

BOARD OF ADJUSTMENT

PO Box 120
Windham, New Hampshire 03087
Telephone (603) 432-3806

Zoning Board of Adjustment Minutes December 12, 2006

Robert Gustafson – Chairman
Mark Samsel – Vice-Chairman
Tony Pellegrini – Secretary
Dianna Fallon – Member
Gail Webster Member
Jim Tierney – Alternate
Al Souma – Alternate
Tom Murray – Alternate

Seat Alternates

Lot # 13-K-33, Case #63-2006

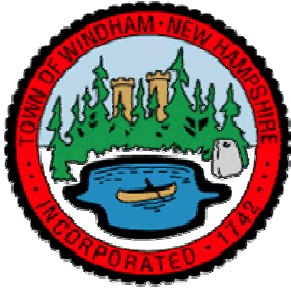
Applicant – Norma L. Hines
Owner – James & Norma Hines
Location – 25 Doiron Road
Zone – Rural

A variance is requested from Section(s) 401 & 702 Appendix A-1 of the Zoning Ordinance to permit the construction of a dwelling where the side setback was approved for 20.8-feet on October 14, 2003, Case #44-2003, but the foundation was set at 20.2-feet.

Mr. Pellegrini read the case into the record. Mr. Clayton Hines presented the case for his parents. Mr. Hines explained that after taking his parents' life savings the original builder, who cannot be found, installed the foundation in the wrong place. The foundation has not been built on and would have to be removed and replaced to meet the setbacks that were approved in 2003. Mr. Hines read the supporting facts into the record. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed unanimously 5-0.

Deliberative Session, Case #63-2006

Mr. Samsel motioned and Mr. Pellegrini seconded the motion to grant Case #63-2006 as requested from Sections 401 & 702 Appendix A-1. Motion passed unanimously 5-0.



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Lot # 18-L-1, Case #64-2006

Applicant – Mr. William Schroeder & Mr. James Labadini

Owner – Andrew Lane

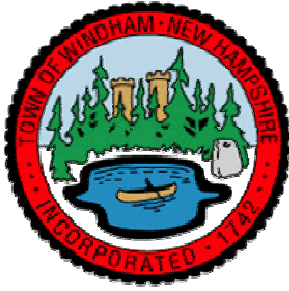
Location – 2 Woodvue Road

Zone – Residential A

An Appeal of An Administrative Decision is requested concerning the release of a garage permit by Mr. Alfred Turner and issued to Mr. & Mrs. Lane of 2 Woodvue Road.

Mr. Pellegrini read the case into the record. Attorney Steven Shadallah, representing Mr. & Mrs. Lane, asked the Chairman if he could be heard on a point of order. Attorney Shadallah said that the point of order (also mentioned in Attorney Shadallah's letter of December 8, 2006) is that his client would like to request that one of the Board Members not sit on this petition. The Chairman read the December 8, 2006 letter from Attorney Shadallah into the record. The Chairman read into the record RSA 673:14 *Disqualification of a Member*. The Chairman asked the Board Members if any of them had a direct personal or pecuniary interest in the outcome that differs from other citizens. Attorney Shadallah said that specifically he would ask the Chairman to ask the particular Board Member not to sit on this case, not because he has a pecuniary interest, but because he could not sit on this if he was a juror. Attorney Shadallah said that there is a concern of impartiality of one of the members. Attorney Michael Donovan, representing Mr. Schroeder, said that the Chairman has a right to know who is being challenged. The statute says that any member can ask for a non-binding advisory vote of the board. Attorney Shadallah said that it is his understanding that on June 14, 2006 there was a hearing before the Zoning Board during which Mr. Samsel effectively accused Mr. Lane of committing perjury. There was subsequently an exchange of letters between Mr. Lane and Mr. Samsel. Mr. Lane asked Mr. Samsel to retract his statement; Mr. Samsel wrote back saying that he would not and he did not see any need to apologize. In light of the exchange between Mr. Samsel and Mr. Lane Attorney Shadallah said that he is not convinced that Mr. Samsel can be impartial. Mr. Samsel said this is a new case and he believes he can be impartial and chose not to recuse himself.

