



# Town of Hopkinton

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## HOPKINTON ZONING BOARD OF ADJUSTMENT MINUTES NOVEMBER 17, 2011

Chairman Janet Krzyzaniak opened the Hopkinton Zoning Board of Adjustment meeting of Thursday, November 17, 2011, at 7:00 PM in the Hopkinton Town Hall. Members present: Charles Koontz, Toni Gray, Daniel Rinden and David Brock.

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### I. Application(s).

ZBA#2011-10 Jamie & Kathleen Schoch and Richard and Jayne Schoch Administrative Appeal of the Selectmen's decision of September 12, 2011, granting Stuart Nelson a one-year extension of a previously granted building permit to construct a residence at 46 Bass Lane. The appeal is associated with Zoning Ordinance subsections 15.8.3 Variances and 15.10 Representations.

Attorney Stephen Nix addressed the Board representing Mr. and Mrs. Jamie Schoch and Mr. and Mrs. Richard Schoch. The appeal is of the granting of the building permit extension by the Board of selectmen. The Schochs believe that there was a condition attached to the variance granted in 2007 that the Nelson house be located in a certain position that is 339 feet from Jamie Schoch's house. A survey of the distance indicates that the foundation is 279 feet, which is about 60-feet short of what was originally told to the Board.

The appeal includes a chronology of the original Variance that had been submitted and approved upon remand to the Board. As part of the application for Variance there were documents submitted on behalf of Mr. Nelson that were also referenced in the June 5, 2007 minutes of the Zoning Board of Adjustment (ZBA). In particular, a document entitled "Applicant's Exhibits ZBA Hearing of 6/5/07." The document referenced as "F" is entitled, "Jamie and Kathleen Schoch's House" and states, "Picture of Jamie Schoch's house through the trees from the proposed site of the new house. Mr. Nelson's proposed residence is approximately 339 feet from Jamie Schoch's existing house." Included with the exhibit was a photograph of trees in the direction of the Schoch's residence.

Mr. Nix suggested that that the issue is whether material representations by the applicant at a ZBA hearing become a condition of approval. He noted that there was not only written representation as to the distance of the Nelson residence to that of Jamie Schoch's residence; there was also verbal representation by Attorney Puffer, referenced in the Minutes of June 5, 2007, in which he noted that the house will be approximately 339 feet from the Schoch's house. The Hopkinton's Zoning Ordinance (15.10) indicates, "Representations made at the public hearing or material submitted to the Board by an applicant for a special exception or variance concerning features of proposed buildings, structures, parking, or use which are subject to regulation pursuant to subsection 15.8.2 or 15.8.3 shall be deemed conditions upon such

special exception or variance.” Attorney Nix believed that the “plain reading” of the Ordinance is that if the applicant makes a representation in writing that something will happen then that will automatically become a condition of approval.

Mr. Brock inquired whether Attorney Nix was claiming that there was a material misrepresentation. In response, Attorney Nix stated that the representation of 339 feet was material to the issuance of the Variance. In his appeal, Attorney Nix cited New Hampshire case law in which representations to the ZBA were deemed conditions of approval. In this particular case, it was Mr. Nelson, through his attorney, who had made these representations and included documents and photographs to the ZBA that the house would be located in a certain position. Attorney Nix noted that the representations were made no less than twice at the June 5<sup>th</sup> meeting; explaining that it was the applicant who had made the distance a material issue. It was an expressed offer as part of the application process.

The Variance was granted to be able to build a residence on a lot with less than the required frontage. Attorney Nix believed that during the meeting there was a lot of discussion concerning privacy noting that frontage also provides a separation and a distance between homes. He stated that the matter was made part of the application by the Applicant, which raises the question if it wasn't a material condition of approval, then why did the applicant go to such an extent to make this representation. He suggested that the only purpose in bring the distance to the Board's attention was to induce the ZBA and to quite the abutters. Lastly, Attorney Nix suggested that if the distance offered by the Applicant isn't considered a material condition to the Variance, then other applicants will come before the Board making representations that “are sort of off the cuff” with there being no recourse in the future.

