

# BOARD OF ADJUSTMENT

PO Box 120  
Windham, New Hampshire 03087  
Telephone (603) 432-3806

## **Zoning Board of Adjustment Minutes September 12, 2006**

Robert Gustafson – Chairman  
Mark Samsel – Vice-Chairman  
Tony Pellegrini – Secretary  
Dianna Fallon – Member  
Gail Webster – Member (Late)  
Jim Tierney – Alternate  
Tom Murray – Alternate (Excused)  
Al Souma – Alternate (Absent)

### **Seat Alternates**

The Chairman appointed Mr. Tierney to replace Mrs. Webster.

### **Lot #17-L-60, Case #33-2006-Request for Rehearing, (Originally heard on 6/27/06 and Continued from August 22, 2006)**

Applicant – Herbert Associates  
Owner – William & Kathleen Deluca  
Location – 19 Farmer Road  
Zone – Residential A

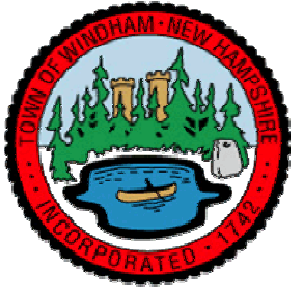
A variance is requested from Sections 603.1.1 & 702 Appendix A-1 of the Zoning Ordinance to permit the construction of a duplex to replace an old existing house on a non-town approved road 10.81–feet from the left rear setback and 11.97–feet from the right rear setback where 30-feet is required.

The applicant requested that the Request for a Rehearing be continued to the next meeting. Mr. Pellegrini motioned and Mr. Samsel seconded the motion to continue the Request for a Rehearing to the September 26, 2006 meeting. Motion passed 4-0-1. Mr. Tierney abstained.

### **Lot # 22-L-71, Case #43-2006**

Applicant – Patricia Desmarais  
Owner – Patricia Desmarais  
Location – 39 West Shore Road  
Zone – Residential A

A variance is requested from Section(s) 401 of the Zoning Ordinance to permit the construction of a 24' X 24'6" attached garage with a finished room above the garage.



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Mr. Pellegrini read the case into the record. Attorney David LeFevre, representing the owner, presented the case. On April 6, 1988 the Zoning Board granted a variance to build a home on Lot #22-L-71 subject to the condition that there be no garage. A home was constructed in accordance with the variance, without a garage, but with a concrete pad for parking. Ms. Desmarais is requesting a variance to build a garage and that the 1988 condition not to build a garage on the property be removed. Many of the homes in the neighborhood have garages. The proposed garage would be built within the area of the existing concrete pad, and as such, there would be no increase in the footprint of the parking area. The existing parking area has a side yard setback of 28-feet and a front yard setback of 35-feet. Attorney LeFevre read the supporting facts into the record. A list of seven neighbors that have no objection to the proposed garage was submitted and marked as Exhibit A. A letter of support from Sultan and Asima Chowdhry was read into the record and marked as Exhibit B. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mr. Pellegrini seconded the motion to go into Deliberative Session. Passed unanimously 5-0.

### **Deliberative Session, Case #43-2006**

Mr. Samsel motioned and Mr. Pellegrini seconded the motion to lift the condition from the 1988 variance that no garage be built and to grant an area variance from Section 401 to permit a 24' X 24'6" garage with a room above. Motion passed unanimously 5-0.

### **Lot # 17-L-75A, Case #44-2006**

Applicant – Edward N. Herbert Associates Inc.

Owner – Koch Family Realty Trust

Location – 36 Horseshoe Road

Zone – Residential A

A variance is requested from Section(s) 401, 406, 702 Appendix A-1 of the Zoning Ordinance to permit the expansion of a non-conforming house and a detached garage 21-feet from the side lot line where 30-feet is required and 20-feet to Horseshoe Road where 50-feet is required.

Mr. Pellegrini read the case and a letter of support from Anthony & Kathleen DiFruscia into the record. Mr. Wes Aspinwall of Herbert Associates, representing the owner, presented the case. Because of the size and shape of the lot, the topography and existing house location and the location with respect to Cobbett's Pond, the proposed addition is in the best possible location. The garage will replace an older garage in poor condition. The same driveway entrance will be used. Five photos were submitted and marked as Exhibits A-1 thru A-5. Mr. Aspinwall read the supporting facts into the record. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mrs. Fallon seconded the motion. Passed unanimously 5-0.



