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**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, May 4, 2010 at 6:30pm
Continuation of the April 27, 2010 Meeting
Mary Herbert conference Room**

7

8

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

11

12 **Attendance**

13

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

16

17 **Members absent:**

18

19 **Alternates present:**

20

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

23

24 Mr. Stanton called the meeting to order at 6:34pm.

25

26 Mr. Stanton invited the Board and members of the public to rise for a pledge of allegiance.

27

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

29

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

31

32 **Unfinished Business**

33

34 **1. 2010:05 – Brewster Investment, LLC, 16 Alexander Drive, Hampton, NH 03842.** The Applicant (1)
35 requests a variance from Article IV, Section 406 to permit the erection of a new home with an attached
36 garage 21.1 feet from Chapel Road on a vacant approved building lot of record, and (2) requests a
37 special exception for Article IV, Section 409.12 to permit the erection of the home/garage within 20
38 feet from an inland wetland. Property owner: Eric R. Cosman, 872 Concord Ave., Belmont, MA 02178;
39 property location: 20 Chapel Road; M/L 005-032; zoning district R-2. This case is continued from the
40 April 27, 2010 ZBA Meeting.

41

42 In attendance for this meeting:

43 Attorney Peter Saari, Casassa and Ryan

44

45 Michael Green, Brewsters Investment, Applicant

46

47 Mr. Stanton explained that, at the discretion of the Board, there may be a vote made to allow testimony
48 from certain individuals, but the Meeting is not opened as a public hearing.

49

50 Mr. Stanton said that the last meeting on this case was left with the Board seeking a legal opinion from
51 the Town Attorney. A list of questions were drafted by Ms. Peckham with input from Members of the
52 Board and sent to the Town Attorney Matthew Serge, Upton & Hatfield. It was a consensus of the Board
53 that the list of questions be submitted into the official record.

54

55 Mr. Stanton said that he received an opinion from the Local Government Center (LGC) for an opinion
56 regarding Section 409.12 of the ordinances.

57

58 Mr. Field called for a point of order. He said that he was under the impression, as well as written in the
59 Rules of Procedure that, as a Board, the standard was set that no individual was to request legal
60 opinions without the consent of the entire Board. Mr. Field suggested that if Mr. Stanton felt that the
61 information was his own personal request, he should recuse himself and offer the information from the
62 audience. He said that offering the information as a statement or position of the Board would be
63 inaccurate, because the Board provided no authorization to seek this opinion.

64

65 Mr. Stanton said that there is nothing currently in the Rules, nor have the Rules been modified to
66 prohibit an individual member from seeking advice from the LGC. He said when a question is asked of
67 Town Counsel and Town funds are to be expended, then by all means, it would have to be a vote of the
68 entire Board. He said that any member of any town board is entitled to ask a legal question of the LGC.
69 He said that the town's policy is to go through the Town Administrator for permission to seek a legal
70 opinion from the LGC, and that is what he did.

71

72 Mr. Stanton explained that the opinion he asked was of an administrative view only as to how to treat a
73 "409.12 case". He wanted to know if the Board should treat the variance before the special exception.
74 He said that when he received the opinion from LGC, he forwarded a copy to the Board members and,
75 since it was a public document, he thought the Applicant should be entitled to a copy, and a copy was
76 provided to the Applicant's attorney.

77

78 Mr. Field said that Mr. Buber had explained to the Board, at a previous meeting, that the only way an
79 individual is allowed to access the LGC is through an official town capacity. He referred to Section 3 of
80 the Rules of Procedure that grants the Chair only powers given by the Board. He said that Mr. Stanton
81 has the right to seek his own opinions, but should submit them on his own as a member of the audience,
82 and that if Mr. Stanton chooses to submit it as evidence for the Board to follow, it was his opinion, that
83 that would be wrong and it should be disregarded.

84

85 Mr. Stanton said that was up to the Board to decide.

86

87 Ms. Peckham said that she agrees with Mr. Field because there have been several conversations that the
88 Board act as a whole body and not as one. She said that if the Board wants to seek a legal opinion, then
89 it should be a consensus of the Board. She said that in her opinion, that the question and answer is
90 tainted by framing the question to Mr. Stanton's needs and not the needs of the Board. She said that it
91 should have been discussed and decided as a Board whether or not it needed to be pursued.

