

BOARD OF ADJUSTMENT

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

Zoning Board of Adjustment Minutes April 10, 2007

Mark Samsel – Chairman
Jim Tierney – Vice-Chairman
Dianna Fallon – Secretary
Gail Webster – Member (Excused)
John Alosso – Member (Excused)
Tom Murray – Alternate

The Chairman appointed Mr. Murray to replace Mrs. Webster for this meeting.

Lot #18-L-1, Case #17-2007 (Continued from 2/27/07)

Applicant – Andrew & Christine Lane
Owner – A&C Revocable Trust
Location – 2 Woodvue Road
Zone – Residential A

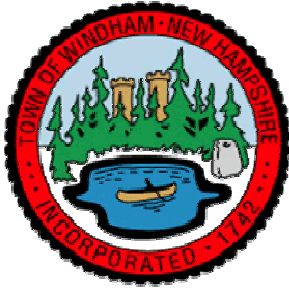
A use or area variance is requested from Section(s) 601 of the Zoning Ordinance to permit the completion of the construction of a garage authorized by a building permit dated November 5, 2003 but withdrawn as of January 22, 2007.

Mrs. Fallon read the case into the record. Mr. Lane requested a continuance of Case 17-2007. Mr. Murray motioned and Mrs. Fallon seconded the motion to continue Case #17-2007 to the May 22, 2007 meeting. Motion passed 4-0. (Please note that later in the meeting this case was continued to the May 15, 2007 meeting).

Lot #24-G-127, Case #21-2007 (Continued from 3/13/07)

Applicant – J.M. Gray & Associates, Inc.
Owner – Adrienne M. Goyette
Location – 9 Princeton Street
Zone – Residential A

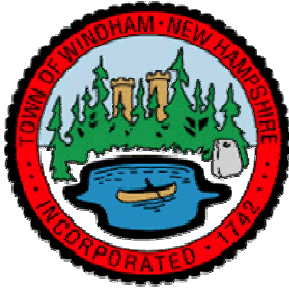
An Equitable Waiver is requested from Section(s) 601 of the Zoning Ordinance to permit the existing building, landscaping and site improvements to remain in the WWPD. Some of these improvements include pedestrian bridges over wetlands, grading for driveways and walkways and piping for irrigation.



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Mrs. Fallon read the case into the record. Mr. Jeff Gray representing the owner presented the case and submitted a revised plan. 9 Princeton Street was created upon subdivision approval by the Town of Windham Planning Board on September 9, 1978. As indicated on the approved plan, a portion of the property was identified as located in the WWPD. The approved plan described the property as including 137,657 square feet of land. Of the total area 78,630 square feet was identified to be in the WWPD; an additional 1800 square feet of drainage easement and 1920 square feet of a discontinued road easement. Therefore, the net useable area of the lot was set as 55,307 square feet. The recorded and approved plan did not show the actual location of the stream running through the southerly portion of the lot. Mr. & Mrs. Arthur Baker purchased the lot on October 31, 1979. Their deed includes the dimensional information above. The property was conveyed subject to the conditions of the WWPD. At the time the lot was created by the Planning Board, the WWPD was defined to include that area of the property within 100 feet from the stream. As it flows through the property, the stream splits into two and flows around a small island. Based on the location of the district on the approved plan, it appears that the district boundary was identified without regard for the split in the stream. Therefore the area of the WWPD, according to the regulations in effect at the time, should have been larger than shown on the approved plan. If the WWPD had been properly represented, the lot would likely not have had sufficient useable area for the single family home that was constructed on the property. After purchasing the property, the Bakers constructed the existing home and also significantly improved the rear yard of the property. They constructed sheds, gardens, pathways, patios and landscaped areas. They improved an addition access from Princeton Street by installing railroad ties and grading. They added two bridges over the stream and installed an irrigation system. The irrigation system includes a pump house within feet of the stream that pumps water from the stream through underground pipes to irrigate all landscaped areas on the property. Much of the construction and improvements are located within the WWPD. In 1981, the WWPD was redefined by an amendment to the ordinance. At that time, the boundary of the district was defined to 100 feet from the edge of the wetland. Beginning in July 1981, the then owner of the property sought a number of permits for improvements to the property. The prior owners also constructed a storage shed on the property which created some controversy. Despite the numerous visits to the property which must have occurred as a result of the permit requests, there was no enforcement of the WWPD. The current owner Adrienne Goyette, purchased the property from Marion Baker on June 16, 2006. Ms. Goyette's deed includes the dimensions of the WWPD and other easements. The property was also again conveyed subject to the conditions of the WWPD. Ms. Goyette regarded the existing dirt pathway that runs along the southerly side of the property generally parallel to the stream. The pathway is plainly visible on aerial photographs of the property that pre-date her ownership. She also cleared and filled two areas that fall within the WWPD. The work was brought to the attention of the Code Enforcement Officer who issued a cease and desist order in October 2006. He relied on the certification plan for the lot which included the same WWPD as erroneously shown on the approved plan. Subsequently, Ms.



