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**Meeting Minutes
Town of North Hampton
Zoning Board of Adjustment
Tuesday, June 24, 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:** David Buber, Chair; Phelps Fullerton, Vice Chair, George Lagassa, and
15 Charles Gordon. (4)
16

17 **Members absent:** Robert Landman. (1)
18

19 **Alternates present:** Dennis Williams, Jonathan Pinette and Lisa Wilson. (3)
20

21 **Administrative Staff present:** Wendy Chase, Recording Secretary.
22

23 **I. Preliminary Matters; Procedure; Swearing in of Witnesses (RSA 673:14 and 15);**
24 **Recording Secretary Report**
25

26 Chair Buber Called the Meeting to Order at 6:30 p.m.
27

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

33 Chair Buber seated Mr. Williams for Mr. Landman.
34

35 Introduction of Members and Alternates - Chair Buber introduced Members of the Board and the
36 Alternates who were present (as identified above).
37

38 Recording Secretary Report - Ms. Chase reported that the June 24, 2014 Meeting Agenda was properly
39 published in the June 12, 2014 edition of the Hampton Union and, posted at the Library, Town Clerk's
40 Office, Town Office and on the Town's website.
41
42

ZBA Meeting Minutes

Swearing In Of Witnesses – Pursuant to RSA 673: 14 and 15, Chair Buber 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.

- 1. Case #2014:06 – Applicants Gregory Raiff, Meghan Raiff Trusts, Matthew Raiff Trust, Nola Raiff Trust, 3 Park Circle, North Hampton, NH 03862. Owners: Same as above; Property location: 3 Park Circle, North Hampton, NH 03862; M/L: 017-107-010; Zoning District: R-2 Residential Medium Density.** The Applicants requests the following Variances, (1) Article IV, Section 409.9B – to permit a new barn, colonnade, driveway and related features approximately 53-feet from wetland where approximately 10-feet exist and 100-feet is required, (2) Article IV, Sections 403 and 405, Table R-2 – to eliminate 1 of the bedrooms in the main home, to allow kitchen/bath/bedroom for family /visitor use only in new barn creating 2 dwellings on 1 lot where 1 dwelling is permitted and (3) Article V, Section 501.2 – To allow the new barn, colonnade, driveway and related features, which expands the existing nonconformity of structures located within the wetland buffer.

In attendance for this application:

Attorney Timothy Phoenix, Applicant's Counsel

Attorney Phoenix explained that his client, Mr. Gregory Raiff, is requesting a continuance of their Case due to the outcome of a site walk they held last week that included, among others, Chris Ganotis, Chair of the Conservation Commission and Michael Cuomo, Soil Scientist, Rockingham County Conservation District (RCCD). Mr. Cuomo reported to the Conservation Commission that he recommended a drainage study be preformed. Attorney Phoenix said they were hopeful that a drainage study would not be necessary, but Mr. Cuomo rendered an opinion that it did. He said there was not enough time to have the study done in time for this meeting, so he asked that the case be continued. He said although he prefers it to be continued to the July 22, 2014 meeting, he was informed that that meeting has a full agenda so he is agreeable to have it continued to the August 26, 2014 meeting.

Mr. Lagassa moved and Mr. Gordon seconded the motion to grant the request, and continue Case #2014:06 to the August 26, 2014 meeting.

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

Minutes

- 1. May 27, 2014 – Mr. Fullerton moved and Mr. Gordon seconded the motion to accept the May 27, 2014 Meeting Minutes as written.**

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

- 2. June 4, 2014 – Mr. Buber noted that there was a change to line #51 to change the last word in the sentence to "Received".**

Mr. Fullerton moved and Mr. Gordon seconded the motion to accept the June 4, 2014 "Special Meeting" Minutes as amended.

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

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

II. Unfinished Business

There is no Unfinished Business.

III. New Business

Attorney Loughlin is representing Mr. Alan Perkins and Dr. Robert Chaikin and thought it would be reasonable for the Board to *hear* both cases at the same time.

Mr. Fullerton read the case description of Case #2014:08 and Case #2014:09 into the record.

2. **Case #2014:08 – Alan Perkins, Trustee, Thurston Farms Realty Trust, 54 Atlantic Avenue, North Hampton, NH 03862. Owner: Golden KS, LLC, 63 Atlantic Avenue, North Hampton, NH 03862; Property location: 63 Atlantic Avenue, North Hampton, NH 03862; M/L: 005-038-000; Zoning District: R-2 Residential Medium Density.** Attorney Peter J. Loughlin, on behalf of the Applicant, Alan Perkins, submits an Appeal of an Administrative Decision pursuant to NH RSA 674:39, I (a) requesting the Zoning Board of Adjustment to hear and decide if there was an error on the part of the Building Inspector in issuing a Building Permit for a cell tower at 63 Atlantic Avenue, North Hampton, NH 03862.
3. **Case #2014:09 – Robert M. Chaikin, Trustee, 59 Atlantic Avenue, North Hampton, NH 03862. Owner: Golden KS, LLC, 63 Atlantic Avenue, North Hampton, NH 03862; Property location: 63 Atlantic Avenue, North Hampton, NH 03862; M/L: 005-038-000; Zoning District: R-2 Residential Medium Density.** Attorney Peter J. Loughlin, on behalf of the Applicant, Robert M. Chaikin, submits an Appeal of an Administrative Decision pursuant to NH RSA 674:39, I (a) requesting the Zoning Board of Adjustment to hear and decide if there was an error on the part of the Building Inspector in issuing a Building Permit for a cell tower at 63 Atlantic Avenue, North Hampton, NH 03862.

In attendance for this application:

Attorney Peter Loughlin, Counsel to the Applicants, Mr. Perkins and Dr. Chaikin
David Maxson, Wireless Consultant, Isotrope, LLC
Brian Grossman, Counsel to the Owner of the property, Guy Marshall, Lamprey Energy
John Nestor, Set Acquisition Consultant, Nanepashemet Project Management Inc.

