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**Meeting Minutes**  
**Continuation of the March 23, 2010 Meeting**  
**Town of North Hampton**  
**Zoning Board of Adjustment**  
**Tuesday, March 30, 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; Richard Batchelder, Vice Chair; Ted Turchan; Michele Peckham, and Robert Field, Jr.

**Members absent:**

**Alternates present:**

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

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

### **Unfinished Business**

Mr. Stanton convened the Meeting at 6:33pm.

Mr. Stanton introduced members of the Board and Staff.

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

Mr. Stanton rearranged the agenda, without objection from the Board, to take up Mr. Field's email concerning case #2010:04 - Cheever, under "other business".

Mr. Field explained that he may have made a mistake, and inadvertently led the Board into making a mistake in believing that the Merriam-Webster's Dictionary's definition of "livestock" was inclusive and comprehensive of the definition of "livestock". He asked that the vote to determine that the Cheever case is not subject to review under the agricultural section of the zoning ordinance be reviewed. He said that he voted in favor of the original motion, therefore he has the right to make a motion to reconsider that vote. He said that it is more of a procedural matter than a substantive matter, because the merits of the case have not yet been deliberated by the Board.

**Mr. Field Moved and Mr. Batchelder seconded the Motion to reconsider the vote made on March 23, 2010 on case 2010:04-Cheever, largely due to his mistake in reliance of the Merriam Webster's Dictionary.**

Mr. Field referred to the draft minutes of March 23, 2010 on lines 276 through 279. He said that he does not believe that the definition of "livestock", given at that meeting, warranted the reliance that the Board placed upon it.

Ms. Peckham questioned what Mr. Field based his Motion on. Mr. Field said that it was based on his own concern that the definition was incomplete. He said that "livestock" is more than what was related in the definition presented at the last meeting.

Ms. Peckham recused herself from the vote, because she recused herself from case #2010:04.

Mr. Stanton explained that the State allows the Zoning Board to make decisions on Zoning Board cases and to make corrections on cases if need be. He said the Motion made is only for the ZBA and there will be no Public Hearing on the Motion made.

Mr. Stanton asked Mr. Mabey where it stood in terms of his enforcement action against Ms. Cheever

Mr. Mabey said that the decision to dismiss the case on March 23, 2010 negated the "cease and desist". He said that if the Board decides to reconsider the past vote and continues to hear the case, and if the variance was denied then he would give Ms. Cheever at least 10 days to remove the chickens before he would issue her a new "cease and desist" order.

Mr. Field said that there are many definitions of "livestock" and he thinks they need to find out what the Planning Board meant by the word "livestock". Mr. Field and Mr. Stanton went back and forth as to who would be responsible for obtaining that information. Mr. Field said that if the records did not show what the Planning Board meant when creating the ordinance then the Zoning Board would have to make an interpretation among common usage of the word. Mr. Field referred to RSA 21:22 – Common Usages.

Mr. Turchan said that the ordinance was written a long time ago, and the Planning Board members at that time are probably not "around" any more. Mr. Field said that the information may be found in the minutes.

**The question was called on the Motion to reconsider.**

**The vote was unanimous in favor of the Motion (4-0).**

Mr. Stanton explained to the Applicant that the Board would add the variance request to the April 27, 2010 Agenda, with the Applicant's permission, and explained that it was a mistake made by the Zoning Board, therefore the ZBA will assume the costs of re-notification. The Board agreed to re-notification of the case even though it is not legally necessary. Mr. Stanton also reminded the Applicant that there will be no enforcement action until the case is heard and deliberated on at the April 27, 2010 Meeting.

Mr. Stanton further explained that the vote to reconsider puts the application "back in time" to just before the original motion to dismiss the case was made.

Ms. Peckham was reseated.

## Unfinished Business

**2010:05 – Brewster Investment, LLC, 16 Alexander Drive, Hampton, NH 03842.** The Applicant (1) requests a variance from Article IV, Section 406 to permit the erection of a new home with an attached garage 21.1 feet from Chapel Road on a vacant approved building lot of record, and (2) requests a special exception for Article IV, Section 409.12 to permit the erection of the home/garage within 20 feet from an inland wetland. Property owner: Eric R. Cosman, 872 Concord Ave., Belmont, MA 02178; property location: 20 Chapel Road; M/L 005-032; zoning district R-2. This case is continued from the March 23, 2010 ZBA Meeting.

Mr. Stanton gave an inventory of material received for case 2010:05 – Brewster Investment, LLC.

