



BOARD OF ADJUSTMENT

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

Zoning Board of Adjustment Minutes September 28, 2010

Board Members

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

Staff

Tim Corwin – ZBA/Code Enforcement Administrator
Patricia Kovolyan – Administrative Assistant

Mrs. Fallon read into the record a notice stating that Cases 44-2010 and 48-2010 were withdrawn and Case 49-2010 was postponed.

Case #44-2010, Lot 17-C-102C

Applicant – Deborah Cassidy
Owner – Deborah Cassidy
Location – 3 Spring Street
Zone – Residence District A

A variance is requested from Section 702.2 to permit the construction of a 12' high shed within the required sight triangle on a corner lot, and from Section 702 and Appendix A-1 to permit the construction of a shed within the minimum yard setbacks. The property is improved with a single family residence.

Case #48-2010, Lot 16-R-185

Applicant – Eric Grue
Owner – Eric Grue and Robert F. Grue
Location – 15 First Street
Zone – Residence District A

Applicant proposes to (i) raise the roof over portions of an existing single family dwelling which is located within the minimum required side yard, (ii) construct a deck within the required minimum side yard, (iii) erect a timber framed storage roof within the minimum required front



BOARD OF ADJUSTMENT

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

yard, and (iv) erect a timber framed storage roof over an existing non-conforming concrete pad located one (1) ft. from the front lot line and three (3) feet from the side lot line. Relief is requested from (i) Section 406.2 to increase the volume of a pre-existing non-conforming house where no increase in volume is permitted; (ii) Section 702 and Appendix A-1 to permit the construction of a deck within three (3) ft. of the side lot line, where a minimum 30 ft. setback is required; (iii) Section 702 and Appendix A-1 to permit the construction of a timber framed storage roof to be located no less than 38 feet from the front lot line where a minimum 50 ft. setback is required; and (iv) Section 406.2 to increase the volume of an existing concrete pad located within the minimum required front and side yards, where no increase in volume is permitted.

Case #49-2010, Lot 1-C-2550

Applicant – Edward N. Herbert Assoc., Inc.

Owner – The Devlin Family Revocable Trust of 1997

Zone – Rural District

Applicant proposes to subdivide the property into two lots, neither having frontage on a street. Relief is requested from Section 702 and Appendix A-1 to permit the subdivision of two lots without any frontage on a street where 175 ft is required.

Case #41-2010, Lot 21-V-230B (32 Fish Road)

Applicant – Charles F. and Mary E. McGonagle

Owner – Charles F. and Mary E. McGonagle

Location – 32 Fish Road

Zone – Residence District A and the Cobbetts Pond Watershed Protection Overlay District

Applicant proposes to (i) remove a pre-existing non-conforming house and construct a larger house in the same footprint and (ii) remove a pre-existing non-conforming porch and to construct a larger porch. Relief is requested from (i) Section 405.2 to permit a pre-existing non-conforming house to be removed and replaced in the same location, with an increase in volume where no increase in volume is permitted; (ii) Sections 405.2, 405.3 and 405.5 to permit the replacement of an existing 15 ft. by 13 ft. porch located within the minimum required side and rear yards with a 32 ft. by 12 ft. porch where no increase in the size of the porch is permitted; (iii) Section 702 and Appendix A-1 to permit the construction of a porch within the required minimum rear and side yards; (iv) Section 616.10 to permit impervious area of 38% where 30% is permitted; (v) Section 702 and Appendix A-1 to permit building coverage of approximately 38% where 20% is permitted, and (vi) Section 616.10(c) to not require Planning Board review of applicant's proposal and to not require applicant to prepare and submit a storm water management and erosion control plan to the Planning Board for review.

Mrs. Fallon read the case into the record.



BOARD OF ADJUSTMENT

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

Mr. Charles McGonagle presented his case explaining that there is an existing sixty year old seasonal cottage on the 2840 square foot lot. The proposed house would be constructed on the existing footprint but the proposed porch would be larger because it will be extended across the front the house. The elevation of the proposed house would be approximately 3 feet higher than the existing cottage because the owners are hoping to install a storage loft in the peak of the house. The project will be designed in such a way that it will not alter the view of Cobbetts Pond for any of the abutters. Mr. McGonagle read the supporting facts into the record.

Mr. Murray asked if there was an updated septic system on the property. Mr. McGonagle replied that there is a system, installed by his parents, that works very well. Mr. McGonagle was advised that he would be required to provide a septic plan to the state.

Mrs. Dunn said that this is a very congested area and because the house would be built to code it would be more useable and more likely to be used. Mrs. Dunn was concerned that the Board did not have a septic plan or an exact height for the roof line.

Mrs. Fallon asked if there would be an increase in parking. Mr. McGonagle replied that the parking would not be changed there would only be one parking space.

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

Deliberative Session, Case #41-2010

The Board entered the Deliberative Session based on testimony provided and the five points as read into the record.

Mr. Partington said that the spirit and intent of the ordinance could not be met by allowing this request so close to the pond.

Mrs. Fallon said there is no increase in the footprint house; the increase would be in the porch. The applicant would be required to submit an application to Shoreland Protection. Mrs. Fallon has a problem with denying the applicant the ability to replace his existing house. She understands it is a congested area but it will continue to be a congested area. It would be more important to Mrs. Fallon that there be an updated septic system. There are a lot of unanswered questions so Mrs. Fallon asked the Board if they would want to deny without prejudice in order to get more information such as septic and height of the roofline before moving forward.

Mr. Murray suggested granting this request without relief from Section 616. This would force the applicant to go before the Planning Board and address some of the concerns regarding septic and building height. There will be a lot of questions that the applicant will have to answer for NH Department of Environmental Services that are not the purview of the Zoning Board.



BOARD OF ADJUSTMENT

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

The Chairman said that he concurred with Mrs. Fallon and Mr. Murray. There are other Boards that will do their job regarding septic and protection of the shoreline. The applicant is allowed reasonable use of his property.

Mrs. Dunn said there is reasonable use of the property and the applicant can rebuild the same size dwelling without a variance. The criteria can not be met to grant this variance. Mrs. Dunn suggested that the request be denied without prejudice so that the applicant can return with more information regarding the septic system and the roofline.

Mr. Murray disagreed stating the applicant has a pre-existing non-conforming use. They would not need to come in front of the Board if they were building on the same footprint and same volume. Mr. Murray did not have a problem with adding volume. They can go to the Planning Board for the increase in the size of the porch. The applicant would have to go before NHDES Subsurface and NHDES Shoreland.

Mrs. Fallon asked if the Board was having trouble with the porch because of the additional 8%. The applicant is within his right regarding the height and he has taken into consideration the neighbor's sight line. When this goes before the Planning Board there could be a lot of improvements. Mrs. Fallon said that maybe the big issue is not the expansion of the deck but what happens with the runoff.

Mr. Murray motioned and Mrs. Fallon seconded the motion to grant a variance for Case 41-2010 from Sections 405.2, 405.3, 405.5 as it pertains to the house and Sections 702 Appendix A-1 to permit the removal the existing house and construct and larger house. **Motion passed 4-1.** Mrs. Dunn voted against the motion because it did not meet the spirit and intent of the ordinance.

Mr. Murray motioned and Mrs. Dunn seconded the motion to deny without prejudice the request for relief from Sections 616.10(b) and 616.10(c). **Motion passed 5-0.**

Lot #7-A-680, Case #46-2010 (81 Searles Road)

Applicant – Heidi Ann Heath

Owner – Heidi Ann Heath

Location – 81 Searles Road

Zone – Rural

An application has been submitted by Heidi Ann Heath for a variance from Section 601.3 of the Windham Zoning Ordinance and Land Use Regulations to permit the construction of a pool within the Wetland & Watershed Protection District. The property is improved with a single family residence.

Mrs. Fallon read the case into the record.



BOARD OF ADJUSTMENT

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

Ms. Heidi Heath displayed her plan and presented the case. The construction of the 18 X 36 in ground gunite salt water pool requires the back to end 43 feet from the foundation of the home. Ms. Heath stated the following steps that will be taken to reduce the impact to the WWPD.

- Silt fencing and hay bails will be used.
- The pool will have a free standing edge. The outer wall be thicker with reinforced bars and cement so no additional fill will be required to hold the pool into the land.
- There will not be a rear patio behind the pool.
- A DC Cartridge filter will be used that does not require back washing, so no water will seep into the WWPD.
- When it is time to winterize the pool the water will be picked up by the water company instead of releasing it into the WWPD.

Ms. Heath said that none of her neighbors have an issue with her request to install a pool. Ms. Heath read the supporting facts into the record. There will not be any blasting to remove ledge. Ms. Heath showed on a plan of the proposed pool where the fencing would be located.

Mrs. Fallon read into the record the September 8, 2010 letter from the Conservation Commission stating that the Commission walked the property on September 2, 2010, The impact to the WWPD has been minimized as much as possible and the backwashing has been eliminated. The Commission was not opposed to the plan.

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

Deliberative Session, Case 46-2010

The Board entered the Deliberative Session based on testimony provided and the five points as read into the record.

Mr. Partington found that all the criteria had been met. Mrs. Dunn said that there is no other reasonable place on the lot to install the pool. Mrs. Fallon suggested that the drain be positioned away from the WWPD.

Mrs. Dunn motioned and Mr. Partington seconded the motion to grant a variance from Section 601.3 of the Zoning Ordinance to allow the construction of a pool within the WWPD with the condition that the overflow drain be directed away from the WWPD. **Motion passed 5-0.**



BOARD OF ADJUSTMENT

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

Case #47-2010, Lot 11-C-1000 (33 Indian Rock Road)

Applicant – Teresa Kahn of the Windham Deli

Owner – Candela Investments LLC

Location – 33 Indian Rock Road

Zone – Business Commercial District A

A variance is requested from Section 706.6 of to install a 32 sq. ft. wall sign advertising the Windham Deli where a 25.5 sq. ft. is permitted.

Mrs. Fallon read the case into the record.

Mr. Murray motioned and Mrs. Fallon seconded the motion to hear Case #47-2010 after Case 50-2010 (to allow the person representing the owner to return with a letter of authorization).

Motion passed 5-0.

Case #50-2010, Lot 11-C-1600 (1 Cochran Farm Road)

Applicant – Edward N. Herbert Assoc., Inc.

Owner – Russell & Shulamit Walker

Location – 1 Cochran Farm Road

Zone – Residence District B

A variance is requested from Section 405.2 to permit a pre-existing non-conforming front porch to be removed and to construct a new front porch in the same footprint with the addition of a second story, with an increase in volume where no increase in volume is permitted.

Mr. Wes Aspinwall of Herbert Associates, representing the owner, displayed a plan and photo and presented the case. Originally the driveway was on North Lowell Road but this was changed to Cochran Farm Road after the subdivision was built. The existing enclosed front porch needs to be removed and replaced in the same location with a new foundation. This request will allow the owners to improve the front portion of their home and provide for a larger interior space on the first and second floors without taking additional space on the ground or coming closer to North Lowell Road. The existing house was built in 1915, prior to zoning regulations and is only 10 feet to the front lot line. There will be an increase in volume within the 50 foot setback. Mr. Aspinwall read the supporting facts into the record.

Mr. Murray motioned and Mrs. Dunn seconded the motion to go into Deliberative Session.

Motion passed 5-0.

Deliberative Session, Case 50-2010

The Board entered the Deliberative Session based on testimony provided and the five points as read into the record.

Mrs. Dunn found that the request met all the criteria.



BOARD OF ADJUSTMENT

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

Mr. Partington motioned and Mr. Murray seconded the motion to grant a variance for Case 50-2010 from Section 405.2 to permit a pre-existing non-conforming front porch to be removed and to construct a new front porch in the same footprint with the addition of a second story per the plan submitted. **Motion passed 5-0.**

Approval of September 14, 2010 minutes

At Mr. Partington's request Mrs. Kovolyan will check the Deliberative Session on Page four. Mrs. Dunn motioned and Mrs. Fallon seconded the motion to approve the September 14, 2010 minutes. **Motion passed 5-0.**

Case #47-2010, Lot 11-C-1000 (33 Indian Rock Road)

Mr. Rob Andrews, representing Teresa Kahn of the Windham Deli, returned to the meeting with a letter of authorization from Ms. Kahn that Mrs. Fallon read into the record. Mr. Andrews said the space was rented and renovated. The applicant wanted to change the existing sign but the current sign is 10% larger than allowed. Mr. Andrews read the supporting facts into the record.

Mr. Corwin explained that the sign that was in place was for a larger space therefore did not require a variance. The current deli has less space than the original deli so a smaller sign would be required.

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

Deliberative Session, Case 47-2010

The Board entered the Deliberative Session based on testimony provided and the five points as read into the record.

The Chairman said that the applicant replaced the existing sign with one that is the same size.

Mr. Partington said that he happened to be in the Community Development Office and the sign was put up before the certificate of occupancy was given to the applicant. Mr. Partington said that the sign fits exactly and looks natural.

Mrs. Fallon said that a smaller sign would be as adequate for the needs of the applicant.

Mr. Partington motioned and Mrs. Dunn seconded the motion to grant a variance for Case #47-2010 from Section 706.6 of the Zoning Ordinance to permit the installation of a 32 square foot wall sign advertising the Windham Deli where 25.5 square feet is permitted. **Motion passed 3-2.**



BOARD OF ADJUSTMENT

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

Mrs. Fallon voted against the motion because the applicant is not denied reasonable use. Mr. Murray voted against the motion because he did not see any reason to vary when the criteria could have been met.

Miscellaneous Board Business

Bylaws

The Members scheduled a meeting for October 19, 2010 at 7:00 PM to discuss bylaws.

ZBA Process Flow Chart

The Chairman asked the Members to read the Flow Chart dated September 29, 2010 from Laura Scott, Community Development Director, and bring any questions or comments to the next meeting.

Discussion regarding postponements

Mr. Partington said at the last meeting when there was a postponed case it was opened and continued to the next meeting. At this meeting for the postponed case the Board just said it was postponed. Mr. Partington asked if the Board needs to act on a postponement or not. Currently the Department is under the orders that if they receive a postponement they are going to assume it is postponed and announce to the public that it is moving to the next available date.

Mrs. Dunn said we had this issue in the past. Technically speaking the Devlin case was withdrawn, it wasn't really postponed. A withdrawal is different than a postponement because there is no application before the Board. The real conundrum is when someone just wants to put it off for a few weeks for convenience.

Mr. Partington's concern is that the postponement was handled incorrectly last time or it was done right the last time so why is the Department making the decision for the Board.

Mrs. Dunn said the Department did not make the decision this time because technically the case was withdrawn.

Mr. Partington said that on the agenda it states the case was postponed. If you were to read the agenda you would think the case has been postponed.

The Chairman said that Mr. Partington feels we are being inconsistent. Looking at the process of the postponement and looking at other towns there is an interesting pattern where some towns are elaborate in their rules and some are not. In the application it states if you don't show or postpone within a certain time period, you take the risk of being denied without prejudice. That is the "hammer" that the Board can use for applicants that abuse the process. The process has worked for the last five years.



BOARD OF ADJUSTMENT

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

Mr. Murray said the Board has never had a formal process; the first time this came up as an issue was during of the cell tower case.

Mr. Tierney said there have been other postponements; some of which have been denied.

Mr. Partington said earlier in the year the Board denied a request for postponement of the Heinzl case; but in these cases the department is making the decision for us. When a notice is put on the door that a case has been postponed the Board wouldn't be able to make a judgment.

Mrs. Dunn said that she thought the postponement was handled correctly the last time; the Board opened it and continued it to a specific date. That is what is recommended in the handbook.

Mr. Case asked how the public is going to know when the postponed case will be heard when the case is not going to be re-noticed.

Mrs. Dunn said she thought the notice stated that the case would be re-noticed.

Mr. Partington said that he thinks the department is under the impression that a postponement is automatically granted and he would like to know what the process is so that it can be worded correctly in the bylaws.

Mr. Tierney suggested that after a case is listed on the agenda as postponed it should come before the Board.

Mrs. Dunn suggested that if an applicant goes before the staff asking for a postponement staff can say that they do not have the authority to accept the postponement once the agenda is set, they can say that it is the Board's decision whether or not to accept the request for a postponement.

Mr. Partington said that he could come up with something for the bylaws and work with Miss Scott although they are almost in complete disagreement; Mr. Partington thinks that the Board should be making all the decisions regarding postponements.

The Chairman said there is a time when the department can make the decision but then there is a time when it switches.

Mr. Tierney said there is a time when the department can handle it within but there should be a cut off date requiring the case to come before the Board.



BOARD OF ADJUSTMENT

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

Mr. Partington said that the way the postponement was handled at the last meeting seemed right to him. The case was opened, it was voted on and an announcement was made regarding the date it would be heard.

The Chairman asked why Case #49-2010 would not be re-noticed.

Mr. Corwin answered, explaining that nothing in the request has been changed.

Mr. Murray said he doesn't understand why the case can't be re-posted.

The Chairman said staff has till 6:00 PM tomorrow (Wednesday, September 24, 2010) to submit the notice to the *Windham Independent*.

Mr. Corwin asked if the Town picks up the tab for the re-notice or do we have to charge the applicant.

Case #49-2010, Lot 1-C-2550

Applicant – Edward N. Herbert Assoc., Inc.

Owner – The Devlin Family Revocable Trust of 1997

Zone – Rural District

Applicant proposes to subdivide the property into two lots, neither having frontage on a street. Relief is requested from Section 702 and Appendix A-1 to permit the subdivision of two lots without any frontage on a street where 175 ft is required.

Mrs. Dunn motioned and Mr. Partington seconded the motion to open Case 49-2010 and after reading it into the record continue it to October 12, 2010. **Motion passed 5-0.**

Mrs. Fallon read Case 49-2010 into the record.

Mrs. Dunn motioned and Mrs. Fallon seconded the motion to continue Case 49-2010 to the specific date of October 12, 2010. **Motion passed 5-0.**

Mail

- September 27, 2010 letter from Attorney Campbell regarding Sneider vs. Town of Windham and Notice of Decision, Case 218-2010-EQ-00176
- September 2010 issue of *Town and City*



BOARD OF ADJUSTMENT

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

Adjournment

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

The next meeting of the Zoning Board of Adjustment is scheduled for October 12, 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.