



Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, October 23, 2012 at 6:30pm
Town Hall, 231 Atlantic Avenue
North Hampton, New Hampshire

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; Phelps Fullerton. (3)

Members absent: George Lagassa and Robert Landman. (2)

Alternates present: Dennis Williams, Jonathan Pinette and Lisa Wilson. (3)

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). Chair Field seated Mr. Pinette for Mr. Lagassa and Ms. Wilson for Mr. Landman. Mr. Williams was designated to replace Mr. Fullerton, at the appropriate point in the Agenda, for Case #2012:03 – Glenn Martin, because he has been seated in his stead since the Case was first introduced to the Board in May or June.

Recording Secretary Report - Ms. Chase reported that the Meeting Agenda was properly published in the October 5, 2012 edition of the Portsmouth Herald, and, posted on October 10, 2012 at the Library, Town Clerk's Office, Town Office and on the Town's website.

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

Chair Field explained that earlier in the day procedural discoveries were made regarding Case #2012:10 – Thomas Huff, that will likely engender considerable interest and discussion. He informed those present for this Case that the Board would probably start to address it around 8:00 p.m. giving them the option to leave and later return at that time if such was their wish.

Chair Field then briefly explained the Board's operating Rules and Procedures to those present. Minute Chair Field once again articulated the process by which Meeting Minutes are generated. He stated that the Recording Secretary prepares and submits an initial "draft" to the Chair who then reviews, further edits and returns them to the Recording Secretary for formatting. The "edited" "draft" is then forwarded to the Members and Alternates participating at such Meeting for their review and comment. Such review and comment is personal to each Member and/or Alternate, and the comments and observations are shared only with the Board Chair and/or the Recording Secretary, and not with each other. The Recording Secretary, in consultation with the Chair, then aggregates the comments, re-edits the "draft" Minutes taking all such comments into consideration, and then distributes the re-edited "draft" minutes to all Members and Alternates for consideration, before a final vote to "accept" is addressed by the entire Board at the next Regular Meeting.

He further explained it is his understanding that the Minutes are neither proprietary to the Recording Secretary nor the Board Chair, rather, they represent the "official" collective record of the Board, and are approved by vote of a majority of the Board. He stated that this process was established by vote of the Board taken several months ago for the purpose of making the "Minutes Approval" process less cumbersome and time consuming at the public meetings.

All Members and Alternates present confirmed that such procedure was both as they wished and recalled.

September 25, 2012, Regular Meeting Minutes – Typographical corrections were made to the Minutes. Mr. Buber Moved, and Mr. Fullerton Seconded, the Motion to approved the September 25, 2012 Meeting Minutes as corrected.

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

Chair Field then proceeded to the Business of the Meeting:

Unfinished Business:

Chair Field then seated Alternate Williams in the stead of Member Fullerton for consideration of Case #2012:03-Glen Martin.

(Continued) #2012:03 – Property Owner: Glenn Martin, 11 Evergreen Drive, North Hampton, NH 03862. Applicant: Same as Owner; Property location: 9 Hampshire Drive, North Hampton, NH 03862; M/L 007-136-000; Zoning District: R-1. The Applicant requests the following Variances: (1) Article IV,

Section 409.8.a relief for a septic system setback of 70.5-feet where 75-feet is required, and (2) Article IV, Section 409.9.A.2 relief for a structure 21.4-feet from poorly drained soils where 50-feet is required.

At the Applicant's request, this Case had been "Continued" from the September 25, 2012, ZBA Meeting, to enable Applicant to prepare a response to the additional independent technical review material which had been prepared for, delivered to, and received by the Board from an independent third (3rd) party reviewer (Rockingham County Conservation District ("RCCD")) all as requested by Board.

In attendance for this Application:

Attorney Bernard Pelech, Applicant's Counsel

Bruce Scamman, Emanuel Engineering, Inc, Applicant's consulting Engineer

Glenn Martin, Applicant/Owner

Chair Field noted that Mr. Minnick, the Town's professional engineering consultant, from the RCCD was present to advise and provide counsel to the Board, as appropriate, of the extent of the Project impact for surface water runoff on both abutting properties and the Little River eco-system. And to be in a position to professionally address, discuss and respond to such matters with the Applicant's Counsel and experts.

Attorney Pelech, on behalf of his Client, Glenn Martin, requested a Continuance of Case #2012:03 to the November 27, 2012 Meeting due to the absence of two (2) Board Members. Mr. Lagassa and Mr. Landman who had been sitting on the Case from the beginning. He said that it would be more appropriate to have the Members sit on the Case from this point forward because the available Alternates had probably not been privy to all of the evidence of this Case, previously introduced.

Upon inquiry of the Chair, Ms. Wilson stated that she has been following the Case, but has not previously been "seated", and definitely respects the Applicant's wishes if he would prefer that she not be "seated".

Mr. Pinette confirmed that he has been present for all the Hearings regarding Case #2012:03 and was conversant with the Case.

