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**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, September 25, 2012 at 6:30pm
Town Hall, 231 Atlantic Avenue
North Hampton, New Hampshire (“Meeting”)**

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These Minutes were prepared as a reasonable summary of the essential content of the Meeting, not as a transcription. All exhibits mentioned, or incorporated by reference, in these Minutes are a part of the official Case Record and available for inspection at the Town Offices.

Attendance:

Members present: Robert B. Field, Jr., Chair; David Buber, Vice Chair; George Lagassa and Phelps Fullerton. (4)

Member(s) absent: Robert Landman. (1)

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

Administrative Staff present: Wendy Chase, Recording Secretary.

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

Chair Field Called the Meeting to Order at 6:30 p.m.

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

Introduction of Members and Alternates - Chair Field introduced Members of the Board and the Alternates who were present (as identified above).

Recording Secretary Report - Ms. Chase reported that the September 25, 2012, Meeting Agenda was properly published in the September 14, 2012 edition of the Portsmouth Herald, and, posted, on the same date, at the Library, Town Clerk’s Office, Town Office and on the Town’s website.

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

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

45

46 **Unfinished Business:**

47 **Chair Field then indicated that he would be adjusting the usual Order Of Business to**
48 **accommodate the interests of the public, and, accordingly, directed the attention of**
49 **the Board to:**

50

51 **1. (Continued) #2012:03 – Property Owner: Glenn Martin, 11 Evergreen Drive, North Hampton, NH**
52 **03862. Applicant: Same as Owner; Property location: 9 Hampshire Drive, North Hampton, NH**
53 **03862; M/L 007-136-000; Zoning District: R-1. The Applicant requests the following Variances: (1)**
54 **Article IV, Section 409.8.a relief for a septic system setback of 70.5-feet where 75-feet is required,**
55 **and (2) Article IV, Section 409.9.A.2 relief for a structure 21.4-feet from poorly drained soils where**
56 **50-feet is required. This Case is “Continued” from the August 28, 2012, ZBA Meeting, additional**
57 **independent technical review by third (3rd) party was requested by Board.**

58

59 In attendance for this Application:

60 Glenn Martin, Owner/Applicant

61 Attorney Bernard Pelech, Applicant’s Counsel

62

63 The Board was in receipt of a request from the Applicant, Mr. Glenn Martin, to continue Case #2012:03 to
64 the October 23, 2012 Meeting.

65

66 Chair Field seated Ms. Wilson for Mr. Landman.

67

68 Attorney Pelech explained that, based on issues raised in the Technical Analysis performed by
69 Rockingham County Conservation District (“RCCD”), Mr. Martin is requesting a continuance so that his
70 Engineer would have time to address those issues before continuing with Case #2012:03 before the
71 Board.

72

73 Chair Field explained to the Applicant that the Board is looking for two (2) supporting pieces of evidence
74 from the Applicant (1.) A State of New Hampshire approved Septic Plan, and, (2.) a Drainage Plan that
75 from an engineering perspective is technically sufficient in the view of the Board to control surface
76 water drainage, and avoid the potential of unreasonable environmental damage to the Little River
77 drainage basin. Once the Board receives those two (2) items it will be able to move forward to making a
78 Decision.

79

80 **Mr. Lagassa Moved, and Mr. Fullerton Seconded, the Motion to grant the request to Continue Case**
81 **#2012:03 – Glenn Martin to the October 23, 2012, Meeting. Member Buber expressed his hope to the**
82 **Applicant that the information necessary for final deliberations would definitely be available to the**
83 **Board on October 23, 2012. He was assured by the Applicant that such would be the case.**
84 **The Vote was unanimous in favor of the Motion (5-0).**

85

86 **New Business:**

87

- 88 1. **#2012:08 – Property Owner: Sunny Brook Farm Realty, LLC., 144 Lafayette Road, North Hampton,**
89 **NH, 03862. Applicant: Same as Owner; Property location: 144 Lafayette Road, North Hampton, NH**
90 **03862; M/L 017-029-000; Zoning District: I-B/R.** The Applicant requests an Appeal of an
91 Administrative Officer (Building Inspector) alleging there is a violation of Article IV, Section 406.5 – A
92 lot in the I-B/R District shall not be utilized for both residential and business purposes.
- 93 2. **#2012:09 – Property Owner: Sunny Brook Farm Realty, LLC., 144 Lafayette Road, North Hampton,**
94 **NH, 03862. Applicant: Same as Owner; Property location: 144 Lafayette Road, North Hampton, NH**
95 **03862; M/L 017-029-000; Zoning District: I-B/R.** The Applicant requests a Variance from Article IV,
96 Section 406.5 to allow the continued use of the Apartment in the Commercial Building.

