



BOARD OF ADJUSTMENT

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

Zoning Board of Adjustment Draft Minutes July 26, 2011

Board Members

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

Staff

Laura Scott, Director of Community Development
Patricia Kovolyan, Administrative Assistant

The Chairman appointed Mr. Tierney to replace Mr. Partington who recused himself from Case 16-2011.

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

Applicant – Marc Sneider
Owner – Brian Bauchman
Location – 120 Haverhill Road
Zone – Rural

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

Mrs. Dunn read the case into the record.

The Chairman asked if the Board Members read Attorney Campbell's May 9, 2011 letter that recommends the Zoning Board vote not hear the appeal because it is outside the jurisdiction of the Board.

Mr. Samsel said that he agrees with Attorney Campbell's recommendation that this appeal is outside the jurisdiction of the Zoning Board.



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The Chairman asked how the Board wanted to proceed and mentioned that the Zoning Board did not have authority over code enforcement actions. The Board of Selectmen is the correct Board to determine if enforcement is being met.

Mrs. Dunn said that it was previously decided, although she did not have the minutes from that meeting, (May 24th) the Board looked at this appeal and made the determination that the majority of the Board (she did not remember what the vote was) could determine whether or not what was being alleged was a violation of the Zoning Ordinance. It is code enforcement's prerogative to enforce or not and that can be dealt with by the BOS. The question before the Board back in May was whether or not what was seen constitutes a violation of the Zoning Ordinance and the court order that is in effect.

Mr. Tierney said the Planning Director did make an interpretation of the zoning ordinance that the Board can review. The Board cannot determine whether it is a violation or not.

The Chairman said to make a zoning interpretation will not accomplish anything because the Zoning Board does not have the power or authority to do anything regarding the enforcement action.

Mrs. Dunn said there are two different issues. First is whether or not there is a violation of the ordinance and if there is what can and should be done. Mrs. Dunn said she agreed that the Zoning Board cannot enforce it if there is a violation but if there has been a determination whether or not something is a violation that is an Administrative Decision and that can be appealed.

Mr. Tierney said he agrees with Mr. Samsel that the Board can't make an interpretation whether this is a violation. Many of the items cannot be addressed by the Zoning Board. The Board can only look at the interpretation of the language of the ordinance and whether the tarp is a fence and if a backhoe is permitted in the rural zone.

Mr. Samsel read a portion of Attorney Campbell's May 9, 2011 letter into the record. *The question of what is a "decision of the administrative officer" is set forth in RSA 676:5 (II) (b): A "decision of the administrative officer" includes any decision involving constriction, interpretation or application of the terms of the ordinance. It does not include a discretionary decision to commence formal or informal enforcement proceedings, but does include any construction, interpretation or application of the terms of the ordinance which is implicated in such enforcement proceedings.* Mr. Samsel said that there are no enforcement proceedings here; there is nothing for the Zoning Board to determine.

Mr. Samsel motioned that the Zoning Board not hear Case 16-2011 based upon the recommendation made by the Town Attorney Campbell as stated in his May 9, 2011 letter



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because he believes the Board does not have jurisdiction in this appeal. Motion failed; no second.

Mr. Sneider, the applicant, submitted a memo dated May 23, 2011 that was marked as Exhibit A. Mr. Sneider asked for an interpretation of the zoning law which according to the RSA the Zoning Board does have jurisdiction to make that decision. There are two issues one is a blue tarp that Mr. Sneider alleges is a fence and a backhoe constitutes a motor vehicle.

- If there are more than two unregistered motor vehicles at the site it is a violation.
- If a backhoe is not considered a motor vehicle by the Zoning Board there would be no restriction prohibiting anyone from having five, six or fifteen backhoes on their property.
- There is a tarp area approximately 30' high X 40-50' wide in the back portion of the lot.
- It was determined that the tarp was not a fence because any barrier that can be walked around is not a fence.
- According to the Zoning Ordinance a fence is a manmade barrier without through passage.
- According to Ms. Scott, because you could go around the barrier it was not a fence.
- If the tarp is not a fence subject to permit requirements what would prevent someone from erecting a 100' high barrier across their backyard, leaving approximately 2' on each side to pass around.