- Application
- Declaration of a “Rain Garden” maintenance agreement
- Site plan drawing #C2
- Memo from Dr. Lord – impervious surface and stream quality
- Letters, photos and property tax records from Edward Stevens, 10 Chapel Road
- A deed from Thayer to Cosman, Book 1829, Page 367
- A letter and photos from Arlene Mowry
- Letter dated March 3, 2010 from Barbara Stafford
- Letter from Jones and Beach Engineering dated February 3, 2010
- Letter from Attorney Saari dated February 17, 2010
- Letter from Mr. Ganotis on behalf of the Conservation Commission

The Board was in receipt of an overlay map depicting the proposed residential home in relation to the surrounding property and resource areas. The members reviewed the plan.

Mr. Green submitted a letter from Mr. Cosman, the owner of the property, to Ms. Chase earlier in the day, and asked her to ask the Board to accept it into the record.

It was a consensus of the board to allow Mr. Cosman’s letter into the record.

Mr. Stanton read the letter from Mr. Cosman into the record. The letter expressed that he has always had the intentions of building on the lot, and that it was an approved lot in an approved subdivision at the time of purchase in 1966. He also explained that he has paid property taxes over the past 44 years on a lot assessed as a buildable lot. Mr. Cosman stated in his letter, that he did not believe the Town of North Hampton should be able to take away his right to build on his property.

Ms. Peckham referred to RSA 674:39 – Regulation of Subdivision of Land Four-Year Exemption, and asked if the RSA applied to this case. The Board discussed the contents of the RSA, under paragraph II that states that once substantial completion of the improvements as show on the subdivision plat or site plan has occurred in compliance with the approved subdivision unless otherwise stipulated by the planning board, the rights of the owner’s interest shall vest and no subsequent changes in zoning ordinances shall operate to affect such improvements.

Mr. Field read from Section I of the RSA where it states that the approved subdivision shall be exempt from changes in the zoning ordinance except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements.

The Board reviewed Section IV of the RSA that states that failure of the planning board to specify by regulation what constitutes "active and substantial development or building" shall entitle the subdivision approved by the planning board to the 4-year exemption.

Ms. Peckham commented that the 4-year exemption within the RSA refers to subdivisions that are not complete, so if the subdivision is complete then the 4-year exemption would not apply.

The Board reviewed the site plan and subdivision plan regulations and did not find a regulation that specified what constitutes an "active and substantial development or building". They also determined that there was no condition on the recorded plat. Mr. Field said that if there is no regulation and there are no conditions on the plat, where there is not, then the property owner is protected under paragraph I of the RSA.

Mr. Field commented that Mr. Cosman had ample opportunity to apply for a tax abatement if he felt that the property was assessed too high. He said that just because the Assessor classifies it as a "building lot" doesn't necessarily mean it's a building lot.

Mr. Turchan referred to the "5<sup>th</sup> Amendment", that you shall not take property without just compensation. The Constitution supersedes over every other regulation.

Mr. Mabey said that the subdivision is on a town road so there weren't any improvements to have. He said that the lots are grandfathered on size, area and frontage. He said that RSA 674:39 deals with the engineering improvements for the subdivision, such as the roads and lots; not the houses. He said that the RSA is designed to protect the developer, so that the town can't change the lot sizes and road standards and make the developer comply, when it was already approved by the planning board.

The Board asked Mr. Saari to speak on the matter.

Mr. Saari said that he intended to bring up RSA 674:39. He said that there was a case in Rye in 2002, *Morgenstern v. Town of Rye* (2002) 147 N.H. 558, 794 A.2d 782. He read a quote from that case into the record: "the developer of a subdivision approved under a prior zoning ordinance that had undergone substantial construction under the approved plan requires a vested right to complete the project in accordance with the original subdivision in spite of the subsequent adoption of a contrary ordinance".

Mr. Turchan referred to a section of RSA 674:39 and quoted from case *AWL Power, Inc. v. City of Rochester* (2002) 148 N.H. 603, 813 A.2d. 517: "Where a developer expended a substantial amount of money on public improvements and constructed six houses, its work was enough to meet the "substantial construction" standard; its right to complete a project permanently vested".

Mr. Field pointed out that RSA 674:39 may apply to the case if the *developer* constructed a number of houses on the lots. It was determined that four of the six lots have been developed, resulting in substantial completion of the subdivision; but it was not determined whether or not substantial completion of the subdivision happened within the first four years.

