

Line 388 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

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

Line 416 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

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

Mr. Field Moved and it was seconded to approve the November 19, 2009 Meeting Minutes as amended.

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

December 15, 2009 Meeting Minutes

Line 33 – Mr. Field made the following (shown as underlined). The Board agreed with the change.

Mr. Stanton commented that there was an editorial published in the Portsmouth Herald and Hampton Union newspapers last week that called the members of the Zoning Board and those that appointed

them “corrupt”. He said that it was, in his opinion, a gratuitous against the fine men and women that serve the Town as a Board Member. He said that the decision to go to an elected board was not because of corruption, but of more of a desire to see Government by the people and for the people. Mr. Field disagreed, and said that he didn’t think that the editorial asserted that the current Board was “corrupt”. He read a portion of the editorial into the record: “residents decided the Town Zoning Board had become corrupt, and voted to elect its members rather than continue to have them appointed by the Select Board”.

Line 43 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

Mr. Field said that there were incidents of conduct by the ZBA that had come into question within the Town, in that criticism of the pattern of the Administration of the ZBA business by prior Boards, were addressed by the Townspeople when they made a decision to change their mind on how members were going to be appointed, and therefore voted for an elected Board.

Line 78

Mr. Stanton said that the Applicants have a contingency contract, and Mr. Field wanted to know how Mr. Stanton knew that information. Ms. Peckham made an amendment to remove her name from this sentence. The Board agreed with the change.

Line 82 – change “show” to “know”; the Board agreed with the change.

Line 144 – change word “with” to “without”; the Board agreed with the change.

Line 147 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

Mr. Field questioned why the 2007 NH DES septic approval states that it is approved with a municipal water supply only and it does not state that on the new 2009 approval.

Mr. Mabey explained that the 2009 NH DES approval references the 2007 approval that states that it is approved with a municipal water supply. Amendment made by Mr. Field. The Board agreed with the change.

Line 245 change “are” to “is” The Board agreed with the change.

Line 283 change the word “knew” to “knee” The Board agreed with the change.

Line 290 – allow reinterpretation

Line 297 – take out the word is The Board agreed with the change.

Line 302 & 303

Mr. Field stated that this Board has not adopted Roberts Rules as its Rules of Procedure. Mr. Field added this statement into the minutes. The Board agreed with the addition.

Mr. Turchan Moved and the Motion was seconded approve the December 15, 2009 Meeting Minutes as amended.

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

January 26, 2010 Meeting Minutes

Line 135 – Mr. Field made the following amendment (shown as underlined). The Board agreed with the change.

Mr. Field called for a point of personal privilege.

Line 294 – Mr. Field made the following amendments (shown as underlined). The Board agreed with the change.

is for purposes of an overlay district of the floodplain development ordinance and is entirely different from section 302.

Line 326 – Mr. Stanton made the following amendment (shown as underlined). The Board agreed with the change.

He gave his opinion that the Board could modify a condition for such reasons as it causes a “hardship”.

The Board agreed that word “opined” not be used in the minutes.

Line 426 – Mr. Stanton made the following amendment (shown as underlined). The Board agreed with the change.

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

Line 537 - 540 Mr. Field made the following amendment (shown as underlined). The Board agreed to the change.

Ganotis responded, in his email, by saying that he would feel more comfortable having the Conservation Commission deliberate the merits of the case before offering any input.

Mr. Field noted for the record that he would make no comment lines 564 – 803 of the January Meeting Minutes.

Mr. Buber Moved and Mr. Turchan to approve the January 26, 2010 Meeting Minutes as amended.

Line 976 remove the word “the”. The Board agreed with the change.

Mr. Field amended the Motion that he was not participating at all on anything relating to case #2010:02. Mr. Buber and Mr. Turchan accepted the amendment.

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

Mr. Buber brought it to the Board’s attention that the variance worksheet used by the Board does not reflect the new law RSA 674:33.

Mr. Field Moved and Ms. Peckham seconded the Motion that the variance worksheet be amended to conform with the language of the Rules of Procedure and Application as to RSA 674:33, and to cite the Legislative Intent.

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

The Board agreed to change the questions on the variance worksheet as follows:

Pont 1 – eliminate the word “not”

Point 2 to read: Would the spirit of the ordinance be observed by granting this variance?

Point 3 – Would substantial justice be done by granting this variance?

Mr. Buber distributed to all Board members present, a two page excerpt from a publication written by Cordell Johnston of the LGC titled “Basics For Planning and Zoning Board Members”. On page one of the text, (publication page 4) under Paragraph 4.b “Planning board rules of procedure” and on the second page of the text (publication page 9) under subparagraph (b) “ZBA rules of procedure”, Attorney Johnston makes the same statements regarding Robert’s Rules of Order as applied to land use boards.

The meeting adjourned at 9:30pm.
Respectfully submitted,

Wendy V. Chase
Recording Secretary

Approved February 23, 2010 (amendments shown underlined)