



# BOARD OF ADJUSTMENT

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

## Zoning Board of Adjustment Draft Minutes May 24, 2011

### Board Members

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

### Staff

Tim Corwin – ZBA/Code Enforcement Administrator  
Patricia Kovolyan – Administrative Assistant

### Seat Alternates

The Chairman appointed Mr. Tierney to replace Mrs. Fallon for this meeting and also appointed Mr. Scholz to replace Mrs. Dunn who will arrive late.

### Lot 5-A-2, Case #12-2011

Applicants/Owners – James and Jean Valenti  
Location – 37 Londonderry Road  
Zone – Rural District

A variance is requested from Section 702/Appendix A-1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the construction of an 8 ft. by 14 ft. cabana to be located on the rear lot line where a minimum 30 ft. setback is required.

Mr. Tierney read the case into the record.

Jean Valenti, property owner, presented her case. The Valenti's yard backs up to the 17<sup>th</sup> tee of the Windham Country Club. Now that the Valenti's want to install a pool, they feel they need to find a way to protect the pool area from the tee area. The cabana that was originally requested would have been on the lot line. The applicant found the area to be too low and it does not provide privacy from the tee. The owner would like to build the cabana sideways in their yard which would provide privacy from the tee. Mrs. Valenti submitted a drawing, marked as Exhibit A, and explained that the proposed cabana would be 16-feet from the lot line instead of on the lot line. Mrs. Valenti read the supporting facts into the record.



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Mr. Tierney said that in the drawing presented the cabana is larger than what was requested and advised the Chairman that there is a problem with the posting because what is being presented is larger than the request.

Mr. Corwin said that the total square footage is smaller.

Mr. Tierney said that the overall structure is still larger.

Mrs. Valenti withdrew her application and will submit a new application showing the correct size cabana and the correct location.

**Mr. Samsel motioned and Mr. Scholz seconded the motion to accept the withdrawal of Case 12-2011. Motion passed 4-0-1. Mr. Partington abstained.**

### **Lot 8-B-4900, Case #13-2011**

Applicant – Edward N. Herbert Assoc., Inc.

Owner – Walker's Crossing, LLC

Location – 6 Libbey Road a/k/a 178 Rockingham Road

Zone – Commercial District A and Rural District

A variance is requested from Section 602.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the construction of a duplex, each unit containing three (3) bedrooms, to be located on the portion of the property located in the Rural District, where duplexes are not permitted within the Rural District.

Mr. Tierney read the case into the record.

Mr. Corwin advised the Board that this property is split zoned and vacant. The portion of the property that is affected by the application is in the rural zone.

Mr. Peter Zohdi of Herbert Associates, representing the owner, presented the case. Mr. Zohdi showed on the displayed plan the lot that was subdivided many years ago and also showed the location of the Windham Animal Hospital. The back of the subdivided lot is the rural area. Dr. Butterfield would like to have a duplex built in this location to house doctors that would work with him so that they would be near by to answer emergency calls. Mr. Zohdi showed the 343.53 acres owned by the Conservation Commission. The parcel in question is multi-family zoned for condos. Each unit will have three bedrooms. Mr. Zohdi submitted a floor plan of the duplex that was marked as Exhibit A and six photos that were marked as Exhibit B.

Attorney John Cronin, also representing the owner, explained that he would incorporate by reference the factual circumstances in the application supported by the five criteria. Attorney Cronin said he would touch on the supporting facts without going into them verbatim. The



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proposed duplex will be located almost 500 feet back from Libbey Road and will not interfere with the public's use of Route 28, Libbey Road or the town land to the east. The duplex will be located 375 feet from the nearest building in the Neighborhood Business District and 735 feet from the nearest single family house in the Rural District. The owners have a need for a duplex and further believe, because of the location off of Route 28 and being behind a business zone, it is not desirable as a single family lot. The duplex is so far away from the surrounding houses in the Rural Zone that it should have no impact on value. The use is compatible with the underlying zone and due to the special conditions and physical characteristics of this lot it is not desirable as a single family site.

**Mr. Samsel motioned and Mr. Scholz seconded the motion to go into Deliberative Session. Motion passed 5-0.**

### **Deliberative Session, Case 13-2011**

Mr. Samsel said that he had no issues with this request, because of the split zone there are special zoning conditions and the five points were met.

Mr. Partington said that the criteria were met and Mr. Scholz and Mr. Tierney agreed.

After reading each criteria into the record the Chairman found they were all met.

**Mr. Samsel motioned and Mr. Partington seconded the motion to grant a variance for Case 13-2011 on 6 Libbey Road a/k/a/ 178 Rockingham Road as requested from Section 602.1 of the Zoning Ordinance to permit the construction of a duplex, each unit containing three bedrooms, to be located on the portion of the property located in the Rural District. Motion granted 5-0.**

### **Lot 2-A-975, Case #14-2011**

Applicant – Peter H. Bronstein, Esquire on behalf of Jim Sheppard

Owners – Daniel and Noreen Murray

Location – 2 Brown Road a/k/a 127 North Lowell Road

Zone – Neighborhood Business District

Application is an Appeal of an Administrative Decision made by the Code Enforcement Administrator that the Applicant's proposed law enforcement supplies/firearms/sporting goods store is not permitted in the Neighborhood Business District.