Mr. Stanton asked for a consensus of the Board on whether or not RSA 674:39 applies to this case or not. Mr. Field thought that it did not apply; Mr. Batchelder said that it did not apply in whole; Mr. Turchan said that he would like to further research the court cases pertaining to the RSA; Ms. Peckham would like to know more of what was accomplished within the first four years of development of the subdivision. The Board determined that it would behoove them to seek legal counsel on the matter.

Ms. Peckham said that she would prepare a list of questions to ask Town Counsel for advice on, particularly whether or not RSA 674:39 applies to this case, and she will circulate it among the members for comment. The Board concurred that they would not seek advice from the Local Government Center. The Board will ask permission from Town Administrator, Steve Fournier, to seek advice from Town Counsel.

Mr. Field suggested asking the Building Inspector when the structures on the lots were built upon, and by whom.

**Mr. Stanton Moved and Mr. Batchelder seconded the Motion to table the deliberations until the Board receives the proper advice from Town Counsel and Ms. Peckham will work on a statement to submit to Mr. Fournier.**

**Mr. Field asked for a friendly amendment to find out what affect ordinances enacted to protect public health standards, such as water quality and sewerage treatment overcome the presumption of the AWL Power case.**

Ms. Peckham said that would be one of the questions for Town Counsel.

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

Mr. Stanton called for a 5 minutes recess.

Mr. Stanton reconvened the Meeting.

**2010:07 – Michael and Kristen Sullivan, 1 Grandview Terrace, North Hampton.** The Applicants request a variance from Article IV, Section 406 and 406.1 to allow the construction of an attached two-car garage approximately 13-feet from Post Road and approximately 20-feet from Grandview Terrace where 30-feet is the setback requirement, and approximately 19-feet In the rear yard where 25-feet is the setback requirement. Property owners: Michael & Kristen Sullivan; property location: 1 Grandview Terrace; M/L 014-052-000; zoning district R-1. This case is continued from the March 23, 2010 ZBA Meeting.

In attendance for this application:

Kristen and Michael Sullivan, Owner/Applicant

Mr. Stanton swore in witnesses. He gave the Applicants the option to question whether a member of the Board should be disqualified. The Applicants did not request a disqualification of any Member.

Ms. Sullivan explained that they purchased the house seven years ago, and that it was built in the 1950s. She said that the setback requirements have changed over the years, and that they were requesting a variance to the current setback requirements to build a two-car garage.

Ms. Sullivan submitted pictures depicting where the proposed garage would sit on the lot into the record. She also submitted a copy of a petition from her neighbors in support of her application. Ms. Sullivan said that she wished to build the garage off of Grandview Terrace instead of Post Road, because Post Road is heavily trafficked, and the cars drive by fast; she is concerned with the safety of her children when playing in the driveway.

Ms. Sullivan explained that they intend to build a standard double overhang door garage off of the house. She was not sure how high they were going to build it. She said that they are in the beginning stages of designing it. She said that they would like to have storage area on top of the garage, and have the garage come off of the house at an angle, but the mouth of the driveway will not change.

Mr. Field questioned why the garage is not proposed to be "squared off" to have a direct entry in and out of the garage. Ms. Sullivan explained that they would have to change the mouth of the driveway to accomplish that.

Ms. Sullivan addressed the five criteria:

**1. Would granting this variance be contrary to the public interest?**

Ms. Sullivan said that the proposal would not be contrary to public interest. She had presented a copy of the petition signed by her abutters stating that they were in support of their application.

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

Ms. Sullivan said that they are not changing the tree-line that has been in existence between the house and Post Road for many years.

**3. Would substantial justice be done by granting this variance?**

Ms. Sullivan said that substantial justice would be done in granting the variance.

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

Ms. Sullivan said that her neighbors expressed that her new garage would improve the aesthetics of the neighborhood.

**5. Would literal enforcement of the provisions of the ordinance result in an unnecessary hardship?**

Ms. Sullivan said that there is no other place to put the garage. She said if she puts it at the other side of the house they would be entering the house from the garage into the bedrooms, and they would still need a variance from the setback requirements. She said that they would also need to relocate their septic system. Mr. Sullivan said that the cost to reconfigure the house and move the setback would present a hardship on them.

Mr. Field voiced concern on the safety of entering and exiting the garage, where they live on a corner. Mr. Sullivan said that the way they are backing out of the driveway currently will not change.

Mr. Stanton opened the public hearing to those in favor or opposed to the project.