Mr. Sneider read into the record Zoning Ordinance 710.2. *Fence: A manmade barrier that prohibits through passage.*

Laura Scott, Community Development Director, said that she responded to this complaint because this was a property she started with when she began working for the Town of Windham as Code Enforcement Officer and the procedure in the office is if you start with a property you continue with it until the end. The Selectmen are aware of this procedure.

- This is a case where enforcement wasn't taken.
- Ms. Scott determined that the issue of a piece of plastic is not a fence and does not need a permit. Mr. Bauchman's children use the tarp for paintball practice.
- The intent of the fence ordinance was to regulate fences along the property line.
- The backhoe is used to clear snow and do site work on his property. It is not used as part of a commercial business.

Attorney John Cronin of Cronin & Bisson, representing Mr. Bauchman, said that there is one fact that needs to be clarified. The piece of equipment being referenced is not a backhoe by definition. A backhoe is something that can be registered for use on a public highway and has rubber tires or wheels. This piece of construction equipment cannot be registered because it has



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tracks not wheels. The tarp is not a barrier, it can be lifted up and you can walk through, it is not a fence.

Mr. Heath Partington of 17 Galway Road said that a complaint was filed at the Community Development Department and Ms. Scott told the applicant, Mr. Sneider, that he could appeal her decision. Attorney Campbell's letter, that Mr. Partington disagrees with, came in after the fact.

Mr. Sneider said whether the backhoe has tracks or wheels does not matter; the Court said it can be registered as a motor vehicle.

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

Deliberative Session, Case #16-2011

Mrs. Dunn said that a vehicle with tracks is not the type of vehicle envisioned when writing the zoning regulations. Simply because the vehicle is unregistered does not make that motor vehicle a violation.

Mr. Tierney said that he has neighbors that have tractors with attachments for snow removal and backhoe attachments for maintenance. Mr. Tierney said he agreed with Ms. Scott's interpretation.

Mrs. Fallon said that for a property of this size a backhoe is reasonable and agrees that it does not need to be registered.

Mr. Samsel said this is a rural zone and has been discussed before and the Chairman agreed.

Mr. Tierney said that the tarp is not a fence or barrier and agreed with Ms. Scott's interpretation.

Mr. Samsel said his first thought was his mother hanging and drying clothes out on a clothesline so he would say this is a tarp.

Mrs. Dunn said the tarp may be a nuisance but not a fence.

Mrs. Fallon said the tarp is not a fence but she has reservations regarding the size.

The Chairman reviewed the three points of the appeal.

1. Ms. Scott's decision not to initiate code enforcement.
2. Determination if the backhoe is an unregistered motor vehicle.
3. Determination of the tarp.



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Mrs. Dunn motioned to deny the Administrative Appeal having found that the backhoe and tarp are not violations of the Zoning Ordinance. Mrs. Dunn withdrew her motion.

Mr. Tierney motioned and Mrs. Fallon seconded the motion to deny the Appeal of an Administrative Decision because the Board found the decisions made by the Community Development Director were correct and under these circumstances the tarp is not considered a fence and a backhoe is not considered a motor vehicle. Motion passed 4-0-1. Mr. Samsel abstained because he felt the Board should not have heard the case.

The Chairman granted a five minute recess.

The Chairman called the meeting back to order.

Mr. Partington replaced Mr. Tierney on the Board for the balance of this meeting.

Lot #22-L-20, Case #25-2011

Applicant/Owner – Corado Brancato

Location – 54 West Shore Road

Zone – Residential A

A variance is requested from Section 702 Appendix A-1 of the Zoning Ordinance to permit the construction of a 112 square foot shed to be located 12 feet from the rear lot line where 30 feet is required and 4 feet from the side lot line where 30 feet is required.

Mrs. Dunn read the case into the record. The owner, Mr. Brancato, presented his case.