Mr. Brock questioned whether Attorney Nix would still be arguing that the distance is a condition of approval if the foundation was 327 feet, rather than 329 feet. Mr. Nix responded by saying that it is a good question because Attorney Puffer raises a point (rebuttal memorandum) that the word “approximate” was used when referencing the 339 feet. Attorney Nix noted that in this particular case there is a 17 percent error. This distance was represented as “greater than a football field”. The approximate difference is 20 yards which Attorney Nix believed to be a significant difference.

Mr. Brock questioned whether Attorney Nix's Client would have any objection if the building were located 339 feet from their residence. In response, Attorney Nix stated that is Client is not objecting to the underlying Variance, but rather the representation that the building would be 339 feet away from their residence.

In attorney puffer's handout he included pages from the dictionary concerning the word “approximate”. Attorney Nix stated that the common meaning is usually the first definition listed. For example, “fairly correct or accurate; near to the actual” is what is the first definition given for the word “approximate”.

Mrs. Gray recalled at one point in time that the Schoch's appealed and then settled. She questioned whether they would have entered into a settlement agreement if they had known about the 60 foot discrepancy. Attorney Nix was unsure. Mrs. Gray stated that it is unfair that the abutters believed one thing and that there is now discrepancy from what was represented. Attorney Mr. Nix agreed and noted that that the settlement is not related to the ZBA hearing.

Mr. Brock suggested that the abutters knew where the partial foundation was and at the time of settlement they could have looked toward their house and decide whether the location was acceptable or not. He believed that the abutters have some obligation early on to bring the

matter before the Town. In response, Attorney Nix explained that at the time of the settlement agreement the foundation had not been installed. The Schochs had based their information on the record before the Zoning Board of Adjustment. In fact, the septic design that was submitted did not show the Schoch's house, so it was not possible in looking at the documents to realize the discrepancy in the distance. Mr. Brock stated that he misunderstood the timeframe in which the foundation had been installed.

Mrs. Gray asked why the building permit extension was required. Attorney Nix noted that the building permit expired in two years and the house wasn't completed, so the Applicant requested an extension.

Mr. Koontz asked if the distance between the centers of both houses would be more than 339 feet. Attorney Nix stated probably not.

Mr. Brock suggested that Schochs had access to the photograph (exhibit f) in 2007 which represents the home construction site in the direction of the Schoch's residence. Attorney Nix agreed, but noted that the Schochs' perspective is in the other direction of the photograph. When the foundation was installed the Schochs had questions and eventually had the distance surveyed. That is when the matter was brought forward.

Mr. Koontz questioned whether this matter was what the Selectmen were referring to when issuing the permit extension. Attorney Nix stated that it is his understanding that this is the issue.

Mr. Brock stated that there is nothing to prevent other issues from arriving in the future, such as the location of accessory buildings. He questioned whether there was ever any agreement throughout the proceedings in which it was agreed that the house would be the only building that would be built on the property. In response, Attorney Nix said that he wasn't present at the proceedings, but in reading the minutes he recalled Attorney Puffer reserving rights for other structures to be constructed. Mr. Koontz concurred, stating that he recalled discussion concerning the setbacks of accessory buildings being less than that required for a residence.

Attorney Mark Puffer addressed the Board representing Stuart Nelson. Attorney Puffer began by responding to questions raised by members during Attorney Nix's presentation. He asked Mr. Nelson to explain what he has done so far in constructing the residence. In response, Mr. Nelson stated that the foundation and cap went in within the first four months of the issuance of the building permit. The walls went up until he basically received a "cease and desist". The power and telephone poles are in.

Mrs. Gray asked if the cease and desist was issued because the permit had expired. Attorney Puffer stated that he didn't believe that there was actually a cease and desist issued. The building permit was going to expire, so Mr. Nelson applied for a one-year extension, but he agreed, if the extension was granted, that he would not continue any construction until the matter was appealed to the Board. Mr. Nelson agreed, stating that when he was before the Selectmen it was suggested that he should not continue to build. Attorney Puffer stated that the selectmen told Mr. Nelson that he would be at risk if he continued construction.

Another issue that was raised by Attorney Nix was the materiality of the representation of the approximation of the distance. Attorney Puffer stated that there are two parts to the answer. At the time the Schochs had raised concerns that they did not want the property developed and that the house may be too close. The approximate distance was raised in response to the Schoch's concerns. Secondly, Attorney Puffer stated that at the hearing in 2007 it was said that

they (Applicant) do not believe that the location of the proposed residence is material. The distance that the house would be constructed is substantially greater than the setbacks and the use is a permitted use, so that the distance had no bearing as to whether a Variance would be granted for the frontage. In fact, during the meeting there were other issues raised about the frontage of the property. What was told to the Board was an approximation of the location of the residence.