Chair Buber asked if Mr. Kelley would be present, since this is an appeal against his finding. Ms. Chase said that Mr. Kelley would not be present.

Attorney Loughlin said that on April 14, 2014, Mr. John Nestor, Project Manager of Nanepashemet, applied for a building permit on behalf of Guy Marshall, Lamprey Energy on property at 63 Atlantic Avenue for the "replacement of existing 80' communications tower with new 80' guyed tower. Installation of radio cabinets in interior garaged area." He said his clients believe the permits were issued improperly and that is why they are appealing the Building Inspector's decision.

Attorney Loughlin said that telecommunication towers are permitted under Section 415.4 of the Town's Zoning Ordinance and quoted, "only after obtaining a Conditional use Permit, as provided for in Section 415.7". He said that Lamprey Energy did not obtain a Conditional Use Permit and is not entitled to have

ZBA Meeting Minutes

a cell tower at this location. He said that on a State level telecommunication facilities are regulated under RSA 12-K – The Deployment of Personal Wireless Service Facilities. The Statute was amended by the Legislature in 2013 (SB 101). He provided copies of NH RSA 12-K to each Board Member. He said the Federal Law has a 90-day requirement for an application to be acted upon, and New Hampshire Law has a 45-day requirement for an application to be acted upon. Attorney Loughlin opined that the law changed so that owners of existing towers would not have to go through the arduous permitting process for collocation. He read the definition of collocation from the Statute 12-K: 2.X, “The placement or installation of new Personal Wireless Service Facilities (PWSF) on existing towers or mounts and capable of structurally supporting the attachment of PWSF’s”.

Attorney Loughlin said that the proposal at 63 Atlantic Avenue is not to collocate on the existing 60-foot tower with a 20-foot whip antenna; they are proposing to tear down the existing radio tower because it does not support the attachment of PWSF’s, and build a new tower, which would not meet the definition of collocation.

Attorney Loughlin said that the Building Inspector responded to him and indicated that the proposed use is a natural expansion of what is already there.

Attorney Loughlin said that one of the three tests when determining if something is an expansion of a non-conforming use is to ask “is there a different impact on the neighborhood?” He said that in this case there is a change of impact on the neighborhood, visually. He said it’s not about whether or not there is good or bad coverage at the lower end of Atlantic Avenue, it’s simply a question of whether or not Lamprey Energy has the approval necessary to put up this tower. Attorney Loughlin said that it is a new tower and they should have to go through the permitting process with the Town.

David Maxson submitted copies of simulated pictures of what the tower and antennas would look like if the new tower were constructed. He explained that under RSA 12-K a “tower” is defined as “a freestanding or guyed structure, such as a monopole, monopine, or lattice tower, designed to support PWSFs”. He said the existing radio tower is not capable of supporting PWSFs. One of the images he submitted was a simulation for the proposed new tower with four full-frame antenna arrays consistent with what wireless companies install on cell towers and said the added arrays would be allowed if the new tower were erected because they would meet the requirements of collocation pursuant to RSA 12-K.

Attorney Grossman introduced himself and Mr. Nestor the Set Acquisition Consultant from Nanepashemet Project Management, Inc. who submitted the Building Permit on behalf of the Owner, Guy Marshall and is a consultant to A T&T. He said that Attorney Loughlin is correct; SB 101 is the controlling issue along with Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 which was a Federal Act. SB101 is what changed RSA 12-K; it’s an extension of it. He submitted one copy to the Board of their rendition of what the proposed tower will actually look like, because it is important for the Board to see, but the only question before the Board is whether or not the Building Inspector was right in issuing the Building Permit; does the proposal qualify under SB 101 as a collocation, or not.

Attorney Grossman referred to RSA 12-K:

- RSA 12-K:10 – Application Review – Collocation applications and modification applications shall be reviewed for conformance with applicable building permit requirements but shall not otherwise be subject to zoning or land use requirements, including design or placement requirements, or public hearing review.

- 185 • RSA 12-K:2.X – Collocation means the placement or installation of new PWSFs on existing
186 towers or mounts, including electrical transmission towers and water towers, as well as existing
187 buildings and other structures capable of structurally supporting the attachment of PWSFs.
188 Attorney Grossman said that the radio tower would be considered “other structures”. The goal
189 of SB101 was to promote the use of existing structures or infrastructure. He said the term “drop
190 and swap” is used in the wireless industry. It’s when there is a tower that could be modified to
191 support the PWSFs, but would be much more difficult then to remove it and replace it. This is
192 what A T&T is proposing; they could modify the existing tower, but the better practice is to
193 remove it, start over, and replace it in-kind.
- 194 • If the proposal meets the requirements of SB 101 it would not be subject to zoning or land use
195 requirements, therefore it would not be an expansion of a non-conforming use. The proposed
196 tower is 80-feet as allowed in the Zoning Ordinance, and it will not exceed it.
- 197 • The proposal is a modification (covered under SB 101), not a substantial modification, (not
198 covered under SB 101). He said it is not a substantial modification.
- 199 • RSA 12-K.XXV – Substantial modification- a). “Increase of the permitted vertical height of a
200 tower or the existing vertical height of a mount by either 10 percent or one additional antenna
201 not to exceed 20-feet”. He said that the tower is 80-feet in height which is allowed”.
202 b). “involves adding an appurtenance to the body of a tower or mount that protrudes
203 horizontally more than 20-feet.” He said that the new structure is increased by three-feet.
204 c). “increase of the permitted square footage of the existing equipment compound by more
205 than 2,500 square-feet”. He said what A T&T is proposing is a 50’ x 50’ square well under the
206 2,500 square-foot threshold.
207

208 Attorney Grossman said that replacing “in-kind” is not a substantial modification because it is still
209 meeting the requirements under SB 101 in that they are not increasing the height more than 20 percent;
210 they are not increasing the width more than 20 percent, and for those reasons they believe the Building
211 Inspector, given the intent and purpose of SB 101, gave a reasonable interpretation to A T&T’s
212 application and applicable law and appropriately issued A T&T a building permit for its proposal.
213