Chair Field explained to the Applicant's Counsel that under Board Rules the Applicant is entitled to have a panel of five (5) individuals and the panel can be comprised of Members and Alternates. And, although the Board tries to accommodate an applicant's desire for consistency, it is not always possible to have such consistency in a case of extended duration due to circumstances beyond the Board's control.

It was a general consensus of the Board that there was no problem granting the requested Continuance.

Chair Field commented that the Board is presently prepared to offer the Applicant a panel of five (5) individuals, pursuant the Board's Rules of Procedure, but the Rules do not state that the Five (5) individuals will not include some representation from Alternates. He suggested, if the Meeting is continued to November, that so long as there are Five (5) Members, or Alternates present, the Case will move forward no matter the makeup of the Board. The Board agreed. The Applicant agreed.

Chair Field asked for a Motion that Case #2012:03 be continued to the November 27, 2012 Meeting, upon the Condition that so long as the Board can offer the Applicant a panel made up of five (5)

136 individuals at the November 27, 2012 Meeting, that the Case will move forward regardless of the
137 composition of the Board.

138
139 Mr. Williams reminded the Applicant that the November Meeting is scheduled to occur during a holiday
140 period and there is a chance that any one of the Members or Alternates may not be available. Attorney
141 Pelech said he understands that risk.

142
143 Chair Field commented that Mr. Minnick is present tonight as part of the contract commitment and that
144 his recall appearance may have some affect on the contract price to the Applicant.

145
146 Attorney Pelech said that he watched the DVD of the September 25, 2012 ZBA Meeting and it was his
147 understanding that the estimate for Mr. Minnick's Board participation includes up to four (4) hours of
148 appearance time.

149
150 **On Motion duly made and Seconded, the Board voted unanimously (5-0) to grant the Continuance**
151 **requested for Case #2012:03 to the November 27, 2012 Meeting with the provision that the Case will**
152 **be heard in November regardless of panel composition.**

153
154 Chair Field asked if Mr. Minnick would be available to come to the November 27th Meeting and he
155 replied that he would be available. Mr. Minnick addressed the Board and said that his initial calculations
156 were based on old data. He said he recently spoke with Mr. Martin's Engineer, Bruce Scamman of
157 Emanuel Engineering, Inc., who redid the calculations and Mr. Minnick said they "look good." Mr.
158 Minnick asked what specific questions the Board might have of him.

159
160 Chair Field responded by stating that the Board has two principal questions: 1). Is the subject lot
161 appropriate for development of the proposed residence? , and, 2). Are the engineering drawings
162 sufficiently complete and detailed to allow Mr. Minnick to conclude from an engineering perspective
163 that the proposed residence can be built on the lot without significant risk of a.) deterioration to the
164 Little River, b.) surface water drainage onto neighboring properties, and c.) to the
165 neighborhood/subdivision drainage system? He said that Board also wants a signed, stamped and an
166 RCCD approved "Septic Plan" from the Applicant.

167
168 Mr. Minnick said that he reviewed Mr. Scamman's most recently revised Plans this evening, and in his
169 opinion, a house could be built on the subject lot. He said his main concern previously was the wetlands
170 below the lot. Mr. Minnick said that he will be available to attend the November 27, 2012 Meeting and
171 provide the information and analysis which he has developed as to the numerous Plans submitted by
172 the Applicant.

173
174 Mr. Scamman said that he met with Mr. Minnick last week to discuss the drainage issues and said that
175 they discussed ways to mitigate the water quality volume, which the State considers most important for
176 degradation of water quality. He said that he has a set of "new" plans to submit to the Board. It was
177 determined that the Board had neither received copies of the "new" plans nor authorized Mr. Minnick,
178 the Town's Professional Expert, to meet with Mr. Scamman, the Applicant's professional expert.

179
180 Mr. Scamman explained that it is normal practice for the two engineers to work together to come up
181 with what the Town is looking for on an analysis. He said that letters he received authored by Dr. Lord,
182 Mr. Cuomo and Mr. Minnick stated that he contact the RCCD if he had questions.

183

Chair Field said that he finds it irregular for the Town's Expert to unilaterally engage in conversations with the Applicant's Expert without the Board's knowledge and approval.

Attorney Pelech explained that Mr. Minnick was working with old data; a plan from the 1960s, and based his calculations on that Plan. Mr. Scamman and Mr. Minnick met to discuss concerns they had on the analysis.

Attorney Pelech said that he reviewed the Zoning Board Minutes of September 25, 2012, and, after the Board granted Mr. Martin a Continuance to tonight's Meeting it had engaged in a ½ hour discussion on the Case without the Applicant or Applicant's Counsel present. At such time the Board discussed whether or not Mr. Cuomo was going to be asked to attend this Meeting so they were expecting him tonight; they have no objection to Mr. Minnick. He also said that two anonymous North Hampton residents called him and told him to review the video recording of the September 25th Meeting because the Chairman "...discussed the merits of the Case..."; and further stated, that "we (the Board) need to have our experts here to rebut their experts", and "we (the Board) need to have our experts here to confront their experts", and further stated "this case is at a critical point and we (the Board) need to have our experts available to rebut and confront their experts". Counsel stated that the Board sits in a "Quasi Judicial" capacity, and that if he were the Chair and made such comments, he would recuse himself.

