



Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, February 25, 2014 at 6:30pm
Town Hall, 231 Atlantic Avenue
North Hampton, NH 03862

7
8 These Minutes were prepared as a reasonable summary of the essential content of the Meeting, not as a
9 transcription. All exhibits mentioned, or incorporated by reference, in these Minutes are a part of the official
10 Case Record and available for inspection at the Town Offices.
11

12 **Attendance:**

13
14 **Members present:** Robert B. Field, Jr., Chair; David Buber, Vice Chair; George Lagassa,
15 Phelps Fullerton and Robert Landman. (5)
16

17 **Members absent: None.**
18

19 **Alternates present:** Dennis Williams and Lisa Wilson. (2)
20

21 **Administrative Staff present:** Kevin Kelley, Building Inspector/Code Enforcement Officer and
22 Wendy Chase, Recording Secretary. Mr. Kelley was seated on the panel for Case # 2014-01, without
23 vote, as per 2009 International Building Code ("Code")
24

25 **I. Call to order; Pledge of Allegiance; Roll call/Introduction of**
26 **Members/Alternates; Recording Secretary Report; Swearing in of Witnesses**
27 **(RSA 673:15); Preliminary Matters; Minutes of previous Meeting – December**
28 **10, 2013.**
29

30 Chair Field Called the Meeting to Order at 6:31 p.m.
31

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

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

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

44 Recording Secretary Report - Ms. Chase reported that the February 25, 2014, Meeting Agenda was
45 properly published in the February 10, 2014 edition of the Portsmouth Herald, and, posted at the
46 Library, Town Clerk's Office, Town Office and on the Town's website. A corrected Agenda was posted on
47 February 19, 2014, correcting a "typo" error appearing in the published title of Section 409.10 from
48 "approval of septic systems" to "conditional use permits". It was deemed by the Chair to be a harmless
49 and immaterial error. No one on the Board or in the audience expressed any disagreement with the
50 Chair's decision.

51
52 Chair Field then briefly explained that Case # 2014-01 ("Case"), before the Board this evening is one of
53 first impression and the Board's usual operating Rules and Procedures don't strictly apply. The Chair
54 further indicated that other boards consulted in the area had no experience with this class of proceeding
55 and could not share any procedural advice. The "Case" is an Appeal to the Zoning Board of an action of
56 the Code Enforcement Officer, and relates to the issuance of a Certificate of Occupancy. In the absence
57 of a set procedure, Chair Field articulated several guiding principles which he intended to apply to this
58 particular proceeding:

- 59
60 1. The Appellants, Jerome Day and Jane Currivan, will first present their Case.
61 2. The Case is an action naming the Town of North Hampton and Mr. Kelley, Building
62 Inspector/Code Enforcement Officer, as Respondents. Mr. Kelley will be seated with the Board
63 pursuant to the International Building Code of 2009 ("Code"), where it is prescribed that he sit
64 with the review panel on a "non-voting" basis. Mr. Kelley will "stand down" from the panel from
65 time to time when giving testimony or answering questions from the Board, the public, or
66 parties to the Case.
67 3. Mr. Kelley will present the Case and explain the rationale and reasoning underlying his decision
68 making process from the Town's perspective.

69
70 Chair Field further explained that the Case originates from a Planning Board Subdivision Approval
71 occurring in 2007. Mr. Philip Wilson was serving as the Chair of the Planning Board at the time, and Chair
72 Field inquired if anyone present, particularly the Parties, had any objection to Alternate Lisa Wilson, Mr.
73 Wilson's wife, participating on the Case as might become necessary?

74
75 There were no objections expressed to Ms. Wilson sitting on the Case by either Party, or by any other
76 Member of the Board.

77
78 Chair Field read a portion of the applicable provision of the Code, R110.1, Use and Occupancy, into the
79 record: *No building or structure shall be used or occupied, and no change in the existing occupancy*
80 *classification of a building or structure or portion thereof shall be made until the building official has*
81 *issued a certificate of occupancy therefore as provided herein. Issuance of a certificate of occupancy shall*
82 *not be construed as an approval of a violation of the provisions of this code or of other ordinances of the*
83 *jurisdiction. Certificates presuming to give authority to violate or cancel the provisions of this code or*
84 *other ordinances of the jurisdiction shall not be valid". There were no objections that this was the*
85 *provision of the Code applicable to this proceeding.*

86
87 Chair Field further referred to the applicable provisions of the North Hampton Zoning Ordinance, Article
88 VII, Sections 704.3 and 704.4, and read Section 704.4 into the record: *Every certificate of occupancy shall*
89 *state that the building or proposed use of a building complies with all provisions of law, and of this*
90 *ordinance, of all other applicable codes or ordinances of the Town and, if applicable, with all provisions*
91 *of any variance or requirements set forth for the special exception uses authorized by the Board of*

92 *Adjustment.* There were no objections that, Sections 704.3 and 704.4 were provisions of the North
93 Hampton Zoning Ordinances applicable to the proceedings.

