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Draft
Zoning Board of Adjustment Minutes
October 11, 2011

Board Members:

Tom Murray, Chairman	Dianna Fallon, Member
Heath Partington, Vice-Chair	Michael Scholz, Alternate
Elizabeth Dunn, Secretary, Member	Jim Tierney, Alternate
Mark Samsel, Member	

Staff:

Tim Corwin, ZBA/Code Enforcement Administrator
Mimi Kolodziej, Planning Assistant

Call to Order/Attendance:

Chairman Murray called the meeting to order at 7:30 pm followed by roll call.

Public Hearings:

Lot 21-Z-268, Case #44-2011

Applicant – Benchmark Engineering, Inc.
Owner – Charles Roberts
Location – 25 Cobbetts Pond Road
Zone – Residence District A

Application is an Appeal of an Administrative Decision made by the Board of Selectmen regarding the Board's decision with respect to a request by the Applicant per RSA 674:30aa to restore Lot 21-Z-268 to its pre-merger status.

Mrs. Dunn read the case into the record.

Mr. Joe Maynard of Benchmark Engineering addressed the Board on behalf of the applicant, Mr. Charles A. Roberts. Mr. Maynard explained that the current tax map does not represent the property as it appears today. In August 2011, Mr. Roberts filed an application to the Selectmen for an un-merger of this property being that it consists of 5 parcels with two additional slivers of parcels. Mr. Maynard provided a history of these five plus 2 sliver parcels of land as they were conveyed from one family member to another beginning in 1913. In 1994, Mrs. Roberts, the current owner of all the parcels, placed them in trust, and they were called out in two tracts: Parcels 13 and the sliver of 14 and Parcels 9-12 and the sliver of 8. Since 1968 when tax maps were adopted by the Town, the entire grouping of parcels was named 21-Z-268. In the late 1990's, Mr. Roberts started working with Mr. Maynard to unmerge the lots into individual lots. In 2010 House Bill 316 was adopted to address involuntary lot mergers without the consent of the owner(s). Mr. Roberts is appealing the Board of Selectmen's decision to deny his request to break Lots 9, 10, 11, and the 8 sliver into 2 separate parcels; 10 and 11 as one, and 9 with the lot 8 sliver as the second. Mr. Roberts maintains that the BOS was required to approve the "unmerger" based on RSA 674:39 aa.

- In response to Board questions, Mr. Maynard outlined the structures on the properties in question:
 1. Lots 9 + sliver of 8 – Garage with bunks; privy; woodshed; doghouse; also has dock and small beach

2. Lots 10 + 11 – garage with a shared driveway over the 10/11 lot line; septic; also has dock and small beach
 - Ms. Fallon asked if the garage was an accessory use to the primary structure; Mr. Maynard stated that it had been used for a variety of functions over the years. It is difficult to assess.
 - Mr. Partington said that a structure built over a lot line is not the only overt action necessary for abandoning a lot line; Mr. Maynard read from Section B of the statute where it states that the burden of proof that any previous owner voluntarily merged their lots must fall on the Municipality. There is no documentation to that effect at the Registry of Deeds.
 - Mr. Partington mentioned that the construction of the house over the lot line, which indicates an abandonment of the lot line, never had anything officially filed either.
 - Mr. Maynard, addressing Mr. Scholz, stated that the fact that there are two privies/septics and two docks/ beaches, one set on each lot, indicates that the intent was for there to be two separate lots.
 - Ms. Dunn stated that the fact that the property has been taxed as one lot since 1968, represents agreement on the part of the owner that this is one lot; Mr. Maynard answered that the applicant lives in another state (VA) and has paid his bill without question. It is not uncommon to have one tax bill sent to the owner of 2 separate lots.
 - Mr. Maynard explained the BOS's decision.
 - Mr. Tierney stated that it appeared it was the owner's intent in 1948 to have two separate tracts when they were created as such; Mr. Maynard responded - No, at the bottom of the 1948 deed it states "meaning and intending to convey lots 9, 10, 11, and 12...and a portion of lot 8..."
 - Ms. Dunn thinks that it is normal to refer to merged lots by referring to a previous plan with separate lot numbers; Mr. Maynard cannot guess what was in the mind of the scribner but thinks it is important to go back to the original 1913 deed. The State law says to refer back to the original subdivision plan.
 - Ms. Dunn thinks it is clear that the tract 1 and tract 2 were to be conveyed as separate parcels; Mr. Maynard thinks that the term "tract" was used as a convenience to pass on the separate lots to two different family members.
 - Mr. Maynard can only guess why certain terms were used; but referred back to the recent 2011 law where it states that the "burden of proof falls on the Municipality"
 - Mr. Maynard stated that the applicant thinks the BOS should have referred to the law instead of considering the multiple lots a "family compound."
 - Mr. Scholz inquired about the location of the septic system; there is an outhouse on lot 9 and lot 11 has a septic system for the house over the lot line. The privy on lot 9 is an in-tact structure.

Attorney Bernard Campbell, speaking on behalf of the Board of Selectman, outlined the Board's decision making process to reach, what he thinks, is a correct decision.

Chairman Murray opened the Hearing to the Public.

Mr. Philip Bouchard, abutter on lot 14, stated that he did not receive a certified letter about the meeting. He is in favor of the Board upholding the Selectmen's decision. His concern is that this piece of property be developed in a fashion consistent with the activity that exists on the Pond. He does not want to see it overdeveloped into 5 or 6 lots. This is a dangerous S-curved section of road and jamming 4-5 lots in the space in question may prove difficult for emergency vehicle access.

Mr. Samsel clarified that at most there would be 4 lots.

Mr. Roger Hohenberger, BOS member, spoke to verify that Attorney Campbell was correct in his explanation of the thought process the BOS went through to arrive at their decision.

Mr. Maynard noted that there was a lot of speculation on Attorney Campbell's part about what the Hornes (the original owners responsible for the subdivision) might have been thinking. He again referred to the 1918

conveyance deed and read from the deed: “meaning and intending to convey lots 9, 10, 11” referring back to the 1913 deed. This is the only definitive knowledge. Mr. Maynard clarified that there was a 5 foot strip of land that was transferred back and forth at water’s edge.

Mr. Charles A. Roberts, the applicant, addressed Mr. Bouchard’s concern about not receiving an abutter’s notice. The lots in question, lots 9, 10, and 11, do not abut his property. Mr. Roberts noted that Mr. Maynard had presented the Board with a 92 page chain of title which referenced the 1913 deed where those lots were called out individually for all time. The precipitous driveway had been mentioned earlier. There is a 9 foot grade difference between the edge of the road and the driveway. The road has been built up over the years. Access to this property has been impeded as the State has improved the road. Mr. Roberts highlighted the 7 lots on the Town Beach side of his property and noted none of them have driveways. He does not think that having a common driveway is a limitation to accessing the housing. He noted that NH DES thinks he is eligible to receive 5 subsurface septic systems for each of his 5 lots and can be grandfathered due to the nature of the deed history. He reminded the Board that no one in his family has requested a lot merger, and he asked them to consider the law in order to re-establish his involuntarily merged lots.

Chairman Murray accepted and signed the 8 lot maps displayed by Attorney Campbell as Exhibits 1 through 8.

Mr. Samsel asked at what point did the Town’s tax map show the lots as merged; 1968 when tax maps were adopted. The assessor noted in the legend that this was for tax purposes only.

Mr. Scholz inquired about the multi-purpose structure on Lot 9 and thought it might support the compound idea with fill-over family using the space on the adjoining lot when needed.

Representative David Bates, author of the legislation in question, noted that legislative intent is very important to the court when the actual words of a law are uncertain. He cited a situation where an owner may purchase an abutting lot and use it for another purpose, for example, setting up a swing set. At which point, the Town took action to consider this as one piece of land and the temporary use of the land was considered an abandonment of the lot line. The legislature recognized that this is unconstitutional and passed a law making it illegal. Mr. Roberts’ specific situation was looked at and the new legislation was created to address those to whom the involuntary merger had already occurred.

