

**BOARD OF SELECTMEN**  
**Minutes of March 5, 2012**

**MEMBERS PRESENT:** Chairman Ross McLeod called the meeting to order at 7:00 PM. Selectmen Bruce Breton, Phil LoChiatto, Kathleen DiFruscia and Roger Hohenberger were present, as was Town Administrator David Sullivan. Mr. McLeod opened with the Pledge of Allegiance.

**FINANCIAL GUARANTEE RELEASE:** Mr. McLeod noted that the release form for Misty Meadow Road and Brookview Road had been signed off by the Planning Board and Community Development Department. Mr. Hohenberger moved and Mr. Breton seconded to release the bond in the amount of \$35,000 plus accrued interest, retaining \$33,325, to Eighty Mammoth Road, LLC. Passed unanimously.

**LIAISON REPORTS:** None.

**MINUTES:** None.

**CORRESPONDENCE:** None.

**ANNOUNCEMENTS:** Mr. McLeod reminded all that the annual election would take place on 3/13 from 7AM to 8PM at the High School.

*Mr. McLeod* then extended congratulations to Miss Marisa DeLuca, who had recently been named Miss NH Teen, and will now be going on to the Miss Teen USA contest.

*Mr. McLeod* extended congratulations to the Windham High School Division II Wrestling champions: Jeff Armstrong, Zach Sprague, Tyler Silverhaus, and Gage Fenton. Also, to recently named NH State Coach of the Year, Tom Darrin; the Varsity and JV Cheerleaders who had recently taken first place in the Capital City Cheer Competition, and; to resident Jimmy Morgan who had recently won a bronze medal in the US National Figure Skating Championships in novice pairs.

**JOINT MEETING WITH PB AND ZBA:** Mr. McLeod noted that the purpose of this meeting was to examine the process and flow of information between the Planning Board (PB) and Zoning Board of Adjustment (ZBA) and the Community Development Department. He added this discussion had been triggered by a request from ZBA Chairman Tom Murray expressing concerns regarding same, and requested that the PB and ZBA Chairs advise for the record who was in attendance from the respective boards.

Ruth-Ellen Post, PB Chair, advised that regular members Jonathan Sycamore, Margaret Crisler and Carolyn Webber were present, as was Alternate Sy Wrenn. Mr. Murray advised that Regular members Mark Samsel, Heath Partington and Dianna Fallon were present, as was Alternate Mike Scholz.

Mr. McLeod clarified that concerns had been raised regarding the process related to 49 Range Road, and Mr. Murray confirmed that; adding that he would like to discuss the process involved in the case. He explained that the applicant had come to the ZBA and the case was decided, followed by a rehearing case which was also decided by the ZBA, and then subsequently there was a Planning Board hearing held despite the fact that the 30 day appeal period was still pending.

Mr. Breton requested a point of order to clarify whether the Boards intended to discuss the specific case, and Mr. Murray answered in the negative, reiterating he wished to discuss the process only. Mr. Breton inquired again whether the specific case was going to be discussed, and Mr. Murray replied that the merits of the case in question were moot, as that case was over. He indicated that the ZBA wants a clear direction as there seems to have been a conflict in this matter; both with one board granting the application while the other denied it, and with staff. Mr. Murray added that this discussion has no bearing on the applicant in question, but only on the process going forward. Mr. Breton replied that if the case was not going to be brought into the discussion that was fine, however, if it were then the applicant should be represented.

Mr. McLeod disagreed that the case itself should not be discussed, as he felt the Board needed to hear about it in order to properly discuss the process flow. Mr. Murray noted that the issue at hand is only the flow of information from board to board and how to prevent similar errors in the future.

Mr. McLeod then inquired whether, when the case was first heard, the decisions rendered were issued in writing from the ZBA. Mr. Murray deferred to Mr. Partington, who had sat as Chair for the meeting, and Mr. Partington indicated he did not intend to mention any specifics of the case in his presentation; but rather only provide a timeline of dates/action. He reiterated that the merits of the case were not the issue. Discussion ensued regarding the context of the discussion and that the case in question could have been highly contested.