214 Chair Buber asked Attorney Grossman how the existing tower would be modified to accommodate the
215 “arrays”. He asked if the existing radio tower is currently being used, and if it is, what it was being used
216 for.
217

218 Attorney Grossman said the extension would increase the width, and built up to 80-feet that would
219 include the existing tower. The base would be modified to support the increase. He said he believed
220 the existing radio tower was used for the trucking energy business, but was not sure if it was currently
221 being utilized.
222

223 Discussion ensued regarding the existing radio tower. If it were to be torn down they could add the
224 radio whip antenna to the new structure, but it would be mounted below the arrays so that it would not
225 extend above the 80-foot height requirement.
226

227 Mr. Williams asked for clarification on the diameter of the proposed tower. Attorney Grossman said the
228 existing tower is 1-foot in diameter and the new tower would be increased to 3-feet in diameter; not 6-
229 feet as described by Mr. Maxson. He said the increase in height, width and diameter proposed are all
230 permissible modifications under SB 101.
231

ZBA Meeting Minutes

Mr. Fullerton said that he researched ham radios and anyone can buy a 72-foot radio tower and mount the antenna. He asked if it was A T&T's policy to collocate on any ham radio tower. Attorney Grossman said that A T&T doesn't have a policy to seek out ham radio towers; if one meets the guidelines of SB 101, then they would consider it.

Chair Buber asked if they considered any other site for this facility, and referred to Section K-12:1, III – *Carriers wishing to build PWSFs in New Hampshire should consider commercially available alternative PWSFs to tall cellular towers, which may include the use of the following: lower antenna mounts, disguised PWSFs, camouflaged PWSFs mounded on existing structures and buildings and custom designed PWSFs to minimize the visual impact on its surroundings.* He also mentioned collocation on another existing tower and a map identifying towers in a 20-mile radius.

Attorney Grossman said if this were a Public Hearing on a Special Exception for A T&T he would understand that question being asked. He referred to K-12:11, I,(b) – In order to ensure uniformity across New Hampshire with respect to the consideration of every collocation application and modification application, no authority may: evaluate a collocation application or modification application based on the availability of other potential locations for the placement of towers, mounts or PWSFs. He concluded that the only question is whether or not the Building Inspector's interpretation under SB 101 is correct.

Chair Buber referred to K-12:11, I, (e) – Notwithstanding the limitations in paragraph I, nothing in this chapter shall be construed to (a) limit or preempt the scope of an authority's review of zoning, land use or permit applications for the siting of new towers or for substantial modifications to existing towers, mounts, or PWSFs, and (b) prevent a municipality from exercising its general zoning and building code enforcement powers pursuant to RSA 672 through RSA 677 and as set forth in this chapter.

Attorney Grossman said that it is their position that it is not a new tower, so Section K-12:11, II is not applicable.

Chair Buber said that the Building permit makes no mention of a modification to a tower, but rather the replacement of an 80-foot communications tower with a new 80-foot guyed tower.

Attorney Grossman did not consider the replacement of the existing tower with a new tower a substantial modification. He said when there is something in the area that is capable of being modified rather than a new tower being constructed somewhere else, the right thing to do is gravitate towards the existing tower.

Mr. Lagassa asked if they had investigated whether or not the existing tower could support the PWSFs. He said it would have to be, in order to qualify as a "tower" according to the definition under K-12, II, XXIV - Tower.

Attorney Grossman said that it may be able to support some types of PWSFs, but A T&T would modify it to support theirs, and it still qualifies because it is still a "mount" or "another structure".

Mr. Fullerton asked what the benefit was to mount the PWSFs at the Lamprey site as opposed to putting in a 180-foot tower in the town's telecommunication district.

ZBA Meeting Minutes

Attorney Grossman said that the gap A T&T is trying to cover is in the area next to the Lamprey site and the overlay district is too far away to address that issue. He said they proposed the guyed tower because it is a modification to what is currently there. He said that the Board is determining whether or not the Building Inspector was right or wrong in issuing a Building Permit, but, that although it could not be considered a condition of approval, A T&T would be willing to use a different design then what is proposed, such as an internal mount flag pole.

Mr. Maxson asked if everyone would agree that the existing tower is not an existing PWSF.

Attorney Grossman said it is not a tower, it is a previously approved mount, and within the contents of SB 101, it allows for in-kind replacement.

Attorney Loughlin said the proposal is a drastic change to an already non-conforming use and suggested that the purpose of the Statute is not to allow this type of change. The Statute is very specific in terms of collocation using an existing tower for PWSFs and doesn't believe that to be the case with this proposal. He referred to Section K-12.11 (b), "no authority may: evaluate a collocation application or modification application based on the availability of other potential locations for the placement of towers, mounts or PWSFs", and said that the Board can't make a decision based on it, and it would be damaging to the Board if it did. The purpose of the Statute is to try and streamline the collocation process, so that section cannot be considered. He said if this were a regular application that would be a legitimate question.

Attorney Grossman asked the Board to refer to the arguments he made regarding SB 101 and the Federal Statue Section 6409 which allows for similar circumstances with replacing in-kind. He said this application meets the criteria and RSA 12-K:10 and it is a permissible modification subject to Building Permit review only.

Chair Buber opened the Public Hearing to those in favor of allowing the Building Permit issued by the Building Inspector to stand.

There was no public comment.

Chair Buber invited those neutral to the case to comment.

Timothy Harned, 66 Lovering Road - disclosed that he is a member of the Planning Board, but was not representing the Planning Board. He was speaking as a private citizen who gained knowledge of this proposal because he is a Planning Board Member. He suggested the Board look into the questioned raised earlier of whether or not the radio tower use was discontinued for the last year. He referred to his experience in drafting amendments to ordinances and the realization that not everything was thought of during the first test case. He referred to SB 101 and K-12 that states if you meet the guidelines pursuant to it the other town ordinances don't apply. He mentioned the site is an existing non-conforming use and wondered if that was considered when issuing the permit. He said the fundamental purpose of a tower is to hold something at a certain height and be able to support a certain weight. He said that a tower supporting 100 lbs and modified to support 500 lbs seems to be a substantial modification. There is no reference to weight in the legislation; only height.

