



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

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

11
12 **Attendance:**

13
14 **Members present:** David Buber, Chair; Phelps Fullerton, Vice Chair, Charles Gordon and Lisa Wilson.

15
16 **Members absent:** George Lagassa.

17
18 **Alternates present:** Jonathan Pinette and Robin Reid.

19
20 **Administrative Staff present:** Wendy Chase, Recording Secretary.

21
22 **Preliminary Matters; Procedure; Swearing in of Witnesses (RSA 673:14 and 15);**
23 **Recording Secretary Report**

24
25 Chair Buber Called the Meeting to Order at 6:30 p.m.

26
27 Pledge of Allegiance -Chair Buber invited the Board Members and those in attendance to rise for a
28 Pledge of Allegiance and noted that reciting the Pledge of Allegiance is solely for those who choose to do
29 so and failure, neglect or inability to do so will have no bearing on the decision making of the Board or
30 the rights of an individual to appear before, and request relief from, the Board.

31
32 Introduction of Members and Alternates - Chair Buber introduced Members of the Board and the
33 Alternates who were present (as identified above).

34
35 Chair Buber seated Mrs. Reid for Mr. Lagassa.

36
37 Recording Secretary Report - Ms. Chase reported that the November 25, 2014 Meeting Agenda was
38 properly published in the November 13, 2014 edition of the Portsmouth Herald, and, posted at the
39 Library, Town Clerk's Office, Town Office and on the Town's website.

40
41 Chair Buber then briefly explained the Board's operating Rules and Procedures to those present.

43 Swearing In Of Witnesses – Pursuant to RSA 673: 14 and 15, Chair Buber swore in all those who were
44 present and who intended to act as witnesses and/or offer evidence to the Board in connection with any
45 Case or matter to be heard at the Meeting.

46

47 **Minutes – October 28, 2014**

48

49 **Mr. Fullerton moved and Mr. Gordon seconded the motion to approve the October 28, 2014 as**
50 **distributed by the Recording Secretary.**

51 **The vote passed in favor of the motion (3 in favor, 0 opposed and 2 abstentions). Mrs. Wilson and**
52 **Mrs. Reid abstained.**

53

54 **Unfinished Business**

55

56 **1. 2014:10 – Applicant Jarrod Patten, 1 Fern Road, North Hampton, NH 03862. Owner: Same as**
57 **Applicant; Property location: 1 Fern Road, North Hampton, NH 03862; M/L: 008-023-001;**
58 **Zoning District: R-1 Residential High Density.** The Applicant requests the following variances:
59 1). Article IV, Section 405.3 to allow an accessory apartment of 871 square-feet within the
60 existing single-family dwelling, that does not meet the provisions of a Special Exception under
61 Article V, Section 513 – Accessory Apartments; 2). Article IV, Section 406 – Yard and Lot
62 requirements, to allow an accessory apartment on a lot less than 2-acres; 3). Article V, Section
63 501.2 - non-conforming use, to allow the expansion of a non-conforming use to allow an
64 accessory apartment, and 4). Article V, Section 501.5 – non-conforming use, to allow the
65 expansion of a use that does not meet current zoning. Relief from Article IV, Section 405.3 has
66 been continued from the October 28, 2014 Meeting. The added relief requested is “New
67 Business” before the Board.

68

69 In attendance for this application:

70 Jarrod Patten, Owner/Applicant

71 Attorney Bernard Pelech, Counsel to the Owner/Applicant

72

73 Mr. Fullerton read the case description into the record.

74

75 Attorney Pelech explained that the case was continued because there was discussion on whether or not
76 the Applicant applied for sufficient variances for the Board to render a decision. They had applied for a
77 variance to Article IV, Section 405.3 in the beginning because the proposal did not satisfy the criteria of
78 Article V, Section 513 – Accessory Apartments by Special Exception, specifically that the proposed
79 apartment is slightly larger; the lot is not the sufficient lot size, and the building didn't exist when the
80 Ordinance was enacted, so because the proposed accessory apartment did not meet all of the criteria
81 under Article V, Section 513, they could not apply for a Special Exception. He explained that he was
82 informed by Ms. Chase that she received a legal opinion from the Local Government Center stating that
83 an applicant cannot seek variance relief from criteria of a Special Exception; all criteria of a Special
84 Exception has to be satisfied in order for the Board to approve it.

