



**Stratham Zoning Board of Adjustment  
Meeting Minutes  
September 22, 2015  
Municipal Center, Selectmen's Meeting Room  
10 Bunker Hill Avenue  
Time: 7:00 PM**

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**Members Present:** Arol Charbonneau, Chairman  
Garrett Dolan, Full Time Member  
Jim Elliott, Secretary  
Chris Brett, Full Time Member  
Chris Cavarretta, Full Time Member

**Members Absent:** Bruno Federico, Board of Selectman Representative  
Phil Caparso, Alternate  
Deidre Lawrence, Alternate

**Staff Present:** Audrey Cline, Code Enforcement Officer

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**1. Call to Order/Roll Call**

The Chairman took roll call and explained the rules of procedure.

**2. Approval of Minutes**

**a. July 14, 2015**

Mr. Elliott motioned to accept the minutes of July 14, 2015 as written. Mr. Dolan seconded the motion. Motion carried unanimously.

**b. September 8, 2015**

Not enough members present to approve meeting minutes.

**c. September 9, 2015**

Not enough members present to approve meeting minutes. Mr. Cavarretta stated he was not present during the September 9, 2015 walk-through.

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

- 2 a. **Case #624: Birse Living Trust, for the property located at 313 Portsmouth Ave,**  
3 **Stratham, NH, Tax Map 22, Lot 29.** An Appeal from Administrative Decision of Audrey  
4 Cline, Code Enforcement Officer, dated June 15, 2015, Non-compliance with ZBA Variance  
5 Case #345 reaffirmed via Appeal from Administrative Decision Case #512 (*Continued from*  
6 *July 14, 2015*).

7  
8 Attorney Thomas Keane, representative for the applicant Mr. Birse, stated that Mr. Birse  
9 would like to speak first. Mr. Birse thanked those who attended the site walk of his  
10 business on September 9, 2015 and hoped they could all agree that Stratham Hill Stone is  
11 a landscape supply construction business that sells landscape products, installs granite  
12 posts and steps, and was approved in 2007. Stratham Hill Stone is in their ninth season  
13 successfully serving Stratham and surrounding communities, is an active supporter of  
14 local events, including the SPCA, Stratham Fair, Boy Scouts, and other events, and they  
15 are here to be a successful Stratham business.

16  
17 Attorney Keane spoke to the history of this property and the Zoning Board of  
18 Adjustment's prior decisions and the pictures, handed out at the September 9, 2015 site  
19 walk, dated 2007-2015. The pictures show where the landscape materials were located,  
20 where the inventory was stored, where the buildings were located, and that the use has  
21 not changed. The use that was approved by the ZBA was a landscape/construction  
22 business for two buildings on the site and the Zoning Ordinance was amended in March  
23 2015 and specifically states 5.1.2 that "a variance is not required if the expansion is a  
24 natural expansion which does not change the nature of the use, does not make the  
25 property proportionately less adequate, and does not have a substantially different impact  
26 on the neighborhood". Attorney Keane and his client believe this applies directly to this  
27 case and that no further variance is required for Mr. Birse to operate the business he is  
28 operating on the property and there is no violation. Attorney Keane stated the town has  
29 the burden of proof to demonstrate to the board that the use has changed, that there is a  
30 violation under the code, and that Mr. Birse is not operating a landscape/construction  
31 business that was approved in 2008.

32  
33 Ms. Cline handed out a packet. Attorney Keane stated for the record that this is the first  
34 time he and his client have seen these materials, and nothing prior to the approval by the  
35 ZBA in 2007 of the landscape/construction use is relevant. The only relevance is  
36 whether or not there is a violation of the approved use granted by the board in 2007. Ms.  
37 Cline started to speak regarding the research to help the board decide the case, Attorney  
38 Keane objected to anything being discussed prior to 2007. Mr. Deschaine stated it is  
39 relevant and the board must vote in order to make that determination. Mr. Deschaine said  
40 the approval in 2007 was based on the prior activity related to that property; which makes  
41 the equivalency of activity in order for the board's decision in 2007 to stand. Ms. Cline  
42 stated that the 2007 approval was not a variance application, but an Appeal from  
43 Administrative Decision and the business was, or was not, the same as in 1972. The  
44 appeal determined that the landscaping service business that was applied for was the  
45 same as the well-drilling business in 1972 and, therefore, the variance that was given to  
46 the well-drilling business applied and not some other variance that needed to be applied