92 Mr. Field asked on what authority Mr. Stanton had to seek legal opinions from the LGC.

93

94 Mr. Stanton said that there is a town memorandum on how to proceed and ask questions of the Local
95 Government Center.

96

97 Mr. Field said that the ZBA is an elected independent board and Mr. Fournier cannot interfere with the
98 internal procedures of the ZBA. It was in Mr. Field's opinion that Mr. Stanton had the right to present
99 the LGC opinion letter into evidence from the floor; not from the table.

100

101 Mr. Stanton said that he is asking the Board to vote on whether or not to include the LGC opinion as a
102 matter of the record because it pertains to Section 409.12.

103

104 Mr. Field said that the Board can vote to amend the Rules and vote to allow it into evidence, but felt
105 that it was improper procedure to do so.

106

107 Mr. Stanton said that there has never been a change to the Rules, and he has the right, like any other
108 Board Member, to go to the LGC to ask a question.

109

110 Ms. Peckham said that anytime legal advice is sought by the Board, the Applicant should be made aware
111 so that they have the opportunity to respond.

112

113 Mr. Stanton said that the opinion he received from the LGC has applicability to case #2010:05, but it is
114 only related to an interpretation of Section 409.12. He said a copy of the opinion was given to Attorney
115 Saari. He asked the Board whether they wished to accept the information into the record.

116

117 Ms. Peckham felt that if the LGC opinion was going to be entered into the record, Attorney Saari should
118 have an opportunity to respond to it.

119

120 Mr. Stanton proposed that the LGC opinion is an administrative guide in reading Section 409.12.

121

122 Mr. Field asked Mr. Stanton why he thought that the LGC opinion was administrative and not
123 substantive.

124

125 Mr. Stanton explained that he was trying to find out how the Board should proceed; whether or not the
126 variance request should be addressed before the special exception. He wanted this information for this
127 case and future cases involving both a variance request and request for special exception.

128

129 **Mr. Stanton Moved and Ms. Peckham seconded the Motion that, in accordance to Section 9 of the**
130 **Rules of Procedure, to waive Section 3b of the rules to permit the introduction of guidance on the**
131 **zoning ordinance that was provided from the Local Government Center, and to provide an**
132 **opportunity for the Applicant to respond to the guidance the Board received.**

133 **The vote passed (4 in favor, 1 opposed, and 0 abstentions). Mr. Field opposed because it was in his**
134 **opinion that it would be fundamentally changing the Rules of Procedure of this Board, and by making**
135 **this waiver the Board comes perilously close to a standard, which says that you have to have a super**
136 **majority to amend the Rules that the Board established.**

137

138 Mr. Stanton said that Attorney Saari sent a memorandum of law provided to the Town Attorney and to
139 Members of the Board.

140 **Mr. Stanton Moved and Ms. Peckham seconded the Motion to enter Attorney Saari's memorandum of**
141 **law into the record.**

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

143

144 Mr. Stanton said that the Board was in receipt of an opinion from the Town Attorney, and a copy of an
145 email that advises the Board to retain the opinion as part of a privileged communication, and only
146 supply to the Applicant the conclusion that was reached by Town Counsel.

147

148 Mr. Stanton said that Town Counsel's conclusion was that RSA 674:39 does not apply because the
149 subdivision was approved and recorded prior to the Statute, and that the lot is not otherwise vested
150 from the setbacks because it is not a provision of the zoning ordinance that affects the subdivision s a
151 project.

152

153 It was in the opinion of Ms. Peckham that the opinion from Town Counsel did not need to be privileged
154 information. Mr. Stanton agreed, but said that it is ultimately up to the Board to decide.

155

156 **Mr. Turchan Moved and Mr. Field seconded the Motion to allow the opinion from Town Counsel to be**
157 **public information.**

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

159

160 A copy of the opinion was offered to the Applicant and any other member of the public.

161

162 Mr. Field said that if the Board wants to preserve Attorney/Client Privilege the Board should enter into
163 nonpublic session under RSA 91A to keep the subject matter private amongst the Board.

164

165 Mr. Stanton refereed to a letter from Mr. Schwaery that was submitted by him after the public session
166 when the case was closed.