Chair Field categorically rejected such suggestion and said, pursuant to State statute, the Board was well within its discretion in discussing the **procedural** manner by which it would be scheduling, seeking and obtaining technical advice. All discussion took place in a Public Meeting at which Applicant could have opted to be present. He said Applicant was fully aware that the Board has been concerned with "surface water runoff", drainage, and septic disposal issues for at least four (4) months, and there was nothing "new" brought up. No testimony from the public was received. He stated that he believed a board is entitled to engage professionals and to manage the manner, in which it will receive, consider, weigh and evaluate their advice, as it does in every case.

Attorney Pelech said that he had additional concerns over the Chair's choice of terminology; using the words "confront" and "rebut". From a legal standpoint he asserted that such words connote an "adversarial" relationship. Chair Field responded that in his opinion such interpretation represented an extremely narrow view; but, that in the future he would likely chose his words more carefully. What was intended is that the Board would utilize the resource of Mr. Minnick to better understand and appreciate technical data, and intelligently evaluate and respond, as necessary, to evidence or testimony offered by Applicant, his counsel, or professional advisors.

Attorney Pelech said that this is a good opportunity for the Board to receive Mr. Scamman's newly revised Plan that was redrawn in accordance with Mr. Minnick's recommendations.

Chair Field said that he was hoping to bring the Case to a resolution this evening, and asked if Attorney Pelech wanted to withdraw his request for a Continuance of this Case and proceed forward this evening. Attorney Pelech responded, "No".

Attorney Pelech explained that the first Case heard by the Zoning Board has been appealed to the Superior Court and he has already committed to Town Counsel, representing the Board, that it will be postponed because if the Board grants the Variances requested in this Case then the Superior Court

Case is moot, but if they do not grant the Variances then they can consolidate an appeal of this Case with the first Case 2012:02 – “Vested Rights”.

Chair Field said that Mr. Cuomo had prepared the report on the “Septic Plan” and, then, after the Meeting it was noted that Mr. Minnick had prepared a report on the “drainage system”, and consequently Mr. Minnick was invited to attend the Meeting to answer questions from the Board regarding his Report. He said from his experience it is unusual for the Town’s expert and the Applicant’s expert to unilaterally discuss the critical engineering data in a Zoning Board Case, absent authorization, prior to tonight’s Meeting, and without the Board’s or the Applicant’s knowledge. As was observed above by Applicant’s counsel, the Board sits in a “quasi-judicial” capacity and unilateral communication would be inappropriate.

Attorney Pelech said that in his experience, during a peer review, the third party (Mr. Minnick) issues a report to the Applicant and his Expert and normally there is a response addressing issues raised. He said that he has no problem with Mr. Minnick, and working with him has been very fruitful.

Chair Field said that all of the other “interested parties”, neighbors and abutters, in this Case were unaware of the conversations going on and didn’t have an equal opportunity to meet with Mr. Minnick and review his work.

Attorney Pelech said that he has never heard of Abutters becoming involved in a peer review; it’s usually between the two Engineers.

Mr. Minnick said that the RCCD should have let the Board know that he was meeting with the Applicant’s Engineer. He said that is the way he operates in all of the towns he works for. He stated that Chair Field was correct and that the Board should receive a copy of everything Mr. Minnick does, and that he should not have direct communications with the Applicant’s Engineers without authorization from the Town.

Mr. Williams directed his comments to Attorney Pelech and said that the Board had properly requested someone from RCCD to come in and help the Board comprehend the import of the calculations in the drainage analysis submitted to the Board. He said the Board isn’t disposed to favoring either side; it wants to hear from the Applicant and Abutters and make a fair and informed decision based on the evidence presented, so that both parties are hopefully pleased.

Chair Field agreed generally with Mr. Williams.

Attorney Pelech agreed with Mr. Williams also, but said that he was concerned with Chair Field’s comments, “to rebut their Experts” and, “to confront their Experts”, and those two terms have legal meanings; they both connote an adversarial relationship.

Chair Field repeated that his choice of words could have been better, and he might have said, “...be prepared to respond, as necessary...”, regarding testimony from the Town’s Expert on the Applicant’s Drainage Plan and Analysis. He said that the Board was not insinuating that it would be necessary for “rebuttal”, but the Board wanted its expert present to be in a position to “respond” from a technical perspective.

It was a sense of the Board, since Mr. Minnick and Mr. Scamman had already been communicating, that they may continue to do so as the Applicant prepares his Case for the next Meeting.

