



# TOWN OF HUDSON

## Zoning Board of Adjustment



J. Bradford Seabury, Chairman

Ben Nadeau, Selectmen Liaison

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### HUDSON ZONING BOARD OF ADJUSTMENT MEETING MINUTES May 24, 2012

#### I. CALL TO ORDER

Chairman Seabury called this meeting of the Hudson Zoning Board of Adjustment to order at 7:35pm on Thursday, May 24, 2012, in the Paul Buxton Meeting Room in the Town Hall basement. Chairman Seabury then requested Clerk Houle to call the roll. Those persons present, along with various applicants, representatives, and interested citizens, were as follows:

#### Members

**Present:** Normand Martin, Jim Pacocha, Mike Pitre, Donna Shuman, and J. Bradford Seabury

#### Members

**Absent:** None (All present)

#### Alternates

**Present:** Maryellen Davis, Gary Dearborn, Kevin Houle, Marilyn McGrath, and Maurice Nolin

#### Alternates

**Absent:** None (All present)

#### Staff

**Present:** Julie Kennedy, Administrative Aide

**Recorder:** Trish Gedziun

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## **II. SEATING OF ALTERNATES AND ANNOUNCEMENTS**

For the benefit of all attendees, Chairman Seabury noted that copies of the agenda for the meeting, as well as an outline of the rules and regulations governing hearings before the Zoning Board of Adjustment, were available at the door of the meeting room. He noted the outline included the procedures that should be followed by anyone who wished to request a rehearing in the event the Board's final decision was not felt to be acceptable. Chairman Seabury pointed out that the Board allowed rehearings only if collectively convinced by a written request that the Board might have made an illogical or illegal decision or if there were positive indications of new evidence that for some reason was not available at the hearing.

Chairman Seabury introduced Mr. Maurice Nolin as a new alternate member of the Board.

## **III. PUBLIC HEARINGS OF SCHEDULED APPLICATIONS BEFORE THE BOARD**

1. **Case 182-125 (5/24/12): Hudson Library Street Association, LLC, 253 Main Street, Nashua, NH, requests the following for property located at 39 Library Street:**
  - A. **(Deferred from 2/23/12): An Appeal from an Administrative Decision issued by the Zoning Administrator dated January 4, 2012, which stated that the property located at 39 Library Street is in violation of the Hudson Zoning Ordinance; the property is a commercial property being used as residential without the appropriate approvals. [Map 182, Lot 125, Zoned TR, HZO Article III, Section 334-16, Building Permits, Section 334-16 C, Conditions of Issuance and Section 334-16.1, Site Plan Approval.**
  - B. **A Variance to allow the change of use from multi-tenant commercial to a multi-family residence. [Map 182, Lot 125, Zoned TR, HZO Article VIII, Section 334-28, Nonconforming Uses, Structures, and Lots.]**

Clerk Houle read aloud the posted notice, as recorded above.

Ms. McGrath stated that she would step down from the case, even though she was not a sitting member of the Board at this meeting, because she had been a member of the Planning Board in 1984 when the case was originally heard. Recorder's Note: Ms. McGrath took a seat in the audience section of the room.

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Chairman Seabury stated that the Board would hear request (B) the request for a Variance first.

### Discussion on (B) – Request for a Variance

Chairman Seabury asked who was present who wished to speak in favor with regard to the application.

Attorney Gerald Prunier, from Prunier & Prolman, P.A., representing the applicant, addressed the Board, stating that the property consisted of a two-story large building as well as a single-story building located in the rear, with a parking lot in between the two buildings.

Attorney Prunier said that the request was to have four tenants in the larger building and one tenant in the rear building. He also said that the existing parking lot had twelve parking spaces available.

Attorney Prunier said that the property was located in a Mixed Use District and that the larger building on the site was of a mixed use. He said that a Variance had been granted to John Sarris, DMD, in 1984 and that his dental office had been located on the property. He further stated that there had been a residential use on the second floor of the building for many years.

Attorney Prunier stated that he believed it was a Residential District that had been changed to a TR District. He also said that the actual use of the buildings had been in question since 1984.

Attorney Prunier said that Dr. Sarris had claimed that there were residential uses in the building “since the time that he was in it.”

