

**BOARD OF ADJUSTMENT MEETING
SEPTEMBER 24, 2002**

MEMBERS:

Bruce Breton - Chairman
Rob Gustafson - Secretary
Jack Gattinella - Member
Al Souma - Member
Chris Doyle - Member
Tony Pellegrini - Alternate
Dick Drummond - Alternate

Lot #17-I-200, Case #30-2002

Michael Nikitas, Lisa Nikitas, Chrissis Investment Trust & Vera Barone
94 Range Road

An Appeal of an Administrative Decision concerning decisions of the Planning Board under RSA 676 (5) (III) appealing site plan approval for a public golf course. Zoning Ordinance Sections 601.3 and 710 are in question. Approval of site plan was improper because use is not permitted in WWPD; there is no prior vested non-conforming use due to discontinuance of any prior use as a public or private golf course; ball fences and netting as approved violate Section 710 and would first require a variance.

Mr. Gustafson read the case into the record. Mr. Gustafson read a letter from Mr. Ronald Abdinoor dated September 23, 2002 requesting that Mr. Gattinella recuse himself from this re-hearing. Mr. Gattinella said that he saw no reason to recuse himself from this case. Mr. Gattinella said that he believes the reason given in Mr. Abdinoor's letter of May 24, 2002 for wanting Mr. Gattinella to recuse himself is that Mr. Gattinella is against his farm. This is not an issue of the farm; this is an issue of An Administrative Decision. Mr. Gattinella went on to say that this all started back when the Planning Board and the Board of Selectman were supporting the re-zoning of that area from residential to rural. At that time Mr. Abdinoor asked Mr. Gattinella if he was supporting the recommendations of the zoning change. Mr. Gattinella replied that he was not supporting a zoning change that would facilitate the economic position of one particular property owner. Mr. Gattinella said that in principle he was against the zoning change, but also told Mr. Abdinoor that he hoped he would get it. Mr. Gattinella said that if this is what Mr. Abdinoor is talking about he is right, but this case (30-2002) is not about a farm it is about a golf course.

Attorney Andrew Prolman presented the case. The Chairman marked the documents presented to the Members by Attorney Prolman as Exhibit A. Attorney Prolman went on to say that according to Windham Zoning Ordinance 601.3 a golf course is not allowed in the WWPD. The golf course on Lot 17-I-200 cannot be considered a pre-existing use because it was never legally permitted and it was abandoned in the 1950's. In an October 8, 1996 letter to Mr. Abdinoor from the Planning & Development Department there is no mention of a golf course. A November 26, 1996 letter to the Planning Board from Mr. Abdinoor mentions the proposed farm stand and the growing and retailing of vegetables but there is no mention of a golf course. December 18, 1996 Planning Board minutes mention a seasonal farm stand and a few parking spaces but there is no mention of a golf course. The April 25, 2002 Zoning Board of Adjustment minutes states that Mr. Walkey, former owner of Lakeview Farm, said that he had sold the farm to Mr. Abdinoor because he promised to keep it as a farm. Mr. Walkey went on to say that he abandoned the golf course because it was not popular at that time. In the same Zoning Board minutes Mr. Bruce Flanders, Building Inspector, stated that the golf course has not been in continuous use and when Mr. Abdinoor purchased the property he did not intend to use the golf course. The May 23, 2001

Planning Board minutes states Attorney Mason, representing Mr. Abdinoor, said the course has been in operation for about 4 years. A letter from Frank Johnson dated September 19, 2002 states that Mr. Johnson's father was haying the property prior to 1960. The golf course cannot be considered an accessory use to residential property in Windham. The rural zone allows for accessory uses but does not specify categories or type of accessory uses. Windham Zoning Ordinance Section 200 defines an accessory use as a use that is subordinate to the main use, the use of which is customarily incidental to the main use of the land. New Hampshire law holds that incidental and subordinate incorporates the requirements that the accessory use be minor in relation to the permitted use and that the accessory use bear a reasonable relationship to the primary use. A golf course is not an incidental or subordinate use to a farm. Section 503 of the Windham Zoning Ordinance requires site plan approval for change of use. Mr. Abdinoor never received site plan approval prior to the adoption of Section 503 of the Zoning Ordinance. The so-called equipment meets the definition of a fence and thus violates the height limitations of Windham Zoning Ordinance 710. The fence is on the side lot line and can be no higher than 6-feet. A fence according to Webster's Dictionary is a barrier intended to prevent escape or intrusion or to mark a boundary. This site is too small for a golf course.