Chair Buber invited those opposed to allowing the issuance of the Building permit by the Building Inspector. He explained that this is an appeal of an Administrative Officer and read the description of work stated on the Building Permit application that was submitted, "Replacement of existing 80' communications tower with new 80' guyed tower. Installation of radio cabinets in interior garaged

ZBA Meeting Minutes

area.” He explained what was being deliberated was whether or not the Building Inspector erred in issuing the Building Permit, or is it a valid Building Permit.

Jerome Day, 153 Atlantic Avenue - said that the application is for the replacement of a tower; not a modification of a tower.

Robert Chaikin, 59 Atlantic Avenue –said that he was asked permission, years ago, by the Lampreys to erect a radio tower to communicate with their business trucks. It was a non-conforming business in a residential area for years. He has lived in the neighborhood for 35 years and did not object to the innocuous radio tower. He said he never envisioned that the whip antenna is part of an 80-foot tower. He commented that the Lamprey Business has changed over the years and was surprised to find out that the abutters were not informed that there was going to be a substantial and significant change to the neighborhood with the erection of the new tower, which he considers it to be an additional new business to an already non-conforming oil business. He said the opportunity to detract further the aesthetics, likely decreasing property values, is a significant change. He referred to public law 112-96 signed into law on February 22, 2014 that changes the Section 704 of the Telecommunications Act which deals with the provision of new transmission equipment that doesn’t substantially change the physical dimensions of existing towers. He said that this is a significant modification of a two-way radio communication tower to a non-conforming business operation.

Michael Whittier, 15 Chapel Road – said that he could not be more strongly opposed to the new tower at Lamprey Energy.

Chair Buber stated for clarification that an Appeal of an Administrative Officer was brought before the Zoning Board by Attorney Loughlin, representing Alan Perkins and Dr. Chaikin to request for an Administrative Appeal pursuant to RSA 674:39, I (a) requesting the Zoning Board of Adjustment to hear and decide if there was an error on the part of the North Hampton Administrative Official (Building Inspector) in issuing a Building Permit for a cell tower at 63 Atlantic Ave.

Mr. Chaikin said that if there is a technical gap in the area, he knows a resident who owns property on Mill Road that would be willing to have a discussion with the telecommunication representatives about his particular piece of property for a viable solution to fill in the technical gaps. He said that there are other alternatives out there than what they are suggesting this evening.

Chair Buber closed the Public Hearing at 8:02 p.m.

Mr. Williams said that he tends to agree with the public that it was a mistake to issue the Building Permit because he sees the proposal as a substantial modification; the radio tower on the Lamprey land is not a PWSF in his opinion.

Mr. Lagassa agreed that it is a substantial modification and Mr. Kelley was in error when granting the Building Permit. He suggested to uphold the appeal of his Building Permit, and revoke the Building Permit, and then if the A T&T, or the applicant, wanted to move forward they would then have to come back and request a variance for the expansion of a non-conforming use.

Mr. Gordon said that he agrees this is a question of statutory interpretation and recognizes the reason for the Statute was to streamline the process. He said it’s reasonable for the Board to take the Statute by its terms. Whether or not the applicant intended to modify the existing structure, that’s not what is

being proposed; they are proposing a completely different structure. He agrees that the Building Inspector did err in granting of the permit, and he has concerns over the Building Inspector's rationale regarding expansion of a non-conforming use. He agrees that they should revoke the issuance of the Building Permit.

Mr. Fullerton said that everything he's read, SB 101 and all the subsequent telecommunication information, all comes around and uses the same phrase, "existing tower" and "existing structure". What is being proposed is to tear down what is existing. He said that he believes the Building Inspector made an error in issuing the Building Permit.

Mr. Buber said that he thoroughly read RSA 12-K and studied the application and the addendum written by Mr. Nestor, dated 4/14/2014. Everything in the addendum points to collocation, the replacement of PWSFs on existing towers, and collocation on existing structures; everything drives back to "existing structures" and "collocation". He said the Building Permit is to replace a 60-foot communication tower with a 20-foot whip antenna with a new tower and the issuance of that is not keeping with the North Hampton Ordinances. The proper procedure to follow is dictated under Section 415 – Wireless Telecommunications Facilities. He said he believes the Building Inspector erred in issuing the permit and that there is no tower existing at 63 Atlantic Avenue that can support PWSFs. He said that this is a new commercial operation being proposed on an already non-conforming commercial operation which would require relief from Section 501.2 of the North Hampton Zoning Ordinances by the Zoning Board of Adjustment. He also referred to Section 501.4 – *in the event that any non-conforming use, conducted in a structure or otherwise, ceases, for whatever reason for a period of one year, or is abandoned for any period, such non-conforming use shall not be resumed.* He said if the current radio tower has not been in service it may fall under this provision and wouldn't be able to be used anyway. He also referred to Section 415.9 – Removal of Abandoned Antennas and Towers – *any antenna or tower that is not operated for a continuous period of 12 months shall be considered abandoned and shall be removed within 90 days of such abandonment....*

Mr. Lagassa moved and Mr. Gordon seconded the motion that the Board concludes that the Building Inspector was in error and to revoke the Building Permit for all of the reasons discussed.

Chair Buber wondered if he should make a friendly amendment to the motion to suggest to the Applicant, that he should go before the Planning Board. Mr. Lagassa said that would be up to the Applicant.

Mr. Gordon withdrew his second to the motion.

Mr. Lagassa moved and Mr. Gordon seconded the motion, that the Board finds that the Building Inspector did in fact err in granting the Building Permit and that they revoke the Building Permit.