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Goyette retained J.M Gray & Associates to survey the property. The surveyor discovered the error in the initial calculations of the WWPD in January 2007.

The Chairman asked that Mr. Gray leave the displayed plans on the board but Mr. Gray refused.

Attorney John Bisson, also representing the owner, explained that an equitable waiver is a relatively new statutory remedy in land use law designed to relieve property owners from the inequitable application of a zoning ordinance when a lot is determined to violate dimensional requirements of the zoning ordinance. According to RSA 674:33-a, an applicant seeking an equitable waiver must generally establish:

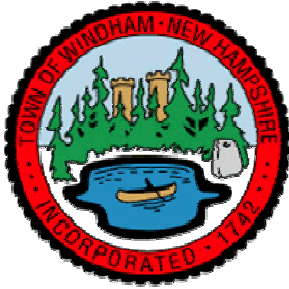
- (a) That the violation was not noticed or discovered by an owner, former owner, owner's agent or municipal official until after a structure in violation had been substantially complete or until after a lot or other division of land in violation had been subdivided by conveyance to a bona fide purchaser for value.
- (b) That the violation was not an outcome of ignorance of the law or ordinance, failure to inquire, obfuscation, misrepresentation or bad faith on the part of any owner, owner's agent or representative, but was instead caused by either a good faith error in measurement or calculation made by an owner or owner's agent, or by an error in ordinance interpretation or applicability made by a municipal official in the process of issuing a permit over which that official had authority.
- (c) That the physical or dimensional violation does not constitute a public or private nuisance, nor diminish the value of other property in the area, or interfere with or adversely affect any present or permissible future uses of any such property.
- (d) Due to the degree of past construction or investment made in ignorance of the facts constituting the violation, the cost of correction far outweighs any public benefit to be gained that it would be inequitable to require the violation to be corrected.

1. The Zoning Board of Adjustment should first establish the property boundary of the WWPD.

The first issue that must be resolved is the proper delineation of the boundary of the WWPD. If properly drawn in light of the actual flow of the stream a significant portion of the property not previously identified as located within the WWPD is actually in the WWPD. Thus, a critical issue for resolution is to determine where the boundary of the WWPD is located.

2. Show that the violation was a result of an innocent mistake.

Ms. Goyette purchased the property from the first purchaser after the subdivision was approved. The prior owners constructed the home and significantly improved the property. Much of what occurred was within the limits of the WWPD as shown on the plan as correctly drawn. The most recent issues that are the subject of the cease and desist order when compared to the improvements in existence at the time of the purchase are slight. An existing access road was graded and two areas on the property were cleared and leveled. Ms. Goyette's actions were a



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natural response to the existing conditions. There was no intention to violate any rule or ordinance. Ms. Goyette proceeded in good faith in light of the condition of the property at the time of her purchase.