94
95 Chair Field, once again, noted for the record that the original Agenda notice mistakenly referred to
96 Section 409.10 as “Approval of Septic Systems” and was corrected to “Conditional Use Permits” and
97 reposted. The Board agreed that it was a minor error that had been promptly corrected upon discovery
98 and they did not see a reason not to proceed. There were no objections to proceeding with the Case
99 from either of the Parties involved, or anyone else in attendance. It was deemed a minor and immaterial
100 publishing error without prejudicial consequence to any potential person of legitimate interest.

101
102 Member Landman then asked to be recused because he has a personal relationship with one of the
103 Parties. Chair Field seated Alternate Wilson for Member Landman in his stead.

104
105 Chair Field also invited Mr. Kelley to join the panel and sit on the panel as a non-voting participant as
106 prescribed in the Code.

107
108 Chair Field, upon prompting, then directed the attention of the Board to the Minutes of December 10,
109 2013.

110
111 **Meeting Minutes – December 10, 2013 –**

112
113 **Mr. Buber Moved, and Mr. Fullerton Seconded, the Motion to approve the December 10, 2013**
114 **Meeting Minutes as presented.**

115
116 **The Vote passed in Favor of the Motion (4 in Favor, 0 Opposed and 1 Abstention). Mrs. Wilson**
117 **abstained, for reason that she had not participated in the December 10, 2013 Meeting.**

118
119 **II. Unfinished Business:**

120 **Case Docket:**

121 **1. None.**

122
123 **III. New Business:**

124
125 **Chair Field then moved to the consideration of Case and read the caption as follows:**

126
127 **Case Docket:**

128 **1. Case #2014:01 – Jerome J. Day and Jane Currivan, 153 Atlantic Avenue, North**
129 **Hampton, NH.** The Applicants are appealing the Decision of the Code Enforcement Officer on
130 the issuance of a Certificate of Occupancy #NR-11-736 for 153B Atlantic Avenue, North
131 Hampton, NH, issued on December 11, 2013, and “other” requests for relief, calling into
132 question the following Zoning Ordinances, and NH RSAs: Article IV., Section 409.9 – Buffer Zone
133 Restrictions; Section 409.10 – *Conditional Use Permits; Section 414:1 – Statement of Policy;
134 Section 414.5.J – Water Resource and Aquifer Protection Violations; NH RSA 483-B.3.I and II –
135 Consistency Required, and NH RSA 483-B.4.VII.b – Impervious surface. Subject property owner:
136 Mill Pond Dream Home, LLC, C/O Sheehan Phinney, Bass & Green, 1000 Elm Street, PO Box

137 3701, Manchester, NH 03105; Subject property location: 151 Atlantic Ave., (originally known as
138 153B Atlantic Ave) North Hampton, NH; M/L 006-144-001; zoning district: R-2.

139

140 **(NOTE:)** Pursuant to "2009 International Residential Code, Section R112," the "Building Official",
141 as such term is defined, is designated as an *ex-officio* member of the Code Appeals Board
142 **without vote.** Kevin Kelley, North Hampton Building Inspector/Code Enforcement Officer, will
143 be invited by the Board, and it is anticipated, that he will participate. Whenever, or if, called as a
144 witness, either by a properly interested party or by the Board, Mr. Kelley will be temporarily
145 excused from the Hearing Panel whenever so testifying or submitting evidence.

146

147 In attendance for this Appeal were:

148

- 149 (i.) Jerome Day and Jane Currivan, Owners/Appellants;
- 150 (ii.) Kevin Kelley, Building Inspector/Code Enforcement Officer of Town of North Hampton;
151 Respondent;
- 152 (iii.) Attorney Jacqueline Fitzgerald-Boyd, representing Andrei Sukhorukov, Millpond
153 Dreamhome LLC, owner of Lot 151 Atlantic Avenue, Interested Party, Owner.

154

155 Chair Field noted that the Board was in receipt of an Authorization Letter, dated February 11, 2014,
156 signed by Andrei Sukhorukov, manager and sole member of the Millpond Dreamhome, LLC, owner of
157 151 Atlantic Avenue giving Attorney Jacqueline C. Fitzgerald-Boyd authority to speak on his behalf in
158 regards to any answers, complaints, meetings and hearings regarding his property at 151 Atlantic Ave,
159 North Hampton, NH.