Mr. Scamman will submit the most recently revised Plan to the Zoning Administrator tomorrow for the Board Members, as well as, a copy for the Public to review.

Chair Field commented that the Plan(s) and other information the Board initially and formally received from the Applicant as evidence were forwarded to Mr. Minnick for review. And, therefore, he doesn't understand how Mr. Minnick could be working with "ancient data", as suggested by Applicant's counsel earlier in the Meeting. He questioned whether "new" Plans of Applicant, not yet in evidence, were involved. Such matter must be resolved at the next Meeting.

Further consideration of the Case was continued.

Chair Field called for a five (5) minute recess at 7:13 p.m..

Chair Field reconvened the Meeting at 7:18 p.m..

2. (Deferred) #2012:08 – Property Owner: Sunny Brook Farm Realty, LLC, 144 Lafayette Road, North Hampton, NH, 03862. Applicant: Same as Owner; Property location: 144 Lafayette Road, North Hampton, NH 03862; M/L 017-029-000; Zoning District: I-B/R. The Applicant requests an Appeal of an Administrative Officer (Building Inspector) alleging there is a violation of Article IV, Section 406.5 – A lot in the I-B/R District shall not be utilized for both residential and business purposes. **This Case is "Deferred" from the September 25, 2012, ZBA Meeting, at the Applicant's request.**

In attendance for this application:

Attorney Pelech, Applicant's Counsel

James Marchese, Applicant/Owner

Attorney Pelech explained that his Client, Mr. Marchese received a Notice of Violation from Interim Building Inspector Charles Smart on an alleged violation of Zoning Ordinance Article IV, Section 406.5 – A lot in the I-B/R District shall not be utilized for both residential and business purposes. Attorney Pelech said that the use of the structure for both a residential unit and a business predates the enactment of Article IV, Section 406.5 on 3/12/85, and that it is a "pre-existing non-conforming use" that has not been abandoned since 3/12/68, as defined in Article V, Section 501.4.

Mr. Marchese gave a brief history on the property:

- There were dormitory style rooms in the "L" of the barn; stage coach passengers coming through Town occupied the rooms.
- Joseph Fitzgerald bought the property in 1983 from a woman who lived there until her death; the apartment was used by "farm hands" and "care takers".
- Mr. Fitzgerald kept all the rooms in tact when he owned the building; bedrooms, one bathroom and one kitchen. He wrote a statement to the Board that the property had existing rooms (living quarters) that were used in 1980 when he owned it.
- Mr. Fitzgerald sold the building to Mr. Rollins and Mr. Hall in 1983; Mr. Hall and his wife occupied the apartment during the week while renovating the furniture store.
- Mr. Rollins and Mr. Hall kept the apartment in use up until 1989 when Mr. Marchese moved in; full time.

ZBA Meeting Minutes

- Mr. Marchese moved to Newington but continued to use the apartment during the summer months.
- Mr. Marchese submitted a letter from Mr. Alan Dickinson stating that the Halls occupied the apartment during the week from 1984-1989, and then Mr. Marchese moved in, in 1989 to present.
- Mr. Marchese said that the Police and Fire Department have been aware that he lives at this location.

In summary, there was a residential use of the home, with occasional farmhands and other itinerants located in the barn, at the beginning of the 20th Century; a woman lived in the home and had “farm hands” living in the barn; the farmhouse was razed and the barn became the principal living area for housing people; in the 1970s and 1980s the back area that was once rooms was modified to a one-bedroom apartment where Mr. Marchese allegedly resides. Mr. Marchese asserts that there has been continuing residential use of the home and/or the barn and that the Building Inspector erred in alleging that there is a violation because the “use” is “grandfathered”.

Ms. Wilson asked if the Applicant had any verification, such as, tax documents that shows there is an apartment in the building. She would like to see a timeline to see if there is any interruption of the residential use. The Applicant did not have that information.

Mr. Marchese said that he lived in the apartment on a full-time basis from 1989 to 1993; and, then, from that point to the present, he occupies the apartment in the summers, from April 1st to the end of October. He sometimes stays during the winter when he comes to plow snow.

Mr. Marchese confirmed for Mr. Fullerton that since the Ordinance was adopted, 3/12/85, there has not been a period of one (1) year or longer where someone did not reside in the building.

Chair Field asked Mr. Marchese if he knew what it was that motivated the Building Inspector in citing the Violation.

Mr. Marchese said he has no knowledge of that; the only thing he can think of is that he was questioned about his residence by the Town Clerk when he registered to vote for the Primary Election.

Chair Field opened the Meeting to those who wished to speak, in “Favor” of the proposal.

Gary Savanowitz, 72 Suzanne Drive, Portsmouth, NH – said that he has known Mr. Marchese since 1990 and the subject apartment has always been in use.

Chair Field opened the Meeting to those who wished to speak, in “Opposition” to the proposal. There was no public comment.

Chair Field closed the Public Hearing at 7:30 p.m.

Ms. Wilson said that she would like verification, written documentation, such as the tax cards, stating that a residence has always been in use.

