



**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, May 25, 2010 at 6:30pm
Mary Herbert conference Room**

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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; Michele Peckham, Robert Field, Jr., David Buber, and
14 George Lagassa

15
16 **Members absent:**

17
18 **Alternates present:** Jennifer Lermer

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 members of the public to rise for a pledge of allegiance.

26
27 Mr. Stanton introduced members of the Board and Staff.

28
29 The first order of business was to reorganize the Board.

30
31 Mr. Stanton moved to nominate Mr. Buber to serve as Chair.

32
33 Ms. Peckham commented on Mr. Buber's being recently elected and thought a more "seasoned"
34 member would be more suitable as Chair.

35
36 Ms. Peckham Moved and Mr. Lagassa seconded the Motion to nominate Mr. Field as Chair.

37
38 Mr. Buber withdrew from the nominations.

39
40 The vote passed in favor of the Motion (4 in favor, 0 opposed and 2 abstentions). Mr. Stanton and Mr.
41 Field abstained.

42
43 Ms. Peckham commended Mr. Stanton for his service to the Board as Chair, and for the good job that he
44 did.

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45 Mr. Field's first act as Chair was to welcome Mr. George Lagassa and David Buber as newly elected
46 Board members and thanked Mr. Stanton for his service.

47
48 Mr. Field read a statement into the record directed at Ms. Chase. He thanked her for her service and
49 said that, neither he, nor any other member of the board has ever intentionally acted in a manner that
50 questioned her integrity, competency or professionalism. Mr. Field said that he looked forward to Ms.
51 Chase's continued work on the ZBA. Mr. Field quoted Governor Christie "all persons in Government
52 have idiosyncrasies, manners and style that are individual. Everybody is an individual person and
53 entitled to bring in their individual personalities to a public board." He further quoted him as saying "I've
54 been elected for four years and you're going to have to put up with me because this is the way I am
55 because Government is a process of distilling different points of view." Mr. Field pledged to each of his
56 colleagues to be themselves and to express themselves as they see fit, and in accordance with the Oath
57 of Office each member has taken. He continued to say that the affairs of the Board will be conducted in
58 accordance with state law, zoning ordinances and the Board's rules of procedures in the best manner
59 that is possible without biased or favoritism of any sort. He thanked each member of the Board and
60 Staff for their service.

61
62 Mr. Field suggested taking up the Vice Chairman nomination.

63
64 **Mr. Buber moved and Mr. Lagassa seconded the Motion to nominate Ms. Michele Peckham as Vice**
65 **Chair.**

66
67 Hearing no other nominations Mr. Field declared the nominations closed.

68
69 **The vote passed in favor of the Motion (4 in favor, 0 opposed and 1 abstention). Ms. Peckham**
70 **abstained.**

71
72 **Mr. Stanton Moved and Ms. Peckham seconded the Motion to appoint Ms. Wendy Chase as Recording**
73 **Secretary to the ZBA.**

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

75
76 Mr. Field explained that the Town voted, at the May 11, 2010 Election, to establish a Code of Ethics Ad
77 hoc Committee to address issues within it, and asked if any member would like to volunteer to serve on
78 the Code of Ethics Ad hoc Committee.

79
80 Mr. Wilson commented from the audience that one of the goals of the Committee is to have something
81 in place by next year's Town Election.

82
83 Mr. Lagassa volunteered to serve on the Code of Ethics Ad hoc Committee.

84
85 **Mr. Stanton Moved and Mr. Buber seconded the Motion to appoint Mr. Lagassa to serve on the Code**
86 **of Ethics Ad hoc Committee.**

87 **The vote passed in favor of the Motion (4 in favor, 0 opposed and 1 abstention).**

88
89 Mr. Field asked to change his previous vote on his nomination as Chair, and abstained. Ms. Peckham
90 and Mr. Lagassa agreed to Mr. Field changing his vote.

91

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92 Mr. Field said that he was not sure that the Zoning Board was in compliance with 91:A when going into
93 non-public session in March 2010. He said that in order to “seal” the minutes there has to be a vote
94 taken to do so by a 2/3 majority vote.

95
96 Mr. Stanton, Ms. Peckham and Mr. Buber agreed that a roll call vote was taken to “seal” those minutes.
97

98 Mr. Field said that during the past month it seems as though there has been knowledge over the
99 contents of those non public minutes. He said that he is unclear how people can make reference to
100 those minutes since they were “sealed”. Mr. Field explained that the Board has the capacity to “unseal”
101 the minutes if the Board feels that the information no longer needs to be protected. Mr. Field
102 suggested that the Board try and get more information on it and he will bring it back up to the Board at
103 the next Meeting.

104
105 Mr. Field said that since this is the first year as an Elected Board, i.e. totally independent of the Select
106 Board and Town offices, the Members need to have the help of Ms. Chase and Mr. Fournier on how
107 communication should take place, and asked for the Board’s authority to meet with Ms. Chase and Mr.
108 Fournier and try to determine what the preferred protocols are for communication between this
109 independent Board and the Administrative Offices.

110
111 Mr. Buber Moved to authorize Mr. Field to speak to Ms. Chase and Mr. Fournier, on behalf of the Board,
112 to determine the preferred protocol for communication between the Board and the Town Offices.

