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**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, March 7, 2014 at 6:30pm
Continuation of the February 25, 2014 Meeting
Town Hall, 231 Atlantic Avenue
North Hampton, NH 03862**

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.

The Recording Secretary was not present; these Meeting Minutes are transcribed by DVD Recording.

Attendance:

Members present: Robert B. Field, Jr., Chair; David Buber, Vice Chair; Phelps Fullerton and Robert Landman

Members absent: George Lagassa

Alternates present: Dennis Williams and Lisa Wilson

Administrative Staff present: Kevin Kelley, Building Inspector/Code Enforcement Officer

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

Chair Field Called the Meeting to Order at 3:04 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.

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.

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

Mr. Landman recused himself from this Case at the February 25, 2014 meeting and Ms. Wilson is seated in his stead.

Chair Field seated Mr. Williams for Mr. Lagassa. Mr. Williams was in attendance at the February 25, 2014 Meeting.

Chair Field suggested the Board appoint a Secretary pro tem in the absence of the Recording Secretary.

Mr. Buber moved and Mr. Williams seconded the motion to appoint Robert Landman as Secretary pro tem.

The vote was unanimous in favor of the motion (5-0).

Meeting Minutes – February 25, 2014

Mr. Fullerton made amendments to the minutes:

Line 335: add, *and that typically gravel, crushed stone and wood decks are not considered, by NH DES to be pervious surfaces.*

Line 461: Code Section R110.1 – *Use and Occupancy*, that lists exemptions for Certificate of Occupancy under Code Section R105.2. Code Section R105.2 specifies that “driveways” are exempt from Certificates of Occupancy.

Line 463: Eliminate the words “near or” after the word “driveway” and insert the following: “...within the wetlands 100 foot setback buffer shall be “pervious”.

Line 465: After the word “that”, change the sentence to read: “...Code Section R105.2 likely does not apply”.

Line 507: After the word ““expensive” add the words “...to construct...”.

Line 510: After the word “said”, insert the words “...he didn’t feel Board Members are qualified to...”.

Eliminate the section in the sentence which reads “...the Board members are not qualified to...”.

Line 409: After the word “involving”, enter the words “...the principle of a...”. Eliminate the “o” before the word “municipal”.

Line 83: After the word “jurisdiction”, add the following sentence. “*Certificates presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid.*”

Mr. Buber moved and Mr. Fullerton seconded the motion to approved the February 25, 2014 Meeting Minutes as amended above and with other minor typographical errors.

The vote was unanimous in favor of the motion (5-0).

Recording Secretary Report – Chair Field said the March 7, 2014 meeting was posted, February 28, 2014 at the Library, Town Clerk’s Office, Town Office and Town’s Website; it was not published in the newspaper because the Case is continued from the February 25, 2014 Meeting.

Chair Field said he would open the Public Hearing for receipt of new information, from new “Parties” present.

The Board had requested, at the February 25, 2014 Meeting, that the Owner obtain a written affidavit on whether or not he received a copy of Mr. Day’s un-recorded driveway plan. Chair Field reported that the Board was not in receipt of the affidavit from the Owner because he resides in Moscow and was unable to obtain one from the U.S. Embassy.

II. Unfinished Business

1. Case #2014:01 – Jerome J. Day and Jane Currivan, 153 Atlantic Avenue, North Hampton, NH. The Applicants are appealing the Decision of the Code Enforcement Officer on the issuance of a Certificate of Occupancy #NR-11-736 for 153B Atlantic Avenue, North Hampton, NH, issued on December 11, 2013, and “other” requests for relief, calling into question the following Zoning Ordinances, and NH RSAs: Article IV., Section 409.9 – Buffer Zone Restrictions; Section 409.10 – *Conditional Use Permits; Section 414:1 – Statement of Policy; Section 414.5.J – Water Resource and Aquifer Protection Violations; NH RSA 483-B.3.I and II – Consistency Required, and NH RSA 483-B.4.VII.b – Impervious Surface. Subject property owner: Mill Pond Dream Home, LLC, C/O Sheehan Phinney, Bass & Green, 1000 Elm Street, PO Box 3701, Manchester, NH 03105; Subject property location: 151 Atlantic Ave., (originally known as 153B Atlantic Ave) North Hampton, NH; M/L 006-144-001; zoning district: R-2. This Case is continued from the February 25, 2014 Meeting giving the Board an opportunity to obtain additional information from the Rockingham County Conservation District regarding the permeability of the driveway’s surface area. This Case is continued from the February 25, 2014 Meeting.

