



*OLD VALUES - NEW HORIZONS*  
**COMMUNITY DEVELOPMENT**

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**Zoning Board of Adjustment**  
**Draft Minutes**  
**June 28, 2011**

**Board Members**

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

**Staff**

Tim Corwin – ZBA/Code Enforcement Administrator  
Elizabeth Wood – Community Planner

**Seat Alternates**

The Chairman appointed Mr. Scholz to replace Mrs. Dunn for this meeting.

The meeting was called to order at 7:30 PM.

**Lot 2-A-550, Case #18-2011**

Applicant – Michael Golden  
Owners – Michael Golden and Brenda Twombly  
Location – 118 North Lowell Road  
Zone – Rural District

Application is an Appeal of an Administrative Decision made by the Community Planner regarding zoning interpretation and enforcement at 118 North Lowell Road.

This case was continued from the June 14, 2011 meeting of the ZBA.

Attorney Bill Mason, representing the owner, presented the case. Attorney Mason stated that he met with Elizabeth Wood, the Community Planner, on 6/20/11 for a site inspection of the property. The issues of the appeal have been narrowed. Attorney Mason asked for a 30 day extension. Ms. Wood suggested a 14-day extension. A letter from Attorney Mason asking for a 30 day extension was included in the packet given to the ZBA members in advance of the meeting.

An agreement was made on site during the site walk. This is reflected in the letter from Ms. Wood that was also included in the packet.

**Mr. Scholz motioned and Mr. Samsel seconded the motion to continue Case 18-2011 to the July 12, 2011 meeting. Motion passed 4-0.**

**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.

This case was continued from the May 24, 2011 meeting of the ZBA.

Mr. Partington recused himself. Mr. Murray said that there are only 3 members present and that all 3 members would need to vote in the affirmative to pass the request. He asked the applicant if he would like to proceed or continue at a later date.

Mr. Samsel asked that the Board not hear the appeal because it is not under the jurisdiction of the Board, and in support thereof read into the record portions of a letter from Attorney Bernie Campbell, Town Counsel, to Tim Corwin, ZBA/Code Enforcement Administrator dated May 9, 2011.

Mr. Samsel recommended that the ZBA follow Attorney Campbell's recommendation and agree not to hear this case. Mr. Murray said that he preferred that the decision be made by a full member Board. Mr. Scholz recommended that the case be continued.

**Mr. Samsel motioned and Mr. Scholz seconded the motion to continue Case #16-2011 to the July 12, 2011 meeting of the ZBA. Motion passed 3-0.**

**Lot 19-A-300, 66 Mammoth Road, Case #11-2011 – Request for Re-Hearing**

Mr. Murray asked the applicant if he would like to suspend the rehearing request until there is a 5 member Board. Mr. LoChiatto said that he would take his chances with the 4-member Board. Mr. Murray told the applicant that he would need a 3-member vote for approval. Mr. LoChiatto said that he would like to have the Board consider the rehearing request tonight.

Mr. Samsel said that the Board is here to see if there is any new information not available at the time of the hearing or if there were any technical errors made at the hearing. Mr. Samsel suggested focusing on paragraph 30 of the Applicant's "Petition for Rehearing" which sets forth the Points of Error.

The Board addressed each of the Applicant's Points of Error:

**Point 1, Paragraph 30, page 4 of the Petition for Rehearing: “The ZBA failed to conclude a variance was not necessary as the state workforce housing statutes supercede the Town of Windham Zoning Ordinance.”**

- Mr. Samsel said he thought the request was valid as stated and that it was proper to hear the case on its merits. He’d prefer to have the opinion of Town Counsel to make a determination on this point.
- Mr. Partington stated that Town Counsel has been clear that these applications require a variance first, that Staff agreed, and that there was no administrative appeal of this decision.
- Mr. Scholz did not feel that this constituted a technical error.
- Mr. Murray stated that he feels that a workforce housing application still needs to meet the requirements of the underlying zone.

**Point 2, Paragraph 30, page 4 of the Petition for Rehearing: “The ZBA failed to consider the statutory requirements relative to workforce housing.”**

- The Chairman stated that he believes the statutory requirements were discussed in detail at the hearing.
- Mr. Samsel stated that he wasn’t sure whether the Board actually looked at the RSA, and that maybe it was an error not to consider this more from a workforce housing perspective than a density perspective.
- Mr. Partington and Mr. Scholz agreed that this is not new information and not a technical error. Mr. Samsel stated that there was no technical error

**Point 3, Paragraph 30, page 4 of the Petition for Rehearing: “The ZBA improperly relied on evidence in unrelated cases, none of which was submitted in the instant case, to conclude that the proposal would diminish values of agricultural property. Specifically, the ZBA appeared to conclude an adjacent parcel was zoned rural when in fact it is zoned as Residence District C.”**

- Mr. Murray stated that the Board did speak to the point of whether or not the zone was correct and that it’s not new information.
- Mr. Partington pointed out that the Board considered continuing the hearing to determine the zoning but the board concluded that it was not a determinative factor. Mr. Murray asked whether this was a technical error.
- Mr. Scholz recalled that the Board considered both scenarios.
- Mr. Samsel said that the question is whether the Board relied on the testimony regarding the neighboring property in its decision. Mr. Samsel said based on the discussion in the minutes it was not a technical error.
- Mr. Murray concluded that there is no new information and no technical error.

