



BOARD OF ADJUSTMENT

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

Zoning Board of Adjustment Minutes December 8, 2009

Board Members:

Mark Samsel – Chairman
Jim Tierney – Vice-Chairman
Dianna Fallon – Secretary
John Alosso – Member
Tom Murray – Member
Bruce Richardson – Alternate
Al Souma – Alternate

Staff

Michael McGuire – Building Inspector
Paula Wrenn – Minute Taker

Lot #18-L-1, Case #17R-2009

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

A variance is requested from Section(s) 601 of the Zoning Ordinance to permit a garage to remain in its current location.

Mrs. Fallon read Lot #18-L-1, Case #17R-2009 into the record. Mr. Tierney and Mr. Murray recused themselves from Case 17R-2009. The Chairman asked Mr. Richardson to sit in for Mr. Tierney and Mr. Souma for Mr. Murray.

Attorney Greg Michael, representing Andrew & Christine Lane, displayed plans and presented the case. The plan shows a garage located in a particular area on their parcel. The problem is part of the WWPD and the distance between the culvert that runs under Woodvue joining Canobie Lake. Canobie Lake in itself “is not a protected area”. The area relates to the underground pipe which triggers the distance and that was confusing to the Town at one point since a permit was issued and the garage was constructed. One of the key features that the Board discussed in the Deliberative Session at the July 27, 2009 meeting was another available location. A fair amount of time at that meeting was focused on this issue and Attorney Michael believes that was somewhat fatal to the vote that occurred on July 27, 2009. This was a Use Variance and that a lot of litigation got them to the point of a 'Use Variance'. The focus at that



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time, at least what Attorney Michael suggested in his letter to the Board, was that it is the *Boccia* criteria “*is there another available location*”, which was discussed at length at the Board's Deliberative session. Attorney Michael does not believe that applies and wants to address the *Simplex* criteria which is the current criteria to use for the Use Variance request. Another concept that came out in that meeting was the theory of self-created creative hardship.

Attorney Michael pointed out that in a recent NH Superior Court hardship case 'Harrington v. Warner' this concept was discussed and the court stated *the fact that the hardship was self created because the landowner had actual constructed knowledge of the restriction, the land owner can introduce evidence of good faith. Good faith can be established in several ways showing that the owner has complied with the rules and procedures showing that the owner had relied on the representations of zoning authorities of builders or showing that the owner had no actual or constructive knowledge of the requirement*”.

Attorney Michael suggested to the Board that this area in question is clearly a good faith alliance that a permit was issued. Attorney Michael's clients had no thought or understanding that a pipe in the ground was a source of WWPD setbacks. Therefore, the Lane's did procure a permit and went ahead and constructed a garage.

Attorney Michael believes that the criteria of Simplex were met. Attorney Michael addressed the distinction of the *Boccia* “is there another reasonable location” criteria and the Use variance criteria of *Simplex*. Attorney Michael believes that three (3) criteria are met. The nature of the WWPD in the area being questioned is a pipe in the ground. The pipe in question is a public pipe not a private pipe. The WWPD in this situation is an arbitrary setback; it does not meet any reasonable basis test where the WWPD is really designed for open-water, open-area situation.

Attorney Michael pointed out that this is a State approved location. Presented photos to the Board marked as Exhibit A.

Mr. James Gove of Gove Environmental Services, talked about the WWPD and that a great deal of WWPD has to do with water quality. The impact that comes from the area of the garage location from the conditions of impervious surface, not bringing into account the homes and lawns, but just the roads themselves that drain down into this location, the increase for impervious surface for the garage area is 7%. The impervious surface from the roads is sand, salt, weather that drips off the cars that enters the pipe. The garage will not have any detrimental effect on the quality of water as there are no pollutants such as sand and salt. The garage is virtually not visible. The garage has no impact on the wildlife, as most of the wildlife moved away when all the previous construction went on in the area. Mr. Gove states that this garage in its present location will have no impact on the WWPD.



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The Chairman asked Mr. Gove to talk about the delineation of where the WWPD is relative to the garage location. As the Ordinance was written, Canobie Lake is not part of the WWPD. There is a wetland greater than one acre on the north side of Woodvue which 10+ acres drains into and essentially drains into the pipe. There was a 100' buffer put around the wetlands which was extended down to match the pipe that essentially ended at the lake. There is also another wetland area over an acre in size with a pipe and has a contributory area of greater than 10 acres in size. Mr. Gove states that the garage is within the WWPD. The flow from the garage sheds in both directions downstream from the pipe. The garage is considered a 'green' surface. The amount of sand and salt that is put on the driveway is negligible.

Mrs. Fallon asked Mr. Gove about Section 601.1.2 *“preserve wetland areas which provide flood protection, nutrient absorption, and augmentation of stream flow during dry periods”*. Mr. Gove explained the flow from the garage goes back to the lake and the nutrients are absorbed prior to entering the lake. This particular area has no impact on the flood storage.

Mr. Gove explained to Mr. Alosso that if the location of the garage changed there would be no impact of the 7% impervious surface.

Attorney Michael reviewed the other four (4) criteria to the Board. After which, Attorney Michael strongly suggested that the Board grant the Variance request.

Mr. Alosso wanted clarification if the garage was completely within the WWPD as was stated earlier in the evening. Attorney Michael explained that clarified there is a small portion that is not in the WWPD. Mr. Souma asked if there was any communication between the town and Mr. & Mrs. Lane regarding the construction of the garage during all this time. Mr. Andrew Lane explained there was an enormous amount of communication during the process. Mr. Lane felt victimized during this process. It was a “stop and go” process and Mr. Lane solved all the problems as Mr. Turner requested. Mr. Lane stated he acted in 'good faith'. The Chairman asked what other permits the Lane's received.

- Electrical
- Heating & Plumbing

Ms. Diane Ciccone, 45 Abbott Road, spoke in favor of this request and submitted a letter stating same.

Mr. Thomas Murray, 29 West Shore Road, spoke in favor of this request.

Mrs. Fallon read a letter of support dated December 2, 2009, from Mrs. Patricia Kovolyan of 3 Woodvue Road.



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Attorney Michael Donovan, representing Mr. Al Letizio and Mr. Bill Schroeder submitted a packet marked as Exhibit B.

Attorney Donovan started his presentation showing the location of the garage in conjunction with the pipe. The question was asked earlier in the meeting by Mr. Souma if there was communication from the town with the Lane's in regard to the construction of the garage. Attorney Donovan presented two additional documents; (1) Letter from Attorney Bernie Campbell to the Lane's attorney dated February 14, 2005 warning them "*against continuing with construction at their own risk while this matter was being appealed*"; (2) Letter from Mr. Al Turner to the Lane's dated May 3, 2006 "*telling them to stop construction*" (Exhibit C). Attorney Donovan requested that all information, including exhibits, from the July 28, 2009 meeting be incorporated into tonight's meeting. Attorney Donovan felt the Board made the right decision at the July 28, 2009 meeting. He discusses the reasons why this is not a 'hardship':

- going from a 2 car garage to 4 car
- lot is not distinguishable from many other lots in town
- build a smaller garage
- nothing unusual in the town of having a lot with a brook beside it which the WWPD is appended to

Attorney Donovan talks about one of the purposes for the WWPD is Section 601.1.1 of the Zoning Ordinance "*to prevent the development of structures for other land users within the WWPD that would contribute to the surface of the water and groundwater contamination*". Attorney Donovan felt there is no unnecessary hardship; this is a self-inflicted hardship. He discussed the "Simplex" variance and explained why the Lane's case is not the same. Attorney Donovan is not arguing that there are other uses of the WWPD that are reasonable; therefore, you shouldn't make a garage use for it. Attorney Donovan argued that the prohibition of structures is not unreasonable given the size of the lot and all the other places you can put a garage on it. This is not the same thing as arguing the availability of other uses which is why Simplex tells you that you can no longer use to defeat a variance.

Attorney Donovan suggested wording for denying the variance to the Board "*unnecessary hardship does not exist because there are no unique conditions which cause restrictions of the WWPD to interfere with the reasonable use of the Lane's lot. The lot is larger than most similarly zoned lots in the Canobie Lake neighborhood and can accommodate a garage without a use variance of the WWPD. The lot is no differently situated than the many other lots in Windham that lie partially within the WWPD district in which you cannot build structures.*"

Attorney Donovan also suggested that the Board deny this variance in the "spirit of the ordinance".



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Attorney Donovan talked about a signed certification and acknowledgment for a "Motion of Rehearing" to the town by the Lane's. He believes that the Lane's want to go back to two lots and have something to sell as a habitable structure on that lot.

Attorney Donovan asked the Board to make the right decision as there is no unnecessary hardship and is contrary to the spirit of intent to the ordinance and is simply not just.

Mr. Souma questioned Attorney Donovan asking if the Lane's have two garages and want to build four why can't they. Attorney Donovan said they can if there is a special condition. He believes that they can't get a variance to do that because it is not a 'special condition of the land'. He talked about the Crosley decision that had a one-car garage and getting variances from Pelham ZBA to build a big two-car garage and the Court said there is no unusual circumstance in needing a two-car garage.

Attorney Donovan would like the drawing by Mr. Al Turner, that was attached to his letter of January 22, 2007, be entered into the record. Mr. Turner wrote to the Lane's denying the permit after the ZBA identified the location of the WWPD. The drawing shows the 100' radius. (*Attorney Donovan located Mr. Turner's January 2, 2007 drawing and it was marked as Exhibit D.*)

Ms. Betty Dunn spoke in opposition and refers to a letter of 2004 from the Conservation Commission addressing the WWPD issue. She asked if we are protecting a pipe or the WWPD. We should be protecting the WWPD in the spirit and intent of the ordinance. Ms. Dunn explained to Mr. Alosso that there is not a state regulation for the WWPD, however, there is the Shoreland Protection Act. Mr. Murray mentioned that the Army Corp of Engineers also has standard setbacks for the State.

Mr. William Schroeder of 14 Woodvue Road said that there is no wetland setback requirement by the State.

Mrs. Fallon read in summary format the following letters of opposition into the record:

- Albert & Patricia Letizio of 5 Woodvue Road
- James & Louise Labadini of 1 Woodvue Road

Mr. Andrew Lane spoke of "good faith" and explained that whenever they were told to stop construction or abandon, they did so.

Attorney Michael stated that the Lane's parcel of land is unique. There are very few parcels that are impacted by a pipe. This is the only WWPD issue. The lake is exempt, the garage meets



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State standards. He stated that this case is about applying the proper standards to this particular location and those standards are clearly and unequivocally met.

The Chairman asked Attorney Michael what the cost would be to remove the garage. He replied \$25,000-\$30,000 to remove it and \$60,000 to rebuild it.

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

The Chairman granted a 5-minute recess.

The Chairman called the meeting back to order.

Deliberative Session, Lot #18-L-1, Case #17R-2009

Mr. Alosso motioned and Mr. Richardson seconded the motion to grant a Use Variance for Case 17R-2009 from Section 601 to permit the garage to remain in its current location. The Chairman suggested that two points be highlighted in the motion:

- from a hardship standpoint that it is unique property relative to others in the area
- the proposed use is a reasonable one

Motion passed 4-1. Mrs. Fallon denied the motion because she doesn't believe the property is unique in its surroundings and it violates the spirit and intent of Zoning Ordinance 601.

The Chairman replaced Mr. Richardson with Mr. Tierney and Mr. Souma with Mr. Murray for the balance of the meeting.

Lot #17-L-78, Case #23-2009 (Continued from July 14, August 11, September 22, and October 27, 2009)

Applicant – Edward N. Herbert Associates, Inc.

Owner – Alexandra Tokanel

Location – 30 Horseshoe Road

Zone – Residential A

A variance is requested from Section(s) 702 Appendix A-1 of the Zoning Ordinance to permit the completion of a deck that was started without the benefit of a permit and constructed in violation of the November 2005 Zoning Board approval.



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Lot #24-F-193 #44-2009(Continued from October 27 and November 10, 2009)

Applicant – Edward N. Herbert Associates, Inc.

Owner – EJR Jr. Development, LLC

Location – 67 Heritage Hill Road

Zone – Rural

A variance is requested from Section(s) 601.4.5 of the Zoning Ordinance to permit a portion of the pool, retaining wall and associated fill to be placed in an area which would otherwise be within an extended portion of the WWPD and not permitted.

Lot #24-F-194 #45-2009 (Continued from October 27 and November 10, 2009)

Applicant – Edward N. Herbert Associates, Inc.

Owner – EJR Jr. Development, LLC

Location – 71 Heritage Hill Road

Zone – Rural

A variance is requested from Section(s) 601.4.5 of the Zoning Ordinance to permit a portion of the pool, retaining wall and associated fill to be placed in an area which would otherwise be within an extended portion of the WWPD and not permitted.

Mr. Zohdi asked the Board to postpone the following cases until the next ZBA meeting (January 12, 2010) as Attorney William Mason had to leave due to an emergency.

Mr. Alosso motioned and Mrs. Fallon seconded the motion to move these three cases to the next meeting in 30-days. Motion passed 5-0.

Mrs. Fallon motioned and Mr. Tierney seconded the motion to reconsider the above motion to hear the three cases in 28-days. Motion passed 5-0

Mr. Alosso motioned and Mr. Tierney seconded the motion to hear these three cases at the January 12, 2010 meeting. Motion passed 5-0.

Approval of November 10, 2009 Minutes

Mrs. Fallon motioned and Mr. Tierney seconded the motion to approve the November 10, 2009 Minutes. Motion passed 5-0

Approval of November 24, 2009 Minutes

Mr. Alosso motioned and Mr. Richardson seconded to approve the November 24, 2009 Minutes. Motion passed 5-0



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Miscellaneous Board Business

Mr. Alosso motioned and Mrs. Fallon seconded the motion to approve Ms. Betty Dunn to be an Alternate Member to the Zoning Board of Adjustment. Motion passed 5-0

Mr. Alosso motioned and Mrs. Fallon seconded the motion to adjourn. Motion passed 5-0.

The next meeting of the Zoning Board of Adjustment is scheduled for January 12, 2010 at 7:30 PM.

These minutes are in draft form and are respectively submitted for approval by Paula Wrenn.