



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

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**Zoning Board of Adjustment**  
**Draft Minutes**  
**November 22, 2011**

**Board Members:**

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

**Staff**

Tim Corwin – ZBA/ Code Enforcement Administrator

**Lot 16-R-785, Case #50-2011**

Applicants/Owners – Anita & John Carew  
Location – Third Street  
Zone – Residence District A

Applicant proposes to construct an 8 ft. x 8 ft. shed on a vacant lot to be located within the minimum required yards. A variance is requested from (a) Section 603.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit a shed to be located on a vacant lot where such a use is not permitted in the Residence District A and (b) Section 702/Appendix A-1 to permit the shed to be located 8.5 ft. from the side lot line shared with Lot 16-R-20 where a minimum yard of 30 ft. is required, 16 ft. from the side lot line shared with Lot 16-R-490 where a minimum yard of 30 ft. is required, and 8 ft. from the rear lot line where a minimum yard of 30 ft. is required.

The applicant stated that they would like to place an 8 x 8 shed at the bottom of their driveway. They need it to store their snow blower. The applicant stated she was not interested in merging the adjoining lots, in case she ever wanted to sell one of the lots. The applicant obtained the subject lot and surrounding lots at the same time. A shed will be located at end of driveway on the right.

Ms. Dunn stated that in order to grant relief, the 5 criteria must be met. One of the intents of the Zoning Ordinance is to not have accessory structures on otherwise vacant lots. If the applicant has the ability to merge, no variance would be needed from that section of the ordinance. Mr. Tierney stated that the deed describes the lots as all one parcel.

The applicant clarified that she pays taxes separately on each lot. The applicant read the 5 points into the record as set forth on her submitted application.

Mr. Murray asked whether the shed could be placed on the same lot as the primary structure in order to avoid the use variance. The applicant stated that she does not think the shed would be accessible there, but that she would have to think about it.

Ms. Dunn clarified that even if the structure was placed on the same lot, dimensional relief would still be required and a new hearing notice posted.

The applicant clarified that the property has both a First and Third Street address. Mr. Tierney suggested that the variance could be approved subject to the merger of the lots. The problem is that the applicant is asking for a use that's not permitted and you have a driveway going through a vacant property. It's preexisting, but it should be subject to merger. If it's gravel, it's fine. The Applicant confirmed that it is.

The Applicant expressed concern that she was not prepared to "argue" with the Board and did not know how to address the questions the Board was asking.

Mr. Scholz suggested that the Applicant request a continuance to work with staff to determine a way forward, and so she won't have to submit a new application. Mr. Murray agreed that the applicant should consider asking the Board for a continuance, and suggested that the applicant could withdraw the case if she decided not to move forward.

The applicant requested a continuance. **Mr. Samsel made a motion to approve a continuance for Case 50-2011, seconded by Mr. Partington. Motion approved 5-0.**

### **Discussion of Re-Hearing Request Procedure**

Mr. Murray stated that Mr. Corwin forwarded an e-mail from Town Counsel, Attorney Bernie Campbell. Ms. Dunn and Mr. Murray stated that they did not read it. Mr. Tierney said that he did, and stated that the ZBA has in the past considered other materials by parties opposed to a re-hearing, it's a matter of due diligence by Town Council on behalf of the Town. In the past, the ZBA has heard from both sides. Mr. Murray's threshold concern was that the ZBA is bound by the RSA and focuses on the two-prong question, and it's always been known that it's considered in a deliberative session. But the concern is that with the memo the Board is taking public input and also that those types of letters from Town Counsel should be filtered through the Chair. There's a conflict in that it's being argued on behalf of the Selectmen, but the ZBA shares the same counsel. As a quasi-judicial board, the applicant should have an expectation of due process. Where a case is being argued aggressively on behalf of the Selectmen, the ZBA could be wrongly influenced by what's in the letter. Ultimately, every board member might need to recuse themselves if they read the letter. This goes into the importance as to why the Board should have its own legal budget. It's not just this case, but others as well where these conflicts have arisen. It's not fair to the public when Town Counsel is on both sides of the coin.

Ms. Dunn stated that here though Town Counsel has not advised the ZBA, and he would not be able to in this case. Ms. Dunn stated that she doesn't remember receiving any additional materials in previous re-hearing requests. But the re-hearing request is a public document and the opposing side can choose to file a response and the Board has administrative rules whereby they determine what they're going to hear. It's more just a matter of getting it on the record. That the Board received something then is not the issue, but the same procedure must be involved whether it's the Board of Selectmen or the average citizen. Mr.

Murray said that he shared that concern and did not want to show any bias or impropriety because it's the Selectmen. Mr. Tierney clarified that here Town Counsel was attorney for appellant, he was just exercising his right to submit his comments.