160

161 Mr. Day presented his Case:

162

- 163 • There are statutory issues and civil issues and he understands that the civil issues are not to be
164 considered at this Public Hearing.
- 165 • First Application for relief dated and received by the Town Office June 8, 2011, was not formally
166 presented to the ZBA. There were no actions taken because of changes in staff at the time.
167 Richard Mabey was the Code Enforcement Officer/Building Inspector at the time. (Exhibit "G")
- 168 • Code Enforcement complaint was submitted to Mr. Kelley dated June 18, 2013 (Exhibit "H").
169 Mr. Day said he did not receive a written response to his Complaint; therefore, he was unable to
170 appeal it to the ZBA at that time. He did have a formal oral conversation with Mr. Kelley in July
171 2013.
- 172 • Letter written to Mr. Kelley (Exhibit "I") to clarify his "key" concerns regarding substantial
173 violations of the Building Code provisions, and provisions in the construction of the driveway.
- 174 • The approved recorded Subdivision Plan (Exhibit "E"), Note #12, states that "the Grantors are to
175 be responsible for the cost of constructing and maintaining the shared driveway from its point
176 of inception on the northerly side of Atlantic Avenue to the southerly sideline of proposed
177 Lot 6-144-2, and the owner of proposed Lot 6-144-2 to be responsible for the costs of
178 constructing and maintaining said driveway from its point of inception on the southerly sideline
179 of proposed Lot 6-144-2 and extending to the location of any house to be constructed on said
180 lot." The owners of proposed Lot 6-144-2 are responsible to construct and maintain utilities
181 within said easement. Note # 10 on the recorded plan states that the utility easement is to
182 follow the actual location of the proposed driveway after construction.

- 183 • The Grantee agreed to construct the driveway in exchange for price concessions on the sale of
184 the lot. According to Mr. Day here was apparently no written contract between the two parties,
185 but the agreement of the Parties as to driveway construction is reflected in the deed that Mr.
186 Day granted to the new owner (Exhibit “D”, 2nd page).
- 187 • Mr. Day said that he was allowed by the Planning Board to create a Driveway Plan (“Plan”) and
188 that he gave a copy of the Plan he created to the new owner’s representative. The Plan was not
189 recorded, however Mr. Day testified that he was told by the Planning Board that he did not need
190 to bring the Plan back to its Board for approval because it was on Mr. Day’s property and it did
191 not involve a new and separate curb cut on Atlantic Avenue.
- 192 • Upon the sale of the property Mr. Day laid out yellow caution tape 25-feet apart and wrapped it
193 around the trees he did not want removed.
- 194 • Mr. Day said that the trees the contractor cut down were not in accordance with Plan, and
195 understands that that is a civil matter, but it’s a source of the problem. The driveway is not
196 complete.
- 197 • The Approved and Recorded Subdivision Plan shows the driveway closer to the wetlands. Mr.
198 Day’s Plan shows the driveway further away from the wetlands. The Plan meets the Ordinance
199 requirements. He said the driveway goes through both the NH DES wetlands buffer and the
200 Town’s wetlands buffer, but there is authorization to go through them.
- 201 • Mr. Day said his major complaint is that the construction carried out has violated the wetlands.
202 • Mr. Day said the Subdivision Plan and the Plan each call for a “pervious” surface and it does not
203 conform to that. (Exhibit “M” and “N”).
- 204 • Mr. Day said that there is no permitted fill, and in his opinion the contractor has filled the
205 wetlands buffer and violated the law. The driveway is made of dirt and mud. From his non-
206 professional perspective, Chair. Field observed that dirt and mud, under certain circumstances,
207 may be “pervious”. Mr. Day said that dirt is “pervious” but that doesn’t meet the requirements
208 of a decent driveway and added that the construction of the driveway is a civil matter.
- 209 • Mr. Field asked if there was a prescription in the Planning Board approvals of the types of
210 material that should be used to construct the “pervious” driveway. Mr. Day said there was no
211 prescription other than to say that it has to be “pervious”. He agreed that it may currently be
212 pervious, but there can’t be any fill allowed in it.
- 213 • Mr. Day said his Appeal is not so much the issuance of the Certificate of Occupancy, but that he
214 was not properly notified that any action had been taken on his initial Complaint made in June
215 2013, of the wetlands violations until he received a copy of the Certificate of Occupancy that
216 was issued in December 2013; therefore, he was never given the opportunity to appeal an
217 action of the Building Inspector/Code Enforcement Officer.

218

219 Chair Field asked Mr. Day to articulate the remedy he was seeking.

220

221 Mr. Day said that, at a minimum, he would like removal of the fill the Owner brought in, and the earth
222 that was pushed out into the buffer area should be restored to its original state.