97
98 In attendance for these two (2) Applications:

99 Attorney Pelech, Applicant's Counsel

100
101 The Board was in receipt of a letter from Attorney Pelech, on behalf of his Client Mr. Marchese,
102 requesting a continuance of both Cases #2012:08 and #2012:09 to the October 23, 2012 Meeting.
103 Attorney Pelech explained that his Client is a critical Witness in both cases and was called out of Town
104 and unable to attend this meeting.

105
106 Chair Field said that, because the Cases have not yet begun to be heard by the Board, they would be
107 "Deferred"; rather than "Continued", to the October 23, 2012 Meeting. Attorney Pelech agreed.

108
109 Chair Field proposed that notice of the hearings of the Cases be re-published in the newspaper, but, that
110 the marginal incremental costs associated with re-publication be borne by the Town.

111
112 **Mr. Lagassa Moved, and Mr. Fullerton Seconded, the Motion to grant the "request to continue" from**
113 **Attorney Pelech, and, rather, "defer" consideration of Case #2012:08 and Case #2012:09 to the**
114 **October 23, 2012 Meeting, and to re-publish notice of Cases 2012:08 and 2012:09 to the time the**
115 **October Agenda is published in the newspaper.**

116
117 Mr. Buber asked Attorney Pelech if Mr. Marchese intended to go forward with the Cases at the
118 October 23, 2012, Meeting, and Attorney Pelech confirmed that they definitely intended on going
119 forward with the Cases at that Meeting.

120
121 **The Vote was unanimous in Favor of the Motion (5-0).**

122 **Approval of Minutes:**

123
124
125 Chair Field commented on the "Right to Know Law" – NH RSA 91-A and said that the manner in which the
126 Zoning Board has been handling the production of "Minutes" and "Decisions" is deemed appropriate
127 and in general conformance with "best practices", but, nevertheless, he wanted to make it clear that
128 when the Recording Secretary sends out copies of "draft" minutes to all Members they should not
129 communicate amongst each other as to content changes or comments, but, rather, should
130 communicate directly with the Recording Secretary or Board Chair; action on "draft" minutes must take
131 place at a Public Hearing. He said that it is not the same with "Decision Letters" because the Chair signs
132 them, but, if there ever were a decision that required Board review then they would follow the same
133 procedures as with "draft" Minutes and contact only the Recording Secretary and/or Chair.

134

135 **1. August 28, 2012, Regular Meeting Minutes:** Chair Field seated Mr. Williams for Mr. Fullerton to
136 review the Minutes because he had been seated for Mr. Fullerton at the August 28, 2012 Meeting.
137 Chair Field again commented that, pursuant to NH RSA 91-A, when “draft” minutes are distributed to
138 the Members by the Recording Secretary, they can only make comments on the “draft” minutes to the
139 Recording Secretary or Chair; not each other. Typographical corrections were made to the Minutes.
140

141 **Mr. Lagassa Moved, and Mr. Williams Seconded, the Motion to approve the August 28, 2012 Meeting**
142 **Minutes as amended.**

143 **The Vote was unanimous in favor of the Motion (4 in favor, 0 opposed and 1 abstention). Alternate**
144 **Wilson abstained for reason that she had not participated in the August Meeting.**
145

146 **Other Business/Reports:**

147
148 Mr. Williams then stepped down and retired at the suggestion of Chair Field, and Mr. Fullerton rejoined
149 the Board.
150

151 Chair Field reported on the Continuing Legal Education (“CLE”) Seminar, sponsored by the NH Bar
152 Association, on the “Right to Know Law”, NH RSA 91-A, that he attended with Mr. Buber in Concord, NH
153 on September 21, 2012. He encouraged the other Members to attend a Seminar on the “Right to Know
154 Law”, NH RSA 91-A. He commented on the upcoming Seminar to be held by the Local Government
155 Center (“LGC”) where a portion will cover the “Right to Know Law”, and stated that he generally has a
156 high regard for the LGC and its legal expertise, but cautioned that the LGC is currently embroiled in a
157 “Right to Know Law” issue. He reminded everyone if they were interested in attending they should
158 contact Ms. Chase.

