



BOARD OF ADJUSTMENT

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

Zoning Board of Adjustment Minutes October 13, 2009

Board Members

Mark Samsel – Chairman
Jim Tierney – Vice-Chairman (Excused)
Dianna Fallon – Secretary
John Alosso – Member
Tom Murray – Member
Bruce Richardson – Alternate

Staff

Laura Scott – Director of Community Development
Patricia Kovolyan – Secretary

Seat Alternate

The Chairman appointed Mr. Richardson to replace Mr. Tierney for this meeting.

Lot #16-D-450, Case #38-2009

Applicant – Edward N. Herbert Associates Inc.
Owner – Linda L. Brown Rev. Trust
Location – 32 Indian Rock Road
Zone – Village Center District

A variance is requested from Section(s) 601 & 612.2 of the Zoning Ordinance to permit a small retail complex to be constructed with portions of two (2) buildings, a portion of a gasoline pump island and canopy, a portion of the driveway, parking and retaining walls within the WWPD and to allow a gas station within the Village Center District.

The Chairman mentioned that he would like to put a five-minute time limit on testimony from the residents, with an option to suspend the rule. Mr. Murray motioned and Mr. Alosso seconded the motion to limit testimony to five minutes. Motion passed 5-0.

Mrs. Fallon read the case into the record. Mr. Peter Zohdi of Herbert Associates, representing the owner, submitted a booklet and presented the case. There are 19,929 square feet of wetlands on the 3.31 acre lot. The proposed 160' X 55' building would be in the rear of the property and the proposed convenience store would be 40' X 80'. The gas station would have six (6) double sided pumps. There would be a 6,904 square foot impact to the WWPD.



BOARD OF ADJUSTMENT

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

The Conservation Commission did a site walk and wrote a letter dated September 1, 2009 to Michael Juranty, Waste Management Supervisor at NH Department of Environmental Services stating that after reviewing the revised site plans which reduces the WWPD impacts from 12, 221 square feet to 6,904 square feet they were not opposed to the plan. No gas pumps or tanks are within the WWPD or the Aquifer Protection District. There are 55 parking spaces proposed for the complex. There will be an on site well and septic. Mr. Zohdi explained that they are working with the owner of Dunkin Donuts regarding access. Mr. Zohdi went thru the booklet he submitted that contains a copy of the application, letters of support, soil resource report, report from the NH Natural Heritage Bureau, proposed site plan, grading plan, a petition with 269 signatures supporting the request and other project related information.

Mr. Zohdi informed the Board that Mr. James Gove of Gove Environmental flagged the site on June 18, 2009. Mr. Gove presented the following:

- Two wetlands on the site, one manmade and one natural fed by a culvert.
- Photos were submitted and marked as Exhibits A, B & C.
- No rare or threatened species were found on the site.
- Runoff would be going toward the wetland system.
- Drainage would be the same for both pre & post development.

Attorney for the owner, Mr. John Cronin, said that after looking at the ordinance he found the goal was to preserve a Village District and to prevent sprawl. In most historic villages you will generally find a service station. The general goals in the ordinance are to provide convenience, minimize sprawl and to provide a benefit to people throughout the town. The Planning Board has the power to request landscaping that would make the site have a "village feel". The ordinance is not a prohibitive ordinance. Attorney Cronin said that no where could he find in the ordinance that these particular uses are expressly prohibited or allowed. Attorney Cronin addressed the five criteria and asked that the Board disregard as irrelevant any objection raised by other gas station owners as simply an effort to limit the natural risk of competition. Potential economic competition is not a legitimate basis to object to a variance, but rather, a natural risk in a free enterprise economy as stated in the Nautilus decision. Attorney Cronin submitted a copy of the Nautilus decision and the Chairman marked it as Exhibit D.

The following residents spoke in support of this request:

- Jay Yennaco of 37 Beacon Hill Road and owner of Delahunty's Nursery stated that it is necessary to have additional businesses in town. The traffic on Route 111 is significant and warrants another gas station.
- Selectman Bruce Breton of 20 Searles Road stated that this type of business is a service envisioned in the Master Plan.



BOARD OF ADJUSTMENT

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

- Dennis Senibaldi of 20 Partridge Road said that this will bring in more tax dollars and a gas station at this location would be convenient.

Betty Dunn of Woodvue Road gave procedural information regarding the reading of letters of support and opposition.

Mrs. Fallon read into the record two letters of support and two paragraphs from the petition signed by 269 residents supporting this request:

- Bruce Moeckel of Moeckel Road
- Goodnow Real Estate, representing Linda Brown, owner of 32 Indian Rock Road.

