



# Town of Hopkinton

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## HOPKINTON ZONING BOARD OF ADJUSTMENT MINUTES MARCH 27, 2012

Chairman Janet Krzyzaniak opened the Hopkinton Zoning Board of Adjustment meeting of Tuesday, March 27, 2012, at 6:30 PM in the Hopkinton Town Hall. Members present: Toni Gray, Charles Koontz, Daniel Rinden and David Brock.

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- I. **Motion for Rehearing** submitted by Attorney Stephan Nix on behalf of **Jamie & Kathleen Schoch and Richard & Jayne Schoch**, dated March 7, 2012, and received March 6, 2012. pertains to the Zoning Board of Adjustment decision of February 7, 2012, in which the Board denied the Applicant's (Case ZBA#2011-10) 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. In addition to denying the Applicant's appeal, the Board clarified and/or modified its decision of October 2, 2007, permitting the actual surveyed distance from the Nelson residence to the Schoch residence of around 279'. RSA 674:33, II. See Notice of Decision of January 5 and February 7, 2012 for limitations on scope of review and decision.

The public notice reflects that the Zoning Board of Adjustment will not accept any verbal or written testimony concerning this matter.

Chairman Krzyzaniak opened the meeting by reading the notice of the meeting. Attorney Nix asked to address the Board with a procedural question. Chairman Krzyzaniak replied no, indicating that there would be no testimony.

In reviewing the Motion for Rehearing, Mrs. Gray made note of a reference to the Board meeting in non-public session to discuss a memorandum from legal counsel and the fact that the law prohibited the non-public session. Mrs. Gray, on behalf of the Board, apologized to the Schochs and Nelsons, indicating that, at the time, the Board was not aware of the change in the law.

Mrs. Gray stated that she is aware that the minutes of the non-public session were available to the public. Mrs. Robertson noted that the minutes were posted on February 9, 2012.

Mrs. Gray suggested that the memorandum from legal counsel be released to the public. Chairman Krzyzaniak agreed, asking for a vote of the Board. With five members voting, all five voted in favor (Brock, Gray, Koontz, Rinden and Krzyzaniak).

At this time, Attorney Nix was provided a copy of the legal memorandum.

Chairman Krzyzaniak advised that as the Chairperson of the Board she takes full responsibility for the mistake. Mrs. Gray responded by saying that it is not the fault of one person, but rather the entire Board. At the time, the members were not aware of the Court's December 2011 decision.

Mrs. Gray advised that there was nothing in the Motion for Rehearing that would have changed her decision. Furthermore, there was nothing heard in non-public session that unduly influenced her decision. Mr. Koontz agreed, stating that there was no discussion in non-public session.

Mr. Brock noted that at the time the motion to enter non-public session was made there was no objection by the Schoch's attorney. The Board agreed.

Mr. Koontz stated that the Board had made a decision based on the facts, which had been thoroughly discussed and reviewed.

Mrs. Gray stated that while she had voted in opposition to Mr. Nelson's frontage variance (2007), she recalled that the distance between the building was not a concern or relevant when deciding on the frontage variance. She believed the distance was a "side issue" between the Nelsons and Schochs. Chairman Krzyzaniak concurred, noting that the distance is greater than what the Zoning Ordinance requires.

There being no further discussion, Mr. Brock, seconded by Mr. Koontz, moved to deny the second Motion for Rehearing. With five members voting, all five in favor (Brock, Gray, Koontz, Rinden and Krzyzaniak). The second Motion for Rehearing was denied.

1. There was no new information from that which was presented on February 7, 2012;
2. The distance between the Schoch and Nelson buildings was not a concern or relevant when deciding the frontage variance (October 2, 2007).
3. The minutes of the non-public session (February 7, 2012) were never sealed;
4. The non-public session did not influence the Board's decision as the Board did not deliberate or review the legal memorandum while in non-public session;
5. The legal memorandum for which the Board referenced on February 7, 2012 has been released to the public.
6. The Board's decision (February 7, 2012) was based on the facts of the case, which had been thoroughly discussed and reviewed.