Mr. Stanton closed the public hearing without public comment.

The Board went over the variance test:

**1. Would granting this variance be contrary to the public interest?**

Mr. Stanton said that they established that they are in a residential area, and the use of a garage is a permitted use. From visibility there is not a significant change in the safety values.

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

Mr. Stanton said that the setback requirements at the time of building the house have changed significantly. Mr. Field said that the only inconsistency with the spirit of the ordinance is the roof line of the proposed garage. The Board agreed there should be a height limitation not to exceed the roofline of the house. The Board agreed with a single story garage, no higher than 10-feet with a roof pitch not to exceed 12-feet.

**3. Would substantial justice be done by granting this variance?**

The Board commented that the surrounding properties have garages.

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

The Board was in receipt of a letter the neighbors signed stating that they did not feel that the addition of a two-car garage will not be a detriment to property values, and there was no evidence presented to the contrary.

**5. Would literal enforcement of the provisions of the ordinance result in an unnecessary hardship?**

**a. For purposes of this subparagraph, "unnecessary hardship" means that, owing to special conditions of the property that distinguish it from other properties in the area: (i) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and (ii) The proposed use is a reasonable one.**

Mr. Field said that it is a reasonable use of the property. Mr. Turchan said that the property has the hardship because it does not have the space to put the proposed garage.

**b. If the criteria in subparagraph (a) are not established, and unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.**

**Mr. Turchan Moved and Mr. Batchelder seconded the Motion to approve the variances for case #2010:07 with the maximum side yard to Post Road to 13-feet, and the front setback to Grandview Terrace to be 20-feet, as denoted in the plan presented to the Board and dated November 5, 2009; plan number 21142430, with the condition that the height of the first floor of the garage to match the roof line of the existing house, and the maximum pitch height of the garage's roof not to exceed 22-feet.**

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

Mr. Stanton explained that the Applicants would be receiving a decision letter and that there was a 30-day appeal period.

**Minutes**

**Mr. Stanton Moved and Mr. Batchelder seconded the Motion to table the February 23, 2010 Meeting Minutes to the April 27, 2010 Meeting.**

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

**Mr. Turchan Moved and Mr. Batchelder seconded the Motion to table the March 23, 2010 Cheever Site Walk Minutes to the April 27, 2010 Meeting.**

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

**Other Business**

Mr. Field said that he was concerned that the Board went into Nonpublic Session improperly at the March 23, 2010 Meeting under RSA 91-A. He said that he carefully examined the Statute and has offered Mr. Fournier an opportunity to provide him with material he said he had that would document the right to go into Nonpublic Session to discuss issues as the Board did.

Mr. Field said that he also thinks that there is confusion with the right to know law by adding assumptions to it that do not exist. He said that when he writes an email and is not worried about it being public then there is no problem with it.

Mr. Field said that he could not find anything under RSA 91-A, that would allow the Board to do what it did on March 23, 2010. He read section (a) and said that this section did not apply to what was discussed in Nonpublic Session on March 23, 2010. Mr. Stanton felt that (a) did apply. Mr. Stanton said that they took a legal vote to seal the minutes. Mr. Field said that (c) did not apply. The Board disagreed, and said that it did apply.

Mr. Stanton said that there was a legal roll call vote to go into Nonpublic Session; a legal roll call vote to come out of Nonpublic Session, and a legal roll call vote to have the minutes sealed at the request of those involved.

Mr. Field said that section (e) did not apply to what was discussed in Nonpublic Session on March 23, 2010. Mr. Turchan said, what was discussed in Nonpublic Session fell under one of the sections that was referred to.

Mr. Field asked the Chair to explain how the vote taken on incomplete information to go into Nonpublic Session was a legal vote.

Mr. Stanton said that Mr. Field could have voted against it; it did not have to be a unanimous vote. Mr. Field said that he voted against it after the fact, because he was told that there was analytical information supporting Mr. Fournier's request to go into Nonpublic Session to be provided to the Board, and that did not occur.

There was a 4 in favor and 1 opposed consensus of the Board that Section (c) of RSA 91-A applied to what was discussed in Nonpublic Session on March 23, 2010.



Mr. Field asked to read 91-A:1 Preamble into the record. *Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.*

**Mr. Turchan Moved and Mr. Batchelder seconded the Motion to adjourn the Meeting at 9:00pm. The vote was unanimous in favor of the Motion (5-0).**

Respectfully Submitted,

Wendy V. Chase  
Recording Secretary

**Approved May 4, 2010**