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### **Deliberative Session, Case #44-2006**

Mr. Samsel motioned and Mr. Tierney seconded the motion to grant a variance for Case #44-2006 with relief from Sections 401, 406.2 and 702 Appendix A-1. Motion passed unanimously 5-0.

Mr. Tierney stepped down from the Board to present Case #45-2006 and Mrs. Webster was on the Board for the balance of the meeting.

### **Lot # 14-A-850, Case #45-2006**

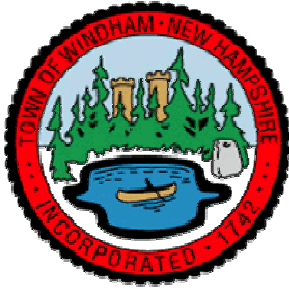
Applicant – Edward Mucci  
Owner – Edward Mucci  
Location – 17 Twin Street  
Zone – Rural

An Appeal of an Administrative Decision is requested from Section(s) 602.1.6 of the Zoning Ordinance. The applicant is appealing the decision that his home business requires site plan approval.

Mr. Pellegrini read the case into the record. Mr. Jim Tierney, representing the owner, presented the case. Mr. Mucci was granted a variance in 1989 to have an automotive dealer's license. In 2005 he was granted a variance to provide an inspection service. Mr. Tierney submitted copies of letters from Mr. Mucci to the Town of Windham and to the State of New Hampshire. Mr. Turner's opinion is that the commercial use of the property requires site plan approval by the Planning Board. Mr. Mucci runs an auto sales business from his property and has submitted an application to the State for an inspection service. The town is now saying he must go thru site plan approval. The following conditions of approval were put on Mr. Mucci's property in 1989:

- Limited to three unregistered vehicles.
- All vehicles are to be kept in the garage.
- No display of vehicles for sale.
- No outside advertising.
- No chemicals.
- No employees.
- No signage.

It is difficult to have a commercial business if you can't have a sign, can't display the vehicles etc. so there would not be anything for the Planning Board to look at with the restrictions already on the property. The general standards of site plan regulations look at pedestrian safety, adequacy of off street parking, loading facilities, environmental factors, signage etc., these requirements do not apply to this property. This is Mr. Mucci's private property, he is not open to the public, people make appointments to come and view the vehicles he has for sale. The inspection station is for the refurbished vehicles only; not for just anyone to come in for an



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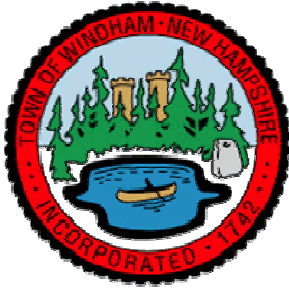
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inspection. Mr. Tierney read into the record RSA 674.43 *Power to Review Site Plans A municipality, having adopted a zoning ordinance as provided in RSA 674:16, and where the planning board has adopted subdivision regulations as provided in RSA 674:36, may by ordinance or resolution further authorize the planning board to require preliminary review of site plans and to review and approve or disapprove site plans for the development or change or expansion of use of tracts for nonresidential uses for multi-family dwelling units, which are defined as any structure containing more than two dwelling units, whether or not such development includes a subdivision or resubdivision of the site.* This property has not been split up; there is nothing commercial about this property. Mr. Mucci is working under the conditions put on his property in 1989.

Mr. Al Turner, Director of Planning & Development, said that back in 1992, Frank Keefe, Code Enforcement Administrator, wrote a letter to Mr. Mucci stating that he visited the property and Mr. Mucci was not in compliance with the 1989 variance. In 1996, Mr. Bruce Flanders, Building Inspector, wrote a letter to Mr. Mucci stating that he was not in compliance with the variance. Mr. Turner read into the record an advertisement for Mucci Auto Sales. Mr. Gustafson said those are enforcement issues. A letter was written to Mr. Mucci on January 20, 2005 indicating why site plan approval is required on the site. Site plan approval is required because Section 503 states when you have a change of use or expansion of any non-residential building, land or structure it shall require site plan approval except when the size of the building does not change and the new use is a permitted use in the zone. This is not a permitted use; it requires a variance. Other sections would apply such as Section 702.5 and Section 704.3. The business is run out of the garage and non-residential uses of a lot require site plan approval. Mr. Turner submitted photos marked as Exhibit A. The site plan approval process would make clear what is and what is not allowed on the property. The Chairman asked if Sections 503, 702.5 and 704.3 were in force in 1989 such that it would require a site plan review. Mr. Turner said they were in effect in 1989. The Chairman said he operated from 1989 to 2005 without any enforcement of site plan review. Mr. Turner said there is nothing in the record showing that Mr. Mucci was notified that he needed site plan approval. The Chairman asked that if Mr. Mucci abandoned the variance that was granted in 2005, would he still be required to go for site plan review since he has been operating under that 1989 variance? Mr. Turner said there is already a history of car repair, now we have an inspection station that will require changes. As of this afternoon, there are 14 vehicles on the property, and Mr. Turner said he thought they were there in anticipation of the inspection station. Mr. Mucci has been cited for bringing oil filters and excessive car debris to the Transfer Station. There is more going on here than the Zoning Board was led to believe during the request for the variance.