113
114 Ms. Peckham made a friendly amendment adding that Mr. Field report back to the Board with any
115 information he receives.

116
117 Mr. Field said that he would report back to the Board when he receives the information.

118
119 Ms. Peckham seconded the Motion.

120
121 Mr. Stanton asked if the request made by Mr. Field was separate from his issues with the non-public
122 session in March.

123
124 Mr. Field said it was totally separate. Mr. Field said that he would like a protocol established for
125 communications between the Elected ZBA, Town Administrator, ZBA’s Recording Secretary and the
126 Administrative Assistant.

127
128 Ms. Peckham said that it may take more than one Meeting to establish rules if there are no current rules
129 in effect.

130
131 Mr. Robert Landman was given permission from the Chair to comment from the audience. Mr.
132 Landman suggested including the Building Inspector when meeting with the Town Staff.

133
134 Mr. Field said that they would “see” how the meeting goes before including the Building Inspector in the
135 discussion.

136
137 With no further discussion on the Motion; the vote was taken.

138
139 **The vote was unanimous in favor of the Motion (5-0).**

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Mr. Field said that the Board should set up a separate Meeting to establish protocol for making selections of ZBA Alternates. He said that the Board has four open positions for Alternates. He explained that an Elected Board appoints its own Alternates, and it's the Primary Members that do the appointing.

Mr. Field said that Alternate Member Jennifer Lermer's term expires in May 2012. He said that it is the Chair's obligation to appoint alternates at a Meeting when a primary member is not present or has recused him/herself from a meeting or case.

Pursuant to RSA 673:11 and 5C of the Rules of Procedure, Mr. Field seated Ms. Lermer in his stead for case 2010:02 – Peter Horne.

Mr. Field recused himself.

Ms. Peckham assumed the Chair.

2010:02 – Peter Horne, Trustee F.S. 123 Nominee Trust, PO Box 1435, North Hampton, NH 03862. The Applicant requests a variance from Article IV., Section 411 to allow a body of water to be used to satisfy minimal lot area requirement; in the alternative, the Applicant requests a variance from Article IV., Section 406 to allow lot areas of 75,000s.f. and 68,480 s.f. where 87,120 s.f. is required. Property owner: Peter Horne, Trustee F.S. 123 Nominee Trust; property location: 112 Mill Road; M/L 006-147-002; zoning district R-2. This case is continued from the March 23, 2010 Meeting.

In attendance for this application:

Attorney Bernard Pelech, Wholey & Pelech

Corey Coldwell, MSC Engineering

Steve Oles, MSC Engineering

Jamie Long, JAB Soil Consultants

Ms. Peckham asked Attorney Pelech to give an update on the case.

Mr. Field spoke from the audience, not as a member of the Board, and said that the public meeting had ended in January and it was left with the abutters and others to give their testimony. He said that there is a record of Mr. Horne's case in the minutes available to all.

Ms. Peckham thanked Mr. Field for his comments, but thought it best to get a brief overview for herself and for the benefit of the new Members.

Mr. Field addressed the Board to object to a member sitting on case #2010:02 – Peter Horne.

Mr. Pelech said that the objection was made at the January Meeting. Mr. Field said that he had new information to support the request to object to a member sitting on the case.

Mr. Field asked for the recusal of Mr. Stanton. He said that (1) resulting in tonight's election with Mr. Field replacing Mr. Stanton as Chair is grounds to assume that Mr. Stanton would not have total objectivity on this case; (2) In regards with the Code of Ethics, at the Select Board Meeting on April 26, 2010, the Select Board made comments that Mr. Field believed Mr. Stanton knew were not true and did nothing about it; (3) Mr. Stanton wrote to the newspapers about the Code of Ethics and was responding

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188 to points from Mr. Wilson who was supportive of the point of view giving the right to a person to face
189 his or her accusers and have knowledge of the complaint in advance to be able to defend themselves,
190 and Mr. Field said that those privileges were not provided to him. Mr. Field said that Mr. Stanton
191 continues to be disabled in his ability to objectively and without bias to judge a property interest of his
192 wife's and himself in excess of 100,000.00. Mr. Field asked the Board to consider acting under RSA
193 673:14,II to conduct an advisory vote on whether a fair and objective assessment of this case can be
194 made by Mr. Stanton.
195

196 Mr. Pelech said that this is the third or fourth time Mr. Field has asked Mr. Stanton to recuse himself.
197 He referred to RSA 673:14 and finds no grounds that Mr. Field had alleged that fall under 673:14. He
198 said that Mr. Field has recused himself and is in no position to request a non-binding vote of the Board
199 as to whether or not Mr. Stanton should disqualify himself. He said that Mr. Stanton's opinions' on the
200 Code of Ethics are his constitutional right, and should not be a basis for disqualification.
201

202 Mr. Field said that he does not have to have "grounds", it's whether the Board feels, based on its
203 knowledge, that there is a problem.
204

205 Mr. Stanton said that he took an Oath when he entered the Military and took that seriously; he took
206 another Oath when he assumed this office to be fair and impartial and takes that Oath seriously. He said
207 that he will do his level best to be fair and impartial, and not pay attention to some of the personalities
208 involved. He said that he could render that kind of service to the Board.
209