85

86 Attorney Pelech applied for variances he thought were relevant to the proposal, as follows:

87 Article IV, Section 406 – Yard and Lot requirements table – The lot is less than the required two acres
88 but, is a lot of record that is also a non-conforming lot.

89 Article V, Section 501.2 – to expand a non-conforming use on a lot that has less than two acres, which is
90 basically the same relief as the previous variance request.

91 Article V, Section 501.5 – for the extension of a use that doesn't meet current zoning; the lot is non-
92 conforming as to lot size.

93

94 Chair Buber asked if Attorney Pelech planned to request relief from Article V, Sections 513.1, 513.2 and
95 513.5 as referenced in the current application.

96

97 Attorney Pelech said he did not, because he was advised that he could not request a variance from
98 provisions of a Special Exception. He requested relief from Article IV, Section 405.3 for that reason.

99

100 Attorney Pelech said that it is his belief that the Application meets the five (5) criteria necessary for the
101 Board to grant the requested variances.

102

103 Mr. Pelech addressed the five (5) criteria of the Variance Test:

104

105 **1. Granting this variance will not be contrary to the public interest nor, would**

106 **2. Granting this variance the spirit of the ordinance is observed.**

107

108 Granting the variance would not be contrary to the public interest, nor would it be contrary to the spirit
109 and intent of the ordinance. The Supreme Court basically consolidated the two criteria giving the single
110 either/or test, which requires the applicant to demonstrate that by granting the variance it would not
111 result in a substantial change in the characteristics of the neighborhood, or threaten public health,
112 safety, and welfare, and if the Board agreed, then granting the variance would not be contrary to the
113 public interest, and granting the variance would be consistent with the spirit and intent of the
114 ordinance. Allowing an accessory apartment at this location will not alter the characteristics of the
115 neighborhood. He said that the property is next door to four commercial apartments and abuts the I-B/R
116 District. The accessory apartment will not threaten the public's health, safety or welfare. Allowing an
117 accessory apartment is a good transitional use of this property that is surrounded by commercial
118 properties.

119

120

121 **3. Granting this variance substantial justice is done.**

122

123 The hardship upon the owner, were the variance to be denied, is not outweighed by any benefit to the
124 general public. Granting the variance will alleviate the hardship to the applicant; he is disabled and the
125 structure is large enough to contain a second unit. It would not result in any overcrowding of the land
126 or overintensification of the land. The footprint meets all of the setback requirements of the Zoning
127 Ordinance and the second dwelling will not affect traffic, and it won't generate undue demand on
128 public services. There seems to be no reason set forth in the ordinance as to why the structure must
129 have existed in 1990 in order to qualify for a Special Exception as an accessory apartment.

130 Furthermore, although the property does not meet the dimensional requirements for the zone, the fact
131 that an accessory apartment exists would certainly not result in overcrowding of the lot.

132

133 **4. Granting this variance the values of surrounding properties are not diminished.**

134

135 Granting the variance shall not result in a diminishment of values of surrounding properties; the

136 appearance of the structure will not change; there is adequate parking on the site; there is adequate
137 open space, and no overcrowding from adjacent properties.

138

139 **5. By not granting this variance, literal enforcement of the provisions of the Ordinance would result in**
140 **an unnecessary hardship.**

141

142 There are special conditions with regard to this property given its location so close to Route 1. It is
143 surrounded by commercial uses. It will not add stress to the highway system and will not over-intensify
144 the use of the property. Because of the surrounding commercial uses and the location of the lot, the lot
145 has special conditions such that to literally enforce the ordinance to prohibit the accessory apartment
146 would result in an unnecessary hardship. This is not a case of an individual attempting to put an
147 accessory apartment in a residential subdivision or a strictly residential area. Given the property's
148 location and surrounded uses, this is certainly a reasonable use.

149

150 Mr. Pelech said that, it is the Applicant's belief, that the variances requested meet the five (5) criteria
151 necessary for the Board to grant them.

152

153 Mr. Pelech said that the property is located in the R-1 zoning district and is surrounded by the I-B/R
154 zoning district.