Mr. Gordon made a friendly amendment to include that because this application contemplates the removal of the existing structure, and replacing it with another structure, does not constitute collocation on an existing tower within the meaning of RSA 12-K. Mr. Lagassa accepted the friendly amendment.

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

IV. Other Business:

1. Communications/Correspondence and Miscellaneous

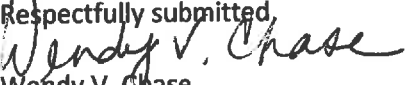
***a. Runnymede Site Walk/Site Visit**

Chair Buber suggested Ms. Chase forward the contact information from Runnymede Farm to each member so they could if they chose to set up a site visit at Runnymede Farm prior to the July 22, 2014 meeting. He reminded the members that there could not be any more than two members at a time at the site visits; three or more members would be a quorum and constitutes a meeting of the Board that would have to be publicly noticed.

The Board agreed that the Zoning Ordinance for Wireless Telecommunication Facilities needs to be updated to reflect the new law RSA 12-K.

Mr. Lagassa moved and Mr. Gordon seconded the motion to adjourn at 8:35 p.m.

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

Respectfully submitted,

Wendy V. Chase
Recording Secretary

Approved July 22, 2014



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Zoning Board of Adjustment
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39 published in the June 12, 2014 edition of the Hampton Union and, posted at the Library, Town Clerk's
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In attendance for this application:

Attorney Timothy Phoenix, Applicant's Counsel

Attorney Phoenix explained that his client, Mr. Gregory Raiff, is requesting a continuance of their Case due to the outcome of a site walk they held last week that included, among others, Chris Ganotis, Chair of the Conservation Commission and Michael Cuomo, Soil Scientist, Rockingham County Conservation District (RCCD). Mr. Cuomo reported to the Conservation Commission that he recommended a drainage study be preformed. Attorney Phoenix said they were hopeful that a drainage study would not be necessary, but Mr. Cuomo rendered an opinion that it did. He said there was not enough time to have the study done in time for this meeting, so he asked that the case be continued. He said although he prefers it to be continued to the July 22, 2014 meeting, he was informed that that meeting has a full agenda so he is agreeable to have it continued to the August 26, 2014 meeting.

Mr. Lagassa moved and Mr. Gordon seconded the motion to grant the request, and continue Case #2014:06 to the August 26, 2014 meeting.

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

Minutes

1. **May 27, 2014** – Mr. Fullerton moved and Mr. Gordon seconded the motion to accept the May 27, 2014 Meeting Minutes as written.

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

2. **June 4, 2014** – Mr. Buber noted that there was a change to line #51 to change the last word in the sentence to "Received".

Mr. Fullerton moved and Mr. Gordon seconded the motion to accept the June 4, 2014 "Special Meeting" Minutes as amended.

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

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

II. Unfinished Business

There is no Unfinished Business.

III. New Business

Attorney Loughlin is representing Mr. Alan Perkins and Dr. Robert Chaikin and thought it would be reasonable for the Board to *hear* both cases at the same time.

Mr. Fullerton read the case description of Case #2014:08 and Case #2014:09 into the record.

2. **Case #2014:08 – Alan Perkins, Trustee, Thurston Farms Realty Trust, 54 Atlantic Avenue, North Hampton, NH 03862. Owner: Golden KS, LLC, 63 Atlantic Avenue, North Hampton, NH 03862; Property location: 63 Atlantic Avenue, North Hampton, NH 03862; M/L: 005-038-000; Zoning District: R-2 Residential Medium Density.** Attorney Peter J. Loughlin, on behalf of the Applicant, Alan Perkins, submits an Appeal of an Administrative Decision pursuant to NH RSA 674:39, I (a) requesting the Zoning Board of Adjustment to hear and decide if there was an error on the part of the Building Inspector in issuing a Building Permit for a cell tower at 63 Atlantic Avenue, North Hampton, NH 03862.
3. **Case #2014:09 – Robert M. Chaikin, Trustee, 59 Atlantic Avenue, North Hampton, NH 03862. Owner: Golden KS, LLC, 63 Atlantic Avenue, North Hampton, NH 03862; Property location: 63 Atlantic Avenue, North Hampton, NH 03862; M/L: 005-038-000; Zoning District: R-2 Residential Medium Density.** Attorney Peter J. Loughlin, on behalf of the Applicant, Robert M. Chaikin, submits an Appeal of an Administrative Decision pursuant to NH RSA 674:39, I (a) requesting the Zoning Board of Adjustment to hear and decide if there was an error on the part of the Building Inspector in issuing a Building Permit for a cell tower at 63 Atlantic Avenue, North Hampton, NH 03862.

In attendance for this application:

Attorney Peter Loughlin, Counsel to the Applicants, Mr. Perkins and Dr. Chaikin
David Maxson, Wireless Consultant, Isotrope, LLC
Brian Grossman, Counsel to the Owner of the property, Guy Marshall, Lamprey Energy
John Nestor, Set Acquisition Consultant, Nanepashemet Project Management Inc.

Chair Buber asked if Mr. Kelley would be present, since this is an appeal against his finding. Ms. Chase said that Mr. Kelley would not be present.

Attorney Loughlin said that on April 14, 2014, Mr. John Nestor, Project Manager of Nanepashemet, applied for a building permit on behalf of Guy Marshall, Lamprey Energy on property at 63 Atlantic Avenue for the "replacement of existing 80' communications tower with new 80' guyed tower. Installation of radio cabinets in interior garaged area." He said his clients believe the permits were issued improperly and that is why they are appealing the Building Inspector's decision.

