



**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, January 25, 2011 at 6:30pm
Town Hall**

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

10
11 **Attendance**

12
13 **Members present:** Robert B. Field, Jr., Chair; Michele Peckham, Vice Chair; Richard Stanton, David
14 Buber, and George Lagassa

15
16 **Members absent: None**

17
18 **Alternates present:** Jennifer Lerner, Jonathan Pinette and Phelps Fullerton

19
20 **Staff present:** Richard Mabey, Code Enforcement Officer/Building Inspector, and Wendy Chase,
21 Recording Secretary.

22
23 Mr. Field convened the meeting at 6:30pm.

24
25 **Preliminary Matters; Procedure; Swearing in of Witnesses; Recording Secretary Report**
26 **Minutes**

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28 Mr. Field invited the Board Members and those in attendance to rise for a Pledge of Allegiance and
29 noted that reciting the Pledge of Allegiance is for those who choose to do so and has no bearing on the
30 decision making of the Board or the rights to appear before the Board.

31
32 Mr. Field introduced members of the Board.

33
34 Ms. Chase reported that the January 25, 2011 Agenda was properly posted at the Library, Town Clerk's
35 Office, Town Office and Library on January 11, 2011. It was also posted on the Town's website.

36
37 Mr. Field swore in witnesses and explained the Board's procedures.

38
39 **Minutes**

40
41 **December 14, 2010** – edits were made to include Members Fullerton and Pinette in the vote of the
42 November 30, 2010 minutes, and to change the vote to 5 in favor, 0 opposed.

43 **Mr. Lagassa Moved and Mr. Stanton seconded the Motion to approve the December 14, 2010 Meeting**
44 **Minutes as amended.**

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

46
47 Mr. Field seated Ms. Lerner, and recused himself from case 2010:02.
48 Ms. Peckham assumed the Chair.

Unfinished Business

1. **2010:02 – Peter Horne, Trustee F.S. 123 Nominee Trust, PO Box 1435, North Hampton, NH 03862. Property location: 112 Mill Road; M/L 006-147-002; zoning district R-2.** 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 75,000 s.f. and 68,480 s.f. where 87,120 s.f. is required. Property owner: Peter Horne, Trustee F.S. 123 Nominee Trust. The Application was submitted on December 29, 2009. This case is continued from the December 14, 2010 Meeting.

In attendance for this Application:

Peter Horne, Owner/Applicant
Attorney Bernard Pelech, Wholey & Pelech Law Offices
Steve Oles, Ames MSC Engineers

Ms. Peckham suggested that the Board begin by going through the Variance test under the *Simplex* criteria for the first Variance request in case 2010:02.

Mr. Pelech requested that the Board deliberate and rule on case #2010:11 (request an amendment to the Variance granted in case 2008:12 to allow the existing garage to be used as a residence) first because the outcome could have a bearing on case #2010:02. He said if case 2010:11 is approved it would negate the reason to build a new structure on the subdivided lot. Mr. Pelech referred the Board to the copy of Mr. Field's proposed agreement between Robert and Elizabeth Field and Mr. Peter Horne. The Board did not have a copy of the agreement.

Mr. Field said that he did not submit copies of the agreement to the Board. He explained that the agreement contains a lot of issues regarding recommended conditions if the Board grants either of the Variances in cases 2010:11 and 2010:02. He said that if the Board grants the Variance in case #2010:11 it should be granted with the benefit of some of the conditions that he and Mr. Horne talked about, but have not agreed to. He also suggested that if the Board grants the Variance request in case #2010:11; it should be with the condition that case 2010:02 be withdrawn.

Ms. Peckham said that the ZBA is an independent Board and is not obligated to take any suggestions offered by either party. She asked Mr. Pelech to state whether or not he needed Variance requests in both cases (2010:11 and 2010:02), and if so, she would be inclined not to reverse the order of the agenda.

Mr. Pelech said that if the Board grants the Variance in case #2010:11 he believes, and assumed Mr. Field agreed, that the Variance request in case #2010:02 would not be required.

Ms. Peckham asked for confirmation from Mr. Pelech that if case #2010:02 was heard first and the Variance request were granted, then case #2010:11 would not need to be considered by the Board.

Mr. Field said that he will contest, if Mr. Pelech agrees, that if case #2010:11 is granted, then case #2010:02 is not required.

Ms. Peckham asked the Board Member's for their opinions.