Mr. Tom Case of 17 Mountain Village Road said he heard Mr. Tierney read the RSA twice and Mr. Turner read the RSA once and it is clear to Mr. Case that there is no authority for residential site plans in the RSA.



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Mr. Tierney said that Section 503 addresses commercial uses. This is an accessory to the use but not a primary use. Mr. Tierney was at the property today and there were 10 or 12 cars on the property all registered and two had dealer plates. Mr. Tierney checked neighboring homes and found that one neighbor had 8-10 cars (4 unregistered) in the driveway. At Faith Road and Route 111 there were 6 cars and on Mammoth road there were 8 cars in the driveway. Mr. Tierney submitted photos. Mr. Mucci has applied for an Inspection License but does not know if he will receive a license to do the inspections. The Chairman closed the public portion of this case. Mrs. Webster motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Passed unanimously 5-0.

### **Deliberative Session, Case #45-2006**

Mr. Samsel motioned and Mr. Pellegrini seconded the motion to reverse the Administrative Decision that the applicant needs site plan approval. Motion passed 3-2. Mrs. Fallon and Mr. Gustafson voted against the motion. Mr. Samsel, Mr. Pellegrini and Mrs. Webster voted for the motion.

The Chairman granted a 5 minute recess.

### **Lot # 14-A-1100, Case #46-2006**

Applicant – New Cingular Wireless PCS, LLC

Owner – Waterhouse Realty Trust, Kevin Waterhouse, Trustee

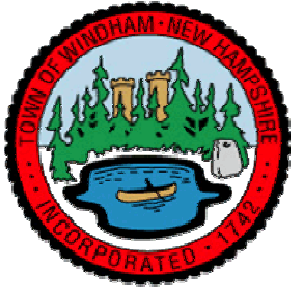
Location – 18 Mammoth Road

Zone – Neighborhood Business

A variance is requested from Section(s) 604.1 of the Zoning Ordinance to permit the construction, operation and maintenance of a wireless telecommunications facility.

Mr. Pellegrini read the case into the record. Mr. Kevin Waterhouse gave a brief history of the property, it has been in continuous use since 1921, and explained that he is constantly approached by his customers that there is a serious need for a tower in the area. Mr. Waterhouse introduced Attorney Douglas Wilkins of Anderson & Kreiger, who presented the case. Attorney Wilkins explained that there are gaps in cell phone coverage and showed the areas on the displayed maps and charts. The Town of Windham allows commercial antenna structures in the Commercial and the Professional Business & Technology District. These districts are located significantly east of the area in which Cingular is seeking to fill its coverage gap. It is impossible for Cingular to provide complete service to Windham under the present zoning scheme, therefore, Cingular must locate in an alternative zoning district, the Neighborhood Business District, which requires a use variance. Attorney Wilkins provided the following information:

- 120' flagpole style tower.
- A 30' X 50' fenced equipment area at the base of the tower with capacity for Cingular's installation as well as future installation by another carrier.
- A shelter at the base of the tower to house switching equipment.



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- A back-up generator and above ground propane tank.
- Standard electric and telephone utilities to be run underground.

Attorney Wilkins read the supporting facts into the record. This will be a multi-carrier pole. Chip Fredette along with Kamal Johari of T-Mobile spoke in favor of this request. Team Mobile will co-use this tower with Cingular. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Passed unanimously 5-0.

### **Deliberative Session, Case #46-2006**

Mr. Pellegrini motioned and Mr. Samsel seconded the motion to grant Case #46-2006. Passed unanimously 5-0.