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At this time, Chairman Krzyzaniak asked that the Board receive and comment on the Applicant's "Motion to Disqualify ZBA Board Members". The Motion was received on March 22, 2012. At the time, Chairman Krzyzaniak had requested that Mrs. Robertson not provide copies to the Board until after the Board's review of the Schoch's second Motion for Rehearing.

Mr. Koontz questioned whether the Motion to Disqualify was timely filed. Mrs. Robertson replied no, but stated that there have been statements made that the Board should respond to.

At this time, Mrs. Robertson passed out copies of the "Motion to Disqualify ZBA Board Members".

Chairman Krzyzaniak read portions of the “Motion to Disqualify ZBA Board Members,” addressing specific statements made (*Chairman Krzyzaniak had read responses that had been prepared by Planning Director K. Robertson in an effort to assist the Board*).

“8. Because ‘Ettinger’ was published on December 8, 2011, the ZBA knew or should have known that the non-public session was unlawful.” **Chairman Krzyzaniak’s response:** “**The Board made a mistake; it was not aware of the decision. The Board already apologized.**”

“9. Immediately upon returning from the non-public session, and without further discussion by the ZBA, a prepared typewritten motion was read and voted upon. See minutes of Feb. 7, 2012 meeting.” **Chairman Krzyzaniak’s response:** “**True.**”

“10. The minutes of the public portion of the Feb. 7, 2012 state: ‘(Note: Minutes of non-public session reflect that the Board of Adjustment entered into non-public session to review a legal memorandum that is classified as ‘confidential and privilege legal communication’. Furthermore, the record reflects that there were no votes taken.)’” **Chairman Krzyzaniak’s response:** “**True.**”

“11. The minutes of the non-public session were subsequently posted on the Hopkinton web site. They state: ‘Mr. Brock was concerned that members of the Board had not had an opportunity to review the legal memorandum from the Board’s counsel. All members indicated that they had reviewed the memorandum. While the Board did not review the legal memorandum, members read NH RSA 674:33, II which provides the Zoning Board of Adjustment with authority to modify any prior condition of approval to the extent that any modifications do not affect compliance with the criteria for variance. Mr. Brock noted that he had prepared a possible motion that he may offer once the Board returns to public session.’” **Chairman Krzyzaniak’s response:** “**True; the minutes had been previously posted, two public places, meeting the minimum posting requirements. The web site specifically notes that ‘All agendas, minutes, and notices provided on this web site are for informational purposes only. Official copies and any attachments referenced are available at the Town Hall.’ The Applicant had never inquired with the Town in an effort to obtain an official copy of the February 7<sup>th</sup> minutes of the meeting and non-public meeting.**”

“12. The decision to release of the non-public minutes at a later date was unknown to the Appellant at the time of filing the Request for Reconsideration – Second, because the original vote to enter into a non-public session under the guise of the attorney/client privilege did not qualify as a meeting under RSA 91-A:2, I (b) and no release of minutes would have occurred under RSA 91-A:3, III, (release of minutes within 72 hours limited to non-public meetings).” **Chairman Krzyzaniak’s response:** “**There has never been a decision to release the non-public minutes. This is an assumption on the part of the Applicant. Following the February 7<sup>th</sup> non-public session, the ZBA never voted to seal the minutes; therefore, the minutes were available to the public.**”

“14. The fact that Mr. Brock had prepared a motion is evidence that he pre-judged this application prior to the public hearing preceding the non-public session.” **Chairman Krzyzaniak’s response: “False. The factual background of this case is important to note. At the time Judge Brock drafted his typewritten motion, the ZBA had already held one hearing and made one decision (back in November) concerning this matter. In fact, the ZBA had already read and granted (Brock voted in favor) the Motion for Rehearing, and in addition the ZBA (Brock) had received detailed legal memoranda from both sides.”**

