



**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, May 22, 2012 at 6:30pm
Mary Herbert Conference Room**

6

7
8 **These Minutes of the May 22, 2012 Regular Meeting of the Zoning Board of Adjustment (“Meeting”) were**
9 **prepared as a reasonable summary of the essential content of the Meeting, not as a transcription. All exhibits**
10 **mentioned in these Minutes are a part of the Town Record.**

11
12 **Attendance:**

13
14 **Members present:** Robert B. Field, Jr., Chair; David Buber, George Lagassa, Phelps Fullerton and
15 Robert Landman (5)

16
17 **Members absent:** None.

18
19 **Alternates present:** Jonathan Pinette; and, Lisa Wilson (who joined the Meeting in progress.)

20
21 **Administrative Staff present:** Wendy Chase, Recording Secretary.

22
23 **Preliminary Matters; Procedure; Swearing in of Witnesses (RSA 673:14 and 15);**
24 **Recording Secretary Report**

25
26 Chair Field mentioned that the location of the Meeting had been changed to the Mary Herbert
27 Conference Room due to construction which was underway at the Town Hall. Proper notice of the
28 change of location had been posted. He also mentioned that, if anyone was present for the Spink Case
29 #2012:01, it has been continued, by agreement and at the request of the Applicant, to the Tuesday, June
30 26, 2012, Meeting of the Board.

31
32 Chair Field called the formal Meeting to Order at 6:30 pm.

33
34 Pledge of Allegiance -Mr. Field invited the Board Members and those in attendance to rise for a Pledge
35 of Allegiance and noted that reciting the Pledge of Allegiance is solely for those who choose to do so and
36 failure, neglect or inability to do so will have no bearing on the decision making of the Board or the
37 rights of an individual to appear before, and request relief from, the Board.

38
39 Introduction of Members and Alternates -Mr. Field introduced Members of the Board and the Alternates
40 who were present (as identified above).

41
42 Chair Field remarked that Ms. Peckham chose not to run for re-election this year and thanked her for
43 her many years serving on the Zoning Board of Adjustment. He also thanked Alternates, Jonathan
44 Pinette and Robert Landman for running for the seat vacated by Ms. Peckham, and for doing so in a

45 manner which brought distinction to the Board. Mr. Robert Landman was elected on May 8, 2012. New
46 Member Landman presented evidence of his having taken the proper Oath of Office before the Town
47 Clerk.

48

49 Recording Secretary Report - Ms. Chase reported that the May 22, 2012, Meeting Agenda was properly
50 published in the May 9, 2012 edition of the Portsmouth Herald, and, posted at the Library, Town Clerk's
51 Office, Town Office and on the Town's website.

52

53 Swearing In Of Witnesses – Pursuant to RSA 673: 14 and 15, Chair Field swore in all those who were
54 present and who intended to act as witnesses and/or offer evidence to the Board in connection with any
55 Case or matter to be heard at the Meeting.

56

57 Chair Field then briefly explained the Board's operating Rules and Procedures to those present.

58

59 **I. Organizational Meeting (2012) of the Board** – The Chair declared that it was
60 appropriate for the Board to act with respect to Board organizational matters.

61

62 1. **Oath of Office for Newly Elected Member(s)**; (Ms. Chase to Administer Oath(s)) – Mr.
63 Landman had been previously sworn into Office by the Town Clerk, and has presented his
64 credentials, and they have been placed on file.

65

66 2. **Elect a Chair; Board Action (One Year)** – Mr. Lagassa Moved, and Mr. Landman Seconded,
67 the Motion to nominate Robert B. Field, Jr., to serve as Board Chair. The Vote was
68 unanimous in Favor of the Motion (4 in Favor, 0 Opposed, and 1 Abstention). Mr. Field
69 abstained on his own nomination. Mr. Field thanked his colleagues and accepted the
70 nomination to serve as Chair for the ensuing year.

71

72 3. **Elect a Vice Chair; Board Action (One Year)** – Mr. Landman Moved, and Mr. Fullerton
73 Seconded, the Motion to nominate Mr. David Buber as Vice Chair. The Vote was unanimous
74 in Favor of the Motion (4 in Favor, 0 Opposed and 1 Abstention) Mr. Buber abstained on his
75 own nomination. Mr. Buber also thanked his colleagues and accepted the nomination to
76 serve as Vice Chair for the ensuing year.

77

78 4. **Appoint a Recording Secretary to the Board; Board Action (One Year)** - Mr. Landman
79 Moved, and Mr. Buber Seconded the Motion, to appoint Ms. Wendy Chase as Recording
80 Secretary for one (1) year. The vote was unanimous in favor of the Motion (5-0).

81

82 Chair Field explained that the Code of Ethics ("Code") adopted by the voters, the Legislative Body, at the
83 May 8, 2012 Town Election prescribes that Board Chairs read the Preamble at the first Meeting
84 convened after the adoption, and each year thereafter as the new Board organizes. Chair Field read
85 aloud the Preamble of the Code and the Board Members and Alternates present signed a Certification
86 acknowledging that they read and understood the Code.

87

88

89

90

91

92 **Approval of Minutes:**

93

94 **I. April 24, 2012, Regular Meeting Minutes** – Typographical errors were corrected. Mr. Fullerton
95 amended line #149 to read “practicing home designer” instead of Architect. **Mr. Lagassa**
96 **Moved, and Mr. Buber Seconded, the Motion to approve the April 24, 2012, Minutes, as**
97 **amended. The Vote passed in favor of the Motion (4 in favor, 0 opposed and 1**
98 **abstention). Mr. Landman abstained for reason that he had not participated at such**
99 **Meeting.**

100

101 **II. April 30, 2012 Special Meeting Minutes** – Typographical errors were corrected. **Mr. Fullerton**
102 **Moved, and Mr. Lagassa Seconded, the Motion to approve the April 30, 2012 Special**
103 **Meeting Minutes, as amended. The Vote passed in favor of the Motion (4 in favor, 0**
104 **opposed and 1 abstention). Mr. Landman abstained for reason that he had not**
105 **participated at such Meeting.**