Ms. Dunn stated that the crux of the matter is whether the applicant has demonstrated one of the two prongs. But has the Board ever said it will not consider any other input of any kind?

Mr. Partington stated that he doesn't understand the purpose of taking public input when the ZBA can answer the questions themselves. Mr. Tierney said that the Board of Selectmen is not the public because they are the party being appealed. Mr. Samsel stated that the burden is on the applicant. Other materials are not relevant.

### **Lot 21-Z-268, 25 Cobbetts Pond Road, Case #44-2011 – Request for Re-Hearing**

Ms. Dunn summarized the re-hearing request. Mr. Samsel suggested that the Board consider each of the applicant's Points of Error set forth in their addendum to their Re-Hearing Request. Mr. Murray agreed and read through the applicant's request.

Applicant's paragraph I: Mr. Samsel stated that this sounds like a second bite at the apple as opposed to technical error. Nor is it new information. Mr. Murray and Mr. Partington both agreed. Ms. Dunn and Mr. Partington stated that this was the attorney's opinion of what the law should be, not a technical error.

Applicant's paragraph II, A, B and C: Mr. Partington stated that he does not think there is new information here and does not think there was a technical error. Ms. Dunn pointed out that the statements contained in footnote 2 are not accurate. During the time with Town Counsel cited, the ZBA discussed workforce housing and not this case. Rather, Town Counsel gave his opinions on this case in public at the hearing. Mr. Murray concurred. Mr. Partington also pointed out that the referenced October 6 memo was made public on the morning of the hearing and it's contents were presented at the hearing.

The consensus of the Board is that the information set forth in paragraphs II A, B, and C did not present any new information or present any technical error. Mr. Samsel agreed that with respect to paragraph A, but feels that a technical error was made with respect to the information presented in paragraphs B and C, which is reflective of his original vote.

Applicant's paragraph III: the Board agreed that this paragraph contains no new information and no technical error. **Mr. Partington motioned seconded by Ms. Fallon to deny the re-hearing request for case 44-2011, approved 5-0.**

### **Review and Approval of 8/23/11, 9/13/11, 10/11/11, 10/25/11, and 11/8/11 Draft Meeting Minutes**

Mr. Samsel motioned seconded by Mr. Partington to approve the 8/23/11 draft meeting minutes, approved 5-0.

Mr. Corwin stated that the revised 9/13/11 draft meeting minutes are not ready and will be included in the Board's packets for the 12/13/11 meeting.

Mr. Samsel motioned seconded by Ms. Fallon to approve the 10/11/11 draft meeting minutes. Mr. Partington requested an edit. Mr. Samsel amended his motion to include Mr. Partington's edit, seconded by Mr. Partington, approved 5-0.

Ms. Dunn made a motion to approve the 10/25/11 draft meeting minutes, seconded by Mr. Partington, approved 5-0 (with Ms. Fallon abstaining and Mr. Tierney voting).

Ms. Dunn, Mr. Partington, Mr. Samsel, and Mr. Scholz requested edits to the 11/8/11 meeting minutes. The minutes will be revised and approved at the 12/13/11 ZBA meeting.

### **Public Hearing – By-Laws Amendment**

The text of the proposed amendment to the "Appeals" section of the By-Laws is as follows:

"8. The Board may affirm, hear and decide appeals where it has been alleged that there is an error in any order, requirement, decision, or determination by an administrative official or reverse such order, requirement, decision, or determination, in whole or in part, or may modify the same; and hear and render determinations on any question relative to the meaning of the text of the Ordinance and the terms of the Zoning Ordinance within 30 days of said decision."

The Board agreed on revisions to the "Appeal of Administrative Decisions" section of the By-Laws which will be posted and will have a public hearing at the 12/13/11 ZBA meeting.

### **Discussion of 49 Range Road ZBA and Planning Board Applications**

Chairman Murray said that he reached out to the other Board members and the consensus was that it was not necessary to meet with Atty. Campbell. Ms. Dunn stated that the ZBA denied a variance and rehearing and an application for the same applicant was approved in short order by the Planning Board. If the use is not allowed how can the Planning Board even be hearing it? The next step would have been appealing to Court, but instead was approved by the Planning Board. Last time the Board discussed making a request to Town Counsel for an opinion as to whether the ZBA could appeal or what other actions it could or should take. There was a question to and response from Atty. Campbell after which a majority of the Board agreed not to meet with him. Ms. Dunn does not feel the ZBA's question was completely presented to Atty Campbell, and if it were the Board would have gotten a different answer. So what does the Board do? Maybe the question is how does the Board prevent this from happening again? Maybe there's nothing to do on this particular case. The ZBA never got an answer as to whether the ZBA could file an action for a declaratory judgment. The question is what does the ZBA do for the future?

