

BOARD OF ADJUSTMENT

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

Zoning Board of Adjustment Minutes May 15, 2007

Mark Samsel – Chairman
Jim Tierney – Vice-Chairman (Excused)
Dianna Fallon – Secretary
Gail Webster – Member
John Alosso – Member
Al Souma – Temporary Member
Tom Murray – Alternate (Excused)
Georges Roy – Temporary Alternate

The Chairman explained that Mr. Souma will be replacing Mr. Tierney and Mr. Roy will be replacing Mr. Murray for this meeting.

The Chairman stated that in Attorney Campbell's letter of April 19, 2007 it states ... *it appears that Mr. Letizio is an abutter and as a matter of due process he would include Mr. Schroeder on any application related to the garage.*

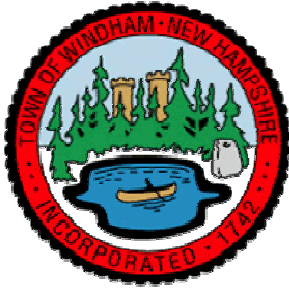
The Chairman defined an equitable waiver and stated that he would only accept testimony relating to the equitable waiver.

Lot #18-L-1, Case #30-2007 (Continued from April 10, 2007)

Applicant – Andrew & Christine Lane
Owner – A&C Revocable Trust
Location – 2 Woodvue Road
Zone – Residential A

An Equitable Waiver is requested from Section 601 of the Zoning Ordinance to permit an existing garage to remain in the WWPD.

Mrs. Fallon read the case into the record. Mrs. Lane of 2 Woodvue Road read the following into the record. *I'd like to make a couple of points for the record. At the March 27th meeting Mr. Tierney brought up his previous employment with the Windham Planning Department and both sides said that they had no problem with him sitting on the case. His vote on that date was not to the liking of the opposition. So at the last meeting they asked Mr. Tierney to recuse himself and he did. Whether his recusal is legal or not doesn't really matter. No one should be able to pressure anyone into leaving with such a flimsy and transparent excuse. However this whole*



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thing is just another example of the underhanded tactics used by a very small group of people who have been bullying and harassing us, the Town of Windham and the NH DES for years.

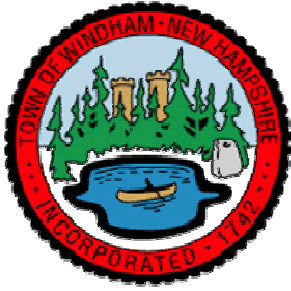
Now we come to the bullying and harassment tactics that certain members of the opposition have been using. When a member of the public comes to the podium, they are asked to give their name and address; not what public office they are holding now or 20 years ago. By bringing that up there is at the very least an appearance of exerting undue influence on the members of the ZBA. When speaking as a member of the public, political affiliations should not be relevant to the matter at hand.

I am going to bring up the tennis court on our property because it is the same issue as the garage. We, the Town and the State were harassed incessantly to get us to remove it. The Assistant Commissioner at the NH DES made a determination in February that the tennis court was built in good faith and is to remain. The matter is closed to any further harassment. The reason I bring this up is because we have done nothing wrong or illegal in building the tennis court or the garage. The area was wetland mapped prior to any building. We had permission from the Town and State, permits from the Town and inspections every step of the way. We had to put up with some nasty people constantly taking pictures of the property, which is like being stalked. We had to put up with constant work stoppages while the Town was investigating the latest complaint. None of the complaints were valid or legal. They were just more underhanded tactics to get us to stop building. Let me state quite plainly that this is a separate buildable lot. We are fighting for our legal right to build on it.

We are here because we believe in the American Justice system and that system starts at the Town level. It must be difficult to ignore personal or political friendship biases and base your decision purely on the law. But that is what Andrew and I are asking you to do. If any of you feel you cannot do that and have already made up your minds as to how you're going to vote without even hearing the evidence, I'm asking you now to recuse yourselves. We are here to ask the ZBA to grant us either an equitable waiver or a zoning variance to allow us to finally finish this garage and to stop this waste of everyone's time and money.

Mr. Lane reminded the board that on January 9, 2007 Mr. Samsel was asked to recuse himself because he would not be eligible to sit on a jury. Mr. Samsel said that he had no reason to recuse himself. Mr. Lane read the supporting four facts into the record.

1. Show that the violation was a result of an innocent mistake.
The dimensional violation of a WWPD setback was not discovered by the owner or the municipal official until years after the structure was substantially completed. The apparent error in an ordinance interpretation was made in good faith by the municipal officer issuing the permit.
2. Show that the mistake was discovered after the violation was substantially built.



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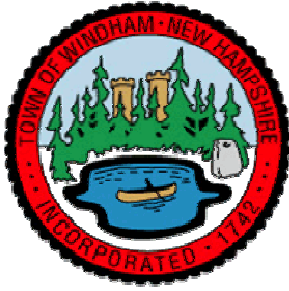
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The mistake was discovered on 1/22/07 and the violation was substantially built by 1/31/05.