223

224 Discussion ensued on whether or not the driveway was considered to be “pervious” in a technical sense,
225 i.e. as the Planning Board and the engineer/draftsman of the Plan intended. Mr. Day said that the
226 current driveway is “pervious” if it is considered that a mud driveway is an acceptable driveway. Mr.
227 Field commented that there are mud driveways in Town. Mr. Day said that the “pervious” issue of the
228 driveway has to be dealt with as a civil matter.

229

ZBA Meeting Minutes

230 Mr. Buber referred to the Subdivision Plan signed by the Planning Board in 2007 that states the driveway
231 shall be “pervious” He said the question is what constitutes “pervious”. Materials submitted by Appellant
232 in which “pervious”, from a technical point of view, was defined were examined. Mr. Day then
233 requested leave for a moment to check further into his files for supporting documentation.

234

235 Chair Field called for a five (5) minute recess at 7:43 p.m.

236

237 Chair Field reconvened the Meeting at 7:48 p.m.

238

239 Mr. Buber said that it has been established that the Subdivision/Site Plan and Deed call for a “pervious
240 surface on the driveway”, but that neither document describes the type of “pervious” surface. Mr. Day
241 agreed and explained after he received approval from the Planning Board in 2007 he designed, through
242 his engineer, a Driveway Plan (“Plan”), but it was not brought back to the Planning Board for approval
243 because he was told it did not need Board approval because Mr. Day could align the driveway the way
244 he wanted to as long as it was in compliance with the signed Subdivision Plan. He further explained that
245 the Grantee had the Plan he created available to him by his agent at the time of purchase and is not sure
246 if his agent actually gave him the Plan or not.

247

248 Mr. Buber asked if the Grantee “signed off” on the Plan designed by Mr. Day. Mr. Day said he did not.
249 Mr. Buber said that the plan clearly describes Mr. Day and his engineer’s vision of how the “pervious
250 driveway” was going to be but there was no formal acceptance from the Grantee or his agents. Mr. Day
251 said there was no further documentation regarding the Plan or the construction of the “pervious”
252 driveway.

253

254 Chair Field asked why there was no reference of Mr. Day’s Plan in the Deed and whether or not the
255 Grantee had knowledge of the Plan, and relied on the Plan. Mr. Day said it wasn’t referenced in the
256 Deed because his Plan was not registered. He said his Plan was made available to the “LLC” and the
257 “LLC” is the Grantee at the time of the transfer of the property. Chair Field stated that, as between the
258 Parties and in a private contract, he is not certain that the formality of recording is required. Although, it
259 is the better practice, and often referenced as “an unrecorded plan.”

260

261 Mr. Day made reference to the Shoreland Water Protection Act, NH RSA 483-B: 4, VII-b., in which he did
262 find the following: –“Impervious surface” – any modified surface that cannot effectively absorb or
263 infiltrate water. Examples of impervious surfaces include but are not limited to roofs, unless designed to
264 effectively absorb or infiltrate water, decks, patios, and paved gravel, crushed stone driveways, parking
265 areas and walkways. (There was no definition of “pervious”).

266

267 Chair Field said, that in his opinion, the driveway, in its natural state, may indeed be pervious under a
268 strained interpretation, even though it is unattractively so. He commented that Fire Chief Cote also
269 signed off on the Certificate of Occupancy as to emergency access.

270

271 Mr. Lagassa said that the Plan is not part of the official Subdivision Plan approved by the Planning Board
272 so, in his opinion, the definition of “pervious” and “impervious” is irrelevant to what the Board’s
273 jurisdiction extends to. That is a civil matter and the ZBA needs to decide whether or not the decision by
274 the Building Inspector is challengeable. He said so far he hadn’t seen or heard evidence that the
275 approved Subdivision Plan had been violated and that he Building Inspector had erred in granting the
276 Certificate of Occupancy.

277

ZBA Meeting Minutes

278 Chair Field said the criteria for issuing a Certificate of Occupancy is broad, and refers to other applicable
279 laws and ordinances. The Building Inspector may not have taken into consideration the unlawful filling
280 and the cutting of trees in the wetland buffer, if that did in fact take place. Further, the issue as to
281 compliance with “pervious” has not clearly been met.

282
283 In conclusion, Mr. Day stated that the fill put on his property is in violation of the ordinances that
284 require any activity in the wetlands buffer must be minimal and only to meet the necessities of the
285 specific piece of property; in his opinion it was not necessary to do any filing on his property.

286
287 Mr. Kelley was invited as a witness to explain his interpretations on behalf of the Town:

288
289 Mr. Kelley’s response to why he didn’t respond to Mr. Day’s complaint right away was because he
290 assumed the position in August 2012, and inherited cases involving life safety issues from as far back as
291 2006 which he deemed more critical.