Attorney Puffer stated that at the June hearing the Board conditioned approval that no further subdivision is to occur and that Mr. Nelson indemnify the Town as it relates to the private road. Later a new hearing was held at which time the Board approved the Variance with no conditions. In response, Mrs. Gray asked whether Attorney Puffer was suggesting that the conditions previously agreed upon were now null and void. In response, Mr. Nelson stated that he has no plans to subdivide the property and is willing to be bound by the conditions previously discussed. Attorney Puffer stated that he did not believe that there were any conditions stated or implied by the Board, which would include the distance between the two residences. The scope of the discussion at the hearing was whether Mr. Nelson, in good faith, believed that he could build on the property at the time of purchase. During the hearing, the septic design completed by Tim Bernier was submitted, but showed no distances from the residence to the property lines, nor did it show distances to abutting residences. Mr. Bernier's recent letter confirms that the house was constructed in the location as was shown on the plan approved by NH Department of Environmental Services in June of 2006.

The Board reviewed the survey, along with the map submitted with the application for Variance stamped "MCRD" and the map submitted with the Building Permit in an effort to determine the portion of the residence that is less than the distance of 339 feet. The corner of the house that is closest to the Schoch's residence is where the jog in the foundation was originally proposed; however, the foundation was constructed without the jog.

Attorney Puffer stated that when consider whether a Variance should be granted the ZBA considers whether the frontage is adequate and whether there is adequate site distance and other issues as it relates to frontage. Whether the building is going to be located in a certain location is really irrelevant to whether the frontage is going to be sufficient.

Mr. Brock asked whether something happened in the period in which Mr. Nelson had requested the Variance that affected where the building would be constructed, and when a specific location for the home was determined. Attorney Puffer responded that the distance from the proposed house to another house is immaterial as to whether the Variance should have been granted for frontage. There is no logical connection as to the location of the house, which meets all the setback requirements, and the Variance that was granted. Attorney Puffer noted that he had also represented during the Variance hearing that the acreage of the property is approximately 8.4 acres. If there a survey of the property determines that the acreage is really 7.5 acres, does that mean that the acreage of approximate 8.4 was a condition. He stated that the representation of the acreage of the property is not a condition as there is no logical connection between the Variance granted and the acreage.

Mr. Brock asked if Attorney Puffer was stating that the only reason that this matter had to come before the ZBA was because of the frontage. Attorney Puffer stated that is correct, noting that the only issue was the 50 foot frontage requirement.

Mr. Brock stated that other than the fact that the Variance had to be granted to allow a building on the lot there was nothing else relevant for the ZBA to consider. Attorney Puffer agreed, stating that if the Nelsons had come in and stated that they only wanted the Variance for the

frontage requirement, but had no idea as to where the building would be constructed, they could have done so. In response, Mr. Rinden stated that assuming all setbacks could be met Mr. Nelson could obtain a Building Permit.

Attorney Puffer noted that during discussions concerning the Variance they had given the approximate distance of the proposed residence to the Schoch residence, but also stated that they did not believe that the distance was material to the Variance that was being requested.

With regards to questions asked about the settlement agreement, Attorney Puffer stated that that Attorney Nix cannot point to evidence in the record indicating that the ZBA found the distance to be a significant factor in granting the Variance. He stated that Attorney Nix asserts that the Schochs relied upon 339 feet in entering into the settlement agreement. This assertion is not a matter for the ZBA, but rather a matter for the Superior Court.

In regards to Attorney Nix's comments with respect to Zoning Ordinance section 15.10, Attorney Puffer did not believe that subsection 15.10 would apply to the Nelson matter as the distance offered was an estimate and not a representation which is commonly defined as "an assertion of fact, not an estimate". Additionally, section 15.10 deals with representations "concerning features of proposed buildings, structures, parking, or use which are subject to regulation." A feature of a building, structure or use is something that is internal and does not include setbacks of a building or its location. Attorney Puffer noted that section 15.10 cannot be interpreted to allow conditions of approval that are not reasonably related to the Variance, and that is what makes the issue immaterial.