Mr. Tierney read the case into the record.

Mr. Corwin, ZBA/Code Enforcement Administrator, explained that his decision was based on a series of correspondence with the applicant, specifically a letter dated April 10, 2011 and a series of e-mails included in the packet provided to the Board Members..



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Attorney Peter Bronstein, representing the owner, submitted paperwork (building interior and exterior views, authorization letter, DOT traffic count, code enforcement decision etc.) that were marked as Exhibits A through J. There are two structures on the property; a 1300 square foot residential structure and a 1400 square foot commercial structure. Previous uses of the commercial structure were a dance studio, spa, sale of dance and gymnastics costumes and supplies, a plumbing business and a landscape business. Currently the commercial structure is split 50/50 between the plumbing business and the sale of dance and gymnastics costumes. The proposed use is for sporting goods and law enforcement supplies. The plan is for Mr. & Mrs. Sheppard to purchase the property (a Purchase and Sale Agreement has been signed), live in the house and Mr. Sheppard will operate the business. The proposed hours of business would be Monday through Thursday from 10:00 AM to 5:00 PM, Fridays from 10:00 AM to 7:00 PM, Saturdays 10:00 AM to 5:00 PM and closed on Sundays. This is a mixed use parcel in the Neighborhood Business District. Attorney Bronstein read into the record Section 604.1.1 of the Zoning Ordinance. *Retail store or service establishment, the principle activity of which shall be the offering of goods or services at retail within the building, for supply of the normal shopping needs of and for consumption by the residents of the area.* Attorney Bronstein went on to say that no definitions were provided for this Section of the ordinance and he did not know the definition of "normal shopping needs" and did not know the definition of "residents of the area". This is a rural area of the town and this would be an attractive use for that area. The use that is being requested has not been specifically excluded as an allowed use. Approximately less than 1000 square feet of the 1400 square feet of the commercial building will be used for retail. The ordinance does not specify that the goods must be on a weekly shopping list but rather that the goods be used and consumed by the residents of the area. The interpretation of this provision by the Code Enforcement Officer is too narrow.

The following residents spoke in opposition to this request.

- Mr. Robert Jacobellis of 130 North Lowell Road submitted two photos marked as Exhibits K&L.
- Mr. John Mangan of 1 Depot Road.
- Mr. William Crucius of 5 Brown Road.
- Mr. Robert Vercellin of 7 Brown Road.
- Sandra Mangan of 1 Depot Road.

Attorney Bronstein said the number of gun shops within a 15 mile radius proves the point that this is a normal shopping activity for this area.

**Mr. Samsel motioned and Mr. Scholz seconded the motion to go into Deliberative Session. Motion passed 5-0.**



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### **Deliberative Session, Case #14-2011**

Mr. Samsel said that five residents spoke to uphold Mr. Corwin's decision. No one spoke in favor of the request.

Mr. Scholz said that there was no compelling evidence submitted to overturn Mr. Corwin's decision. Mr. Corwin did a thorough job.

Mr. Partington said he thought the applicant, after being told no by Mr. Corwin that the gun shop doesn't fit with Windham's ordinance, the applicant added a number of different items in order to try to make the business represent the ordinance.

Mr. Tierney agreed with Mr. Partington's statement. Mr. Tierney had a difficult time with the town allowing retail sales of dance attire on this property. It is retail whether you are selling shoes or ammunition; retail is retail.

The Chairman said he was hung up on "normal shopping needs".

**Mr. Tierney motioned and Mr. Samsel seconded the motion to uphold Mr. Corwin's decision for Case 14-2011 as written in his April 21, 2011 letter for the property at 2 Brown Road a/k/a 127 North Lowell Road. Motion passed 4-1. Mr. Partington voted against the motion.**

### **Lot 2-A-975, Case #15-2011**

Applicant – Peter H. Bronstein, Esquire on behalf of Jim Sheppard

Owners – Daniel and Noreen Murray

Location – 2 Brown Road a/k/a 127 North Lowell Road

Zone – Neighborhood Business District

A variance is requested from Section 604.1.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit a retail store, which will offer for sale law enforcement supplies, firearms, and sporting goods, where only retail stores offering goods for the supply of the normal shopping needs of and for consumption by the residents of the area are permitted in the Neighborhood Business District.

Mr. Tierney read the case into the record.

**Mr. Partington motioned and Mr. Scholz seconded the motion not to read the list of abutters (same as listed for Case 14-2011). Motion passed 5-0.**



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**At Attorney Bronstein's suggestion Mr. Scholz motioned and Mr. Partington seconded the motion to accept the exhibits from the previous case (14-2011) and to accept the facts as previously stated. Motion passed 5-0.**

Attorney Bronstein advised the Board that a diverse list of uses are allowed in the Neighborhood business zone from bingo halls to agriculture. Attorney Bronstein read the supporting facts into the record. If a variance is granted no changes will be made to the building except cosmetic upgrading.

