



## COMMUNITY DEVELOPMENT

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### Draft (2) Zoning Board of Adjustment Minutes October 9, 2012

#### Board Members:

Mark Samsel, Chairman – Present  
Heath Partington, Vice-Chairman – Present  
Elizabeth Dunn, Member – Present  
Jim Tierney, Member – Excused

Mike Scholz, Alternate – Present  
Mike Mazalewski, Alternate – Present  
Tony Pellegrini, Alternate - Present  
Jay Yennaco, Member - Present

#### Staff:

Nancy Prendergast, ZBA/Code Enforcement Administrator  
Cathy Pinette, ZBA Minute Taker

#### Call to Order/Attendance

Chairman Samsel called the meeting to order at 7:30 pm, introduced the Board Members and staff, and explained the meeting process.

The Chairman appointed Mr. Mazalewski to sit for Mr. Tierney.

#### Public Hearings

Ms. Dunn read Case #37-2012 into the record, along with the abutters and a letter from Cynthia Roy stating Mr. Stuart Pappas of Hallmark Home Improvement Inc. was representing them.

#### Lot 21-V-250, Case #37-2012

Applicant –Hallmark Home Improvement Inc.  
Owner – Scott & Cynthia Roy  
Location – 18 Fish Road  
District – Residential A

The following variances are requested from the Zoning Ordinance to permit one of two existing year-round structures to be razed and replaced a new single-family dwelling to be constructed further from the pond; and to relocate an existing shed: **Section 401-** to allow for the increase in the extent of non-conformity of the structure; **Section 405.2** – to allow for the increase in the area or volume of the structure; **Section 405.3** - to allow for the increase in the non-conformity of the structure; **Section 405.5** - to allow for the replacement structure to be less conforming to the required setbacks; **Section 616.10.3** – to allow relief from submittal of a storm water management and erosion control plan to the Planning Board; **Section 702** and **Appendix A-1** – to allow a lot area of 16,161 +/- sq. ft. where 50,000 sq. ft. is required; to allow a front setback for the new structure of 30+/-' where 50' is required; to allow side setbacks for the new structure of 12+/-' and 22+/-' where 30' is required, and to allow a side setback for the relocated shed of 4+/-' where 30' is required.

- The Chair noted that Ms. Prendergast has recommended that the applicant does not need relief from Sections 401, 405.2 and 405.3 as the structure is being relocated further from the waterfront and both the area and the volume of the structure have been reduced.
- Mr. Stuart Pappas addressed the Board. Mr. Pappas stated that they are planning on taking down a structure that is 10 feet from the water and rebuilding a 26' x 32' home 100 feet from the water. They were before the Board 2 months ago and went and revisited the plans and dropped the volume considerably.
- Mr. Scott Roy, 18 Fish Rd, addressed the Board. He stated they had bought the property with 2 houses on it because they had wanted a rental property on their property. The front house needs a considerable amount of work. Floor sags, it is decayed, the electrical is questionable, the crawl space underneath is muddy and the supports are rotted. They spoke to a number of builders who stated it was better to rebuild the structure as opposed to renovate. The current building is only 10 – 15 feet from the water and the best location was to move it to where they have the most land. It would be centered on the lot, closer to the road for safety and it moves it away from the neighboring houses. They are decreasing the footprint by 188 sq. ft. When they came before the Board previously the volume was too much so they have reduced it to one floor thus reducing the congestion on the water.
- Mr. Mazalewski asked Mr. Roy if he was still planning on having a two car garage. Mr. Roy stated it is just a basement for utilities and their boat. Mr. Mazalewski asked if the rental will have access to the basement and Mr. Roy stated no.
- Ms. Dunn stated that the applicant's proposal had a basement, first floor and attic and wanted to know how high the roof line was. She asked if it was 7 – 8 feet. Mr. Roy stated that the road side has a higher elevation. He stated no one would have visibility of the garage door as they are on the other house.
- Mr. Scholz asked Mr. Roy if he has submitted a plan that shows the height. Mr. Roy stated the height in the Ordinance states 35 feet.
- Mr. Scholz asked Mr. Roy how many floors he was proposing. Mr. Roy stated a crawl space, first floor and attic. They have decreased the livable area and they are here for volume not height. This house would be just as high as others in the area. He said the house they supposedly diminishing (Ms. Freshman's house) is larger than his proposed house.
- Ms. Cynthia Roy, 18 Fish Rd, read the five criteria into the record.
- The Chair asked how far away the driveway to the older structure is. Mr. Roy stated 45 feet.