Mr. Ross McLeod, Chairman of the Planning Board read the following Findings of Facts into the record.

1. Lakeview Farm is in the Rural Zoning District.
2. The Rural Zoning District allows the establishment of farms and agricultural uses of land (Section 602.1).
3. The Rural Zoning District allows the establishment of golf courses as permitted uses with site plan approval (Section 602.2).
4. Lakeview Farm received site plan approval to allow the public use of an established golf course on May 15, 2002 (subject to appeal). The golf course was constructed in the 1920's prior to current zoning ordinances and ceased commercial operation in the 1950's.
5. The WWPD is an overlay-zoning district that is intended to protect wetland and water resources (Section 601.1).
6. The establishment of Agriculture and Farming are allowed uses in the WWPD (Section 601.3.2).
7. The establishment of Recreation and Parks are allowed in the WWPD (Section 601.3.7).
8. The WWPD Ordinance requires that any terrain disturbance (filling or excavation of earth) required for permitted uses or uses granted by variance shall apply for a special permit from the Planning Board (Section 601.4.8).
9. The site plan application and site plans submitted for the public golf course at 94 Range Road did not indicate any filling, excavation or construction work of any kind in the WWPD.
10. The site plan application and plans did not include a special permit to fill or excavate in the WWPD because no work was proposed in the WWPD.
11. The golf course was constructed in the 1920's and re-established in 1998 as a private golf course for personal use.
12. The golf course impact to the WWPD (if any) was completed prior to the March 2002 Town Meeting and therefore the golf course use was established in the WWPD prior to the March 2002 Town Meeting.
13. The Public Use of the established golf course at 94 Range Road is not a WWPD issue but is a Rural Zoning District issue.

Mr. Gattinella asked Mr. McLeod how the golf course could be defined as non-commercial when the owner wants to open the course to the public? If you look at Section 602 it states The Rural District is intended as a district for rural, residential and non-commercial uses. Mr. McLeod replied that the administrative use is gone but the physical course is still there and that is exactly why the WWPD Ordinance does not apply, because the golf course was there before it was changed to WWPD.

The Chairman granted a five-minute recess.
The Chairman called the meeting back to order.

Mr. Turner, Director of Planning & Development, said that netting was installed in response to the safety concerns of the neighbors. On May 23, 2001 at a conceptual discussion of Lakeview Farm, Mr. Michael Nikitas said that he had safety concerns for the Bella Vista Road residents and that a net should be constructed. Mr. Turner said that Mr. Flanders does not consider the netting a structure. Mr. Flanders said that we are not here to decide if this is a structure or not; but we are here to decide if this is a fence or not. A fence is primarily a barrier and generally on a boundary line. Without a golf course there would be no netting.

Attorney Mason, representing Mr. Abdinoor, gave a history of the golf course and the requests for variances. Attorney Mason talked about the issue of safety that was raised by the abutters at both the Planning Board and Zoning Board of Adjustment meetings. The facility will not change with regard to going public, but the level of use would change. The netting is not intended as a barrier, just as a safety net. Mr. Gustafson said that he is hung up on commercial use. Section 601.3.7 does not mention construction but does mention uses. Attorney Mason submitted a photograph dated August 2000. Attorney Mason said that Mr. Abdinoor did not create this course; he restored this course. Mr. Gustafson said that Section 601.3.7 says uses permitted. Mr. Turner responded that this ordinance does not apply if you're not doing any work in the WWPD, the Rural Zone would apply. Mr. Gattinella said that the opening paragraph in the Zoning Ordinance for a Rural District clearly states "The Rural District is intended as a District for Rural, Residential and Non-Commercial usage". Mr. Abdinoor is requesting that his golf course be commercial and that is not the intent of the Rural District.