The following letters of support were submitted but not read into the record.

- Robert Andrews of 29 Ministerial Road.
- Laura Allain of 3 Heritage Hill Road.
- Robert Breton of 81 North Lowell Road.
- Sean Devaney
- Anthony DiOrio of 12 Wildwood Road.
- Wayne Holm of 27 Lowell Road.
- Jacqueline & Jeffry Hudkins of 12 Sheffield Street.
- Henry LaBranche of 12 Juniper Road.
- Richard Mignault of 5 Farrwood Road.
- John Tokanel of Tokie Enterprises.

Mrs. Fallon read into the record two letters of opposition:

- Jonathan Sycamore of Cobbetts Pond Road
- Carol Pynn of Cobbetts Pond Road

The following residents spoke in opposition to this request:

- Attorney James Troisi, representing Arthur Klemm and Thomas Klemm. Their main goal is to seek a fair, impartial and uniform application of the zoning ordinance. This is a substantial variance from the purposes of the Village District. Attorney Troisi read into the record Section **612.1 Purpose: To preserve the area around the town Hall, the Fire Station, the Armstrong Building, the Bartlett Buildings and the Historic District as the traditional and actual Town Center. The purpose of this ordinance is to establish special conditions which when satisfied would allow through design guidelines, mixed uses of retail, professional offices and residential in the Town Center. This district would minimize sprawl along road corridors by providing an off road village center that would preserve the Town Center.** Attorney Trios went on to mention the uses listed in Section 612.2 retail shops, eating and drinking establishments where consumption is primarily



BOARD OF ADJUSTMENT

PO Box 120

Windham, New Hampshire 03087

Telephone (603) 432-3806

- intended to be on the premises professional offices, schools, banks bakeries, civic, public, institutional facilities, medical offices, clinics, single and townhouse residential uses and personal services, etc. Please respect the master plan that does not resemble what the applicant says it resembles. The master plan tries to deemphasize the motoring public from the Village Center District; it mentions pedestrians, bicycles, cultural, educational and historical uses. The plan embraces the historic district. If the variance is granted, you would be smashing the intent and spirit of the Village District that was voted on by the people of Windham. No where in the Master Plan is a gas station or like use mentioned for the Village Center District. To change the use in the zone is rezoning. Gas Stations are allowed in the Business Commercial A and Business Commercial B Districts and Limited Industrial District and the Neighborhood Business District. Gas Stations bring noise, traffic, maybe fumes, will have to service motorcycles, trucks, motor homes and buses 50-feet from the edge of the roadway where you might have planned sidewalks in the future. This is contrary to the public interest. Hardship is the biggest hurdle when granting or denying variances. The reasonable use of that land is available to the owner. There is nothing about the uniqueness of the site that states it should be used for a gas station. If you decide to grant the variance, you are disregarding the master plan and the vote of the majority of the citizens of Windham. Substantial justice would be violated. This would be the first gas station allowed in the Village District. Where would it stop? Attorney Troisi submitted a letter from the Windham Independent authored by Mr. James Belair.
- James Belair of 13 Galway (submitted a letter marked as Exhibit E) Mr. Belair said that he wanted to discuss the process. This isn't the proper forum to be reviewing this proposal. The Chairman asked Mr. Belair to address the request. Mr. Belair went on to say that this request is more for a zoning change than a variance. Amendments have been made to the Zoning ordinance every year since 1954. Different zones were established for specific purposes. Countless Boards have established what uses are allowed in certain zones. If Gas Stations were an allowed use the applicant would not be seeking a variance. The inclination of every political body is to expand their power. When you try to unilaterally expand your power you take away from the political process that is already in existence. The Chairman advised Mr. Belair that the Board did not need a lecture on the purposes of the Zoning Ordinance and expansion of power and that Mr. Belair should stick to his concerns regarding this application. Mr. Belair said that this is not an allowable use in the Village Center District. The Board is a relief valve. The Board must adhere to Simplex. There is no hardship and the site is not unique.
- Heath Pardington of 17 Galway. In opposition mainly because of the gas station which is not an allowed use. If there was no gas station Mr. Pardington would not have a problem with the request.



BOARD OF ADJUSTMENT

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

- Carol Pynn of Cobbetts Pond Road (submitted a letter). The Village Center District goes up behind the Town Hall. Ms. Pynn asked once the door has been opened and variances are granted for this very special and sensitive district when will it stop. The best idea is to put it on the ballot and rezone it.
- Jim McDonald of 14 Clarke Farm Road who is involved with the Windham Economic Development Committee said he would like to see Windham developed at the will of the people. Put this off to the Town warrant process. Given the size of the population of Windham it would take approximately 600 households to properly represent the opinion of the Town.

Attorney Cronin said that there would not be any negative impacts to the abutting properties.

Mr. Zohdi said that there would be a walking trail.

Mr. Alosso motioned and Mr. Murray seconded the motion to go into Deliberative Session. Motion passed 5-0.

The Chairman granted a five-minute recess.

The Chairman called the meeting back to order.

Deliberative Session, Case #38-2009

Mr. Richardson suggested that portions of the building and gas station be taken out of the WWPD. If parking were taken out of the WWPD the applicant would lose 7 spaces. This property probably went up in value since the Dunkin Donuts was built so property values would not be diminished. Because of the topography of that particular side of the road Mr. Richardson does not see this becoming a string of strip malls or gas stations. Mrs. Fallon said that the applicant has reasonable use of the property without violating the ordinance. Mr. Alosso said that the ordinance is so ambiguous and it is not a prohibitive ordinance. An exception has been made to the area already with Dunkin Donuts. Mrs. Fallon said that this area is designed for mixed use, small retail and apartments and there is no information showing that this can't be done on both sides of Route 111. Mr. Murray said that the hardship test fails because there is reasonable use but this property is in a unique setting. Mr. Murray does not feel there should be a gas station on this property because of the WWPD. Mr. Samsel said the pumps are not in the WWPD. Mr. Murray has a concern regarding runoff. The Chairman read from the Handbook the first prong of *Simplex rather than having to demonstrate that there is not any reasonable use of the land, Landowners now have to demonstrate that the restriction interferes with their reasonable use of the property considering the unique setting.* The Chairman said there is uniqueness because of Route 111.



BOARD OF ADJUSTMENT

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

Mr. Alosso said the following:

- This would be 250 feet from the exit.
- There are unique characteristics
- This is not a prohibitive ordinance.
- The request is not contrary to public interest.
- Meets criteria.
- Conservation Commission supported,
- Mr. Gove gave presentation that it was satisfactory.
- This request will go before the Planning Board.
- Mr. Breton stated earlier that he was under the impression that a gas station would not be excluded from Route 111.
- Gas station serves the town.
- Village District use is somewhat ambiguous and open for interpretation.
- It is impossible to list all not permitted uses, therefore, the Board must use its best judgment in serving the interest of the residents.

Mr. Alosso motioned and Mr. Richardson seconded the motion to grant a variance for Case #38-2009 from Sections 601.3 and 612.2 of the Zoning Ordinance to permit a small retail complex to be constructed with portions of two buildings, a portion of a gasoline pump island and canopy, a portion of the driveway, parking and retaining walls within the WWPD and to allow a gas station within the Village Center District per the plan submitted. Motion passed 3-2. Mr. Richardson, Mr. Alosso and Mr. Samsel voted for the motion. Mrs. Fallon and Mr. Murray voted against the motion because the owner has reasonable use and it violates the spirit and intent of the Village Center District.

Minutes

Mr. Alosso motioned and Mr. Murray seconded the motion to approve the September 8, 2009 minutes as amended. Motion passed 5-0.

Mr. Alosso motioned and Mr. Murray seconded the motion to approve the September 22, 2009 minutes. Motion passed 5-0.

Other Business

Mrs. Fallon read a letter from Attorney Michaels requesting Case #17-2009 be moved from the October 27, 2009 meeting to the November 10, 2009 meeting. Mrs. Fallon motioned and Mr. Murray seconded the motion to move Case #17-2009 to the November 10, 2009 meeting. Motion passed 5-0.



BOARD OF ADJUSTMENT

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

Mail

- October 6, 2009 Letter from Attorney Michael requesting a continuance of Case #17-2009, 2 Woodvue Road, to the November 10, 2009 meeting.
- Zoning Amendment Calendar from RPC
- LGC's Annual Conference scheduled for November 18-20, 2009 in Manchester, NH.
- September 2009 Issue of *NH Town and City*.
- Newsletter from the Greater Nashua Habitat for Humanity.

Mr. Richardson motioned and Mr. Alosso seconded the motion to adjourn. Motion passed unanimously. The next meeting of the Zoning Board of Adjustment is scheduled for October 27, 2009 at 7:30 PM in the Planning & Development Office.

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