



**"Special Meeting" Minutes  
Town of North Hampton  
Zoning Board of Adjustment  
Wednesday, June 4, 2014 at 4:00pm  
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.

**Attendance:**

**Members present:** David Buber, Chair; Phelps Fullerton, Vice Chair, George Lagassa, and Charles Gordon. (4)

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

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

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

**Preliminary Matters; Call to order; Pledge of Allegiance; Roll call/Introduction of Members/ Alternates; Recording Secretary Report**

Chair Buber Called the Meeting to Order at 4:00 p.m.

Pledge of Allegiance -Chair Buber invited the Board Members and those in attendance to rise for a Pledge of Allegiance.

Introduction of Members and Alternates - Chair Buber introduced Members of the Board and the Alternates, and Staff who were present (as identified above). Mrs. Wilson had already been seated for Mr. Landman.

Recording Secretary Report - Ms. Chase reported that the Special Meeting Agenda was properly posted on May 28, 2014 at the Library, Town Clerk's Office, Town Office and on the Town's website. A copy of the Special Meeting Agenda was mailed to Jerome Day and Jane Currivan by returned-receipt, certified mail.

**I. New Business**

**1. The Zoning Board of Adjustment will conduct a Special Meeting to act on the request of a Motion for Rehearing filed by Attorney Charles Griffin on behalf of Jerome Day and Jane Currivan of 151 Atlantic Avenue, North Hampton, NH 03862. The request is made with respect to ZBA Case #2014:01 and the Board's Decision of April 23, 2014, changing its Decision Letter of March 7, 2014, by deleting the phrase, "The design and construction shall be left in the hands of the parties."**

Chair Buber read from the 2012 Local Government Center Law Lecture Series Publication titled, "New Hampshire Local Government Center, 2012 Municipal Law Lecturer Series, Lecture 1: 'Procedural Basics for Planning and Zoning Boards' Section E. "Requests For Rehearing", Paragraph 2. 'Procedure Once the Motion Has Been Received.'"

Chair Buber explained that the Board met on April 23, 2014 to right a wrong by correcting a statement made in a Decision Letter pertaining to Case #2014:01. They did not meet to change the Decision made at the March 7, 2014 meeting which was in the form of a motion and subsequent unanimous approval.

Chair Buber asked for a sense of the Board regarding the Rehearing whether to grant it or continue with the proceedings.

Mrs. Wilson said that she did not consider the April 23, 2014 meeting an actual Rehearing; they met to make a correction of a procedural error, and since it was not a Rehearing she questioned whether the Board could actually grant a Rehearing on the correction made at the Special Meeting. She said she's not sure a Rehearing is in order when the previous meeting wasn't a Rehearing.

Chair Buber decided to move forward with the requested Motion for Rehearing.

Chair Buber commented that the Decision was made on March 7, 2014 and the Decision letter was signed and mailed on March 14, 2014.

The following are statements made by Attorney Charles A. Griffin contained in his Motion for Rehearing and corresponding summary responses by the Members of the North Hampton Zoning Board of Adjustment at its June 4, 2014 "Special Meeting".

**The April 23, 2014, decision of the ZBA changing its Letter of Decision by deleting that phrase was unlawful for the following reasons:**

- 1. a. The ZBA had previously approved the Minutes of its March 7, 2014, meeting containing that statement, to wit: "The exact type of pervious driveway design and installation was left in the hands of the parties."**

Mr. Gordon said that the original Decision Letter was written by, the then Chair, who believed in good faith, that what he wrote reflected the decision of the Board. He said that the Board did not review the final Decision Letter, but it was the Board's job to determine, at the April 23, 2014 meeting, and after reviewing the minutes and DVD recording, whether or not the Decision Letter contained a phrase that was not consistent with what was actually decided at the March 7, 2014 meeting.

Mr. Fullerton said that the phrase "The design and installation shall be in the hands of the parties" was a summarization by the previous Chair. A transcription of the actual recording at the March 7, 2014 meeting is clear as to who's responsible of the installation of the pervious driveway; there was no discussion of including architectural review or oversight by the Days as to the type of pervious driveway. He said the Board attempted to come to a resolution of what the original intent of the Board was.

Mrs. Wilson said that the minutes do not expressly state the phrase "The design and construction shall be left in the hands of the parties". She said the Board attempted to correct a procedural error and does not think it is in the Board's purview to change what was in the actual minutes or the DVD.

Mr. Lagassa agreed with the above comments.