155

156 Chair Buber referred to the application submitted by Mr. Pelech, specifically, the relief request from
157 Article IV, Section 405.3 to allow an accessory apartment that doesn't meet the provisions of a Special
158 Exception under Article V, Section 513. He believed Article V, Section 513 comes into play, and relief
159 should be requested from the provisions the proposal doesn't satisfy. He referred to the definition of
160 Accessory Apartments, Article III, Section 302.1 – *one dwelling unit, located within a single-family*
161 *dwelling that is clearly subordinate to the principal dwelling and meets the conditions set forth in Section*
162 *513.*

163

164 Mr. Gordon said that unless the applicant meets the provisions under Article V, Section 513 a Special
165 Exception cannot be granted. He said that the proposal before the Board would not be considered an
166 accessory apartment according the definition under Article III, Section 302.1; therefore it is not
167 permitted, and in order to do something that is not permitted you apply for a variance, and the
168 provision that doesn't permit it, is Article IV, Section 405.3.

169

170 Ms. Chase received an opinion from the Local Government Center that a variance cannot be sought on
171 provisions of a Special Exception. She relayed that information to Attorney Pelech when he applied for
172 the variance.

173

174 Chair Buber opened the Public Hearing to all those in favor of the variances requested, neutral to the
175 variances requested ,or opposed to the variances requested.

176

177 There was no public comment.

178

179 Chair Buber closed the Public Hearing.

180

181 **Board Deliberation**

182

183 Mrs. Wilson said that after listening to all of the evidence she did not believe special conditions exist.
184 The property is close to the I-B/R district, but is not in the I-B/R district. The subject lot is half an acre
185 and the lot size requirement is two acres. The applicant has use of the property and has already been
186 granted variances in the past. The Applicant was also allowed to build his single family home in 2005 on
187 a half acre when two acre lot requirements were in effect. She referred to Chester Rod and Gun Club,
188 Inc. v. Town of Chester. She said that the proposal is not in the Spirit and Intent of the Ordinance,
189 because essentially the Board would be granting a multi-family dwelling on a half acre lot. She
190 referenced an opinion from Peter Loughlin in NH Practice Land Use and Zoning, third edition, the court
191 must decide if the property is uniquely burdened as compared to other similarly situated properties. If it
192 affects a number of similarly situated properties, the proper remedy is an amendment to the Zoning
193 Ordinance. The Applicant must prove that the hardship is a unique condition of the property and not the
194 general area. This Applicant is already living on the property and there have been variances granted on
195 this non-conforming lot. She doesn't see any evidence there are unique conditions just because it is a
196 .45 acre lot close to the I-B/R District. The purpose of the ordinance is not to increase density, and this
197 proposal would increase the density, and that is contrary to the basic objectives of the Zoning
198 Ordinance; it is a drastic departure from the Zoning Ordinance.

199
200 Chair Buber concurred with Mrs. Wilson but added that in Chester Rod and Gun Club, Inc. v. Town of
201 Chester, the Supreme Court set forth two tests to whether the ordinance's basic objectives would be
202 violated (this deals with the first prong contrary to public interest):

203 Test 1: the variance would not alter the essential character of the neighborhood;

204 Test 2: the variance would not threaten the public health, safety and welfare. The second prong is:

205 "would granting the variance be consistent with the Spirit of the Ordinance", and referred to Malachy-
206 Glen Associates, Inc. v. Town of Chichester, March 20, 2007, the court determined that if the variance
207 doesn't alter the essential character of the locality and doesn't threaten the public health, safety and
208 welfare, then it would be consistent with the Spirit of the Ordinance; the Supreme Court has essentially
209 tied the two prongs together.

210
211 Mrs. Wilson referred to RSA 674:33 Powers of the Board of Adjustment – unnecessary hardship shall be
212 related to special conditions that remain unchanged, and she doesn't believe there are special
213 conditions of subject property.

214
215 Mrs. Reid said that she agrees with Mrs. Wilson, and she too reviewed Chester Rod and Gun Club, Inc. v.
216 Town of Chester. She said there doesn't seem like there is a hardship because the applicant is using the
217 property.

218
219 Mr. Gordon asked if he could ask Attorney Pelech if there were other variances.

220
221 Chair Buber said that it's possible to reopen the Public Hearing, but the Board is in the middle of
222 deliberations, and if they reopened the Public Hearing, they would have to re-notice it.

223
224 Mr. Gordon did not want the Chair to reopen the Public Hearing. He discovered he had copies of the
225 variances in his packet. He said that in his opinion an 871 square-foot apartment did not constitute a
226 multi-family residence. He said that it is relevant to note that this is a mixed use, or transitional
227 neighborhood, and in his view, the presence of a fully enclosed small apartment within this dwelling,
228 that doesn't change the appearance of the exterior, does not do the kind of violence to the intents and

229 purposes of the ordinances that would make granting the variance improper. He believes the five (5)
230 criteria of the variances requested have been met.