106

107 **Unfinished Business:**

108

109 **1. (Continued) Case #2012:01 – John Spink, 800 South Road, Rye, NH 03870. Property location: North**
110 **Road Rear (land abuts Rye Town Line); M/L: 016-001-000; Zoning District: R-2.** The Applicant requests
111 a Variance from Article IV, Section 406 for relief from the frontage requirement of 175-feet. The lot is
112 landlocked and will access South Road in Rye, NH via a recorded Easement. **Property owner: John R.**
113 **Spink, Jr., 800 South Road, Rye, NH 03870. This Case is continued from the April 24, 2012 ZBA**
114 **Meeting.**

115

116 Chair Field stated that a continuance of the Spink Case was requested by the Applicant’s Counsel, and
117 through E-Mail communication to the Zoning Administrator the majority of the Board Members and
118 Alternates informally granted the continuance, subject to ratification, with a condition that the
119 Applicant inform the Board not later than 9:00 am on June 13, 2012 whether or not they choose to
120 move forward so that the Zoning Board has time to receive legal advice from Town Counsel which has
121 been preliminarily requested.

122

123 **Mr. Landman Moved, and Mr. Buber Seconded, the Motion to ratify and confirm the continuance of**
124 **Case #2012:01 – John Spink, to the June 26, 2012 Regular Meeting to allow for additional information**
125 **gathering which is relevant to the Case.**

126 **The Vote was unanimous in Favor of the Motion (5-0).**

127

128 **2. Barr-Moran Appeal-**The Board was in receipt of a copy of an “Assented to Motion to Consolidate”
129 regarding the two (2) zoning appeals involving the Town, and the Little Boar’s Head Village District, for
130 the Barr-Moran, Inc. v. Town of North Hampton Superior Court Cases (Appealed Decisions of the North
131 Hampton Zoning Board and Little Boar’s Head Village District Zoning Board regarding the Beach Plum
132 signage). Legal counsel to the Board recommended agreeing to the consolidation request. The Chair
133 requested formal ratification of its prior informal indication of approval.

134

135 **Mr. Buber Moved, and Mr. Landman Seconded, the Motion to ratify and confirm the informal**
136 **approval of the Members and Alternate to consolidate the two (2) Barr-Moran, Inc. Cases as**
137 **recommended by legal counsel.**

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

139

140 **New Business:**

141

- 142 **1. Case #2012:02 – Glenn Martin, 150 Mirona Road, Portsmouth, NH 03801. Property location: 9**
143 **Hampshire Drive, North Hampton, NH 03862; M/L 007-136-000; Zoning District: R-1.** The
144 Applicant requests an Administrative Appeal; the Applicant appeals the Decision of the Building
145 Inspector that Variances are required prior to the issuance of a Building Permit because, the
146 Glendale Park Subdivision was substantially completed thus the lot has Vested Rights. **Property**
147 **owner: Glenn Martin, 11 Evergreen Drive, North Hampton, NH 03862.**

148

149 In attendance to present this Application were:

150 Glenn Martin, Owner/Applicant

151 Attorney Bernard Pelech, Wholey and Pelech Law Offices

152

153 Chair Field explained that there had been a case involving the same applicant, with similar issues,
154 addressed by the ZBA in September 2011 and he had asked Ms. Chase to circulate copies of materials
155 prepared at the time and relating to the issues in such case to each Member and the Applicant's
156 Attorney. Attorney Pelech had not yet received his copy; Ms. Chase provided him with a copy.

157

158 Attorney Pelech presented Case #2012:02 on behalf of his Client, Mr. Glenn Martin. He stated that many
159 years ago the North Hampton Planning Board had approved the 48 lot subdivision (Glendale Park) in
160 December 1961, which was recorded at the Rockingham County Registry of Deeds as Plan #03369. Lots
161 5, 6, 7, 8, 31 and 36 were sold in 1962; lots 1, 2 and 4 were sold in 1963; lot 49 was sold in 1965; lots 15
162 and 37 were sold in 1967; Lots 13, 17, 43, 44, 45, and 26 were sold in 1968; Lots 11, 46, 18, 19, 30 and
163 40 were sold in 1969; Lot 25 was sold in 1971; Lots 24, 14, and 29 were sold in 1972; Lots 3 and 32 were
164 sold in 1973; lot 12 was sold in 1974; the remaining lots with the exception of lot 47 and 16 were sold
165 between 1975 and 1996. Alden Avenue, Hampshire Road, Kimberly Drive and Glendale Road were
166 accepted by the Town of North Hampton as public streets.

167

168 Attorney Pelech articulated that the basis of the Administrative Appeal is that the right to construct a
169 home on the subject lot is a vested right, as the Glendale Park Subdivision has been substantially
170 completed for many years and as such, the doctrine of "vesting", both statutory and common law,
171 applies.

172

173 Attorney Pelech explained that there are two (2) types of vesting: 1). Statutory Vesting – sets forth a
174 period of time, four (4) to six (6) years after the Planning Board approves the subdivision that the
175 subdivision is immune to zoning changes in that period of time; and 2). Common Law Vesting – per the
176 decision of the New Hampshire Supreme Court. He referred to Piper v. Meredith 110 NH 291 (1970),
177 "An owner, who, relying in good faith on the absence of any regulation which would prohibit his
178 proposed project, has made substantial construction on the property or has incurred substantial
179 liabilities relating directly thereto, or both, acquires a vested right to complete his project in spite of the
180 subsequent adoption of an ordinance prohibiting the same". He said they believe they have vested
181 rights making the lot immune from subsequent changes to the zoning ordinance. He said that the AWL
182 Power, Inc. v. City of Rochester Case, the Supreme Court found that the developer met all of the
183 conditions of common law; the developer had already constructed 6 of the 18 houses and spent
184 \$201,000.00 in public improvements. Attorney Pelech referred to Thomas Morgenstern v. Town of Rye
185 where the Supreme Court acknowledged the doctrine of common law vesting and found for the

186 developer; they also determined that the vested rights passes from the developer to the subsequent
187 landowners. Attorney Pelech referred to the synopsis of Henry and Murphy v. Allenstown where the
188 project was substantially completed and the zoning had changed but the Supreme Court found that the
189 developer had vested rights. Attorney Pelech said that the Glendale Subdivision has been substantially
190 completed; there are two lots that remain un-built upon. He went over the copies of Zoning
191 Amendments from 1946, 1955 and 1956 that Ms. Chase had forwarded to him. *Secretary's note: An*
192 *Abutter had requested this information and Ms. Chase provided it to the Abutter and forwarded copies*
193 *to the Board Members and to Attorney Pelech.* The subdivision met the side setbacks when it was
194 approved in 1961. The Wetlands setback requirements came much later.