Mr. Stanton said that he would like to take action on the first case on the Agenda, case #2010:02, first because if they begin with the second case, case #2010:11, new evidence may be introduced that could have an effect on case #2010:11. He suggested the Board take action on case #2010:02 first, and leave it up to the Applicant to decide how he wants to proceed with case #2010:11.

Ms. Lermer said that case #2010:02 should be acted on first, unless the Applicant wished to withdraw it.

Mr. Field suggested that the Board recess for 15 minutes so that he could have someone make copies of his agreement for the Board Members to review.

Ms. Peckham called for a 15 minute recess at 6:53pm, and both Mr. Field and Mr. Pelech submitted copies of their proposed, unsigned agreements.

Ms. Peckham reconvened the Meeting at 7:11pm, and explained that the Members read both documents.

Mr. Field directed the Board's attention to paragraph three (3) of the agreement he submitted and said that a, b, c, d, and e of that section is acquiescence of this process.

Mr. Pelech said that the difference between the two (2) proposed agreements is in paragraph three (3) of the proposed agreement submitted by Mr. Field; Mr. Horne did not agree with the entire paragraph three (3).

Mr. Pelech explained that if case #2010:11 was granted allowing the garage to be used as a residence the Applicant would still need to come before the Board for a Variance request to subdivide the lot. Mr. Pelech said that the Board could grant the Variance request in case #2010:02 with the condition that the only new residence on the lot would be the three (3) car garage.

Mr. Lagassa agreed with Mr. Pelech's interpretation that the Applicant would still need to apply for a Variance to subdivide the lot if case 2010:11 was granted. He said he was in favor of continuing the deliberations on case #2010:02, and getting it done before moving on to the next case (2010:11).

Mr. Buber said that in case #2010:02, the Applicant is requesting a Variance with the intent of building an additional new residence, and in case #2010:11 they are not adding a new building, which mitigates the idea of impervious surfaces for runoff and potential contamination to Little River and the Mill Pond. He said that he would like to hear what both Mr. Field and Mr. Pelech have to say about case #2010:11 first.

Ms. Peckham called for a vote. The Board voted 4 in favor, 1 opposed and 0 abstentions to act on case #2010:02 first, and not to reverse the Agenda items. Mr. Buber opposed.

The Board continued with deliberations on case 2010:02. Ms. Peckham said that the Board would not be accepting any new testimony and that if one of the "prongs" of the Variance test fails, the Variance is denied, but the Board should still go through all of the criteria to make a complete record.

Ms. Peckham explained that the Board was addressing the first Variance request in case #2010:02, *request of a Variance from Article IV, Section 411*

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1. Granting the Variance will **not** be **contrary to the public interest**. Ms. Peckham explained that for the Variance to be contrary to the public interest, it must unduly and to a marked degree violate the basic zoning objectives of the zoning ordinance, and to determine this, does the Variance alter the essential character of the neighborhood or threaten the health, safety or general welfare of the public?

Mr. Lagassa said that he initially did not feel that the public interest would not be harmed by granting the Variance. He said after visiting the property, and seeing all the existing buildings on the lot, he now feels that it would result in a too intensive use of the land and it would not be consistent with the public interest to grant the Variance.

Ms. Lerner agreed with Mr. Lagassa and added that Mr. Horne has the right to drain the pond to meet the acreage requirement, and that by granting the Variance it would ruin the rural character of the area.

Mr. Buber read his prepared statement into the record:

- For over 31 years, since its adoption, Section 411 has precluded the use of "bodies of water" when calculating minimal lot size. This portion of the ordinance has never been previously challenged.

- If such use were to be permitted, there is no doubt that increased pressure on an already fragile eco-system would occur.

- Little River and Mill Pond are already experiencing the effects of increased bacteria, e-coli, nitrogen and algae. Sources of these conditions are attributed to storm run-off and septic system leaching and/or failures. The overall quality of the Little River continues to deteriorate (NHCC letters dated 6/7/10 & 8/23/10).

- Mr. Horne is requesting a subdivision of his property into two lots. The only feasible way to make the lots conforming to the Town's 2 acre minimum lot size is by including portions of a "body of water" i.e., Mill Pond. Without that inclusion, the two lots would be non-conforming in size being 1.57 acres and 1.72 acres.

