

TOWN OF NORTH HAMPTON N.H.

ZONING BOARD OF ADJUSTMENT

MINUTES

of

SPECIAL MEETING

APRIL 30, 2012

A Special Meeting, for a limited purpose (“Meeting”), of the Town of North Hampton, Zoning Board of Adjustment, (“ZBA”) was convened at 8:00 a.m. on April 30, 2012, at the Mary Herbert Conference Room, located at Town Offices, 233 Atlantic Avenue, North Hampton New Hampshire, pursuant to the Call of the Chair, and upon Public Notice duly posted by Wendy Chase, Administrative Assistant to the ZBA, in the manner prescribed by NH RSA 91-A.

The Meeting was “Called to Order” by Chair, Robert B. Field, Jr. at 8:01 in the forenoon. A Quorum of Board Members and Alternate, sitting on Case- In re: #2012:01, John R. Spink, Jr., (“Case”), were present and voting throughout the Meeting.

Member(s) Presentwere: Robert B. Field, Jr., Chair; David Buber; and George Lagassa. (3)

Member(s) Absentwere: Michele Peckham, Vice Chair; and Phelps Fullerton. (2)

Alternate(s) Present and Sitting was: Jonathan Pinette. (1)

Alternate(s) Present and Available as Necessary was: Robert J. Landman. (1)

Alternate(s) Absentwere: Dennis Williams and Lisa Wilson. (2)

Present in the Audience were: Applicant John R. Spink, Jr., and his Legal Counsel,R. Timothy Phoenix, who had been specially notified of the Meeting.

In the absence of the Recording Secretary, Chair Field agreed to maintain a record of the Meeting as Secretary Pro-Tem. He began the Meeting by introducing the ZBA Members and Alternates present; acknowledging the presence of Messrs. Spink and Phoenix; stating that the Meeting was Public Meeting for a limited purpose and not a Public Hearing, but that the ZBA reserved the right to invite the two guests in the audience to speak as might be deemed helpful; and, inviting all present to join in reciting the Pledge of Allegiance, without prejudice, as each might wish.

Chair Field then advised those present that the Special Purpose of the Meeting was to consider the advisability of seeking approval from the Town Administrator, Stephen Fournier, for the engagement of Town Counsel to advise the ZBA on important legal matters as a procedural predicate to further consideration of the substantive issues in the Case. The Chair reported that he had received a communication from Ms. Chase forwarding an E-Mail, dated April 25,2012, addressed to her from Mr.

Philip Wilson, a person speaking in “opposition” at the Public Hearing on April 24, 2012, in which Mr. Wilson advised the ZBA of the Rockingham County Superior Court Decision, in the Matter of Seth Peters, et al, vs. Town Of Nottingham (#04-E-0121) 08/10/2004, (Robert E. K. Morrill, P.J.). Such case had considered similar issues, specifically, RSA 674:41, to those presented in Case, and as identified by Member Fullerton on April 24, 2012. Chair Field also pointed out that RSA 676:5 enables/authorizes the ZBA to “tax” such costs as might be incurred, to the Applicant, provided that such were not duplicative of prior Planning Board efforts.

It was also noted by Mr. Wilson that the issues involved in Case were seminal; that it was most important that the Board have the necessary resources and support to address the issues; and, that early intervention of counsel might well save time and expense for all parties going into the future.

Chair Field then sought the advice and counsel of the ZBA as to its wish on proceeding. Mr. Pinette indicated a preference to engage counsel; Mr. Lagassa was undecided but wished more information on the “cost” and “duties” of counsel; and, advice on the extent to which Board action could be pre-empted by State statute. Chair Field responded that he had no information on cost, but that he anticipated Attorney Matthew Serge, of the firm Upton & Hatfield, in Concord, regular land use counsel to the Town, and the firm now representing the ZBA in the Barr-Moran Case, so called, would likely be called upon to serve. He also indicated that the ZBA could only act discretionarily with respect to its Zoning Ordinance, and, while not certain, he reasoned that State statutes would be pre-emptive. Member Buber offered observations as to present sections of the Ordinance which were quite restrictive in their application to “North Hampton” situated parcels. He felt that the multi-jurisdictional elements of the Case were problematic. Chair Field then offered his perspectives to the discussion, and, stated that he felt the designated legal counsel would be a wiser choice than use of the Local Government Center resources.

Chair Field then inquired of the Board as to their wishes regarding receipt of comment from Attorney Phoenix. It was unanimously agreed to invite Attorney Phoenix to speak. Mr. Phoenix, was recognized and he then advised the Board of several concerns, among which were- 1) need for a copy of the Peters case; 2) desire to receive a copy of any opinion counsel to Board would render; 3) clear estimate of scope of work by, and cost of, counsel; 4) lack of clarity as to applicability of RSA 674:41 to Case; and, 5) he requested a copy of the Minutes of this Meeting when prepared. Chair Field declined to categorically waive the “attorney client” privilege, but stated that he had no objection for counsel to telephone Board counsel to gather a sense of the academic evaluation of the issues; and, he further stated that he had no idea as to the potential cost of engaging counsel; however, his goal was to articulate the legal issues clearly and, as possible to restrict the inquiry to a minimum of time and expense. A copy of the “draft” Minutes would be made available as soon as possible. It was again suggested that an early resolution of the predicate legal issues would likely save costs for ALL parties.

Chair Field then articulated the following as the key issues to be presented to counsel, subject to further review:

- I. Is the Peters Case still good law? i.e. Has the Supreme Court spoken on the matter since 2004?
- II. Have the amendments made by the Legislature to RSA 674, since 2004, changed the legal principles on which the Peters Case was decided?

- III. Is the relief being requested in Case, and/or are the facts and/or concerns presented by witnesses and Board Members, properly within the scope of RSA 674?
- IV. Is the ZBA, when acting in its adjudicative capacity and when interpreting its own Ordinance, subject to pre-emption of State statute?
- V. Are costs associated with engaging independent legal counsel properly assessable to an Applicant under RSA 676:5?

The Chair then invited a Motion from the ZBA, to authorize and direct him to seek authorization from Mr. Fournier to engage legal counsel for the purpose of providing advice and counsel on the foregoing issues.

On Motion duly made by Member Buber and seconded by Member Lagassa, after further discussion it was unanimously:

VOTED- To authorize and direct the Chair to request authorization to engage legal counsel to advise the Board on the matters relating to NH RSA 674:41 as set forth above.

Chair Field stated that he would seek such authorization from Mr. Fournier as soon as possible; and, that he would also prepare a statement of the issues of concern to be addressed to counsel, and circulate such to the Board in advance for comment.

There being no further business to come before the Board, on Motion duly made and seconded, it was unanimously:

VOTED- To adjourn.

The Meeting was adjourned at 8:31 in the forenoon.

A TRUE RECORD, ATTEST

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Robert B. Field, Jr., Board Chair/Secretary Pro-Tem

Approved 5/22/2012