Attorney Loughlin said that telecommunication towers are permitted under Section 415.4 of the Town's Zoning Ordinance and quoted, "only after obtaining a Conditional use Permit, as provided for in Section 415.7". He said that Lamprey Energy did not obtain a Conditional Use Permit and is not entitled to have

ZBA Meeting Minutes

a cell tower at this location. He said that on a State level telecommunication facilities are regulated under RSA 12-K – The Deployment of Personal Wireless Service Facilities. The Statute was amended by the Legislature in 2013 (SB 101). He provided copies of NH RSA 12-K to each Board Member. He said the Federal Law has a 90-day requirement for an application to be acted upon, and New Hampshire Law has a 45-day requirement for an application to be acted upon. Attorney Loughlin opined that the law changed so that owners of existing towers would not have to go through the arduous permitting process for collocation. He read the definition of collocation from the Statute 12-K: 2.X, “The placement or installation of new Personal Wireless Service Facilities (PWSF) on existing towers or mounts and capable of structurally supporting the attachment of PWSF’s”.

Attorney Loughlin said that the proposal at 63 Atlantic Avenue is not to collocate on the existing 60-foot tower with a 20-foot whip antenna; they are proposing to tear down the existing radio tower because it does not support the attachment of PWSF’s, and build a new tower, which would not meet the definition of collocation.

Attorney Loughlin said that the Building Inspector responded to him and indicated that the proposed use is a natural expansion of what is already there.

Attorney Loughlin said that one of the three tests when determining if something is an expansion of a non-conforming use is to ask “is there a different impact on the neighborhood?” He said that in this case there is a change of impact on the neighborhood, visually. He said it’s not about whether or not there is good or bad coverage at the lower end of Atlantic Avenue, it’s simply a question of whether or not Lamprey Energy has the approval necessary to put up this tower. Attorney Loughlin said that it is a new tower and they should have to go through the permitting process with the Town.

David Maxson submitted copies of simulated pictures of what the tower and antennas would look like if the new tower were constructed. He explained that under RSA 12-K a “tower” is defined as “a freestanding or guyed structure, such as a monopole, monopine, or lattice tower, designed to support PWSFs”. He said the existing radio tower is not capable of supporting PWSFs. One of the images he submitted was a simulation for the proposed new tower with four full-frame antenna arrays consistent with what wireless companies install on cell towers and said the added arrays would be allowed if the new tower were erected because they would meet the requirements of collocation pursuant to RSA 12-K.

Attorney Grossman introduced himself and Mr. Nestor the Set Acquisition Consultant from Nanepashemet Project Management, Inc. who submitted the Building Permit on behalf of the Owner, Guy Marshall and is a consultant to A T&T. He said that Attorney Loughlin is correct; SB 101 is the controlling issue along with Section 6409 of the Middle Class Tax Relief and Job Creation Act of 2012 which was a Federal Act. SB101 is what changed RSA 12-K; it’s an extension of it. He submitted one copy to the Board of their rendition of what the proposed tower will actually look like, because it is important for the Board to see, but the only question before the Board is whether or not the Building Inspector was right in issuing the Building Permit; does the proposal qualify under SB 101 as a collocation, or not.

Attorney Grossman referred to RSA 12-K:

- RSA 12-K:10 – Application Review – Collocation applications and modification applications shall be reviewed for conformance with applicable building permit requirements but shall not otherwise be subject to zoning or land use requirements, including design or placement requirements, or public hearing review.

- RSA 12-K:2.X – Collocation means the placement or installation of new PWSFs on existing towers or mounts, including electrical transmission towers and water towers, as well as existing buildings and other structures capable of structurally supporting the attachment of PWSFs. Attorney Grossman said that the radio tower would be considered “other structures”. The goal of SB101 was to promote the use of existing structures or infrastructure. He said the term “drop and swap” is used in the wireless industry. It’s when there is a tower that could be modified to support the PWSFs, but would be much more difficult then to remove it and replace it. This is what A T&T is proposing; they could modify the existing tower, but the better practice is to remove it, start over, and replace it in-kind.
- If the proposal meets the requirements of SB 101 it would not be subject to zoning or land use requirements, therefore it would not be an expansion of a non-conforming use. The proposed tower is 80-feet as allowed in the Zoning Ordinance, and it will not exceed it.
- The proposal is a modification (covered under SB 101), not a substantial modification, (not covered under SB 101). He said it is not a substantial modification.
- RSA 12-K.XXV – Substantial modification- a). “Increase of the permitted vertical height of a tower or the existing vertical height of a mount by either 10 percent or one additional antenna not to exceed 20-feet”. He said that the tower is 80-feet in height which is allowed”.
b). “involves adding an appurtenance to the body of a tower or mount that protrudes horizontally more than 20-feet.” He said that the new structure is increased by three-feet.
c). “increase of the permitted square footage of the existing equipment compound by more than 2,500 square-feet”. He said what A T&T is proposing is a 50’ x 50’ square well under the 2,500 square-foot threshold.

Attorney Grossman said that replacing “in-kind” is not a substantial modification because it is still meeting the requirements under SB 101 in that they are not increasing the height more than 20 percent; they are not increasing the width more than 20 percent, and for those reasons they believe the Building Inspector, given the intent and purpose of SB 101, gave a reasonable interpretation to A T&T’s application and applicable law and appropriately issued A T&T a building permit for its proposal.

Chair Buber asked Attorney Grossman how the existing tower would be modified to accommodate the “arrays”. He asked if the existing radio tower is currently being used, and if it is, what it was being used for.

Attorney Grossman said the extension would increase the width, and built up to 80-feet that would include the existing tower. The base would be modified to support the increase. He said he believed the existing radio tower was used for the trucking energy business, but was not sure if it was currently being utilized.

Discussion ensued regarding the existing radio tower. If it were to be torn down they could add the radio whip antenna to the new structure, but it would be mounted below the arrays so that it would not extend above the 80-foot height requirement.

Mr. Williams asked for clarification on the diameter of the proposed tower. Attorney Grossman said the existing tower is 1-foot in diameter and the new tower would be increased to 3-feet in diameter; not 6-feet as described by Mr. Maxson. He said the increase in height, width and diameter proposed are all permissible modifications under SB 101.