167

168 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion to accept the letter of Glenn Schwaery,**
169 **23 Chapel Road, dated April 23, 2010, as part of the record to be deliberated.**

170

171 Ms. Peckham said that according to Mr. Schwaery's letter the Board set a precedent by accepting
172 information after the public session was closed, so in order to be fair the Board should be consistent and
173 accept the letter. Mr. Stanton said that it should be dealt with on a case by case basis.

174

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

176

177 Mr. Stanton said that a gentleman approached him at the last meeting to give him pictures pertaining to
178 the Chapel Road case, he advised him to give the pictures to the Zoning Administrator. Ms. Chase said
179 that she received the pictures, but did not know the name of the person submitting them.

180

181 The Board agreed not to accept the pictures because they were unaware of the person submitting them.

182

183 **Mr. Field Moved and Mr. Batchelder seconded the Motion to reject the pictures into evidence.**

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

185

186

187 **Minutes**

188

189 **February 23, 2010 – Mr. Stanton Moved and Mr. Field seconded the Motion to approve the February**
190 **23, 2010 Meeting Minutes.**

191 **The vote passed in favor of the Motion (3 in favor, 0 opposed and 2 abstentions). Mr. Batchelder and**
192 **Ms. Peckham abstained because they were not present at the Meeting.**

193

194 **March 23, 2010 – Mr. Field – to change to the meeting location from the Mary Herbert Room to the**
195 **Town Hall, and to include Dr. Leonard Lords credentials within lines 657-675. Mr. Stanton - to change**
196 **line 707 from 18,000 square feet to 1,800 square feet.**

197 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion to approve the March 23, 2010 Meeting**
198 **Minutes as amended.**

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

200

201 **March 30, 2010 – Mr. Stanton – change “with” to “will” on line 85.**

202 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion to approve the March 30, 2010 Meeting**
203 **Minutes.**

204

205 Mr. Field said that one of the questions asked of Attorney Serge related to public health standards and
206 he did not submit a response to that question. Mr. Field noted for the record that Mr. Serge’s opinion
207 failed to relate to those issues.

208

209 **The vote was unanimous in favor of the Motion to approve the March 30, 2010 Minutes (5-0).**

210

211 Mr. Field asked if the Meeting was going to be open to the public to respond to the new information.

212

213 Mr. Stanton said that the Board would need to deal with it on a case by case basis. He said that the
214 Applicant has been provided a courtesy to be able to respond to the new information, but to open the
215 Meeting to the public would require re-notification.

216

217 Mr. Field said that by admitting new information into the record and allowing Mr. Saari to respond, it
218 would be unfair to deny the right for anyone to respond to the information added into the record this
219 evening.

220

221 Mr. Saari responded to the letter from Town Attorney Matthew Serge, Upton & Hatfield. He said that
222 he agrees with Attorney Serge that the Courts have not addressed the issues of setbacks in decisions
223 concerning vesting, but logically if the purpose of the vesting argument was to protect the validity of
224 individual lots in a subdivision there would be a lot that could not be built upon at all, and it would make
225 sense that the vesting argument would apply equally to this situation as it would with another lot that
226 was substandard for frontage or area. Mr. Saari said that he disagrees with the LGC opinion. He said
227 that the ordinance has a section for prohibited uses, Section 405, and beyond that is a specific section
228 dealing with prohibited uses as they apply to wetlands, Section 409.8. He said that nowhere in those
229 sections is what the Applicant is proposing to do in this application. He referred to Section 409.12, and
230 said that nowhere in that section does it specify placement of structures on the lot.

231

232 Mr. Stanton said that the Board would have to decide if the prohibited uses under Section 409.8 (which
233 does not list single family homes) defines the word “structures” under Section 409.12.B because both

234 Sections are under 409 – Wetland Conservation Areas. He said that when the Board deliberates they
235 should first deal with the variance request and then the special exception.