Attorney Prunier stated that the purpose of the applicant’s request was to not only clarify the use but to also obtain all of the necessary permits to bring the property up to code (i.e. – installation of a sprinkler system)

Attorney Prunier distributed copies of Assessors records from 2009 which indicated that the property was of a mixed use. (Consisting of three offices and two studio apartments)

Attorney Prunier stated that in 1997, the Polk Directory listed three units – two businesses at 39 Library Street and one business at 37 Library Street.

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Attorney Prunier distributed copies of some financial records, prepared by Dr. Sarris, pertaining to the sale of the property. He noted that these records clearly indicated a total of five tenants – four units (mixed).

Attorney Prunier reiterated that he felt the documented history proved that the property was of a mixed use (both commercial and residential) dating back to at least 1994.

Attorney Prunier said that he felt the applicants request to turn the building into a multi-family “more than” complied with the existing Hudson Zoning Ordinance. He also said that it would not be contrary to the public’s interest because the property would provide housing for the working class. Attorney Prunier said that he felt it was a reasonable use of the property based on the location and the surrounding properties.

Mr. Richard Maynard, P.E., from Maynard & Paquette Engineering Associates, LLC, addressed the Board, stating that there were fourteen neighboring properties that were of a mixed use. He said the character of the neighborhood was definitely of a mixed use

Attorney Prunier, in closing, addressed the Board stating that he felt in light of the reasons cited and the evidence presented, the Variance should be granted.

Chairman Seabury asked if there were anyone else present who wished to speak in favor, in opposition, or neutrally with regard to the application. No one else came forward.

Chairman Seabury declared the matter before the Board.

Chairman Seabury commented that the documents presented by the individual owner, Dr. Sarris, did not mean anything and the assessment data presented was irrelevant with regard to decisions made by the Zoning Board of Adjustment. He said that he did not see any evidence presented that indicated the town had authorized the mixed uses.

Mr. Martin commented that he would vote not to approve the request for the Variance because it was not an allowed use.

Mr. Pitre asked if the lot located to the rear of the property was a separate lot. Mr. Maynard replied that there were two separate lots and had been that way since 1984. He further replied that the building on the rear of the property met all of the requirements and the applicant was not requesting a Variance for it.

Mr. Maynard commented that he felt the town was aware of the fact that the property was being used as a multi-use for many years.

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Ms. Davis stated that the property was approved as a multi-use and had never been approved as a mixed use. She also said that just because the town had not noticed the non-conformity, it did not make it right.

Mr. Pitre commented that, as a citizen of the town, he felt the property looked as if it were a multi-use all along – whether the town knew about it or not.

Mr. Martin made a motion to deny the request for a Variance.

Mr. Pacocha seconded the motion.

Mr. Martin, speaking on his motion, stated that the site plan from 1984 did not include using the property as a mixed use. He further stated that he felt the property would be better served, in terms of safety, as a commercial use and not a residential use. He also said that he did not feel the request met the criteria for a Variance.

Mr. Pacocha, speaking on his second, stated that just because a property had a violation on it for many years did not make it correct. He also said that he felt to allow the violation to continue was not in the spirit of the ordinance.

VOTE: Chairman Seabury asked Clerk Houle to poll the Board on the motion to deny the request for a Variance, and to record the members' votes, which were as follows:

Mr. Martin	To deny
Mr. Pacocha	To deny
Mr. Pitre	To approve
Ms. Shuman	To deny
Mr. Seabury	To deny

Chairman Seabury stated that, there having been four votes to deny the request for a Variance, and one vote to approve the request for a Variance, the motion had carried.

### Discussion on (A) – Appeal from a Zoning Administrator's Decision

Attorney Prunier stated that the applicant wanted the Board to hear the request for Section (A) – the Appeal from a Zoning Administrator's Decision.

Chairman Seabury asked if there were anyone else present who wished to speak in favor, in opposition, or neutrally with regard to the application. No one else came forward.

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Chairman Seabury asked if there were any members of the Board who had questions or comments.

Mr. Martin made a motion to uphold the Zoning Administrator’s Decision.

Mr. Pacocha seconded the motion.

Mr. Martin, speaking on his motion, stated that he felt the decision was correct and he would have come to the same decision, given the evidence presented to the Board.