159 Chair Field recommended that the Board Members download, print, and review the N.H. Attorney
160 General’s Memorandum (2009) on the” Right to Know Law”. He has already downloaded a copy and will
161 forward a copy electronically for those who are interested. He and Mr. Buber went over some of the
162 highlights of the Seminar:

- 163 • Section 91-A:8 has been repealed and is being reenacted, and effective January 1, 2013, if the
164 court finds that an Officer, Employee or other Official of the Public Body or Public Agency has
165 violated any provision of RSA 91-A **in bad faith** the Court shall impose against such **person** a civil
166 penalty of not less than \$250.00 or more than \$2,000.00 and require that person to attend a
167 class on the “Right to Know” law at their own expense.
- 168 • The Chair does not ENJOY the prerogative to unilaterally grant continuances requested by an
169 applicant, even though it may have been allowed under the Board’s “Rules of Procedure”,
170 Section 5.G. “...or otherwise defer a Public Hearing on an Application has been (sic) filed by such
171 Applicant.” Chair Field recommended that the Board remove that provision from the “Rules of
172 Procedure”.

173
174 **Chair Field Moved, and Mr. Lagassa Seconded, the Motion to delete, under “Section 5 - Meetings,**
175 **subparagraph G”, the words “...or otherwise defer a Public Hearing on an Application has been (sic)**
176 **filed by such Applicant, and place a period after the word, withdraw.**
177

178 **Under the Board's "Rules of Procedure", Section 9 – Amendments/Waivers, subparagraph A, it states:**
179 **"These Rules of Procedure may only be amended or revised by a super majority Vote, meaning four**
180 **(4), of the primary Board Members, and unless waived by a super majority, and only upon notice to all**
181 **Board members". Chair Field had previously Noticed all Board Members of the conundrum presented**
182 **by the offending clause in the "Rules of Procedure".** There were four (4) primary Board members
183 present and voting.
184

185 **The Vote was unanimous in Favor of the Motion (4 in favor, 0 opposed and 1 abstention). Ms. Wilson**
186 **abstained because she is not a Primary Member of the Board.**
187

188 Chair Field then reported on the status of the Barr-Moran Case (Beach Plum) before the Superior Court.
189 He said that he attended the Court Hearing in Exeter and the Superior Court postponed action on the
190 case until after the Planning Board and Little Boar's Head Zoning Board acted on their cases. Chair Field
191 said that, in a conversation with Attorney Serge, Attorney Serge indicated that he is not entirely clear
192 on precisely what action the Planning Board took when it recently considered the Barr-Moran request
193 for a " Conditional Use Sign Permit", nor is he clear on the effect of the Decision of the Planning Board.
194 He reserved the right to look into the matter further, and see what effect, if any, that such action will
195 have on the litigation.
196

197 Barr-Moran had applied to the Planning Board for a "Conditional Use Sign Application", and Chair Field
198 summarized the action of the Planning Board as he understood it from watching the re-broadcast of the
199 Meeting on Channel 22, that the Planning Board determined that, with the "sculptures" in their current
200 locations, they did constitute " signs", but, if they were moved to an area further removed from public
201 view, they were not "signs", and, therefore, did not need a "Conditional Use Sign Permit". He further
202 explained that the Planning Board Case is still within the thirty (30)days appeal period, and there is a
203 possibility that the Case could be appealed to the Zoning Board under the Planning Board
204 "...interpretation of the Zoning Ordinance..." provision, and that further discussion by the Board should
205 best be limited at this time.
206

207 Chair Field then reported that he had further spoken with the Town's Attorney, Matt Serge, and they
208 discussed what Mr. Serge would be doing with the prosecution on the Barr-Moran Case that is already
209 on Appeal. Attorney Serge asked that Chair Field seek the advice from the Zoning Board Members on
210 whether or not they wished for him to request the Court to Rule on whether or not the Zoning Board's
211 support of the Building Inspector's initial interpretation that the "sculptures" were "signs" was correct
212 as a matter of law. Chair Field would like the Court to make a final determination rather than have the
213 Case "dismissed" or "withdrawn" because the Zoning Board may have to deal with the issue by way of
214 an appeal of the Planning Board's recent determination, or future cases dealing with the signage issue.
215 He pointed out that the Court may determine to not grant the Board's request for a final ruling. Chair
216 Field asked the Members to support his proposal if it was their wish.
217

218 Chair Field said that the Court Hearing scheduled for September 26, 2012, has been postponed to an, as
219 yet, undetermined date because "compliance" with the Court's August Order to formally apply for
220 relief from the Planning Board and Little Boar's Head Zoning Board, was made by the Applicant .
221

222 Mr. Lagassa said that he would like the Case to be resolved and not linger on with legal fees.
223

224 **Mr. Lagassa Moved, and Mr. Buber Seconded, the Motion that the Chair instruct Attorney Serge to**
225 **seek a final determination of the Superior Court on the status of the “sculpture” as to whether or not**
226 **it is a “sign”.**