Mr. Fullerton said that the Applicant has provided sworn testimony, and it was corroborated from another witness, both being under Oath, that someone has lived in the building since the Ordinance was

ZBA Meeting Minutes

adopted by the Town, and it has not gone vacant for a period of one (1) year or longer as described in Section 501.4, which would result in the loss of any “grandfathered” rights. He said it would be nice to have a tax card to see if there are any notations indicating that there has been an apartment there over the years.

Mr. Buber said that he didn’t think it was necessary to drag things out looking for a tax card; he accepts the sworn testimony of the Applicant.

Chair Field agreed with Mr. Buber that they have heard testimony under Oath. He said his concern is with the definition of “residence”. He said that customarily a residence implies having plumbing and cooking facilities, but doesn’t necessarily mandate size of the living unit. There appears to be evidence that human beings have been residing in the space continuously for over one hundred years.

Mr. Buber said that Board is focusing on what has occurred from 1985 to today because that’s when the Ordinance went into effect. What happened prior to that is not germane to the issue.

Chair Field called for a five (5) Minute recess so that Ms. Chase could access the Town Office and “pull” the Building and Tax File on the property for the Board to review.

Chair Field reconvened the Meeting at 7:45 p.m.

A File containing a letter to the Building Inspector from Police Chief Brian Page of a possible Code Violation of an alleged unapproved residential use within a commercial building at 144 Lafayette Road was discovered. Attorney Pelech said that he was unaware of the letter. Both Attorney Pelech and Mr. Marchese were provided an opportunity to read the letter.

It was concluded that the Town Clerk, brought to the attention of the Police Chief, that there may be an illegal apartment at 144 Lafayette Road, and he wrote a letter to the Interim Building Inspector, Charlie Smart who found no evidence that there was approval for a residential use in the commercial building resulting in his issuance of a Notice of Violation, dated June 11, 2012, which directed and ordered the Applicant to”...Cease and Desist the residential use;...”.

Attorney Pelech commented that the Tax Assessor’s Card indicated that there was an “exterior” inspection of the property by the Assessor. Chair Field agreed, but added that there is also no notation on the Tax Card that there is an apartment in the building.

Chair Field explained that the Board was voting on whether to uphold the Building Inspector’s interpretation that there is a violation of Article IV, Section 406.5 – A lot in the I-B/R that is presently utilized for business purposes shall not be used for residential purposes.

Ms. Wilson Moved, and Mr. Pinette Seconded, the Motion to support the Administrative Officer’s Decision to declare a Violation to Article IV, Section 406.5 of the Zoning Ordinance. Discussion on the Motion ensued.

The Vote passed in Favor of the Motion, (3 in Favor, 2 Opposed and 0 Abstentions). Mr. Fullerton and Mr. Buber Opposed.

The Chair declared that the Motion passed and that the Administrative Officer's Decision was supported, and that the Notice of Violation, dated June 11, 2012 remained in effect.

3. (Deferred) #2012:09 – Property Owner: Sunny Brook Farm Realty, LLC, 144 Lafayette Road, North Hampton, NH, 03862. Applicant: Same as Owner; Property location: 144 Lafayette Road, North Hampton, NH 03862; M/L 017-029-000; Zoning District: I-B/R. The Applicant requests a Variance from Article IV, Section 406.5 to allow the continued use of the Apartment in the Commercial Building. **This Case is “Deferred” from the September 25, 2012, ZBA Meeting, at the Applicant’s request.**

In attendance for this Application:
Attorney Pelech, Applicant’s Counsel
James Marchese, Applicant/Owner

Attorney Pelech presented his Case #2012:09 on behalf of Mr. Marchese. He explained that they are requesting this Variance because the Board voted to support the Building Inspector’s Decision in the prior Case, #2012:08.

Attorney Pelech explained that the property has been used for residential purposes since prior to 1985 when the Zoning Ordinance was changed, subsequently a Variance was granted in 1999 to allow a retail furniture store.

Attorney Pelech said that they believe a Variance is justified because of the history of the property, and given the fact that it is a large commercial property presently unoccupied, and a property that has always had a “caretaker” or a “resident” because it has always had a residential apartment.

Attorney Pelech addressed the five (5) criteria of the Variance test:

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

Attorney Pelech said the Application meets the criteria as set forth in the case of Malachy Glen v. Town of Chichester and the case of Chester Rod & Gun Club v. Town of Chester. Granting the Variance would not result in any substantial change to the characteristics of the neighborhood nor would it threaten public health, safety and welfare; therefore the “Public Interest” and “Spirit of the Ordinance” criteria has been met. It is in the public’s interest to promote safety and having someone staying in the apartment for purposes of security is certainly in the public’s interest.

2. Would granting this variance be consistent with the “Spirit of the Ordinance”?

Attorney Pelech said the Application meets the criteria as set forth in the case of Malachy Glen v. Town of Chichester and the case of Chester Rod & Gun Club v. Town of Chester.