231
232 Chair Buber agreed that this doesn't constitute multiple dwellings on a single lot. An accessory
233 apartment is subordinate to the primary dwelling. He concurs with Mr. Gordon on that point.

234
235 Mr. Fullerton doesn't see it as an accessory apartment simply because of the definition (Section 302.1),
236 because it doesn't meet the conditions under Section 513. He views it as a multiple dwelling.

237
238 It was determined that the construction of the house in 2005 on a lot less than the required two-acres
239 did not require a variance; the lot was a lot of record.

240
241 Mr. Fullerton said he was grappling with the hardship issue. He said he has looked at the property and
242 has a hard time seeing its unique setting in its environment that creates an unnecessary hardship. He
243 said he doesn't see that the application has made the case for the unnecessary hardship criterion.

244
245 Mr. Fullerton doesn't believe it meets the first two criteria of the variance test, even though the
246 language from the Supreme Courts says it does. He said if the lot was 1.8 acres and in the I-B/R, and did
247 not unduly and to a marked degree conflict with the ordinance, the proposal would be more acceptable
248 to him. He based his decision on the fact that he doesn't believe the property to be unique, and that it
249 doesn't support unnecessary hardship.

250
251 Chair Buber said that based on the rulings by the Supreme Court, he believes the application meets the
252 first and second prongs of the variance test. He said he is "iffy" on the third prong – *will substantial*
253 *justice be done* – the surrounding lots have 1/3 to a little over one acre per lot and even though they
254 decide cases individually, if everyone in that area wanted an accessory apartment, he doesn't see that
255 would be in the spirit of the ordinance. He was not sure if allowing an accessory apartment would
256 diminish surrounding properties; there was no testimony either way regarding property value. He said
257 he doesn't see where the application meets the 5th prong – hardship, and would have to vote not to
258 approve the variances requested, based on the hardship aspect.

259
260 Mr. Gordon said that he would be inclined to vote in favor of the application.

261
262 **Mr. Gordon moved to grant the variances as requested for Case 2014:10. There was no second to the**
263 **motion. The motion failed.**

264
265 **Mr. Fullerton moved and Mr. Buber seconded the motion that Case #2014:10, Applicant Jarrod Patten,**
266 **that the variances requested, as indicated in the application, be denied because it does not meet the**
267 **unnecessary hardship criterion.**

268
269 Mrs. Wilson asked if they should also add in the motion that it doesn't meet the Spirit and Intent of the
270 Ordinance. Chair Buber thought that by adding that they would be going down a "slippery slope".

271
272 **The vote was passed in favor of the motion (4 in favor, 1 opposed and 0 abstention).**

273
274 Chair Buber reminded the Applicant of the 30-day appeal period process.

275

276 **New Business**

277

- 278 **1. 2014:12 – Applicants Sharon and Horace Rommelman, 4-2 George’s Lane, Fremont, NH 03844.**
279 **Owners: Everett and Susan Allen, 242 Atlantic Avenue, North Hampton, NH and Jeff**
280 **DiBartolomeo, 244 Atlantic Avenue, North Hampton, NH; Property location; 242 and 244**
281 **Atlantic Avenue, North Hampton, NH; M/L 008-096 and 008-097: Zoning District R-1**
282 **Residential High Density.** The Applicants request a variance to Article IV, Sections 406 – Yard
283 and lot requirements to allow the proposed lot line adjustment between the properties at 242
284 and 244 Atlantic Avenue.

285

286 In attendance for this application:

287 Attorney Steve Ells, Counsel to the Rommelmans, prior owners of 242 Atlantic Avenue and the Allens,
288 current owners of 242 Atlantic Avenue