### **Lot # 14-A-1100, Case #47-2006**

Applicant – New Cingular Wireless PCS, LLC

Owner – Waterhouse Realty Trust, Kevin Waterhouse, Trustee

Location – 18 Mammoth Road

Zone – Neighborhood Business

A variance is requested from Section(s) 701.1.1 of the Zoning Ordinance to permit the construction, operation and maintenance of a wireless telecommunications facility.

Mr. Pellegrini read the case into the record. Attorney Wilkins along with Jonathan McNeal, Real Estate Consultant for Cingular Wireless, requested a continuance of Case #47-2006. Mr. Samsel motioned and Mrs. Fallon seconded the motion to continue Case #47-2006 to the October 10, 2006 meeting. Passed unanimously 5-0.

### **Lot # 3-B-262, Case #48-2006**

Applicant – Gerard Beique

Owner – Gerard Beique

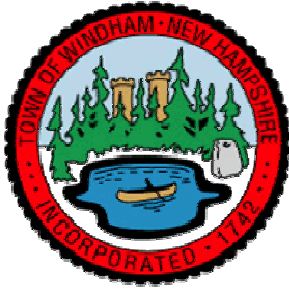
Location – 20 Flat Rock Road

Zone – Rural

A variance is requested from Section(s) 200, 401, 501, 601.3, 601.4.6, 601.5, 702 Appendix A-1 & Note 1 of the Zoning Ordinance to permit the construction of a single family dwelling with a well & septic on an existing lot of record.

Mr. Pellegrini read the case into the record. Attorney William Theroux and Timothy Lavelle of Lavelle Associates, representing the applicant, presented the case. The issues on all three lots are the same (lots 3-B-262, 3-B-350 and 3-B-352). All three lots are undersized lots of record. The home well and septic are within the WWPDP. Attorney Theroux said that he was confused as to why Section #200 (definitions) was on the permit denial. After discussing Sections 200 and 601.5 with the Building Inspector it was decided that relief was not needed from those two





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sections. Attorney Theroux said that the plan was presented to the Conservation Commission and they received a favorable ruling. Mr. Pellegrini said that there is a letter in the file from the Conservation Commission. Mr. Pellegrini read into the record the letter from the Conservation Commission which states that *after reviewing the current three-lot plan at the August 10, 2006 Conservation Commission meeting the members decided that they preferred the original two lot proposal. The two lot subdivision was more suitable for the parcel based on a site walk attended by the commission Members. The Conservation Commission asked that sedimentation and erosion control measure be shown on the plan and that silt fencing be used.* The Chairman asked for the minutes from the August 10, 2006 Conservation Commission minutes. Attorney Theroux said that it wasn't the Conservation Commission's job to decide whether there should be two lots or three lots it was to make recommendations on the placement of the houses, wells and septic on the three individual lots. Sublime Engineering and Meridian Land Services have looked at the site. Attorney Theroux read the supporting facts into the record. Mr. Timothy Lavelle explained that the house could not be pushed further back on the lot because of ledge. There wasn't enough soil over ledge to support the septic system. The leach field is outside the WWPD but not the septic tank. Attorney Theroux explained that when two properties are owned by different owners there cannot be a lot line adjustment, it has to go for a full subdivision approval, therefore they went back to the three lots which are of record. The Chairman read into the record the portion of the August 10, 2006 Conservation minutes pertaining to Cases 48, 49 & 50-2006. The Chairman closed the public portion of this case. Mr. Pellegrini motioned and Mr. Samsel seconded the motion to go into Deliberative Session. Passed unanimously 5-0. Mrs. Fallon motioned and Mr. Samsel seconded the motion to go back into public session. Passed unanimously 5-0. The Chairman asked if the applicant has stamped plans. The applicant has stamped plans and would not need relief from Section 601.5. Mr. James Lavelle explained that Sublime Engineering and Meridian Land Services checked for WWPD on these parcels. Mr. Samsel motioned and Mr. Pellegrini seconded the motion to go back into Deliberative Session. Passed unanimously 5-0.

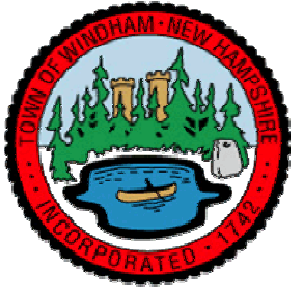
### **Deliberative Session, Case #48-2006**

Mr. Samsel motioned and Mr. Pellegrini seconded the motion to Grant Case 48-2006 for a variance as requested from Sections 401, 501, 601.3, 601.4.6 and 702 Appendix A-1 and Note 1 to permit a single family dwelling at 20 Flat Rock Road. Motion passed 4-1. Mrs. Fallon voted against the motion. Mr. Pellegrini, Mrs. Webster, Mr. Samsel and Mr. Gustafson voted for the motion.

