



## COMMUNITY DEVELOPMENT

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### Draft Zoning Board of Adjustment Minutes March 12, 2013

#### Board Members:

Mark Samsel, Chairman – Present  
Heath Partington, Vice-Chairman – Present  
Elizabeth Dunn, Member – Excused  
Jim Tierney, Member – Present  
Jay Yennaco, Member – Present

Mike Scholz, Alternate – Arrived at 7:35  
Mike Mazalewski, Alternate – Excused  
Tony Pellegrini, Alternate - Present

#### Staff:

Nancy Prendergast, ZBA/Code Enforcement Administrator  
Cathy Pinette, ZBA Minute Taker

#### Call to Order/Attendance

Chairman Samsel called the meeting to order at 7:33 pm, introduced the Board Members and staff, and explained the meeting process.

#### Public Hearings

Mr. Tierney read Lot 17-H-10, 17-H-20 & 17-H-25, Case # 9-2013 into the record, the list of abutters and two letters of authorization from the property owners.

#### Lot 17-H-10, 17-H-20 & 17-H-25, Case # 9-2013

Applicant – The Dubai Group, Inc.

Owner – Naults Honda for Karen L. Heller 1997 Trust (Lot 17-H-10 & Lot 17-H-20) & Common Man for Alex Ray Windham LLC (Lot 17-H-25)

Location – 60 Range Road, 64 Range Road, 70 Range Road

Zone – Gateway Commercial District, Cobbetts Pond and Canobie Lake Watershed Protection Overlay District

Variances are requested from the following sections of the Zoning Ordinance in association with a Common Man historic building relocation/re-use and Naults site expansion:

**706.8** - to allow a 0 ft front setback for a free-standing sign where 5 ft is required.

**601.3** - to allow a relocated historic building, a portion of a new building, associated septic systems, parking and other improvements within the WWPD where it is not a permitted use.

**601.4.6** – to allow 3 septic systems within the WWPD and 0 ft, 50 ft, and 80 ft respectively from the edge of wetland to be filled where 100 ft is required.

**616.9.1** – to allow septic systems within the required 50 ft and 75 ft setback to a wetland that will be filled.

**616.10.1** – to allow new impervious driveways within 75 ft of a wetland.

- Mr. Karl Dubay, of the Dubay Group addressed the Board. Mr. Dubay stated he went before the Planning Board for a preliminary design about a year ago and then the applicant's put the project on hold. Mr. Dubay gave a history of the plan. He spoke to Community Development, Conservation, and the Historic/Heritage Committee and they'll be looking at the plans. Mr. Dubay would like to reschedule the hearing to gather more information from the two Committees. Mr. Dubay spoke regarding the septic systems and where the wetlands would be filled and he would need to re-notify for clarification. There is one septic system with the restored historic building and that wetland will not be filled. The other two septic systems will be filled in. Regarding Section 601.4.6 he might like a text revision and Section 616.9.1 he would like that text reworded.
- The Board discussed Mr. Dubay's request. The consensus of the Board was they would like abutter input and also questioned clarifying the language in the Public Hearing Notice.
- Mr. Dubay gave a summary of the proposed plan and spoke about the new 111A. He stated the back of the current building will be the front when the new road goes in. Nault's would like to expand their building and improve the building by putting in a new showroom and new parking. The existing septic and part of the building is currently in the WWPD. A large portion of the WWPD will be filled by DOT as part of the 93 project. Mr. Dubay spoke about the variances he was requesting. The Woof Woof sign is in the state right-of-way and he will work with everyone involved to put a new sign in on the property when the state right away is rectified. The sign will meet zoning as it currently does not. Mr. Dubay spoke about the variances requested which are outlined in his application.
- The Board questioned if Mr. Dubay knew when they would switch Range Road and the new 111A. Mr. Dubay stated that DOT has told the abutters very soon. He stated the plan's for Nault's will not happen until the new front door is built which will be Phase 2 after the new 111A is in place. Phase 1 is moving the historic building, they want to do safety improvements with Woof Woof when the State right of way is fixed, they will be adding a new pad for Nault's, a driveway and moving the Common Man.

### **Questions/comments from the Board**

- Does Phase 1 of moving the building include a septic? Mr. Dubay stated yes
- Are there other reasons the State is filling in the wetlands? Mr. Dubay stated yes, for an access way to the businesses.
- Will the wetlands be filled before Nault's is built? Mr. Dubay stated yes.
- Why isn't the new septic system going in where the historic house is and not under the parking lot? Mr. Dubay stated they have to meet vertical and horizontal setbacks, they need to keep the leach bed separated, Nault's display area will be moved to the side of the building and that would not be aesthetically pleasing.
- Mr. Tierney raised concerns with having three lots with two separate owners and the variances in one case. Mr. Dubay explained how everything is interconnected with this project. Mr. Tierney stated his concerns were that these three lots with two separate owners are asking for variances that

do not particularly pertain to each lot. The Board stated that if relief is given it would have to be given for a specific lot.