“16. The fact that the ZBA returned from the unlawful non-public session with a typewritten motion that was immediately read into the record is evidence that the ZBA deliberated in the non-public session, notwithstanding that the actual vote was taken in public.” **Chairman Krzyzaniak’s response: “False. The ZBA did not deliberate in non-public session. Again, the factual background will show that the ZBA had already held one hearing and made one decision concerning this matter. This includes the ZBA granting a Motion for Rehearing in addition to receiving legal memoranda from both sides. There was no need to deliberate on the matter as there was no new information presented from that which was presented at the November 2011 hearing.”**

“17. In essence, the public vote was a ratification of the non-public session discussion and decision regarding the motion.” **Chairman Krzyzaniak’s response: “False. This is a poor assumption by the Applicant.”**

“18. Because the entire ZBA met in an unlawful non-public session emerging with a prepared motion that was read and voted upon without discussion, all ZBA members pre-judged the application in an ex parte setting before re-entering the public session.” **Chairman Krzyzaniak’s response: “False.”**

“19. The disparity between the minutes of the public portion of the Feb. 7, 2012 meeting and the later released minutes of non-public session of the meeting raises at least the perception of an after-the-fact act by part or all of the ZBA to cleanse the prior proceedings.” **Chairman Krzyzaniak’s response: “False. Again, this is an assumption or perception by the Applicant.”**

“20. The underlying record and minutes are clear that the exiting ZBA members deliberated and judged this application in an improper forum.” **Chairman Krzyzaniak’s response: “False.”**

“22. The actions of the entire ZBA at the February 7, 2012, have tainted the waters and disqualified all members sitting at the February 7, 2012 hearing.” **Chairman Krzyzaniak’s response: “False”.**

Chairman Krzyzaniak noted that, until recently (February), the Zoning Board of Adjustment had never entered into non-public session. She then recalled many years ago (20+) when Jim Hargrove was a member of the Board, the Board may have entered into a non-public session.

Mr. Koontz stated that the Board did not deliberate or discuss the application when in non-public session. Mrs. Robertson reminded members that they were only in non-public session for a total of eight minutes.

Mr. Koontz suggested that if either attorney was aware of the change in the law, then they should have immediately brought it to the Board's attention. Mrs. Gray agreed, noting that they may have known of the violation and did not say anything in an effort to gain a rehearing; however, no one will ever know.

Mr. Brock stated that if the attorneys were aware of the law they had a legal obligation to inform the Board.

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At this time, Chairman Krzyzaniak informed the Board that at the next Selectmen's meeting she will request that she not be reappointed to the Zoning Board of Adjustment. She has served as a member for approximately 30 years. She stated that it has become difficult to sit on matters like this (Schoch/Nelson) as it is upsetting. This case has been going on for years. Following brief discussion, members were saddened by Chairman Krzyzaniak's announcement, but understood and wished her well.

## II. Adjournment.

Mrs. Gray, seconded by Mr. Koontz, moved to adjourn at 6:55 PM. Motion carried unanimously.

Karen L. Robertson  
Planning/Zoning Director

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### *History concerning this matter:*

1. April 4, 2006, ZBA denied Variance (Nelson).
2. June 1, 2006, ZBA denied Motion for Rehearing (Nelson).
3. March 15, 2007, Merrimack County Superior Court remands to ZBA Substantial Justice Criterion.
4. June 5, 2007, ZBA approved Variance (Nelson).
5. August 15, 2007, ZBA approved Motion for Rehearing (Schoch).
6. October 2, 2007, ZBA approved Variance (Nelson).
7. September 14, 2009, BOS approved Building Permit (Nelson).
8. September 12, 2011, BOS approved a one-year extension of Building Permit (Nelson).
9. November 17, 2011, ZBA denied Administrative Appeal (Schoch).
10. January 5, 2012, ZBA approved Motion for Rehearing (Schoch).
11. February 7, 2012, ZBA denied Administrative Appeal and clarified and/or modified their decision of October 2, 2007 (Schoch).
12. March 27, 2012, ZBA denied Motion for Rehearing (Schoch).