Lastly, Attorney Puffer stated that during Attorney Nix's presentation there were questions asked about the Schochs' obligation to have come forward when they had determined that the 339 feet was an issue. The Schochs' had the survey information as early as November of 2010 because, at that time, Attorney Nix wrote to Mr. Nelson and raised the issue; however, they did not do anything further until August of this year when they raised the matter with the Selectmen.

Again, the Board briefly discussed the configuration of the Nelson residence and the point of closest proximity with Mr. Nelson agreeing that the non-jogged corner of the residence is the closest point. He also noted that the drawings appear to be "flipped."

Mr. Koontz stated that the misunderstandings before the parties are extraordinary. Mr. Brock asked if the parties could agree as to the point of the narrowest contact from the Schoch's property to the Nelson house. In response, Attorney Puffer stated that it is the northwest corner of the building.

Mr. Gray asked Mr. Nelson whether when making changes to the building he amends his Building Permit. In response, Mr. Nelson recalled discussions with the Planning Director Karen Robertson with respect to his intentions to eliminate the jog in the design of the residence. Mrs. Robertson noted that she could not recall the conversation.

Attorney Nix informed the Board of the fact that he had obtained a copy of the ZBA file concerning this matter and because of the lengthy proceedings in this case he had made a chronological list of the events that had taken place. The original Variance application, which was submitted in March of 2006, went through a number of meetings and was denied. The denial was then appealed to Superior Court and while that appeal was going on a second variance application was filed (July 17, 2006). It was the second Variance application that included the septic design and that application was denied because there was no material change in circumstances. Then, in March 2007 the Superior Court issued an order that related

back to the original application, which remanded to the ZBA the Substantial Justice criterion. At this time, Attorney Nix submitted a copy of the original application for Variance (stamped in the upper right hand corner received 3/20/06, with a hand note indicating check 6709, \$165) that relates to the Administrative Appeal. The original application for a Variance was signed by Stuart Nelson on March 15, 2006, and contains attachments. Attorney Nix provided the Board with a copy of the building permit plan. He stated that the location of the proposed home on the plan attached to the Variance application is different than the plan provided with the Building Permit.

In reviewing the plans, Mrs. Gray thought that not only did the house move, but the ownership that had been indicated on the plan had changed. Attorney Nix agreed, stating that the plan stamped "MCRD" is an older plan that was from the Registry. It appears that Applicant had used that plan as part of his application. The abutting lot in question is owned by Jamie and Kathleen Schoch, rather than Richard and Jayne Schoch.

Attorney Nix stated that while Attorney Puffer indicated in his presentation that the septic design was submitted at the October 2007 meeting, the document was not referenced in Attorney Puffer's exhibits that were provided to the Board at that meeting. In fact, there was no reference in the minutes of a new plan being submitted. Instead, it appears that the septic design was submitted for the second application for Variance, while the 339 foot distance came from the original plan.

Attorney Nix stated that the issue is not whether the ZBA expressly or implied the location of the house as a condition. The issue is the language in the Ordinance, which says "Representations made at a public hearing or material submitted to the Board by an applicant for a special exception or variance... shall be deemed conditions upon such special exception or variance." He then offered an example in which an applicant, during a ZBA hearing, had represented that he would plant a row of trees. If the applicant represented that he would plant the trees it would not matter whether the ZBA included the planting as a condition. It is not unusual for a ZBA to consider other issues when reviewing a request for a land use Variance, especially when the applicant makes a written representation as to the location of the house that affects abutters.

Mrs. Gray asked how the matter could be rectified. In response, Attorney Nix stated that there are several ways, such as an application to the ZBA for amendment to the conditions of the Variance or the relocation of the house. He noted that Mr. Nelson is not an owner that had never built a house. In fact, Mr. Nelson is a plumber, who has had experience dealing with surveyors.

Mr. Brock asked about the delay in the time from when the Schochs were aware of the discrepancy from when construction began. Attorney Nix responded that when the surveyor discovered the discrepancy there was little work on the house. It wasn't until he was notified that there was an increase in the amount of construction occurring at the property.