3. Show that the mistake was discovered after the violation was substantially built.

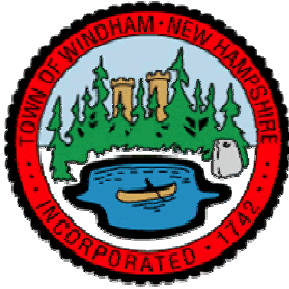
The mistake creating the need for this equitable waiver occurred at the time of the initial approval of the subdivision in 1978. The stream at the center of this dispute was improperly drawn on the plan, therefore the area of the WWPD was incorrect. Had the stream been properly drawn and the WWPD correctly identified, the lot in question would likely not have been improved as it currently is. The area available for the construction of the single family home would have been significantly smaller. Much of the improvements, made by the original owners. Many of the improvements were inconsistent with the restrictions of the WWPD. Despite the number of permit applications submitted to the Town for the property, the Town never took issue with any of the improvements within the WWPD. All of the improvements at issue in the cease and desist order were completed long before the discovery of the error by Ms. Goyette's surveyor.

4. Show that the violation is not a public or private nuisance, or diminishes the value of other property, or adversely affect any present or permitted future uses of the property.

The property is used as a single family home with a large, landscaped yard. These recent changes have not changed the use in any way and have not added any additional burden on the neighborhood. The maintenance of the single family home with the yard and related improvements are consistent with the surroundings and in harmony with the neighborhood.

According to New Hampshire law, a private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another's property. To constitute a nuisance, the activities must cause harm that exceed the customary interferences with land that a land user suffers in an organized society, and be an appreciable and tangible interference with a property interest. A public nuisance is an unreasonable interference with rights common to all member of the community encompassing health and safety issues.

The changes to the property at issue in the cease and desist order do not interfere with the use and enjoyment of any other property. This lot is one of the largest in the area. The pathway that has been graded has been in existence on the property providing an additional access point to Princeton Street for many years. The additional cleared areas, although within the WWPD, are sufficiently far from the stream and wetlands so as not to create any adverse runoff issues. In addition, the areas are not paved and have only a minimal impact on runoff. Any consequences of these issues do not rise to the level of a private or public nuisance.



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Regarding the value of other properties in the area, this property is one of the largest in the neighborhood. The lot most impacted by the changes is Lot 24-G-126 which includes a buffer of approximately 23,000 square feet located in the WWPD. The impact of any changes to the Goyette property is slight. There can be no suggestion that the changes negatively impact the property value of any property in the area.

5. Show that the cost of correction far outweighs any public benefit and that it would be unfair to require the violation be corrected.

The difficulty is attempting to identify the scope of the violation to be corrected. The entire configuration of this property is a violation. Part of the home lies within the WWPD as properly drawn. Many of the improvements to the property including the railroad ties, pump house, irrigation system and sheds were installed in violation of the WWPD. There has been nearly 30 years of work on the property. Enforcement of the WWPD would effectively be a taking for little public gain at this time.

6. An alternative to 1&2 above, show that the violation has existed for over 10 years without any attempt by the municipality to enforce it.

The violation occurred at the time of the original subdivision when this lot was created. That error went unnoticed until January 2007. There was no enforcement action directed at any of the improvements within the WWPD, such as the installation of the railroad ties along the path or the installation of the pump house. Despite the numerous permit applications over the years, the Town undertook no action to address any concern with improvements within the WWPD. To take action now is unfair to the current owner.

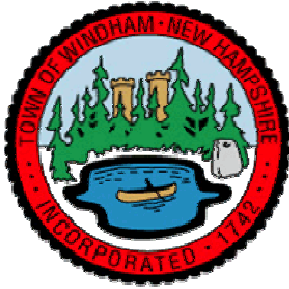
Mr. Murray said that he can agree with the arguments prior to Ms. Goyette purchasing the property but has difficulty with what has happened recently.