289 Everett and Susan Allen, owners of 242 Atlantic Avenue

290 Attorney Eric Maher, Counsel to Jeff DiBartolomeo

291 Jeff DiBartolomeo, Owner of 244 Atlantic Avenue

292

293 Mr. Fullerton read the Case description into the record.

294

295 Attorney Ells explained that in 1972 the then owner, Timothy Amborse, built an addition consisting of a
296 small apartment at 242 Atlantic Avenue. Mr. and Mrs. Rommelman purchased the property at 242
297 Atlantic Avenue in 1990. Mr. Charles Lamprey owned the property at 244 Atlantic Avenue and in the
298 early 1990s built a garage; at that point he had the property surveyed and discovered that a portion of
299 the Rommelman’s building and driveway encroached onto his property. The Rommelman’s applied for a
300 lot line adjustment with the Planning Board and attended the first meeting on November 2, 1992; the
301 meeting was continued to November 16, 1992 and then again to December 7, 1992. There was no one
302 present at the meeting; therefore the Planning Board did not act on it. The Rommelman’s planned to
303 sell the property at 242 Atlantic Avenue in 2014 and applied for a lot line adjustment with the Planning
304 Board. The Planning Board approved the lot line adjustment application on September 2, 2014, with
305 conditions. The plan was recorded at the Registry of Deeds on September 18, 2014; Plan #C38446. The
306 property was resurveyed, and it was discovered that the structures located on the property did not
307 meet the required setbacks in the Zoning Ordinance.

308

309 Attorney Ells said that in 1972 there were setback requirements, and a portion of the addition and
310 entire driveway was built on the adjacent property; 244 Atlantic Avenue.

311

312 Chair Buber asked why the Applicant’s did not apply for an Equitable Waiver instead of a Variance since
313 the encroachment has been there since 1972.

314

315 Attorney Ells said that if he did that he would be asking to leave everything the way it is and essentially
316 have the Board “bless it”, but since he was creating something new he had to take the Variance route.

317

318 Chair Buber commented that the discovery of the encroachment in 1992 negated the Equitable Waiver
319 route.

320

321 Attorney Ells said that by granting the Variance it will make the lot less non-conforming.

322

323 Attorney Ells addressed the five criteria of the Variance Test:

324

325 **1. Granting this variance will not be contrary to the public interest.**

326

327 The granting of the variance will not be contrary to the public interest because the proposed use is
328 residential in a zone which permits residential uses and has existed for over twenty (20) years. The
329 proposed lot line adjustment shall eliminate the encroachment and make the lot at 242 Atlantic Avenue
330 much less non-conforming.

331

332 **2. Granting this variance the spirit of the ordinance is observed.**

333

334 The granting of the variance will be consistent with the spirit of the ordinance because the variance shall
335 allow for a reasonable use of the property at 242 Atlantic Avenue without harm to the public or private
336 rights of others.

337

338 **3. Granting this variance substantial justice is done.**

339

340 Substantial justice shall be done by granting the variance; on balance, the harm to be suffered by the
341 applicant, if the variance is not granted, shall far outweigh any benefit to the public if the ordinance is
342 strictly enforced in this circumstance.

343

344 **4. Granting this variance the values of surrounding properties are not diminished.**

345

346 The granting of the variance shall not result in a diminishment of values of surrounding properties; the
347 land has been laid out and used in the fashion proposed for over the past twenty (20) years. The
348 variance shall just allow the parties to document and formalize this use.

349

350 **5. By not granting this variance, literal enforcement of the provisions of the Ordinance would result in
351 an unnecessary hardship.**

352

353 The homes at 242 and 244 Atlantic Avenue have been in their current locations for many years but the
354 required 25-foot side setback cannot be achieved without the relocation of a structure. The neighbors
355 are attempting to correct the situation by a land swap and lot line relocation, but require a variance to
356 be able to proceed with the proposed correction.

357

358 Chair Buber commented that he reviewed the DVD recording of the September 2, 2014 Planning Board
359 meeting when they approved the lot line adjustment, and has no issue with variance requested.

360

361 **Mr. Fullerton moved and Mrs. Reid seconded the motion to approve the Variance request for Case
362 #2014:12 to allow the 18.5-foot side setback where 25-feet is required.**

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

364

365 Ms. Chase reported that there was no "New" or "Unfinished" Business scheduled for the December 9,
366 2014 Zoning Board Meeting.

367

368 **Mr. Buber moved and Mrs. Reid seconded the motion to cancel the December 9, 2014 Zoning Board of
369 Adjustment meeting due to lack of "New" and "Unfinished" Business before the Board.**

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

371

372 Chair Buber wished everyone Happy Holidays.

373

374 **Mrs. Reid moved and Mr. Fullerton seconded the motion to adjourn the meeting at 7:50pm.**

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

376

377 Respectfully submitted,

378

379 Wendy V. Chase

380 Recording Secretary

381

382 Approved February 24, 2015

383