ZBA Meeting Minutes

Mr. Fullerton said that he researched ham radios and anyone can buy a 72-foot radio tower and mount the antenna. He asked if it was A T&T's policy to collocate on any ham radio tower. Attorney Grossman said that A T&T doesn't have a policy to seek out ham radio towers; if one meets the guidelines of SB 101, then they would consider it.

Chair Buber asked if they considered any other site for this facility, and referred to Section K-12:1, III – *Carriers wishing to build PWSFs in New Hampshire should consider commercially available alternative PWSFs to tall cellular towers, which may include the use of the following: lower antenna mounts, disguised PWSFs, camouflaged PWSFs mounded on existing structures and buildings and custom designed PWSFs to minimize the visual impact on its surroundings.* He also mentioned collocation on another existing tower and a map identifying towers in a 20-mile radius.

Attorney Grossman said if this were a Public Hearing on a Special Exception for A T&T he would understand that question being asked. He referred to K-12:11, I,(b) – In order to ensure uniformity across New Hampshire with respect to the consideration of every collocation application and modification application, no authority may: evaluate a collocation application or modification application based on the availability of other potential locations for the placement of towers, mounts or PWSFs. He concluded that the only question is whether or not the Building Inspector's interpretation under SB 101 is correct.

Chair Buber referred to K-12:11, I, (e) – Notwithstanding the limitations in paragraph I, nothing in this chapter shall be construed to (a) limit or preempt the scope of an authority's review of zoning, land use or permit applications for the siting of new towers or for substantial modifications to existing towers, mounts, or PWSFs, and (b) prevent a municipality from exercising its general zoning and building code enforcement powers pursuant to RSA 672 through RSA 677 and as set forth in this chapter.

Attorney Grossman said that it is their position that it is not a new tower, so Section K-12:11, II is not applicable.

Chair Buber said that the Building permit makes no mention of a modification to a tower, but rather the replacement of an 80-foot communications tower with a new 80-foot guyed tower.

Attorney Grossman did not consider the replacement of the existing tower with a new tower a substantial modification. He said when there is something in the area that is capable of being modified rather than a new tower being constructed somewhere else, the right thing to do is gravitate towards the existing tower.

Mr. Lagassa asked if they had investigated whether or not the existing tower could support the PWSFs. He said it would have to be, in order to qualify as a "tower" according to the definition under K-12, II, XXIV - Tower.

Attorney Grossman said that it may be able to support some types of PWSFs, but A T&T would modify it to support theirs, and it still qualifies because it is still a "mount" or "another structure".

Mr. Fullerton asked what the benefit was to mount the PWSFs at the Lamprey site as opposed to putting in a 180-foot tower in the town's telecommunication district.

Attorney Grossman said that the gap A T&T is trying to cover is in the area next to the Lamprey site and the overlay district is too far away to address that issue. He said they proposed the guyed tower because it is a modification to what is currently there. He said that the Board is determining whether or not the Building Inspector was right or wrong in issuing a Building Permit, but, that although it could not be considered a condition of approval, A T&T would be willing to use a different design then what is proposed, such as an internal mount flag pole.

Mr. Maxson asked if everyone would agree that the existing tower is not an existing PWSF.

Attorney Grossman said it is not a tower, it is a previously approved mount, and within the contents of SB 101, it allows for in-kind replacement.

Attorney Loughlin said the proposal is a drastic change to an already non-conforming use and suggested that the purpose of the Statute is not to allow this type of change. The Statute is very specific in terms of collocation using an existing tower for PWSFs and doesn't believe that to be the case with this proposal. He referred to Section K-12.11 (b), "no authority may: evaluate a collocation application or modification application based on the availability of other potential locations for the placement of towers, mounts or PWSFs", and said that the Board can't make a decision based on it, and it would be damaging to the Board if it did. The purpose of the Statute is to try and streamline the collocation process, so that section cannot be considered. He said if this were a regular application that would be a legitimate question.

Attorney Grossman asked the Board to refer to the arguments he made regarding SB 101 and the Federal Statue Section 6409 which allows for similar circumstances with replacing in-kind. He said this application meets the criteria and RSA 12-K:10 and it is a permissible modification subject to Building Permit review only.

Chair Buber opened the Public Hearing to those in favor of allowing the Building Permit issued by the Building Inspector to stand.

There was no public comment.

Chair Buber invited those neutral to the case to comment.

Timothy Harned, 66 Lovering Road - disclosed that he is a member of the Planning Board, but was not representing the Planning Board. He was speaking as a private citizen who gained knowledge of this proposal because he is a Planning Board Member. He suggested the Board look into the questioned raised earlier of whether or not the radio tower use was discontinued for the last year. He referred to his experience in drafting amendments to ordinances and the realization that not everything was thought of during the first test case. He referred to SB 101 and K-12 that states if you meet the guidelines pursuant to it the other town ordinances don't apply. He mentioned the site is an existing non-conforming use and wondered if that was considered when issuing the permit. He said the fundamental purpose of a tower is to hold something at a certain height and be able to support a certain weight. He said that a tower supporting 100 lbs and modified to support 500 lbs seems to be a substantial modification. There is no reference to weight in the legislation; only height.

Chair Buber invited those opposed to allowing the issuance of the Building permit by the Building Inspector. He explained that this is an appeal of an Administrative Officer and read the description of work stated on the Building Permit application that was submitted, "Replacement of existing 80' communications tower with new 80' guyed tower. Installation of radio cabinets in interior garaged

ZBA Meeting Minutes

area.” He explained what was being deliberated was whether or not the Building Inspector erred in issuing the Building Permit, or is it a valid Building Permit.

Jerome Day, 153 Atlantic Avenue - said that the application is for the replacement of a tower; not a modification of a tower.

