



# BOARD OF ADJUSTMENT

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

## Zoning Board of Adjustment Minutes May 11, 2010

### Board Members

Mark Samsel – Chairman  
Tom Murray – Vice-Chairman  
Dianna Fallon – Secretary  
Elizabeth Dunn – Member  
Heath Partington – Member  
Jim Tierney – Alternate (Excused)  
John Alosso – Alternate (Excused)

### Staff

Laura Scott – Community Development Director  
Patricia Kovolyan – Administrative Assistant

### Discussion of Withdrawal of Case 6-2010, Lot 2-A-76

Applicant – Cellco Partnership d/b/a Verizon Wireless, John Weaver, Agent  
Owner – John & Emilia MacDonnell  
Location – 111 North Lowell Road  
Zone – Rural

A variance is requested from Section(s) 602.1 of the Zoning Ordinance to permit the construction of a wireless telecommunication tower and support structures.

The Chairman gave a brief history of Case 6-2010. At the April 20, 2010 meeting the applicant withdrew his request prior to the applicant rebuttal phase of the hearing. The Zoning Board decided to continue discussion of Case 6-2010 in order to get an opinion from Town Counsel regarding the withdrawal. There is no application or case in front of the Zoning Board because the applicant withdrew his request. The Board was strongly advised by Town Counsel not to discuss speculative possibilities on future applications. If the Zoning Board engaged in any conversation regarding future applications the Board would be at risk for recusal due to bias. At this point there is no decision to be made by the Zoning Board.

Mrs. Dunn said that the issue is settled but she would agree to give the abutters some limited time to argue the issue of whether or not the Zoning Board still has jurisdiction but did not want discussion regarding whether or not this variance should have been granted.

Mrs. Fallon's doesn't want to be put into a situation where she would be prejudiced in any way



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because of information given that would impact a future case. The Chairman is acting in the best interest of the abutters by not opening the case.

Mr. Partington said from a common sense point of view Town Counsel's advice is the best road to take for all the parties involved.

Mr. Murray said he agrees with Town Counsel's advice. The case has been withdrawn therefore there is no further action to be taken by the Zoning Board.

Mrs. Dunn motioned and Mrs. Fallon seconded the motion to make public the April 29, 2010 letter from Attorney Campbell. **Motion passed 5-0.**

The Chairman advised Mr. Joel Dube of 4 Beacon Hill Road not to go any further than a procedural question. Mr. Dube mentioned Fisher vs. Dover would apply to this case. The Chairman asked Mr. Dube to end his testimony. Mr. Dube said he will be faced with another \$10,000.00 in attorney's fees for the next application. Mr. Dube went on to say that he is a taxpayer and the Board is not doing him justice; they think they are but they are not. Mr. Dube said that he has done more research on this case than Town Counsel and more research than anyone on the Board. It has consumed his life and his house is at stake and these "clowns" put it at stake and he resents it. Mr. Dube also resents the fact that this has fallen on his shoulders, it should be the Board's responsibility to protect the ordinance and his house. He can count on one hand the number of questions asked by the Board regarding gap in coverage. Mr. Dube's brother said to let Mr. Joel Dube speak because they sat thru three hours of Mr. Hildreth's lies.

The Chairman asked for order and then said it is difficult for him as Chairman to shut off conversation, but legally the Board has a responsibility that it has to adhere to. This case could be taken to another Board in another town if the Board is not careful.

Mr. Bryan McDade started to speak about the Morgenstern vs. Rye Case but the Chairman stopped him because Morgenstern vs. Rye deals with a case where the application is in play. Right now there is no application in front of the Board.

Mr. Bob Leonard of 88 Meetinghouse Road asked if another application is submitted for a cell tower will everyone be starting back at square one. Mrs. Dunn replied stating that if there is another application for a cell tower on that site the first thing the Board would look at is if whether or not to even hear it. The procedure would be defined at that time.

Attorney Richardson, representing Mr. Joel Dube, said this is a duly noted meeting and the Board has not granted the request to withdraw, therefore the case has been kept open. Under those circumstances the Board can continue to hear evidence. The problem with bias coming to the Board is when it comes outside of the context of a duly noticed hearing. It was suggested that



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once the applicant withdraws the case is over and done with and that is the general rule in New Hampshire. RSA 676:7 states this Board shall hear from abutters. That right to be heard is meaningless if it is not accompanied by a decision. The issues are likely to come again. The Members of the public are going to be horribly disserved if they have to start over again. At this point the Chairman ended further discussion.

### **Lot #17-L-78-A-1 Case # 8-2010 (Continued from March 23, 2010 & April 13, 2010)**

Applicant – Peter Bronstein  
Owner – Brett & Larissa Nigro  
Location – 28 Horseshoe Rd.  
Zone – Residential A

A variance is requested from Section(s) 401, 702 and Appendix A-1 and 1.10b of the proposed Cobbetts Pond Watershed Overlay District of the Zoning Ordinance to permit a garage / shed with dimensions of 16' - 3" x 24' - 4" to remain in place on a non-conforming lot of 2,578 sq ft with front setback of 8' +/- , side setback of 7.5' and 12" and back setbacks of 12" and 18" with impervious area exceeding 30% and building coverage of less than 20%.

The Chairman advised the Board that Attorney Bronstein is withdrawing Case #8-2010.

Ms. Scott, Community Planning Director, said the reason for the application was because of a code enforcement action by the Department. The applicant has been looking for a home for the shed as opposed to asking for a variance.

The Chairman read into the record the following email that was sent by Attorney Bronstein to Attorney Campbell. *As per our various communications of this day, please be advised that on behalf of our clients, Mr. and Mrs. Nigro, we are hereby withdrawing the Variance Application as referenced above (Nigro, 28 Horseshoe Road – Variance Application – Case #8-2010) scheduled for hearing before the ZBA this evening and will agree to execute a Forbearance Agreement so long as no charges or penalties are incurred prior to October 1, 2010 by which date the structure in question will be removed.*

### **Lot # 1-B-14 Case # 18-2010**

Applicant – Steven Johnson  
Owner – Steven Johnson  
Location – 3 William St  
Zone – Rural

A variance is requested from Section 702 and Appendix A-1 of the Zoning Ordinance to permit the building of an attached 10 ft x 10 ft shed to the left side of the dwelling with a side setback of 25 feet where 30 feet is required.



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Mrs. Fallon read the case into the record. Mr. Steven Johnson presented his case and submitted photos that show why he could not place the shed in another location on his property. One side has a propane tank, vents and an oil fill. On the back side there are boiler and dryer vents. The Chairman marked the photos as Exhibits A & B. Mr. Johnson read the five supporting criteria into the record.

Mr. Murray suggested the applicant try placing the shed in the back of the house because it looks as if a variance wouldn't be needed if the shed was located in the rear.

Mr. Johnson would like to continue the case to the next meeting (May 25, 2010) so that he could see if the back would be the best option and what clearances would be needed.

Mrs. Dunn motioned and Mr. Murray seconded the motion to continue Case #18-2010. **Motion passed 5-0.**

### **Lot # 8-B-4603 Case # 19-2010**

Applicant – Ronald & Marjorie Smith

Owner – Ronald & Marjorie Smith

Location – 9 Goodhue Rd.

Zone – Rural

A variance is requested from Section(s) 702 and Appendix A-1 of the Zoning Ordinance to permit the addition of a two-stall garage with exercise room, computer nook and bathroom above with a side setback of 25 feet where 30 feet is required.

Mrs. Fallon read the case into the record. Mr. Ronald Smith submitted an aerial of the property and presented his case. Mr. Smith explained why the addition could not be placed somewhere else on the property. On one side it is only 37-feet to the property line, behind the house there is a swimming pool, deck and screened porch. The third side has an existing driveway so it made sense to locate the proposed garage at that location. Mr. Smith read the five supporting criteria into the record.

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

### **Deliberative Session, Case #19-2010**

Mrs. Dunn reviewed the five criteria. Mrs. Dunn motioned and Mr. Partington seconded the motion to approve a variance for Case #19-2010 as requested per the plan submitted. **Motion passed 5-0.**



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### **Lot #16-F-4 Case # 14-2010 (Rehearing)**

Applicant – Laura Scott & Joe Maynard

Owner – James Frazier

Location – 24 Ash St.

Zone – Residential A

A rehearing is requested of Case 14-2010 heard on April 13, 2010.

### **Lot #17-J-113 Case # 15-2010**

Applicant – Laura Scott & Joe Maynard

Owner – Matthew Gaudio

Location – 16 Rocky Ridge Rd.

Zone – Residential A

A rehearing is requested of Case 15-2010 heard on April 13, 2010.

### **Lot #17-M- 22 Case # 16-2010**

Applicant – Laura Scott & Joe Maynard

Owner – Richard Armstrong & Alan Armstrong

Location – 19 Oak St

Zone – Residential A

A rehearing is requested of Case 16-2010 heard on April 13, 2010.

### **Lot #17-L-50 Case # 17-2010**

Applicant – Laura Scott & Joe Maynard

Owner – Derek & Jessica Monson

Location – 18 Turtle Rock Rd.

Zone – Residential A

A rehearing is requested of Case 17-2010 heard on April 13, 2010.

Ms. Scott explained that there are four separate requests for a rehearing, all for the same reason but wanted the cases handled individually. The requests were done by Ms. Scott & Mr. Maynard on behalf of Mr. Maynard's clients.

Mrs. Dunn said that it appeared to her that the rehearing requests were signed by Ms. Scott on behalf of Mr. Maynard. Ms. Scott explained that she signed on Mr. Maynard's behalf with his authorization because Mr. Maynard could not arrive before the deadline to sign the applications. Mrs. Dunn said that in the future it should be clear who is requesting the rehearing. In this case it appears it should be simply from Ms. Scott. Mr. Maynard's clients were granted relief so he has no reason to ask for a rehearing. In the future it would be better to come from the Administrator. Ms. Scott explained that she asked Mr. Maynard if he wanted to do a joint request and he agreed. Mr. Maynard said that he is looking out for his client's interest. After reading Attorney



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Campbell's letter Mr. Maynard felt that he would be in front of the ZBA again for these four cases. He thought it would move things along if he was the co-applicant and head off any delay.

Mr. Murray, Ms. Scott and the Board had a lengthy discussion regarding the procedures that should be followed regarding the Cobbetts Pond Watershed Variances.

The Chairman read a portion of page 5 of the April 30, 2010 letter from Attorney Campbell.

*...As I see it, you have two (2) options:*

- *Notwithstanding what you believe to be an erroneous decision, you can elect to issue the building permits in these cases as requested. If you anticipated this issue would not re-occur or establish a wide-spread precedent, you could consider this option, although it does implicate RSA 676:13 which prohibits building permits contrary to the ordinance provisions.*
- *Your department could elect to file rehearing requests on these cases in accordance with RSA 677:2. The rulings issued in these case "directly affect" the administrative official who denied the applications in the first instance.*

The Chairman said there are really three options because the letter goes on to state: *I would not "ignore" the decisions and simply refuse to issue the requested permits. That would raise significant "due process" issues for the property owners, and is contrary to the general "exhaustion of remedies" requirement.*

The Chairman asked Ms. Scott (in regard to option three) what she would do if the Board denied the rehearing requests. Ms. Scott said if the rehearing is denied there is another process she could use.

Mrs. Dunn said that after reading Attorney Campbell's letter she is willing to say that the Board erred to some extent. The Board was reading 676:12 as if to say if you apply for a building permit before the magic date then you were exempt from the ordinance automatically. Attorney Campbell is saying if you apply after that date you are not exempt if you apply before that date you may or may not be exempt and it depends on whether or not you have vested rights. If the rehearings are granted then the specifics will show whether there are vested rights.

Mr. Partington said it seems as if the Board is taking in a whole slew of information for a request for rehearing. Mr. Partington said he is under the impression that the Board is in a judicial capacity when talking about a request for rehearing and the Board should simply make a ruling on what is in front of them and whether a technical error was made. Maybe this information should be taken outside of the realm of a rehearing in order to get clarification.

Mrs. Dunn said the conversation has been based on whether the Board made an error.



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Mrs. Dunn motioned and Mrs. Fallon seconded the motion to rehear case #14-2010 to examine whether or not the Board erred in its decision and there is new legal information concerning the case. Mrs. Dunn withdrew her motion and Mrs. Fallon withdrew her second.

Mrs. Dunn motioned and Mrs. Fallon seconded the motion to grant a rehearing of Case #14-2010 because there is new information on the legal status of this case. **Motion passed 4-1.** Mr. Murray voted against the motion because he felt no technical error was made and no new information was submitted.

Mrs. Dunn motioned and Mrs. Fallon seconded the motion to grant a rehearing of Case #15-2010 because there is new information on the legal status of this case. **Motion passed 4-1.** Mr. Murray voted against the motion because he felt no technical error was made and no new information was submitted.

Mrs. Dunn motioned and Mrs. Fallon seconded the motion to grant a rehearing of Case #16-2010 because there is new information on the legal status of this case. **Motion passed 4-1.** Mr. Murray voted against the motion because he felt no technical error was made and no new information was submitted.

Mrs. Dunn motioned and Mrs. Fallon seconded the motion to grant a rehearing of Case #17-2010 because there is new information on the legal status of this case. **Motion passed 4-1.** Mr. Murray voted against the motion because he felt no technical error was made and no new information was submitted.

Ms. Scott asked the Board to send a letter to the Board of Selectmen requesting the fees for Cases 14, 15, 16 & 17-2010 be waived. Mr. Murray motioned and Mrs. Fallon seconded the motion to waive the fees. **Motion passed 4-1.** Mr. Samsel voted against the motion.

Mrs. Dunn asked that Mrs. Kovolyan be directed to write a letter on the Board's behalf. Mrs. Kovolyan said that she would draft a letter and then email it to the Chairman for his review.

The Chairman granted a five minute recess.

The Chairman called the meeting back to order.



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### Approval of April 7, 13 and 20, 2010 Minutes

Mrs. Fallon motioned and Mr. Partington seconded the motion to approve the April 7, 2010 minutes. **Motion passed 5-0.**

Mr. Partington motioned and Mrs. Fallon seconded the motion to accept the amended April 13, 2010 minutes. **Motion passed 5-0.**

Mr. Partington motioned and Mr. Murray seconded the motion to accept the amended April 20, 2010 minutes. **Motion passed 5-0.**

### Miscellaneous Board Business

Mrs. Dunn will check the statute regarding the Terms of Alternate Appointments.

The Chairman reminded the Members to have their suggestions for by-law changes ready for the May 25, 2010 meeting.

### Correspondence

- April 21, 2010 Letter from Ansel Sanborn of NHDOT to Cliff Sinnott of RPC regarding CTAP Local Government Account.
- April 27, 2010 Letter from Justin Richardson of Upton & Hatfield regarding Verizon Wireless Application
- April 29, 2010 Letter from Attorney Campbell to Mark Samsel regarding Lakewood Associates vs. Town of Windham
- April 29, 2010 Letter from Attorney Campbell to Mark Samsel regarding Withdrawal of Variance Application
- April 2010 issue of *New Hampshire Town and City*.

Mr. Partington motioned and Mrs. Dunn seconded the motion to adjourn. **Motion passed 5-0.**

The next meeting of the Zoning Board of Adjustment is scheduled for May 25, 2010 at 7:30 PM in the Community Development Department.

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