Mr. Partington then reviewed the following timeline with the Board:

- 8/4/11 – minor site plan application was submitted to the Community Development Department. No denial letter was generated, nor was there an Appeal of an Administrative Decision when the applicant was advised that a variance would be required.
- 8/23/11 – the ZBA heard the case and moved to deny the request 3-2.
- 8/31/11 – the Planning Board held a public hearing on the minor site plan application and determined it was not “minor” but “major” and did not hear the case at that time.
- 9/20/11 – the applicant filed a major site plan application
- 9/27/11 – a request for re-hearing was also denied by the ZBA, 3-1-1

Mr. LoChiatto interjected to inquire whether the aforementioned had all been relative to the same plans, and Mr. Partington replied in the affirmative, with additional information being submitted.

- 10/26/11 – the Planning Board heard the major site plan application

Mr. Hohenberger inquired whether the information presented to the PB on 10/26 was different than that submitted to the ZBA. Mr. Partington replied that was part of the issue, as the ZBA did not know whether it was the same. Ms. Post added that the PB had received only one set of plans related to the major site plan application. Mr. Hohenberger inquired whether the PB had been aware of the ZBA’s previous decisions, and Ms. Post replied in the negative; noting the Board had received no copies of the ZBA decisions or minutes. She added that the ZBA hearing had been mentioned during the PB meeting, but not as being an obstacle to PB approval. Mr. Partington added that a member of the PB had, toward the end of the hearing, questioned the route the plan had taken to the PB and that the question regarding the variance was posed but not fully answered.

Mr. McLeod again inquired whether, at any point, the ZBA’s decision was put into writing and distributed. Mr. Partington replied that, while he hadn’t seen them, he was sure it had been done as it is required by law. Mrs. DiFruscia inquired to whom it would have been distributed, and Mr. Murray and Mr. Partington replied it would have gone to the applicant with a copy placed in the file. Mr. Murray added that, after a 30 day period, the decision of the ZBA becomes a final order, and the same variance cannot be applied for again.

Mrs. DiFruscia inquired whether the ZBA had been aware the applicant was going back to the PB, and Mr. Murray replied in the negative. Mr. Partington added that he had only learned of it as he’d seen it on TV. Discussion ensued regarding the ZBA process, and Mr. Partington clarified that the ZBA cannot hear the same case twice per statute.

Mrs. DiFruscia inquired whether the ZBA had any other process concerns beyond notifications, and Mr. Murray replied in the affirmative citing concerns with how cases are handled from the outset. He noted that staff receives applications and determines whether or not a variance is required and, if so, a denial letter should be issued which the ZBA is not receiving. Mr. Murray added that staff needs to generate these letters immediately in order to avoid similar situations in the future.

Mr. Partington noted concerns regarding consistency of information (ie: PB does not have ZBA info and vice versa), and inconsistency in the handling of cases by staff members due to multiple people handling applications. Mr. Murray added that the RSA's are clear regarding those duties bestowed upon inspectors, code enforcement officers, and others; and that the statutes need to be followed, which he does not believe the Town is doing. He noted that this could cause issues regarding applications/cases not being handled by the proper staff member in that different staff have different roles and responsibilities, and such improper handling could open the Town to lawsuits. Discussion ensued relative to Town Counsel's correspondence of 1/03/2012 regarding this issue.

Ms. Post indicated that it is PB practice to request a copy of decision letters/minutes regarding any ZBA granted variances, and that they do receive that information. She noted that the PB has not been receiving denials, as such matters would generally not go to the PB, and requested that such information be received by the PB moving forward. Discussion ensued, and the Selectmen concurred. Mr. LoChiatto suggested that staff provide a timeline of ZBA activity to the PB, along with any decision letters, and Mr. Partington supported same.