- Mr. Scholz said that the swing set was very different and not on par with the case at hand. He questioned whether there was a voluntary merger due to the use of the various structures across boundary lines.
- Representative Bates said that it would be upon the Municipality to prove; it is not a question of what one thinks.
- Mr. Partington said that a building sitting across a lot line supports abandonment of the lot line
- Representative Bates commented that proximity of a building to a lot line does not support abandonment.
- Chairman Murray expressed agreement with the applicant.
- Ms. Dunn asked Mr. Corwin if there were any applications in the applicant’s file for variances of any kind that might shed some light on the lot line question; Mr. Corwin retrieved the applicant’s file and found there were no pertinent requests
- Mr. Hohenberger said that the taking of land is unconstitutional; however, if the applicant wanted his land subdivided in 1968, he should have accepted the appropriate taxation or be willing to pay the retroactive taxes. He thinks that landowners accept the block land division because of the lower taxes.
- Mr. Scholz discussed the common use driveway and the configuration of the top building facing into lot 9; Mr. Maynard said there is no way of knowing what was in people’s mind at the time, but that in his experience, these older lake lots often made decisions based on convenience. The building is currently 2 inches from the lot line. Looking at the skew of the lot lines, he thinks that the owners

involved may have run the lot lines perpendicular from the lake and that may have accounted for this small adjustment.

- There were questions about the age of the septic; Mr. Roberts said it was built in 1966; when did the Town start regulating septic systems; Mr. Maynard answered 1968; and when were the building constructed; from 1918 through the mid 1920's.

Mr. Samsel motioned to enter deliberative session

Board question/comments included:

- Ms. Dunn thought the Board should leave the application open to provide time to research the building department files, thoroughly read the material at hand, and for the ZBA to receive legal counsel from an attorney different than the BOS's counsel.
- Mr. Samsel is ready to make a decision and thinks an attorney would be costly and take too much time.
- Mr. Partington agreed with Mr. Samsel.
- Ms. Fallon would like to research the building files to answer Board questions.
- Chairman Murray confirmed that the Board was comfortable that the deeds in the packet are accurate.

Diana seconded. The vote passed: 5-0.

The Board entered the Deliberative Session based on the testimony provided.

- Ms. Fallon-Sees the bunkhouse as an accessory building and therefore, thinks Lots 9, 10, & 11 were used as one parcel. She thinks the BOS did their due diligence in deciding that, in whole, there are 3 useable lots.
- Chairman Murray thinks the landowner has Constitutional rights to develop his land as he wishes. Because the owner constructed an accessory building on the second lot, does not give the Town the right to merge the lots into one lot.
- Ms. Fallon said that the existence on lot 11 of a septic that serves lot 10 indicates one lot and a voluntary merger.
- Chairman Murray disagreed and said that the original deed must be considered and disagrees with Attorney Campbell's opinion. He does believe there is a valid point in expecting that the applicant should pay his fare share of taxes.
- Mr. Samsel mentioned that the 1994 deed refers to separate lot 9, 10, 11, and part of 8. It is recorded as lots. The Town assessor refers to these separate lots as does DES.
- Ms. Dunn said that the lots were conveyed as 2 tracts and described as 2 tracts for several deeds back and thinks that they were intended to be conveyed as a unit.
- Mr. Samsel thinks that referring to the individual lots as tracts was a matter of convenience. The 1994 deed called out individual lots referring back to the 1913 deed. The tax map where tracts were mentioned was for tax purposes only.
- Mr. Partington said that how the lots are taxed has no influence on the deed. He agrees with the applicant and the Chairman on that point. However, Mr. Partington stated that the fact that the garage was constructed on Lot 10, 2 inches from the Lot 9 property line, with the garage door facing Lot 9, means that the garage was constructed so as to make it impossible to use without accessing it via Lot 9. Mr. Partington stated that the construction of the garage in this manner was the "overt act" indicating intent to abandon the lot line and effect a voluntary merger.
- Mr. Samsel said the Board should consider the date of the building-1920's and how much of the lot line was used. The ZBA has approved a 0 lot line variance within the past 2 months.
- Mr. Samsel asked Mr. Corwin if there was a violation of the use of the garage. Mr. Corwin replied that because it is an existing, non-conforming use on a single use property, there is no violation.

Mr. Samsel motioned for Case #44-2011 to grant the applicant's request to the Appeal of Administrative Decision with respect to his request made pursuant to RSA 674:39-aa to restore the Property to its pre-merger configuration and:

- Establish Lot #1 – Made up of a portion of the original Lot #8 and the entire Lot #9 and to
- Create Lot #2 – Made of the original Lot #10 and the original Lot #1

Ms. Dunn seconded. Motion denied: 2-3. Ms. Fallon, Ms. Dunn, and Mr. Partington denied.

Mr. Partington motioned to deny the Appeal of Administrative Decision of Case #44-2011 as the Board of Selectmen made the correct determination as Lots 8, 9, 10 and 11 have been voluntarily merged. Seconded by Ms. Dunn. Motion passed: 3-2. Chairman Murray and Mr. Samsel denied.

Chairman Murray called a brief recess and re-opened the meeting at 10:01 pm.

Lot 19-B-500, Case #43-2011

Applicants/Owners – Robert & Janet Covino

Location – 63 Mammoth Road

Zone – Residence District A

Applicant proposes to subdivide Lot 19-B-500 into a 4.637 acre single family buildable lot with onsite septic and water and a 34.254 acre lot to be donated to the Town of Windham Conservation Commission. A variance is requested from (a) Section 601.3 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the construction of a single family residence within the Wetland and Watershed Protection District that encumbers the proposed 4.637 acre lot, where single family residences are not a permitted use in the WWPD; (b) Section 702/Appendix A-1, "Minimum Lot Area By Soil Type", to permit the 30,000 sq. ft. of contiguous area required for the proposed 4.637 acres lot to be located within the WWPD where the minimum required contiguous area may not include the WWPD; and (c) Section 702/Appendix A-1, "Minimum Lot Area By Soil Type", to permit the 10,000 sq. ft. rectangular area required for the proposed 4.637 acre lot to be located within the WWPD.

Ms. Dunn read Case #43-2011 into the record.

Ms. Jennifer McCourt of McCourt Engineering represented the applicants, Robert and Janet Covino. She explained that the Covinos have been in discussion with the Town Conservation Committee regarding the taking of the back lot for the Town. Ms. McCourt highlighted the details of the 34 lot parcel in question with its large WWPD. The intent is to deed the large back, wetland tract to the Town. There is a buildable lot available out back; however, the applicant would have to access it through a wetland tract and create disturbance. The applicant is asking to be allowed to build in the front WWPD area with direct access from Mammoth Road in exchange for 34.254 acres which would be deeded to the Town.

Ms. McCourt read through the five variance criteria.

- Ms. Dunn inquired about neighboring wells and septic systems and whether a survey has been performed; Ms. McCourt replied that there has been no survey. Ms. Dunn also asked if the existing metal building will go away; Ms. McCourt replied not necessarily. It would depend on the new owners.
- Mr. Samsel asked what the timing was for the conveyance of the property to the Town; Ms. McCourt said as soon as Planning Board approval is received.

Chairman Murray opened the Hearing to the Public.

Mr. David Searles of 9 Sundridge Road expressed concern about the Wetlands being opened up to the Public. It is already constantly abused by drinking youth and partygoers. He would rather see residential lots or leave it as it is.

Mr. Samsel asked if the Police had been informed; Mr. Searles responded yes. Mr. Samsel asked if the land is posted; Mr. Searles responded yes. There is a chain link fence that lasted 4-5 months.