- 292
- 293 • Mr. Kelley visited the Day property in September 2012, with the Interim Building Inspector,
294 Charlie Smart during a “ride along”.
 - 295 • Mr. Day has two plans, (1) an approved Subdivision Plan with 12 Notes, and (2) a Plan,
296 containing the same 12 Notes of his vision on how the driveway should be constructed. Any
297 “amended plan” needs to go before the Planning Board for approval and Mr. Kelley did not see
298 any approvals in the Planning Board minutes that Mr. Day was given permission to design his
299 own driveway plan. Chair Field suggested Mr. Day make note of that because the Board may
300 want to see minutes of the 2007 meeting.
 - 301 • Mr. Kelley and Mr. Kroner, Chair of the Planning Board did a site walk with the Subdivision Plan
302 in hand and neither one saw any issues that Mr. Day referred to in his original letter of
303 complaint. It appeared that fill was brought in, but according to Article IV, Section 409.10 fill is
304 allowed up to 3,000 square feet. He said, that in his opinion, there was not more than 3,000 sq.
305 ft. of fill, but stated that he is not an Engineer. Chair Field asked Mr. Kelley to rationalize his
306 estimate and technique for making such determination. He stated again that he was not an
307 engineer and could not.
 - 308 • Mr. Kelley said that according to NH DES in jurisdictional wetlands you are “allowed to cut every
309 tree in the wetlands as long as you don’t disturb it, or stump it.” It states nowhere on the
310 approved Subdivision Pan what trees can or cannot be cut. Mr. Fullerton referred to Article IV;
311 Section 409.7.A – “Forestry and tree farming which does not involve clear cutting is a permitted
312 use in the wetlands “Emphasis added.)
 - 313 • Mr. Kelley said that he did not see standing water on the driveway. He walked the driveway and
314 took pictures in November 2013 (the Board had copies of the pictures) and said it was pouring
315 rain and it looked to him that the driveway did “perk”. It is his opinion that there are no
316 wetlands violations that Mr. Day reported in July 2013. However, he stated that he is not a
317 wetlands scientist.
 - 318 • Mr. Kelley said that there was no evidence of fill, gravel or disturbance of wetlands.
 - 319 • Mr. Kelley contacted Mr. Eben Lewis from NH DES.
 - 320 • Mr. Kelley tacked a copy of the Certificate of Occupancy on the telephone pole on December 11,
321 2013 and went to the Day’s house to deliver a copy of the Certificate of Occupancy and a letter,
322 but they were not home, he left a message and Mr. Day stopped by to retrieve the copies at the
323 Town Office. He said he made the extra effort because he knew how important it was to Mr.
324 Day.

325
326 Mr. Fullerton referred to Article IV, Section 409.9.A – no structure or “impermeable surface” shall be
327 permitted within 100’ of the wetlands. He suggested that the Board should be referring to the NH RSA
328 regarding “impermeable surface”.
329
330 Members of the Board agreed that they had often assumed for years that “gravel” was considered a
331 “pervious surface” when, in fact, it is not.
332
333 Mr. Kelley questioned the Board if they knew whether or not the standard back in 2007 was to allow
334 gravel surfaces. The Board had no clear recollection.
335
336 Mr. Fullerton said that he has been in business for 25 years designing single-family homes and that
337 typically gravel, crushed stone and wood decks are not considered, by NH DES to be pervious surfaces.
338
339 Chair Field said that the issue before the Board is what did the Parties intend by choosing and using the
340 word “pervious” in three (3) documents; and, from the photographic evidence, currently the soils do not
341 appear to be compacted and appear ‘pervious’.
342
343 Mr. Buber referred to the pictures submitted by the Applicant (Exhibit “L”) dated September 2013 and
344 asked if Mr. Kelley observed any erosion when inspecting the site in November 2013. Mr. Kelley said
345 that he did not observe any erosion, he said most likely the area had not been stabilized with grass yet.
346
347 Mr. Fullerton said that there is a seven (7) foot drop in grade and there would naturally be runoff before
348 the landscaping was put in place. He said that, in his opinion, it looks like the topography grades were
349 already there and there was no need of fill.
350
351 Chair Field read from the Certificate of Occupancy as issued, *Issuance of this certificate of occupancy*
352 *shall not be construed as an approval of a violation of the provisions of this code or of other ordinances*
353 *of Jurisdiction*. He asked Mr. Kelley whether he felt that any other ordinances of the jurisdiction of North
354 Hampton that apply to that property. Mr. Kelley responded that *all* ordinances apply and that he sees no
355 violations.
356
357 Attorney Jacqueline Fitzgerald-Boyd, representing Mill Pond Dreamhome LLC., Owner, was then
358 recognized by the Chair to speak. Ms. Fitzgerald-Boyd said that this is largely a civil issue between the
359 two property owners. She said that there was no gravel, dirt or fill brought in to construct the driveway;
360 it is the natural virgin soil that is there. She spoke to the Wetland Scientist, Kevin Hatch from
361 Cornerstone Environmental and he said there were no wetlands violations. Ms. Fitzgerald-Boyd asked if
362 the Board had inspected the site, and they indicated that they had not as yet. She pointed out that the
363 lighting in the pictures gives the illusion of a gravel driveway, but it is not. She said that her client went
364 above and beyond and filed a Shoreland Protection Act application which was not required, because
365 they built the house 250-feet away from the shoreland. Ms. Fitzgerald-Boyd said that she is not familiar
366 with the (driveway) Plan created by Mr. Day, and is not sure her client has or had knowledge of it. She
367 reiterated that this is a civil matter between the two property owners. She said that Mr. Day “marked”
368 out the driveway to where he wanted it, and it was constructed that way. There are still yellow
369 “markers” on the property.
370

