



# BOARD OF ADJUSTMENT

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

## Zoning Board of Adjustment Minutes November 24, 2009

### Board Members

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

### Staff

Michael McGuire – Building Inspector  
Patricia Kovolyan – Secretary

### Seat Alternates

The Chairman seated Mr. Richardson for Mr. Murray.

### Lot #24-E-42 #49-2009

Applicant – James K. Hawko  
Owner – James K. Hawko  
Location – 249 Range Road  
Zone – Residential A

A variance is requested from Section(s) 601.3 of the Zoning Ordinance to permit the construction of a detached 24' X 24' garage within the WWPD.

Mrs. Fallon read the case into the record. Mr. James Hawko presented his case. Mr. Hawko advised the Board that back in April of 2000 he received a variance for an 860 square foot addition. The portable garage he had been using collapsed from the weight of the snow. Mr. Hawko would like to store his boat, car and truck in the proposed garage. Part of the existing driveway black top would be used as the floor of the proposed garage. The garage would be 102 feet from Golden Brook. No fill will be needed. The grade will not be changed. Mr. Hawko submitted a letter of support from Patrick Boylen of 251 Range Road that was marked as Exhibit A. Mrs. Fallon read the letter of support into the record. Mr. Hawko also submitted six photos that were marked as Exhibit B. Mr. Hawko read the supporting facts into the record.

Mr. Alosso motioned and Mr. Tierney seconded the motion to go into Deliberative Session.

**Motion passed 5-0.**



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### **Deliberative Session, Case #49-2009**

Mr. Tierney motioned and Mr. Richardson seconded the motion to grant a variance for Case #49-2009 per the plot plan submitted. **Motion passed 5-0.**

### **Lot #24-C-27 #50-2009**

Applicant – John & Barbara Steere

Owner – John & Barbara Steere

Location – 17 Rock Pond Road

Zone – Residential A

A variance is requested from Section(s) 401 & 702 Appendix A-1 of the Zoning Ordinance to permit the construction of a 6' X 36' farmers porch 20' from the side setback where 30' is required.

Mrs. Fallon let the Board know that she lives on Rock Pond Road. The Chairman asked if Mrs. Fallon had any problem hearing this case. Mrs. Fallon did not have any problem sitting on the Board for this case. Mrs. Fallon read the case into the record. Mr. John Steere, the owner, presented his case. Along with the 6-foot deep proposed porch the brick steps need to be repaired. When the house was built the side setback was 20-feet. Mr. Steere read the supporting facts into the record.

Mr. Alosso motioned and Mr. Tierney seconded the motion to go into Deliberative Session. **Motion passed 5-0.**

### **Deliberative Session, Case #50-2009**

Mr. Alosso motioned and Mr. Tierney seconded the motion to grant a variance from Section(s) 401 & 702 Appendix A-1 of the Zoning Ordinance to permit the construction of a 6' X 36' farmers porch 20' from the side setback where 30' is required. **Motion passed 5-0.**

### **Lot #16-F-1 #51-2009**

Applicant – Tracy & Debra Talcott

Owner – Tracy & Debra Talcott

Location – 16 Ash Street

Zone – Residential A

A variance is requested from Section(s) 702 Appendix A-1 of the Zoning Ordinance to permit the razing & reconstruction of a new dwelling on the same footprint with a 22-foot front (shoreline) setback where 50-feet is required on a .91 acre lot where 50,000 square feet is required.

Mrs. Fallon read the case into the record. Attorney William Mason, representing the owner, presented the case. Attorney Mason submitted a packet containing the following information:



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- Tax Card.
- Two plans showing elevation.
- Shoreland Impact Permit #2009-01291 from NH DES, Expiration Date 9/25/2014.
- Approval for Construction #CA2009098734 for a septic system from NH DES Subsurface Systems Bureau.

Attorney Mason said that this is a 40,000 square foot lot. The proposed house will be built on the same footprint. The existing garage will remain on the site. Attorney Mason read the supporting facts into the record.

Mr. Alosso motioned and Mr. Tierney seconded the motion to go into Deliberative Session.  
**Motion passed 5-0.**

### **Deliberative Session, Case #51-2009**

Mr. Tierney motioned and Mr. Richardson seconded the motion to grant a variance for Case #51-2009 from Section(s) 702 Appendix A-1 of the Zoning Ordinance to permit the razing & reconstruction of a new dwelling per the plan submitted. **Motion passed 5-0.**

### **Lot #16-D-450, Case #38-2009 Request for Rehearing**

Applicant – Arthur & Tom Klemm

Owner – Linda L. Brown Rev. Trust

Location – 32 Indian Rock Road

Zone – Village Center District

A rehearing is requested regarding the decision made by the Zoning Board of Adjustment on October 13, 2009.

The Chairman read the request into the record. The Chairman asked for comments from the Board regarding the issue of *standing*. Mr. Tierney asked if this is an abutter directly affected or a party of interest.

The Chairman read a portion of RSA 677:2 into the record. *Within 30 days after any order or decision of the Zoning Board of Adjustment, or any decision of the local legislative body or a board of appeals in regard to its zoning, the selectmen, any party to the action or proceedings, or any person directly affected thereby may apply for a rehearing in respect to any matter determined in the action or proceeding ...* Mr. Samsel said that we talked to this applicant's attorney at the original hearing. Mr. Samsel said he believes the applicant is a party to the decision.



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Mr. Richardson said since the applicant hired an attorney they must feel they are affected and he felt that the applicant qualified as being affected.

Mr. Tierney read RSA 677:7 into the record. ***Parties in Interest.** Any person whose rights may be directly affected by the outcome of the appeal may appear and become a party, or the court may order such person to be joined as parties as justice may require.*

Mr. Samsel said that it is better to err on the conservative side and acknowledge the *standing*.

Mr. Richardson motioned and Mrs. Fallon seconded the motion to acknowledge standing to the applicant for this request for a rehearing. **Motion passed 3-2.** Mr. Alosso and Mr. Tierney voted against the motion.

The Chairman mentioned that there are 42 items in the first document and 19 in the second document to cover. The Chairman said that he would go through each section and allow discussion of any item in that section.

Mr. Tierney said there is nothing on the first page that shows new information or technical error.

Mr. Samsel read from Page 1, Item #2 of the request. *The minutes of the meeting do not detail what any witness stated other than the proponent's attorney. The 3-2 decision merely stated the majority found "unique characteristics of the property", without stating what they were. The minority "voted against the motion because the owner has reasonable use and it violates the spirit and intent of the Village Center District".* Mr. Samsel disagreed because the minutes are quite detailed. The applicant may have had access to unapproved minutes which may have been shorter. Mrs. Fallon said that during the Deliberative Session it was stated that the property was unique but no definition was given. Mr. Samsel said that during the Deliberative Session the five points are not always discussed. A couple of cases have gone to court and one of the arguments was that the Board did not talk about the reasons why. The judge said just by our motion and the fact that it was read into the record affirms that we had considered those points. Mr. Samsel said he talk to the uniqueness of the property and the fact that Route 111 is right in the middle of that Village Center District.

Mr. Alosso said that he did not find anything to discuss from a technical point of view or new information on Page 2, items 7 through 15 of the request.

Mr. Tierney wanted to discuss item 11 on page 2 of the request. *The application does not state the relevant factors under New Hampshire law to grant a use variance.* Mr. Samsel said that there is a wide range of clarity and the five points were read into the record. Mr. Alosso said that is a broad based statement (Item 11). Mr. Alosso went on to say, the fact of the matter is he is



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totally comfortable with the discussion, and the length of time spent on the case. There is nothing from a technical basis and no new information presented in the 42 points.

Items 21 through 34 Pages 3 & 4. The Chairman read Item 25 into the record. *As to the second factor, there is nothing unique about the property. "The landowner must show that the hardship is a result of specific conditions of the property and not the area in general".* The Chairman said the property is unique because of Route 111 and his vote was based on the uniqueness of the property. Mrs. Fallon said the reason she denied the original case was because she did see any unique characteristics of the property and the owner has reasonable use.