1 for. The 1972 decision stated Mr. Birse would be operating under the same requirements  
2 as the business in 1972. Attorney Keane disagreed with the explanation and believes Mr.  
3 Birse is in compliance with the approval from 2007. Attorney Keane argued that Mr.  
4 Birse is before the board regarding the notice of violation (which states the “use has  
5 expanded beyond what is allowed”) and the Town has the burden of proof. Mr.  
6 Cavarretta voted to start at 2007; Mr. Dolan stated that there was no variance in 2007;  
7 Mr. Elliot voted to go back to 1972. Mr. Dolan stated the 1972 variance was granted for  
8 the storage of equipment, it wasn’t granted for a business because at that time the parcel  
9 needed to be owner-occupied. Ms. Cline stated she believes Mr. Birse should be  
10 operating under the 1972 Variance. The Board voted unanimously to hear Case #624  
11 starting with 2007 and if they need to go back to the 1972 Variance decision they will.  
12

13 Ms. Cline stated Mr. Birse came before the board in 2007 with an Administrative Appeal  
14 that he was going to operate a business at 313 Portsmouth Avenue in the same nature as  
15 the business that had been operating there. Due to Mr. Birse’s business not being a well-  
16 drilling business, but a landscaping/construction business, he asked to use the property  
17 for the storage of his equipment and supplies. In the 2007 the case, as defined and as Mr.  
18 Birse represented it, the landscape/construction business is a service based business; go to  
19 the customer location, do the work and come back to the home base to store the  
20 equipment. Mr. Birse has been working under the Variance to run a business in that  
21 location. It is important to recognize that a business that was authorized by variance is a  
22 “legally, non-conforming” business, just like a business that was started before zoning  
23 spoke to it. They are both “legally, non-conforming”. Expansion of a non-conforming  
24 use requires additional variances, they cannot be expanded at will without having a  
25 variance.  
26

27 Slide #1 – 2006 – The nature of the property before the landscape business was approved,  
28 note the foliage and the dirt area.

29 Slide #2 – 2007&2008 - Mr. Birse received his approval to operate as a service landscape  
30 business and there are some changes on the site; bins of material, storing material outside  
31 of bins and some landscape displays out front appear.

32 Slide #3 – 2009 – There is still some foliage on the site.

33 Slide #4 – 2010 – More bin work, additional material, some activity occurring in the  
34 back.

35 Slide #5 – 2011 – An increased amount of development of the site for commercial  
36 purposes, more bins, more inventory, and something unknown occurring in the back of  
37 the property.

38 Slide #6 – 2013 – The material bins have increased and expanded, and there is storage of  
39 inventory in various areas.

40 Slide #7 – 2014 – More increase, trees are removed (Mr. Birse noted Unutil cut the trees,  
41 it was not him).

42 Slide #8 – 2015 – The past foliage is now entirely storage and has been developed.  
43 Inventory along the driveway, more inventory on the left side of the driveway, and more  
44 changes in the back of the property. Some of the bins appear to be encroaching over the  
45 property lines. There are no setbacks to the area. 100% of this lot is now developed.  
46 During the site walk it came to our attention that there appears to be 4 different

1 independent businesses on the property; the original retail landscape company; an  
2 electronics recycling business in the other ½ of the building; the cell tower utility; and a  
3 tech stone manufacturing process.  
4

5 Ms. Cline presented the staff review. Ms. Cline is concerned that the business is not a  
6 landscaping company; they don't go to customers for projects, but they sell materials to  
7 others for those projects. It is 100% retail, they advertise to the general public, the site is  
8 open to the general public to come in to shop, order, and do everything that is related to  
9 retail sales. The Express Electronics business does not have any approvals, they recycle  
10 electronics and consumer goods, and have not been through the Zoning, Site Plan or  
11 Code approvals for the building. The recycling has hazardous type materials, which is  
12 why building codes are important. Ms. Cline handed out pictures of the types of things  
13 recycled inside the business. Mr. Birse's stone lettering business does not have ZBA or  
14 Planning Board approvals to develop this building, enclose in the bays, and create an  
15 office and area to cut stone. Cell Tower Utility has approvals. Ms. Cline stated the  
16 owner and this property, as well as future owners, deserve to have a clear and  
17 unambiguous approval or denial of the use or uses that are warranted for this property.  
18 The only way to get an approval is through the variance process, statutorily it cannot be  
19 done through the appeal process since it is not the way uses are approved. Variances  
20 require a variance application, which is required for either the expansion of the legally  
21 non-conforming use or a change of use. If there is an approval, the Planning Board site  
22 review process is always required for commercial lots. The ZBA may identify some  
23 scoping restrictions with regard to the site plan, but that does not replace the Planning  
24 Board approval process for the site plan. Mr. Birse applied for a service related business,  
25 which is exactly what the well-drilling business was prior. If there was a change to a  
26 retail business it would have to be approved through a variance, it could not be done  
27 through Administrative Appeal process that was done in 2007. The original approval did  
28 not allow for customers on site, it was a service based business. A use that is not  
29 permitted cannot be permitted because someone has been doing it, there is no way to  
30 grandfather an illegal use. The term natural expansion is very limited. It is clear in the  
31 case law that natural expansion is not controlled by a business doing better. The Supreme  
32 Court has never approved a natural expansion outside of a building that was legally non-  
33 conforming use. Municipal Estoppel needs to meet four points. Courts have found that  
34 the property owner is charged with knowing the zoning regulations and approvals  
35 associated with his/her property. If it is written in the town documents and zoning code,  
36 the courts have found the property owner is responsible for knowing what it says.  
37

