

**BOARD OF ADJUSTMENT MEETING
MARCH 25, 2003**

MEMBERS:

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

Lot #7-B-30, Case #6-2003 Continued from February 25, 2003

Samuel & Jean Nassar
62 Searles Road

An Appeal of an Administrative Decision is requested from Section 601.4.5 of the Zoning Ordinance. This Wetland Watershed Protection District Section of the ordinance has been interpreted to apply when the second hundred feet has an upward slope of 12% or more.

Mr. Gattinella read the case into the record. Mr. Turner, Code Enforcement Administrator, read into the record a letter he wrote to the Chairman of the Zoning Board of Adjustment requesting that Mr. Breton disqualify himself from further deliberations, discussions or decisions regarding the Nassar appeal. Mr. Turner's letter explained that he was making this request because it was brought to his attention through a February 27, 2003 letter to the editor published in the Windham Independent stating that Mr. Nassar and Mr. Breton meet regularly for coffee and discussions. Mr. Turner's letter states that according to RSA 673:14 members of Land Use Boards should be disqualified from sitting or deciding on a hearing if there is even an appearance of conflict. Mr. Turner's letter also states that Mr. Breton had recent conversations with people at the Transfer Station, which indicated that he is not neutral in this case. Mr. Turner also requested that Mr. Gattinella be disqualified from this case because he also meets regularly with Sam Nassar in the mornings. Mr. Gattinella said that per RSA 673:14 Mr. Turner's challenge could only be made prior to or at the commencement of the meeting. Mr. Gattinella said that per the RSA only a board member could request that another board member be disqualified. Mr. Gattinella resigned from the Zoning Board of Adjustment. Mr. Gustafson said that he agreed with Mr. Gattinella that this request may not be made by anyone other than Board Members. Mr. Gustafson asked Mr. Turner if he could prove Mr. Breton or Mr. Gattinella have any personal or pecuniary interest in the outcome of this case. Mr. Turner replied, I gave you Attorney Campbell's legal opinion. Mr. Breton asked if Mr. Turner was questioning his integrity. Mr. Turner replied that the same standard must be applied as in a court of law. Mr. Gustafson suggested that the decision to hear the case or not should be left to each Member. Mr. Breton said that he also has had coffee for seven years with Mr. Abdinoor but did not vote in favor of Mr. Abdinoor's request but voted in favor of the evidence. Mr. Charlie Jaynes said that the Board has a regulation that is clear and that questions or doubts should not be raised. Mr. Breton decided not to disqualify himself and continue with the meeting. Because of Mr. Gattinella's resignation there was not a complete Board so Mr. Nassar was asked if he wanted to continue his case or reschedule when there is a full Board. Mr. Nassar waived his right to a full Board and the Members continued to hear case 6-2003. Mr. Spaulding of SFC Engineering presented the case for Mr. Nassar. Mr. Spaulding offered the following clarification on how SFC Engineering has applied Section 601 to the proposed Fox Farm Subdivision.

At Mr. Doyle's request the Chairman granted a five-minute recess.

The Chairman called the meeting back to order.

Following is the procedure used by SFC Engineering to determine the limits of the WWPD Zone:

1. Offset the existing wetlands line 100 feet to determine the 100-foot primary WWPD line.
2. Review topographic survey uphill of the primary WWPD line to determine the limits of the 12% or greater upward slope. Mark the location where the slope breaks to less than 12%.
3. If the slope break marked in Step #2 is 100-feet or greater from the primary WWPD, as required under Subsection 601.4.5, the WWPD would be extended 100-feet. If the slope break is less than 100-feet from the primary WWPD line the additional 100-foot WWPD required under Subsection 601.4.5 did not apply.
4. If the slope break marked in Step #2 extends upslope 100-feet or greater from the primary WWPD line established in Step#1, but did not have a minimum width of 100-feet as required under Subsection 601.4.5, then the additional 100-foot WWPD did not apply.
5. If it was determined in Step #2 that the slope break is 100-feet or greater from the primary WWPD line established in Step #1 and had a minimum width of 100-feet or more, the WWPD line would be increased as required under Subsection 601.4.5, "The WWPD shall be increased by 100-feet under the following conditions: When that 100-feet has an upward slope of 12% or more and a minimum width of 100-feet."

Mr. Spaulding went onto say that at the February 25, 2003 meeting there were three different opinions presented by representatives from the Town of Windham on how the Town of Windham's Zoning Ordinance 601 has been interpreted since 1976.

1. Mr. Turner stated that if there is a 12-foot elevation change in the second 100-feet then the WWPD is extended.
2. Mr. Thorndike provided a written statement that if the second 100-feet had an average slope of 12% or more then the WWPD was extended.
3. Mr. Wilder stated that if any area within the second 100-feet had a slope of 12% or more then the WWPD was extended.

Also at the February 25, 2003 meeting Mr. Turner and Mr. Wilder gave examples of when their interpretation did not apply, i.e. when the contours flattened out, sloped in a downward direction, or a natural occurring swale was present within the second 100-feet. The method SFC Engineering used to apply the Zoning Ordinance as written to the Fox Farm Subdivision wasn't to get additional lots by reducing the WWPD zone nor is the approach a result of SFC's lack of experience in the Town of Windham. The approach is straightforward; it follows the ordinance as written and does not involve interpretation of how the ordinance should be applied under different scenarios.

Mr. Gustafson submitted 10 test cases that were reviewed with Mr. Spaulding.

Mr. Turner advised the Board that Mr. Thorndike was not able to attend the meeting. Mr. Turner submitted a letter from Mr. Thorndike dated February 27, 2003 showing the procedure used to determine WWPD areas.