ZBA Meeting Minutes

371 Chair Field said that there are two competing stories, and, based on testimony and the evidence
372 submitted, the Board has to weigh and decide whether or not the violations existed when the Certificate
373 of Occupancy was issued: and then, why was it issued.

374
375 Mr. Kelley said he visited the property with Interim Inspector Charlie Smart in September 2012, and
376 noticed a silt fence was down and had the contractor fix it, which he did. Mr. Day confirmed that to be
377 true.

378
379 Chair Field said that Ms. Fitzgerald-Boyd and Mr. Kelley contend that no fill or gravel was brought in to
380 the site and asked Mr. Day for his point of view.

381
382 Mr. Day said that the silt fences were never maintained along both properties; except for one that Mr.
383 Kelly had the contractor fix, which he did. The burying of the other silt fences he considers to be a
384 violation. Mr. Day said the project is not completed yet. He said that there is a gravel type surface on the
385 driveway that is used as underlayment to asphalt. He said that in his opinion the surface is "impervious"
386 because it is gravel.

387
388 Mr. Buber asked if it would benefit the Board to take a "site walk" on the property. Mr. Day said, "No", it
389 is snow covered. He said once the weather is better the Board should do a site walk.

390
391 Mr. Day said the main issue is that 2 ½ feet of fill was put in, it was not brought in, it was pushed from
392 the top of the knoll downward and estimated it to be hundreds of square feet, not thousands of square
393 feet. The Owner was supposed to construct a "sheet-flow" driveway; water should run/flow over/under
394 the driveway and out the other side.

395
396 Mr. Day said that the Owner of the back lot responded verbally to a letter he sent to the representative
397 of the LLC and told his Agent, Ms. Prentice, to settle the matter with Mr. Day. Ms. Prentice came back
398 with a sample of pervious tile and Mr. Day asked if it was certified as pervious tile and she said she
399 would check and he has not heard from her since. Mr. Day had nothing in writing from the Owner; it was
400 a verbal discussion.

401
402 Chair Field said the Board needs to determine whether or not the Certificate of Occupancy issued by Mr.
403 Kelley should be suspended due to violations or non-compliance with the laws of the State, or
404 ordinances of the Town.

405
406 Mr. Day said he did not have his Plan recorded because he was told by the Planning Board that it didn't
407 need to be. He originally wanted a gravel driveway and it was shown on his original sketch but a certified
408 engineer told him gravel was not a qualified "pervious" surface, so he changed "gravel" to "pervious".
409 Chair Field, queried Mr. Day as to the identity of the Planning Board official who advised him that
410 recording was unnecessary. Chair Field suggested that this might be an instance involving the principle
411 of a "municipal estoppel".

412
413 Mr. Day asked that the Board notify the Owners of the Lot and advise him that there is a potential
414 problem, from the point of view of the Town, and it may then be possible for the Owner and Mr. Day to
415 work something out.

416

ZBA Meeting Minutes

417 Mr. Kelley said that after further review of the pictures presented he determined that even though it
418 looks like a gravel surface, it is not. He said the question remains was the wetlands buffer violated or
419 not.

420
421 Chair Field said that the closer to the driveway surface the picture foci get, it appears less like gravel and
422 more like dirt and blue stone. He said it doesn't look like it would compact very well.

423
424 Mr. Kelley said he visited the property in the pouring rain and there was no standing water; he referred
425 to the pictures he had taken.

426
427 Mr. Day said that the added fill has disrupted the natural flow of the buffer.