- On page 13 of the Environmental Impact Analysis conducted by Ms. Adele Fiorillo of NHSC, dated July 2009, Ms. Fiorillo contends that the overall increase of impervious surfaces would go from 8.4% to 9.3% if the property were allowed to be developed in accordance with Mr. Horne's proposed plan. (All three of Mr. Horne's lots were used for this calculation)

- In a letter dated September 29, 2009 from Dr. Leonard Lord, CWS, CSS of the Rockingham County Conservation District to the North Hampton Planning Board, notes the following:

Lot 147-2-1 Impervious Surface = 21.2%

Lot 147-2-2 Impervious Surface = 17.2%

Combined = 19.2%

(Only Lots 147-2-1 & 147-2-2 were used and the calculations were without including any portion of Mill Pond)

188 NOTE: This is almost twice the 10% threshold of North Hampton's guideline. Also, 1/3 of the surfaces
189 are located within the 100 ft. wetland buffer.

- 190 • If the Applicant's Variance requests were allowed, the following would result:
- 191 1. Without the incorporation of a "body of water", a conforming lot would be turned into two
- 192 (2) non-conforming lots. This is counter intuitive to zoning regulations.
- 193 2. If a portion of a "body of water" (i.e. the Mill Pond) were allowed to meet minimal lot size, a
- 194 more intensive use of the property would occur and a potentially deleterious impact could
- 195 result on the Mill Pond, Little River and the Little River Salt Marsh eco-systems from storm water
- 196 run-off and contamination.
- 197 • A Town has an obligation to protect itself from overcrowding and intensive "over-use" of properties.
- 198
- 199 • It also has an obligation to protect its water quality, aquatic life and environment.
- 200
- 201 • If "bodies of water" were allowed to be used in the calculation of minimal lot size throughout the
- 202 Town, overcrowding, intensive use and pressure on the land and water bodies would occur,
- 203 affecting the health, safety and welfare of the community and its environment. More intensive use
- 204 of land is counter to the objectives of North Hampton's Zoning Ordinance.
- 205
- 206 • As Justice Broderick cited in "Bacon v. The Town of Enfield" (1/20/04): "The cumulative impact of
- 207 many such projects might well be significant. For this reason, uses that contribute to shorefront
- 208 congestion and over development could be inconsistent with the 'spirit of the ordinance'."
- 209
- 210 • In my view, the Variances requested conflict with the explicit and implicit purposes of the North
- 211 Hampton zoning ordinance. Further development of the property would change the essential
- 212 character of the neighborhood, threaten the environment, and otherwise injure "public rights". If
- 213 granted, the Variances would be contrary to the public interest and would be inconsistent with the
- 214 "spirit of the ordinance" and should be denied.
- 215

216 Mr. Stanton said that the request is so that the Applicant can put a house on a lot, and that in itself is

217 not against the Zoning Ordinance. He said that the Board is being asked to define a line in a body of

218 water determining where a wetland begins and where a body of water begins and the Board heard

219 expert testimony that the Government set a standard in determining that line to be at two (2) meters.

220 He also added that the proposed location of the house is outside the 100-foot wetland buffer.

221

222 Ms. Lerner referred to previous ZBA decisions on the property, case 2007:16 where a Variance was

223 granted to allow the current garage with the condition that any plumbing within the structure will not

224 be used without further approval from the Building Inspector for proper permits, and case 2008:12

225 granting a Variance to allow a lot line relocation with the conditions that no additional structures or

226 increase in the footprint to any structures within the 100-foot wetland setback and all accessory

227 structures on both lots remain accessory structures.

228

229 Mr. Stanton commented that a new septic system was installed outside of the current garage since

230 those approvals. He said that the Board could add, as a condition of approval, that a containment

231 system would be required to mitigate water runoff.

Mr. Buber stated the following:

- North Hampton's Town Zoning Ordinance does not have a definition for "bodies of water", and I think we all know that.
- The Town of North Hampton in its Zoning Ordinance has a definition of wetlands found in Article III-Definitions-Paragraph 41.
- Article III, Section 301 of the Zoning Ordinance states in part that "In the interpretation and enforcement of this ordinance, all words other than those defined specifically below, shall have the meanings implied by their context in the ordinance or their ordinarily accepted meanings." This position is also supported by a number of NH case law decisions, one being Collden Corporation vs. Town of Wolfboro, Supreme Court of NH, opinion issued February 19, 2010.
- The traditional rules of statutory construction generally govern the Court's review of ordinances and zoning regulations. They construe the words and phrases of regulations according to the common and approved usage of the language. Therefore, "bodies of water" when using plain and/or ordinary meanings certainly can include, but are not necessarily limited to oceans, lakes, rivers, bays, brooks, streams, and ponds. Further, in submitted evidence noted as "Number 12", by abutter Mr. Field a document titled "Mill Pond" states: "A mill pond is any body of water used as a reservoir for a water-powered mill.
- The applicant, during various testimony and presentations, done by counsel and expert witnesses, referenced two documents delineating wetlands and bodies of water and wish to use those documents and apply them to the delineation of wetlands verses body of water for Mill Pond. They are:
 - "Classification of Wetlands and Deep Water Habitats of the United States"
(Cowardin, et.al.), US Department of Interior, Fish and Wildlife Services
(December 1979)
 - "Army Corps of Engineers Wetlands Delineation Manual" (January 1987)
- In a letter dated March 17, 2010 from Mr. Michael Cuomo, certified soil and certified wetland scientist, to the North Hampton Conservation Commission, Mr. Cuomo states that the 6.6 feet break between wetlands and deep water habitats referenced in the above publication by Cowardin is a "classification system", not a "regulatory system". He stated that, "NHDES does not recognize any change in regulatory protection or setbacks based on a 6.6 feet distinction between aquatic deepwater habitats and wetlands". He also stated, "...for regulatory purposes, the water body known as Mill Pond clearly begins at the bank".
- The Town of North Hampton in March 1979, by a vote of 348 to 104, adopted Section 411 into its Zoning Ordinance. It is clear upon reviewing the Articles under consideration at that time, that the Town was concerned about protecting its water quality, aquatic eco-system and environment. North Hampton has never adopted either one of the above referenced publications as part of its Zoning Ordinance. In fact, Section 411 pre-dates both publications by 9 months and 8 years, respectively.

- 277
- 278 • The Board, when deliberating, needs to consider information available when the ordinance was
- 279 written, and not interject information that came into effect after the fact and attempt to apply it
- 280 retroactively. Accordingly, Mill Pond must be considered in total as a “body of water”, and the
- 281 issue of wetlands does not come into play. Therefore, Mill Pond, as a “body of water”, cannot
- 282 and should not be used in the calculation of lot size. (It should be noted that there have been
- 283 no ZBA decisions in over thirty one years involving the use of water bodies when calculating lot
- 284 size.)
- 285
- 286 • The Horne property is not uniquely situated. A number of properties in Town abut bodies of
- 287 water. As stated in NH Supreme Court case, *Bacon v. Town of Enfield* ... “Accordingly, when a
- 288 Zoning Ordinance effects a number of similarly situated landowners, the proper remedy is an
- 289 amendment of the ordinance – NOT a variance.”
- 290
- 291 • Therefore, it is my opinion that sometime in the future, it would be helpful if “bodies of water”
- 292 were to be defined in the Town Zoning Ordinance by the legislative body of the town via a
- 293 Warrant Article.
- 294
- 295 • In the interim however, the hearing of this case should proceed and be guided by the rules of
- 296 statutory construction.
- 297

298 Ms. Peckham said that the ordinance was adopted in 1979; prior to the wetland definitions by the
299 United States Government, and the use of the words “body of water” should be taken within the
300 context of how it was understood at the time the ordinance was adopted. She said that there was
301 testimony that the Mill Pond was the only “water body” in Town at the time the ordinance was adopted.
302 She further stated that the purpose of the ordinance is to protect water quality in Town, and the Mill
303 Pond is important to the Town’s water system. She said granting the Variance would be contrary to
304 public interest.

305

306 Mr. Stanton referred the Board to Section 409.1.G of the Ordinances: *To provide a single and consistent*
307 *approach for indentifying and delineating wetlands based on the most advanced professional standards*
308 *and scientific analysis*. He said that accepting the definition of “two meters” is where you delineate the
309 “break” between wetlands and “bodies of water” would be consistent with the ordinance. He said the
310 intent of Section 409.1.G is to keep up with scientific definitions. He also said that if Mill Pond was the
311 only “body of water” that was used at the time the ordinance was adopted then that could be
312 considered “spot zoning”, which is not legal.

