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5 **Stratham Zoning Board of Appeals**  
6 **Meeting Minutes**  
7 **July 14, 2015**  
8 **Municipal Center, Selectmen's Meeting Room**  
9 10 Bunker Hill Avenue  
10 Time: 7:00 PM  
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13 **Members Present:** Arol Charbonneau, Chairman  
14 Bruno Federico, Selectmen's Representative  
15 Garrett Dolan, Member  
16 Jim Elliot, Member  
17 Phil Caparso, Alternate  
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19 **Members Absent:** Chris Brett, Member  
20 Chris Cavarretta, Member  
21 Deidre Lawrence, Alternate  
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23 **Staff Present:** Audrey Cline, Code Enforcement Officer  
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27 **1. Call to Order/Roll Call.**

28 Mr. Charbonneau took roll call.

29 **2. Review/Approval of Meeting Minutes.**

30 a. June 09, 2015

31 Not enough members in attendance to approve the minutes.

32 b. June 23, 2015

33 Mr. Elliot motions to approve the June 23, 2015 meeting minutes. Mr. Charbonneau  
34 seconds the motion.

35 **3. Public Hearing(s)**

36 a. **Case #624: Birse Living Trust, for the property located at 313 Portsmouth Ave,**  
37 **Stratham, NH, Tax Map 22, Lot 29.** An Appeal from Administrative Decision of  
38 Audrey Cline, Code Enforcement Officer, dated June 15, 2015, Non-compliance with  
39 ZBA Variance Case #345 reaffirmed via Appeal from Administrative Decision Case  
40 #512.

1 Mr. Keane, Keane McDonald Law Firm, representing Mr. & Mrs. Birse & Trust,  
2 waived the reading of the violation letter from Ms. Cline. Mr. Keane explains there  
3 was a variance granted to Mr. Hannah in 1972 to build a storage shed for equipment  
4 related to his well drilling business; Mr. Hannah then sold it to Mr. Skillings who  
5 remained in the same business. Exhibit 1 shows the variance was voted to allow Mr.  
6 Hannah to build a garage and storage shed as per plans submitted and should the use of  
7 the building be changed by either the present or future owner a rehearing by the Board  
8 of Adjustment would take place. Mr. Birse purchased the property in 2007 consistent  
9 with that variance order in 1972 and came before the Board of Adjustment to inform  
10 them that the use was being changed to a landscaping/construction business. Mr. Birse  
11 has conducted business on the property consistent with the use he presented to the  
12 Board of Adjustment in 2007. The two buildings are used by Mr. Birse consistent with  
13 the representations he made to the Board of Adjustment in 2007. In the packet  
14 submitted, the Town Planner and the Board of Adjustment recognized that there were  
15 no restrictions on the use of the property; it does not state any restrictions on how the  
16 property is used other than the two buildings and the fact that the use was permitted for  
17 landscaping/ construction. Chuck Grasse, in Exhibit #7, specifically stated that the use  
18 on other portions was never discussed or restricted by the Board's decision in Case #45.  
19 It's also important to note that Mr. Birse stated to the Board of Adjustment in 2007 that  
20 he intended to grow his business, and it seems there is an objection to the fact that Mr.  
21 Birse is growing his business as he represented. The Notice of Violation is inconsistent  
22 because the use has not changed; the variance was granted for the use of the garage and  
23 shed for landscaping/construction and there were no restrictions on the rest of the  
24 property. However, the Code Enforcement Officer issued a notice of violation which  
25 states the property is not being used in keeping with the Hannah variance approved in  
26 1972. The notice also lists 4 to 5 restrictions which are also inconsistent due to the  
27 Board of Adjustment recognizing it being changed to a landscaping/construction  
28 business. The business is restricted per the statement of Skillings's to 33 percent to  
29 contractors, in the approval that was granted to Mr. Birse there were no restrictions  
30 placed on his business at that time. Mr. Keane noted that once the variance was  
31 approved and Mr. Birse runs his business consistent with the variance, he is in  
32 compliance.