Attorney Michael Donovan, representing Mr. Schroeder, submitted a four-page letter along with a 28-page handout. Attorney Donovan requested that the Board not make a decision tonight but view the site with a wetland expert and attorneys present in case there are any questions about the testimony that will be given tonight. Attorney Donovan will present an overview of the case and the legal argument and Russ Wilder will talk regarding wetland issues, Fran Fink, Wetland Specialist and Mr. Schroeder will also speak regarding this case. Attorney Donovan showed on a sketch two drainage easements, one under Woodvue Road and one under West Shore Road. There are two brooks that run under those drainage easements into Canobie Lake. A copy of a five-page wetland violation complaint form that Mr. Turner filed against the Lanes on October 22, 2002 was shown. The complaint included three diagrams. A culvert is shown on the diagram with an invert elevation of 223.5 feet (an invert is the elevation of the bottom of a pipe) and a 20-



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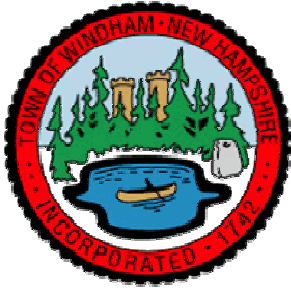
foot wide easement is shown and hand written is the word *brook*. Back in 2004 Mr. Turner made an administrative decision that the normal 100-foot WWPD back from the edge of a brook did not apply in this circumstance because the area labeled *brook* was in fact part of the lake. The WWPD includes all areas within 100 feet of the normal high water of a brook. This case is not complicated it is whether the two brooks that run through the two easement areas are brooks to which the 100-foot WWPD applies or whether they are part of the lake and there is no setback that applies. In the January 11, 2005 minutes Mr. Turner states that his last decision involving the WWPD was made on November 17, 2003 and then he goes on to say that the state shoreland people are not concerned, but the DES will be involved. The WWPD is not an issue because this is within the high water area of Canobie Lake. The issue to decide is if two brooks are part of Canobie Lake.

Russ Wilder of 2 Birchwood Road submitted and described photos and his tour of the Salem Water Treatment Plant. The Treatment Plant keeps track of exactly what the elevation is in Canobie Lake. On a particular day, the elevation was 219.85, the reference line which is the top of the spillway, was 219.91. With Canobie Lake being as high as it can be the brook was still flowing.

Fran Fink, Wetland Scientist for the town of Reading, Massachusetts, gave a history of her background. Ms. Fink viewed the area on May 23, 2006 when water levels were high. She could see water flowing down both channels into the main body of the lake.

Mr. Bill Schroeder of 14 Woodvue Road submitted and described photos he took on December 11, 2006. Fran Fink also gave an explanation of the same photos.

Mr. Alfred Turner, Director of Planning & Development, submitted maps to the Board. Mr. Turner gave a brief history of his educational background. In 2002 Mr. Turner filed a complaint with the NHDES regarding tree cutting. Most of the year the lake level is down. The normal high water mark means the line on the shore, running parallel to a brook, stream or pond, established by fluctuations on the water and indicated by physical characteristics such as a clear, natural line impressed on the immediate bank, shelving, changes in the character of soil, destruction of terrestrial vegetation, the presence of litter and debris, or other appropriate means that consider the characteristics of the surrounding areas. Where the normal high water mark is not easily discernible, the normal high water mark may be determined by the Department of Environmental Services. In 2003 Mr. Turner noticed that the water was still in the area of Mr. Lane's garage and saw that it was part of the lake. Even the NHDES had trouble deciding where the lake is and where the wetland is. Mr. Turner said that he saw that staining was consistent from the peninsula to the culverts. Before West Shore Road and I-93 were built the lake actually went all the way over to Range Road. When West Shore Road was built land was filled in with debris. There is

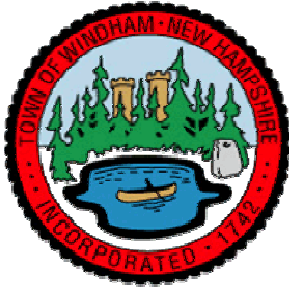


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water on both sides of West Shore Road. The large wetland in the area is not a brook but is part of the lake. This large wetland has two culverts entering into the lake. Sometimes the water flows in reverse from the lake into the wetland because the wetland is absorbing flooding. The ordinance states that a culvert cannot interrupt a stream. The invert shown on the map was proposed but not existing, it is not an actual invert. Mr. Lane hired a wetland scientist in 2003. Mr. John St. John wrote in his September 4, 2003 letter that there is one large contiguous wetland delineated along the northern edge of Canobie Lake and drainage easement from West Shore Road. The wetland scientist said this was a wetland not a brook running up along the area between the garage and West Shore Road. Mr. Turner submitted a map showing the lake coming in and lapping up against the two culverts. Mr. Turner showed staining on the rocks in the photos submitted by Attorney Donovan. The Conservation Commission hired a wetland scientist, Mr. Mark West. In Mr. West's letter of April 14, 2004 he states that *the surface water of the lake borders the wetland boundary along the western portion of the site in the form of scrub-shrub lacustrine wetland. Evidence of shoreline included water stained leaves and watermarks on trees consistent with the high water mark of the lake.* Mr. Gove of Gove Environmental visited the site recently and his report states that the normal high water mark is all the way up to the culverts as of December 6, 2006. Mr. Turner submitted a 10-page *Findings of Facts* report. Three wetland scientists agree that the lake goes up to the culverts. The WWPD begins at the culvert under Woodvue Road at the mouth of the pipe which is north of Woodvue Road and west of West Shore Road.

