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Zoning Board of Adjustment
Draft Minutes
May 10, 2011

Board Members

Tom Murray – Chairman
Heath Partington – Vice-Chairman
Elizabeth Dunn – Secretary
Mark Samsel – Member
Dianna Fallon – Member
Jim Tierney – Alternate
Mike Scholz – Alternate

Staff

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

Lot 19-A-300, Case #11-2011 (Continued from April 26, 2011)

Applicant – Edward N. Herbert Assoc., Inc.
Owner – Sun Coast Properties, LLC
Location – 66 Mammoth Road
Zone – Rural District

Applicant proposes to construct 5 residential duplex buildings. The 10 dwelling units will be sold in a condominium form of ownership, and 4 of the dwelling units will be workforce housing per RSA 674:59. A variance is requested from Section 602.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the construction of 5 duplex residential buildings which is not a use permitted in the Rural District.

Mr. Tim Corwin advised the Board that in addition to the Exhibits A, B & C that were submitted at the April 26, 2011 meeting the following items were submitted subsequent to that meeting.

- Notice of Decision for Plus Fifty-Five, LLC v. Hooksett.
- Letter to Attorney Cronin dated 5/3/11 from McKeon Appraisal Services, Exhibit D.
- Revised Site Plan for “Deacon Place” – 66 Mammoth Road dated 4/26/11, Exhibit E.
- May , 2011 Letter & Financial Analysis of project by Sun Coast Properties Exhibit F.

Mr. Peter Zohdi of Edward N Herbert Associates, Inc., representing the owner, advised the Board that he would be happy to answer their questions.

Mrs. Dunn asked what the differences are between the plan that was submitted previously and the plan the Board received for tonight's meeting.

Mr. Zohdi said the differences are the landscaping and the number of leach beds. Mr. Zohdi showed on his displayed plan which four units would be attached to what tank and leach bed. These units will be serviced by Pennichuck Water.

Attorney John Cronin of Cronin & Bisson explained that the reason the applicant is before the Zoning Board of Adjustment is to follow the recommendation of the staff. If you follow the criteria of the five prongs the applicant meets that test. In Mr. Mark McKeon's (a licensed appraiser) letter of May 3, 2011 he renders an opinion that if a variance is granted there would be no diminution of the surrounding properties and Attorney Cronin did not hear any evidence at the prior meeting that this project would have a negative impact on the community. The financial information that was submitted is more for the Planning Board. In its decision of the Hooksett Case, the Court came to the conclusion that it was not a work force housing application. This case has also been unusual procedurally. Attorney Cronin has not been at a case when a member of the Planning Board and the Board of Selectmen spoke against a project. When a public record is left open members of that Board can be put in an awkward position by family or friends to answer questions about something that may be new or controversial. If this request is denied Attorney Cronin asked that specific findings be made on the five prongs. In case this matter gets appealed, Attorney Cronin asked if any of the Board Members had occasion to talk to anyone about this case or communicate by email outside of this meeting, that the Board Member state in the record that he or she had such a conversation. Attorney Cronin asked that the Board look favorably on this request for a variance.

Mr. Scholz said that in Mr. McKeon's May 3, 2011 letter he does not address properties that are dissimilar, as some are in that area, such as single family residences. Attorney Cronin said that he believes the letter does address dissimilar properties; the definition of detached residences would include single family residences.

Mr. Scholz said he did not specifically recall the individual mentioned by Attorney Cronin stating at the last meeting that he was in opposition to the request but did recall him stating that he was speaking as a resident, not a member of the Board of Selectmen or Planning Board.

Attorney Cronin said it was clear to him that particular gentlemen was not in favor of this project.

Mrs. Dunn said that several exhibits were submitted by Attorney Cronin at the April 26, 2011 meeting and if he expected the Board to rely on those exhibits in making their decision the members needed time to read that information.

Attorney Cronin said that an important distinction was being missed. It is certainly commonplace for the Board to take evidence for any matter before it. If there is a considerable amount of evidence, the Board can say it has too much and it needs to be studied before making a vote. Attorney Cronin said he was not making an accusation just that this is unusual and it causes him concern not because of what a Board Member might do but because it would not be unusual for someone who did not attend a meeting to approach someone and say this is not a good project or they could also approach a member and voice their opinion as to why it is a good project.

Mrs. Dunn said that Mr. McKeon's appraisal provides an opinion of condominiums in general and he is not making an opinion on ten units under these circumstances.

Attorney Cronin said that if you read Mr. McKeon's letter in its entirety, it is clear that his review is based on this particular plan and project and the properties along Mammoth Road.

Mrs. Dunn went on to say that she wanted to respectfully disagree with Attorney Cronin's analysis of the Hooksett case. It does make an analysis of work force housing before the Zoning Board.

Mrs. Dunn read a portion of page three of the Keach-Nordstrom May 10, 2011 letter. *We recommend the applicant provide your Department with a written statement indicating whether or not it is satisfied that potential rate of return represents a reasonable and realistic opportunity for the development of work force housing.*

Attorney Cronin said that his client would expect the rate of return to be greater. They could live with that and it would be acceptable.

Mrs. Fallon mentioned that the McKeon letter does not take into account agricultural uses as far as diminished property values.

Attorney Cronin said the letter does not comment on that.

Mr. Partington said that in the financial data profit margin was used rather than return of investment. Mr. Partington asked why this was calculated as a percentage of the amount of money coming in after the fact.

Attorney Cronin said the applicant relied on the recommendation of Mr. Fougere a Planning Consultant that has done a lot of work on work force housing.

Mrs. Fallon said that back in 2006 this area was zoned Rural now it is Res C. In the minutes from 2006 there was a request to deny the case because of issues related to sight, smell, insects and runoff.

Laura Scott, Community Development Director, said in regard to Mr. Ford's property at 70 Mammoth Road she did look through the zoning maps and the warrant articles but could not find where the zoning changed. The zoning maps are generated by the assessor's data. Mr. Ford's property could have been lumped together with 80 Mammoth Road and no one noticed until now. The rules for agricultural zoning are different than they were in 2006. The rules are looser but there is more protection in place. Also there is more protection at the state level. Ms. Scott will research this further it could be just a glitch in the system.

Mr. Zohdi said he believes the zoning map is correct. He would not have put condominiums in the Rural Zone; the property is zoned Res C.

Mr. Scholz respectfully asked the Chairman to waive a provision in the by-laws allowing alternates to provide information during deliberations for this particular case.

Mrs. Dunn said to change the By-laws now under these circumstance gives her significant concern. Mrs. Dunn also said that she was very interested in the information that Mr. Scholz would provide and the Board could hear it before they went into Deliberative Session.

Mr. Scholz said the Hooksett Case was relevant. This is a heavily traveled road, a relatively small lot with a number of houses and Mr. Scholz was not sure that it would be in the public's interest from a safety concern to have that many houses on a small lot that would not provide enough area for children to play safely. This is mentioned on page 5 and again on page 9 of the Hooksett case.

Mr. Tierney said the Legislature did not require towns to adopt a Work Force Housing Ordinance as long as they have an ordinance ready to allow reasonable and realistic Work Force Housing opportunities. Windham's current regulations allow Work Force Housing in the proper zones.

Mr. Zohdi said he attended a meeting with the Technical Review Committee. Both the Fire and Police Departments had no problem with this project. Mr. Zohdi pointed out that there is almost no zone Res C left in town. In regard to density, Mr. Zohdi complies with NH Department of Environmental Services loading requirements.

Mrs. Dunn said the question of how that lot is zoned is a material issue and it should be resolved before voting on this request.

The Chairman asked the Board Members if how the lot is zoned would make a difference in their vote.

Mr. Partington said he would like to have the information, but was not sure that it would be fair the applicant to hear this case again. Mr. Partington said he did not believe the information would change anything. Both Mr. Samsel and the Chairman agreed with Mr. Partington.

Mr. Samsel motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. **Motion passed 4-1.** Mrs. Dunn voted against the motion because of the uncertainty of the zone and because she felt the case should be continued until they have the applicable information.

Deliberative Session, Case #11-2011

The Chairman said that the Board should go through the five criteria point by point.

- 1. The proposed use would not diminish surrounding property values because:**
Mrs. Fallon said that it could harm a particular parcel.

Mrs. Dunn said she is concerned about the fact that this is a high density development that is different from the surrounding properties. North of the property and across the road there are single family homes. The number of units and type of development proposed can cause diminution of value.