195

196 Chair Field understood, and so stated for the record, Attorney Pelech's proposition to mean that the
197 Town could do nothing that would impair or impede Mr. Martin's right to build because he had vested
198 rights. Attorney Pelech said that as far as the frontage and the side setbacks are concerned that is
199 correct, but it could be argued that the wetlands setbacks were established to protect the Public's
200 "health, safety and welfare" and that would trump the vesting.

201

202 Chair Field opened the Hearing to those in favor of the proposal.

203 Chair Field closed the Hearing to those in favor without public comment.

204

205 Chair Field opened the Hearing to those either Neutral to the proposal, or just wishing to provide
206 information deemed relevant. Chair Field closed the Hearing to those neutral to the proposal without
207 public comment.

208

209 Chair Field opened the Hearing to those Opposed to the proposal.

210 **Jeff Hillier, 3 Glendale Road** – said that he built his house in 1967 and when he added a garage a few
211 years later and learned that he had to get permission from the Town because he was 17.5-feet from the
212 property line. He said that he has since purchased additional land on that side so it doesn't matter
213 anymore, but wanted to mention it for the record.

214

215 **David Raymond, 69 Walnut Avenue** – said that the Applicant is appealing a decision of the Building
216 Inspector and the Town recently voted at the May Election to give the Building Inspector more authority
217 and the Board should uphold the Building Inspector's decisions concerning building permits and take his
218 recommendations that the Applicant should request variances for what he proposes to do to his
219 property.

220

221 **Michael Saal, 7 Hampshire Road** – said that he went through the legal briefs and wanted to make a
222 couple of points. He said that fifty (50) years is a long time for a development. The Town has already
223 paved the roads so the development is not actively being developed.

224

225 **Don Corcoran, 11 Hampshire Road** – said he doesn't object to Mr. Martin developing his lot, but a
226 house too close to his property line will diminish his property's value and affect his privacy. He is also
227 concerned that water runoff would affect his property and septic system. He said that he would like to
228 see a smaller house proposal that would not require variances to side setbacks. Chair Field mentioned
229 that a document was submitted by the Applicant today with the Zoning Administrator that deals with
230 valuation of property. A copy was provided for public inspection.

231

232 **David Peters, 6 Hampshire Road** – said that his house is on the opposite lot to the lot in question and
233 said that he is opposed to the Board granting the petition for approval based on this lot being a

234 “grandfathered” lot; it would be like throwing out all the rules and regulations that have been in effect
235 since 1961.

236

237 **William Needham, 15 Hampshire Road** – said he was opposed to this proposal and was present at the
238 last Hearing. Chair Field said that he wanted to make it clear that the last proposal was properly
239 withdrawn by Applicant before a Decision was reached, and, therefore, what might have been
240 presented has no direct bearing on this Case. This evening’s case is a new Case in all respects. Mr.
241 Needham said that the wetlands ordinance is a critical component for the Town when looking at the
242 Little River. He said that the neighborhood flows back into the Hobbs Marsh which outflows into the
243 Little River. He referred to the document written by Chris Ganotis, Chair of the Conservation
244 Commission, titled Little River Continues to Disintegrate at Accelerated Levels.

245

246 **Tom Argue, 6 Kimberly Drive** – said that he is concerned about the wetlands; he owns the wetlands that
247 this subject lot would drain into. He said he is concerned with pesticides and fertilizers they may use on
248 the lawn that would be going into the wetlands. He said the lot of wetlands that he owns is
249 approximately 1/3 of an acre.

250

251 Chair Field asked if anyone from the audience could provide drainage information.

252

253 **Arthur Nadeau, 34 Pine Road** – said that the lot drains through a 12-inch culvert underneath Kimberly
254 Drive. He commented the Mr. Hobbs sold the lots over a period of time to control his income.

255

256 Attorney Pelech wanted to make it clear for the record that it’s up to the Courts to decide whether or
257 not vesting trumps the wetlands ordinance or the wetlands ordinance trumps vesting. He read Attorney
258 Matt Serge’s opinion and disagrees because he “lumps” all the setback requirements together. He said
259 that there are no culverts on the Martin property; water sheet-flow runs onto Mr. Argue’s property
260 from Mr. Martin’s property; Mr. Argue has a 12-inch culvert that runs across Kimberly Road underneath
261 the road. Mr. Martin’s lot abuts up to Mr. Argue’s lot, which is a very wet lot.

262

263 Mr. Buber asked Attorney Pelech at which point did the Glendale Subdivision become vested by
264 common law. Attorney Pelech said that vesting occurs when a project becomes substantially complete.
265 Mr. Buber commented that in 1974, 31 of the 48 lots were developed or sold; would the vesting have
266 started then? Attorney Pelech said that he would say in 1974 the subdivision had vested rights. Mr.
267 Buber asked if any other variances have been requested or approved in Glendale Park since 1961 or
268 1974 and Attorney Pelech said that there have been, but not too many because the houses were built
269 pre-wetlands zoning ordinances. Mr. Buber referred to the Case Law submitted with the application,
270 and quoted a section from Henry and Murphy v. Town of Allenstown “...This does not mean, however,
271 that the plaintiff and its successors in interest may disregard the town zoning ordinance in its entirety.
272 In addition to the lot size requirement, that ordinance also restricts construction to that of one-family
273 and two-family homes. This restriction is reasonable and does not touch upon any vested rights of the
274 plaintiff. Accordingly, although the plaintiff may develop the remaining sixteen lots without regard to
275 the town’s lot area requirement, it may only build one-family and two-family homes...”... he said that the
276 Court took the position that you can’t totally ignore changes in the Zoning Ordinance or Regulations. He
277 said that even if this is a vested property subsequent Zoning Ordinances can apply. Attorney Pelech
278 said, “Yes, as long as they are reasonable”.