Ms. Scott approached and clarified that there was an Appeal of Administrative Decision filed with Mr. Corwin within the 30 day required period, which was in progress at the time of the Planning Board hearing. Mr. Murray inquired whether it was filed after the original variance request, to which Ms. Scott replied in the affirmative. Discussion ensued regarding the ZBA by-laws and possibly specifically including therein the time frame of actions.

Ms. Scott went on to note that the Appeal of Administrative Decision had been filed in case the court had sent the case back to the Town. She then reiterated/clarified the timeline of the case in question, noting it had been denied twice, appealed to the Superior Court and simultaneously an Appeal of Administrative Decision had been filed stating they did not need a variance. Further discussion ensued regarding the 8/23 hearing.

Ms. Scott indicated that the reason she had determined originally that it needed a variance was because that had been her determination regarding the property in 2010 and when, a year later, she had been asked again she had given the same opinion and referred the case to Mr. Corwin. She noted Mr. Corwin had not issued a notice of denial, and discussion again ensued regarding the process for generating such letters and whether it should be standard procedure. Ms. Scott indicated that oftentimes variance applications are received by staff without them having been contacted at all, as the applicant already knows a variance is needed. Discussion ensued regarding the need for a plan to go to the PB and be denied in order to receive a denial notice and past practice in the Department.

Mr. Murray indicated that Town Counsel strongly recommends making a denial letter a requirement and further discussion ensued. Mrs. Crisler inquired whether the denial establishes the time frame for appeals, and Mr. Murray replied in the affirmative. Further discussion ensued regarding procedures, and Mr. Breton indicated that staff needs to advise residents as such if a denial letter needs to be obtained prior to applying for a variance.

Mr. Partington noted that the thirty day process begins when the denial letter is issued, and Mr. LoChiatto noted that perhaps, for those applicants who know they need variance without talking to staff, the process should be that they meet with the Code Enforcement Officer who will then generate said letter. Discussion ensued.

Mr. McLeod noted that there is a statutory requirement to issue a "denial", and Mr. Murray indicated he was not suggesting creating more work for anyone, but rather that the Department resume using the process utilized by Mr. McGuire in the past. He added that, with a new Code Enforcement Officer coming on staff it was an opportunity to instruct him/her in doing it that former way.

Ms. Scott suggested that the ZBA amend their application to include a denial letter as a requirement, citing for example that there were currently three plans scheduled for the 3/27 meeting for which none of the applicants had spoken to staff. She noted that staff does generate memos regarding applications after review of same, but they are not official denials. Discussion ensued as to when/why the former process changed, and it was suggested that staff should be following the same procedures regardless of how an application comes in. All concurred that the Community Development Department needs to generate a denial letter. Mr. Scholz noted that the ZBA can amend their application, however, the Department can also do the letter in the interim, such as for the three pending cases. Further discussion ensued.

Ms. Scott then went on to explain that, the day after the re-hearing was denied, she met with the owner who presented something different to her than was presented either time to the ZBA. She indicated that, with the new information, she felt it could go to the Planning Board for a change of use. Ms. Scott noted that it had never occurred to her to include the ZBA denial or minutes in the PB packets because it was a different use, and confirmed that Mr. Sycamore had mentioned the ZBA denial during the hearing. She indicated that she would not have sent the applicant to the ZBA if she had known the scope of the project, and that none of that information was presented to the ZBA by the applicant. Ms. Scott indicated that the PB had granted the change of use 7-0 with the major site plan being voted separately. Mr. Hohenberger suggested that it be made a condition of application to the PB that the applicant state if there is history with the ZBA, and Ms. Post concurred; adding that it would alert the PB to any issues.