Attorney Steven Shadallah introduced Mr. Gove of Gove Environmental. Mr. Gove submitted his report dated December 8, 2006. Lakes fluctuate they do not stay at the same level. A reference line is a set elevation, it is set by a spillway height, and it does not represent fluctuations. For Canobie Lake, the reference line is the waterline at full pond as determined by the elevation of the spillway crest. It is typically based upon the height of a dam (spillway crest), and is not corrected for storm events, flooding situations, or even season runoff. The normal high water mark will always be at a higher elevation than the NHDES reference line, because the water level during storm events will be higher than the height of the dam. On December 5, 2006 Mr. Gove conducted a field investigation of the parcel and photographs of the pond are included in the report. South from the pool area, the upland is lawn that extends down to a drop-off that forms the bank of Canobie Lake. The lake is very shallow, and a large purple loosestrife dominated area extends several hundred feet southward to open, deep water. The water marks of the bank clearly show that the normal high water mark is at the drop-off from the lawn. Approximately ten feet south of the edge of the fill for the garage, the water marks clearly show the edge of the high water boundary. The high water marks continue to the west side of the fill and up to the mouth of the two culvers that feed into the lake, one culvert under Woodvue Road and the other under West Shore Road. The water stains, lack of terrestrial vegetation and the observed non-flowing water clearly shows the limit of the normal high water mark. Attached photographs taken at the time of the inspection show the connectivity between the water adjacent to the culverts and the lake level. In Section 601.4.4 of the Zoning Ordinance Canobie Lake is



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one of the lakes that does not have a WWPD extending from its normal high water mark, nor shall they be considered a “pond” to adjacent wetlands. The WWPD associated with a stream or brook entering any of the exempt water bodies shall continue up to the normal high water mark of these water bodies. This exemption means that because the normal high water mark of Canobie Lake extends around the subject parcel from the south to the west and ending at the mouths of the two culvers that the site is not subject o the WWPD setbacks. The small amount of loosestrife wetland that extends above the high water mark to around the east side of the garage is isolated and too small (less than 1 acre) to have its own WWPD. Mr. Gove explained his submitted photos. Mr. Gove’s report also includes a copy of the Canobie Lake log book page from the Town of Salem noting that water elevations at 220.75 feet, which further documents the seasonal water fluctuations of the lake. The following spoke in support of the appeal of the administrative decision:

- Al Letizio, Jr. of 5 Woodvue Road
- Pat Nysten of 4 Edgewood Road
- Betty Dunn of 30 Woodvue Road
- Ginny Campiolla of 51 West Shore Road
- Bob McKay of Lake Shore Road in Salem, NH

Mr. Pellegrini read into the record letters in opposition to the appeal of an administrative decision:

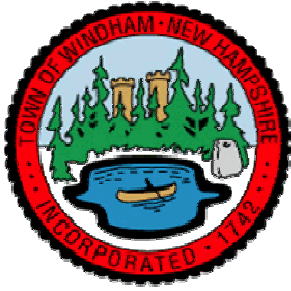
- Michelle & Robert Russell of 6 Woodvue Road
- Christine & Eric Mawby of 7 Woodvue Road
- Patricia Kovolyan of 3 Woodvue Road

Mr. Gove clarified the elevation question. The reference line is 219.91 the invert is 220.4 so 5/10 of a foot fluctuation to get to the invert. The normal high water mark can never be below the reference line.

Mr. Turner explained that at one time the swamp was part of Canobie Lake before I-93 and West Shore Road.

Fran Fink described what she saw in the photos submitted by Mr. Gove.

Russ Wilder discussed the lake elevations submitted by Mr. Gove. Those elevations were a result of an extraordinary event, the Mothers Day flood.