279

280 Mr. Landman referred to Zoning Ordinance provision, Article IV, Section 414.5.G.3, Drainage, and said
281 that it is his understanding that water on the property shall stay on the property and not drain onto

ZBA Meeting Minutes

282 neighboring properties. Attorney Pelech said that there are new State Laws that say you cannot
283 increase the rate or the amount of water runoff onto an adjacent property.

284

285 **Glenn Martin, 11 Evergreen Drive** – noted for the record that his address on his application was
286 incorrect and that it should be 11 Evergreen Drive, North Hampton. He showed a map of the original
287 subdivision showing the topography and said that nothing has changed. He said the water leaving Mr.
288 Argue’s property goes onto his property. The plan he referred to was the “original plan” showing the
289 original elevations of Glendale Park. Mr. Martin agreed to submit a copy of the Plan into the record.

290

291 Chair Field closed the Public Hearing portion of the Case.

292

293 Mr. Landman had a further question of Mr. Martin; Chair Field invited Mr. Martin to return to the
294 podium to respond to Member Landman.

295

296 Following completion of the exchange, Chair Field declared the Public Hearing closed.

297

298 Chair Field said that the Board needs to determine whether or not the “wetlands setback” ordinances as
299 they apply to the subject lot are sufficient to impact the Board’s decision as to whether the lot is
300 “grandfathered” to all such provisions.

301

302 Mr. Buber said that the crux to the case is the Applicant feels that, under Common Law Standards for
303 Vesting, they are immune from subsequent changes to the Zoning Ordinances.

304

305 Chair Field and Mr. Buber agreed that the Applicant is basically saying that the Building Inspector’s
306 interpretation is that the Applicant needing Variances is wrong, and that the Board should favor the
307 Applicant’s view rather than that of the Building Inspector.

308

309 Mr. Landman said that because the wetlands ordinances have evolved over a period of time that they
310 cannot just be put aside. He said that he wouldn’t overrule the Building Inspector, and wouldn’t say the
311 Board doesn’t have a right to evaluate whether or not variances are needed for the wetlands.

312

313 Chair Field said that Mr. Landman has made observations that Little River is in danger of contamination
314 and if the Board allowed this to go forward without conditions or restrictions it would conceivably
315 contribute to the continuing and possible future contamination of the Little River and, in the interest of
316 public health and safety, that is what the “wetlands ordinances” are intended to protect.

317

318 Mr. Fullerton said that there seems to be Case Law for vested rights and there has been a succession of
319 ownership of the property to Mr. Martin today. He said he thinks it’s arbitrary for the Board to pick and
320 choose which ordinances trump the vested rights. He said after reviewing the Case laws submitted with
321 the Application he didn’t see where specific town ordinances trumped vested rights. He said when an
322 ordinance pertains to health and safety issues it’s a weighty argument that that would trump vested
323 rights. He said he has a difficult time singling out the last lot as the one contributing to the
324 eutrophication of that body of wetland. He said that the tax card on the Martin property shows it’s
325 assessed at \$145,000 which seems more substantial than just a piece of land you can have a picnic on.

326

327 Chair Field commented that the landowner has the right to seek an abatement if they feel the
328 assessment is unreasonable.

329

ZBA Meeting Minutes

330 Mr. Lagassa said the Assessor probably assessed the property based on the conditions as they exist
331 today, which would take into consideration the setbacks on the property according to the current
332 ordinances. He said that the Board is called upon to make a legal decision and the Board should make a
333 decision whether it's the right or wrong; expressing an opinion is the right decision in this instance. He
334 referred to the opinion from Attorney Serge and is persuaded by the logic, as well as, Attorney Pelech's
335 admission that there are certain kinds of changes in the law that could potentially trump the vested
336 rights. He said in his opinion, given the importance of the wetlands as evidenced in the Master Plan and
337 recent news articles, the general public would agree that the wetlands ordinances should trump the
338 vested rights. He said the Applicant can appeal the decision and the Board can then find out how the
339 Courts feel about it.

340
341 Chair Field asked Attorney Pelech if he was aware of any New Hampshire Supreme Court case since
342 2010 wherein the Court has established criteria for a "line" between permissible changes and non-
343 permissible changes as such relate to "vested rights"? Attorney Pelech said he had a case in North
344 Hampton Little Boar's Head District where Little Boar's Head administrators had applied the AWL Power,
345 Inc. v. City of Rochester Case, and decided that AWL Power Case trumps the wetlands. Chair Field
346 suggested that such issues might have been case specific.

347
348 Mr. Buber said that Case #2012:02 has nothing to do with setbacks; it is an Administrative Appeal and
349 the Applicant is saying that Glendale Park falls under the doctrine of Common Law Standard for Vesting;
350 that he has vested rights immune to subsequent changes to the Zoning Ordinances. He referred to
351 Henry and Murphy v Town of Allenstown – "...does not mean the plaintiff and his successors may
352 disregard the town zoning ordinance in its entirety...". He referred to a legal opinion for a 2010 ZBA
353 Case that also stated that. He said that, in his opinion, this property is not totally immune to all Town
354 ordinances that have come since this property was vested, and concurred with Mr. Lagassa that the
355 Board needs to make a decision.

356
357 Chair Field said that it would be a dramatic change to what zoning is all about from the point of view of
358 "safety, health and welfare". There are elements of the Zoning Ordinance that cannot be disregarded.
359 It's the Board's job to decide whether circumstances of this case permit, as suggested by the Applicant,
360 an indefinite and complete waiver to the Zoning Ordinances, or whether Town ordinances, in part, are
361 applicable to it.

362
363 Mr. Landman echoed what Mr. Buber said and said that lot sizes have changed in Town, and not
364 allowing the landowner to build on the lot might be considered to be a "taking", but that Zoning does
365 have a place, and the Courts may be asked to ultimately decide the question

366
367 In rethinking the matter, Mr. Fullerton said that the subject lot may indeed have "vested rights", but is
368 not immune to all of the Town's Zoning.