210 Ms. Peckham asked if any Member of the Board wanted Mr. Stanton to "step down".
211

212 Ms. Lerner said that she has been either an alternate member or regular member for many years on the
213 ZBA and in her opinion has never seen Mr. Field, Mr. Jon Simmons or Mr. Stanton act in an
214 inappropriate manner on any case.
215

216 Not hearing any further comments Ms. Peckham said that accepting Mr. Stanton's statement that he
217 will honor his obligation to be fair and impartial, the Board will move forward with the case.
218

219 Mr. Pelech gave the following summary:

- 220 • He submitted a copy of a memorandum dated January 15, 2010 in support of the application of
221 Peter Horne. He certified that it was the same copy he presented at the January 26, 2010
222 meeting that was signed by Mr. Pelech.
- 223 • Mr. Pelech began his presentation at the January 26, 2010 Meeting and did not conclude
224 because he agreed to stop the presentation so another case (Cheever Case) could be heard by
225 the Board.
- 226 • The case was continued to the March 23, 2010 Meeting.
- 227 • Mr. Pelech, at the March meeting, asked for a continuance to the April Meeting, but Mr. Field
228 would not be present so he agreed to continue to the May 25, 2010 Meeting. Mr. Stanton
229 confirmed that Mr. Pelech was in the middle of his presentation and the public session had not
230 taken place yet.
- 231 • Mr. Pelech referred to the report from Michael Cuomo, RCCD to the Conservation Commission.
232 Mr. Field spoke from the audience and said that the January 26, 2010 Meeting Minutes stated
233 that the Horne case was continued for the purpose of receiving input from the Conservation
234 Commission, not to hear more input from Mr. Pelech.
235

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236 Ms. Peckham said that there were several questions raised at the January Meeting, and receiving input
237 from the Conservation Commission was not the only reason to continue the case. Ms. Peckham said that
238 she would like to hear all of the evidence.

239
240 Ms. Peckham said that the ZBA is not a trial court and the Board Members should hear all of the
241 evidence by both parties.

242
243 Mr. Pelech submitted a supplemental memorandum that was in response to Mr. Cuomo's report, dated
244 March 17, 2010, to the Conservation Commission. He made the following points:

- 245 • Mr. Cuomo suggests that the Conservation Commission deny the application because by
246 granting it, it would be contrary to the "spirit of the ordinance". Mr. Pelech said that Mr. Cuomo
247 addresses only one of the five criteria in his opinion letter and does not discuss how he arrives
248 at his determination that granting the variance would be contrary to the "spirit of the
249 ordinance". He referred to the case of Chester Rod & Gun Club v. Town of Chester, 152 NH 577
250 (2005) where the Supreme Court set forth two tests by which a Board could determine whether
251 or not granting a variance would violate the "spirit and intent" of the ordinance and whether or
252 not granting the variance would be contrary to the "public interest". The Court said that there
253 are two approaches to determine if a variance would violate basic zoning objectives (1) would
254 granting the variance alter the essential character of the locality, and (2) would granting the
255 variance threaten the public health, safety or welfare.
- 256 • Granting the variance would not alter the essential characteristics of the neighborhood, nor
257 would it threaten the public health, safety and welfare.
- 258 • There is no indication in the Zoning Ordinance as to the intent of the Article IV, Section 411,
259 which was enacted in 1979.
- 260 • Mr. Horne voluntarily had prepared a Comprehensive Environmental Impact Analysis covering
261 all of the properties on Tax Map 6, Lots, 147-2, 147-3 and 147-4. The Environmental Impact
262 Analysis was prepared by Adele Fiorillo, NHSC, Inc. Environmental Consultants in July 2009. Dr.
263 Leonard Lord, Rockingham County Conservation District did the peer review and concluded that
264 "the proposed project (Subdivision) will not have a direct physical impact on the wetland or
265 wetland buffer." Dr. Lord at that time also discovered that Section 411 of the Ordinance states
266 that bodies of water cannot be used to satisfy minimum lot area.
- 267 • In conclusion, the Board should grant the requested variance as it is certainly not contrary to the
268 "spirit and intent" of the ordinance when the Board applies the appropriate test as set forth by
269 the New Hampshire Supreme Court.

270
271 Mr. Pelech said that he did a lot of research to find the Town's reasoning for enacting Section 411 –
272 Wetlands – Minimum Lot Area. "Wetlands excluding bodies of water may be used to satisfy minimum
273 lot area and setback requirements provided that.....". He said he searched records of Planning Board
274 minutes of 1978 and 1979 and found nothing that would explain why the Town of North Hampton
275 adopted that Section. He said that he researched all the approved subdivision plans for 1977, 1978 and
276 1979 and found none to have any connection to Section 411. Mr. Pelech said that the Mill Pond is the
277 only large body of water in North Hampton, other than the Ocean.