428
429 Attorney Fitzgerald-Boyd said that the property is finished; the driveway is done; the landscaping is
430 done, and the house is For Sale. She said she is not sure her client, the Owner, was aware of the Plan
431 prepared by Mr. Day. She made the comment that Mr. Day is trying to extort the "pavers" out of her
432 Client.

433
434 Chair Field said the letter from Attorney Charles Griffin, the Day's attorney, to the Owner of the lot,
435 implies there was common knowledge of Mr. Day's Plan. He referred to point 7 of the letter that makes
436 reference to specifications of the driveway construction which were only shown on Mr. Day's Plan. If so,
437 it would appear to create a direct link of the two plans as far as the Parties are concerned

438
439 Mr. Buber referred to Code Section, R110.1; *issuance of a certificate of occupancy shall not be construed*
440 *as an approval of a violation of the provisions of this code or of other ordinances of the jurisdiction.*
441 *Certificates presuming to give authority to violate or cancel the provisions of this code or other*
442 *ordinances of the jurisdiction shall not be valid.* He asked Mr. Kelley what he thought that meant to him.

443
444 Mr. Kelley said that it means that if an applicant violates any ordinance or State law he would not issue a
445 Certificate of Occupancy. He said if he saw a violation regarding Mr. Day's property, he would not have
446 issued a Certificate of Occupancy.

447
448 Mr. Lagassa said that if a violation is found after the issuance of a Certificate of Occupancy it doesn't
449 necessarily invalidate the Occupancy Permit. Mr. Buber agreed.

450
451 Chair Field disagreed and read from Code Section R110.1, *Certificates presuming to give authority to*
452 *violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid,* and
453 said that if the issuance of a Certificate of Occupancy purports to overlook those violations then it is
454 invalid.

455
456 Mr. Buber said that in his opinion a Certificate of Occupancy can be issued without validating or
457 approving the violation; it's issued independently. Mr. Lagassa agreed.

458
459 Chair Field said that if the Board finds that there are violations he doesn't think the Certificate of
460 Occupancy can stand.

461
462 Mr. Fullerton referred to Code Section R110.1 – Use and Occupancy, that lists exemptions for Certificate
463 of Occupancy under Code Section R105.2. Code Section R105.2 specifies that "driveways" are exempt
464 from Certificates of Occupancy. He said the "wrinkle" is the requirement by the Planning Board that all

ZBA Meeting Minutes

465 sections of the driveway within the wetlands 100-foot setback buffer shall be “pervious”. Thus, the
466 driveway is not just a “regular” driveway, but, rather, it crosses a wetlands buffer, and it has
467 construction standards imposed on a sub-division by the Planning Board. He concluded that the Code
468 Section R105.2 likely does not apply.

469
470 Chair Field then recognized other members of the audience who wished to speak.

471
472 Robert Landman, 34 Post Road, (a recused Board Member) explained that he was speaking as member
473 of the public. He has known the Days for years and they would never resort to extortion. He said he
474 reviewed the pictures and they appear to show the driveway surface to be gravel.

475
476 There being no other persons wishing to speak, Chair Field closed the Public Hearing.

477
478 Chair Field said that the Board has to determine whether or not the Building Inspector properly took
479 into consideration any and all violations, including, but not limited to the matter of “pervious” driveway
480 construction, when issuing a Certificate of Occupancy.

481
482 Mr. Buber said there are three (3) parts of this case:

- 483
484 1. Civil issue that this Board has no involvement in.
485 2. Are there any existing violations of wetlands buffer? Or other violations, i.e. “pervious” surface.
486 3. Whether the Certificate of Occupancy is valid or invalid.

487
488 He said he was inclined to let the Certificate of Occupancy stand, and let the civil matter work itself out.
489 The Board should rely on the “eyes and ears” of the Code Enforcement Officer, who says there are no
490 violations.

491
492 Chair Field said another issue is whether Mr. Day’s Plan was known to all Parties. The letter from
493 Attorney Griffin to the owners of the back lot refers to the Plan, and suggests that the Owner, or Agent,
494 was aware.

495
496 Mrs. Wilson said that she tends to defer to the opinion of the Code Enforcement Officer; he has been at
497 the site, but then again didn’t have the benefit of seeing the driveway in the original state. She said that
498 if the driveway is impermeable then it doesn’t meet the conditions of the Planning Board’s approval. It is
499 a tough situation and the Board may have to wait until spring to do a site walk.

500
501 Chair Field said that the house is selling for over a million dollars and letting it sit there on the market is
502 harmful to somebody; the Parties deserve a decision.

503
504 Mr. Lagassa said that the Board can support the Building Inspector’s decision, overturn it, or defer it. He
505 said the house is on the market for 2.5 million dollars, so no decision by the Board would harm the
506 seller.