313

314 Mr. Buber said there are other “bodies of water” such as, the ocean, rivers and other ponds.

315

316 **The Board voted 1 in favor, 4 opposed and 0 abstentions to granting the Variance will not be contrary**
317 **to the public interest. Mr. Stanton voted in favor.**

318

319 Ms. Peckham suggested voting on all of the criteria to provide a complete record.

- 320 2. Special conditions exist such that literal enforcement of the ordinance **will result in unnecessary**
321 **hardship.**

- 322
- 323 A. Applicant seeking **use Variance—Simplex** Analysis: (See Simplex Technologies v. Town of
324 Newington, 145 NH 727)

- 325
- 326 i. The zoning restriction as applied to the property interferes with the landowner's
- 327 reasonable use of the property, considering the unique setting of the property in its
- 328 environment.
- 329 ii. No fair and substantial relationship exists between the general purposes of the zoning
- 330 ordinance and the specific restriction on the property; and,
- 331 iii. The Variance would not injure the public or private rights of others.
- 332

333 Ms. Peckham said that in her opinion, the property is not uniquely situated because there are several

334 other properties that surround Mill Pond that would be affected by the Variance.

335

336 Mr. Stanton asked Ms. Peckham to reread the criterion the Board was voting on. She stated "special

337 conditions exist such that literal enforcement of the ordinance will result in unnecessary hardship". She

338 explained that voting in favor of this criterion meant that unnecessary hardship exists.

339

340 **The Board voted 0 in favor, 5 opposed and 0 abstentions that special conditions exist such that literal**

341 **enforcement of the ordinance will result in unnecessary hardship.**

342

- 343 3. Granting the Variance is consistent with the **spirit of the ordinance.**
- 344

345 Ms. Peckham said that this criterion is similar to criterion number one - "Public Interest".

346

347 **The Board voted 1 in favor, 4 opposed and 0 abstentions to granting the Variance is consistent with**

348 **the spirit of the ordinance.**

349

- 350 4. By granting the Variance **substantial justice** will be done.
- 351

352 Ms. Peckham explained this criterion by quoting Attorney Peter Loughlin "any loss to the individual that

353 is not outweighed by the gain to the general public is an injustice".

354

355 Ms. Lerner said that it's a tough call between the public rights to do what they want with their property

356 and abiding by the zoning ordinances.

357

358 Ms. Peckham said that based on the previous votes on the criteria it seems that the Board agrees that

359 the public interest does outweigh the loss to the individual.

360

361 **The Board voted 1 in favor, 4 opposed and 0 abstentions that by granting the Variance substantial**

362 **justice will be done.**

363

- 364 5. Granting the Variance will **not diminish the values of surrounding properties.**
- 365

366 Ms. Lerner commented that she does not recall a case where the Board has ever been able to prove the

367 diminution of property values.

368

369 Ms. Peckham said that the burden is on the Applicant, and is not sure that the Applicant proved to the

370 Board that surrounding property values would not be diminished. There was testimony from the

371 Historical Society that leaned towards diminution in property values.

372

Mr. Buber said that at least two abutters had concerns that property values would be affected if the Variance was granted, and the Applicant's Attorney replied that the surrounding property values would not diminish, but had no evidence to back that up.

Ms. Peckham said that the accumulative effect may have an impact on the surrounding property values.

Mr. Stanton said that it is a difficult "prong" in the Variance test. He said that value is determined by the look of the proposed house in its environment, so without knowing what it looks like makes it difficult to determine whether the surrounding property values would be diminished; a very nice house could increase the values and a very modest house could decrease surrounding values. He said that based on the fact that within the last ten years, the houses built in the area of the subject property have not diminished values of the surrounding properties; therefore he does not believe granting this Variance would result in the diminution of surrounding property values.

Mr. Lagassa said that adding a new residence is overburdening the property, not only in terms of the environment, but ultimately affecting the visual impact. He said after visiting the property he decided that the lot is already overcrowded, giving the possibility that another house could lower the value of surrounding properties.

The Board voted 1 in favor, 4 opposed and 0 abstentions that granting the Variance will not diminish the values of surrounding properties. Mr. Stanton voted in favor.

The Board voted 1 in favor, 4 opposed, with no abstention, to granting the Variance request to Article IV, Section 411 to allow a body of water to be used to satisfy minimal lot area requirements. Mr. Stanton voted in favor. The Variance request is denied.

The Board took action on the second Variance request from Article IV, Section 406 to allow lot areas of 75,000 s.f. and 68,480 s.f. where 87,120 s.f. is required. Ms. Peckham explained that the Board would be using the "Boccia" standards because it is an "area" Variance that was applied for before the law was changed, effective January 1, 2010.