3. Show that the violation is not a public or private nuisance, or diminish the value of other property, or adversely affects any present or permitted future uses of the property. The present location of the garage meets all the visual and state setbacks required for waterfront and corner lots promulgated by the Town and NH DES.
4. Show that the cost of correction far outweighs any public benefit and that it would be unfair to require the violation be corrected. The permit was issued and acted on in good faith. The cost of removing the garage would far outweigh any possible benefit to the public. In addition, the concrete drainage culvert under the road to which the ZBA decision has now attached a 100 foot WWPDP setback is uphill from the garage and cannot be subjected to any runoff from the garage so no benefit is gained by enforcing this dimensional requirement.

Mr. Lane displayed a time line ranging from August 2003 thru January 2007 and gave background information for each date.

- 8/13/03 Contract signed.
- 8/25/03 Wetland Delineation.
- 9/2/03 Permit application submitted and subjected to extensive review.
- 11/5/03 Permit #336 granted to construct garage.
- 11/13/03 Stop Work Order issued (additional issues raised).
- 11/14/03 Responses provided by NH DES and Nobis Engineering (more extensive review follows).
- 1/30/04 Stop Work Order removed (winter delays foundation pouring).
- 11/8/04 NH DES approves rotated location of garage (only 46 square feet of the structure will be within the restricted area).
- 11/24/04 Mr. Turner confirms approval of rotated location (Mr. Turner thanks the Lanes for their patience and wishes them luck).
- 12/13/04 Mr. Tierney inspects foundation.
- 1/9/05 ZBA denies appeal by Schroeder and allows construction of the garage to continue.
- 1/29/05 Garage framing completed (roof, windows, walls and siding installed).
- 1/31/05 amended building permit approved (location of windows).
- 5/20/05 Town issues electrical permit #116 for garage.
- 2/23/06 Town issues HVAC plumbing permit #61 for garage.
- 3/13/06 Town inspection passes gas piping.
- 3/26/06 Town inspection passes electrical (recommends insulating and adding a 2X4 stringer to the stairway wall).
- 5/3/06 Town inspection passes electrical trench and allows backfill.
- 1/9/07 ZBA overrules Director of Planning.

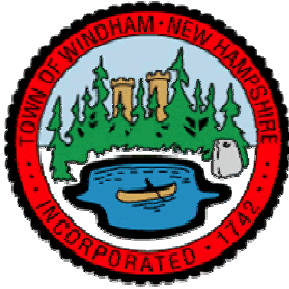


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- 1/22/07 Director of Planning suspends permit based on the 1/9/07 ZBA decision.

Mr. Lane explained that Mr. Turner advised that the garage be rotated so that it would be further away from the wetlands. The reason, in Mr. Turner's opinion, if building a foundation within 4-feet of the wetland, there is the potential of damaging the wetland. The Town asked that the NH DES sign off on the new location and then the permit would be released. The NH DES agreed to the new location. Mr. Samsel questioned if there are two lots or one lot. Mr. Lane provided two deeds one for lot 18-L-1 and one for 18-L-2. These lots were part of the subdivision that was intended to have two homes; there is a water supply to each of the lots. Mr. Lane explained that on 12/13/04 Mr. Tierney inspected the foundation and at his recommendation it was made wider and stronger than the original plan. Mr. Lane was then surprised that Mr. Tierney did not pass the inspection. Mr. Lane referred to ZBA Case #2-2005 heard on January 11, 2005. The petition of James Labadini and William Schroeder was denied. After the January 11, 2005 meeting Mr. Turner, in front of the Lane's attorney, advised the Lanes to get that building up as fast as they could, therefore, the Lane's feel they acted in good faith. The first time it was ever suggested that there might be a WWPD setback on the Lane's lot was at the January 9, 2007 ZBA meeting. That decision is under appeal by both sides. The decision of the ZBA was that there is a brook that runs from the opposite side of Woodvue Road and it runs down thru a concrete culvert and stops when it hits the lake. Because of this pipe that is near the Lane's lot there is a 100-foot setback included in the WWPD, therefore this pipe in and of itself has a 100-foot setback. The problem with that is that the WWPD doesn't say that a concrete culvert can never be the end of the brook it only says it can be an interruption of a stream. Mr. Turner interpreted the January 9, 2007 ZBA decision based on Heron Cove and stated that not only is the culvert protected but he believes that all the land from the end of the culvert 100-feet out all the way up to the edge of the lake is also protected by the WWPD. When Mr. Turner did that he completely eliminated any possibility of building on lot 18-L-1 and there is already a permitted structure on that lot. On January 6, 2005 Attorney Burnham received an injunction to allow the back fill of the foundation. This was in response to calls from Nobis Engineering stating that if it gets any colder the foundation is going to crack. On 1/11/05 the ZBA determined that the construction of the garage could continue. On 1/13/05 the Town inspected and passed the foundation and authorized the back fill. Mr. Samsel said that the Lane's were advised that an appeal was pending. There is an appeal period during which time an appeal can be made and puts the applicant at risk. There is an extra setback to the corner lot, it is 50-feet and that setback has been met. At the end of the Lane's lot the lake can be as much as 450-feet away or right up to the bank. Mr. Lane read into the record a letter from Mr. Gove of Gove Environmental Services dated April 10, 2007 ...*the garage and driveway will not cause degradation within the WWPD*. The removal of the garage could cause damage. The people of the town have the right to expect the building permit issued should stand. There was a brief discussion if the Lane's property is considered one or two lots. Mr. Lane provided two deeds. Mrs. Lane said that Mr. Turner, during a phone conversation,