3. Would “Substantial justice” be done by granting this variance?

The Board must find that the hardship to the Applicant is not outweighed by some benefit to the general public in denying the Variance. Attorney Pelech said that he cannot imagine any benefit to the general public in denying the Variance.

4. Would granting this variance result in “Diminution of Values” of surrounding properties?

Attorney Pelech said that no one knows the apartment is there and is certainly not detrimental to the value of surrounding properties.

5. Would literal enforcement of the provisions of the ordinance result in an “Unnecessary Hardship”?

Attorney Pelech said that this property was a residential property and continued to be used as a residence prior to the adoption of the 1985 Ordinance that states that you cannot have a residential use and a commercial use in the I-B/R District.

Attorney Pelech asked that the Board take notice of the testimony under Oath provided in the previous case.

Attorney Pelech said that it is reasonable for a property of this size to have a “caretaker” or “watchman” on the property for security reasons. He said the intent of the Ordinance in the I-B/R was to prohibit large mixed use types of uses where there were several commercial uses and a residential component consisting of numerous dwelling units. In this Case it’s a use subordinate to the retail use.

Chair Field suggested, as a matter of “judicial efficiency”, that the Board take judicial notice of the testimony presented in the prior Case #2012:09, relating to the same premises, if there was no objection from the Board. There was no objection.

Chair Field opened the Meeting to those wishing to speak in “Favor” of the proposal. There was no public comment.

Chair Field opened the Meeting to those wishing to offer “Neutral” information on the proposal. There was no public comment.

Chair Field opened the Meeting to those wishing to express “Opposition” to the proposal. There was no public comment.

Chair Field closed the Public Hearing at 8:10 p.m.

Ms. Wilson asked how the Board would know that the apartment meets all the building requirements and Building Codes, and can the Board grant a Variance without that knowledge.

Mr. Pinette said that having someone on the property is extremely beneficial; it is a unique property that is very well maintained. He is supportive in granting the Variance.

Mr. Fullerton said that he thought that the Applicant met all five (5) criteria of the Variance test and is in support of granting the Variance.

Mr. Buber said that based on the testimony presented he would support granting the Variance without precedent setting.

Chair Field addressed his comments to Ms. Wilson and explained that the Board can approve a residential use; whether it can actually be occupied, is up to the Building Inspector, who seemingly would have to inspect the apartment and determine if a Certificate of Occupancy could be issued.

Chair Field agreed that from a public safety perspective it would be beneficial if the building was occupied, and, testimony offered, without rebuttal, suggests that it has been occupied without interruption, during the necessary period of time. He voiced concern over the fact that the apartment does not appear on the Property Tax Card and suggested that the Applicant needs to clear up such matter with the Town.

Ms. Wilson Moved, and Chair Field Seconded, the Motion to grant the Variance with the Conditions that (1) it be a single residence for one person, such as a caretaker, security guard or watchman, and (2) that the single resident apartment meet all specified Building Code requirements.

Mr. Pinette asked if that would be unduly limiting someone from having a guest.

Mr. Fullerton said that he thought the conditions are too restrictive. He said the request is to allow continued use of the apartment (singular) in the commercial building and does not think there should be "strings" attached on it, whether it's a family, individual or summer border.

The Motion was brought to a vote.

The Vote was unanimous in Opposition of the Motion (0 in Favor, 5 Opposed, and 0 Abstentions). The Motion Failed.

Mr. Buber then Moved, and Mr. Pinette Seconded, the Motion that, based on the information and testimony given this evening the Applicant be granted a Variance from Article IV, Section 406.5 to allow the "continued use of the apartment in a commercial building".

The Vote passed in Favor of the Motion (4 in Favor, 1 Opposed, and 0 Abstentions). Ms. Wilson Opposed.

Chair Field noted that this Case has no precedential value and it is the Board's presumption and suggestion that the Applicant will meet with the Building Inspector/Code Enforcement Officer and obtain a proper Certificate of Occupancy and that it will meet all the Building Code requirements for such occupancy. He said it would be in the Applicant's best interest regarding health and safety. He said that it is not technically a Condition of the Motion made and approved, but, rather, it was offered as a strong suggestion to the Applicant. Ms. Chase was asked to bring this Decision, and the recommendation to the attention of the Building Inspector.

New Business:

1. #2012:10 – Property Owner: Thomas C. Huff, as Trustee of the Thomas C. Huff Revocable Trust DTD 10/25/1994, 6899 Heritage Club Drive, Mason, Ohio 45040. Applicant: Same as Owner; Property location: 34A Ocean Blvd, North Hampton, NH 03862; M/L 001-075-000; Zoning District: R-2. The Applicant requests the following Variances: (1) Article IV, Section 406 – relief from the 30-foot side-yard setback by razing the existing deck already within the side-yard setback, and replacing it with a new deck and remodel to the existing house, and (2) Article V, Section 501.2 to allow an extension, expansion or change to a non-conforming use increasing the size of the building footprint.