Mr. Partington noted that it appeared the applicant appealed the Administrative Decision to Ms. Scott outside of the 30-day window, and added that he/she had had the opportunity to present that same information to the ZBA. Mr. Murray noted that he believed where Ms. Scott erred was in sending the plan to the PB, noting that it should not be staff's determination as to whether it is new or not, but that of a quasi-judicial board. He added that there is a standing order against the property now based upon the ZBA's denials. Discussion ensued regarding the reasons behind the re-hearing/appeal, Fischer v. Dover, Town Counsel opinion, and procedure.

Mr. Murray reiterated the existence of the standing order, and added that if staff found it had erred in that the application should not have gone to the ZBA, then it should have been sent back to the ZBA and staff explained as such to the Board. Mrs. DiFruscia inquired if the new information regarding use of the property should have been brought forth at the re-hearing stage, and Mr. Murray indicated that was correct; adding it could also have been revealed via another variance request if it were a different application. Mr. Breton noted he would agree with Mr. Murray if it were regarding the same exact case; however it was different if a variance were not required. Discussion ensued regarding Mr. Murray's discussion with Town Counsel.

Mr. McLeod summed up the requests/determinations made thus far as follows:

- ZBA will amend their application to include requirement for a denial letter
- Staff will, in the interim, address generating same
- PB will be alerted to any ZBA history
- Staff will not filter cases

Mr. Breton also requested that Town Counsel be asked to review the ZBA's procedures. Discussion ensued, and it was determined that the LGC could conduct the same review at no cost to the Town.

Mrs. DiFruscia asked that the Departmental process be looked at as well, and Mr. Murray noted that duties pertaining to ZBA activities are established via statute in RSA 673:33 (a). Discussion ensued regarding same, as well as sending of all cases to the ZBA. Mr. Murray indicated it should always be the ZBA who determines whether a plan is substantially different. Ms. Scott inquired how far back the PB wished the ZBA history included in their information to go; and Ms. Post replied an outline of the history along with the most recent minutes should be included.

Mr. Murray advised that the NH OEM offers courses/meetings regarding zoning, and all may benefit from attending. Discussion ensued regarding relevant statutes/decisions and ordinances.

Mr. Breton suggested that PB may want to have the full property file on hand for their hearings, and Ms. Post did not feel that was necessary as the information is usually accessible.

Further discussion ensued regarding sending of cases back to the ZBA and the circumstances leading up to this meeting, before Mr. McLeod again summed up the following determinations made:

- ZBA will amend their application to include requirement for a denial letter in their checklist
- Staff will, in the interim, address generating same
- PB will be alerted to any ZBA actions via an outline of the history and most recent minutes
- Staff will not filter cases; all will be sent back to the ZBA
- ZBA By-laws and procedures will be submitted by the Town Administrator to the LGC for review

Mr. Scholz requested that staff roles/duties and processes also be reviewed. Lengthy discussion ensued regarding the current job descriptions, handling of Code Enforcement cases, and confusion at the ZBA regarding handling of same. The following additional determinations were made:

- Staff will ensure all current job descriptions are circulated to the Boards
- The Department will advise the ZBA of which staff is handling Code Enforcement on cases before the ZBA

Mr. Scholz then inquired whether the ZBA would be participating in the interview process for the new Code Enforcement Officer/Zoning Administrator; and Mr. McLeod replied in the negative noting that it would represent a conflict of interest.

After further, brief discussion, the Chair called for a five minute recess.

**REPRESENTATIVE MCMAHON:** Mr. McMahon advised he had requested to attend on behalf of Mr. Jeffrey Pelletier who, for the past 20 years, has run Windham Farms on Range Road at the driving range. Mr. McMahon explained that the stand itself has existed for 60 years and, when the NH DOT purchased the property in question as part of the by-pass project, Mr. Pelletier began leasing the property abutting the driving range to continue operations. He explained that the construction itself impacted the stand's income, causing Mr. Pelletier to fall behind in his rent payments, which the State reduced from \$1,200/month to \$800/month. Mr. McMahon indicated that, to date, Mr. Pelletier has paid \$8,500 towards his arrears of \$12K, however, the State has advised him that they are going to evict him. Mr. McMahon noted that the eviction date was scheduled for that day, however, within the last five days he had been in contact with the Attorney General's Office and Mr. Jeff Brillhart at the DOT regarding this matter.