Chair Buber agreed with the above comments and said that the previous Chair drafted a summary that began with "in summary, and not exclusively"; it was not to be taken verbatim. The actual motion made, and unanimously approved by the Board, can be found on lines 368 through 374 of the March 7, 2014 ZBA meeting minutes.

**Board Members concurred 5-0-0.**

**b. The ZBA repeated that statement in its Letter of Decision dated March 14, 2014.**

Chair Buber said that the above is a correct statement, but basically done by an error, and not mentioned in the final motion (lines 368 through 374 of the March 7, 2014 ZBA meeting minutes).

**Board Members concurred 5-0-0.**

**c. There was evidence in the record to support the insertion of that statement, namely:**

**(1) A statement from the building inspector that Mr. Day needs to agree where the driveway is.**

Chair Buber stated for the record that he would have appreciated it if Attorney Griffin would have referenced where in the meeting minutes the statements he mentioned occurred. He said he reread the March 7<sup>th</sup> meeting minutes and the DVDs and could not find where the above statement occurred and was not sure what the statement, if made, referred to.

Mr. Lagassa asked for clarification and thought that the location of the driveway is "spelled out" in the agreements between the Days and Millpond Dreamhome LLC.

Chair Buber said that that is a civil matter and that is how the Board left it. He referred to the March 7, 2014 minutes on line 408 regarding the civil issue, "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".

**Board Members concurred 5-0-0.**

**(2) A statement from the Chair that the location of the driveway "falls to the owner and the Days to decide."**

Chair Buber said that there was no reference made as to where this statement occurred. He said a lot of discussion takes place during the Board's deliberations, and what matters is what goes into the final motion, and the vote of the Board.

**Board Members concurred 5-0-0.**

- 142  
143 **(3) A statement from the Chair that the details of the previous driveway are**  
144 **between the owner and the Days; that they have the right to pick a**  
145 **pervious driveway and that oversight of the work is going to fall between**  
146 **the owner and the Days.**  
147

148 Chair Buber said, again, this was not referenced as to where the statement was made and it was not  
149 read into the motion.  
150

151 Mr. Fullerton quoted a statement made by Chair Field at the March 7, 2014 meeting, "to allow the  
152 owners to design and construct a pervious driveway per subdivision plan #D-35115 and to further  
153 provide that such design and construction of the driveway shall be done under the review of an  
154 Engineer selected by the Town Building and Safety Officer and paid for by the Owner". He said he does  
155 not know where the above statement, from Attorney  
156 Griffin came from.  
157

158 **Board Members concurred 5-0-0.**  
159

- 160 **d. Unless a change of circumstances has intervened, the doctrine of res judicata applies and**  
161 **the Board may not reopen the matter and reconsider its decision. Anderson, American**  
162 **Law of Zoning, 4<sup>th</sup> Ed., Section 22.03.**  
163

164 Chair Buber said that there was a change in circumstances. The Board discovered that an erroneous  
165 statement was included in the Decision Letter. He said "res judicata" essentially means that once a  
166 matter is judicially decided; it is finally decided.  
167

168 Mr. Gordon said that the Board did not revisit the decision at its April 23, 2014 Special Meeting, all it did  
169 was determine whether or not the decision was accurately stated in the decision letter and after review  
170 of the meeting minutes and DVD the letter did not accurately reflect the decision. There was no re-  
171 visitation of the actual Decision. Mr. Gordon said the Decision Letter has to accurately communicate the  
172 Board's Decision.  
173

174 Chair Buber said that he spoke with an attorney who said it was the Board's obligation to right a wrong  
175 regardless if it went beyond the appeal period by two days. They did not change the Decision Letter;  
176 they corrected the Decision Letter. Chair Buber said, with permission from the Town Administrator,  
177 contacted the Town's Attorney and he was of the same mindset. He said something was brought to the  
178 Board's attention in a reasonable amount of time, even though it exceeded the appeal period window,  
179 and the Board decided to hold a Special Meeting to discuss it.  
180

181 Mrs. Wilson agreed, she said the Board was correcting an error on a Decision Letter; not changing it.  
182

183 Mr. Fullerton said the Board was making a clarification; not revisiting the Decision, or holding a  
184 Rehearing.  
185

186 **Board Members concurred 5-0-0.**  
187

- 188 **2. The ZBA made its decision in response to a letter dated April 8, 2014, from Attorney**  
189 **Jacqueline Fitzgerald Boyd representing Millpond Dreamhouse [sic], LLC, requesting that the**

phrase “the design and installation shall be in the hands of the parties” be deleted from its March 14, 2014, Letter of Decision.