ZBA Meeting Minutes

In attendance for this Application:

Attorney Peter Saari, Applicant's Counsel

Chair Field explained that it came to his attention that this Case may not be appropriately before the Board. He spoke to Town Counsel and the Legal Staff at the Local Government Center (LGC). He presented the following:

- Little Boar's Head District, in 1937, was granted by the State, authority to adopt a Zoning Code, which they did, and they have their own Zoning Board of Adjustment.
- The Town of North Hampton adopted a Zoning Code in 1946 and there were two (2) districts, the i.) Little Boar's Head Zoning District and, ii.) the Rural Zoning District that made up the remainder of the Town. He read Section III of the 1946 Zoning Ordinance into the record: *"In the Little Boar's Head Zoning District, any use of any land or premises permitted under the Zoning Ordinance for Little Boar's Head District, and any later amendments thereto, shall be lawful, but no use not permitted under said ordinance or amendments shall be lawful. Provided that no use not permitted in The Rural Zoning District shall be permitted in the Little Boar's Head Zoning District"*. Chair Field said that he thought that the "Rural Zoning District" was meant to be the rest of the Town other than the Little Boar's Head District.

Chair Field said that he cannot find a legal source that would authorize this Board to take jurisdiction over the Case Attorney Saari is proposing that the Board hear. He agrees that the request is consistent with past practices, but after speaking to the LGC and Town Counsel; it's not clear why it has been administered this way.

Mr. Buber concurred with the Chair and said that by statutory law the Little Boar's Head Village District has the power to enact and enforce zoning regulations.

Attorney Saari concurred that it is unclear why an Applicant would need to go before both the LBH ZBA and the Town's Board. He said that he represents Rye Beach District and it has been established that they have exclusive jurisdiction over their District and they were granted Zoning Powers by the Legislation the same time Little Boar's Head Village District was, in 1937.

Attorney Saari said that he is concerned that if LBH has exclusive power and approvals of a Variance; would the Town of North Hampton's Building Inspector recognize that Variance.

Chair Field invited Mr. Charles Gordon, former Chair of the Little Boar's Head, Zoning Board of Adjustment to speak on the matter.

Mr. Gordon was sworn by the Chair.

Mr. Gordon, Sea Road in Little Boar's Head Village District reported that he served on the LBH ZBA for eight (8) years; four (4) of them as Chair. He said it was the LBH District's understanding that after the Town adopted its own Ordinance in 1946 that there would be "concurrent jurisdiction"; the Town's Ordinances would apply in LBH, as well as, LBH Ordinances. He read a statement made by William Fowler from a 1970 LBH Commissioner's Report, "since property in our district is subject to both ordinances, the more restrictive provisions apply in all cases". He further said, by way of possible explanation, that he thought it was relevant that LBH and Rye Beach established ordinances in the same year, 1937 and the authority for LBH made no reference to "exclusivity" where Rye Beach's does. He also commented that a change to the process could implicate Planning Board issues regarding zoning

ZBA Meeting Minutes

ordinances that have been changed to require Planning Board approval by a “conditional use” permitting process.

Chair Field suggested that the Board seek an opinion from Counsel on this matter.

Attorney Saari requested a Continuance of Case #2012:10 for two (2) months, and they will move forward with the LBH ZBA, and if they need to come back to the North Hampton ZBA they will have time to do that.

Mr. Buber Moved, and Mr. Fullerton Seconded, the Motion to Continue Case #2012:10 to the December 11, 2012 Meeting.

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

Mr. Buber Moved, and Mr. Fullerton Seconded, the Motion to authorize the Chair to seek advice from Town Counsel on the LBH ZBA and Town ZBA matter.

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

Mr. Buber asked Attorney Saari if someone applied for a Building Permit during the variance process. Attorney Saari explained that this Board takes the position that an appeal requires an “appeal from some action; in this case an appeal from the Building Inspector. He said he doesn’t know why the Town requires the Building Inspector to take such action.

Mr. Buber said he doesn’t remember that always being part of the process when a variance request has been presented; that it had to rely on some sort of denial.

Chair Field said that it is a requirement under the Board’s Rules of Procedure. However, it may be the case that the Rule is occasionally and unintentionally ignored.

Ms. Chase explained that the Building Inspector gave the Applicant a verbal denial and then submitted a written denial letter, which the Board received earlier today. It explains the timing inconsistency between the Application and the Denial as noted by Mr. Buber.

Chair Field opened the Meeting for public input.

Jane Rockwell, 9 Atlantic Avenue in Little Boar’s Head Village District – Said that she owns property that abuts Mr. Huff’s property on three (3) sides. She said that she came here tonight to work on a decision and finds that two (2) month continuance of this Case is a long time to deal with this.

Chair Field said that the Case will soon be before LBH ZBA in the meantime, and she will be able to voice her opinions at that meeting. He further noted that because of the holiday schedule, two (2) full months will not pass before the Board’s December meeting.