- 278
279 • Mr. Horne applied to the Planning Board for a subdivision to create one additional lot in
280 November 2008.
- 281 • The Planning Board determined that the Applicant needed a variance from the ZBA because the
282 existing buildings were located in a wetlands buffer, and a variance was needed to allow those

- 283 existing structures to be in the wetland buffer; the ZBA granted the variance request on January
284 27, 2009.
- 285 • Mr. Horne applied for a variance in 2007 to raze an existing building and rebuild a garage on a
286 non-conforming lot; the ZBA granted the variance on July 24 2007.
 - 287 • Mr. Horne applied for a variance for his existing in-ground pool that was in the wetland buffer
288 that had been there since the 1960s; the ZBA granted the variance in March 24, 2009.
 - 289 • Mr. Horne went back to the Planning Board with their variances in place and had agreed to a
290 number of conditions recommended by the Planning Board. Mr. Horne agreed that he would
291 sign necessary documents that all four lot owners would be responsible for the maintenance
292 and liability of the dam; He was also agreeable to the loop road being a private roadway. Mr.
293 Horne volunteered to do an Environmental Impact Analysis done by NHSC, Inc. and it was
294 submitted to the Planning Board. The Planning Board asked Dr. Lord to do a peer review and
295 make comments on it, dated September 29, 2009. Dr. Lord concluded that the proposed project
296 will not have direct impact on the wetlands or the wetlands buffer. He also found that the lots
297 don't comply with Section 411 – Wetlands – Minimum lot area.
 - 298 • The Applicant is seeking a variance from 411 to allow the Applicant to use the area in “blue”
299 (depicted on the plan) to meet the required 2-acre lot size; in the alternative, they are seeking
300 relief from section 406 to allow the lots to be smaller than the required 2-acre lot size. Lot 6-
301 147-2-1 would consist of 2.47 acres if the pond could be used, and lot 147-2-2 would consist of
302 2.14 acres if the pond could be used. Without the use of the Mill Pond, lot 147-2-1 would
303 consist of 1.57 acres and lot 147-2-2 would consist of 1.72 acres.

304
305 Mr. Pelech said that the *Simplex* analysis is appropriate for the use variance; the second variance
306 request would fall under the *Boccia* analysis because the application was filed before January 1, 2010,
307 and the amendments to RSA 674:33 states any application filed before January 1, 2010 would be judged
308 under the old *Boccia* standard. Mr. Horne's Application was filed December 30, 2009.

309
310 **1. Would granting this variance not be contrary to the public interest?**

311 Mr. Pelech referred to *Chester Rod & Gun Club v Town of Chester, 152 N.H. 577 (2005)*, and
312 *Malachy Glen Associates, Inc. v. Town of Chichester (March 20, 2007)*. Mr. Pelech said that the
313 applicant proposes to subdivide one lot into two, each having the required street frontage on
314 Mill Road. When the area of that portion of Mill Pond owned by the Applicant is included in the
315 lot it totals approximately 4.6 acres, and the two proposed lots each exceed two acres as
316 required by the ordinance. Both lots meet the septic lot loading requirements of NH DES and
317 Mr. Pelech submitted approved septic approvals from the State of NH.

318
319 The Supreme Court then set forth two tests to determine whether an ordinance's basic
320 objectives would be violated. (1) Would the essential character of the locality be altered? (2)
321 Would granting the variance threaten the public health safety or welfare? Mr. Pelech said that
322 granting the variance would not alter the essential characteristics of the locality, nor would it in
323 any way threaten the public health, safety or welfare. It would have no affect on the
324 characteristics of the neighborhood, or endanger the general public.

325
326 **2. Special conditions exist such that a literal enforcement of the Ordinance results in**
327 **unnecessary hardship.**

328 **i. The zoning restriction as applied interferes with the landowner's reasonable use of the**
329 **property considering the unique setting of the property in its environment**

330 The lot is abutted on two sides by the Mill Pond. The Pond is manmade, the size which is
331 controlled by a dam on the Applicant's property. The fact that the size of the property and
332 water level of the pond can be altered by the Applicant creates special conditions.
333

334 Mr. Buber asked who controls the size of the Mill Pond. Mr. Pelech said that Mr. Horne has that control.
335 He explained that NH DES gives Mr. Horne the authority to lower or raise the dam and level of water,
336 but he would need to notify the public if he were to substantially lower the water.
337

338 Mr. Coldwell said that he was informed by NH DES that Mr. Horne has total control over the dam, and
339 that he could substantially lower the dam to create marsh land if he chooses to do so.
340

341 Mr. Oles had submitted an email from Fish and Game and DES explaining Mr. Horne's ability to lower
342 the dam. It explained how Mr. Horne would have to contact Fish and Game to find out what times of
343 the year he would be able to lower the dam because of wildlife activities i.e., spawning.
344

345 Ms. Peckham said that the email Mr. Oles provided to her was the definition of "water body" and
346 "wetlands"; it did not explain Mr. Horne's authority to control the dam.
347

348 Mr. Buber said that he would like the Applicant to provide a copy to the Board of the communications
349 between NH DES and Mr. Horne that specifically addresses the control of the dam, and the height of the
350 water body. Mr. Pelech provided a copy and Ms. Chase will make copies for the Board members as well
351 as recused member, Mr. Field.
352