Mr. Samsel said the proposed development would not cause diminution of value of the surrounding properties but has a concern regarding the number of units.

Mr. Partington said based on the testimony provided the development would not diminish property values.

Mr. Murray said he agrees with Mr. Samsel and Mr. Partington.

- 2. Granting the variance would not be contrary to the public interest and would not be contrary to the spirit of the ordinance because:**

Mrs. Fallon said she is concerned because there is no infrastructure, no walkable community, no public transit and the property is isolated.

Mrs. Dunn said she is concerned because this particular plan is so far out of the realm of what is allowed.

Mr. Samsel said his main concern is that Windham does not have a Work Force Housing Ordinance therefore it is hard to make a comparison.

Mr. Partington said this amount of density is far beyond what has been considered on a rural lot. At the first hearing of this case, Mr. Partington was under the impression that the RPC numbers were “the ones” and he thought Windham was under the 46%. Throughout the course of the hearing that has come into question. Mr. Partington does not know if Windham does or does not meet its obligation.

Mr. Murray said he said he agrees with Mr. Tierney’s earlier testimony that Windham has the ability within certain zones to offer reasonable density bonuses. Density in a Rural Zone is contrary to the public interest.

3. Denial of the variance would result in unnecessary hardship to the owner owing to Special conditions of the land because:

Mrs. Fallon said the owner currently has reasonable use.

Mrs. Dunn asked if this proposed use is a reasonable one and would some other proposal be reasonable on this site. Mrs. Dunn said she was stuck.

Mr. Samsel said he has an issue with the density.

Mr. Partington said there are no special conditions and the proposal is too dense.

Mr. Murray said there are no special conditions of the land compared to the one next to it or the one next to that.

4. By granting the variance, substantial justice would be done because:

Mrs. Fallon said she still has concerns regarding the close proximity to agricultural property.

Mrs. Dunn said this prong was not definitive for her.

Mr. Samsel said if this is denied it will be hard to argue that it is outweighing any gain to the public, whether it is four units or ten it is a work force opportunity.

Mr. Partington said this criteria is met. There has been very little input from direct abutters.

Mr. Murray agreed.

5. The applicant has reasonable use.

Mrs. Fallon said the applicant has reasonable use.

Mrs. Dunn agreed.

Mr. Samsel agreed.

Mr. Partington agreed.

Mr. Murray agreed.

Mrs. Dunn motioned and Mr. Samsel seconded the motion to grant a variance for Case #11-2011. Motion denied 1-4. Mrs. Fallon, Mrs. Dunn, Mr. Partington and Mr. Murray voted against the motion.

The Chairman voted against the motion because the request did not meet the following supporting facts, #2, 3, 3A, 3B, 4, 5A1, 5A2 and 5B. Mrs. Dunn said substantial justice was met but no the other facts. Mrs. Fallon agreed with the Chairman. Mr. Partington said he did not have sufficient information regarding diminishing the value of surrounding property.

Approval of April 26, 2011 minutes

The April 26, 2011 minutes will be reviewed at the May 24, 2011 meeting.

By-Law Revisions

Mr. Corwin asked the Board to review the proposed revisions to the by-laws in the next two weeks. The Board can do what it wants where alternates are concerned as long as it is reflected in the rules of procedure. Mr. Scholz had some questions to the revisions that were answered by Mr. Corwin.

Zoning Map

Mr. Tierney said he had an issue with the zoning map. The zoning map as presented is not the official map of the town. Windham does not have a multi zone property as listed. The Board should have a copy of the official map prepared by the Planning Board. The zoning map should not reflect parcels. If boundary lines are not correct it could make a difference in a variance application. Anyone reviewing plans, such as Mr. Corwin or the Building Inspector, should have a copy of the official map.

Mr. Case said he complained last year about multi zones and he was told that Eric DeLong is a GIS person who is working on the map and now you have a new map with the same information on it. It is not a multi zone it is a split zone.

Mr. Tierney said the assistant planner used to run the program.

Mrs. Fallon said that conservation land is not listed at all.

Mr. Corwin will have copies of the Junk Yard application at the next meeting.

Adjournment

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

The next meeting of the Zoning Board of Adjustment is scheduled for May 24, 2011 at 7:30 PM in the Community Development Office.

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