38 Mr. Charbonneau questioned whether Ms. Cline knew about the other businesses on site  
39 when she wrote the administrative decision. Ms. Cline only knew about the cell tower,  
40 she did not know about the other businesses. Mr. Deschaine questioned where Ms. Cline  
41 got the information regarding the Estoppel and non-conforming uses; Ms. Cline  
42 responded they are summaries from the New Hampshire Practice, Land Use Planning and  
43 Zoning, Fourth Edition, by Loughlin.  
44  
45

1 Attorney Keane spoke to Ms. Cline's presentation. Any representation made tonight that  
2 states retail sales were not contemplated is contrary to all of the facts in the case, the  
3 notice of violation states the business is restricted per Skilling's statement to 33% retail to  
4 contractors; the bins do not cover any greater area than they did in 2008; the buildings  
5 remain in the same location and used for the same purpose; retail sales to the general  
6 public is a percentage of overall sales and has decreased since 2008; and the operating  
7 hours conducted by Land Care are less than what Mr. Birse operated at in 2008. The site  
8 plan submitted in 2007 has not changed from what is there today. The Chairman of the  
9 Board of Adjustment, Neil Rowe, made a statement on record in a memorandum to Paul  
10 Deschaine and Terry Barnes "the use on other portions of the property was never  
11 discussed or restricted by the Board's decision in Case #45". Mr. Birse was never  
12 restricted from working on the property by the variance granted to Hannah and Skilling's  
13 nor by the approved use to Mr. Birse. In 2007 a site plan was not required, which would  
14 be helpful in this situation. Mr. Elliot questioned Attorney Keane on Exhibit 8, meeting  
15 minutes regarding Case 512; Bruce Barker asked if the business was going to be retail to  
16 which Mr. Birse responded they will be selling mulch out of the 5 existing bins on the  
17 property but they will be delivering it. Mr. Elliot agreed the minutes back up what Ms.  
18 Cline is stating, which is, that it has become more than what was granted in 2007.  
19 Attorney Keane explained that Mr. Birse stayed in contact with Terry Barnes on a regular  
20 basis to keep him up to date on what he was doing on the property. Mr. Elliot stated that,  
21 if looking at the property from 2007 to now, it looks like it has expanded, and from  
22 2007/2008 to today there doesn't seem to be any communication regarding growth.

23  
24 Mr. Birse explained that when he was working with Mr. Barnes and the business sign  
25 was approved, a second business on the property was also approved. Larchmont  
26 Engineering & Irrigation was in half of Mr. Birse's building, there has always been two  
27 entities on the property since Mr. Birse has been there. Mr. Birse was approved to  
28 operate those two businesses with the sign, which is when he was asked by Mr. Barnes  
29 and provided a plan. Mr. Birse stated they were just starting the business and didn't have  
30 the whole view of the business, but he gave Mr. Barnes everything he could. A Granite  
31 countertop business was denied, but the cutting business is Mr. Birse's. Mr.  
32 Charbonneau stated that Ms. Cline would like the pallets and materials restricted to inside  
33 the building or in the bins. Ms. Cline stated that in order for Attorney Keane to compare  
34 Skilling's with Stratham Stone, the Board needs to go back to Case #45 granted in 1972  
35 to see what was approved. The Variance was granted to build a garage and storage shed;  
36 there were no details. Ms. Cline explained that Mr. Hannah applied for a variance  
37 because he did not live on the property and wanted to build a building to store equipment  
38 and materials. The rest of that ordinance was still in place and restricted Mr. Hannah.