227
228 **Chair Field, once again stated his belief that a “sign” can be both “art” and a “sign”, and cited the old**
229 **“cigar store indian”**

230 **The Vote passed in favor of the Motion (4 in Favor, 1 Opposed and 0 Abstention). Ms. Wilson**
231 **Opposed, without explanation.**

232

233 The Chair reported on other topics discussed at the “Right To Know” (“RTK”) Program.

234

235 **a.) Sealed Minutes (“Non-Public Sessions”) –**

236

237 Chair Field read from the Memo he sent out to the Members:

238

239 “Sealed Minutes (“Non-Public Sessions”) - As you already know, sealed Minutes of “non-public
240 sessions” may only remain sealed until the circumstances initially warranting the information to
241 be sealed no longer apply. RSA 91-A:3,III. The Panel recommended that all “sealed” records be
242 promptly and periodically examined and reviewed, and “unsealed” by a Board as **soon as**
243 **possible**. Some entities designate a “release date” at the time of sealing. Preciously little activity
244 warrants indefinite “sealing”. Judgment as to “unsealing” rests solely with a “majority” of the
245 members of the Board. I am personally aware of only one (1) set of sealed Minutes, which arose
246 a few years ago concerning a “Non-Public Session” convened by the prior Board Chair, as to
247 which I recall “objecting” for reason of apparent “non-compliance” with RTK provisions. Please
248 note that the Board “did not” seal the August 3, 2012, “Non-Public Session”, Minutes. Minutes
249 of “non-public” sessions, unless properly sealed, must be made available to the public within 72
250 hours. Wendy, are there any other sealed records? Please investigate and report your findings
251 to the Board”.

252 Chair Field commented that the Board should address any “Sealed” Meeting Minutes, or potentially be
253 found in violation of the Right to Know Law. Member Buber concurred.

254

255 **b.) Professional /Expert Reports; Other Documents Received-**

256

257 Chair Field explained that the Board has the authority to request professional opinions on cases and,
258 when the Report is received by the Board, unless the Board has promised to provide a copy to the
259 Applicant, if the report remains in the custody of the Board’s Agent, it does not have to affirmatively
260 disclose the fact that the information has been received, but, if someone from the public requests a
261 copy of the Report, it has to be given to them.

262

263 Chair Field said that a letter addressed to the Chair does not have to be opened by a Staff Member, and
264 while the document is in a sealed envelope, it is not yet part of the “government record”. He suggested
265 that when a letter is addressed to the Chair or Zoning Board that it remained sealed, and, when opened
266 by a Member of the Board, it should be forwarded to all Board Members, and the Administrative Agent
267 as soon as possible. At such point, it becomes available for public inspection upon request.

268

269 Mr. Buber pointed out that documents protected under “attorney client privilege” or other “statutory
270 exceptions” are not “government records” and, one possible “statutory exception” is “redaction” of

271 sensitive information from an otherwise accessible document. He said "records" need to be reviewed to
272 see if there is any confidential information within them that should first be redacted before handing
273 them over for public inspection. He also said his understanding is that the "costs involved" in gathering
274 the requested information can be charged to the requesting party.

275
276 Chair Field said that information cannot be denied because a portion is confidential; redaction is a way
277 of making material available without making it all available. He agreed that the costs for copies made is
278 charged to the requesting party, but, that his understanding is that the Town must incur all costs
279 associated with their preservation as "official records", initial assembly in response to a request for
280 access, redaction review, and and presenting the documents for public review. Copying is at the sole
281 expense of the "requesting party" and no "copier" or index need be made available.

282
283 Chair Field suggested that United States mail addressed to the Chair and/or Vice Chair of the Zoning
284 Board not be opened until the Vice Chair or Chair has had a chance to look at it and disseminate the
285 record.

286
287 Discussion ensued on what fees can be charged to the requesting party. The Board will investigate and
288 take up the discussion at the next Meeting. Member Buber was agreeable to accepting such
289 assignment.

290
291 Mr. Fullerton questioned what the difference was with the Administrative Assistant receiving
292 professional reports by mail, opening the mail, emailing the members that it has arrived, and putting a
293 copy of it in their mailboxes, and the report coming in and keeping it sealed until the Chair or Vice Chair
294 had the opportunity to review it; wouldn't that be the same thing. Mr. Fullerton said that the process
295 should be "spelled out" in "black and white" so that it is understood by the Board what the hierarchy is,
296 because if it is information pertinent to an Applicant before the Board, it's not fair to hold onto that
297 information for days.