33 The concerns raised in the Notice of Violation of the bins remain the same as they did  
34 back in 2007 and are reduced slightly in the length because of the wireless antenna on  
35 the property. Due to the current construction of the antenna, much of the inventory has  
36 been moved forward temporarily and may appear that there is more inventory in the  
37 front of the lot today than there was 6 months ago. As soon as the antenna construction  
38 is complete, all of the inventory presently in the front of the property will be put back in  
39 the bins, which take up less space than they did in 2008. Retail sales to the general  
40 public is a percentage of overall sales which are less than what Mr. Hanna had and less  
41 than what they were in 2008. Now that Mr. Birse has built up and since sold his  
42 business, the new owner does contract the business, which is beneficial because it  
43 reduces the number of people who are in and out of that site. The current operating  
44 hours are less than what Mr. Birse ran for the years he operated his business, and the  
45 2007 approval set no conditions on the hours of operation. The Notice of Violation  
46 suggests the use approved for the applicant in 2007 has to be consistent with Mr.

1 Hanna's use of the property. Mr. Birse came before the board and explained to the  
2 board, extensively, what he was planning to do with the property, refer to the minutes  
3 attached to the application submitted. It concludes that an additional variance will not  
4 be required by Mr. Birse because he is continuing to use the two buildings that were  
5 approved in 1972. There was also no proposal to expand the business activity on the  
6 site and, therefore, there was no approval for the use of the yard area; which is contrary  
7 to the memo provided to the board by the town planner which states there are no  
8 restrictions on the use of property other than the use of the current two buildings. If  
9 Mr. Birse added a building or two buildings and they didn't meet setbacks or zoning  
10 then there would be an argument to seek another variance, but he has not expanded the  
11 number of buildings on the property. We recognize the volume of sales has grown, but  
12 everyone should be happy about the growing business in town. Mr. Birse should not be  
13 punished for his growing business.

14 Mr. Charbonneau questioned Mr. Birse about the use of the bins; which were not used  
15 by the well-drilling company, and how the buildings were being used during Case  
16 #512; was the remainder of the yard being used for outside storage in addition to the  
17 bins that are referred to in the minutes. Mr. Birse responded that yes, the yard was used  
18 for bricks, stone, and other products. The bins were 25 ft. long when Mr. Birse  
19 acquired them and now that same area can be used for 3 different products but the bins  
20 were long because they held 30 ft. pieces of well pipe. Mr. Charbonneau questioned  
21 whether the product visible in the front and side of the property is normally not there, to  
22 which Mr. Birse states the product in front is normally not there other than for some  
23 display. It will be where it has been for the last few years, which is for visual purpose.  
24 The back property is currently empty during the construction of the tower. The  
25 construction of the tower is supposed to be finished in the next three weeks, as far as  
26 the fencing, then Mr. Birse will plant some trees per the plan. Mr. Elliot questioned  
27 whether the inventory which is currently in the front of the property would be moved to  
28 the back of the property. Mr. Birse agreed it will move back once the construction is  
29 complete. Mr. Keane stated the use of the buildings and the remaining land has not  
30 changed, and there were no restrictions put on the use of the remaining land either in  
31 the initial case in 1972 or the subsequent case in 2007. Mr. Charbonneau questioned  
32 the state of the property back in 2007 and believes the Board in 2007 relied on Attorney  
33 Morrison stated "continued use of the buildings would not require a new variance, but  
34 if expansion of the use to other locations on the site it would". Attorney Keane believes  
35 Attorney Morrison was referring to expanding the buildings on the property which  
36 would require another variance, but the use of the ground area was never discussed, nor  
37 does the use of the ground area require a variance. Mr. Charbonneau questioned the  
38 hours of operation. Mr. Birse responded that the current hours of operation are geared  
39 towards contractors so they are open until 4:30 pm and closed on Sunday. Mr.  
40 Charbonneau asked about the sales, which Mr. Birse states the sales are wholesale to  
41 contractors; approximately 75% contractor sales.

42 Mr. Federico explains the town received many complaints regarding the flyer that went  
43 out to every resident in the Town of Stratham, promoting Stratham Hill Stone as a retail  
44 business; which prompted the Code Enforcement Officer to check on the situation. Mr.  
45 Federico is concerned Stratham Hill Stone is marketing to residential consumers. Mr.