353 Mr. Pelech explained that it was because of Mr. Field's concern over public safety if there were a dam
354 failure and the sole responsibility lied upon one lot owner, that Mr. Horne agreed that he would draft
355 whatever documents that Town Counsel might approve that states that the owners of the (currently 3
356 lots, proposing to be 4 lots) would be jointly liable for repair, maintenance and liability of the dam
357 because those lots share the benefits of the Mill Pond.
358

359 Mr. Pelech explained that Mr. Horne was under no obligation to rebuild the dam. He did it voluntarily
360 because he wanted the benefits of the open body of water. He explained that Mr. Horne rebuilt the
361 dam to the extent that the Mill Pond increased.
362

363 Mr. Stanton asked if the Pond became 10-acres would it then be considered a "great pond" in the State
364 that would have to adhere to a different set of rules.
365

366 Mr. Coldwell said that being 10-acres does classify it as a "great pond", and "great ponds" in New
367 Hampshire are public waters. He said in this case the pond is private and even if it grows over time it
368 remains private. Mr. Lagassa said that it is the privacy of the land underneath the water; and has
369 nothing to do with the ownership of the dam.

370 Mr. Oles said that the Dam Bureau has the Mill Pond listed as having 11.3 acres.

371

372 Mr. Pelech said that after researching the rights concerning the dam with NH DES, he said that Mr.
373 Horne controls the dam and not the owners across the dam.

374

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

377 There is nothing concrete and tangible to prove what the townspeople and the Planning Board
378 intended when they enacted Section 411 back in 1979. Mr. Pelech said, that in his opinion one
379 of the purposes was probably to ensure that lots sizes were adequate to support subsurface
380 septic systems. The lots meet the requirements from DES for lot loading septic systems. The lots
381 will each have in excess of 75,000 sq. ft. of upland. The Ordinance allows an Applicant to include
382 the area of wetlands up to one acre in the calculation of lot size, but does not allow the inclusion
383 of water bodies. The Applicant could transform a portion of the Mill Pond from a "water body"
384 to "wetlands" by lowering the water level behind the dam to create the necessary lot size, but
385 Mr. Horne does not want to lower the dam because it would result in the loss of fish habitat, the
386 ability to store water for fire protection, lose the ability of flood control, and to lose the ability
387 to infiltrate the water into ground water.

388

389 **iii. The variance will not injure the public or private rights of others.**

390 Granting the variance would have no affect on public or private rights of others; no one will be
391 harmed by the granting of the variance.

392

393 **3. The variance is consistent with the spirit of the Ordinance.**

394 No new construction will occur in the wetlands buffer, and no changes of use will be made
395 within the existing structures. In the case of *Malachy Glen Associates v. Town of Chichester*
396 (March 20, 2007) the Supreme Court cited the *Chester* case and found that if granting a variance
397 does not alter the essential character of the locality; it's a residential neighborhood and will
398 remain a residential neighborhood. It will not threaten the public health, safety and welfare if
399 the variance is granted. Public health, safety and welfare may be affected if Mr. Horne lowered
400 the dam.

401

402 **4. By granting this variance, would substantial justice be done?**

403 In denying the variance there would be a hardship on the Applicant in that he would be
404 deprived of using his land as he wishes to do. The lots would meet all of the requirements of
405 the Zoning Ordinance if the Mill Pond area is included. There would be no benefit to the general
406 public in denying the Applicant's request; however, the hardship upon the Applicant would be
407 substantial. The Applicant's hardship is not outweighed by a benefit to the general public.

408

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

410 The creation of an additional lot will have no effect upon surrounding property values. Once the
411 variance is granted, any structure to be erected on the new lot would be outside of the wetlands
412 buffer and meet all the requirements of the Zoning Ordinance.

413

414 Mr. Pelech said that if the variance request from Section 411 is denied; the Applicant requests an area
415 variance Section 406 to allow the Applicant to subdivide the one lot into two lots with less than the two-
416 acre requirement. He explained that the application was filed before January 1, 2010, and thus the
417 revisions to NH RSA 674:33 do not apply and the "Boccia" criteria should be used in determining
418 whether or not to grant the requested area variance.

419 Mr. Pelech addressed the criteria under the "Boccia test":

420

421 1. **Granting the variance would not be contrary to the public interest.**

422 It will not change the characteristics of the neighborhood or threaten the public safety, health
423 and welfare.

424 2. **Granting the variance would not be contrary to the spirit and intent of the ordinance.**

425 The same two part test argued previously.

426 3. **Substantial justice would be done by granting the variance.**

427 The Board needs to determine what the benefit to the general public would be if this is denied.
428 Mr. Pelech said the hardship to Mr. Horne outweighs the benefit to the general public.

429 4. **Will granting the variance diminish surrounding property values?**

430 Mr. Pelech explained that earlier.

431 **5A. An area variance is needed to enable the applicant's proposed use of the property given the**
432 **special conditions of the property.**

433 This is a unique parcel of land because it is surrounded by water; there are few properties
434 similarly situated which have that burden of open water. The Applicant would need relief from
435 Section 406 to allow an area of 75,000 sq. ft. and an area of 68,000 sq. ft., less than the required
436 2-acre lot size without using the Mill Pond as land area.