Mr. Pacocha, speaking on his second, stated that he was in complete agreement with what Mr. Martin had said.

VOTE: Chairman Seabury asked Clerk Houle to poll the Board on the motion to uphold the Zoning Administrator’s Decision, and to record the members’ votes, which were as follows:

Mr. Martin	To uphold the Zoning Administrator’s Decision
Mr. Pacocha	To uphold the Zoning Administrator’s Decision
Mr. Pitre	To uphold the Zoning Administrator’s Decision
Ms. Shuman	To uphold the Zoning Administrator’s Decision
Mr. Seabury	To uphold the Zoning Administrator’s Decision

Chairman Seabury stated that, there having been five votes to uphold the Zoning Administrator’s Decision, the motion had carried.

Chairman Seabury declared a break at 8:30pm, calling the meeting back to order at 8:38pm.

- Case 217-005 (5/24/12, Rehearing): Alan and Theresa Boissonneault Living Trust, P.O. Box 2431, 1016 Yates Road, Oak Harbor, WA, requests a Variance for property located at 13 Mark Street, to allow access to the proposed lot without the proper frontage; 120 feet required, 0.0 feet proposed. [Map 217, Lot 005, Zoned R-2, HZO Article VII, Section 334-27, Table of Dimensional Requirements.]**

Clerk Houle read aloud the posted notice, as recorded above.

Ms. McGrath stated that she would also step down from this case, even though she was not a sitting member of the Board at this meeting, because she had been a member of the Planning Board when the case was originally heard. (Ms. McGrath remained in the audience section of the room.

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Ms. Shuman stated that she too would step down from the case as she had not sat on any of the prior hearings pertaining to the case.

Chairman Seabury stated that he would seat Mr. Dearborn in place of Ms. Shuman, who had stepped down and taken a seat in the audience section of the room.

Chairman Seabury read aloud a letter dated May 16, 2012, from Attorney David LeFevre, addressed to the Zoning Board of Adjustment, summarized as follows:

*It is my conclusion that Lot 5 on the Wason Heights subdivision does, in fact, have legal access through the Wason Heights subdivision. However, the “Property” does not have legal access through the neighboring “Burns Hill Road” subdivision.*

*The Wason Heights subdivision was recorded at the HCRD on July 9, 1970. The Burns Hill Road subdivision was recorded at the HCRD on May 11, 1978. Mark Street is shown in both subdivisions, ending in each subdivision at a cul-de-sac, with a “stub” extending from the cul-de-sac to the neighboring subdivision. Although the intention appears to have been to connect Mark Street, in fact, the respective mark Street stubs do not align with each other. The “Property” abuts both of the stubs.*

*The portion of Mark Street within the Wason Heights subdivision was never built and is a “paper street.” As a matter of law, the owners have an implied easement to access the “Property” via the paper street. This is because the “Property” was conveyed in reference to the Wason Heights plan. However, no similar implied easement exists to access the “Property” via the Burns Hill Road subdivision because the “Property” was not conveyed in reference to the Buns Hill Road plan.*

*According to the Town’s GIS System, the portion of Mark Street within the Burns Hill Road subdivision was built to a length of 3,119 feet, which is the distance to the end of the cul-de-sac. According to the Town Report from the 1985 Town Meeting, Article 6, the portion of Mark Street within the Burns Hill Road subdivision was accepted as a public road “to the end of the existing pavement.” Thus, the portion of Mark Street between the cul-de-sac and the “Property”, i.e. the “stub”, was never accepted or opened as a public right-of-way. Nor has this portion of Mark Street ever been plowed in the winter or otherwise maintained by the Town in any fashion.*

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*Based on the foregoing, there is no private right of access or public right-of-access to the “Property” via the portion of Mark Street in the Burns Hill subdivision.*

*I do not agree that the Town’s deeded right-of-way to Mark Street in the Burns Hill Road subdivision provides an alternative ground for access. As stated previously, the stub was never accepted or opened as a public right-of-way.*

*Nor can I agree that RSA 674:41 provides any authority for legal access. The statute presupposed the existence of legal access. The statute does not grant legal access where it does not exist.*

Chairman Seabury asked who was present who wished to speak in favor with regard to the application.