1. Granting the Variance will **not** be **contrary to the public interest**.

Mr. Buber said that all the "prongs" in the "Boccia" test are the same as the "Simplex" test except for the hardship criterion. The Board agreed. Mr. Buber said that the same arguments addressing the prior Variance request can be used in this Variance request except for the "hardship" criterion.

The Board voted 0 in favor, 4 opposed and 1 abstention that by granting the Variance will not be contrary to public interest. Mr. Stanton abstained.

3. Granting the Variance is consistent with the **spirit of the ordinance**.

The Board voted 0 in favor, 4 opposed and 1 abstention that by granting the Variance is consistent to the spirit of the ordinance. Mr. Stanton abstained.

4. By granting the Variance **substantial justice** will be done.

The Board voted 0 in favor, 4 opposed and 1 abstention that by granting the Variance substantial justice will be done. Mr. Stanton abstained.

5. Granting the Variance will **not diminish the values of surrounding properties.**

The Board voted 0 in favor, 4 opposed and 1 abstentions that by granting the Variance will not diminish the values of surrounding properties. Mr. Stanton abstained.

2. Special conditions exist such that literal enforcement of the ordinance **will result in unnecessary hardship.**

B. Applicant seeking **area Variance—Boccia** Analysis (See Michael Boccia v. City of Portsmouth, Supreme Court of NH, Opinion Issued May 25, 2004)

i. An area Variance is needed to enable the Applicant's proposed use of the property given the special conditions of the property.

Mr. Stanton said that he thought there were special conditions of the property because it's not the only dam on Little River, but it is the only dam that has been noted by the Historical Society, making the property and the size of the pond unique from all other dams on Little River.

The Board voted 1 in favor, 4 opposed and 0 abstentions that there are special conditions of the property. Mr. Stanton voted in favor.

ii. The benefit sought by the Applicant cannot be achieved by some other method reasonably feasible for the Applicant to pursue, other than an area Variance.

Ms. Peckham said that, in her opinion, there were no other alternatives, and that this prong applies.

Mr. Stanton questioned what would happen if Mr. Horne decided to drain the pond and use the wetland to meet the acreage requirement.

Ms. Peckham said that the Applicant has stated that he would not drain the pond and if he did so, he would have committed Perjury.

The Board voted 5 in favor, 0 opposed and 0 abstention that the benefit sought by the Applicant cannot be achieved by some other method reasonably feasible for the Applicant to pursue, other than an area Variance.

The Board voted 0 in favor, 4 opposed and 1 abstention to grant the Variance request form Article IV, Section 411 to allow a body of water to be used to satisfy minimal lot area requirements. Mr. Stanton abstained. The Variance request is denied.

2. 2010:11 – Peter Horne, Trustee F.S. 123 Nominee Trust, PO Box 1435, North Hampton, NH 03862. Property location: 112 Mill Road; M/L 006-147-002; zoning district R-2. The Applicant seeks to amend the Variance granted in ZBA case #2008:12 from Article V, Section 501.2, by removing condition #2 – *All accessory structures on both lots remain accessory structures.* Property owner:

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467 Peter Horne, Trustee F.S. 123 Nominee Trust. This case is continued from the December 14, 2010
468 Meeting.

469

470 In attendance for this Application:

471 Peter Horne, Owner/Applicant

472 Attorney Bernard Pelech, Wholey & Pelech Law Offices

473 Steve Oles, Ames MSC Engineers

474

475 Mr. Pelech, on behalf of his client Mr. Horne, withdrew case 2010:11 without prejudice.

476

477 The Board voted 5 in favor, 0 opposed and 0 abstentions to accept the withdrawal from Mr. Pelech
478 regarding case 2010:11.

479

480 Mr. Field resumed the Chair, and called for a recess at 8:20pm.

481

482 Mr. Field reconvened the Meeting at 8:23pm.

483

484 There was no "New Business" before the Board.

485

486 Mr. Lagassa reported on the Code of Ethics Ad hoc Committee. He said that the Committee met on
487 January 19, 2011 and finalized a draft of the Code of Ethics. He said that the Select Board plans to add
488 the topic as an agenda item at their February 14, 2011 Meeting.

489 Mr. Field thanked Mr. Lagassa for doing the work on the Code of Ethics Committee and asked Ms. Chase
490 to make copies and put them in each Member's mailboxes and to also forward a copy by e-mail.