369
370 **Mr. Buber Moved, and Mr. Lagassa Seconded, the Motion to deny the Appeal of an Administrative**
371 **Decision based on case law and the discussion this evening regarding the Case.**

372
373 **Chair Field said that the Motion ought to include in it, if passed, the Board's ruling on the Case is**
374 **based on Henry and Murphy v. Town of Allenstown. The Board agreed.**
375 **The Vote was unanimous in favor of the Motion (5-0).**

376
377 Chair Field reminded everyone of the thirty (30) day appeal period.

378
379 Chair Field then stated that those who spoke in the previous Case, just decided, needed to stay if they
380 wanted to speak and offer evidence with regard to the matters raised in Case #2012:03, to now be
381 heard

382
383 **2. Case #2012:03 – Glenn Martin, 150 Mirona Road, Portsmouth, NH 03801. Property location: 9**
384 **Hampshire Drive, North Hampton, NH 03862; M/L 007-136-000; Zoning District: R-1.** The Applicant
385 requests the following Variances: (1) Article IV, Section 406.2.2 for a lot of record with 99.88-feet of
386 frontage where 100-feet is required, (2) Article IV, Section 406 relief from the side yard setbacks of 17-
387 feet +/- where 25-feet is required, (3) Article IV, Section 409.8.a relief for a septic system setback of
388 70.5-feet where 75-feet is required, and (4) Article IV, Section 409.9.A.2 relief for a structure 21.4-feet
389 from poorly drained soils where 50-feet is required.

390
391 In attendance to present the Application were:
392 Glenn Martin, Owner/Applicant
393 Attorney Pelech, Wholey and Pelech Law Offices
394 Sandy Breton, Septic System Designer
395 Steve Rikers, Soil Scientist, Sand Piper Environmental

396
397 Attorney Pelech began the presentation by noting that the lot has 99.88-feet of frontage where 100-feet
398 is required.

399
400 Chair Field asked if the Board would consider waiving the Procedural Rule as to presentation
401 requirements regarding the limited matter of .12 feet of frontage. The Board had no issue. He then
402 asked if anyone from the Public wished to speak against it. The Chair stated that due to the “materiality”
403 of the request it would deem the “factors” involved to be “self-evident”. Chair Field then asked Attorney
404 Pelech to proceed with the presentation of the other “variance” requests.

405
406 Attorney Pelech said that the major variance request is for wetlands setback. He said they had to
407 balance the front yard setback with the wetlands buffer. The proposed septic would be 70.5 feet away
408 from wetlands where 75-feet is required. He said that it is a Clean Solutions septic system; the same
409 system the Planning Board had approved for each individual lot in Greystone Village.

410
411 Attorney Pelech said the client’s team attended the most recent Conservation Commission meeting and
412 made a similar presentation. He further stated that the Commission decided to bring in their own
413 expert to look at the site and report to them. Attorney Pelech has not yet received any information
414 from the Conservation Commission. Ms. Chase said that she did not receive any information from the
415 Conservation Commission.

416
417 Attorney Pelech said that they would not be able to put a livable house on the lot that would conform to
418 the setback requirements. They submitted a picture of a proposed house and said that it would be
419 consistent with the neighborhood; a two-bedroom ranch style. He said if they were to conform to the
420 setbacks the house would be 5-feet wide and that is the “hardship”.

421
422 **1. Would granting this variance be contrary to the “Public Interest” or “Public Safety”?**
423

424 Attorney Pelech said that the Supreme Court came down with a two part case, where they stated that
425 the spirit of the ordinance and the public interest are so interrelated that they can be decided with an

426 either or test; if granting the variance will not alter the substantial character and nature of the
427 neighborhood then it's not contrary to the spirit and intent of the ordinance nor is it contrary to Public
428 Interest, or if the Board finds that granting the Variance will not threaten public health safety and
429 welfare then it's not contrary to the Spirit and Intent of the Ordinance and not contrary to the Public
430 Interest. He said that the application meets the test; the house will be similar to other houses in the
431 neighborhood. He said it won't threaten public health and welfare; they are proposing to mitigate
432 water runoff with "rain gardens" to capture roof runoff. In addition they are proposing to plant a natural
433 buffer along the poorly drained soils with noninvasive species plants.

434

435 **2. Would granting this variance be consistent with the "Spirit of the Ordinance"?**

436

437 If the Board thinks that the benefit to the public by denying the variances is greater than the hardship on
438 Mr. Martin then the Board should deny the variance. The hardship on Mr. Martin, if denied, is
439 substantial because it basically renders the lot unbuildable.

440

441 **3. Would "Substantial justice" be done by granting this variance? (See above)**

442

443 **4. Would granting this variance result in "Diminution of Values" of surrounding properties?**

444

445 Attorney Pelech said that they heard the concerns from the Abutters about drainage and they believe
446 they can alleviate those concerns. They plan to install "rain gardens" and told the Conservation
447 Commission that they will not use chemicals on the lawn. The Board was in receipt of a letter from
448 Realtor Nancy Beveridge stating that a house built on the lot would not result in diminution of value, he
449 read some of her letter into the record: "I have seen the plans and location for this home as I have sold
450 both abutting properties in the past. If a variance is denied, a smaller, awkward looking home will need
451 to be designed which will not be in keeping with the look or size or price range of the neighborhood and
452 without room for a garage, cars and other items are more visible in the yard or driveway. The garage on
453 the right will also give a bit more privacy to the home to the right as garage space, not living space will
454 abut the rear of that home." Houses that sold in that development over the past two years range from
455 \$295,000 to \$385,000. The Board had a copy of the letter.

456

457 **5. Would literal enforcement of the provisions of the ordinance result in an "Unnecessary Hardship"?**

458

459 Attorney Pelech said with the new Zoning Ordinances the old lot has to comply which would result in a
460 5-foot wide house, and if relief is not granted the property cannot be used, which basically is a "taking"
461 of Mr. Martin's property that he has been paying taxes on all along as a buildable lot. There are special
462 conditions in regard to this lot that creates an unnecessary hardship on the applicant. The wetlands
463 ordinance is written to protect the wetlands and he thinks the Applicant is doing that by putting in a
464 clean solution septic system; an aerobic pretreatment system. He said that there is no fair and
465 substantial relationship that exists that applies to this particular piece of property; therefore a variance
466 is needed for those special conditions. The use is allowed by the Ordinance, the house will be no larger
467 and the setbacks will be roughly the same as the houses around there; it's obviously a reasonable use.
468 Attorney Pelech said that the real hardship lies between the crunch of the front setback and the
469 wetlands setback and the Board needs to consider some relief so that something could be done on this
470 lot.

