



**Meeting Minutes**  
**Town of North Hampton**  
**Zoning Board of Adjustment**  
**Tuesday, December 10, 2013 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; George Lagassa, and Phelps Fullerton. (4)

**Members absent:** Robert Landman. (1)

**Alternates present:** Jonathan Pinette. (1)

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

**I. 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.

Chair Field seated Mr. Pinette for Mr. Landman.

**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 December 10, 2013, Meeting Agenda was properly published in the November 25, 2013 edition of the Portsmouth Herald, and, posted 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 the legal implications of such act.

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

**As An Additional Preliminary Matter**, Chair Field disclosed that he is a neighbor and abutter to the Applicants of Case #2013:04 which is scheduled to be heard this evening by the Board. He inquired of, and presented to the Applicants, and any other interested parties, the opportunity to request that he recuse himself from the Appeal set forth in the Application leaving them with a four (4) Member Board, and added that they are entitled to a five (5) Member Board.

Both Mr. and Mrs. Derby indicated that they were comfortable with Chair Field sitting on their Case and there were no other objections raised.

**Approval of Meeting Minutes of November 26, 2013** –Minor typographical edits were made by members of the Board.

**Mr. Lagassa then Moved, and Mr. Buber Seconded, the Motion, to Accept the Meeting Minutes of November 26, 2013, as corrected, at this Meeting.**

**The Vote was unanimous in Favor of the Motion (5-0). The Minutes of the November 26, 2013 Meeting were approved.**

## **II. Unfinished Business.**

No Unfinished Business.

## **III. New Business.**

**Case Docket: Chair Field read the Notice as published and opened the Public Hearing.**

**1. Case #2013:04 – Dan and Jane Derby, Co-Trustees of The Dan R. Derby Revocable Trust of 2011, 129 Mill Road, North Hampton, NH. Applicants: Same as Owners; Property location: 129 Mill Road, North Hampton, NH; M/L 006-092-000; Zoning District: R-2.** The Applicants request a Variance from Article IV, Section 406 – Yard and Lot requirements for a portion of a proposed home addition of a ground level bedroom/bathroom, 25-feet from the front yard and side yard setback where 35-feet is required from the front yard setback, and 30-feet is required from the side yard setback.

In attendance for this Application:

Dan and Jane Derby, Owners/Applicants

Chair Field noted for the record that Ms. Chase had distributed, by E-Mail Communication, a "Letter of Denial" from the Building Inspector. He explained that this is a Board of Appeals and the Board is of the opinion that there should be some sort of predicate action taken by an "administrative officer" pursuant to which any Appeal to the Board is based, and in this case it is the denial of a Building Permit, and the Board needs written evidence of the denial.

**Dan Derby, 129 Mill Road** – Presented his Application to the Board. He said that they purchased the house in 2011; the house was listed as a three bedroom house. The third bedroom is 9' x 10' which they felt was unusable as a bedroom so they converted the room into an office. They produced pictures of the office in their application packets and the two bedroom status is supported by the Town's assessment record. They would like to maintain the current look of the house by adding a bedroom and bathroom to the first floor in the back of the house.

Chair Field noted that the septic system plan submitted with the Application states it as a failed system. Mr. Derby said that they put in a new septic system, designed for a three (3) bedroom house, in 2011.

Mr. Derby said that he spoke to his neighbors about his proposed addition and said they were comfortable with it. Mr. Derby submitted a letter into the record stating "no problems" with the proposed plan by close abutters, Cathi Remington and Peter Horne. (The Horne Trust)

Chair Field asked that the Recording Secretary verify that Cathi Remington, a recent purchaser of the abutting lot to the rear, was properly notified as an Abutter. Ms. Chase confirmed that she was, by Certified, Returned Receipt, mailing.

Mr. Derby went over the Five (5) Criteria of the Variance Test.

**1. Would granting this variance be contrary to the "Public Interest" or "Public Safety"?**

The proposal is not contrary to the Public Interest because the addition will match the house's design from all Abutter's home sites; it will cause no change in the character of the neighborhood. The addition will not be very visible from the street or the Abutters.

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

The Spirit of the Ordinance is observed. Due to its proposed location, the addition will be a significant distance from all Abutter home sites, existing or planned. Setback requirements exist to prevent home overcrowding or neighborhood aesthetic deterioration; the abutting homes will not be affected by the existence of the addition.

**3. Would "Substantial justice" be done by granting this variance?**

There would be a substantial benefit in usability and safety to the property owners in having a first floor bedroom/bathroom. There is no known benefit to the general public in denying the Variance.

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

Along with improvements already put in place which include new septic, interior/exterior renovations and repairs, landscaping, etc., this addition will improve long term livability and value of the existing home, and will have a net positive financial impact on the neighborhood.

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

Literal enforcement would create the owner's inability to provide for reasonable ongoing use of the home. Other locations for the third bedroom would be impractical, costly and disruptive to the home's sensible and practical use.

The proposed use, allowing for the third, ground floor level bedroom, is reasonable and appropriate particularly for older owners. Three (3) bedrooms is an expectation for potential buyers with one on the ground floor being a benefit.

Mr. Buber referred to the copy of a picture of the house submitted with the application and asked what the location of the proposed addition's roof peak would be. Mr. Derby said that it will be between the two-story windows, approximately one-third of the way up the windows.

**Jane Derby, 129 Mill Road** – said that they will lose one ground level window and the other ground level window will become an entrance; a door will be in its place. They will not lose the windows on the second story.

Chair Field asked if they planned on doing any other design characteristics to the room to accommodate handicap accessibility. Mr. Derby did not have any plans for handicap accessibility as this time.