- The Board asked Mr. Dubay if the driveway for Woof Woof is owned by the Common Man? Mr. Dubay stated some is owned by the Common Man and some is owned by the State. There is a right of access on the driveway to get to Woof Woof. He stated there will be access to Woof Woof during all phases.
- The Board asked how high above the existing grade will the new foundation on the historic house be? Mr. Dubay stated the back of the house at the basement will be at grade and is about 4 to 5 feet in front of the house. There ARE also proposing two small additions to the house to bring it up to code for ADA, a place for utilities, and one on the back of the building because of the stone chimney taking up so much room you cannot walk around it.

The Chair opened the hearing to the public at 8:45 pm

- Mr. Pat Nysten, 4 Edgewood Rd., addressed the Board. He stated he went to the preliminary Planning Board meeting. He has lived on Edgewood Road for 10 years and all the businesses have been good neighbors and he thinks this project will be good. He does have reservations. This is a 100% expansion for Nault's and he doesn't know what kind of building it would be aesthetically. He is concerned with any community development in town making sure it is consistent with the ordinances. Nault's is currently a nonconforming use used for ATVs, motor vehicles and motorcycles sales. He thinks this needs a use permit. He wants to make sure the ordinance is adhered to. He stated he had a correspondence from Town legal counsel stating auto sales are not allowed in this district.
- The Chair explained to Mr. Nysten that this Board is not an enforcement Board, their role is to grant variances. He stated there are no use permits in the State anymore. He stated Mr. Nysten's comments should be addressing the variances.
- Mr. Nysten read Attorney Campbell's memo that he wanted to introduce as evidence. Attorney Campbell stated in his memo that it was not allowed in the district. Ms. Scott was copied on the memo. The Chair suggested Mr. Nysten asked for an Administrative Appeal.
- The Board asked Ms. Prendergast if this project was started by Ms. Scott. Ms. Prendergast stated yes, a year ago. The Board asked Ms. Prendergast if she had looked at this as a new case? Ms. Prendergast stated she took all the information. Mr. Tierney stated Nault's is just expanding the use. Mr. Nysten stated there was a determination that it was retail. He also stated merging lots is a new nonconforming use.
- Mr. Ralph St. Claire, 70 Range Rd., owner of Woof Woof, addressed the Board. His concerns were as follows: two lots being lumped into one approval, he has no problem with the Nault proposal, serious concerns with the Common Man, septic going in where a wetland is that his businesses is on and would like more information on that, he has heard no dates for the 111 A project, his sign was surveyed and was told it was not in the right-of-way and now he's being told that it is and he wants to keep his sign, moving the building and allowing a septic without the state actually doing the fill is an issue and he stated Mr. Ray and Ms. Scott stated this project is part of a larger project in the future and he will have to move.

- The Board stated they will look at how Mr. St. Claire would be affected if they granted the variances.
- Mr. Tom Case addressed the Board. He stated he agreed with Mr. Tierney and has never seen a variance with two owners and three lots. Also the Board bases their decision on what is and not what will be. The Board asked Mr. Case if he would like a condition saying “subject to the state filling in the wetlands”.
- Mr. Dubay stated all the information on the plans show grading, interconnections, etc. The wetland will be filled as the State is doing it. This application can be done with a combined application with two separate owners and three lots. He has seen it in other towns. There are several notes on the plan that speak to the Master Plan. He is improving the access to Woof Woof. He surveyed the property and the sign is in the right-of-way. Mr. Ray is buying the right-of-way. Mr. Dubay can follow up on Mr. Nysten's comments but is not asking for the sale of motor vehicles, they can continue that use. The variance has nothing to do with the use. The look of the building would be governed by the Planning Board and we also have design regulations.

The public portion was closed

- The Board asked who decided to combine the lots under one case number?. Mr. Dubay stated he spoke with Community Development and talked with Mr. Ray and Mr. Nault and it was decided if they were going to spend the time and money on the historic building they would do everything together. He stated they are doubling the size of the building and he thinks that is a good thing. They will now also have room for tractor-trailers to turn around instead of backing out onto the roadway.

The Chair polled the Board to see if this needed to be posted as two separate cases.

- Discussion by the Board included: would like some examples of where this has happened before with separate owners and separate lots, but also sees it as a combined project; the variance criteria becomes very cloudy, when you speak to one doesn't apply to the other lots, the historic house vs Nault's, Nault's seems to be a separate case; the presentation could have been all combined but with two case numbers and two votes, legally it is questionable; legal counsel input; more clarity; does the Board want to only include the historic building at this meeting and repost the rest; get opinion from Attorney Campbell to see if this is two cases; the applicant said he wanted to move it to the 26th.
- Mr. Dubay stated this project goes together and is totally unique. He asked that Attorney Campbell look at the Master Plan and the Gateway District and the setbacks.
- The Board discussed keeping testimony from this case and what lots need what variances. Mr. Dubay stated he will provide more clarity to what lots need what variances.