Mr. Koontz questioned whether there is some contention involving the property as the Schochs had thought that they were to purchase the property, but instead the property was purchased by Mr. Nelson. Attorney Nix stated that the Schochs had a verbal agreement that they would purchase the property. At the same time, Mr. Koontz noted that he also recalled Mr. Nelson stating that he had no plans to cut the trees, but then cut the trees anyways.

Mr. Brock stated that the problem is when the Schochs first noticed when the distance was incorrect and when construction had started. Attorney Nix again stated that there was little or

no construction during that time period so that there was no harm to anyone. When Mr. Nelson restarted construction is when the Town was made aware of the discrepancy.

Attorney Puffer readdressed the Board explaining that the original application for Variance was filed in March of 2006. The original Variance was denied. In the original application Mr. Nelson appealed and Judge Conboy remanded the matter back to the Board based on the Substantial Justice criterion. The ZBA then held a hearing and approved Mr. Nelson's Variance application. At the Substantial Justice hearing Mr. Bernier's map accompanied the documents submitted to the Board, which showed the proposed location of the Nelson's residence. The map stamped "MCRD" also showed the location of a proposed house.

Mr. Nelson readdressed the Board explaining that he had taken pictures and used a range finder in estimating the 339 feet, which he now knows was incorrect. He did not determine the 339 foot distance based on the plan stamped "MCRD".

Attorney Puffer noted that the Schochs were aware in November 2010 that there was a discrepancy because they had Attorney Nix send a letter to Mr. Nelson advising him of the same.

Mr. Nelson readdressed the Board reiterating the work done to date at the property, which includes the cap of the foundation, walls, utility poles and the lawn. It wasn't until later in 2010 that Mr. Nelson had built walls and had more material at the property.

Attorney Puffer stated that there must be a common law requirement in determining that the distance of the house to an abutter is a condition of the Variance when in fact the Variance was issued because of the frontage of the lot being less than the required 50 feet and not because of a setback issue.

Mr. Brock asked Attorney Puffer if he agreed that the first application for Variance is relevant to this hearing. Attorney Puffer replied yes, and noted that the documents submitted in October when the remand hearing had taken place are also relevant.

At this time, public testimony was closed.

Mr. Brock suggested that given the late hour the Board take the matter under advisement, or enter into a non-public session to discuss the issues being raised; however, entering into non-public session would only occur should all parties agree. In response, Attorney Nix asked Attorney Puffer his opinion concerning the non-public session. Attorney Puffer stated that he would have to discuss the issue with his Client. *Note: The ZBA did not enter into non-public session.*

Following brief discussion, Mr. Brock moved to continue review of the appeal to another hearing. Mrs. Gray seconded the motion. Mrs. Robertson questioned whether further comments from the public would be received at the next hearing. Chairman Krzyzaniak replied no.

Attorney Puffer addressed the Board advising that the delay would affect his client as there is flooring and other material that needs to be protected; otherwise, Mr. Nelson will lose some of the material that he has invested in the project. Mr. Nelson agreed, advising that he needs to take the next step in covering the subfloors and winterizing the residence. In response, Mr. Brock suggested that allowing further work may mean that another appeal could be brought before the Board.

At this time, Mr. Brock and Mrs. Gray withdrew their motion to continue the application. The Board agreed to vote on the appeal without any further delay. **With five members voting, two voted in favor (Gray and Krzyzaniak) and three voted in opposition (Brock, Koontz and Rinden). The appeal was denied.**

Mrs. Gray expressed concern as to which parties' interpretation of section 15.10 is correct. Mrs. Krzyzaniak concurred.

Mr. Koontz believed that there was no clear distinction made as to the relativity of the location of the Nelson residence to that of the Schoch residence. Mr. Koontz suggested that perhaps during the Variance hearings Mr. Nelson had offered too much information; however, the information submitted does not mean that it relates to the Variance being sought at the time. Mr. Brock stated that he did not find, even on a limited basis, that the distance between the two residences was material to the application for Variance. Mr. Rinden concurred.

## **II. Adjournment.**

There being no further business to come before the meeting, Chairman Krzyzaniak declared the meeting adjourned at 9:35 PM. The next regular scheduled meeting of the Board is Tuesday, December 6, 2011, at 7:00 PM in the Town Hall.

Karen Robertson  
Planning Director