298
299 Chair Field said that in speaking with Counsel one way to protect information from release in the Public
300 Domain, before the Board has had a chance to review it, is to keep it sealed in the envelope. He said if
301 the Chair and Vice Chair are unavailable they would go by seniority to the other Board Members. He
302 said that anyone could request information, even the newspaper, and it's not fair if there is an article in
303 the paper involving technical information about an Application, requested by the Board, that the Board
304 had not yet had an opportunity to review.

305
306 Ms. Wilson questioned whether this method would delay information getting to the public, because
307 there is only so much time involved. She said that the Chair and Vice Chair are representing the entire
308 Board and if they are both unavailable then the other Members would have to serve in their capacity,
309 and wondered why it mattered whether the document is received sooner or later.

310
311 Chair Field said that allowing the Administrative Assistant to open the mail making it a "governmental
312 record" from the beginning could conceivably bring harm to the Board and its ability to make a decision.
313 He said that he would like the Board to follow the process that if a letter comes in and it's addressed to
314 the Chair or Vice Chair that it not be opened until someone on the Board has had the chance to review
315 it. One must recall, that it is quite possible that information relating to litigation could be a part of any
316 communication, and the Board should have the opportunity to determine if it is subject to "attorney-
317 client " privilege and confidence.

318

319 **c.) Consultation with Counsel** – Chair Field referred to the NH Supreme Court case of Ettinger v.
320 Town of Madison Planning Board, 162 N.H. 785 (2011), and, said that the Court held that private
321 consultation with legal counsel requires that legal counsel **be present**, either in person or
322 telephonically. Mr. Buber gave the example that if the Board seeks a legal opinion and Counsel
323 sends a response letter to the Board; the Board cannot go into “non-public session” to discuss the
324 letter; the letter must be addressed in a public meeting, with the exception, that if it is an ongoing
325 litigation or negotiation, then Counsel does not have to be present in the non-public session. .
326

327 Mr. Buber asked permission to seek a clarification of “actual cost” from the Attorney that presented that
328 information at the “Right to Know Law” Seminar. Chair Field said that he could, and asked him to please
329 report his findings at the next meeting.
330

331 Chair Field reminded the Members that they can send E-mail Communications to each other as long as
332 such communications are not related to “actions, decisions or votes” of the Board. But, that it was “best
333 practice” to **NOT communicate** by E-Mail.
334

335 **d.) Case #2012:13; Appearance of Mr. Michael Cuomo/Edwin L. Minnick at October Meeting-**
336

337 The Board discussed whether or not they wanted Mr. Mike Cuomo (Mr. Edwin Minnick) from the RCCD
338 to attend next month’s Meeting to discuss the report that was sent by RCCD to the Board regarding Case
339 2012:03 – Glenn Martin – 9 Hampshire Drive.
340

341 Discussion ensued, and, with the assistance of Ms. Chase, it was preliminarily determined that
342 attendance at two (2) ZBA Meetings by a representative of RCCD was included in the “work estimate”
343 provided by RCCD dated July 16, 2012, #9200, and signed by Glenn Martin on August 29, 2012.
344

345 Members of the Board indicated that an “Executive Summary” of Mr. Minnick’s Report would be helpful
346 to their understanding of the Analysis, and, requested, the Chair to so advise the RCCD. The Chair
347 agreed.
348

349 (Secretary’s Note- Following the Meeting the Chair noted that Mr. Edwin L. Minnick had prepared the
350 information on “drainage analysis” and that it was his work with which the Board needed technical
351 advisory assistance at the next Meeting. Accordingly, the Chair, by E-Mail, to RCCD dated September 25,
352 2012, requested that Mr. Minnick be present at such Meeting. And, in the same E-Mail, Chair Field
353 requested that Mr. Minick prepare an Executive Summary.)
354

355 The Chair called for a five (5) minute Recess.

356 The Chair reconvened the Meeting.
357

358 **Mr. Lagassa Moved, and Mr. Fullerton Seconded, the Motion to request Mr. Mike Cuomo (Edwin**
359 **Minnick) to attend the October 23, 2012, Meeting on behalf of his report on Case #2012:03 – Glenn**
360 **Martin – 9 Hampshire Drive.**

361 **The Vote was unanimous in favor of the Motion (5-0).**
362

363 **There being no further business to come before the Meeting,**
364

365 **Mr. Buber Moved, and Mr. Lagassa Seconded the Motion, to adjourn the Meeting at 8:00 pm.**

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

ZBA Meeting Minutes

367 Respectfully submitted,
368
369 Wendy V. Chase
370 Recording Secretary
371
372 Draft Minutes edited by the Chair, Robert B. Field, Jr., for Board Approval.
373
374 Minutes approved 10/23/2012
375