437 **5B. The benefit sought by the applicant cannot be achieved by some other method reasonably**
438 **feasible to pursue, other than an area variance.**

439 There is no reasonable way of obtaining additional uplands other than lowering the level of the
440 Mill Pond to create marsh land, but Mr. Horne does not think that would be beneficial to the
441 general public. He said that reducing the water level would reduce surrounding property values,
442 reduce wildlife habitat, negate stormwater retention capabilities, and drastically alter the
443 aesthetics of the area.

444

445 In conclusion, Mr. Pelech said that the Applicant has met the five criteria of the *Simplex* case so the
446 variance request from Article IV, Section 411 so it should be granted. In the alternative, if the Board
447 denies the variance request from Section 411, the request of an area variance from Article IV, Section
448 406, should be granted as the application meets the criteria set forth in the *Boccia* case.

449

450 Mr. Lagassa asked for the dimensions of the proposed lots.

451

452 Mr. Stanton asked what the latest guidance from the Government or the State is to be used when
453 defining a wetland.

454

455 Ms. Peckham called for recess at 8:11pm.

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456 Ms. Peckham reconvened the Meeting at 8:21pm.

457

458 Mr. Jamie long was sworn in. Mr. Long said that he is a certified wetlands scientist, and certified soil
459 scientist. Mr. Long said that they use the 1979 Fish and Wildlife Services Classification of Wetlands and
460 Deepwater Habitats to define wetlands. He said that deepwater habitats starts at 6.6 feet and anything
461 up to that point is considered a wetland, because plant life exists up to that 6.6 feet point.

462

463 Mr. Coldwell pointed to the map that showed the light blue area that depicts the pond area of less than
464 6.6 feet of depth, and the dark blue area depicting the pond area that is greater than 6.6 feet in depth.
465 Mr. Coldwell said that Section 411 does not distinguish between a “wetland” and “body of water”. He
466 said that the Mill Pond is a “body of water”, however the Mill Pond, scientifically is separated with the
467 shore as a “wetlands” and the “body of water” is in the middle.

468

469 Mr. Buber said the wetland definition in the Zoning Ordinances follows RSA 482-A:2 and RSA 675:55 and
470 he found nothing in the Town’s definition or within the RSA’s for the State that include the criteria of
471 “6.6-feet” or less, being a “wetland”.

472

473 Mr. Long said that it is a “wetland” because it meets the criteria in the 1987 federal manual for a
474 “wetland”. He said there is a whole hierarchy in classifying wetlands.

475

476 Mr. Pelech submitted the following into the record:

477

- a copy of the email sent to James Weber, NH DES Dam Bureau
- copy of the NH DES data sheet for the Mill Pond dam
- NH DES Environmental fact sheet titled Basic Nomenclature of a Dam
- NH DES fact sheet titled Liability and Responsibility of Dam Owners
- NH DES fact sheet titled Dam Ownership in New Hampshire
- NH DES fact sheet titled Public Informational Meetings for the Lowering of Water bodies
- NH DES fact sheet titled Classification of Dams in New Hampshire
- NH DES fact sheet titled What is the Annual Dam Registration Fee?
- NH DES fact sheet titled Frequently Asked Questions about Dam Removal
- NH DES fact sheet titled Acquiring a Dam
- NH DES fact sheet titled Best Management Practices for the Maintenance and Operation of Dams
- NHDAMS Data sheet on Mill Pond

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Mr. Field asked the Board to give him the opportunity to rebut anything that Mr. Pelech has entered into the record because he did not have a chance to review it all, and to be able to file any objection to it. He also would like Dr. Lord’s credentials added to the record. Mr. Pelech had no objections.

Ms. Peckham suggested that both parties submit a copy of Dr. Leonard Lord and Adele Fiorillo’s list of credentials into the record.

Mr. Field said that the Zoning Ordinance is the law the Town has adopted for land use of the Town. When an applicant can’t conform to the law they would come before the ZBA for a variance. He said that the burden of proof lies with the Applicant. Mr. Field said that the Town is interested in protecting the wetlands as proven in the Master Plan.

ZBA Meeting Minutes

503 Mr. Field submitted the following copies into the record:

- 504 • Planning Board minutes dated 8/24/1978
- 505 • Notes on additions to new Section 411
- 506 • Proposed zoning changes, (not dated).
- 507 • Planning Board minutes dated 1/18/1979
- 508 • Report of Town Meeting March 13, 1979 and a copy of the Election results

509

510 The record showed that the zoning amendment to Section 411 passed by a vote of 341 in favor and 112
511 opposed, and it showed an actual calculation. Mr. Field said that the point he wanted to make was that
512 there was a lot of deliberation and thought from the townspeople and Planning Board on the zoning
513 ordinance amendments to Sections 411 and other Sections concerning wetlands protection.