- a. Attorney Fitzgerald Boyd claimed her April 8, 2014, letter was not an appeal of the ZBA’s March 7, 2014, decision but rather an appeal of the language used in that decision and the ZBA adopted her position and changed its March 7, 2014, Letter of Decision as she requested.

Chair Buber said that the Board did receive a letter from Attorney Fitzgerald Boyd that stated it was not an appeal of the ZBA’s March 7, 2014 Decision. He said it was her intent to inform the Board that the language in the Decision Letter did not dovetail the motion, and after review of the minutes and, of the DVD recordings of the Meetings, the Board decided to correct the Decision Letter to accurately reflect the Board’s Decision.

**Board Members concurred 5-0-0.**

- b. The ZBA erroneously concluded that the April 8, 2014, letter was not a request for rehearing but was a very limited review of its March 7, 2014, decision for the following reasons:

- (1) The powers of the zoning board of adjustment are determined by statute, RSA 674:33 and the ZBA’s Rules of Procedure Section 2 state in part that the powers of the Board shall be those authorized under RSA 674:33.

Chair Buber said he agreed. “There is no issue there”.

- (2) The ZBA’s Rules of Procedure Section 6.H. state in part that the Board may reconsider a decision provided such reconsideration is within the appeal period of the original decision.

Chair Buber read the following Section from the Board’s Rules of Procedure:

**“H. Reconsideration by the Board** - The Board may reconsider a decision to grant or deny an application or grant or deny a motion for rehearing provided such reconsideration is within the appeal period of the original decision”.

Mr. Gordon said that the Board did not need to meet to reconsider the Board’s original decision; if that were the case, then Attorney Fitzgerald-Boyd would have lost out because she would not have made the 30-day appeal period.

**Board Members concurred 5-0-0.**

- (3) Attorney Fitzgerald Boyd’s April 8, 2014, letter was not filed within 30 days of the decision of the March 7, 2014, decision of the ZBA.

Chair Buber said Attorney Fitzgerald-Boyd was not filing an appeal of the Board’s Decision.

**Board Members concurred 5-0-0.**

- 235  
236           **(4) On April 14, 2014, their attorney submitted a response to Attorney Fitzgerald Boyd's**  
237           **April 8, 2014, letter in which he stated that her letter was nothing more than an**  
238           **untimely request for rehearing which was not filed within 30 days of the decision of**  
239           **the ZBA (Bonzetto v. Town of Richmond, 163 NH 736, 741, 742 (2012), as it concerned**  
240           **a matter determined in the action or proceeding and covered within the Board's**  
241           **order, RSA 677:2.**

242  
243 Chair Buber said that the latter part of the paragraph doesn't change what the Board discussed above.  
244 Attorney Fitzgerald-Boyd was not filing an appeal of the Board's Decision.

245  
246 **Board Members concurred 5-0-0.**

- 247  
248           **(5) There is nothing in the enabling statute that permits a zoning board of adjustment to**  
249           **revisit a prior decision other than through a motion for rehearing.**

250  
251 Chair Buber said that the Board did not revisit the "Decision"; they reviewed the Decision Letter and  
252 found that there was an error in it.

253  
254 **Board Members concurred 5-0-0.**

- 255  
256           **c. As a result, the ZBA's decision to change its Letter of Decision by deleting the phrase "the**  
257           **design and installation shall be in the hands of the parties" was illegal.**

258  
259 Chair Buber said that, prior to, and subsequent to the April 23, 2014 "Special Meeting" of the Board, he  
260 personally talked with four (4) Attorneys. Attorney Sanderson's response was confusing, but did state  
261 that the phrase "The design and construction shall be left in the hands of the parties" is ambiguous and  
262 unlikely enforceable.

263  
264 **Board Members concurred 5-0-0.**

- 265  
266           **3. The composition of the ZBA on March 7, 2014, was substantially different from that on April**  
267           **23, 2014.**

268  
269 Chair Buber explained that between the March 7, 2014 and April 23, 2014 meetings there was a Town  
270 Election and Chair Field was not reelected and Mr. Gordon was elected. Mr. Gordon had the right as an  
271 elected member to sit and attend the "Special Meeting" on this issue, even though he did not sit on the  
272 previous hearings. Mr. Gordon read the minutes and reviewed the DVDs of the meetings. He also served  
273 on the Little Boar's Head Village District Zoning Board of Adjustment for eight (8) years and four (4) of  
274 those years as Chair, and is a retired Attorney.

275  
276 Mr. Gordon said he would not have "sat" if it was a reconsideration of a decision made at a meeting  
277 where he had not participated. He said it was a review of the factual record to determine whether that  
278 Decision Letter accurately communicated the decision.