**Mr. Tierney motioned to continue Lot 17-H-10, 17-H-20 & 17-H-25, Case # 9-2013 to March 26, 2013, seconded by Mr. Yennaco. Motion passed 5 – 0.**

The Chair entered Exhibit A, nonconfidential legal memo to the Town from Attorney Campbell dated November 20, 2012.

The Board took a recess at 9:40 pm was back in session at 9:48 pm

Mr. Mazalewski recused himself from Lot 17-L-45 & 17-L-46, Case # 10-2013 as he is an abutter.

Mr. Tierney read Lot 17-L-45 & 17-L-46, Case # 10-2013 into the record, along with the list of abutters and a letter of authorization.

Ms. Prendergast stated one abutter was crossed off the list and the new owner was added. The new owner came in to the Department and it was a typographical error in the Department.

**Lot 17-L-45 & 17-L-46, Case # 10-2013**

Applicant – The Dubay Group, Inc.

Owner – Ryan Carr (Lot 17-L-45) & Edward S. Gallagher (Lot 17-L-46)

Location – 134 Range Road & 4 Turtle Rock Road

Zone – Residence A District, Cobbetts Pond Overlay District

A variance is requested from the following section of the Zoning Ordinance in association with a lot line adjustment with no new units or construction proposed:

**702 and Appendix A-1, Minimal Lot Area by Soil Type** –to allow 1.04 acres to be transferred from Lot 17-L-45 to Lot 17-L-46, resulting in 1.34 acres and 2.43 acres, respectively, where Lot 17-L-45 will meet the minimal lot area square footage but will not meet the minimal lot area by soil type.

- Mr. Karl Dubay, of the Dubay Group, addressed the Board. He stated he is just proposing to move a lot line which will make a situation better. This will give Mr. Carr the ability to put his house under an historic restrictive covenant. He is here for a variance because the applicant would like to allow 1.04 acres to be transferred from Lot 17-L-45 to Lot 17-L-46, resulting in 1.34 acres and 2.43 acres. He explained the soil types on the lots.

**Questions/comments from the board**

- Why does the new lot line location shaped on the lot like that? Mr. Dubay stated Mr. Ryan's house has Pennichuck water and there is an existing well on his property that will help the new owner.
- Mr. Ed Gallagher, 4 Turtle Rock Rd., addressed the Board. He stated one of the advantages is that Mr. Carr has a well in that area so they did the lot line adjustment to help each other. Mr. Gallagher will get the well and Mr. Carr will get the historic designation.
- Mr. Ryan Carr, 132 Range Rd., explained his history with the property. He stated there will be no further development, it will be a nice project and it is neighbors helping neighbors.
- Mr. Dubay stated this was a unique project as it is a historic house and the extra land can help the abutter.
- The Board asked Mr. Dubay what the percentage the soil type was under. Mr. Dubay pointed to the colored plan on the wall and stated the green lot was .6, the pink lot was .4 – .5, and the blue lot was 1.0. He stated he did do test pits in case a new septic is ever needed.

Mr. Dubay read the five criteria into the record.

- The Board asked if the applicant would be okay with having a condition of an historic covenant. Mr. Dubay stated yes.

**Mr. Partington motioned to go into Deliberative Session, seconded by Mr. Tierney. Motion passed 5 – 0.**

- The Board's comments were as follows: there is no change to the character, this will not affect health or safety, it benefits both the applicant and the abutter, there is no diminution in values of surrounding homes, the land is an odd shape, the applicant is on Pennichuck water and the well on the land will help the abutter.

**Mr. Partington motioned, in consideration of the five criteria, to approve the variance for Case #10-2013 from 702 and Appendix A-1, Minimal Lot Area by Soil Type –to allow 1.04 acres to be transferred from Lot 17-L-45 to Lot 17-L-46, resulting in 1.34 acres and 2.43 acres, respectively, where Lot 17-L-45 will meet the minimal lot area square footage but will not meet the minimal lot area by soil type with the one condition that a restrictive covenant be recorded with the Registry of Deeds for the historic home on Lot 17-L-45, seconded by Mr. Pellegrini. Motion passed 5 – 0.**

The Chair advised all of the 30 day appeal.

### **Review and Approval of Draft Meeting Minutes**

**February 26, 2012**

- The Board made amendments to the minutes and they will be brought back for approval.

### **Old/New Business**

Court Cases: Cafua (Supreme Court TBD), Roberts (Supreme Court 3/7/13), 21<sup>st</sup> Century (Superior Court 4/10/13)

- The Board discussed upcoming court cases and who will represent them from the Board.

### **Adjournment**

**Mr. Partington motioned to adjourn, seconded by Mr. Tierney. Motion passed 5 – 0.**

Meeting adjourned at 10:30 pm

These minutes are in draft form and respectfully submitted for your approval by Cathy Pinette, ZBA Minute Taker.