**Point 4, Paragraph 30, page 4 of the Petition for Rehearing: “The ZBA improperly rejected the value evidence of Mark McKeon, a licensed real estate appraiser and the evidence offered by Steven Keach, the Town’s consulting engineer regarding workforce house.”**

- Mr. Scholz stated that this is not a technical error or new information. Mr. Scholz stated he does not feel the Board improperly rejected the value evidence.
- Mr. Murray stated that the consensus is no new information and no technical error.

**Point 5, Paragraph 30, page 5 of the Petition for Rehearing: “The ZBA failed to consider the only issue of zoning non-compliance is density and the purpose of the workforce housing legislation is to allow increased density in workforce housing projects.**

- Mr. Samsel says that maybe there is a technical error on this point. Mr. Samsel said that he probably did not weigh the density issue against the technical statutory requirements. He stated that he leans towards considering this a technical error.
- Mr. Partington said he did consider the RSA and that this is not a technical error or new information. Mr. Scholz agreed.
- Mr. Murray restated that the underlying zone requirements must be met. He doesn't feel that there is new information or a technical error.
- Mr. Scholz says he recalls specific conversations regarding density.
- Mr. Samsel asked whether density and the application was weighed in regards to the RSA. Mr. Murray stated that this was part of his analysis but that he doesn't know if he actually conveyed that. Mr. Samsel does not see any discussion in the minutes that they considered the RSA – rather, the discussion was focused on the Zoning Ordinance. Mr. Murray concurred and stated that this is in fact a technical error.
- Mr. Murray referred to Section III of the Workforce Housing Statute, RSA 674:58 to determine whether the statute was considered.
- Mr. Partington stated that he believes the statutory requirements were considered during Deliberative Session.
- Mr. Samsel read from the statute, Section III and emphasized the “collective impact of all ordinances” language and stated that this might not have been considered.
- Mr. Murray suggested moving forward and then coming back to this.

**Point 6, Paragraph 30, page 5 of the Petition for Rehearing: “Reportedly, one or more ZBA members denied the variances on the mistaken belief that the applicant was an entity owned or controlled by Mr. Eric Nickerson. Although irrelevant to the variance determination, Mr. Nickerson has no interest or control in Sun Coast Properties, LLC or the proposed development.”**

- Mr. Murray said that the ownership issue has no bearing on his decision making.
- Mr. Scholz said that this is hearsay. There is no technical error or new information.
- Mr. Partington concurred.

**Point 7, Paragraph 30, page 5 of the Petition for Rehearing: “The ZBA failed to vote on each prong of the variance test independently as specifically requested by Sun Coast. The issue is important as the initial comments suggested that the majority found the variance, if**

**granted, would not diminish the value of surrounding properties. However, comments after the vote suggest that at least one member took contradictory positions on the value prong.”**

**Point 8, Paragraph 30, page 5 of the Petition for Rehearing: “The Minutes of the Meeting reflect the ZBA failed to vote on each of the prongs as a Board. The minutes document members offered individual positions on certain prongs, however, a Board vote on each prong is lacking.”**

- Mr. Samsel stated he has concerns with this. How the Board votes is up to the Board. However, in reading the minutes of the Board, Mr. Samsel agrees with the Applicant – there are contradictory statements and would be concerned that the case would come back to the Board based on the minutes.
- Mr. Murray stated that the Board has been advised in the past not to vote on a variance request prong by prong. The detail in the minutes was provided as a courtesy to the applicant to let them know where each member stood for each prong.
- Mr. Samsel went through the various inconsistencies and contradictions reflected in the approved minutes.
- Mr. Scholz stated that he does not feel there is a technical error or new information.
- Mr. Samsel said that the language that was used may be perceived by a judge as a technical error. Mr. Samsel said that a judge looking at the case would see inconsistencies in what members said and what the vote was and that the case would be remanded.
- Mr. Murray agreed that a judge will see inconsistencies in what the Board members said and how they voted.
- Mr. Partington thought it was more of an issue of clarity than contradiction. Mr. Scholz stated the minutes reflect that the members in certain circumstances were not convinced and that’s what their vote reflects. Mr. Samsel stated that then should have been stated on the record.
- Mr. Murray stated the Board would move forward and come back to this.

**Point 9, Paragraph 30, page 5 of the Petition for Rehearing: “The ZBA members failed despite specific request, to disclose whether or not they engaged in any way in ex-parte communications regarding the application. The ZBA is a quasi-judicial proceeding and any application should only be considered by members who are free from outside influence or persuasion. Full disclosure is required to allow Sun Coast to move for recusal if warranted.”**

- Mr. Samsel said that it is a member’s responsibility to disclose whether or not they have engaged in any ex-parte communication.
- Mr. Murray stated that he believes the Board acknowledged that there were no such communications.
- Mr. Scholz said he does not see a technical error.
- Mr. Partington said he reviewed the tape; applicant’s counsel suggested that the Board only speak to this issue if there were in fact any such communications.