The Board asked if any commercial vehicles are being parked in the rear of the property. Mr. Gray said that a trailer and pick up truck have been parked out back.

Dr. James Finn, Chairman of the Conservation Commission, explained that the Commission had no problems with the mitigation plan presented at a recent meeting by Mr. Gray but the recent repairs and improvements should be removed and remediated.

Mr. George Burnet of 11 Princeton Street and Mr. Andrew Hawkins of 14 Princeton Street spoke in opposition to this request.

The Chairman paraphrased a portion of an April 10, 2007 letter from Mr. Al Turner, Director of Planning & Development. In his letter Mr. Turner states that most of the improvements to this property were done years ago by a previous owner in the old WWPD delineation without permits



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and approvals. The recent WWPD disturbances have been cited for violations and do not qualify for an Equitable Waiver.

Mr. Murray motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed 4-0.

Deliberative Session, Case #21-2007

Mr. Murray motioned and Mrs. Fallon seconded the motion to grant an Equitable Waiver as requested from Section 601. Prior to the purchase of the property by Mrs. Goyette requirements A,B,C & D of RSA 674:33-a have been met and for newer areas prior to October 24, 2006 requirements A,C & D of RSA 674:33-a have been met but requirement B has not been met therefore the following conditions apply: The cleared area on the south side of the lot (1819 square feet) is to be remediated per the recommendation of the Conservation Commission, as well, the dirt pathway is to be remediated per the direction of the Conservation Commission and the cleared area on the north side (4043 square feet) is to be restored per the recommendation of the Conservation Commission in a time frame suggested by the Conservation Commission. Motion passed 4-0.

The Chairman granted a five-minute recess.

The Chairman called the meeting back to order.

Lot #17-C-11, Case #28-2007

Applicant – Mark S. Hussey

Owner – Mark S. & Thomas S. Hussey

Location – 1 Summer Street

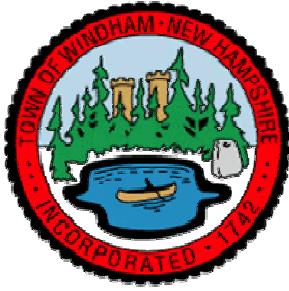
Zone – Residential A

A variance is requested from Section(s) 405.2 of the Zoning Ordinance to permit the razing of an existing one-story seasonal cottage and replace it with a new 24' X 36' two-bedroom, two story dwelling with an 8' X 36' farmers porch.

Mrs. Fallon read the case into the record. Mr. Hussey presented his case and explained that he wants to tear down an existing one-story structure and replace it with a two-story structure. There would be a decrease in the footprint from 24' X 40' to 24' X 36' and a decrease in the number of bedrooms from three to two. Mr. Hussey read the supporting facts into the record. Mr. Murray motioned and Mr. Tierney seconded the motion to go into Deliberative Session. Motion passed 4-0.

Deliberative Session, Case #28-2007

Mr. Murray motioned and Mrs. Fallon seconded the motion to grant an area variance for Case #28-2007 from Section 405.2 of the Zoning Ordinance to permit the razing of a one-story seasonal cottage as stated per the plan previously submitted. Motion passed 4-0.



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Lot #8-C-1, Case #29-2007

Applicant – Edward N. Herbert Associates, Inc.

Owner – Bruce Richardson

Location – 105 Rockingham Road

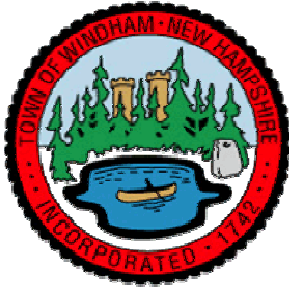
Zone – Business Commercial A

A variance is requested from Section(s) 906 of the Zoning Ordinance to permit a previously approved variance (Case 61-2005) which has expired, without being exercised by recipient, to be re-approved.