514

515 Mr. Field submitted a packet of information and documents concerning the Mill Pond into the record
516 and reviewed it with the Board:

- 517 • Inspection report – Inspection of Dam# 181.01 on February 14, 2000, Mr. Field said that Mill
518 Pond dam is an important dam; the drainage area is designated as 3.19 sq. miles, and affects a
519 lot of the Town around the Little River. Mr. Field said that Mr. Horne did a great job rebuilding
520 the dam but was not sure he “wanted” to do it. Under the recommendations of the inspection
521 report, the Inspector recommends that the DES issue an LOD (letter of deficiency) that requests
522 the repairs to be completed.
- 523 • Copy of Letter of Deficiency sent to Mr. George B. Horne dated February 22, 2000 from DES with
524 a list of deficiencies that were observed, and recommended to be corrected by June 1, 2000.
- 525 • Follow up inspection report to Steve Doyon, Administrator Dam Safety Section allowing Mr.
526 Horne an extension to complete the repairs until March 1, 2001. The dam was referred to as a
527 “pond” in the report.
- 528 • A letter from Mr. George B. Horne to the NH DES requesting a change to the inspection date,
529 dated March 22, 2005.
- 530 • A letter from NH DES to Mr. Horne agreeing to the inspection date change, dated March 25,
531 2005.
- 532 • October 2005 Storm Survey filled out by Mr. Horne
- 533 • Site Evaluation for 2005 Mid October Flood Height: 15; Length: 110; IMPND: 9; D A sq mi: 3.19
- 534 • Letter from DES dated November 14, 2005, stating that there are outstanding deficiencies.
- 535 • Site Evaluation for 2006 May Flooding (Mother’s day storm event)
- 536 • NH DES Site Inspection Form dated July 2, 2006
- 537 • NH DES Trip Report, dated July 31, 2006, that stated that they “strongly request that Mr. Horne
538 contact NH DES before implementing any remedial work”.
- 539 • Email from Timothy Horne to NH DES, dated August 7, 2006. (Mr. Timothy Horne takes over
540 after his Father’s passing)
- 541 • Email from Grace Levergood, NH DES to Timothy Horne, dated August 28, 2008 discussing he
542 repairs to the dam.
- 543 • Operation and Maintenance plan for Mill Pond Dam, signed by Peter Horne, dated 12/17/07.
544 Mr. Field said that the dam was built with characteristics to hold back the impoundment for an
545 11-acre pond at a certain level. Mr. Field said that Mr. Horne signed the operation and
546 maintenance plan to keep the pond at a “normal” level. Mr. Pelech said that that document
547 referred to the old dam; not the current dam. Mr. Field said that it was for the current dam and
548 that there were no other operation and maintenance plans for Mill Pond on record.

ZBA Meeting Minutes

- 549
- NH DES permit to reconstruct a dam, dated 3/26/2008. Mr. Field read #9 of the report:
- 550 “Registration of the dam by DES does not relieve the owner from meeting the requirement of
- 551 public safety or other provisions of the law”. Mr. Field said that he did not find any record of
- 552 any of the other subdivided lots that had an agreement that alleged that they all agree with
- 553 costs of maintaining the dam.
- Copies of pictures of the reconstruction of the dam
 - Inspection report dated June 10, 2009 recommending the outstanding Letter of Deficiency (LOD)
 - A letter of Compliance for Letter of Deficiency dated June 18, 2009 from NH DES to Mr. Horne.
- 554
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559 Mr. Field said that according to the Dam Bureau, once you achieve the status of a “great pond” you have

560 to honor littoral and riparian rights under the common law to abutting land owners. If the pond is less

561 than 10-acres only riparian rights have to be honored. Ms. Peckham asked for a copy and Mr. Field said

562 that he learned this information from a conversation he had with Mark Stevens from the DES Dam

563 Bureau.

564

565 Mr. Field said that it was a nine year process to correct the deficiencies of the pond. There is an

566 Operation and Maintenance Plan used by DES and if there is a more current plan it should be produced.

567

- 568 Mr. Field submitted the following documents into the record:
- Copy of aerial pictures of the Mill Pond from Google Earth
 - A copy from Black’s Law Dictionary Seventh Edition on the words *Littoral, riparian, riparian right*
 - Copies of NH RSAs concerning dams: RSA 211:11, 211:12, 482:12, 482:13, 482:18, 482:23
 - Copy from the Zoning Ordinance Section 301 – Definitions and Section 411 Wetlands –
 - Copy of a paragraph from NH Supreme Court Case Collden Corporation v. Town of Wolfeboro
 - Copy of a newspaper article *Save the Shells* from the Seacoast Sunday March 21, 2010 edition
 - Copy of a newspaper article from Seacoast Sunday March 21, 2010 edition titled *El Nino being*
 - Copy of tax map 6 outlining the Horne properties
 - Copy of a portion of the Horne ZBA Application submitted 12/30/2009
 - Copy of information on Mill ponds and Watermill downloaded from Wikipedia
 - Partial copy of the Impact Analysis Review from Leonard Lord, PHD, CSS, CSW on the
 - Copy of an unsigned letter from Carter Bishop, 118 Mill Road, opposed to granting the
- 570 and *riparian-rights doctrine*
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587 Mr. Field said that Mr. Horne’s property is not unique. He owns a pond and dam located on his

588 property, directly across the Street from Mr. Horne, and has to maintain it and report to the Dam

589 Bureau.

590

591 Mr. Field said that Board needs to try to find out what the planning Board meant when developing

592 Section 411 in 1979, and what they meant by “bodies of water”.

593

594 Mr. Field certified that the Horne dam has been there since the 17th Century.

595

ZBA Meeting Minutes

596 Mr. Field discussed riparian rights – water rights and littoral rights – rights to your shoreline. Mr. Field
597 said that the pond is over 10-acres, which makes it a “great pond” and everyone along the pond has
598 riparian and littoral rights to it, so no one person can just decide to lower the pond.