Mr. Jim Sheppard, the applicant, said that the shop he has in Massachusetts has no bearing on what he plans to do in New Hampshire. His goal is to move his family to Windham and have a small shop on the same property in order to greet his children when they arrive home from school. Mr. Sheppard is a licensed gunsmith in Massachusetts. Gun repairs would be done at the shop and hunting supplies would be available.

The following spoke in favor of this request.

- Michelle Sheppard, wife of the applicant.
- Mr. Scott Reiff of 200 Range Road.

The following spoke in opposition to this request.

- Mr. Robert Jacobellis of 130 North Lowell Road.
- Mr. John Mangan of 1 Depot Road.
- Mr. William Crucius of 5 Brown Road.
- Ms. Jame Crucius of 5 Brown Road.
- Ms. Sandra Mangan of 1 Depot Road.

Attorney Bronstein said that there would not be much of an increase in traffic and the parking situation is fine.

**Mr. Samsel motioned and Mr. Tierney seconded the motion to go into Deliberative Session. Motion passed 5-0.**

### **Deliberative Session, Case 15-2011**

Mr. Tierney said that the contents of the store is not the purview of the Zoning Board; it is a Planning Board issue.

The Chairman polled the Board regarding the five criteria.

1. The variance will not be contrary to the public interest and does not change or alter the character of the existing neighborhood. Mr. Tierney said it would not alter the neighborhood. Mr. Scholz, Mr. Partington, Mr. Samsel and the Chairman agreed.



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2. The spirit of the ordinance is observed. Mr. Tierney, Mr. Scholz, Mr. Samsel and the Chairman agreed that this criteria was not met. Mr. Partington disagreed and said yes this criteria is met.
3. Substantial justice is done. Mr. Tierney, Mr. Scholz, Mr. Samsel and the Chairman all agreed that this criteria was not met. Mr. Partington said that this criteria was met.
4. The values of surrounding properties are not diminished. Mr. Tierney, Mr. Scholz, Mr. Samsel, Mr. Partington and the Chairman all agreed that this criteria was met.
5. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship. Mr. Tierney, Mr. Scholz (fails A-1), Mr. Samsel, Mr. Partington and the Chairman all agreed that this criteria was not met.

The request failed to meet four of the five criteria.

**Mr. Samsel motioned and Mr. Scholz seconded the motion to grant a variance for Case 15-2011 from Section 604.1.1 of the Zoning Ordinance to permit a retail store which will offer for sale law enforcement supplies, firearms and sporting goods where only retail stores offering goods for the supply of the normal shopping needs of and for consumption by the residents of the area are permitted in the Neighborhood Business District. Motion denied 5-0.**

**The Chairman granted a five minute recess.**

**The Chairman called the meeting back to order.**

The Chairman appointed Mrs. Dunn to replace Mr. Scholz.

Mr. Partington recused himself from Case 16-2011.

The Chairman appointed Mr. Scholz to replace Mr. Partington for Case 16-2011.

### **Lot 9-A-400, Case #16-2011**

Applicant – Marc Sneider

Owner – Brian Bauchman

Location – 120 Haverhill Road

Zone – Rural District

Application is an Appeal of an Administrative Decision made by the Community Development Director regarding zoning interpretation and enforcement at 120 Haverhill Road.

Mr. Tierney read the case into the record.



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Mr. Samsel said Attorney Campbell's letter (to Tim Corwin, dated May 9, 2011...After having reviewed the paperwork, it would be my recommendation that the Board of Adjustment vote not to hear the appeal because it is outside the jurisdiction of the Board...) is clear and he agreed that the Board should not be hearing this case.

Mr. Tierney said he agreed with many of the points made by Attorney Campbell but felt that the Community Development Director did make some interpretations of the Zoning Ordinance that the Board could hear but agreed that that an enforcement procedure could not be forced. Mr. Tierney also stated that he does not like using email correspondence as part of the record.

Mrs. Dunn said the most recent court decision stating that the Board was correct was on a totally different procedural position. Mrs. Dunn continued, stating that it is within the Board's jurisdiction, authority and proper use of the Board's power to decide whether or not an administrative decision was correct in terms of the ordinance.

Mr. Tierney said whether there is a violation is an enforcement action and it is not up to the Board to judge whether it is a violation of the zoning ordinance.

Mr. Sneider, the applicant, requested a continuance to the June 28<sup>th</sup> Zoning Board meeting.

**Mrs. Dunn motioned and Mr. Scholz seconded the motion to continue Case #16-2011 to the June 28, 2011 Zoning Board meeting. Motion passed 4-1. Mr. Samsel voted against the motion.**

### **Approval of April 26, 2011 and May 10, 2011 Minutes**

Board Members had some questions and changes to the minutes. Mrs. Kovolyan will check the video and if valid will make the requested changes. The amended minutes will be reviewed at the June 14, 2011 meeting.

**Mr. Tierney motioned and Mr. Scholz seconded the motion to adjourn. Motion passed 5-0.**

The next meeting of the Zoning Board of Adjustment is scheduled for June 14, 2011 at 7:30 PM in the Community Development Office.

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