39  
40 The Board looked at a 2015 plan Attorney Keane submitted. Mr. Deschaine explained  
41 that the Town of Stratham is not looking to shut Mr. Birse's business down, but they  
42 would like him to reach the level of activity that he represented in 2007, which the board  
43 made a determination that didn't violate the terms of the 1972 Variance. Mr. Deschaine  
44 and Attorney Keane discussed the definition of commercial use regarding the variance  
45 granted in 1972. Ms. Cline stated that the site plan cannot be approved by the Code  
46 Enforcement Officer nor the Zoning Board of Adjustment, and this is where the slippery

1 slope occurs when discussions occur and decisions are made that are not in the right  
2 venue. Ms. Cline reiterated that she does not want to see Mr. Birse shut down, but as a  
3 Code Enforcement Officer she would like to see the ZBA Variance process as it is  
4 required and permit whatever they believe is permissible through the Variance process.  
5 Attorney Keane stated that there is no variance required. Mr. Dolan questioned where  
6 page 2 is of Exhibit 7; there is no signature or further discussion. The board concluded  
7 that it is an email and not the minutes of a meeting or the actual Notice of Decision by the  
8 board.  
9

10 A discussion took place regarding the definition of retail sales and service related  
11 business. Ms. Cline read the definition of “retail sales” as defined in the Town of  
12 Stratham Zoning Ordinance. Mr. Charbonneau questioned Mr. Birse on Exhibit 5, a  
13 2008 letter Mr. Birse sent to Chuck Grassi and Terry Barnes, regarding Mr. Grassi and  
14 Mr. Barnes inspecting the site and what was the nature for that inspection. Mr. Birse  
15 explained it was regarding the timeline on displays out front that were approved due to  
16 pallets by the road. Mr. Elliott questioned Ms. Cline whether there were any prior  
17 concerns regarding growth of retail business or use of the land or if this is the first. Ms.  
18 Cline responded that Mr. Barnes was concerned about the amount of material on the  
19 property, and it is within the last year that she feels there is has been an explosion of  
20 inventory on the site. Attorney Keane explained that Mr. Birse has never received a  
21 notice of violation and the only reason questions are being raised now is due to the cell  
22 tower construction and the material having to be brought to the front of the property  
23 during that time. Mr. Dolan questioned Mr. Birse on the sale of the business to a new  
24 operator of Stratham Hill Stone. Mr. Birse explains he is part of the business for the next  
25 10 years. Mr. Dolan questioned whether the new owner and Mr. Birse work together.  
26 Mr. Birse said the work he does on site is done for Stratham Hill Stone and he is only  
27 involved while they get trained. Mr. Birse explained he is a subcontractor to Stratham  
28 Hill Stone and has an office on the property. Mr. Birse stated to the board that  
29 Larchmont Engineering received their own approvals from the town and they only rented  
30 space from Mr. Birse. Mr. Dolan stated it is a change of use if there are now three  
31 businesses operating on the property. Mr. Dolan read the definition of Variance to the  
32 terms of Article 4, Section J, to permit two storage buildings on an R/A property, Zoning  
33 Ordinance of 1972 of Case #45. Mr. Elliot requested more evidence that it has been  
34 expanded, talk with prior board member Timothy Copeland, find out more information  
35 regarding what was actually approved in 2007 due to lack of information to make a  
36 decision. Mr. Cavarretta and Mr. Charbonneau requested more guidance from the  
37 Town’s attorney regarding this case. Dave Canada, representing the Board of Selectman,  
38 stated the Board of Selectman will not accept the Zoning Board of Adjustment approving  
39 the site plan and greed with Ms. Cline that there are variances needed and to include the  
40 site plan review. Mr. Brett stated the 2007 case was not a variance and did not include  
41 the discussion and approval of the Variance criteria required. Peter Grey questioned  
42 whether an audio tape of the 2007 meeting existed and does the Variance granted in 1972  
43 support multiple businesses running on the property. Mr. Deschaine explained that prior  
44 to 2010, the practice was to reuse the tapes after transcription. Ms. Cline stated the staff  
45 would look for the tapes.  
46



1 Mr. Dolan motioned to continue Case #624 to October 27, 2015 and in the interim seek  
2 advice of Town Council on how to proceed in review of the case history. Mr. Elliott  
3 seconded the motion. Motion carried unanimously.  
4

- 5 b. **Case #627: Patrick & Elissa Simpson, for property owned by Andrew & Christine**  
6 **VanDerslice, located at 18 Union Road, Stratham, NH, Tax Map 10, Lot 139.** A Special  
7 Exception application pursuant to Stratham's Zoning Ordinance Section 5.4 ACCESSORY  
8 APARTMENTS. The applicant proposes to construct an accessory apartment within an  
9 existing single family dwelling (*Continued from September 22, 2015*).

10  
11 Mr. Dolan motioned to continued Case #624 to November 10, 2015. Mr. Cavarretta  
12 seconded the motion. Motion carried unanimously.  
13

14 Mr. Dolan made a motion to adjourn at 9:43 pm. Mr. Brett seconded the motion. Motion  
15 carried unanimously.