491

492 Mr. Stanton asked if public input would be allowed at the Select Board's Meeting on February 14th, and
493 Mr. Lagassa said that the Committee was told that there would be a Public Hearing on the proposed
494 Code of Ethics at the February 14, 2011 Select Board Meeting. Mr. Lagassa explained that the
495 Committee tried to make the Code of Ethics more of a "positive" document and referred to Article IV –
496 Sustaining an Ethical Culture. He said the goal is to make everyone aware that the Code of Ethics is part
497 of the deal when serving Office.

498

499 Mr. Lagassa will send Ms. Chase a copy to distribute to the Members.

500

501 Mr. Field went over the history regarding the proposed Administrative Services Agreement.

- 502 • In 2002 the Planning Board was changed from an Appointed Board to an Elected Board. Mr.
503 Wilson, Chairman of the Planning Board, wrote a letter to the Selectmen suggesting that the
504 relationship between Town Administration and the Planning Board should be clarified.
- 505 • In 2011 the ZBA became a fully Elected Board; Mr. Field spoke to the Board regarding the
506 proposed Administrative Services Agreement and was instructed by the Board to explore with
507 the Town Administrator how that might be accomplished.
- 508 • Mr. Field met with Mr. Fournier and Ms. Chase in June and Mr. Fournier provided an agenda list
509 to Mr. Field on items to be considered.
- 510 • Mr. Field received a draft from Mr. Fournier in October 2010 and invited Mr. Field to make any
511 changes/suggestions to it. He would then present it to the Zoning Board for their approval of
512 the proposed "business arrangement".
- 513 • Mr. Field presented a draft in October and then in December and distributed them to the Board
514 Members. Ms. Chase wrote a letter to Mr. Fournier and the Select Board stating that she did not

want the Select Board to enter into a Services Agreement with the Zoning Board because she was hired by the Town of North Hampton under an agreed upon job description. She attached a copy of the draft agreement.

- Ms. Chase was invited to provide a copy of her job description to each of the Members. The Board did not receive a copy.
- The Select Board wrote a letter to Chairman Field and Members of the ZBA stating that they could not accept the agreement as written, and felt that it oversteps the role of the ZBA with respect to employees of the Town.
- Mr. Field responded to the Select Board that the document they received was a “draft” and that their decision was premature.
- Mr. Field said that the document he drafted is a legal document.
- Mr. Field read a letter from Mr. Wilson and an E-mail from Larry Miller.

Mr. Field said that the Board has had some very complicated cases where constant supervision is both necessary and important. He said he feels that it is his obligation to the Town, the voters and all Members of the ZBA to try to come up with a document, if the Board agrees, that they can take to the Town to let them know what the needs of the Board are.

Mr. Stanton said that Mr. Field made a statement that he was “instructed” by the Board to meet with the Town Administrator, and it was his recollection that Mr. Field asked for permission from the Board to talk to the Town Administrator about pursuing a relationship between the Town and the Board. He said Mr. Field also made a comment that since the Board became an Elected Board that they now have special rights and privileges. Mr. Stanton said that the only changes are that the ZBA Members are now elected instead of Appointed and the Board can now appoint their own Alternate Members. Mr. Stanton commented that the Planning Board doesn’t have a Services Agreement with the Town.

Mr. Field referred to an E-mail sent on June 8, 2010 that invited comment from the Board Members on a proposed Services Agreement. He felt it was his “charge” to meet with Mr. Fournier to come up with an arrangement where the Board could do business with the Town and Mr. Fournier assisted in the process. Mr. Field further stated that the Planning Board has sought an Agreement for eight years and they do not have one.

Mr. Stanton said that he did research on other Towns and did not find a Town that had a Services Agreement between a Board and the Town.

Ms. Peckham said that without seeing Ms. Chase’s contract it’s hard to determine whether or not the proposed Services Agreement expanded upon her current duties, and if it did there may be a need for an increase in salary.

Mr. Field further stated that according to RSA 673:16 he believed there is a broad power for a land use board to acquire the services that it needs and to impose a cost to it. But to be practical, the services we are provided are fine with some definition and it is up to the Town to see that its ordinance is administered properly. In his opinion, the ZBA would look to the Town in the first instance, but it seemed to him that the ZBA had independent authority.

Ms. Peckham expressed her concern that the ZBA doesn’t have a copy of Ms. Chase’s contract and that she was worried about how the ZBA’s contract would affect Ms. Chase’s current contract.