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Mr. Schroeder read into the record his November 8, 2006 phone conversation with Mark West. Mr. Shroeder wanted to know if Mr. West would support the statement Al Turner made that: *Mark West agrees with me that the normal high water line of the lake extends all the way to the culvert.* At the time West made the inspection, March 31, 2004, there was no building or foundation on the lot. There was an excavated hole, made in 2003, in approximately the position of the present building. Mark West said the Conservation Commission, which is always short of funds, asked him to make a brief inspection and report and only authorized \$200.00 for the work. As he recalled the main issue was possible wetland violations with work that had already been done there. He said he made a number of observations, which were itemized in the letter, and that was the extent of the work he did. Mr. West said there were a number of things he did not do:

- He did not delineate the wetland.
- He did not investigate water reference levels.
- He did not determine the CSPA reference line location.
- He did not investigate the stream channel.
- He did not delineate or determine the normal high water line of the lake.

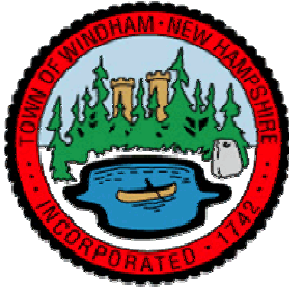
Mr. Schroeder said that Mr. West told him that he has had nothing to do with the site since April 2004 and gave no indication that the town had contacted him regarding supporting Mr. Turner's claim.

At the Chairman's request the Board discussed whether they should view the site or make a decision regarding the request. Mr. Samsel motioned and Mrs. Fallon seconded the motion to continue Case #64-2006 to the January 9, 2007 meeting to provide the Zoning Board an opportunity to visit the site and review the information presented at the December 12, 2006 meeting. Motion passed 5-0.

Mr. & Mrs. Lane gave permission to Board Members only to enter onto their property to view the site.

The Chairman marked the following as Exhibits:

- Exhibit A – 28 page handout from Attorney Donovan.
- Exhibit B – I-93 Environmental Impact Map.
- Exhibit C – Two photos taken by Mr. Schroeder on 12/11/06.
- Exhibit D - Map of old boundaries of Canobie Lake.
- Exhibit E – Map of Reference Line.
- Exhibit F – 10-Pages of Findings of Facts – Al Turner.
- Exhibit G – December 8, 2006 Gove Environmental Report.



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In response to Attorney Donovan's question regarding the evidence portion of the case the Chairman said that the evidence portion as such is closed but there can be responses to questions from the Board.

Lot # 16-P-1002, Case #65-2006

Applicant – Dennis Root

Owner – Root Family Revocable Trust

Location – 15 Third Street

Zone – Residential A

A variance is requested from Section(s) 401 & 702 Appendix A-1 of the Zoning ordinance to permit the placement of a storage shed 0' from the left side setback where 30' is required and 40' from the front setback where 50' is required.

Mr. Pellegrini read the case into the record. Mr. Root explained that the shed will actually be a little more than 1-foot from the setback. Mr. Root read the supporting facts into the record. The Chairman closed the public portion of this case. Mr. Pellegrini motioned and Mrs. Webster seconded the motion to go into Deliberative Session. Motion passed unanimously 5-0.

Deliberative Session, Case #65-2006

Mr. Samsel motioned and Mr. Pellegrini seconded the motion to grant Case #65-2006 to allow the variance as requested from Sections 401 & 702 Appendix A-1 to permit placement of a storage shed no closer than 1-foot from the left side setback and 40-feet from the front setback. Motion passed unanimously 5-0.

Lot # 16-P-1005, Case #66-2006

Applicant – Joseph Maynard

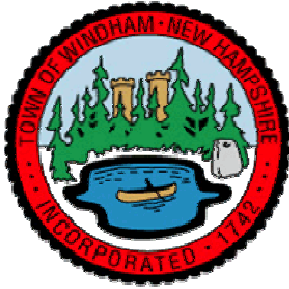
Owner – Richard & Violet Brownlee & Dianne Reeves

Location – 11 Third Street

Zone – Residential A

A variance is requested from Section(s) 401 & 702 Appendix A-1 of the Zoning ordinance to permit the placement of a structure 29-feet from the front setback where 50-feet is required and 40-feet from the front setback where 50-feet is required, 15-feet from the side setback where 30-feet is required and 20-feet to the deck where 30-feet is required This is a corner lot having two front and two side yards with no rear yard.