Attorney Andrew Prolman, from Prunier & Prolman, P.A., representing the applicant, addressed the Board, stating that he had spoken to Attorney LeFevre but said that he disagreed with his opinion.

Attorney Prolman stated that a number of professionals (including Mr. Oleksak) had previously determined that a Variance was needed on the property because there was not sufficient frontage. (120 feet required, 50 feet proposed) Attorney Prolman stated that he was now proposing 0.00 feet of frontage.

Attorney Prolman said he disagreed with Attorney LeFevre’s opinion because he did not feel that the facts supported his conclusions. He said that the Boissonneaults had purchased their property in 1970 and that the intended access way was the paper Mark Street. He also said that he felt the Mark Street on the next plan (Hillsborough County Plan #11142) was intended, by the Planning Board, to continue and provide access to the paper Mark Street.

Attorney Prolman read aloud a section of the Planning Board’s meeting minutes from the August 10, 1977, meeting, (with reference to the Lehoullier Subdivision Plan) as follows “*Bob Jasper made a motion to approve subject to bonding or paving up to the town standards remaining portion of Mark Street, up to the property line and maintenance bond as set.*” He said that he felt the intent of the Planning Board at that time was that the Mark Street would have provided access to the other lots.



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Attorney Prolman read aloud a portion of the “Right-of-Way” summarized as follows: *“the said Right-of-Way is granted to the Town of Hudson in common with others for all purposes of a street.”*

Attorney Prolman said that the Lehoullier Plan had gone back to the Planning Board in 1980 with regard to the consolidation of the lots. He said that the Planning Board had approved the consolidation and there was no mention of “the stub” not being allowed. Attorney Prolman also said that the words “temporary cul-de-sac” were on the same plan. He further said that he believed that the Planning Board’s intention was always to have a full public way even though the two Mark Streets did not line up.

Attorney Prolman stated that he did not think it was fair to expect the applicants to bear the burden of building out the entire length of Mark Street when there was public access right up to the property line.

Attorney Prolman stated that he felt he had offered a fair solution to the problem when, on behalf of the applicants, he offered an easement for a future roadway so that the two Mark Streets could connect and maintain access to the other lots.

Attorney Prolman said that he felt the property should be subject to either the Robinson Condition or the triangle easement area condition but that it was not fair to impose both of them.

Attorney Prolman read aloud a portion of the Application for a Variance summarized as follows:

- 1. Granting of the requested Variance will not be contrary to the public interest because it allows for a single-family home in an existing neighborhood.*
- 2. The proposed use will observe the spirit of the ordinance because the proposed reduced frontage and house lot will not create overcrowding of the neighborhood; allows use of the lot as originally intended; would not alter the essential character of the neighborhood and does not affect health, safety, or welfare issues.*
- 3. Substantial justice would be done to the property owner by granting the Variance because it provides the only access to the lot for the applicants who have owned the house lot since 1970; the proposed house is remote and set back; the lot will support a house, septic system, and well that*

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*meets all current environmental regulations of the Town of Hudson and State of NH regulations; there would be no harm to neighbors or the general public in the Town of Hudson.*

- 4. The proposed use will not diminish the values of surrounding properties because the proposed new 4-bedroom house expected sale price between \$300,000 - \$400,000 and it would be in character with the surrounding neighborhood; no negative impact to the surrounding neighborhood, and clean up and monitoring of end of the cul-de-sac.*
  
- 5. Special conditions exist such that literal enforcement of the ordinance results in **unnecessary hardship** because strict application of the 120' frontage requirement would not be fair and reasonable as applied to this site because the lot has no other access than the Mark Street "stub" as shown on the plan. Mark Street presents an odd and special condition on the property. The "1970" Mark Street is a paper street which could provide sufficient frontage but was never built out and unlikely to ever be built out because of the site distance issue and traffic safety concerns on Wason Road. The "1980" Mark Street dead ends directly at the Boissonneault lot. The proposed driveway off of the Mark Street "stub" is the only way to use the lot. Given the very unique circumstances of this case, and the disconnected Mark Street lay out, this application meets both hardship definitions of RSA 674:33, I (b) (5) (A) and (B).*

Chairman Seabury asked if there were anyone else present who wished to speak in favor with regard to the application.

Mrs. Theresa C. Boissonneault, the applicant, addressed the Board, stating that she was in favor with regard to the application and asked the Board for advice.

Mr. Alan E. Boissonneault, the applicant, addressed the Board, stating that he did not understand why the town had not requested a bond on the land. Chairman Seabury replied that he did not think the town requested bonds back then.

Mr. Boissonneault stated that he felt the fact that the two Mark Streets did not align was deliberate to prevent access to Wason Road. He further stated that he felt the town wanted him to correct the problem of the misaligned streets and he did not feel that was his problem.

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Chairman Seabury commented that he did not feel the Planning Board ever knew that the two Mark Streets did not connect.

Chairman Seabury asked if there were anyone else present who wished to speak in favor, in opposition, or neutrally with regard to the application. No one else came forward.

Chairman Seabury declared the matter before the Board.

Mr. Pacocha commented that he felt that everyone who owned a lot when the first plan was approved had an equal obligation with regard to the cost of developing the road.

Chairman Seabury commented that he felt allowing this property to be developed would cause a problem for the four neighboring lots. Attorney Prolman replied that he disagreed with that statement.

Mr. Martin made a motion to deny the request for a Variance.

Mr. Dearborn seconded the motion.

Mr. Martin, speaking on his motion, stated that this piece of property (Lot 275-005) was part of the existing plan from 1970 and allowing the Variance would leave the remaining land owners without access to the property. He also said that he was concerned with public safety in terms of emergency vehicles entering and exiting the property.

Mr. Dearborn, speaking on his second, stated that in addition to Mr. Martin's comments, he felt there was no frontage on the Mark Street Extension and if the Board approved the Variance, it would become a private driveway for the property.

VOTE: Chairman Seabury asked Clerk Houle to poll the Board on the motion to deny the request for a Variance, and to record the members' votes, which were as follows:

Mr. Martin	To deny
Mr. Dearborn	To deny
Mr. Pacocha	To approve
Mr. Pitre	To approve
Mr. Seabury	To deny

Chairman Seabury declared that, there having been three votes to deny the request for a Variance, and two votes to approve the request for a Variance, the motion had carried.

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Chairman Seabury declared a break at 10:12pm, calling the meeting back to order at 10:17pm.

Chairman Seabury stated that Ms. Shuman had returned to her seat as a full voting member of the Board. He also stated that Mr. Dearborn and Ms. McGrath had returned to their seats as non-voting alternate members of the Board respectively.

3. **Case 177-014 (5/24/12): Timothy L. Wilbur, 47 Kimball Hill Road, Hudson, NH, requests the following:**

**A. An Equitable Waiver to allow the existing dwelling that was constructed in 1880 to remain within the front setbacks. [Map 177, Lot 014, Zoned G, HZO Article VIII, Section 334-28, Nonconforming Uses, Structures and Lots.]**

**B. A Variance to allow an above-the-ground pool to be installed within the front-yard setbacks; 50 feet required, 17 feet proposed. [Map 177, Lot 014, Zoned G, HZO Article VII, Section 334-27, Table of Dimensional Requirements.]**

Clerk Houle read aloud the posted notice, as recorded above.

Chairman Seabury asked Ms. Kennedy if she were aware of any code enforcement issues on the property. Ms. Kennedy replied that there were not.

*Discussion on (A) – Request for an Equitable Waiver*

Mr. Pitre made a motion to approve the request for an Equitable Waiver.

Mr. Martin seconded the motion.

Mr. Pitre, speaking on his motion, stated that he felt the house had been in existence since 1880, it was an innocent mistake, it was not a nuisance, and there would be a high correction cost.

Mr. Martin, speaking on his second, stated that he agreed with everything Mr. Pitre had said.

VOTE: Chairman Seabury asked Clerk Houle to poll the Board on the motion to approve the request for an Equitable Waiver, and to record the members' votes, which were as follows:

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Mr. Pitre	To approve
Mr. Martin	To approve
Mr. Pacocha	To approve
Ms. Shuman	To approve
Mr. Seabury	To approve

Chairman Seabury declared that, there having been five votes to approve the request for an Equitable Waiver, the motion had carried.

### Discussion on (B) – Request for a Variance

Chairman Seabury asked who was present who wished to speak in favor with regard to the application.

Mr. Timothy L. Wilber, the applicant, addressed the Board, and read aloud a portion of the Application for a Variance summarized as follows:

- 1. Granting of the requested Variance will not be contrary to the public interest because I have spoken with our most direct neighbors and they do not object to the location of our pool.*
- 2. The proposed use will observe the spirit of the ordinance because other households in our neighborhood have pools. We are observing other zoning laws and need to apply for this Variance due to our odd property line, which does not allow for the typical setback required from the street.*
- 3. Substantial justice would be done to the property owner by granting the Variance because this is the best location for the pool due to safety and financial reasons. We would have difficulty putting the pool in any other location. This is the main part of our yard that we spend time in and locating our pool here would allow us to safely supervise children and adults who utilize the pool. This location also offers the cheapest cost to install the proper electricity needs.*
- 4. The proposed use will not diminish the values of surrounding properties because due to the location and our property line, we will not be infringing on the property values of our neighbors.*
- 5. Special conditions exist such that literal enforcement of the ordinance results in **unnecessary hardship** because in looking at maps of our*

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*property, one can see that the location proposed is the only (somewhat) flat location that a pool can be installed. Our house was built in 1880 our property line is very unique and was put in place prior to the zoning laws that exist today. Due to our old property line, the only way to install our pool in the necessary location is to install the pool inside of the setbacks that are currently outlined.*

Chairman Seabury asked if there were anyone else present who wished to speak in favor with regard to the application.

Mr. Jay Henshaw, from Gibraltar Pools, representing the applicant, addressed the Board, stating that the proposed location of the pool was the safest possible location.

Mr. Pacocha asked how big the pool was. Mr. Wilber replied that the proposed pool was a 16' x24' rectangular pool.

Mr. Pitre made a motion to approve the request for a Variance with the stipulation that the applicant maintain a privacy fence in keeping with the existing fence – whether natural or manufactured.

Mr. Martin seconded the motion.

Mr. Pitre, speaking on his motion, stated that he felt the applicant was making the property more conforming and it was the only practical location for the proposed pool.

Mr. Martin, speaking on his second, stated that he agreed with what Mr. Pitre had said.

VOTE: Chairman Seabury asked Clerk Houle to poll the Board on the motion to approve the request for a Variance, with the noted stipulation, and to record the members' votes, which were as follows:

Mr. Pitre	To approve
Mr. Martin	To approve
Mr. Pacocha	To approve
Ms. Shuman	To approve
Mr. Seabury	To approve

Chairman Seabury declared that, there having been five votes to approve the request for a Variance, with the noted stipulation, the motion had carried.

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### **IV. APPROVAL OF MEETING MINUTES**

The following changes were made to the minutes of the April 26, 2012, meeting:

Page 14, 1<sup>st</sup> paragraph – the words “counted or discounted” was changed to “verified” - Seabury

Page 18 – “May 24, 2012” was changed to “April 26, 2012” – Dearborn

Page 18 – last line – “as an end lot” was changed to “a corner lot” – Martin

Mr. Martin made a motion to approve the minutes from the April 26, 2012, meeting, as amended by the Board.

Ms. Shuman seconded the motion.

Chairman Seabury called for a verbal vote, and he then stated that all of the sitting Board members were in favor of approving the minutes from the April 26, 2012, meeting, as amended by the Board.

### **V. OTHER BUSINESS**

Ms. Davis commented that it appeared that there were quite a few requests for Home Occupation Special Exceptions pertaining to firearms. She further commented that she did not feel that the sale of firearms was not a typical home occupation.

Chairman Seabury replied that it was a growing trend.

Ms. McGrath commented that she would feel better if the Hudson Police Department provided information to the Board with regard to how these types of businesses would be monitored.

### **V. ADJOURNMENT**

All scheduled items having been processed, Mr. Martin made a motion to adjourn the meeting.

Ms. Shuman seconded the motion.

VOTE: All members voted in favor. The motion passed unanimously.

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Chairman Seabury declared the meeting to be adjourned at 11:06pm.

Date: May 31, 2012

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J. Bradford Seabury, Chairman

Recorder: Trish Gedziun