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563 Mr. Field said that the ZBA is only speculating on Ms. Chase's contract. We don't know because we
564 haven't seen it.

565
566 Mr. Lagassa asked if other than the contract that is being referred to, is there anywhere else where
567 there is a contractual agreement, and stated that he thought codifying was a good idea.

568
569 Mr. Field stated there was no evidence of a contract – perhaps verbal agreements.

570
571 Mr. Lagassa questioned Mr. Field whether there was an implication that perhaps the Planning Board and
572 ZBA should have more involvement in the day-to-day supervision of those employees.

573
574 Mr. Field state: "No, quite the contrary."

575
576 Mr. Buber said that it was quite clear to him last spring that this Board authorized the Chair to proceed
577 in discussions with Mr. Fournier regarding a Services Contract and he didn't believe there was any
578 dispute or debate about that. Ultimately, Mr. Fournier provided, and Mr. Buber believed Mr. Fournier
579 agreed, that a Service Contract would be in order, and Mr. Fournier provided information along those
580 lines to the Chair. The Chair took that information, and information gathered from Mr. Wilson, and put it
581 together in this draft copy. Mr. Buber further stated that after reading the draft, he felt that from his
582 viewpoint, all of the duties and tasks cited were currently being performed by Wendy. He further stated
583 that he thought the Board does want a Services Agreement.

584
585 Mr. Stanton replied, "Don't assume that, because I don't see the necessity at all."

586
587 Mr. Buber and Mr. Stanton registered disagreement with each other as to what the Board had
588 authorized the Chair to do regarding the Services Agreement. Mr. Buber suggested the Board bring the
589 issue to a head tonight (January 25, 2011) and have a vote to resolve it.

590
591 Mr. Buber asked the Chair if Mr. Fournier, who was in attendance in the audience, could be recognized
592 to speak before the Board.

593
594 Mr. Field referred to RSA 673:16 – *Each local land use board may appoint such employees as it deems*
595 *necessary for its work who shall be subject to the same employment rules as other corresponding civil*
596 *employees of the municipality.*

597
598 Mr. Fournier received permission from the Chair to address the Board. Mr. Fournier explained that both
599 the Zoning Administrator and the Code Enforcement Officer/Building Inspector report to the Town
600 Administrator; the Select Board does the hiring and firing.

601
602 Mr. Fournier agreed that there should be a Services Agreement between the Town and the ZBA. He was
603 asked to forward copies of the Zoning Administrator and Code Enforcement Officer/Building Inspector's
604 job descriptions and contract. He said that he would have copies for the Board by the middle of next
605 week.

606
607 Mr. Fournier agreed to work with Members of the ZBA and Planning Board on the proposed Services
608 Agreement.

609

Mr. Field suggested having the Services Agreement in place prior to the May Elections. Mr. Fournier was agreeable to that.

Mr. Stanton and Ms. Peckham voiced concern over involving the Code Enforcement Officer/Building Inspector in the Services Agreement, because of statutory guidelines. Ms. Peckham suggested the Board do more investigation on the matter.

Mr. Lagassa said that it is important to review the current job descriptions.

Mr. Buber said that he thought a Services Agreement between the Board and the Town is paramount.

Mr. Field suggested appointing Mr. Buber and to invite Mr. Wilson and Mr. Fournier to join them in working on the proposed Services Agreement.

Ms. Peckham said that she would vote in favor to proceed as long as it was considered preliminary, and commented that the agreement is between the ZBA and the Planning Board should not be included; the ZBA should have their own document and the Planning Board should have their own document.

Mr. Buber Moved and Ms. Peckham seconded the Motion that the Zoning Board of Adjustment vote on whether it will support or not support an Administrative Services Agreement between the Town of North Hampton, New Hampshire and the Town of North Hampton Zoning Board of Adjustment.

Mr. Lagassa asked if the Motion made was to support the concept of entering into a Services Agreement between the ZBA and the Town. Mr. Buber said it was.

The vote on the Motion made by Mr. Buber was 4 in favor, 1 opposed and 0 abstention. Mr. Stanton voted against.

Mr. Field said that he would not appoint a negotiating committee at this time.

Ms. Lerner asked that the Alternate Members receive copies of the employee's contracts. Mr. Field said that they would.

The Meeting was adjourned at 9:50pm.

Respectfully submitted,

Wendy V. Chase
Recording Secretary

Approved 3/22/2011