Robert Chaikin, 59 Atlantic Avenue –said that he was asked permission, years ago, by the Lampreys to erect a radio tower to communicate with their business trucks. It was a non-conforming business in a residential area for years. He has lived in the neighborhood for 35 years and did not object to the innocuous radio tower. He said he never envisioned that the whip antenna is part of an 80-foot tower. He commented that the Lamprey Business has changed over the years and was surprised to find out that the abutters were not informed that there was going to be a substantial and significant change to the neighborhood with the erection of the new tower, which he considers it to be an additional new business to an already non-conforming oil business. He said the opportunity to detract further the aesthetics, likely decreasing property values, is a significant change. He referred to public law 112-96 signed into law on February 22, 2014 that changes the Section 704 of the Telecommunications Act which deals with the provision of new transmission equipment that doesn’t substantially change the physical dimensions of existing towers. He said that this is a significant modification of a two-way radio communication tower to a non-conforming business operation.

Michael Whittier, 15 Chapel Road – said that he could not be more strongly opposed to the new tower at Lamprey Energy.

Chair Buber stated for clarification that an Appeal of an Administrative Officer was brought before the Zoning Board by Attorney Loughlin, representing Alan Perkins and Dr. Chaikin to request for an Administrative Appeal pursuant to RSA 674:39, I (a) requesting the Zoning Board of Adjustment to hear and decide if there was an error on the part of the North Hampton Administrative Official (Building Inspector) in issuing a Building Permit for a cell tower at 63 Atlantic Ave.

Mr. Chaikin said that if there is a technical gap in the area, he knows a resident who owns property on Mill Road that would be willing to have a discussion with the telecommunication representatives about his particular piece of property for a viable solution to fill in the technical gaps. He said that there are other alternatives out there than what they are suggesting this evening.

Chair Buber closed the Public Hearing at 8:02 p.m.

Mr. Williams said that he tends to agree with the public that it was a mistake to issue the Building Permit because he sees the proposal as a substantial modification; the radio tower on the Lamprey land is not a PWSF in his opinion.

Mr. Lagassa agreed that it is a substantial modification and Mr. Kelley was in error when granting the Building Permit. He suggested to uphold the appeal of his Building Permit, and revoke the Building Permit, and then if the A T&T, or the applicant, wanted to move forward they would then have to come back and request a variance for the expansion of a non-conforming use.

Mr. Gordon said that he agrees this is a question of statutory interpretation and recognizes the reason for the Statute was to streamline the process. He said it’s reasonable for the Board to take the Statute by its terms. Whether or not the applicant intended to modify the existing structure, that’s not what is

being proposed; they are proposing a completely different structure. He agrees that the Building Inspector did err in granting of the permit, and he has concerns over the Building Inspector's rationale regarding expansion of a non-conforming use. He agrees that they should revoke the issuance of the Building Permit.

Mr. Fullerton said that everything he's read, SB 101 and all the subsequent telecommunication information, all comes around and uses the same phrase, "existing tower" and "existing structure". What is being proposed is to tear down what is existing. He said that he believes the Building Inspector made an error in issuing the Building Permit.

Mr. Buber said that he thoroughly read RSA 12-K and studied the application and the addendum written by Mr. Nestor, dated 4/14/2014. Everything in the addendum points to collocation, the replacement of PWSFs on existing towers, and collocation on existing structures; everything drives back to "existing structures" and "collocation". He said the Building Permit is to replace a 60-foot communication tower with a 20-foot whip antenna with a new tower and the issuance of that is not keeping with the North Hampton Ordinances. The proper procedure to follow is dictated under Section 415 – Wireless Telecommunications Facilities. He said he believes the Building Inspector erred in issuing the permit and that there is no tower existing at 63 Atlantic Avenue that can support PWSFs. He said that this is a new commercial operation being proposed on an already non-conforming commercial operation which would require relief from Section 501.2 of the North Hampton Zoning Ordinances by the Zoning Board of Adjustment. He also referred to Section 501.4 – *in the event that any non-conforming use, conducted in a structure or otherwise, ceases, for whatever reason for a period of one year, or is abandoned for any period, such non-conforming use shall not be resumed.* He said if the current radio tower has not been in service it may fall under this provision and wouldn't be able to be used anyway. He also referred to Section 415.9 – Removal of Abandoned Antennas and Towers – *any antenna or tower that is not operated for a continuous period of 12 months shall be considered abandoned and shall be removed within 90 days of such abandonment....*

Mr. Lagassa moved and Mr. Gordon seconded the motion that the Board concludes that the Building Inspector was in error and to revoke the Building Permit for all of the reasons discussed.

Chair Buber wondered if he should make a friendly amendment to the motion to suggest to the Applicant, that he should go before the Planning Board. Mr. Lagassa said that would be up to the Applicant.

Mr. Gordon withdrew his second to the motion.

Mr. Lagassa moved and Mr. Gordon seconded the motion, that the Board finds that the Building Inspector did in fact err in granting the Building Permit and that they revoke the Building Permit.

Mr. Gordon made a friendly amendment to include that because this application contemplates the removal of the existing structure, and replacing it with another structure, does not constitute collocation on an existing tower within the meaning of RSA 12-K. Mr. Lagassa accepted the friendly amendment.

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

IV. Other Business:

1. Communications/Correspondence and Miscellaneous

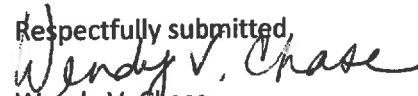
***a. Runnymede Site Walk/Site Visit**

Chair Buber suggested Ms. Chase forward the contact information from Runnymede Farm to each member so they could if they chose to set up a site visit at Runnymede Farm prior to the July 22, 2014 meeting. He reminded the members that there could not be any more than two members at a time at the site visits; three or more members would be a quorum and constitutes a meeting of the Board that would have to be publicly noticed.

The Board agreed that the Zoning Ordinance for Wireless Telecommunication Facilities needs to be updated to reflect the new law RSA 12-K.

Mr. Lagassa moved and Mr. Gordon seconded the motion to adjourn at 8:35 p.m.

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

Respectfully submitted,

Wendy V. Chase
Recording Secretary

Approved July 22, 2014