1 Deschaine states his concern that every resident received a mailing which does not  
2 seems to be geared towards contractors. Attorney Keane states, regardless of the  
3 mailing and the change of the use of the business, the sales to the general public are less  
4 now than they were 2008 and the Skilling's ratios of 33%. Attorney Keane agrees  
5 more contractor sales and less public sales is better in terms of traffic safety coming and  
6 going onto Portsmouth Avenue. Ms. Cline states there is a definition of retail sales, per  
7 the Town of Stratham Zoning Ordinance, in the last page of the packet; retail includes  
8 sale to contractors, a showroom, etc. Attorney Keane argues that Hanna should then  
9 have been considered a retail sales business. Ms. Cline states she understood Hanna  
10 took their product off of the property and recognizes they had, what is considered retail,  
11 inside the building. Ms. Cline states the variance does not mention retail or wholesale,  
12 only use of the building for a garage and storage shed. In Ms. Cline's review the  
13 variance is based on 5 criteria, which is giving permission for something that is not  
14 allowed, that it would specify what it is giving permission for, and would not write  
15 down everything that it was not giving permission for which is different than allowed  
16 by right. The variance is allowing certain types of uses in certain manners because it's  
17 a variance and has effect on the neighborhood and those manners and usage as what  
18 was identified. The manner in which it's being used today is not what the original  
19 board intended. Ms. Cline does not believe the board spoke to allowing use of the  
20 outside area at will for storage of materials and product, and if they had, she believes  
21 the board would have asked for a planning board review.

22 Mr. Federico explains that Stratham Hill Stone is in a residential/ agricultural zone and  
23 the Town of Stratham has tried 3 times in the past 10 years to expand commercial  
24 operations north of the town center, up Rt. 33 to Greenland line, and the town has  
25 strongly rejected each of those attempts to allow commercial activity. Attorney Keane  
26 states, regardless of the town's attempts to keep the commercial aspect out of that area,  
27 if a variance is requested and all the criteria is met, the Board of Adjustment cannot  
28 stop commercial business from occurring. Ms. Cline explains, in Attorney Keane's  
29 scenario the Board would approve a certain amount of parking and conditions that go  
30 along with that approval. Mr. Dolan states the criteria for a site plan review, zoning  
31 restrictions, and the board's participation to mitigate the circumstances of a variance are  
32 very different today than what they were in 1972. Attorney Keane argues what was  
33 approved back in 1972 should be allowed forever, as long as it's not contrary to that  
34 approval. Mr. Caparso gives a scenario of a home business in a residential area  
35 approved for 1 person working in that business; the home sells and the new owner now  
36 has 5 people working in that business, the use is the same technically, but in reality the  
37 use has changed. Mr. Charbonneau is concerned that there were no restrictions on use  
38 beyond the buildings, but unsure of whether that means you're allowed to use it in that  
39 manner or would the board have addressed that and put some conditions on the use.  
40 Ms. Cline would like Attorney Keane to clarify who owned the property and what the  
41 time frame was for the pictures that were submitted with the application, the dates are  
42 general dates. Ms. Cline pointed to a picture in 2007, before Mr. Birse purchased the  
43 property, which shows what the use of the property looked like. Mr. Birse states that  
44 the owner had left the property a year prior and the property was empty in the photo  
45 Ms. Cline questions. Ms. Cline would like confirmation on where the 5 bins were  
46 located on the property, which seem to appear after the photo and then again in 2010.