236

237 Mr. Stanton invited anyone from the public to comment.

238 There was no public comment.

239

240 Stanton did an inventory of evidence:

- 241 • Application
- 242 • Information from the Building Inspector (copies of building permits for some of the abutting
243 properties)
- 244 • Plot diagram and site plan
- 245 • Satellite photo of houses and how they sit on the lots, supplied Jones and Beach Engineering
- 246 • Dimension for proposed structure without elevations, showing the proposed setbacks
- 247 • Aerial photo of Chapel Road provided by Mr. Mabey
- 248 • Letter from Arlene Mowry
- 249 • Letter from Mr. Cosman, dated 3/10/2010
- 250 • Updated deed dated 3/12/2010
- 251 • Letter from Barbara Stafford, dated 3/3/2010
- 252 • Letter from Ed Stevens, dated 3/23/2010
- 253 • Letter from the Conservation Commission, dated 3/18/2010, and attached analysis from
254 Michael Cuomo, RCCD
- 255 • Dr. Lord impervious surface and stream quality measures hand out
- 256 • Proposed rain garden easement agreement
- 257 • Letter from Little Boars Head, dated 2/17/2010
- 258 • Letter for requesting a continuance, dated 2/23/2010
- 259 • Letter from Glenn Schwaery, dated April 28, 2010 entered into the record 5/4/2010
- 260 • Memorandum of Law from Attorney Peter Saari, Casassa & Ryan, dated 4/15/2010
- 261 • Reply from the LGC, distributed on April 19, 2010
- 262 • Request for legal opinion on the Board's questions dated April 12, 2010
- 263 • Email, dated April 23, 2010 from Matthew Serge to Ms. Chase
- 264 • Attorney Serge's letter, dated April 22, 2010

265

266 Mr. Stanton suggested the Board address the variance first and then the special exception.

267

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

269

270 Mr. Stanton commented that it is a single family home in the R-2 district and would not be contrary to
271 public interest. Mr. Field felt that it would be contrary to public interest because he visited the site on 3
272 or 4 occasions and witnessed the entire lot flooded. He said that he does not see it in the interest of the
273 Town to approve this variance. He felt that it was contrary to the public interest to have a wetland of
274 this magnitude compromised to this extent in that area.

275

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

277

278 Mr. Stanton said that the spirit of the ordinance was to provide setbacks for health and safety and to
279 maintain property values. He said that the current setback requirement is 35-feet; and when the lot was
280 developed in the 1960's the setback requirement was 30-feet. He felt that 21-feet would be contrary to

281 the spirit of the ordinance. Mr. Turchan said that he had “trouble” with 21-feet. He said that the
282 distance between the proposed house and street wasn’t even a car-length.

283

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

285

286 Mr. Stanton referred to Mr. Cosman’s letter where he states that he has been paying property taxes on
287 a buildable lot for years, and that may constitute substantial justices. Mr. Field disagreed, he said that
288 zoning ordinances change from time to time and every property owner has the right to seek relief if they
289 feel that their property is over assessed. Mr. Turchan asked at what point it becomes a “taking” of the
290 property. Mr. Stanton said when the property cannot be built upon.

291

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

293

294 Mr. Stanton said that the diminished value would be more on the subject lot than the surrounding
295 properties due to the close proximity to the road that the proposed house would be, if approved. He
296 referred to Mr. Steven’s letter, (abutter to the subject property) where he stated that he felt that it
297 would have a negative effect on the rural nature of the neighborhood and the corresponding negative
298 impact on property value. Mr. Turchan said that building a house so close to the street would detract
299 from the neighborhood.

300

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

302

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

308

309 Mr. Stanton said that the proposed use is a reasonable one (building a house on the lot).

310

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

316

317 Mr. Stanton said that the subject lot would qualify as special conditions because of the deed restriction
318 that states that it can only be built upon on the Chapel Road side of the stream, but does not justify
319 deferring from paragraph “a” “fair and substantial relationship”. Mr. Field said that he did not find the
320 lot to be unique because there is a lot beside it that cannot be built upon because of the water. Mr.
321 Turchan and Ms. Peckham agreed. Mr. Turchan said that the subject lot is in direct contact with the
322 marsh; there is no wetland vegetation that may help mitigate runoff. Mr. Field said that a rain garden
323 would not help at all because the lot floods. He said that the townspeople voted to create the setbacks
324 to protect people’s wells and the public health and safety of the town.

325

326 **Mr. Turchan Moved and Mr. Stanton seconded the Motion to grant the variance to 21.1 foot front**
327 **setback where 35-feet is required.**

328 **The vote was unanimous in opposition of the Motion (0 in favor, 5 opposed and 0 abstentions).**

329 The Board discussed whether or not they needed to address the special exception for Article IV, Section
330 409.12 since the variance request failed. Mr. Stanton said that by denying the variance it makes the
331 special exception request moot.