Mr. Murray read Paragraph 31 of the Petition for Rehearing into the record. Mr. Partington stated that this concern is not pertinent. Mr. Murray said this had no impact on the Board's decision and that it does not constitute a technical error or new information.

Mr. Murray read Paragraph 32 of the Petition for Rehearing into the record. Mr. Murray said that there was significant amount of time spent on discussion of this point. He believes the application was heard on its merits with consideration of the requirements of workforce housing legislation. Mr. Scholz stated that he considered this as well. Mr. Partington doesn't know who stated this. Mr. Murray believes Ms. Dunn may have said this, but that the comment was taken completely out of context and that the decision was rendered based on the five point variance criteria.

Mr. Murray suggested that the Board circle back to Point 5 of the Points of Error. Mr. Murray does not believe he stated for the record the correlation between the RSA and the application and why it failed. Mr. Scholz asked whether if it's not in the minutes it constitutes a technical error. Mr. Murray stated the issue is what will a judge do with this. Mr. Murray stated that this needs to be cleaned up before it appears before a judge, but also stated concern for the applicant in terms of incurring additional fees.

Mr. Samsel stated that he did not want the case to be remanded. He believes that that 674:58 and 59 need to be gone through by the Board point by point and not doing this puts the Board at a disadvantage. Mr. Samsel stated that this ties back into the last sentence of paragraph 32 and that as a matter of process both the Zoning Ordinance and legislation be evaluated. Mr. Scholz agreed. Mr. Partington stated that he believes this was covered.

Mr. Murray said to be complete, the Board should finish considering Points 6 and 7. Mr. Scholz stated the Board is not obligated to vote on each prong. Mr. Murray agreed – the request may be considered by the Board, but is not a requirement. Nevertheless, Mr. Murray stated that he could foresee an attorney convincing a judge otherwise. Mr. Murray suggested that the Board obtain a legal opinion on how to move forward with this at the next hearing. But that for the purposes of the rehearing request, this does not constitute new information or a technical error. Mr. Partington agreed.

Mr. Samsel stated that the Board does need to do better if this is heard again and each member needs to give their exact position.

Mr. Murray summarized the other portions of the Petition for Rehearing. Mr. Murray stated that there are three board members who believe that a technical error was made with respect to Point of Error 5. Mr. Scholz stated that he believes the Board addressed this but that it was a technical error not to specifically address RSA 674:58 and 59 during deliberative.

Mr. Samsel made a motion to grant a rehearing for Case#11-2011 to rehear the case at the earliest possible date and not award the applicant its costs, expenses or attorney's fees, as requested in the request for the rehearing by Sun Coast Properties, LLC. Seconded by Mr. Scholz. Mr. Samsel made a motion to withdraw his motion. Seconded by Mr. Scholz. Motion approved 4-0.

**Mr. Samsel made a motion to grant a rehearing for Case#11-2011 to rehear the case at the earliest possible date and not award the applicant its costs, expenses and reasonable attorney's fees as the Board believes that it made a technical error relative to Points of Error, Paragraph 30, Prong 5, and that under Paragraph 32 the application should have been heard on its merits with consideration of the requirements of the workforce housing legislation. Seconded by Mr. Scholz. Motion Approved 3-1. Mr. Partington voted against the motion.**

Mr. Corwin said that 7/26/11 is an available meeting date.

### **Review and Approval of 6/14/11 Draft Meeting Minutes**

Mr. Partington pointed out his recommendations for corrections to the minutes. Mr. Murray recommended postponing approval to the next meeting when a full board is present.

Mr. Scholz concurred. Mr. Murray postponed approval of the minutes to the next meeting.

### **Consideration of ZBA By-Law Amendments**

Mr. Murray said that he prefers to have a full Board to discuss and that this item will be postponed till the next meeting.

### **Other Business**

Mr. Murray asked the Board if they wanted to seek advice of legal counsel to determine the procedure with respect to voting on each of the 5 variance criteria prongs. Mr. Partington stated that he would like to place discussion of how the Board is voting on variances on a future meeting agenda. Mr. Murray is also interested in obtaining legal advice on how to properly craft motions, including motions to deny. Ms. Scott, Community Development Director, stated that staff will come up with a list of legal questions, to be reviewed by the Chairman, and will present those questions to Attorney Campbell in order to provide guidance to the ZBA.

**Ms. Samsel motioned and Mr. Scholz seconded the motion to adjourn. Motion passed unanimously.**

The next meeting of the Zoning Board of Adjustment is scheduled for July 12, 2011 at 7:30 PM in the Community Development Office.

These minutes are in draft form and are submitted for approval by Elizabeth Wood and Tim Corwin.