507
508 Mr. Fullerton said the layout of the driveway was a private arrangement between the owners and is a
509 civil issue that should not fall on the Board’s shoulders. He said a “pervious” driveway is expensive to
510 construct, and, if the Planning Board intended it to be constructed that way, it is an injustice to all those
511 other driveway owners, in general, who were required to put in a “pervious” driveway and did, and then
512 not hold this Owner to the same standards. He said he didn’t feel Board members are qualified to

ZBA Meeting Minutes

513 determine whether or not the driveway is "pervious", but a soil scientist could do it quickly, and it could
514 probably be done before the next meeting. Mr. Fullerton said it can be readily accomplished in the
515 winter conditions.

516
517 Chair Field suggested holding a "Special Meeting" to further consider this Case. It was suggested to meet
518 on March 7, 2014, at 3:00 p.m. before the Town Elections on March 11, 2014, in case the makeup of the
519 Board changes, and the Owner and the Appellant deserve a timely answer, and should not have to wait
520 in limbo for months.

521
522 Chair Field said that he would like an Affidavit from the Owner, under oath, whether or not he, or his
523 Agent, had knowledge of the "non-recorded driveway plan".

524
525 Mrs. Wilson said that she would like to know if the driveway is "permeable", therefore they would need
526 a soil scientist to tell them that.

527
528 Mr. Buber said he doesn't see how the testimony is relevant to Mr. Day's Plan; there is apparently no
529 contractual relationship and it is a waste of time, but it is not a waste of time to see if the driveway is
530 "pervious".

531
532 The Board decided that the Parties should engage the services of Michael Cuomo from the Rockingham
533 County Conservation District (RCCD) to perform the "pervious" tests on the driveway to see if it
534 conforms with generally accepted engineering standards.

535
536 Chair Field suggested it be requested that Mr. Cuomo submit his findings to the Board by Thursday,
537 March 6, 2013, by 4:00 p.m. He said that the Board has authority to assign the costs, and since the Town
538 is involved he would like to suggest that the cost of Mr. Cuomo's services be split in half between the
539 Appellant and the Respondent (Town). Ms. Chase and Mr. Kelley said they have no authority to expend
540 monies from the Town. Mr. Field said that if one of the Parties does not agree to pay then it won't be
541 done and the Board will base their decision on the testimony of the Parties, and other witnesses, and
542 the weight of the evidence submitted, and without the benefit of additional soils/"pervious"
543 information.

544
545 **Mr. Lagassa Moved and Mr. Fullerton Seconded the Motion to Notice and hold a "Special Meeting" of**
546 **the Board on March 7, 2014, at the Town Hall at 3:00 p.m.**

547
548 **The Vote was Unanimous in Favor of the Motion (5-0).**

549
550 **Mr. Buber Moved, and Mr. Lagassa Seconded, the Motion to request information for the "Special**
551 **Meeting" to include an Affidavit from the Owner as to the circumstances of his knowledge and timing**
552 **of the "unrecorded driveway plan" prepared by Mr. Day, and, that a soil scientist to opine whether or**
553 **not the existing condition of the driveway is "pervious" or impervious.**

554
555 **The Vote was Unanimous in Favor of the Motion (5-0).** Chair Field confirmed with the Parties the
556 nature of the additional information desired.

557
558 Chair Field invited Member Landman to resume his seat.

559 Ms. Wilson stepped down as Alternate

560 Mr. Kelley stepped down from the Panel and retired from the Meeting.

561
562
563
564
565
566
567
568
569
570
571
572
573
574
575
576
577
578
579
580
581
582
583
584
585
586
587
588
589
590

IV. Other Business:

1. Communications/Correspondence and Miscellaneous –

(a.) Report on Little Boar’s Head District-Jurisdictional Issues; - Chair Field reported that he received information that the Town and Little Boar’s Head reached an agreement to resolve the “jurisdictional “problem and Little Boar’s Head is going to accept the fact that they have their own Zoning District and they are going to pursue all related elements of independent zoning administration.

(b.) Report on Election Candidates - March 11, 2014, Town Election- Two (2) Member positions to be filled by ballot; and, Chair Field reported that there are three (3) people running for two (2) open ZBA seats on March 11 2014. Chair Field and Mr. Fullerton are seeking re-election and Chuck Gordon is also running. All voters of the Town were invited to Vote on March 11, 2014.

(c.) Other matters properly before the Meeting.
There were no other matters to come before the Board.

On Motion duly made and Seconded, it was:

Unanimously, Voted (5-0) to Adjourn the Meeting at 10:30 p.m., without objection.

Respectfully submitted,
Wendy V. Chase
Recording Secretary

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

Approved March 25, 2014