599
600 Mr. Field said that if Mr. Horne decided to lower the pond to create land for his proposed subdivision, it
601 would be a catastrophe for the Town.

602
603 Mr. Field said that there have been several subdivisions on the Horne property. He said it is creeping,
604 crawling, incremental despoliation of the property. He said that Mill Road is designated as a “scenic
605 road”, and by designating it as a scenic road, the notion of the Town is to keep it as historically pure as
606 can be. Mr. Field said the voters of North Hampton voted to designate Mill Road as a “scenic road”. Mr.
607 Pelech disagreed with Mr. Field and asked him to provide proof of the vote designating Mill Road as a
608 “scenic road”.

609
610 Mr. Pelech said that they would stipulate that Mr. Horne would not drain the pond, but they do have to
611 demonstrate other reasonable alternatives.

612
613 Mr. Field referred to the March 23, 2010 ZBA minutes, line number 678 through 694 that stipulates Dr.
614 Lord’s credentials. Ms. Peckham said that it was determined earlier that a copy of Dr. Lords and Ms.
615 Adele Fiorillo’s credentials would be added to the record. Mr. Pelech will forward a copy of Ms. Fiorillo’s
616 credentials to Ms. Chase to add to the record.

617
618 Mr. Field referred to the peer review from Dr. Lord on the Environmental analysis performed by Adele
619 Fiorillo. He referenced Dr. Lord’s comments on the existing garage that looks like a residence. Ms.
620 Peckham asked Mr. Field to speak on the variance request before them.

621
622 Mr. Field read portions of a letter from Mr. Bishop Carter, 118 Mill Road. The letter was not signed, but
623 Mr. Field said on his Oath that he received this letter from Bishop Carter and he will try and get it signed.
624 The letter from Mr. Bishop concludes that he does not believe the ZBA should grant any zoning
625 variances to permit further residential development, especially along an important waterway such as
626 the pond. He stated that as an abutter to Mr. Horne’s property, any change to the pond, development
627 around the pond, or its ecosystem threatens the value of his home and property.

628
629 The Board discussed continuing the meeting to next week. Ms. Peckham allowed letters from the
630 Historical, Heritage and Conservation Commission to be read by representatives of each Board or
631 Commission.

632
633 Ms. Peckham swore in witnesses.

634
635 Ms. Penny Holbert read a letter on behalf of the Historical Society. Ms. Holbert submitted the letter into
636 the record at the March 23, 2010 Meeting. Ms. Holbert read the history of the mills on Little River, and
637 in conclusion stated that the Board of the North Hampton Historical Society is unanimous in its
638 commitment to submit our plea to the Zoning Board of Adjustment to join us in support to maintain Mill
639 Pond, its current shoreline, depth, dam and development in conformance with existing regulations, thus
640 denying a variance for subdivision.

641
642 Ms. Jenifer Landman read a letter, submitted at the March 23, 2010 ZBA Meeting, into the record. The
643 letter explains that one of the duties of the Heritage Commission is to advise local agencies and other

644 local boards in their review of requests on matters affecting or potentially affecting cultural and historic
645 resources. In conclusion the Heritage Commission recommends that this request for a variance be
646 denied because it is not in the public's interest, but is considered a threat to the Mill Pond's historic
647 integrity.

648
649 Mr. Chris Ganotis, Chair of the Conservation Commission read a letter from the Commission, dated
650 March 18, 2010 to the ZBA. The Commission sought expert review, opinion and testimony from the
651 Rockingham County Conservation District (RCCD) on the Horne ZBA Application. Mr. Michael Cuomo,
652 Soil Scientist RCCD suggests in his report that the Conservation Commission recommend denial. He
653 determined that the water body known as Mill Pond clearly begins at the bank. He concluded that areas
654 inundated by pond water at normal pond elevation would be recognized by lay people as part of Mill
655 Pond; a water body.

656
657 Due to the late hour; the Board decided to continue the meeting.

658
659 **Mr. Stanton moved and Ms. Lerner seconded the motion to continue the Meeting to June 9, 2010 at**
660 **6:30pm in the Mary Herbert Conference room.**

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

662

663 Mr. Lerner stepped down.

664 Mr. Field resumed the Chair at 10:35pm.

665

666 Mr. Field suggested establishing criteria on selecting Alternates at the June 9th Meeting. He said that
667 there are 4 Alternate positions, two to expire in 2011, and two to expire in 2013. He explained that Mr.
668 Turchan gave up his alternate position when he filled Ms. Smith's remaining term.

669

670 **Mr. Stanton Moved and Mr. Buber seconded the Motion to continue the Meeting to June 9, 2010 at**
671 **6:30pm in the Mary Herbert Conference room and that the Vice Chair will continue deliberations on**
672 **Case #2010:02, and when that is concluded the Board will deal with the process of the selection of**
673 **alternates.**

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

675

676 **The meeting was recessed without objection at 10:47pm.**

677

678 Respectfully submitted,

679

680 Wendy V. Chase

681 Recording Secretary