John Knapp, 9 Atlantic Avenue, in Little Boar’s Head Village District - Said that he reviewed the petition for variance before the Board and noticed it listed previous denials.

Chair Field explained to Mr. Knapp that the Board was not now hearing evidence on this Case as it had been Continued.

Mr. Knapp said that a denial granted by the Board previously did not contain a Denial Letter from the Building Inspector.

Chair Field explained that generally if someone wishes to pursue a project and thinks there is a potential zoning issue they discuss it with the Building Inspector, and if the Building Inspector denies the permit request because of "zoning" issues, the basis for such determines what the appeal content will be to the ZBA; the Board is not authorized to take "original jurisdiction" of cases.

Mr. Knapp had a letter from the LBH ZBA Chair, Janet Gorman to submit to the Board, and the Chair suggested he submit it at the LBH ZBA Hearing; not to this Board.

Mr. Gordon asked what the status would be of the Town's Building Inspector if it was determined that the Town has no jurisdiction in the Little Boar's Head Village District.

Chair Field said it was a good question, but not within the purview of this Board to resolve.

Chair Field then Closed the Public Hearing.

Other Business

1. Communications/Correspondence and Miscellaneous;

2. NH RSA 91-A- "Right To Know" Law. Receive report from Member Buber.

Mr. Buber reported that at last month's Meeting he was charged to find out what "actual costs" could be charged to the party requesting information from the Town under the Right To Know Law NH RSA 91-A. Mr. Buber reached out to two of the Attorneys/Presenters from the Right-to-know Law Update seminar he attended with Chair Field on September 21, 2012 in Concord. Attorney Laura Spector-Morgan, Mitchell Municipal Group, responded to his inquiry. Attorney Spector-Morgan forwarded a copy of the Grafton County Superior Court Case (Judge Bornstein) that held that when the request was for computer records, the cost of searching the computers for responsive documents was part of the actual cost of providing a copy. She said, "although the opinion does not address whether this would apply equally to the cost of searching paper records for responsive records, I can certainly see the argument that it would". Attorney Spector-Morgan sent Mr. Buber a copy of the Grafton County Superior Court case and recommended that the Board consult with the town's attorney regarding this issue, as well as, the town's administration to see if there is any town policy on this question. Mr. Buber said that on the surface it looks as though the requesting party can be charged for all costs associated with a document request.

Chair Field suggested that Ms. Chase consult with the Town Administration on how to best begin the process of charging for "actual costs" incurred by the Town regarding requests for information pursuant to RSA 91-A.

3. Other Business Matters Properly Before the Meeting.

March 23, 2010 Non-Public Zoning Board of Adjustment Meeting Minutes.

Chair Field said that the March 23, 2010 Non-Public Meeting Minutes were prepared and “Sealed” by the then Town Administrator, Stephen Fournier. The Zoning Board approved such Minutes on April 29, 2010; they were apparently unsealed and opened on June 4, 2010 and again on July 26, 2010, by the Town Administrator, with no reason given. It was determined that the Zoning Board voted to “Seal” the Non-public meeting minutes at the March 23, 2010 Zoning Board Meeting.

Mr. Buber Moved, and Mr. Fullerton Seconded the Motion, to “Unseal” the March 23, 2010 Zoning Board of Adjustment Non-public Meeting Minutes, pursuant to the prescriptions of NH RSA 91-A.

The Vote was Unanimous in Favor of the Motion (3-0). Such vote represented the vote of a majority of the Members of the Board as prescribed by statute

4. Town Administrator Selection Panel. Chair Field reported to the Board that he was invited by the Select Board to serve on the Committee to select a new Town Administrator. The Committee will be meeting on October 30th and 31st.

5. Barr-Moran Litigation. Chair Field reported that the Barr-Moran Superior Court Hearing was rescheduled. He advised Town Counsel of the conundrum the Board is facing with Little Boar’s Head Village District.

6. Review proposed FY14 ZBA Budget. The Board was in receipt of a copy of the “Proposed Budget” for Planning and Zoning FY 2014 for review.

Mr. Buber commented on the Training/Education budget line item and suggested that it be increased from the budgeted amount of \$500.00 to an amount that would help accommodate members when attending conferences offered to the Board Members. He said that there is no allocation for lodging and meals and some of the conferences are held far from here.

Chair Field said that it is important for Board Members to attend educational and training conferences offered to them throughout the year.

Chair Field suggested increasing the line to \$1,500.00 and received no objection from the Board. He will forward that suggested amount to the Select Board.

There being no further business to come before the Meeting,

**Mr. Fullerton Moved, and Mr. Pinette Seconded, the Motion to Adjourn the Meeting at 9:30 p.m.
The Vote was unanimous in Favor of the Motion (5-0).**

Respectfully submitted,

Wendy V. Chase
Recording Secretary

Approved November 27, 2012