The Chair opened the hearing to the public.

- Ms. Susan Freshman, 16 Fish Rd, addressed the Board. She asked to admit her written statement for the record and read it. The Chair accepted her statement as Exhibit A. She stated she cannot state how congested this area is already. She presented the Board with various pictures showing the lot line, where her house is, and a picture from her kitchen windows as to where the driveway and

houses would be, and a picture of the current shed. She stated this project would diminish her property. She doesn't think since the Ordinance states 50,000 sq ft anyone with 16,000 sq ft should be able to build and ignore rules and regulations. She stated if the setback requirements are granted 616.10.3 should still be required. Water displacement onto her property is a huge concern. The Chair accepted the pictures as Exhibit B.

- Mr. Roy addressed the Board. He stated photo 5 does not go beyond the well. He stated the abutter's house is on .13 acres. His lot has 2 houses averaging .19 acres. Based on the fact that this area is congested you cannot expect things to stay the same. The proposed house is in a better location, safer and the abutter's house is 1,378 sq. ft and his will be 832 sq. ft. He showed the Board pictures of other houses in the area that are similar to the one he is proposing to build.
- The Chair asked if he can substantiate the relief from Section 616.10.3. Mr. Pappas stated the structure is improving impervious surface and there will be gravel around the area with drains. The Chair asked if that was submitted. Mr. Pappas thought he gave it to the building inspector. Mr. Pappas pointed to that on the plan.
- Ms. Dunn asked where the well head was. Mr. Roy showed pictures. Ms. Dunn stated she had a copy of the schematic that was given to the Board at the last meeting and asked if that was correct. Mr. Roy stated yes. Ms. Dunn asked how close the well head was to the proposed house and Mr. Roy stated 3 feet.
- Mr. Scholz asked Mr. Roy in regards to the neighbors concerns about section 616.10.3, if he would have any reservations if the Board did not grant that. Ms. Prendergast stated the applicant would have to go to the Planning Board with that if relief was not granted.
- Mr. Yennaco asked what the proposed plan would do with the parking. Mr. Roy stated the driveway is staying and nothing is changing with parking.
- Ms. Dunn asked for clarification on the building. Mr. Pappas stated 22 – 23 feet would be visible on the lake side. Ms. Dunn asked how close the house would be to the lot line. Mr. Pappas stated 12 feet.
- Mr. Scholz asked why Section 405.5 is needed. Ms. Prendergast stated she wasn't sure if 2' on one side is less conforming than 12' and 22'. Ms. Dunn stated that when you read the Ordinance it is an existing structure that would be made less non-conforming. This is a new structure.
- Mr. David Freshman, 16 Fish Rd, addressed the Board. He stated he has pictures of the applicants well and this is not his house in the picture. He provided the same pictures as Mrs. Freshman and the well is not where they claim. He stated the septic hump is where the water is running off from onto his property.
- Mr. Scholz stated that the applicant had 2 houses and by right he can build in the same location. Mr. Freshman stated he had no problem with Mr. Roy building in the same footprint.

The Chairman entertained a motion to go into Deliberative Session.

**Motion by Mr. Yennaco to go into Deliberative Session, seconded by Mr. Partington. Motion passed 5 – 0.**

- Mr. Yennaco asked the Board if they are in agreement with Sections 405.2 and 405.3 regarding the volume not being increased. Mr. Scholz stated he was not. Ms. Prendergast stated the volume had a reduction of 480 cubic feet. Mr. Scholz read Section 405.2. Ms. Dunn questioned if that was for existing structures and not for moving a non-conforming to a new site. Ms. Dunn asked Ms. Prendergast to clarify the calculations. Ms. Prendergast clarified her calculations.
- The Chair questioned the need for Section 405.2. Mr. Yennaco stated it was not an increase in the non-conformity. Ms. Dunn questioned when the building is moved to a new location is that less non-conforming. Mr. Mazalewski stated there is an increase in non-conformity as it is so close to the street setback. The Chair stated it is more conforming from the lake and less from the road.
- Mr. Partington stated Section 401 is very arguable, it is a math equation.