Mr. McMahon indicated that, as he felt Mr. Pelletier's hardship was a result of the by-pass project, he had come to the Board for assistance. He then detailed a proposal which would allow Mr. Pelletier to continue to operate until 12/31/2012, paying the current rent of \$800/month until June, at which time it would be reduced to \$400/month. Discussion ensued as to the previous terms, which did not include an end date, and the previous reduction in rent as a result of the State taking down the previous building. Mr. Pelletier clarified that the only time he had been in arrears was when the building came down, and that he had caught up. He also cited the impacts to his operations of a single lane in/out of the property, as well as noting that for a period of three years the construction was directly in front of his building.

After further discussion, Mr. Hohenberger moved and Mr. Breton seconded that the Chair execute a letter of support for the proposal as discussed, with the remaining members to sign as well, and that same be cc'd to Senator Rausch. Passed unanimously.

**OLD/NEW BUSINESS:** Mr. Sullivan advised that the Federal Government had changed the requirements relative to the Salt Reduction Grant as it pertained to the Highway Truck bid award. He noted that the Town must now state the make/model of cab and chassis in the bid; must accept the low bidder, and cannot split the bid. Mr. Sullivan indicated that this means the Board should support the inclusion of Liberty International's bid data as previously received in the grant package.

Discussion ensued as to the rejection of the first round of bids for the vehicle and that, in the second round of bidding only Liberty was able to meet the Build America requirements. Mr. Sullivan noted that, if the Board took no action, they risked losing the bid; adding that the purchase must be finalized by June. Discussion ensued.

Mr. Breton moved and Mr. Hohenberger seconded to award the purchase of the highway truck to Liberty; and that the ancillary items be placed out to separate bid. Passed unanimously.

*Cristy Road:* Mr. Sullivan advised that the Planning Board had authorized the release of the Cristy Road Extension bond, with a recommendation to retain \$5K for swale cleaning/landscaping; however, he would prefer the Board release the bond in its entirety and require the developer to post a new \$5K bond for work in the Town's right of way. Ms. Scott clarified that the bond in question was a cash bond, and the \$5K could simply be moved to escrow or elsewhere for the right of way work. She added that all had signed off on the release and that \$5K was more than adequate for the work that remained. Brief discussion ensued, and Mr. Sullivan indicated he would post this for a public hearing accordingly.

**NON-PUBLIC SESSION:** Mr. Hohenberger moved and Mr. Breton seconded to enter into nonpublic session in accordance with RSA 91-A:3 II a, b, d and e. Roll call vote all "yes". The topics of discussion were personnel, land acquisition and legal.

The Board, Tax Collector Ruth Robertson, Mr. Sullivan and Ms. Devlin were in attendance in the first session.

The Board discussed the vacant Deputy Tax Collector position. Mr. Breton moved and Mr. Hohenberger seconded to support the recommendation of the Tax Collector and Town Administrator to fill the position. Passed unanimously.

*The Board*, Ms. Scott, Mr. Sullivan and Ms. Devlin were in attendance in the second session.

The Board discussed the vacant Conservation/ZBA support position. Mr. Breton moved and Mr. Hohenberger seconded to support hiring the recommended candidate subject to the requirements of the employee policy. Passed unanimously.

Mrs. DiFruscia moved and Mr. Hohenberger seconded to adjourn. Passed unanimously.

Meeting was adjourned at 10:00 PM, followed by a discussion of matters related to Union negotiations.

Respectfully submitted,

Wendi Devlin, Administrative Assistant.

*Note: These minutes are in draft form and have not been submitted to the Board for approval.*