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asked Mr. & Mrs. Lane to come in and sign to have the two lots merged. Mr. & Mrs. Lane did sign to have the lots merged.

Mr. Stephen Andrews of 48 Woodvue Road who works in commercial real estate suggested that the reasonableness test be used.

Mr. Tom Case of 70 Mountain Village Road said that he thought tonight would be a “slam dunk approval”. Mr. Case questioned what was said to the gentlemen that spoke before him, “we’re not talking about removing a garage”. Mr. Case asked that the statement be explained. Mr. Samsel said that the result of this decision may or may not have bearing on it. Mr. Case said suppose your decision is against the client, he would have to remove his garage. Mr. Case asked for another explanation and Mr. Samsel said that he would not repeat his statement. Mr. Case then said if you don’t grant the equitable waiver and the applicant does not apply for a variance he would have to remove the garage.

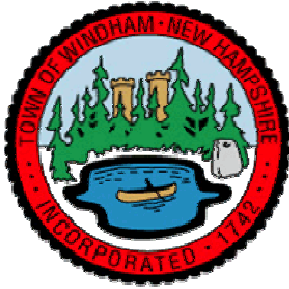
Mr. Lane read into the record letters of support from the following:

- Pennichuck East Utility, Inc.
- Mr. Lane of 2 Woodvue Road (as an abutter to Lot 18-L-1).
- Mr. & Mrs. Goglia of 25 Woodvue Road.
- Kerry Zaines & William Mouyos of 4 Lakewood Road.
- Mr. & Mrs. Mawby of 7 Woodvue Road.
- Mr. & Mrs. Russell of 6 Woodvue Road.
- Mrs. Kovolyan of 3 Woodvue Road.

Mr. Eric Mawby of 7 Woodvue Road spoke in support of the request. Mr. Mawby addressed point #1 of the equitable waiver. Mr. Mawby spoke to the reputable behavior of Mr. & Mrs. Lane who have always tried to find a way to resolve the issue within the law and have never been of the attitude to find a way around the problem. They have always worked with the town to resolve the issue to the satisfaction of the town.

Mr. James Labadini of 1 Woodvue Road read his letter of opposition into the record.

Mr. William Schroeder of 14 Woodvue Road spoke in opposition of this request and submitted a packet of information. This Equitable Waiver request is essentially a request to be permitted to complete and keep a building which has been determined to be located within the Windham Wetland and Watershed Protection District, WWPD, in violation of the WWPD ordinance, which is Section 601 of the Windham Zoning Ordinance. Mr. Schroeder said that after consultation with his attorney he wanted to make the following points, and requested that they be considered. Mr. Schroeder gave a definition of an equitable waiver and quoted from “15 NH Practice, Land Use Planning & Zoning” by Peter J. Loughlan, Esq. “A situation which has often

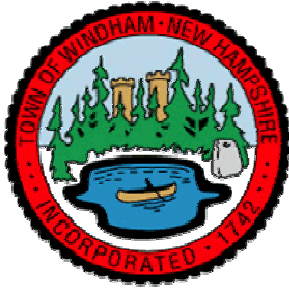


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created consternation for landowners and land use boards is an “honest mistake” in the siting of a building. Prior to 1996, when a subsequent survey disclosed that a building was mistakenly located so that it transgressed a few inches or a few feet into a setback area, the only relief available was to seek a variance from the Zoning Board of Adjustment. ... To address the problem of the “honest Mistake” the legislature has provided for an “equitable waiver of dimensional requirements”.... Mr. Schroeder submitted a timeline of the major events from the first building permit, on November 5, 2003, to the ZBA decision on January 9, 2007. Mr. Schroeder reviewed the timeline with the Board to present a clear picture of how the events developed:

- 11/5/03 Building Permit issued for garage.
- 4/16/04 Permit rescinded. “because your proposed building will not fit in the area you have excavated without wetland impacts...”
- 7/28/04 Letter from Turner to Lanes. “I still cannot release your building permit at this time...you can submit a new plot plan indicating exactly where you want to build the “garage” ... The new plot plan will indicate where all wetlands and WWPD are located and the required setbacks. We will then review your submittal for compliance with all existing codes. Your other option is to build the garage near the existing garage where there is plenty of room and little protected shoreland or WWPD”.
- 11/24/04 Permit is un-rescinded. This is an Administrative Decision. The Lanes had addressed the Shoreland Protection issue, but had submitted no information regarding WWPD location and required setbacks. Construction started immediately.
- 12/9/04 Appeal of Administrative Decision is filed by Labadini and Schroeder, alleging that the WWPD was not properly enforced and the permit should not have been released. Construction stopped.
- 1/6/05 Court grants only backfill.
- 1/13/05 ZBA hearing of appeal. Lanes argued that it had not been “timely filed” and the ZBA agreed. Dismissed without hearing on the merits.
- 1/31/05 Lanes now claim the garage was substantially completed on this date.
- 2/4/05 Letter from Attorney Donovan to Attorney Burnham (representing Lanes) “I request that you immediately advise Mr. Lane of the risk that, if he constructs the garage at issue while proceedings challenging the garage are pending, he does so at substantial risk that, if my clients prevail, he will have to take down the garage.”
- 2/14/05 Letter from Attorney Campbell (Town Attorney) to Attorney Burnham. “...I learned (for the first time) that your client has pursued construction of the garage well beyond that allowed under the temporary order granted by the Court...I would encourage compliance with RSA 6763:6 by your client...”
- 2/22/05 ZBA denied petition for rehearing of the January 11 decision.
- 9/8/05 Superior Court overturned ZBA decision and remanded the matter to the ZBA for a hearing on the merits.



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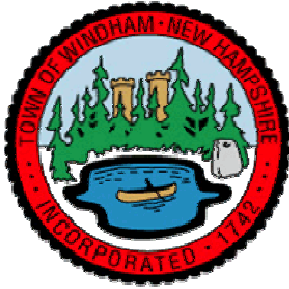
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- 5/3/06 Letter from Turner to Lanes "... The Superior Court has ordered you to only back fill the foundation. If work continues, we will be forced to obtain a court order to stop all work at the garage."
- 10/31/06 NH Supreme Court denied Lanes' appeal of Superior Court Decision.
- 1/9/07 ZBA grants appeal and determines where WWPD ends.
- 1/22/07 Letter from Turner to Lanes "Your garage is in the WWPD overlay area and your building permit approval is withdrawn..."

Mrs. Dunn of 30 Woodvue Road addressed the purpose of 674:33a the equitable waiver of a dimensional requirement and gave a history of the reason for enacting the statute. Mrs. Dunn went on to say that this structure is built within the WWPD and there has been discussion if that is important. The purpose of the WWPD is to protect our waters, watersheds, flood areas and the water quality of the body of water into which this water flows. This garage is a violation of the basic concepts of the WWPD; the entirety of the building is in violation. Mrs. Dunn provided a copy of the tax assessing record for the Lane's property; it is assessed as one property with a total land area of 1.83 acres. If anyone had tried in recent years to call this two lots and had asked for separate housing units to be built on either lot they would have been denied. Look at the statement on the record that the primary structure straddles the lot line, no building permit would have been issued for a structure that straddles an existing lot line. Whether or not it has been formally recorded at the Registry in the County, it has been taxed as one property, the old lot has disappeared and there are no building rights. One of the criteria looked at is benefit to the community. The benefit to the community and the motive of the people who have been working on this case is enforcement of the ordinance. Mrs. Dunn said that the building itself looks terrible, she has driven people by and asked their opinion. Mr. Samsel said that this is not relevant. Mrs. Dunn said it is relevant because you have to look at tax values and assessment values as part of the benefit to the community. A building which appears to be a commercial building, you look at it and say, why is there another almost house size building on this lot. Mr. Samsel said this is not relevant to the points. Mrs. Dunn said it is relevant to the value of the surrounding properties, because it exists, it devalues the surrounding properties. Mr. Samsel asked how it has devalued the surrounding properties. Mrs. Dunn replied that she did not know in terms of town assessment but if you were to ask a realtor how this affects the Labadini's property or how it affects the Kovolyan's property or how it affects the Letizio's property I am sure you would get a negative response because it is a second building which appears to be a commercial building on a residential street. That is a significant devaluation. Mrs. Dunn advised the Board that they can consider if the lot is valuable with or without the building. For Mr. Lane to continue in the brief period of time between the ZBA's initial denial of the timeliness of the appeal and to continue beyond the scope of what he was allowed to do in the injunction when there is a history of problems that speaks to the reasonableness of his decision. Mrs. