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COMMUNITY DEVELOPMENT

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**Zoning Board of Adjustment
Draft Minutes
December 13, 2011**

Board Members:

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

Staff

Tim Corwin – ZBA/ Code Enforcement Administrator

Lot 16-R-785, Case #50-2011 – Continued from 11/22/11

Applicants/Owners – Anita & John Carew
Location – Third Street
Zone – Residence District A

Applicant proposes to construct an 8 ft. x 8 ft. shed on a vacant lot to be located within the minimum required yards. A variance is requested from (a) Section 603.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit a shed to be located on a vacant lot where such a use is not permitted in the Residence District A and (b) Section 702/Appendix A-1 to permit the shed to be located 8.5 ft. from the side lot line shared with Lot 16-R-20 where a minimum yard of 30 ft. is required, 16 ft. from the side lot line shared with Lot 16-R-490 where a minimum yard of 30 ft. is required, and 8 ft. from the rear lot line where a minimum yard of 30 ft. is required.

Ms. Dunn noted that this case was continued from the 11/22/11 meeting but that the ZBA was in receipt of a 12/1/11 e-mail from the Applicant asking for the case to be withdrawn. Therefore, no, action is needed by the Board.

Lot 21-V-253A, Case #51-2011

Applicant – Benchmark Engineering, Inc.
Owner – James Fisher
Location – 1 Willow Road
Zone – Residence District A

A variance is requested from Section 1200.1.3 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the conversion of an existing seasonal dwelling to a full time year-round dwelling on a lot that is nonconforming with respect to minimum frontage requirements, minimum front, side and rear yard setbacks, and minimum lot size area where such conversion is permitted only where the lot conforms to the dimensional requirements of Section 700 of the Zoning Ordinance.

Ms. Dunn read the case into the record.

Mr. Joseph Maynard of Benchmark Engineering, representing the applicant, presented the case and stated that there is an existing 2 bedroom home on the property. To convert to year round under the Zoning Ordinance, the applicant will need to meet the building code and health code requirements. The applicant has obtained septic approval from DES. Conversion also requires compliance with the minimum requirements of Section 700 but is deficient with respect to lot size and frontage requirements. No other improvements are proposed other than the conversion itself and there will be no outside work except for septic improvements as required. The existing structure is non-conforming with respect to setbacks, but no improvements or changes are proposed to the structure other than those necessary to comply with the conversion requirements under the Zoning Ordinance.

Mr. Samsel asked when the structure was built. Mr. Maynard could not confirm exactly.

Mr. Maynard read the five points into the record.

Mr. Maynard confirmed that the existing system is not approved by DES but there are no apparent signs of failure. Mr. Fisher lives in Canada – so it hasn't been used. The system then is clean because it hasn't been used. Nothing will change on the property at this time. The present septic is ok, there are no issues. The soils in this area are extremely good. Under the Zoning Ordinance, conversion requires a new septic design approved by DES, but not the actual installation. If an issue with the existing system arises, then the new system is installed.

Noone spoke in opposition to or in favor of the request.

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

Deliberative Session, Case # 51-2011

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

Mr. Samsel stated the five points were met and had no issue. Mr. Partington and Ms. Dunn agreed.

Mr. Partington motioned to grant the variance for Case 51-2011 from Section 1200.1.3 to permit the conversion of an existing seasonal dwelling on a lot that is nonconforming with respect to minimum frontage requirements, minimum front, side and rear yard setbacks, and minimum lot size area where such conversion is permitted only where the lot conforms to the dimensional requirements of Section 700 of the Zoning Ordinance, per plan submitted. Seconded by Mr. Samsel. Approved 5-0.

Lot 16-R-187, Case #52-2011

Applicant – Benchmark Engineering, Inc.

Owner – Donna & Martin Delaney

Location – 10 Second Street

Zone – Residence District A

A variance is requested from Section 1200.1.3 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the conversion of an existing seasonal dwelling to a full time year-round dwelling on a lot that is nonconforming with respect to minimum frontage requirements, minimum side yard setback, and minimum lot size area where such conversion is permitted only where the lot conforms to the dimensional requirements of Section 700 of the Zoning Ordinance.

Ms. Dunn read the case into the record.

Mr. Joseph Maynard of Benchmark Engineering, representing the applicant, presented the case and stated that the proposal is to convert the existing dwelling to year round use. The lot does not meet the minimum dimensional requirements, but it is an existing structure. A new state approved septic system was installed approximately 2007. Applicants also own the neighboring lot which the clean solutions system is shared with. No other changes to the structure are proposed at this time other than what's required by Mr. McGuire with respect to what's required by the Building Code. The shed was placed on the plan just to show what exists on the property.

Ms. Dunn stated that she tried to find the property in order to drive by it, but could not find it. Ms. Dunn asked if the variance is granted, is there anything that you would see from the exterior? Mr. Maynard stated that the only change you would see, if any, would be the addition of another entryway if required by the Building Code. Otherwise, there will be no changes.

Mr. Maynard read the 5 variance criteria into the record.

Noone spoke in opposition to or in favor of the request.

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

Deliberative Session, Case # 52-2011

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

The Board agreed the application meets the 5 variance criteria.

Mr. Partington motioned to grant a variance for Case 52-2011 from Section 1200.1.3 to permit the conversion of an existing seasonal dwelling to a full time year-round dwelling on a lot that is nonconforming with respect to minimum frontage requirements, minimum side yard setback, and minimum lot size area where such conversion is permitted only where the lot conforms to the dimensional requirements of Section 700 of the Zoning Ordinance. Approved 5-0.

Lot 16-R-785, Case #50-2011 – Continued from 11/22/11

Mr. Scholz asked whether Case 50-2011 should have a vote by the Board to approve the withdrawal. The Board discussed the By-Laws and there was a difference of opinion as to whether a vote is required. The Board decided to entertain a motion.

Ms. Dunn made a motion to accept the withdrawal of Case 50-2011, seconded by Mr. Samsel. Approved 5-0.

Lot 11-A-1418, 76 Meetinghouse Road, Case #46-2011– Request for Re-Hearing

Ms. Dunn read the request into the record.

Mr. Murray seated Mr. Scholz for Ms. Fallon.

Mr. Murray stated that the Board must consider whether new information is presented or technical error is made.

Ms. Dunn read the first paragraph of the Request for Re-Hearing into the record.

Mr. Samsel stated that in light of the Court's decision in the Flat Rock Road case, the vote the Board took in this case demonstrates that the 5 points were considered and accepted as presented. Ms. Dunn stated that the Board did hear the property could be developed as an open space subdivision, but in looking at the hardship criteria, she felt that the ZBA had to look at the statute in conjunction with the hardship criteria. Ms. Dunn stated that this is not an easy case, and not black and white, but the ZBA did not make a technical error and the argument is not new. Mr. Partington stated he voted against the application but not because of the hardship criteria pointed out in this first paragraph. Mr. Scholz agreed with Mr. Samsel, it is not a technical error. Mr. Murray concurred that no technical error was made and no new information is offered.

Ms. Dunn read the second paragraph into the record.

Mr. Samsel said that the percentage of the open space is the substance of the variance request. Mr. Samsel stated that he does not base his decisions on the look and feel of the project. Mr. Partington and Ms. Dunn stated that no new information or technical error was presented. Mr. Murray agreed with Mr. Samsel that the decision is not based on look and feel. Mr. Samsel reiterated that a project may be deemed a "betterment" by the Board, but ultimately it is the 5 points on which the decision is based.

Ms. Dunn read the third paragraph into the record.

Mr. Samsel stated that he does have concerns about this paragraph. The presentation of the land that was available in this current lot and the abutting lot was brought up. Maybe it was missed in the hearing, but this paragraph spells out quite clearly that there could have been available land to reduce the amount of open space. Ms. Dunn says there was discussion on this point and that there were topographical constraints, changes in elevation, wetlands, etc. The Board also wanted to preserve the remaining utility of the lot. Mr. Scholz stated that the Board mentioned there were other options before them. Mr. Scholz agrees with Mr. Samsel that the Board may not have given enough time to consider that this was a self imposed hardship specifically with respect to developing as an open space subdivision. Because the applicant chose to go the open space route, we look at the application in light of that, and the self imposed hardship weighs very heavily.

Ms. Dunn stated that Mr. Tierney asked whether there could be this many units with the required 65% open space, but the remaining lots would be very small, so it reflected on the economic viability of the project. Mr. Scholz stated that the crux of the problem is that the applicant had a choice as to what type of development they could have. The Board may want to consider the self-imposed hardship and examine that more.

Mr. Partington does not believe it's new information nor a technical error. If it was not a workforce housing development, the Board would never have considered this variance request. Mr. Scholz stated that he's having doubts that there was not a technical error based on this paragraph. Mr. Murray stated that this does not contain new information. With respect to technical error, Mr. Murray stated that he took that into consideration. Mr. Murray would caution the Board that there is a very strong likelihood that this will go to the next level. This could be remanded back to the ZBA. Mr. Murray stated that he could see this being a point of contention. Ms. Dunn stated that the Board should not base decisions on whether the case will be remanded.

Ms. Samsel stated that Mr. Partington and Ms. Dunn's statements calmed his concerns.

Ms. Dunn read the last sentence. Mr. Murray stated that the last sentence does not offer anything new.

Mr. Scholz stated that he believes that a technical error was made by the Board with respect to the information contained in paragraph 3, even though he understands that the Board considered it. Mr. Scholz stated that in reading the request for the rehearing he got a better understanding of what the abutters were trying to convey, and together that leads to the conclusion that the Board made an error.