Chairman Murray stated that he spoke with Atty. Campbell who said a different application was filed, and suggested that we get a copy of the denial letter in the original case and see what the differences are between that case and the second case and why a denial letter was not issued. Atty. Campbell noted that the ZBA is a quasi-judicial board and not an evidentiary board. Things come to the board. Atty. Campbell made it clear as to the process the Board could take. Chairman Murray said he did not discuss in detail the ZBA's ability to appeal the Planning Board decision. Atty. Campbell did say that the ZBA could request a joint meeting with the Board of Selectmen to state the ZBA's position on what happened and give the Board of Selectmen the opportunity to take an action where the clearly have standing. There is also the

option of including the Planning Board in the joint meeting request, whereby if it's deemed that the application is very similar to the first, the Planning Board could rescind their approval. Mr. Murray stated that if the Board still wishes to meet with Atty. Campbell or have any further questions, he can pursue that.

Mr. Partington asked what the goal of a joint hearing would be. Mr. Murray stated that the goal would be for the Board of Selectmen to take action or for the Planning Board to rescind their approval. There are three options: selectmen, selectmen and/or Planning Board, or the ZBA can appeal themselves, but it would have to demonstrate standing. But no one on the ZBA would be able to sit, so it would have to be heard by an entirely different board.

Ms. Dunn stated that the issue is that the ZBA denied something which the Planning Board then approved. The question is whether the new application was truly different. What the ZBA needs to do is talk about process in the future.

Mr. Tom Case explained that the reason it was accepted by the Planning Board was because it was brought forth to the Planning Board as a medical facility because they do Botox injections, which is an allowed use, so they don't need a variance. Mr. Partington stated that at the Planning Board it was explained that they have 2 medical professionals on staff and that is what changed the determination. Mr. Case stated that if staff knew exactly what the use was from the start, the determination would have never been made that they needed a variance. Ms. Dunn stated that the real issue is that a decision was made administratively that this was a different application and is the application substantively different. In the future, the Planning Board should ask what the ZBA considered before considering an application. Mr. Samsel stated that the gatekeeper is the staff, who frequently make decisions about what does and doesn't need a variance, so should the ZBA review all such staff decisions? Ms. Fallon stated that the medical nature of the business should have been included in the re-hearing request.

The Board took a 5 minute recess to give Mr. Corwin an opportunity to locate the May, 2010 determination letter and the application to the Planning Board which was accepted and approved subsequent to the ZBA denial.

Mr. Corwin and Mr. Tierney reviewed the relevant building and Planning Board files, but did not find a determination letter or the planning board application.

Mr. Partington stated that he has seen the Planning Board application as well as Laura Scott's presentation to the Planning Board. There was new information added to the same application. Mr. Murray asked whether the Board feels as though the new application was substantially different. If no, then it's a clear violation of the process and the Board should request a joint hearing with the Board of Selectmen to raise the issues and request the Planning Board be part of that process and rescind the decision. Mr. Partington stated that the issue is whether having two medical professionals makes this not a barber shop which is what the ZBA primarily focused on before.

Mr. Murray stated that he is inclined to schedule a joint hearing with the Board of Selectmen and allow the Planning Board to be part of that process. This will give staff time to put the application together and the ZBA can make a determination whether or not this should have gone to the Planning Board. The

Board concurred that the Chairman should take the necessary steps to arrange a meeting with the Board of Selectmen and the Planning Board.

Mr. Scholz asked the Board to consider that it not permit the staff to make legal determinations on behalf of the Board and to not have access to written communications between Town Counsel and the ZBA. The issue is that certain communications to the ZBA were made public by staff without the ZBA's permission. Mr. Murray stated that he is concerned with staff handling confidential communications from Town Counsel. Those should be delivered sealed to the Board. The concern is that the Board will be put into a position where they need to recuse themselves in the interests of due process.

The Board also discussed the process for the Chair to communicate with Town Counsel, and how questions to counsel are transmitted. Mr. Scholz stated that the Chair should not have to send questions through Dave Sullivan, rather Mr. Sullivan should only give the ZBA permission to or not to speak with Town Counsel. The substance of the question should only be shared directly with Town Counsel. Mr. Murray agreed and said that Town Counsel's response should go directly to the ZBA.

Ms. Dunn asked whether a "Draft" watermark could be added to the draft minutes. Mr. Corwin confirmed that it could.

Ms. Dunn stated that there should be a rejection letter for cases before the ZBA can act. The ZBA needs a denial letter.

### **Adjournment**

Mr. Samsel made a motion to adjourn seconded by Ms. Fallon, approved 5-0.

These minutes submitted in draft form by Tim Corwin.