Mrs. Fallon read the case into the record. Mr. Peter Zohdi of Herbert Associates presented the case for the owner. A variance was granted for this property on December 13, 2005 for a car lot; nothing needed to be built or paved. Mr. Zohdi requested an extension for an expired variance. Mr. Tierney explained that a variance can not expire before asking for a duration of approval. The problem is the variance has expired it is now dead and the duration of approval would mean nothing because it is already dead, therefore, the Board would be extending nothing. You cannot revive a variance that is dead. Mr. Zohdi said that he was before the Planning Board for a public discussion before the expiration of the variance on November 20, 2006. The Board needs to decide if the variance was acted upon because the plan was brought before the Planning Board before the variance expired. There were no physical changes made to the site. Mr. Tierney said that at any time when you go before a Planning Board and they ask for this or that and you think the time will run out for the variance you should come back before the Zoning Board before the expiration of the variance. Mr. Murray and Mr. Samsel asked if going before the Planning Board exercised the variance. Mr. Tierney explained said if the applicant needed a state dealership license or approval from Shoreland Protection he would still need to return to the Zoning Board before the expiration of the variance. Mr. Tierney asked when the applicant first visited was to the Planning Board. Mr. Zohdi replied that the first visit was on December 5, 2006. Mr. Tierney asked what took so long; the variance was granted in December of 2005 and the applicant did not go in front of the Planning Board until November of 2006. Mr. Zohdi explained that there are many requirements especially with commercial properties. Mrs. Fallon advised the Board that an officer of Lamplighter Village, an abutter, was not notified. Mr. Tom Case of 70 Mountain Village Road said that Lamplighter Village is not an abutter to this property. Mr. Murray motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed 4-0.

Deliberative Session, Case #29-2007

Mr. Murray motioned and Mrs. Fallon seconded the motion to grant a variance as requested from Section 906 to permit a previously approved variance, Case #61-2005 which is expired and exercised by the recipient by going to public discussion. Mr. Murray and Mr. Samsel voted for the motion and Mr. Tierney and Mrs. Fallon voted against the motion. Motion failed 2-2. Mr. Tierney and Mrs. Fallon voted against the motion because it expired. Mr. Murray and Mr. Samsel voted for the motion because the variance was exercised.



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Lot #18-L-1, Case #30-2007

Applicant – Andrew & Christine Lane

Owner – A&C Revocable Trust

Location – 2 Woodvue Road

Zone – Residential A

An Equitable Waiver is requested from Section 601 of the Zoning Ordinance to permit an existing garage to remain in the WWPD.

Mr. Murray advised the Board that he did not want to represent any appearance of impropriety but he is a resident of Canobie Lake and does not have any pecuniary interest in the case.

Mr. Schroeder of 14 Woodvue Road said that he had a related point of order. Mr. Schroeder asked Mr. Tierney to consider if he should sit on this case because he worked for the Building Department and signed the original building permit. Mr. Schroeder asked that Mr. Murray consider whether he should sit on this case.

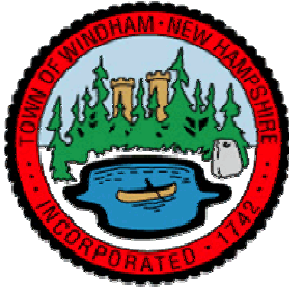
The Chairman granted a five-minute recess.

The Chairman called the meeting back to order.

Mr. Murray asked if Mr. Lane would like a full member board or would like to proceed. Mr. Lane said he feels it will be difficult to get an impartial decision but he is willing to go ahead with the board this evening. Mr. Murray motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed 4-0.