In attendance for Case #2014:01:

Jerome Day, Owner/Applicant

Jane Currivan, Owner/Applicant

Attorney Charles Griffin, Esq. Law Offices of Boynton, Waldron, Doleac, Woodman, & Scott, P.A.,

Counsel for the Applicants

Attorney Jacqueline Boyd-Fitzgerald, Counsel for Mill Pond Dream Home, LLC

Kevin Kelley, Building Inspector/Code Enforcement Officer

Gregg Bauer, Bauer Construction

Chair Field referred to NH RSA 674:35 and 674:36 that is the source of authority for the Planning Board to act, and authority to adopt Subdivision Regulations. He read the following sections of the Subdivision Regulations into the record:

SECTION II - PURPOSE AND INTENT - The stated purpose of these regulations to provide against such scattered or premature subdivision of land as would create danger or injury to health, safety, or welfare by reason of the lack of water supply, drainage, transportation, schools, fire department or other public services, or necessitate an excessive expenditure of public funds for the supply of such services.

SECTION V - GENERAL PROVISIONS - The subdivision procedure in no way relieves the applicant from compliance with or approval under the provisions of the Town's Zoning Ordinance, Site Plan Review Regulations, Building Codes, and/or other regulations which pertain to or govern the proposed development. No subdivision plan will be approved unless it is in compliance with all pertinent ordinances and regulations.

B. Minimum Not Maximum - The Planning Board will fully consider all aspects of an application before rendering its decision. This will include study of all subdivision design and technical aspects of the proposal as well as consideration of the impact of the development on resources, on local traffic patterns and on available public utilities, services, and municipal resources.

D. Review Standards - In reviewing subdivision plans, the Board shall take into consideration the public health, safety and general welfare, the comfort and convenience of the general public, and shall

ensure that proposed development does not have a detrimental effect on the abutters, the neighborhood, and the environment of the Town.

Chair Field commented that the Planning Board reached their Decision on the Day's subdivision in 2007 pursuant to State Laws and North Hampton Subdivision Regulations.

Chair Field said that the following issues need to be addressed:

1. Agree upon the definition of "pervious" and "pervious driveway". He explained that if there is not a definition of a word within the Ordinance it is normal practice to look to the ordinary meaning of the words. The word "pervious" is not defined, but "impervious" is.
2. Determine what is in place, whether or not it is a "pervious driveway" according to the approved Subdivision Plan #D-35115. Mr. Field and Mr. Buber visited the site on March 1, 2014. Mr. Fullerton and Mr. Williams visited the site on separate occasions. Mrs. Wilson did not visit the site.
3. Determine whether or not the Building Inspector properly took into consideration the "pervious" standards and "filling" standards when issuing the Certificate of Occupancy.
4. Determine what relief is forwarded if necessary.

Mr. Kelley chose to stay seated in the audience for convenience sake.

Chair Field said that Attorney Boyd-Fitzgerald submitted a request for information pursuant to NH RSA 91:A. She confirmed that she received a response by Ms. Chase.

Chair Field said that the Board received a packet of information from Attorney Boyd-Fitzgerald today and information was received by Attorney Griffin earlier in the week. All Parties involved received copies.

Chair Field read a statement from Ms. Chase into the record, *The March 7, 2014 ZBA Agenda was properly posted at the Town Office, Town Clerk's Office, Library and Town's website on February 28, 2014. It was not published in the newspaper because the case was continued and properly announced at the February 25, 2014 ZBA Meeting to a "date certain", March 7, 2014 at 3:00pm. Wendy Chase*

Ms. Currivan said she had submitted copies of pictures of the driveway.

Chair Field opened the Public Hearing for new information only.

Attorney Boyd-Fitzgerald said her client was unable to secure an appointment with the U.S. Embassy in Moscow, therefore she did not have a signed affidavit as requested by the Board, but she did have a "statement" from him referenced as "D" in the packet she submitted to the Board. She said her client did not have knowledge of the non-recorded driveway plan created by Mr. Day and that her client's agent said she did not have a copy of that plan at the time of the purchase. She referred to Exhibit "E", purchase and sales agreement addendum that refers to the recorded subdivision plan #D-35115. She said the landowner knows that he is bound by the deed.

Chair Field said that the Board suggested a Soil Scientist inspect the site and the Appellate and the Respondent would split the cost. He said the Board does not have the benefit of that information.

Attorney Boyd-Fitzgerald's client had "perk" tests done by Kevin Hatch, LLS of Cornerstone Survey Assoc. (Attachment "C"). He stated, in his opinion, that the existing driveway is a pervious surface. She said there will be a difference of opinion between the parties and her client has offered to pay for an independent Soil Scientist to inspect the site if the Town wants him to. She said she was told that there was no "fill" brought on the site, but it has recently come to her attention that there was $\frac{3}{4}$ " gravel brought into the site. She referred to attachment "B" an affidavit of Robert Villella, the general contractor for the Mill Pond Dream Home, LLC, that states he instructed Mr. Bauer to clean up the mud; he did not instruct him to replace it with $\frac{3}{4}$ " gravel, if he did he would have required 1 $\frac{1}{2}$ " crushed gravel which is the industry standard.

Attorney Fitzgerald-Boyd said that she believes the existing driveway is of pervious material based on the definition of what impervious means. She said, for marketability, her client is considering installing pervious asphalt on the driveway.

Attorney Griffin, representing Mr. Day and Ms. Currivan, stated for the record that he watched the recording of the February 25, 2014 meeting and has a good sense of what transpired. He said that he reviewed the State Statutes and the definition of the term "pervious" does not appear. He explained that when that happens the principle of law is to look to the ordinary definition of the term. Attorney Griffin submitted the following information:

- He referred to Exhibit "M" of Mr. Day's original submission, an article from the University of Florida, which defines permeable surfaces as consisting of various types of pavement, pavers and other devices that require stormwater infiltration while serving as a structural surface.
- The definition of "pervious" taken from the Miriam Webster Dictionary – under synonyms of "pervious", "passable, permeable, penetrable and porous".
- Excerpt from the New Hampshire Homeowner's Guide to Stormwater Management – a section on "Pervious Walkways & Patios".

Chair Field referred to Exhibit "M" – Pervious Driveway Surfaces cross section diagram and asked if the referenced "No. 57 Stone" is the same as " $\frac{3}{4}$ " gravel as shown the driveway plan.

Mr. Bauer said that "No. 57" Stone is $\frac{3}{4}$ ", $\frac{1}{2}$ " and $\frac{3}{8}$ " stone, mixed clean.

Mr. Day explained that he developed a driveway plan for a pervious driveway because he was obliged to construct it. The plan was not recorded. Mr. Day was informed by the Town that gravel was acceptable for a pervious driveway; his engineers said that according to NH DES, gravel is not pervious. Mr. Day said that the "detail" section of his plans calls for a certain type of pervious pavers. He said that that is one example of pervious driveway material, but said that the driveway doesn't have to be constructed with those exact pavers. He said during the negotiations with Mr. Andrei Sukhorukov, the detail of the construction wasn't mentioned; they only discussed that the driveway had to be pervious.

Mr. Williams asked Mr. Bauer to explain different types of pervious driveway construction.

Mr. Bauer introduced himself and said he was representing Jerome Day. He listed examples of pervious surfaces: cobblestones, pavers, pervious hot top and plastic grate system. After further discussion it was determined that the affidavit he supplied was incorrect. He explained that he delivered 170 tons of $\frac{3}{4}$ " gravel, the affidavit states that he delivered 170 yards; 170 tons equals approximately 150 cubic yards. He referred to invoice #628, page 2 that listed the material he purchased from Pike Industry. Mr. Bauer

explained that he was hired to put in the utilities and had to dig a 600-foot trench. He put the 170 tons of gravel onto the access way to support the construction vehicles going to the site to construct the house with the understanding from Mr. Viella, the general contractor, that all the gravel put down would have to be removed prior to the construction of the pervious driveway. Mr. Bauer said that the access way surface is currently made up of crushed gravel and begins at the end of Mr. Day's paved area to the garage, with nothing underneath it except the virgin soil.

Attorney Fitzgerald-Boyd said that her client, Mr. Sukhorukov is most likely going to put something in, because as it stands, it is a mud driveway.

Attorney Griffin referred to an opinion letter written by Kevin Hatch of Cornerstone Survey Associates and submitted by Attorney Fitzgerald-Boyd. He stressed the fact that Mr. Hatch is not a licensed Soil Scientist and stated that the letter is not worth the paper that it is written on.

Chair Field recessed the public hearing portion of the meeting.

Mr. Williams said that based on evidence and testimony of both meetings he doesn't find the driveway, in its current condition, to be pervious.

Mrs. Wilson said that after listening to the testimony, it doesn't appear to be a pervious driveway and it's up to the Board to decide whether they need the testimony of a Soil Scientist to determine if it is pervious.

Mr. Fullerton said that in light of not having an opinion from a Soil Scientist, the Board has to determine whether they feel the case has been made that the access way is pervious or not. There is nothing in the NH RSAs or the Zoning Ordinance that defines pervious. NH DES has a stormwater model ordinance and makes them available for Towns to adopt into their Zoning Ordinances which has a definition of "pervious cover", a land surface with a high capacity for infiltration. He said that after hearing all the testimony it doesn't seem to him that the current access way's base or surface is of a pervious nature.

Mr. Buber said that Mr. Bauer knows how the access way was constructed and he testified that crushed gravel was put in from the paved area on Mr. Day's property to the new house and covering the entire driveway. He said, in his opinion, the "driveway" is not pervious.

Chair Field said he visited the site and in no way does it meet the standard set by the Planning Board for a pervious driveway. He said the gravel was put there to allow construction equipment to get to the construction site and is not a "base" or a "surface" of a pervious driveway.

Chair Field moved and Mr. Buber seconded the motion that the Board determine, is the access way, as it exists at this moment and time, a pervious driveway.

Mrs. Wilson said that it is not a pervious driveway, but answered, "Yes" to the Motion.

Mr. Williams said that after visiting the site and seeing standing water on Mr. Day's property, and in light of the testimony of the gravel that was brought in, he said it is not a pervious surface.

Mr. Fullerton said that it is not a pervious surface and doesn't approach the conditions set forth by the Planning Board for the Subdivision.

Mr. Buber said, based on his prior comments, it is not a pervious surface.

Chair Field said it is not a pervious surface.

The vote was unanimous in favor of the motion that it is not a pervious driveway (5-0).

Chair Field moved and Mr. Buber seconded the motion, does the Board agree that, is what is on site now a pervious driveway as each member understands the intention of the Subdivision Plan.

Ms. Wilson voted, "No".

Mr. Williams said that it is not a pervious driveway per the intent of the Planning Board.

Mr. Fullerton said that it is not a pervious driveway.

Mr. Buber voted that it is not in accordance, or in the intent, of the approved Site Plan #D-35115.

Chair Field voted that it is not a pervious surface in accordance with the site plan and the Planning Board's general responsibilities.

The vote was unanimous in favor of the motion that what is on site now is not a pervious driveway in accordance with the site plan #D-35115 or the intentions of the Planning Board.

Attorney Fitzgerald-Boyd opined that the driveway and the Certificate of Occupancy are two separate and distinct issues. She referred to Building Code R110.3 – "after the Building official inspects the building or structure and finds no violations of the provisions of this code or other laws that are enforced by the department of building safety, the building official shall issue a certificate of occupancy...". She referred to Building Code R105.2 that states certificates of occupancy are not required for work exempt from permits under R105.2, and R105.2 lists "sidewalks and driveways". She said the driveway issue is not a reason for the Board to withhold a Certificate of Occupancy.

Attorney Griffin referred to Section 704.4 of the Zoning Ordinance, that states, that "a Certificate of Occupancy shall state that the building or proposed use of a building complies with all provisions of law, and of this ordinance, of all other applicable codes or ordinances of the Town...." He also referred to Section 1001 – Conflict, and said that "the provision which imposes the greater restriction or the higher standard shall govern", and clearly the Zoning Ordinance imposes the higher standard. Attorney Griffin said that the construction of the pervious driveway was a condition of approval of the subdivision plan. He said the issuance of the Certificate of Occupancy, although done in good faith, was issued improperly. He referred to the Certificate of Occupancy itself that states that "the certificate presuming to violate or cancel the provisions of this code or other ordinances of the Town shall not be valid". He said, if other ordinances of the Town are violated, the Certificate of Occupancy is to be cancelled. He said the Certificate of Occupancy was not properly issued.

Mr. Kelley said that based on his observations when visiting the site on November 27, 2014, during a rain storm, the "driveway" was not an issue. He issued the Certificate of Occupancy based on the structure itself; it was "signed off" by himself and the Fire Chief.

Discussion ensued on inspections of driveways and roads in Town. Mr. Kelley said that driveways are exempt from building permits and he assumed the Town's Engineer inspects newly constructed roads.

Mr. Buber referred to Section 704.4 of the Zoning Ordinance: *Every certificate of occupancy shall state that the building or proposed use of a building complies with all provisions of law, and of this ordinance, of all other applicable codes or ordinances of the Town and, if applicable, with all provisions of any variance or requirements set forth for the special exception uses authorized by the Board of Adjustment.* He questioned why the Certificate of Occupancy doesn't include this language. Mr. Kelley said that he would fix it.

Mr. Landman served on the Planning Board in the past and said that the Town's Engineer would inspect roads that were built in a subdivision.

Chair Field suggested the Board take a vote; a "Yes" vote would be that the Building Inspector took into consideration all of things he should have, and a "No" vote would be that he did not.

Mrs. Wilson said the Building Inspector was doing his job with all the information he had. Ms. Wilson voted, "No".

Mr. Williams said he agreed with Mrs. Wilson that it was not intentional for the Building Inspector not to administer the provisions of Section 704.5. Mr. Williams voted, "No".

Mr. Fullerton voted, "No".

Mr. Buber voted, "No".

Chair Field voted, "No".

In summary, and not exclusively, the Board found (1,) that the "access-way"/driveway was NOT "pervious" as such term is commonly used, as a word of art, by civil engineers; (2,) the Board found that the "access-way"/driveway, as in place, did NOT conform with either the trade definition of "Pervious Driveway", or the presumed intention of the P.B. when it prescribed such construction on the approved 2007 Subdivision Plan; (3,) the Board determined that Mr. Kelley, as a matter of misfortune, mistake and unintentional omission, rather than commission, resulting in harm to Appellant, neglected to properly take into consideration and give weight to the failure of the "access-way"/driveway in place to conform with the "Pervious Driveway" prescription of the P.B. when he issued the Certificate Of Occupancy; and, (4,) the Board determined that the appropriate remedy was a, recession/revocation of the current CO and the BI/CEO was instructed to issue a "Temporary Certificate of Occupancy", valid until July 31, 2014, to enable the Owner to complete the "Access-way"/"pervious driveway". The exact type of "pervious driveway", design and installation was left in the hands of the Parties, subject, however, to the BI/CEO engaging on behalf of the Town a civil engineer of his choice to review, supervise and have final approval of the "pervious driveway" design and construction; ALL at the expense of Owner. If the "pervious driveway" is not in place and completed in a manner satisfactory to the BI/CEO and consulting engineer on or before July 31, 2014, the "Temporary Certificate of Occupancy" shall become null and void. If, however, whenever the "access-way"/pervious driveway is completed to the satisfaction of the BI/CEO and consulting engineer, then a permanent Certificate of Occupancy may be issued by the BI/CEO in the ordinary course.

Mr. Field moved and Mr. Buber seconded the motion to direct the Building Inspector/Code Enforcement Officer to (1) invalidate the current Certificate of Occupancy, (2) issue a temporary

Certificate of Occupancy with an expiry date of July 31, 2014, and (3) the driveway be constructed in accordance with the subdivision plan subject to the design and construction approval of a certified engineer, selected by the Town's Building Inspector/Code Enforcement Officer, and paid for by the Owner.

The vote was unanimous in favor of the motion (5-0).

Mr. Day said that, three (3) years ago, prior to any gravel brought in, the contractor pushed earth onto his property and it has altered the flow of water going into the wetlands, which is detrimental to the wetlands. He asked that the Board require that the violations of the wetlands buffer be removed in the process of constructing the driveway.

Mr. Kelley said according to the plan the pad for the transformer is two to three feet into the wetlands, which would be considered a wetlands violation. He said he will notify Eben Lewis from NH DES to determine if it is a violation. Mr. Kelley said he will require that the wetlands be re-delineated, have the borings tested for fill, and have the construction of the driveway documented by an engineer of his choosing.

Mr. Day said he was satisfied with Mr. Kelley's proposal.

As to "fill", the Board concluded, based on recently submitted Affidavits, that 170 tons/150 cubic yards, of crushed gravel, not ¾" crushed stone, had been filled in, placed on, the access route across the "wetlands buffer zone" and on the Owner's driveway site, by Owner's subcontractor (Mr. Bauer) in an effort to stabilize the "virgin soil" for utility line construction and for heavy construction vehicles transiting to the construction site. Such will most likely be removed during the upcoming "pervious driveway" construction, and as a consequence the Board took no action. At the request of Attorney Fitzgerald-Boyd, it was noted that she wished to correct her statement of "no filling" made on February 25, 2014, to now conform with the newly disclosed information concerning "filling". When asked if he wished to correct his previous comments for the same reason, Mr. Kelly said, "No."

Mr. Day stated that he did not wish to pursue the "tree cutting" issue made in his original complaint.

Attorney Griffin said that a portion of Mr. Day's paved driveway was disrupted during construction and would like to make sure that it is restored to its original state before construction of the pervious driveway begins.

Attorney Fitzgerald-Boyd said that she believes that is part of the agreement between the two Parties and is a civil issue. Mr. Day agreed.

The Board found that the alleged damage occasioned by Owner to the existing driveway of Mr. Day, will be remediated by the Parties in accordance with the terms of their construction agreement. All other contested matters between the Parties were determined by the Board to be civil in nature and NOT within the jurisdiction of the Board.

Chair Field closed the Public Hearing.

Chair Field thanked Bob Landman for acting as Secretary pro tem.

417 **Mr. Buber moved and Mr. Williams seconded the motion to adjourn at 6:36 p.m.**
418 **The vote was unanimous in favor of the motion (5-0).**

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421 Respectfully submitted,

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423 Wendy V. Chase

424 Planning & Zoning Administrator

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426 **Approved March 25, 2014**

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