332
333 Mr. Field suggested that the Board go forward with the special exception. The Board agreed.

334
335 Mr. Field referred to Section 601 of the Ordinance and thought the Board should review it along with
336 Section 490.12 because that there is a certain relationship between the two that the Board should take
337 into consideration.

338
339 **Section 409.12**

340 **Special Exceptions Granted by the Zoning Board of Adjustment: Upon application to**
341 **the Board of Adjustment, a special exception may be granted to permit the erection of a**
342 **new structure on vacant approved building lots of record or the expansion of an existing**
343 **structure located within the Wetlands Conservation District, or any buffer zones,**
344 **provided that all of the following conditions are found to exist:**

345 **A. The lot upon which an exception is sought was an official lot of record, as recorded in**
346 **the Rockingham County Registry of Deeds prior to March 8, 1988.**

347 Mr. Stanton Moved and Mr. Batchelder seconded the Motion that Section "A" criteria
348 has been met.
349 The vote passed (4-0-1). Mr. Field abstained.

350
351 **B. The new structure or expansion is not otherwise prohibited under the zoning ordinance.**

352 Mr. Field said that what is being proposed is prohibited by virtue of the variance
353 request, and believes it does not conform to "B".
354 Mr. Stanton Moved and Mr. Batchelder seconded the Motion that Section "B" meets
355 the criteria.
356 The vote was unanimous in opposition of the Motion (0 in favor, 5 opposed, and 0
357 abstentions).

358
359 **C. The use for which the exception is sought cannot feasibly be carried out on a portion or**
360 **portions of the lot, which are outside the Wetlands Conservation District or the buffer**
361 **zone.**

362 Mr. Field Moved and Mr. Batchelder seconded the Motion that Section "C" is a correct
363 statement and that the lot falls under this category.
364 The vote was unanimous in favor of the Motion (5-0).

365
366 **D. Due to the provisions of the Wetlands Conservation District, no reasonable and**
367 **economically viable use of the lot can be made without the exception.**

368 There was no evidence presented to deal with Section "D". Mr. Field said that it may be
369 possible to build a garage on the lot. Mr. Stanton said that it may be a wood cutting lot. It
370 was a consensus of the Board that "D" fails because there was no evidence presented.

371 **E. The design and construction of the proposed use will, to the extent practicable, be**
372 **undertaken in such a manner as to be consistent with the purposes and spirit of this**
373 **ordinance and shall not diminish the natural resource values of affected wetlands in any**
374 **appreciable way. March 10, 2009.**

375 Mr. Field Moved that Section “E” fails. Mr. Stanton said that the “rain garden” proposal
376 does not cover the entire impervious surface so therefore there is going to be a
377 measurable difference. Mr. Field said that Dr. Lord also presented testimony that the
378 “rain garden” was an inadequate proposal. Mr. Turchan commented that Dr. Lord said
379 that he was not a civil engineer. Mr. Field said that Dr. Lord has considerable
380 credentials as a wetlands expert. Mr. Field said that the Conservation Commission
381 submitted an opinion and engaged in professionals to support their opinion, and as a
382 part of the body of evidence the Zoning Board has to take into account what the
383 Conservation Commission has said about this lot.

384
385 Mr. Field Moved and Mr. Batchelder seconded the Motion that the proposal fails to
386 meet the criteria of Section E.

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

388

389 **Mr. Stanton Moved and Mr. Batchelder seconded the Motion to deny the special exception under**
390 **409.12 for the Application for 20 Chapel Road.**

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

392

393 Mr. Stanton reminded the Applicant of the 30-day appeal period.

394

395 Mr. Stanton wished all Mothers a “Happy Mother’s Day” on Sunday.

396

397 Mr. Stanton explained that Mr. Richard Batchelder’s term is expiring and that he did not seek reelection.

398

399 **Mr. Stanton Moved and Mr. Turchan seconded the Motion to commend Mr. Batchelder for his years**
400 **of superior public service on the Board.**

401 **The vote was unanimous in favor of the Motion.**

402

403 A Motion was made and seconded to adjourn the Meeting at 8:05pm.

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

405

406 Respectfully submitted,

407 Wendy V. Chase

408 Recording Secretary

409

410 **Approved June 9, 2010**