471

472 Mr. Buber referred to [Case #2011:07](#) – Glenn Martin, and said that in his view this case is identical to
473 [Case # 2011:07](#) heard by the Board in September 2011. He explained that the Board asked for a lot of

474 information from the Applicant before he withdrew his Application; information discussed at that time
475 appears to Mr. Buber to be germane to the present Case. The Board, at that time, had requested the
476 following information:

- 477 1. Stormwater Management Plan
- 478 2. The Applicant to address the five (5) issues stated in the letter submitted by the Conservation
479 Commission and a report from the Conservation Commission relative to the five (5) issues and
480 relative to any environmental impact.
- 481 3. The percentage of impervious surface.
- 482 4. An actual house plan
- 483 5. A Soils Scientist's verification that the proposed septic system is the best system for that
484 particular lot.
- 485 6. The proposed house to be reduced to fifty (50) feet so that it would meet the sideline setbacks
486 and not require a variance to that.
- 487 7. Request a variance from the required 100-feet of frontage where 99.88-feet is proposed.
488

489 Mr. Buber said that, except for a "stab" at a house plan, out of the remaining six (6) items, five (5) of
490 them seem to be still open and unresponded to in the current Application. He asked Attorney Pelech if
491 he knew the status on them.

492
493 Attorney Pelech said that he could only report on the recent Conservation Commission matters.
494

495 Chair Field commented that the Conservation Commission was keenly involved in last year's case and,
496 observing their absence, was wondering if they thought that their information contributed from last
497 year would automatically carry over to this Case.
498

499 Attorney Pelech said the concerns of the Conservation Commission were the type of septic system they
500 would be using, flagging the wetlands, and mitigating factors. He said they have all of that information.
501

502 Chair Field then asked that Lisa Wilson, who serves as a Conservation Commission Alternate, as well as,
503 a Zoning Board Alternate whether or not she could enlighten the Board on any information that
504 transpired at the Conservation Commission. Ms. Wilson spoke as a member of the audience and said
505 that she concurs with Attorney Pelech's assessment, but said that the Applicant did say he would
506 consider building a "pervious" driveway. Attorney Pelech said that was true.
507

508 Chair Field said that the septic plan (Plan") is not "stamped" by a registered professional, but references
509 the Septic Designer. He commented that there is a lot of small writing on the plan which is difficult to
510 read. He said the Town (several Boards) are jaundiced about "Rain Gardens" and the new "clean
511 solution" type septic systems. He would like more readable and acceptable information on both the
512 "rain gardens", and the Clean Solution septic system. He would also like to see a drainage pattern.
513 Chair Field commented that there are tremendous administrative and financial burdens associated with
514 continuing maintenance, repair and replacement on/of "rain gardens".
515

516 Ms. Sandy Breton designed the septic system and went over the operational and administrative
517 procedures. She explained that her Plan has been presented to the Building Inspector and has been
518 "denied" because they need a variance to the setback requirement. The Plan has not been submitted to
519 Rockingham County Conservation District (RCCD) or NH Department of Environmental Services (NHDES).
520 The Plan is not stamped because it is a "draft" copy. The Plan has to be approved by RCCD before it can
521 be submitted for approval to NHDES.

522

523 Ms. Breton went over the design specifics:

- 524 • Designed for a two (2) bedroom home.
- 525 • Clean Solution system which is a pretreatment system, designed for a two-bedroom home, but
- 526 is the same sized system used for a four-bedroom home.
- 527 • The system is made by Waste Water Alternative and they have reviewed the plan and their only
- 528 comment was that the plan did not note that it needs risers above the tank; in their opinion it's
- 529 fine to submit to NHDES according to State standards.
- 530 • It meets the 50-foot State required setback and the 10-foot State required side setback.
- 531 • The reason its location is 25-feet from the front of the lot is because of the water line.
- 532 • The system is a gravity system and does not need pumps; it works like a mini treatment plant.

533

534 Mr. Landman commented that the house plan shows three (3) bedrooms and the septic design shows
535 two (2) bedrooms. Mr. Martin said that plan was the original proposal and that the ranch will be a two-
536 bedroom. Mr. Landman asked Ms. Breton to find out how long the septic system would last during a
537 power outage. Ms. Breton said that it is a 2,200 gallon tank and probably would last for a week without
538 power. Ms. Breton said that the State required setback for the tank is 5-feet and the setback for the
539 leach field is 10-feet.

540

541 Chair Field asked if the Case were to be continued would the Applicant be able to submit the septic plan
542 to the Rockingham County Conservation District ("RCCD") for approval prior to the next meeting. He
543 said the Board is authorized to request a third (3rd) party technical review, but could wait on such review
544 until the Applicant receives RCCD review. Mr. Fullerton suggested that if the "variance" is approved the
545 Board could make it subject to RCCD approval. Ms. Breton said they could send it to RCCD for approval,
546 but it's not the typical process.

547

548 Ms. Breton said that location of the house is the best balance because if you move the house closer to
549 the road it takes away from the leach field. They need the variance from the 75-setback for the septic
550 because the water line is in the way. She also commented that the impervious area will be greatly
551 reduced with a pervious driveway.

552

553 Steve Rikers said that he attended the April 19, 2012 Conservation Commission Meeting and the Chair
554 suggested the Applicant come up with a mitigation plan for the water runoff. Mr. Rikers said that given
555 the size and the constraints of the lot they lack room to do a lot. He said that they are looking to
556 mitigate stormwater runoff and overland sheet flow into the wetlands. Mr. Rikers said that they cannot
557 control the amount of rainfall on the lot, but they have some control over where the water goes and
558 how the water runoff is treated.