Deliberative Session, Case #30-2007

Mr. Tierney said that he did work for the Town at the time and did a lot of research prior to the building permit being issued and therefore has a lot of knowledge regarding the case and feels as though he can be impartial. Mr. Tierney said as far as being a juror, probably not, because he worked for the Town at the time, but that was four years ago and he wasn't sure how the court would look at that. Mr. Samsel said that the equitable waiver talks to mistakes and procedure and could put Mr. Tierney in a difficult position. Mr. Murray said he is a resident and has no problem addressing the issues but the difficulty is that no matter what decision he makes half the neighborhood will hate him. Mr. Murray said he believes he would not be disqualified from a jury for this case. Mr. Murray said he has offered contributions to the Canobie Lake Association and he would let the Board Members decide whether he should sit on this case. Mr. Tierney recused himself from the case. Mr. Murray decided not to recuse himself and will hear the case on its merits. Mr. Murray motioned and Mrs. Fallon seconded the motion to go back into Public Session. Motion passed 4-0.



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Mr. Lane said that he heard Mr. Tierney's comments for recusing himself but that would apply to any decision because he was the Building Inspector for the entire Town and it would not bother the Lanes to have Mr. Tierney sit on the case. Mr. Murray being a member of the Canobie Lake Protective Association, could present a conflict, but Mr. Lane said that he was willing to believe the Members would be impartial.

There was a discussion regarding the best date to hold a special meeting to hear the cases involving 2 Woodvue Road.

Mr. Al Letizio of 5 Woodvue Road advised the Board that he is an abutter to the Lane's property and has not been considered or notified as an abutter. Mr. Letizio sent a letter regarding notification as an abutter. Mr. Samsel suggested that Mr. Letizio be added to the list and Mr. Lane agreed to add Mr. Letizio to the list as an interested party but not as an abutter. Mr. Lane said that he owns three lots and Mr. Letizio is not an abutter to the lot where the garage stands.

Mr. Murray motioned and Mr. Tierney seconded the motion to continue Case #30-2007 to the May 15, 2007 meeting at 7:00 PM. Motion passed 4-0.

Mr. Murray motioned and Mrs. Fallon seconded the motion to move Case #17-2007 from the May 22, 2007 meeting to the May 15, 2007 meeting at 7:00 PM. Motion passed 4-0.

Mrs. Dunn of Woodvue Road said there is a ruling regarding returning to the Zoning Board for the same or similar variances.

Approval of March 27, 2007 Minutes

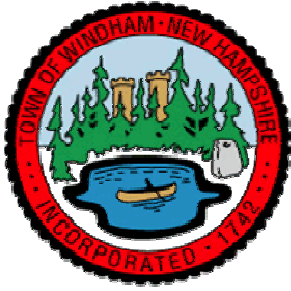
Mrs. Fallon motioned and Mr. Tierney seconded the motion to approve the March 27, 2007 minutes as submitted. Motion passed 4-0.

The Board decided that the March 13, 2007 minutes did not need to be amended. Mr. Tierney motioned and Mr. Murray seconded the motion to approve the March 13, 2007 minutes as submitted. Motion passed 4-0.

Other Business

Mr. Murray motioned and Mrs. Fallon seconded the motion to pay invoice #39791 in the amount of \$2952.00 for services rendered by Attorney Loughman. Motion passed 4-0.

The Chairman asked that an advertisement be put in the local paper for alternate members to the Zoning board. Mrs. Kovolyan will put the ad in the Windham Independent.



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The Chairman distributed certificates and volunteer pins to the Members commemorating National Volunteer Week.

The members discussed the By-laws. They will make changes, corrections etc. and discuss them at the next meeting.

Mail

- April 3, 2007 letter from Attorney Campbell requesting a consultation.
- April 5, 2007 invoice from Attorney Loughman.
- April issue of *Town and City*.
- Copy of Al Turner's e-mail regarding CTAP Community Workshop scheduled for April 19, 2007 at PSNH in Manchester.
- April 10, 2007 letter of resignation from Al Souma.

Mr. Murray motioned and Mr. Tierney seconded the motion to adjourn. Motion passed 4-0.

The next meeting of the Zoning Board of Adjustment is scheduled for April 24, 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.