### **Lot # 3-B-350, Case #49-2006**

Applicant – Gerard Beique  
Owner – Tynco Realty  
Location – 24 Flat Rock Road  
Zone – Rural

A variance is requested from Section(s) 200, 401, 501, 601.3, 601.4.6, 601.5, 702 Appendix A-1 & Note 1 of the Zoning Ordinance to permit the construction of a single family dwelling with a well & septic on an existing lot of record.



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Mr. Pellegrini read the case into the record. Attorney Theroux explained placement of the house, well and septic. Mr. Samsel motioned and Mr. Pellegrini seconded the motion to waive the reading of the supporting facts. Motion passed unanimously 5-0. Mr. Tierney said regarding Section 501 where there is no building and the lot has not been developed in any way there is no violation in the ordinance. If the applicant is granted a variance to build they still would not be violating the ordinance. Attorney Theroux decided to leave Section 501 in his request. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mrs. Webster seconded the motion to go into Deliberative Session. Passed unanimously 5-0.

### **Deliberative Session, Case #49-2006**

Mr. Samsel made a motion for Case #49-2006 and Mr. Pellegrini seconded the motion to grant a variance from Sections 401, 501, 601.3, 601.4.6, and 702 Appendix A-1 and Note 1 for 24 Flat Rock Road. Motion passed 4-1. Mrs. Fallon voted against the motion. Mr. Pellegrini, Mrs. Webster, Mr. Samsel and Mr. Gustafson voted for the motion.

### **Lot # 3-B-352, Case #50-2006**

Applicant – Gerard Beique

Owner – Tynco Realty

Location – 22 Flat Rock Road

Zone – Rural

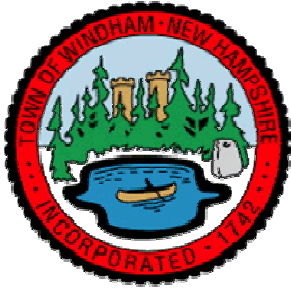
A variance is requested from Section(s) 200, 401, 501, 601.3, 601.4.6, 601.5, 702 Appendix A-1 & Note 1 of the Zoning Ordinance to permit the construction of a single family dwelling with a well & septic on an existing lot of record.

Mr. Pellegrini read the case into the record. Mr. Samsel motioned and Mrs. Fallon seconded the motion to waive the reading of the abutters. Passed unanimously 5-0. Attorney Theroux presented the case and explained that there are the same issues with the WWPD and an undersized lot as the previous case. Mr. Samsel motioned and Mr. Pellegrini seconded the motion to waive the reading of the supporting facts. Passed unanimously 5-0. The Chairman closed the public portion of this case. Mrs. Webster motioned and Mr. Pellegrini seconded the motion to go into Deliberative Session. Motion passed unanimously 5-0.

### **Deliberative Session**

Mr. Samsel made a motion for case 50-2006 and Mr. Pellegrini seconded the motion to grant a variance from Sections 401, 501, 601.3, 601.4.6 and 702 Appendix A-1 and Note 1 for 22 Flat Rock Road. Motion passed 4-1. Mrs. Fallon voted against the motion. Mr. Pellegrini, Mrs. Webster, Mr. Samsel and Mr. Gustafson voted for the motion.





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### Approval of August 8, 2006 & August 22, 2006 Minutes

Mr. Pellegrini motioned and Mr. Tierney seconded the motion to approve the August 8, 2006 minutes as written. Motion passed 4-0. Mr. Pellegrini, Mrs. Webster, Mr. Tierney and Mr. Gustafson voted on the minutes.

The August 22, 2006 minutes will be voted on at the next Zoning Board meeting in order to give the recording secretary time to check the wording of a motion for Case #33-2006.

### Mail

- September 11, 2006 Letter from Attorney Campbell confirming the September 20, 2006 meeting with the Zoning Board.
- August 31, 2006 Memo from the NH Office of Energy & Planning regarding the Fall Planning & Zoning Conference.

At 11.30 PM Mr. Samsel motioned and Mrs. Fallon seconded the motion to adjourn. Passed unanimously 5-0.

The next meeting of the Zoning Board of Adjustment is scheduled for October 10, 2006 at 7:30 PM in the Planning & Development Office.

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