The Chairman read Item 34 into the record. *The pedestrians and bicyclists contemplated in the master plan will be harmed by this proposal and there is no loss to the applicant since it appears he is only considering buying the property on speculation. In addition, the use is not consistent with the current aesthetically pleasing and less intensive retail uses.* Mr. Alosso said that whatever you put there could be harmful to pedestrians. Mrs. Fallon said this is a safety issue. The Village Center District allowed for connectivity and pedestrian access.

Items 35 through 42 Page 5. The Chairman read Item #41 into the record. *The granting of the requested variance is, in effect, an improper attempt to rezone a portion of the Village Center District.* Mr. Richardson said that the Board did not rezone the property. The Board makes exceptions to sections of the zoning ordinance.

### Document #2

The Chairman said Items 1 through 15 are comments, no new information.

The Chairman read Items 16 through 19, Fraud on the Tribunal into the record.

*16. At the first hearing, the applicant and/or others on behalf of the applicant, represented that the Windham Planning Board never considered whether gas stations should be allowed in the Village Center District at or prior to the time of its enactment in 1999.*

*17. In fact, it was considered and the Board decided to exclude them. See attached affidavit of State Representative Margaret Crisler.*

*18. Such conduct is deemed "fraud on the tribunal", see eq State v. Moguin, 105 NH9, 12 (1963) and is akin to judicial estoppel which bars an action or defense. See Cohoon v IDM Software, 153 NH 1, 3 (2005).*

*19. Thus, the applicant's application should also be denied on this basis..*

The Chairman read into the record the following affidavit signed by Margaret Crisler and notarized.



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*My name is Margaret Crisler and I reside at 10 Sunridge Road in Windham, New Hampshire, and I further state the following:*

- 1. That I am a New Hampshire State Representative and I formerly served three terms on the Board of Selectmen for the Town of Windham.*
- 2. I was a Selectmen and Selectmen's representative to the Planning Board in 1998 and 1999. I was present and participated in the numerous workshops and planning board hearings when the Village Center District was discussed throughout said time period.*
- 3. The issue of gas stations was specifically addressed during these deliberations and it was determined that gas stations were not to be an allowed use in the district. The district was to be a pedestrian friendly area and gas stations were not to be allowed. In fact, the town meeting vote was roughly 2 to 1 in favor of establishing the district (1417 for and 737 against).*
- 4. Consequently, gas stations were not included as a permitted use in the Village Center District section of the Town Ordinance.*

Mr. Alosso said that there was nothing in the ordinance precluding a gas station being there and if the Planning Board and Ms. Crisler thought it shouldn't have been they should have put it in writing at that point in time. Mr. Richardson said he did not agree with Ms. Crisler. Mr. Richardson attended those meetings and does not believe that it was ever stated that gas stations were not an allowed use. If that were so it would state that in the ordinance. Mr. Tierney asked why the minutes of that meeting weren't submitted. Mr. Richardson said that Ms. Crisler's affidavit is someone's interpretation of what happened several years ago. It is not substantiated.

The Chairman said this is a second bite of the apple. This information should be presented the night the request is heard.

Mr. Alosso motioned and Mr. Richardson seconded the motion to deny the request for a rehearing of Case 38-2009 because there was no technical error and no new information. **Motion passed 4-1.** Request failed. Mrs. Fallon voted against the motion.

### **Approval of November 10, 2009 Minutes**

The November 10, 2009 minutes will be approved at the December 8, 2009 meeting.

### **Mail**

- Issue of *Town and City*.



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### Miscellaneous Board Business

The Chairman said that Mrs. Dunn's request to be an alternate member of the Zoning Board would be continued to the next meeting. The Chairman would like to have a full board in attendance.

Mr. Tierney motioned and Mr. Alosso seconded the motion to adjourn. **Motion passed 5-0.**

The next meeting of the Zoning Board of Adjustment is scheduled for December 8, 2009 at 7:30 PM in the Community Development Department.

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