559

560 Mr. Rikers explained that the water runoff from the roof will run into the gutters and drain into the
561 ground spouts and flow into the two (2) proposed "rain gardens". They also propose an added wetland
562 buffer enhancement area with planted shrubs along the wetlands.

563

564 Mr. Rikers said that he has installed "rain gardens" for eleven (11) years but does not inspect them so he
565 does not know the actual effective life span of a "rain garden". Mr. Buber asked if a "rain garden"
566 expert would be consulted regarding installation of the "rain garden", and Mr. Rikers said that he
567 doesn't know of any "rain garden" experts. Mr. Field asked what the cost was to monitor a "rain
568 garden" after installation and Mr. Rikers said that it depended on how much the Inspector charges. The

569 Inspector would be looking for functionality to see how long the water remains in the garden and see if
570 it is receiving treatment. Chair Field observed that the Town's previous Building Inspector/Code
571 Enforcement Officer had publicly cautioned the Board to be extremely careful and critical as to the use
572 of "rain gardens" to control "storm water" runoff, in that site monitoring and enforcement of
573 maintenance, performance and operational standards was administratively difficult from a practical
574 point of view. To the Chair's knowledge, there has only been one (1) "rain garden" approved to date by
575 the Board, and that has proven somewhat problematical to many.

576

577 Mr. Rikers said that "rain gardens" are an excavated area that will hold water longer than another area.
578 He said that they only work on certain sites; they need gravity. He said the "rain garden" will treat the
579 roof runoff and any overflow from the "rain garden" will flow into the buffer enhancement area and be
580 treated there.

581

582 Mr. Landman asked what the difference was between a "dry well" and a "rain garden". Mr. Rikers said
583 that "rain gardens" have plantings and a "dry well" does not.

584

585 Mr. Fullerton asked if the Applicant would bring in a sample of the 'grass paver' they propose to use for
586 the "pervious" driveway. Attorney Pelech said that they would.

587

588 Attorney Pelech said that as far as maintenance for a "rain garden" it is just like what would be required
589 for drainage swales on commercial properties that require an annual inspection.

590

591 Chair Field invited public comment "In Favor", or "supportive", of the Application.

592

593 **David Farrell, 21 Kimberly Drive** – said that all the lots in the neighborhood are non-conforming and
594 that Mr. Martin isn't asking for anymore relief than any other person in the neighborhood would need
595 to ask for to do anything on their properties. He thanked Mr. Martin for holding a meeting at the
596 Library to explain his proposal for those in the neighborhood that were interested. He said that there
597 seems to be more scrutiny on fresh rain water than on septic systems.

598

599 Ms. Breton said that regarding maintenance with this particular septic system, the Company has the
600 owner sign an agreement to maintain the system and the Company does a yearly inspection to see if the
601 septic system needs to be pumped out.

602

603 Chair Field then opened the Public Hearing to those who would like to offer neutral or general
604 information on the proposal.

605

606 **Phil Wilson, 9 Runnymede Drive** – said that the Planning Board approved a number of high-tech aerobic
607 septic systems in Greystone Village with a condition that every system have an alarm installed on it and
608 required the Developer to post a certain amount of money to be maintained in perpetuity in case they
609 failed and needed to be repaired. Mr. Wilson said the Planning Board is concerned with septic systems
610 as well as water runoff that carry fertilizers, pesticides and antifreeze into the wetlands.

611

612 Chair Field noted for the record that Mr. Wilson had served as the Planning Board Chair for many years,
613 and is currently a member of the Select Board. He is known to be familiar on the issues involved.

614

615 **Michael Saal, 7 Hampshire Road** – asked if the Applicant knew where the water line was on his property
616 and how far it is from their property. He asked how high the water table was on the lot. Mr. Rikers said

617 that the water table is high but doesn't impact the ability of the "rain garden" to do its job. Ms. Breton
618 said that she will add Mr. Saal's water line on the plan.

619

620 **Tom Argue, 6 Kimberly Road** – said that the lay of the land is "bowl" shaped and the foundation is in the
621 middle and the driveway is uphill, wouldn't that negate the effects of the "rain gardens" from the
622 subject lot. He would like to see a water drainage plan.

623

624 Chair Field opened the Public Hearing to those Opposed to the proposal.

625

626 **William Needham, 15 Hampshire Road** – said that his lot is downhill from the wet lot and the abutting
627 lot to the subject lot is always wet. Mr. Martin asked Chair Field to ask Mr. Needham if he used lawn
628 chemicals and fertilizers. Mr. Needham said that he uses non-nitrate fertilizers but didn't know the
629 name of it off the top of his head.

630

631 **Michael Saal, 7 Hampshire Road** – said that the elevations shows a walkout basement and is concerned
632 with what happens to the front of the property; if it will end up on his property. He said that a new
633 house in the development had their system fail and needed a replacement. He said it's good to see a
634 state of the art system being proposed. He is also concerned that the plans submitted are incomplete
635 and there is a contradiction because the septic is designed for a two-bedroom and the house picture
636 shows a three-bedroom. Chair Field said that they would make a note of it.

637

638 **David Raymond, 69 Walnut Avenue**, said that everyone has to comply with new zoning; he said that he
639 had to apply for a variance to construct his garage. Chair Field asked if Mr. Raymond was an abutter to
640 the property and he said that he was not, but he has been a Town Resident for many years and that his
641 daughter lived in that neighborhood.

642

643 **David Peters, 6 Hampshire Road** – said that he has lived in his house for 44 years and there are very
644 poorly drained soils; every house in the neighborhood has a sump pump. He said that he will be looking
645 across the street at a state of the art septic system with a house behind it and doesn't see how that will
646 improve the value of his property across the street. He asked if the septic could be moved to the back of
647 the lot. Ms. Breton said that it could not because it wouldn't comply with State setbacks.

648

649 **John Colman, 8 Hampshire Road** – said that he "piggy backs" what Mr. Peters said. He said that he
650 doesn't believe that just because a "Realtor" states something that it is fact.

651

652 Chair Field said that the Applicant had submitted a professional opinion from a Realtor, and a Realtor
653 has more expertise and knowledge on the "market" than the Board Members. He said that Mr. Peters,
654 or anyone else, can submit evidence on the property values, if they would like.