The Chairman entertained a motion

**Mr. Partington motioned that relief is not needed for Section 405.2 for Lot 21-V-250, seconded by Mr. Yennaco. Motion passed 5 – 0.**

- The Chairman stated that approval is required as something is allowed as they are grandfathered.
- Ms. Dunn stated she drove down to the area again today and it is very congested. There is a right of a continuance of non-conforming and the goal is to reduce non-conforming. When she looked at the neighbor's house and how close it was she stated it is a diminution value to the neighbor. It is still a large structure on a tiny lot. She questioned whether this met the criteria and how this is different from any other lot. The Chair stated that they have approval for two homes on one lot.
- Mr. Partington stated it comes down to spirit and intent and diminution. He has not seen any evidence from either party whether it would diminish surrounding properties. It is better, but not a perfect solution. Ms. Dunn stated there was testimony from the neighbor. Mr. Partington stated they did have testimony from the neighbor about run off but the applicant also stated they would mitigate. Mr. Yennaco stated that the issue the neighbor had was water run off and they stated if a variance is granted that Section 616.10.3 be kept in as water run off does diminish property values. Mr. Yennaco stated it is hard to look at this with no plans and just a sketch and pictures. They need to address what would happen with the water run off and that is something the Planning Board should look at. The Chair agreed with Mr. Yennaco.
- Mr. Mazalewski stated what Mr. Yennaco stated was also his concern. He likes the project, it meets 4 of the criteria clearly but is not sure about diminishment.
- The Chair stated something has to be allowed on the lot. Either what they are proposing or somewhere else. He will make his own determination on the diminishment. The only other concern was the shed. He is not sure of a need. Mr. Mazalewski agreed about the shed since they will have a basement.

- Mr. Yennaco stated regarding diminishment of value that there are many things that could diminish property values that could block the neighbor's views like fences and trees. There could be other neighbors who are diminishing their property. For the Board to judge if the proposal would be good or bad is hard. Mr. Partington stated that those other scenarios could happen but they are not in front of the Board.
- Mr. Mazalewski asked if the staircase was 12 feet from the abutters was it 8 feet from the lot line. Ms. Prendergast stated that the dimension goes with the structure only.
- The Chair stated if the application is granted it should have a condition for the Planning Board. Mr. Partington agreed and asked about a storm water management plan. The Chair asked Ms. Prendergast about that. Ms. Prendergast stated that would have to be included in the site plan.

The Board discussed the 5 criteria.

- Public Interest – public safety
- Spirit and Intent – there is not a lot of room for distance.
- Substantial Justice – Moving it away from the water
- Diminishment – as stated previously
- Hardship – questionable, it is a skinny lot and there are currently 2 houses allowed on this lot. Is it reasonable? Yes
- Mr. Mazalewski stated it was good if the staircase was switched to the other side.

The Chairman entertained a motion.

**Mr. Partington motioned in consideration of the 5 points to deny a variance from Section 616.10.3 for Case No. 37-2012, seconded by Mr. Yennaco. Motion passed, no relief granted 5 – 0.**

The Board consensus was that the request did not meet the spirit and intent of the ordinance, and there was no hardship.

**Mr. Partington motioned in consideration of the 5 points to deny a variance for Sections 401, 405.3, 405.5, 703 and Appendix A-1 for Case No. 37-2012, seconded by Ms. Dunn. Motion failed 2 – 3.**

- Mr. Partington and Ms. Dunn voted yes. The Chair, Mr. Yennaco and Mr. Mazalewski voted no.
- Mr. Partington stated his reason was that it wasn't proven there would not be a diminishment of property values considering the staircase and water run off. The Chair stated it meets the 5 criteria. Mr. Mazalewski and Mr. Yennaco would be ok with the conditions.

**Mr. Partington motioned in consideration of the 5 points to approve a variance for Section 401, 405.2, 405.3, 405.5, and Section 702 and Appendix A-1 to allow a lot area of 16,161 sq. ft. where 50,000 sq. ft. is required, to allow a front setback for the new structure of 30' where 50' is required, to allow side setbacks for the new structure of 12' and 22' where 30' is required, with the following conditions: 1) The staircase is not located within the 12' setback. 2) Recommendation that Planning Board looks at runoff within the 12 foot setback and requires ongoing remediation of potential runoff issues for Case No. 37-2012, seconded by Mr. Yennaco. Motion passed 3 – 2.**

- The Chair, Mr. Yennaco and Mr. Mazalewski voted yes. Ms. Dunn and Mr. Partington voted no.
- Ms. Dunn was opposed because of diminution in value of surrounding properties. Mr. Partington was opposed because of diminution in value of surrounding properties, specifically 16 Fish Road.

**Mr. Partington motioned in consideration of the 5 points a motion to deny a variance from Section 702 and Appendix A-1 to allow a side setback of 4' for the relocated shed where 30' is required, seconded by Ms. Dunn. Motion passed to deny 5 – 0.**

- The Board consensus was that the request did not meet the spirit and intent of the ordinance, and there was no hardship.

The Chair advised all of the 30 day appeal process.

The Board took a recess at 9:09 pm and was back in session at 9:15 pm.

The Chair appointed Mr. Scholz to sit for the next case.

Ms. Dunn read Case #38-2012 into the record along with the abutter list.

**Lot 11-C-1010, Case #38-2012**

Applicant – 21 Century Development Corp.

Owner – Same

Location – 29 Indian Rock Road

Zone – Business Commercial A

An Appeal of Administrative Decision has been submitted by 21<sup>st</sup> Century Development Corp. appealing the ZBA/Code Enforcement Administrators decision in a September 5, 2012 email, which states that the proposed changes to the existing free-standing sign are beyond the scope of Section 706.7.1 and as such requires a permit, and that the change from a monochromatic reader board to a multi-color is an increase in nonconformity and not allowed under Section 401 of the Zoning Ordinance.

- Mr. Tony Massahos, 29 Indian Rock Road, addressed the Board. He stated he has researched maintenance and repairs of his sign at Windham Commons. He stated the sign was installed in 1999. He gave some history of the sign and when the Zoning laws changed. He stated the sign is 13 years old and faded. Everyone else is changing their signs and he keeps his property to high standards. He wants to replace the electronic reader message board, and change the “Windham Commons” placard sign and get rid of the red color. He wants to make it green. He was told by Ms. Prendergast that he needs a permit. Mr. Massahos disagrees because he states there is no copy

change. In 1998 the sign was approved and there was no approval for color. There was no Zoning Ordinance in 1998 for color signs. Mr. Massahos read his prepared statement that he passed out to the Board. He stated based on current zoning his sign is a pre-existing non-conforming. It does not require a permit for repainting, cleaning or other normal maintenance as long as the sign copy or structure is not changed. There is also no increase in the extent of the non-conforming use. He stated copy is not color. He can find no reference in the ordinances to the design or color of the sign. In 1998 when the sign was approved it was for an electronic message reader board and there were no restrictions placed on the color of LED's. There were never any restrictions placed on file that stated it had to be red. There was no zoning in place to restrict messages boards to be monochromatic. There are currently no existing zoning regulations pertaining to electronic message boards other than the section on prohibited signs. There is no definition of "copy" or "color" in the ordinance. He does not believe he needs a permit to perform the required maintenance to his sign.

- The Chair asked Mr. Massahos if the sign was similar to the one he had now. Mr. Massahos stated yes, same box, same lettering.
- Mr. Massahos stated he received Ms. Prendergast's decision and he believes he should be able to replace his reader message board with an updated version. He would like the Board to clarify. He spoke about taking this to court if it is not rectified. He spoke about his tenants and a tax abatement he had to go through.
- Mr. Partington asked Mr. Massahos what the negative was to getting a permit. Mr. Massahos stated because he didn't need one under the zoning law.
- Ms. Dunn asked for a photo of the originally approved sign. Ms. Prendergast provided it to the Board. Ms. Dunn asked Mr. Massahos if the picture was the current sign that approved. Mr. Massahos stated yes.
- Mr. Scholz stated that there is reference to color within the Zoning Ordinance. The Historic District and Village Center District have color in the regulations. Mr. Massahos stated he is in Commercial A.
- Ms. Prendergast addressed the Board. She stated that she has no objections to what the applicant would like to do with his sign. She stated currently signs go before the Planning Board with site plan approval and color is reviewed. Then she issues the sign permit based on the approval. If the applicant proposes a change to the free-standing sign, she then sends it back to the Planning Board. Mr. Massahos spoke about signs that don't need approval. Ms. Prendergast showed the Board a picture of the existing sign and the approved sign permit on the computer, and noted that what is existing is what was approved in 1998. She stated that what Mr. Massahos is proposing is a change and needs a permit. She stated she needs to look at a picture of the proposed sign and see if it is a change from what was approved and installed. The Chair asked Ms. Prendergast to define a change. Ms. Prendergast stated it was a change if there was a new panel. Ms. Dunn asked if when they changed the sign at TM Cellular and Klemm's if they received a permit. Ms. Prendergast stated yes. The Chair asked if that would be 6 permits for 6 tenants. Ms. Prendergast stated yes. Ms. Prendergast showed the Board pictures of a multi-color electronic reader board that Mr. Massahos said would be similar to what he would like to display. Ms. Prendergast stated that the