279  
280 **Board Members concurred 5-0-0.**

- 282           **a. At the March 7, 2014, meeting the ZBA was comprised of Messrs. Field, Buber, Fullerton,**  
283           **Williams, and Ms. Wilson. Mr. Lagassa and Mr. Gordon were absent. On April 23, 2014, it**  
284           **was comprised of Messrs. Buber, Phelps, Fullerton, Lagassa and Gordon. Both Messrs.**  
285           **Lagassa and Gordon participated extensively in the discussions and deliberations on April**  
286           **23, 2014, and Mr. Gordon made the motion to change the March 7, 2014, Letter of**  
287           **Decision by deleting the wording, "in the hands of the parties."**  
288

289 Chair Buber said the February 25, 2014 meeting comprised of Chair Field, Mr. Buber,  
290 Mr. Lagassa, Mr. Fullerton, Mr. Landman (recused himself), Mr. Williams, and Mrs. Wilson. Mrs. Wilson  
291 was seated for Mr. Landman. The March 7, 2014 meeting comprised of Chair Field, Mr. Buber, Mr.  
292 Fullerton, Mr. Landman, Mr. Williams and Mrs. Wilson. Mr. Landman was recused, Mr. Lagassa was  
293 absent; Mrs. Wilson was seated for Mr. Landman and Mr. Williams was seated for Mr. Lagassa. The April  
294 23, 2014 Special Meeting/Work Session comprised of everyone; Chair Buber, Mr. Fullerton, Mr. Lagassa,  
295 Mr. Landman (recused), Mr. Gordon, Mrs. Wilson, Mr. Williams and Mr. Pinette. Every member of the  
296 Board offered commentary, and every full member and alternate member agreed to the correction to  
297 the Decision Letter.  
298

299 **Board Members concurred 5-0-0.**  
300

- 301           **b. RSA 673:14 provides that no member of the ZBA shall sit upon the hearing of any**  
302           **question which the Board is to decide in a quasi-judicial capacity if that member would**  
303           **have been disqualified to act as a juror upon the trial of the same matter.**  
304

305 Chair Buber referred to RSA 673:14 and there was nothing within the RSA that a Zoning Member would  
306 be disqualified that didn't meet the jury standard.  
307

308 Mr. Gordon said he did not have to be disqualified because he had no conflict of interest.  
309

310 Mrs. Wilson said that Mr. Gordon was duly elected after the previous hearing and there is nothing in the  
311 law that states he could not participate. Mrs. Wilson said it would still be Mr. Gordon's choice if it were  
312 a rehearing, unless it was specifically requested by the applicant that he recuse himself.  
313

314 Mr. Gordon said that Mrs. Wilson made a good point.  
315

316 **Board Members concurred 5-0-0.**  
317

- 318           **c. If Messrs. Lagassa and Gordon were members of a jury not present when the evidence**  
319           **was presented but then proceeded to participate in the deliberations of the case, that**  
320           **would clearly be improper and they would be disqualified.**  
321

322 Chair Buber said that the Board was not in deliberations of the case and he did not see any conflicts of  
323 the jury standards concerning Mr. Lagassa and Mr. Gordon.  
324

325 **Board Members concurred 5-0-0.**  
326

- 327           **d. Even though the disputed members' votes were only two of five unanimous votes, the**  
328           **April 23, 2014, decision of the ZBA is invalid because it is impossible to estimate the**

**influence one member might have had on others. Winslow v. Town of Holderness Planning Board, 125 NH 262 (1984).**

Chair Buber said the entire Board was present; it was a "Special Meeting"; it was a "Work Session" and everybody in attendance participated, and everyone voted, so even if they determined that Mr. Gordon and Mr. Lagassa should be disqualified, the Board still had 5 votes in favor, 0 opposed because the Alternates voted in favor. Mrs. Wilson said that it could never be more than a 5 member vote; she said the Alternates can participate in the discussion. Chair Buber agreed, he was just pointing out a hypothetical that if there is a question of two (2) members influencing seven (7) people who were involved in the decision on April 23<sup>rd</sup>, he doesn't buy that argument.

Mr. Lagassa said even if the two members were disallowed the motion still would have carried 3 -2.

**Board Members concurred 5-0-0.**

**Mr. Buber moved and Mr. Fullerton seconded the motion that the rehearing request for Case 2014:01 be denied based on points discussed at this "Special Meeting".**

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

**Mr. Lagassa moved and Mr. Gordon seconded the motion to adjourn the meeting at 5:00pm.**

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

Respectfully submitted,

Wendy V. Chase  
Recording Secretary

Approved June 24, 2014