Ms. Dunn made a motion to grant the re-hearing for Case 46-2011. Mr. Samsel seconded. The Board voted against the motion 4-1. Mr. Scholz voted to grant.

Mr. Partington motioned to deny the re-hearing for Case 46-2011, seconded by Mr. Samsel. Approved 4-1. Mr. Scholz voted against the motion.

Review and Approval of 9/13/11 and 11/22/11 Draft Meeting Minutes

Mr. Samsel motioned to approve the September 13 minutes. Mr. Partington seconded. Motion passed: 5-0.

Mr. Samsel motioned to approve the November 22 minutes as amended. Mr. Partington seconded. Motion passed: 5-0.

Public Hearing – Amendment to “Appeals” Section of By-Laws

Mr. Corwin stated the proposed amendment to the “Appeals” Section of the By-Laws was posted in accordance with the requirements of the By-Laws and, therefore, the Board could hold a hearing on the amendment tonight and vote to approve. Mr. Samsel proposed some minor changes to paragraph 5 of the proposed amended Appeals section. The Board discussed Mr. Samsel's edits and Mr. Scholz offered an additional edit to Mr. Samsel's edits. Mr. Samsel motioned to adopt the proposed changes to the “Appeals” section of the By-Laws as amended by Mr. Samsel and Mr. Scholz. The motion was seconded by Mr. Partington. Approved 5-0.

Discussion – Amending the By-Laws re: ZBA Budget Administration and Fees

Mr. Murray stated that he and Mr. Samsel met with the Board of Selectmen who approved a legal budget for the ZBA, and asked how the Board wishes to set that up and discuss roles and responsibilities with respect to the budget, and finally to discuss who the Board should use as counsel. The budget is \$5,500 and David Sullivan will remain the “gatekeeper” for access to the counsel. Mr. Murray suggested retaining Attorney Campbell's services on a day to day basis, but there will come a time when there is a conflict of interest and the Board would have to seek alternate counsel at that time.

Mr. Samsel stated that the Board of Selectmen granted a line item for legal services budget. If the ZBA exceeds the budget, money would be appropriated, which is how the Board operates today. The Board can choose to proceed as is, change counsel, or use Attorney Campbell. Mr. Murray stated that he does not want the budget to thwart Board members from obtaining legal counsel, but the Board should be cognizant of the budget and try to work within it. The budget gives the ZBA the ability to remain a separate quasi-judicial board, maintaining separation of powers with its own legal counsel as needed. If there's a conflict that the Board sees, the Board has the ability to seek alternate counsel. Now that the Board has the budget, it will need to monitor the budget and make sure the money is spent wisely. The Board will have to monitor the budget. The responsibility should be assigned, perhaps to the secretary or the vice-chairman. Mr. Samsel suggested that the last meeting per quarter, the Board receive an update. Mr. Murray stated that the By-Laws do not need to be amended. Ms. Fallon noted that the Secretary is responsible for "transactions". The Board should also receive copies of the invoices.

Mr. Murray stated that there is now a direct line of access through Dave Sullivan to legal counsel. Ms. Dunn stated that it must be clear what the question is. Mr. Scholz stated that no one else should be privy to ZBA legal communications. The Board might want to give Bernie a heads up that communications should come directly to the ZBA. Mr. Scholz asked what the communication with Bernie setting this up would say. Mr. Murray suggested that the letter to Attorney Campbell state that all communication to and from the ZBA will be made directly through the ZBA and no other party will be involved unless at the direction of the ZBA. Mr. Murray stated that he will draft something for Attorney Campbell.

Other

The Board expressed interest in attending a NH DES presentation on the Shoreland Water Quality Protection Act, as presented to the ZBA in an e-mail from Derek Monson of the Cobbetts Pond Improvement Association.

Mr. Murray stated that a future discussion for the Board to have is whether the ZBA application fees are adequate, and that perhaps the ZBA should consider raising their fees. The idea is to integrate the fees into the legal budget line item. Ms. Dunn stated that she doesn't want to price out the little guy. Mr. Murray stated that the cases that come before the Board will become increasingly complex and litigation may rise.

Mr. Murray brought up the idea of a joint meeting with the Planning Board and Board of Selectmen, and wanted to confirm that the Board was still interested. The Board confirmed their continued interest and Mr. Murray stated that he would work on a letter to requesting the meeting. Mr. Samsel asked what would the agenda and intended outcome of the joint meeting be? Ms. Dunn said that it would be a discussion of the process; a case review from the moment the 49 Range Road applicant walked into the door and how to make it better going forward.

Ms. Dunn stated that in the future she would like to see letters of denial before the ZBA moves forward on an application. The Board concurred.

Adjournment

These minutes submitted in draft form by Tim Corwin.