Mr. Pellegrini read the case into the record. Mr. Joseph Maynard of Benchmark Engineering, representing the owners, presented the case. Mr. Maynard explained that this property has frontage on both 3rd & C Streets; 40-feet of frontage on C Street and 29-feet of frontage on 3rd Street. The proposed house will be 1005 square feet with a 600 square foot garage. Mr. Maynard read the supporting facts into the record. Mr. Robert Grue of 2A Second Street and Mr. Dennis Root of 15 Third Street spoke in favor of this request. The Chairman closed the public portion of



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this case. Mr. Samsel motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed 5-0.

Deliberative Session, Case #66-2006

Mr. Samsel motioned and Mr. Pellegrini seconded the motion to grant Case #66-2006 an area variance as requested from Sections 401 & 702 Appendix A-1 per the plan submitted. Motion passed unanimously 5-0.

Lot # 17-J-107, Case #67-2006

Applicant – Benchmark Engineering

Owner – Eric & Jennifer Meyer

Location – 12 Rocky Ridge Road

Zone – Residential A

A variance is requested from Section(s) 401 & 702 Appendix A-1, 406.2 and 900 of the Zoning ordinance to permit the construction of an addition to an existing dwelling on a private road 20-feet from the front setback where 50-feet is required, 18-feet from the side setback where 30-feet is required, 25-feet from the side setback where 30-feet is required and increase the building footprint by 14' X 41'.

Mr. Pellegrini read the case into the record. Mr. Joseph Maynard of Benchmark Engineering, representing the owners, presented the case. The dwelling is approximately 250'-350' away from Cobbetts Pond. A new septic system was installed 4-5 years ago. The proposed 14' X 41' addition will be across the rear of the existing dwelling. The lot is 88-feet wide. Mr. Maynard read the supporting facts into the record. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mr. Pellegrini seconded the motion to go into Deliberative Session. Motion passed unanimously 5-0.

Deliberative Session, Case #67-2006

Mr. Samsel motioned and Mr. Pellegrini seconded the motion to grant Case #67-2006 as requested from Section 401, 702 Appendix A-1 & 406.2 per the plan submitted. Motion passed unanimously 5-0.

The Chairman replaced Mrs. Webster with Mr. Tierney for Case #58-2006

Lot #19-A-400, Case #58-2006 Request for Rehearing (Originally heard on 10/24/06)

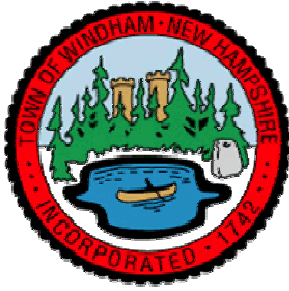
Applicant – Eight Mammoth Road LLC

Owner – Ford Family Trust

Location – 70 Mammoth Road

Zone – Rural

A rehearing is requested regarding the decision made by the Zoning Board of Adjustment on October 24, 2006.



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Mr. Pellegrini read the request into the record. Mr. Samsel motioned and Mrs. Fallon seconded the motion to continue the Request for a Rehearing of Case #58-02006 to the January 9, 2007. Motioned passed unanimously 5-0.

Approval of November 14, 2006 Minutes

Mrs. Fallon motioned and Mr. Samsel seconded the motion to approve the November 14, 2006 minutes as written. Motion passed unanimously 5-0.

The Chairman replaced Mr. Tierney with Mrs. Webster for the balance of the meeting.

Mail

- American Planning Association advertisement to subscribe to *Zoning Practice* a monthly publication.
- State of NH, Rockingham Superior Court, Order of Notice regarding Selectmen for the Town of Windham, NH v. Town of Windham Zoning Board of Adjustment.
- Notice from Rockingham Planning Commission regarding the CTAP Planning Conference scheduled for December 2, 2006.
- November 21, 2006 memo from David Sullivan, Town Administrator regarding the 2006 Annual Town Report.
- Brochure from Granite State Gas Transmission regarding safety and reliable energy delivery.
- Notice from Rockingham Planning Commission regarding the 2007 zoning ordinance Amendment Schedule.
- Letter from Attorney Shadallah to Rob Gustafson regarding Case 64-2006, 2 Woodvue Road along with 6 copies of a report from Gove Environmental.

At 12:03 AM, December 13, 2006 Mr. Samsel motioned and Mr. Pellegrini seconded the motion to go into Closed Session per RSA 91-A:3 for the purpose of reputations. Motion passed unanimously on a roll-call vote.

The next meeting of the Zoning Board of Adjustment is scheduled for January 9, 2007 at 7:30 PM in the Planning & Development Office.

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