655

656 Mr. Martin said that there will be no "candy cane" pipe on the property and he talked about moving the
657 stonewall forward to make a natural stonewall across the front. He said that the elevation difference is
658 two (2) feet in the front behind the stonewall and won't have a negative appearance to the neighbors.

659

660 **Tamara Saal, 7 Hampshire Road** – asked if the Board would request that the Applicant provide an
661 elevation plan of the proposed house.

662

663 Chair Field said that there is a picture of the house as part of the Application and it is up to the Board to
664 decide if they want the Applicant to submit a plan with the house elevations.

ZBA Meeting Minutes

665 Mr. Buber said that Mr. Martin had applied for Variance in September 2011, to be allowed to put a
666 septic system on the lot to sell it and asked him if that was still his intention not to build the house
667 himself.

668
669 Mr. Martin said that he is not a builder. He said he inherited the lot and is not sure what he will end up
670 doing with it, whether he would build a house for himself to live in or build a house and sell it. He said
671 that he would not commit to what he will do because he didn't know for sure. He said that he is going to
672 research his records because he thinks an abatement on the assessment was applied for in the past and
673 denied.

674
675 Chair Field then "Closed" the Public Hearing.

676
677 Chair Field declared a five (5) minute recess at 10:00 p.m.
678 Chair Field reconvened the Meeting at 10:05 p.m.

679
680 **Mr. Buber Moved, and Mr. Landman Seconded, the Motion to approve the Variance request from**
681 **Zoning Ordinance Article IV, Section 406.2.2 to allow 99.88-feet of frontage where 100-feet is**
682 **required.**

683 **It was noted that the Board earlier in the Meeting had taken "notice" of the "de-minimus"**
684 **circumstances relating to this very limited aspect of the Case.**
685 **The Vote was unanimous in favor of the Motion (5-0).**

686
687 The Board then briefly discussed additional information they would like to receive from the Applicant.
688

689 The Board then addressed the "side yard" setback issue, and agreed that it was conforming under the
690 "Vesting Rights" principle espoused by Attorney Pelech.
691

692 **Mr. Fullerton Moved, and Mr. Lagassa Seconded, the Motion to approve the Variance requested as to**
693 **Article IV, Section 406 to allow a side yard setback of 17 +/- feet where 25-feet is required. ("Vested**
694 **Rights" principle.)**

695
696 Discussion ensued to include that the basis for the Motion and vote was based upon the "Vesting
697 Argument" advanced by Attorney Pelech and articulated by the Supreme Court in Henry and Murphy v.
698 Town of Allenstown. Mr. Buber did not agree with that; the Board then agreed that it did not need to
699 be included.

700
701 Mr. Peters, an observer in the audience, requested permission to speak to the Board during the
702 "Deliberation" portion of the Meeting.

703
704 Chair Field asked if it was the Board's preference to waive the Rule to allow Mr. Peters to speak during
705 Deliberative portion of the Meeting. He asked for a "vote".

706
707 **Mr. Landman Moved to waive the Board's Rule and allow Mr. Peters to speak.**
708 **There was no Second to the Motion; the Motion failed.**

709
710 **The Vote was unanimous in favor of the Motion to grant the Variance to Section 406 – "Side yard**
711 **setbacks (5-0).**

712 The Board agreed to continue Case #2012:03 to the June 26, 2012 Meeting and requested the Applicant
713 submit the following information prior to that Meeting:

- 714 1. Elevation of the house showing the effect of the stonewall and the mound of the septic system
715 in the front yard and how it might appear from across the road to the South.
- 716 2. A definitive statement that the septic system will serve only two (2) bedrooms within the house.
- 717 3. A septic system plan that shows the topography and reflects approval from the RCCD presented
718 in a larger format.
- 719 4. Full size copy of the 1961 plan showing the topography of the site and be able to compare it with
720 the septic plan that also shows the topography of the site.
- 721 5. Stormwater Management Plan that demonstrates how the surface water runoff will occur on
722 the site and how the site with the construction of the basement and foundation is likely to affect
723 the runoff from adjoining properties from both across the street and beside the house to see
724 how water flows down into the pocket and out the culvert.
- 725 6. Letter to Conservation Commission. The Chair will write to the Conservation Commission
726 inviting any comments they wish to make on this project.
- 727 7. Ratio of amount of impervious surface to the lot area.
- 728 8. Comprehensive plan of the "rain garden" and its cross sections. Statement and long term plan as
729 to "construction, maintenance, and repair" of the "rain garden"
- 730 9. 8 ½" x 11" sheet of paper sample of the material for the pervious driveway.
- 731 10. Thirteen (13) copies of all materials requested.
- 732

733 Attorney Pelech suggested the Members walk the site sometime before the next Meeting.

734

735 Chair Field reminded everyone of the thirty (30) day Appeal period. (It was later determined that, from
736 an administrative perspective, the actions taken on two (2) of the "variance" requests were integral to
737 the entire Case and, accordingly, were not deemed to be final actions, as the Case was being
738 "continued" to gather more information which may result in "reconsideration" of such actions.
739 Therefore, no "Notice Of Decision" letter(s) has yet been issued.)

740

741 **Other Business:**

742

743 **1. Board discussion on how to handle a review of the Rules of Procedures, individually or through a**
744 **Committee.** Chair Field ruled to continue the discussion on the Rules of Procedure to another Meeting.

745

746 **2. Communications/Correspondence and Miscellaneous - Report on Correspondence, dated April 26,**
747 **2012, forwarded to Town of Rye-re: Case #2012:01, Spink. (RSA 674:53)** – Chair Field reported on this
748 at the beginning of the Meeting.

749

750 **3. Such other business as may properly come before the Board (Workforce Housing Symposium).** Mr.
751 Lagassa attended the Workforce Housing Seminar, held in Exeter and suggested postponing discussion
752 to the next meeting. The Chair concurred.

753

754 **Mr. Buber Moved, and Mr. Fullerton Seconded, the Motion to adjourn at 10:30 p.m.**

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

756

757 Respectfully submitted,

758 Wendy V. Chase

759 Recording Secretary

Approved, June 26, 2012