change from the existing mono-chromatic reader board to a multi-color reader board is an increase in the nonconformity of the free-standing sign and requires a variance.

- Mr. Scholz read section 706.7.1 for the Board. And asked Ms. Prendergast what her interpretation of normal maintenance and repairs were. Ms. Prendergast stated normal maintenance is something she doesn't notice when driving by. The Chair stated normal maintenance is not repainting a different color. Ms. Prendergast stated that in Section 400, an electronic reader message board is an increase in the non-conforming use.
- Mr. Yennaco stated Ms. Prendergast is in a tough position because she is looking at something that was approved in 1998 and things are different now and technologies improve. He questioned whether this is similar to a computer/software upgrade. Mr. Scholz stated as technology changes so does the ordinance. The applicant has a right to replace "in kind". In 1998 the applicant chose to go with monochromatic lights. Ms. Prendergast stated she goes with what was approved at the time.
- Ms. Dunn asked if Mr. Massahos was to apply now for the sign he currently has if that would be allowed. Ms. Prendergast stated no.
- Ms. Prendergast stated the picture she was showing the Board is what Mr. Massahos presented at the time of approval.
- Mr. Massahos stated color is not copy. It is not in the Town's Ordinances. He had an option when he installed it originally to have it red, gold, monocolors. He doesn't think Section 401 applies. He thinks this is a repair because he cannot replace it. He is not before the Board to have it approved. He is appealing Ms. Prendergast's decision as to whether or not section 401 applies, and whether he needs a sign permit to change out the electronic reader board. Mr. Massahos also believes that he does not need a permit to change the background color of his "Windham Commons" sign from red to green as color has nothing to do with copy. Ms. Prendergast stated that in 1998 the ordinance had different restrictions on what was allowed.

The Chair opened the hearing to the public at 10:15 pm.

- Mr. Tom Case addressed the Board. He asked if the approved plan in the Community Development Office says the sign has to be red. Mr. Partington stated that the original sign as shown in the picture is red and that was part of the plan when approved.

The public portion was closed at 10:18 pm.

The Chair entertained a motion to go into Deliberative Session.

**Mr. Yennaco motioned to go into Deliberative Session, seconded by Ms. Partington. Motion passed 5 – 0.**

- The Chair stated if you look at section 706.3.1 it is pretty clear that all signs except for pre-existing non-conforming must conform to the regulations and current code.
- Ms. Dunn stated the sign ordinance was overhauled in the past couple of years.