- Shed needed for storage of lawn equipment and children's toys.
- There are existing sheds on adjacent undersized lots.
- Original application for a 10' X 14' shed was down sized to 8' X 14'.

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

Deliberative Session, Case #25-2011

Mrs. Dunn said she had concerns regarding a large house on a small lot in an already congested area.

Mr. Samsel had no issue.

Mr. Partington had an issue that there is a previous variance.



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After a brief discussion regarding a posting error (incorrect lot number) the Board decided to proceed and that it was not a fatal error.

Mr. Samsel motioned and Mr. Partington seconded the motion to grant a variance as requested for Case 25-2011 from Section 702 Appendix A-1 of the Zoning Ordinance to permit the construction of a 112 square foot storage shed to be located 12' from the rear lot line where 30' is required and 4' from the side lot line where 30' is required. Motion passed 4-1. Mrs. Dunn voted against the motion because the request would diminish property values, it is not in the spirit and intent of the ordinance and there is no hardship.

Lot 19-A-300, Case #27-2011 - Rehearing

Applicant – Edward N. Herbert Assoc., Inc.

Owner – Sun Coast Properties, LLC

Location – 66 Mammoth Road

Zone – Rural

Applicant proposes to construct 5 residential duplex buildings. The 10 dwelling units will be sold in a condominium form of ownership, and 4 of the dwelling units will be work force housing per RSA 674:59. A variance is requested from Section 602.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the construction of 5 duplex residential buildings which is not a use permitted in the Rural District.

Mrs. Dunn read the case into the record.

Attorney Cronin, representing the applicant, presented the case for the Work Force Housing Project. The applicant was advised to go before the Zoning Board of Adjustment and then return to the Planning Board. Attorney Cronin respectfully disagreed with the determination to seek a variance; he does not believe a variance is required. The Workforce Housing Ordinance is a special state statute that would have priority over any local ordinance. Attorney Cronin asked the Board to review the application in the context of Workforce Housing Statute in the first instance. Secondly, Attorney Cronin said that this request warrants the granting of a variance even if it was not a Workforce Housing project. In this particular case, all of the state permits and approvals have been received for both septic and water and that is the standard measure of whether the site can support this number of units from a density point of view. In this particular case, the hardship can be defined by the lack of an ordinance to determine what density benefits should be given to Work Force Housing.

Mr. Murray said that in Appendix A-1 of the Ordinance there are lot sizing standards for work force housing; therefore there is a density bonus within the ordinance. Mr. Murray asked if the applicant was asking for more of a bonus than what is offered.



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Attorney Cronin said his client meets that particular legislation.

Mr. Murray asked if the applicant meets that particular legislation why are they in front of the Zoning Board.

Ms. Laura Scott, Community Development Director, said the applicant is not asking for a density bonus because of the soil, they are asking to have more than one housing unit on the lot in a rural zone.

Mr. Peter Zohdi of Herbert Associates explained that HISS soil mapping was done by Gove Environmental. Loading requirements and septic systems were approved by the State of NH. No wells will be drilled. Water will be provided by Pennichuck Water Systems. Mr. Zohdi went on to say that the calculations entitle the applicant to ten two bedroom units. There are no wetlands or WWPD on this site.

Ms. Scott mentioned that Mrs. Glance did have concerns regarding the first application but was not able to attend the meeting. She did not voice any concerns until after the Board had made a decision.

Attorney Cronin submitted a letter from Mark McKeon Appraisal Services dated July 26, 2011 and marked as Exhibit A, regarding the impact that the proposed condominiums would have on this project. A unit cost analysis for Sun Coast properties was submitted and marked as Exhibit B.

Mr. Zohdi spoke about the lack of affordable land in the Village District and the Multi-Family Zone.

Mr. Samsel asked the percentage of building coverage. Mr. Zohdi answered:

- Proposed Building Coverage – 9.5%
- Paved Area – 10.3%
- Open Space – 80.2%

Mrs. Dunn read into the record a letter from Mrs. Mary Glance of 64 Mammoth Road, an abutter, listing her four concerns.

The following spoke in opposition to this request:

- Mr. Alan Carpenter of 8 Glenwood Road.
- Mr. Wayne Morris of 14 Jordan Road.
- Mr. Ross McCloud of 4 Nottingham Road.



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Ms. Scott said she wanted to clarify the impact fees. The applicant would be required to pay public safety (police & fire) impact fees; school impact fees do not apply to this development, not because it is Work Force Housing but because it is a condo form of ownership. School impact fees only apply to single family, fee simple lots.

Mr. Walter Kolodziej of 8 Kent Street commented on the request.

Mr. Tom Case of 7 Mountain Village Road advised the Board that they should only be concerned with the number of buildings on the lot. The Planning Board should be hearing this project not the Zoning Board.

Mr. Partington said the Planning Board made an assessment of the current ordinance but did not make an assessment of whether Windham met its fair share of Work Force Housing.

Ms. Scott said the Planning Board looked at the data and felt that Windham did not offer a realistic opportunity.

Attorney Cronin said people would be more willing to accept this project if it was characterized as something other than Work Force Housing. Work Force Housing is not low income housing. Work Force Housing allows hard working people to live in a great town such as Windham. Attorney Cronin went on to address comments made by Mr. McLeod who spoke as a resident. Mr. McLeod changed his position from the initial hearing. Mr. McLeod said this would be a great site for Work Force Housing; not such a great site for single family housing because of the power lines. Attorney Cronin said that he respectfully disagrees with the Supreme Court. When you look at those standards it is not what reasonable expectations are generally. The Board is supposed to look at the application in the context of what the applicant proposes, not what might be reasonable in someone else's mind. Attorney Cronin reminded the Board that in the beginning he asked that the Board take a look at this application and approve it as a Work Force Housing variance but he was also receptive to various conditions.

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

Deliberative Session Case 27-2011

Does Windham have its fair share of Work Force Housing.

Mr. Partington – No

Mr. Samsel – No

Mrs. Dunn – No

Mrs. Fallon – Yes

Chairman – Yes



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Windham allows reasonable opportunities for Work Force Housing

Mr. Partington – No
Mr. Samsel – No
Mrs. Dunn – Can't Answer
Mrs. Fallon - Yes
Chairman – Yes

Five Criteria

Waiving the terms of the Ordinance will not be contrary to the public interest.

Mr. Partington – No
Mr. Samsel – Yes
Mrs. Dunn – No
Mrs. Fallon – No
Chairman - No

Deviation from the strict requirements is consistent with the spirit of the ordinance.

Mr. Partington – No
Mr. Samsel – Yes
Mrs. Dunn – No
Mrs. Fallon – No
Chairman – No

Granting the Variance would do substantial justice.

Mr. Partington Yes
Mr. Samsel Yes
Mrs. Dunn – Yes
Mrs. Fallon – Yes
Chairman – No

Value of the surrounding property will not be diminished.

Mr. Partington – Yes
Mr. Samsel – Yes
Mrs. Dunn – No
Mrs. Fallon – No
Chairman – Yes



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Literal enforcement of the provisions of the ordinance would result in unnecessary hardship.

Mr. Partington – No
Mr. Samsel- Yes
Mrs. Dunn – No
Mrs. Fallon – No
Chairman – No

Proposed use is reasonable.

Mr. Partington – No
Mr. Samsel – Yes
Mrs. Dunn – No
Mrs. Fallon – No
Chairman - No

Mr. Partington motioned and Mrs. Dunn seconded the motion to deny Case 27-2011 as presented after consideration of RSA 674:59 the Board decided a variance would be contrary to the public interest and the spirit of the ordinance would not be observed and literal enforcement would not result in unnecessary hardship. Motion passed 4-1; request denied.

Mrs. Dunn motioned and Mr. Samsel seconded the motion to adjourn Motion passed unanimously.

The next meeting of the Zoning Board of Adjustment is scheduled for August 9, 2011 at 7:30 PM in the Community Development Office.

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