Mr. Lagassa questioned whether or not the variance request was for a revision to the entire lot line setback of 25-feet, as opposed to asking permission to violate the existing setback. Mr. Derby said that it was for the existing setback.

Mr. Lagassa asked if the addition could be moved back, so the entrance would be through the rear window, as opposed to the front window.

Mr. Derby said that they considered that but would rather not do that from an aesthetic point of view because it would not keep with the current look of the house if it was moved back, and that is their desire. He said that the closets will be along the street wall, but they intend to add windows in the closets so that the outside won't be just a long bare blank wall.

Chair Field continued the Public Hearing to accommodate those in Favor of the Application.

There was no one from the Public present; therefore there was no public comment.

Chair Field continued the Public Hearing to those who wished to introduce evidence Neutral to the Application, and advisory to the Board.

There was no one from the Public present; therefore there was no public comment.

Chair Field then continued the Public Hearing to accommodate those Opposed to the Application.

There was no one from the Public present; therefore there was no public comment.

Chair Field then closed the Public Hearing.

Mr. Lagassa said that, in his opinion, the Applicants met the five (5) standards and he has no objection to the proposal.

Chair Field pointed out that there is a special handicap provision in the zoning law for premises, but it does not apply when there is no handicapped or disabled person. The provision applies only to the person with the handicap, and does "not" run with the land. The "handicap" exemption, therefore, does not apply in this Case.

**Mr. Pinette Moved, and Mr. Buber Seconded, the Motion to Approve the Variance Request as advertised for Case #2013:04.**

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

Chair Field reminded the Applicants of the 30-day Appeal Period, and informed them that they would receive a Decision Letter by mail most likely by the end of the week.

#### **IV. Other Business.**

Chair Field referred to the recent Local Government Center Article written by Attorney Paul Sanderson titled, Attaching "Conditions" to Approvals in Land Use Boards. The Article discussed the "conditions" and the affect that "conditions" have on the actions of the ZBA and Planning Board.

Chair Field said that several variance approvals, or Special Exceptions, granted by the Board over the past five to ten years have had "conditions" attached to them. He said it would be helpful to him, if the Board agreed, to formally request of the Building Inspector that he conduct, during the next 90 to 120 days, an administrative review of "conditions" attached to zoning decisions and see if there has been any inadvertent expansion of the various conditions. He specifically referenced the last two paragraphs of the Article that deals with unauthorized expansions of a Special Exception.

Chair Field said that he thought there might possibly be many cases of "creeping" expansion of the Board's Conditions of Approval. He said if the Board agreed, they could, through Ms. Chase, and the actions taken tonight, ask the Building Inspector to report to the Board in the spring on cases where the Board has placed "conditions" on prior approvals.

Mr. Fullerton said that it is a good start as a way to track the possibility of expansion. He asked if the Decision Letters with the "Conditions" were recorded at the Registry of Deeds. Ms. Chase confirmed that they are recorded.

Chair Field said that he can think of three (3) cases where the Board has attached "conditions" and has questions of whether there has been some "creeping" expansion or changing of the "conditions" from the point and time of when it was approved, and some cases near and dear to his heart.

Mr. Pinette thought it was a good idea and asked how many years back the Board wanted to go.

Chair Field suggested three (3) to five (5) years.

Mr. Pinette thought that Special Exception Approvals were reviewed by the Building Inspector yearly; he asked that if they wait every three (3) to five (5) years and ownerships change, how the new owner will become aware of any Special Conditions.

Chair Field said the "Conditions" from the ZBA "run with the land". He asked Ms. Chase if Mr. Kelley reviews the Conditions of Approval, and if so, how often. Ms. Chase answered, "Never".

Chair Field mentioned that there is also a Statute of Limitations when action has to be taken based on approval which is usually one (1) year.

Mr. Lagassa said that going back three (3) to five (5) years will give the Board a good data base to begin with and then going forward "conditions" should be checked annually, and perhaps Mr. Kelley should be put on notice to do that going forward in the future.

In light of the precautionary points raised by Attorney Sanderson in an article authored and published by the Local Governance Center (LGC) (November-December 2013, p. 15), Chair Field suggested that the Board either by Consensus Action, or by a Vote of the Board, have the "conditions" placed on Variances and Special Exceptions be reviewed by the Building Inspector, and that the Board would like him to begin on a date five (5) years prior to the end of this year which would be 2008; and, give him sufficient time, such as, at the Board's April 22, 2014, Meeting to report to the Board of the status of his findings on the "conditions", and beginning in 2014, each approved case be reviewed within the first year. The Board determined to act by Vote.

**Mr. Pinette Moved, and Mr. Lagassa Seconded, a Motion as follows:** In the spirit of the November-December 2013 precautionary Article on "conditions" published by the LGC, the Board requests the Town Building Inspector to (i) review all Variances and Special Exceptions granted since December 2008 which have "conditions attached"; (ii) determine the extent to which such conditions may have been materially extended or expanded by the landowner beyond that which was originally authorized by the Board; (iii) report findings to the Board at its April 22, 2014 Meeting; and, (iv) advise what enforcement action(s) might be appropriate for the Board to consider.  
The Vote was unanimous in Favor of the Motion (5-0).

**Ms. Chase will conversationally advise Mr. Kelley of the Board's request; and, if formalization is necessary, Chair Field will write a Letter Of Request.**

There being no further business to come before the Board, Chair Field wished everyone Happy Holidays.

**Mr. Buber Moved, and Mr. Lagassa Seconded, the Motion to Adjourn at 7:02 p.m.**

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

Respectfully submitted,

Wendy V. Chase  
Recording Secretary

**Draft Minutes edited by the Chair, Robert B. Field, Jr., for Board approval.**