Mr. William O'Brien, an abutter, loves walking the area. It is a beautiful, un-posted hunting land, and he would not like to see it posted. He seldom hears disturbances and has never seen the gate unlocked. He would rather see one house close to Mammoth Road.

Mr. Tom Case thinks the Board is predicating their decision on the land donation to the Conservation Commission. The 5-points do not address why the house should be completely within the WWPD. Is it in the Public interest; or is it about the land donation?

Ms. McCourt rebutted saying:

- The land donated to the Town increases the value of surrounding property
- Preservation of much larger wetland
- It adds a very large permanent buffer to the WWPD providing erosion controls

The Board asked Ms. McCourt to describe the water sources and beaver activity; Ms. McCourt stated that much of the ponding has occurred because of the beaver activity.

Mr. Samsel motioned to enter deliberative session. Seconded by Ms. Dunn. Motion passed: 5-0.

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

- Mr. Samsel thinks this is about the development of the Parcel, not the land donation. Three of the 5 points address the benefits of the conservation piece. There are other places a house lot could be placed outside the WWPD. He does not see the hardship. He is on the fence.
- Ms. Fallon confirmed that Mr. Samsel thinks there are other locations for houses to be built. Where is the hardship?
- Ms. Dunn drew an analogy with the Devlin case and asked how it was different.
- Mr. Samsel prefers a conveyance of the donated land first and then a request for the house lot to follow.
- Ms. Dunn said there would be no benefit in that situation. The Town may end up with no land donation if we do not approve it as presented. She thinks the intent of the ordinance is to protect the wetlands. The other situation would result in several crossings of the wetland areas.
- Chairman Murray underscored Mr. Case's point. He thinks that the land donation is a clear benefit that would outweigh the building of the structure in the WWPD.
- Mr. Samsel does not see a financial hardship and said that the 5-points must deal with relief from the ordinance.
- Ms. Fallon said the property has access issues. The applicant is asking to build in the WWPD, but is willing to mitigate that by donating much better property. One house in this area is better than 3 houses in the uplands. She recognizes a hardship.
- Mr. Partington said the Board needs to consider the conveyance of the large parcel when making a determination. The Conservation Land must be added in to the Substantial Justice factor. He wants nothing approved until the Town has the back property.
- Ms. Dunn thinks that the large lot will be better monitored by Town Police if it is in Town ownership.

Ms. Samsel noted that the Board has put conditions on other arrangements that have gone undelivered.

By a vote of 5-0, the Board approved a motion to grant the variances requested, contingent upon approval of the subdivision by the Planning Board and then conveyance of the proposed 34.254 acre lot to the Town for conservation purposes.

By-Laws Amendment

Review and Approval of 9/7/11, 9/20/11, and 9/27/11 Draft Meeting Minutes:

Minutes of 9/7/2011

Ms. Dunn motioned to accept the ZBA portion of the 9/7/2011 minutes as amended. Mr. Partington seconded. Motion passed 4-0. Mr. Samsel abstained.

Minutes of 9/20/2011

Ms. Dunn motioned to accept the minutes of 9/20/2011 as amended. Mr. Partington seconded. Motion passed 5-0, including a vote by Mr. Scholz. Mr. Samsel abstained.

Minutes of 9/27/2011

Ms. Fallon motioned to approve the minutes of 9/27/2011. Mr. Samsel seconded. Motion passed: 5-0.

Miscellaneous:

- Tab 11 Member Binder Update – 2011 LGC Legislative Bulletin has been sent to Board members via PDF.
- Harborside Supreme Court Case – Staff encouraged the Board to read it
- Mr. Tierney offered his proposed re-write of the appeals of the administrative decision section of the ZBA by-laws. The Board will review and discuss it when Mr. Tierney is present.

Adjournment:

Mr. Samsel motioned to adjourn. Seconded by Ms. Dunn. Motion passed: 5-0.

The meeting adjourned at 11:02 pm.

These minutes are respectfully submitted for your review by Mimi Kolodziej.