1. Identify all areas of streams and wetland subject to the provision of Regulations 601.4.1, 2, 3 and 4.

2. Measure out and mark a distance of 100-feet (150-feet on certain brooks) from the edge of the wetland or high water mark. This is required without regard for any particular slope or grade.
3. Where abutting slopes appear to be steep, we measure out and mark lightly an additional 100-feet parallel to this WWPD to a point 200-feet from the wetland.
4. On lines radial or 90-degrees to the first WWPD line we count the number of spaces between 2-foot contour lines to the second WWPD line. This gives us the degree of slope.
5. Slopes of 12% or greater that have a width greater than 100-feet are then marked and indicated as WWPD.

Mr. Turner submitted another letter along with a drawing from Mr. Thorndike dated March 17, 2003. This letter states that during the past five years, sixty-five subdivision plans involving WWPD have been reviewed by the Planning Board. Most of these plans involved the 200-foot WWPD extension and represents the work of fourteen different engineering offices, only one of which has challenged the interpretation. Mr. Turner said that the Applicant must show that the interpretation of the Code Enforcement Officer is in error. The Applicant has not been denied any permits or applications as a result of the Code Enforcement Administrator's interpretation of this section of the WWPD ordinance. The decision of the Zoning Board will affect properties going back to 1974.

Mr. Gustafson asked Mr. Turner to review the test cases for clarification. Mr. Turner said that he never makes interpretations "off the cuff" or over the telephone. Mr. Turner said that he spends a lot of time interpreting the Ordinance when he makes his decisions; he will ask other people's opinions and also rely on Planning Board and Conservation Commission Members. Mr. Turner said that this is not an exercise he would want to go to court with and say that he answered those questions. Mr. Gustafson said to Mr. Turner what he basically described is an average of a 12% slope over 100-feet. Mr. Gustafson pointed out that some of the test cases have flat or downward slopes. Mr. Gustafson asked if there are issues of negative or flat slopes in interpreting this ordinance. Mr. Turner said I think maybe you missed something so he would go over Mr. Thorndike's procedure one more time. Mr. Breton asked Mr. Turner what Mr. Thorndike's capacity is with the town. Mr. Turner replied that Mr. Thorndike is a consultant; in the past he was the Town Engineer and Surveyor. Mr. Breton asked Mr. Turner what is his capacity with the town. Mr. Turner replied Code Enforcement Administrator. Mr. Breton said that since Mr. Turner is responsible for the interpretation and enforcement of the town's codes he would like to see Mr. Turner's formula. Mr. Gustafson asked if there have been cases where there was an average of 12% or greater over that 100 feet that had downward or flat slopes within them that were still included. Mr. Turner replied yes. Mr. Gustafson asked were there any that were not included because of downward slopes. Mr. Turner said that he was not aware of any but that is going back seven years. You have to look at real topography. We are allowed to use common sense and we sit down and negotiate with the Applicant.

Mr. Spaulding said that Mr. Turner claims that he has not seen Mr. Nassar's plan but he has. Mr. Spaulding said that if the intent of the ordinance was to protect the WWPD allowed uses such as farming would not be permitted.

Mr. Doyle motioned to go into Deliberative Session. Mr. Gustafson seconded the motion. Passed unanimously.

Deliberative Session, Case #6-2003

Mr. Gustafson said that it appeared that the Code Enforcement Administrator was using an average slope and the Applicant was using an instantaneous slope. The interpretation has been an average 12% slope and that is based on practicality of applying the ordinance and the intent of the ordinance. Mr. Gustafson motioned to uphold the decision of the Code Enforcement Office. Mr. Souma seconded the motion. Mr. Doyle, Mr. Souma, Mr. Gustafson and Mr. Breton voted to uphold the decision of the Code Enforcement

Officer. Passed unanimously.

Mr. Breton said that he hoped the Planning Board would work on this Ordinance to clarify it for the Public and the Zoning Board.

The Chairman granted a five-minute recess.

The Chairman called the meeting back to order.

Lot #21-K-24, Case #2-2003 (Continued from February 25, 2003)

Denis Tremblay & Katrina Foss

74 Turtle Rock Road

An Appeal from an Administrative Decision RSA 674:41 concerning Section 702.2 of the Zoning Ordinance is requested to grant a waiver to allow access to Lot 21-K-24 over Turtle Rock Road which is not a Class V or better road.

Mr. Tremblay withdrew Case #2-2003. The Board of Selectmen voted to grant a building permit for lot #21-K-24 per RSA 674:41.

Minutes

Mr. Doyle motioned and Mr. Souma seconded the motion to approve the February 25, 2003 minutes as written.

Mail

1. Rockingham Planning Commission - Technical Advisory Bulletin regarding master plans and regional plans.
2. Introductory Letter from Attorney John Anthony Simmons.
3. Letter from Attorney Mason regarding Case #2-2003.
4. Letter from Heron Cove Association regarding Section 601.

Mr. Souma motioned to bring Mr. Turner's conduct to the attention of the Board of Selectmen and ask them to review tonight's videotape. Mr. Gustafson seconded the motion. Motion did not carry; Mr. Breton and Mr. Doyle abstained.

Mr. Doyle motioned that at the next Board of Selectmen meeting he will bring up for discussion Zoning Board of Adjustment issues. Mr. Gustafson seconded the motion. Motion passed 3-0-1. Mr. Breton abstained.

Mr. Gustafson motioned and Mr. Doyle seconded the motion to adjourn at 9:16 PM. Passed unanimously.

The next meeting of the Zoning Board of Adjustment will be on April 8, 2003 at 7:30 PM at the Planning & Development Office.

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