- The Chair stated that Mr. Massahos does not need a sign permit to make his proposed changes because 706.3.1 makes a pre-existing non-conforming sign exempt from the regulations.
- Mr. Partington stated it does need a permit.
- Ms. Dunn stated pre-existing non-conforming means he can keep the current sign as-is forever.
- Mr. Scholz stated once you make a change then it changes the sign. He stated Section 706.3 is not applicable to 706.4. A sign copy is a change and testimony from Ms. Prendergast is that a change in color is something that needs a permit.
- Ms. Dunn stated that part of the approval by the Planning Board is to approve the color so changing that would need a permit.
- The Chair stated Ms. Prendergast gave testimony to converting the “Windham Commons” sign and that the color can change, but she would need a sign permit.
- Mr. Yennaco stated that color was not identified in the file for the electronic reader board, and the proposed changes are normal maintenance.
- Mr. Partington stated that if the applicant changes his sign, he needs to adhere to the current regulations.
- Mr. Scholz stated the intent is that the Boards do regulate sign copy and it could be interpreted to include color.
- The Chair stated this is a pre-existing non-conforming sign and as he reads the ordinance it is clear.
- Mr. Scholz explained his interpretation of the ordinance.
- The Board discussed whether a permit is needed for changing the background color of the “Windham Commons” sign copy, or whether the background color change was regular maintenance.
- The Board discussed that the applicant may have had the option in 1998 to have multi-color electronic reader board but then chose to install/use a monochromatic reader board thereby abandoning the multi-color option.
- The Board discussed that the electronic reader board/message board is what makes the existing sign pre-existing non-conforming. . The Board discussed why reader boards are no longer allowed and whether a sign permit and/or variance is needed for the proposed change to the electronic reader board.
- The Board discussed whether color is part of the design and is regulated; and whether changing the reader board from one color to multicolor makes the free-standing sign more non-conforming.

The Chair entertained a motion. The Board discussed and agreed to separate the motions regarding each issue in the appeal.

**Ms. Dunn motioned to uphold the administrative decision to the extent that the applicant needs to obtain a permit to change the background color of the existing sign from red to green because the change is beyond the scope of Section 706.7.1, seconded by Mr. Partington. Motion failed 2 – 3.**

- Mr. Partington and Ms. Dunn voted yes. The Chair, Mr. Yennaco and Mr. Scholz voted no.

**Mr. Yennaco motioned to grant the Appeal of Administrative Decision to the extent that the applicant does not need to obtain a permit to change the background color of the existing free-standing sign from red to green as it is within the scope of Section 706.7.1. seconded by Mr. Scholz. Motion passed 3-2.**

- Mr. Yennaco and Mr. Scholz voted yes. Mr. Partington, Ms. Dunn and the Chair voted no.

**Mr. Scholz motioned to overturn the Code Enforcement Administrator's decision that the applicant needs a permit for changing the monochromatic reader board to a multi-chromatic reader board for case #38-2012, Lot 11-C-1010, because it falls within the scope of Section 706.7.1. Seconded by Mr. Yennaco. Motion passed 3 – 2.**

- The Chair, Mr. Yennaco and Mr. Scholz voted yes. Mr. Partington and Ms. Dunn voted no.

**Ms. Dunn motioned to uphold the Code Enforcement Administrator's decision that the applicant needs a variance to change from a monochromatic reader board to a multi-color reader board as it is an increase in non-conformity and not allowed under Section 401 of the Zoning Ordinance. Seconded by Mr. Partington.**

- The Board discussed monochromatic reader boards. Mr. Scholz stated he was looking at each definition of signs and monochromatic reader boards. They do not have any grandfathered rights to expand the use or design including color or style. Ms. Dunn stated under Section 706.5.1.2 electronic reader boards are no longer allowed.
- **Motion passed 3 – 2.** Mr. Partington, Mr. Scholz Ms Dunn voted yes. The Chair and Mr. Yennaco voted no.

The Chair advised all of the 30 day appeal process.

- The Chair stated the Board would not be meeting on October 23, 2012. He would like to move the Public Hearing for the Rules of procedure until November 13, 2012.

#### **Zoning Board of Adjustment Rules of Procedure (By-Laws)**

A public hearing is to be held in accordance with NH RSA 676.1 *Method of Adopting Rules of Procedure* to amend the Zoning Board of Adjustment By-Laws to add section 4.2 regarding Joint Meetings and Hearings.

## **Review and Approval of Draft Meeting Minutes**

- September 25, 2012 Minutes – postponed to the next meeting.
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- Mr. Scholz stated he had found a note in previous minutes about adding a draft watermark to the minutes.

## **Binder Update**

- Tab 1 Member List

## **Old/New Business**

- Mr. Partington stated that Superior Court upheld the Board's decision on the Cafua case.

## **Adjournment**

The Chair entertained a motion.

**Ms. Dunn motioned to adjourn, seconded by Mr. Scholz. Motion passed 5 – 0.**

Meeting adjourned at 11:50 pm.

These minutes are in draft form and respectfully submitted for approval by Cathy Pinette, ZBA Minute Taker.