Mr. Hohenberger advised the Board that he was not speaking on behalf of the Planning Board or the Board of Selectman. This case is not "black & white" it is all about interpretation. Anyone who serves on a public board realizes that they are there to serve the public. Since this is a difficult case Mr. Hohenberger requested that the Board take into consideration during the Deliberative Session the following amendments that were passed by the public.

- Amendment #7 Putting golf courses under site plan review Votes 1185 in favor, 302 against.
- Amendment #8 Allowing golf courses in a rural zone 1156 in favor, 319 against.
- Article #22 Gave an easement to Mr. Abdinoor 1167 in favor, 306 against.

Attorney Prolman said that this is a "black & white" issue. There is a violation of Section 503. Since this is change of use and there needs to be site plan approval.

The Chairman granted a five-minute recess.
The Chairman called the meeting back to order.

Alternate Appointment

Due to Mr. Doyle's injury the Chairman appointed Mr. Drummond to replace Mr. Doyle for the balance of this meeting.

Attorney Prolman said the site plan shows existing 30 and 40-foot poles and netting. They are in the WWPD. At some point in time some work was done in the WWPD. This work should not have been done because as of February 2002 the Landowner did not have site plan approval to do any work on the site. Therefore the statement that the WWPD doesn't apply because "we got a golf course" doesn't work. That legal analysis fails.

Mr. Souma asked if the netting needed approval. Mr. Turner responded that the netting did not need approval because the terrain was not altered. Mr. Breton said that the poles were installed which would

alter the terrain. Mr. Turner said that the WWPD was not discovered until after the Planning Board application came in and the site plan approval process was well underway.

The Chairman closed the public portion of this case.

Mr. Gattinella motioned to change the order of business and go into Deliberative Session. Mr. Gustafson seconded the motion. Passed unanimously.

DELIBERATIVE SESSION

Lot #17-I-200, Case #30-2002

Mr. Gustafson said that there are two issues; approval of site plan and the fence issue. When the town voted on Amendments 7 & 8 and Article 22 they were not voting on the WWPD issue. Mr. Gustafson motioned to overturn the decision of the Planning Board in approving the site plan according to 601.3.7. The commercial use of a golf course is not permitted in the WWPD. Mr. Souma seconded the motion. Mr. Souma, Mr. Gattinella, Mr. Breton, Mr. Drummond and Mr. Gustafson voted to overturn the decision of the Planning Board. Passed 5-0. Mr. Gustafson amended his original motion. Mr. Gustafson motioned to overturn the decision of the Planning Board in approving the site plan according to 601.3.7 and that we find there is no prior vested non-conforming commercial use, private or public. Mr. Souma seconded the motion. Mr. Souma, Mr. Gattinella, Mr. Drummond, Mr. Gustafson and Mr. Breton voted to overturn the decision of the Planning Board. Passed 5-0.

Mr. Gattinella motioned to uphold the decision of the Planning Board that the netting that was put up for safety does not violate Section 710. Mr. Gustafson seconded the motion. Mr. Souma, Mr. Drummond, Mr. Gustafson, Mr. Gattinella and Mr. Breton voted to uphold the decision of the Planning Board. Passed 5-0.

Minutes

Mr. Gustafson motioned to approve the September 10, 2002 minutes as amended. Mr. Drummond seconded the motion. Passed unanimously.

Other Business

Mr. Gattinella motioned to approve the By-Laws as amended. Mr. Gustafson seconded the motion. Passed unanimously.

Mail

- July/August 2002 Issue of State Planning News
- September 2002 Issue of Town & City

Election of Officers

Mr. Gustafson resigned from his position as secretary.

Mr. Gattinella nominated Mr. Gustafson for Vice-Chairman. Mr. Souma seconded the nomination. Nomination was unopposed. Passed unanimously.

Mr. Gustafson nominated Mr. Gattinella for Secretary. Mr. Souma seconded the nomination. Nomination was unopposed. Passed unanimously.

Mr. Gustafson motioned to adjourn at 11:05 PM. Mr. Gattinella seconded the motion. Passed

unanimously.

The next meeting of the Zoning Board of Adjustment will be on October 8, 2002 at 7:30 PM in the Planning & Development Office.

NOTE: These minutes are in draft form and are respectfully submitted for approval by Patricia Kovolyan.