1 There appears to be only 1 bin on the property at that time. Ms. Cline explains that  
2 with a variance you don't speak to what you don't do, you only speak to what you may  
3 do. This variance was only approved for the buildings, without discussion of the how  
4 the rest of the property was to be used, which during the public hearing, the neighbors,  
5 the people who are affected by the 5 criteria would not get an opportunity to speak.  
6 The outside of the property was not run through the 5 criteria in the original hearing or  
7 in the second hearing, (which was not a variance hearing, it was a hearing to confirm  
8 you don't need a variance if you are keeping with the same type of business). Attorney  
9 Keane agrees that the 2007 hearing was not a variance hearing, the criteria was not  
10 discussed and the use of the outside of the property, the scope of the business, and the  
11 impact changed from the original approval. Mr. Federico's concern is that there was  
12 never a site plan review by the planning board. Attorney Keane states it was not  
13 needed since the use was remaining the same. Mr. Caparso states that the outside  
14 storage use has changed. The bins shown in the photos submitted are metal bins and  
15 the bins now are more of a permanent structure. Mr. Birse confirmed the bins are made  
16 of concrete and are movable. Mr. Hughes, an abutter to the property, has seen a lot of  
17 movement of inventory because of the tower construction and he has witnessed less  
18 traffic since the new owner has taken over.

19 Discussion between the board regarding what the Code Enforcement officer believes is  
20 necessary to comply with the variance was discussed.

21 "Notice – To restrict all inventory and material to the original 5 bins and building and  
22 sales office"

23 The board agrees there is not enough definition of what was to be permitted and how  
24 the restrictions were supposed to be implemented. Mr. Dolan agrees the town planner  
25 stated there were no restrictions on the remaining portion of the property that were  
26 supposed to be utilized. Mr. Caparso asked about the signage. Ms. Cline states there is  
27 signage on the displays, which is visible for the street, as well as other types of signage  
28 on the property. Mr. Elliot would like explanation of what the Code Enforcement  
29 officer was referring to in the 2007 variance that put the owner in violation. Ms. Cline  
30 believes there are more than 5 bins of material, stock and inventory currently on the  
31 property. The decision on the appeal was that another variance was not needed as the  
32 Birse's business was the same type of use as the first business. Ms. Cline states the  
33 information in the file is the only information she can go by to base her decisions and in  
34 a variance situation what is permitted is stated and everything else is not permitted. It  
35 is not listed as to what is not permitted, there is only a list of what is permitted. In the  
36 opinion of the town's attorney, she believes there is no proposal for an expansion of  
37 business and if there was there would be another variance required to go through the 5  
38 criteria so the public has a chance to voice their opinions on impact. Ms. Cline agrees  
39 that there are no restrictions on the property, as well as there are no approvals on the  
40 property, since it was not put through the process. The scope, with regard to the letter  
41 submitted, is the landscaper has several crews which come to the site, get the product  
42 they need and take to a job where they spend the day applying that product. The scope,  
43 impact, and size changes when most of what you are doing is actually selling to other  
44 contractors coming to get product. Mr. Deschaine handed out aerial photographs to the

1 board documenting the aerial changes in the property from 1974 to 2014. Mr. Dolan  
2 explains the Board's duty is to deal with variances that may have been done in the past  
3 with little or no information as to future possibilities. Mr. Federico believes the  
4 variance that was approved for Mr. Hanna for the use of 2 buildings and no outside use  
5 is now being used as an expansion of use. Mr. Federico states with that expansion of  
6 use Mr. Birse needs to go to the Planning Board for a site review. Mr. Dolan does not  
7 see where that is a restriction listed on the variance. Mr. Federico read Article IVA, B  
8 through H, of T2 speaking to the change of use, as well as the minutes from Case #512,  
9 paragraph 5, where Mr. Birse states he will be selling mulch out of the existing 5 bins  
10 on the property and will be delivering it. Ms. Cline reiterates there was never a  
11 variance for a landscaping business, the second hearing was not a variance, there were  
12 no conditions placed or not placed. Attorney Keane stated there was never a need for a  
13 new variance since there was no change of use, the property was remaining as a  
14 commercial business in a residential zone. Ms. Cline states it may be appropriate to  
15 have a new variance to move from what the variance was approved for previously to  
16 what the Birse's would like to have, which would include a site plan review. Ms. Cline  
17 explains the difference between commercial use in a commercial district where the use  
18 is permitted and commercial use in an agricultural/residential district where the use is  
19 not permitted by right. Ms. Cline gives the definition of permissive and restrictive  
20 zoning; permissive zoning only allows what you have permission to do, restrictive  
21 zoning explains what you cannot do. Mr. Elliot requested to see the plans submitted in  
22 the variance granted to Mr. Hanna, which are very minimal. Mr. Deschaine states,  
23 weighing the presentation in 2007 in terms of what the board felt was with keeping with  
24 the original variance conditions, he would like clarification of what has changed since  
25 2007; Mr. Birse states nothing has changed. Mr. Deschaine sees a natural progression  
26 of change and that this case is at a juncture where there is a difference of opinion and  
27 has been crossed again.

28 Mr. Deschaine advises the board that given the lack of documentation and decision  
29 process of this case history that the board has the authority create a line so there will be  
30 no "interpretation" in the future; which will assist the Code Enforcement Officer to  
31 fulfill her duties and the owner of the property to have a clearer understanding of what  
32 they can do. Mr. Copeland, former 2007 Zoning Board member, recalls the board  
33 believing that the business was a wholesale business with the stipulation that it would  
34 not be a retail business in any way. Mr. Copeland remembers specifically discussing  
35 whether it was going to be a wholesale business or a retail business, which would hinge  
36 on the Board's decision whether to allow or deny the application; it was approved due  
37 to the fact that it was wholesale and not retail which would impact traffic and other  
38 factors pertaining to a retail business. Mr. Deschaine noted that when there is an  
39 administrative appeal of an officer's decision, the board becomes that code enforcement  
40 officer who can accept or reject the administrative officer's decision or make their own  
41 decision. It is the board's decision to find whether the code enforcement officer's  
42 determination was correct, and if the board finds it incorrect the record stands as it is or  
43 condition that finding on and determine the finding on what previous board's meant.

44

1 The Board discusses each point the code enforcement officer listed in the Notice of  
2 Violation:

- 3 1. Restrict all inventory & material to the original five bins and building sales office.
- 4 2. Remove all exterior signage and displays except the approved Stratham Stone sign.
- 5 3. Restrict retail sales to contractors only, and restrict retail sales to a dollar amount  
6 of no more than 33% of Skillings dollar sales amount.
- 7 4. Restrict office and retail hours of operation from 7:30am-4:30pm five days a week  
8 and 9am-12pm on Saturdays.

9 Mr. Federico agrees with the Code Enforcement's four statements. Mr. Charbonneau  
10 states the previous board said the bins, the sales office, and they were allowing for a  
11 landscape business was there and it's hard to believe they did not envision some type of  
12 outside storage in addition to the bins. Mr. Dolan with Mr. Charbonneau agree that  
13 based on the previous minutes submitted, their understanding is there were no  
14 restrictions on any outside activities or displays other than what was approved in Mr.  
15 Birse's signage and display plan that Mr. Barnes, former Code Enforcement Office,  
16 approved. Mr. Dolan is unsure how to define the size of the inventory... how many SF  
17 on the ground as well as how high, how many cubic yards of each inventory item you  
18 can store on site? Mr. Charbonneau and Mr. Caparso believe it will be a different view  
19 once the tower is constructed. Mr. Deschaine stated if retail sales were occurring with  
20 the previous variance it was very minimal, and it's a difference in impact when the  
21 majority of the business is now retail. Attorney Keane suggested waiting until the  
22 tower is constructed and the inventory is moved back to the original location when the  
23 Board can then do a site walk and identify the area where inventory will be stored on  
24 the property. Mr. Elliott, Mr. Caparso, and Mr. Charbonneau do not agree with #3 and  
25 controlling the "33% of Skillings dollar sales amount", unless we have access to their  
26 sales on a monthly basis, which is not feasible. The Board agrees with #2 and #4 of the  
27 Notice of Violation. Ms. Cline would like a decision on whether retail sales are  
28 permitted and whether the intent was to allow retail or not.

29 Mr. Dolan motions to postpone a decision on Case #624 to accommodate a site walk to  
30 be held on September 9, 2015 at 6:00 pm and postpone the board's decision to a  
31 rehearing date of September 22, 2015 at 7:00 pm. Mr. Caparso seconds the motion.  
32 Motion carried unanimously.  
33

#### 34 **4. Adjournment.**

35

36 Mr. Dolan motions to adjourn at 9:24 PM, Mr. Caparso seconds the motion. Motion  
37 carried.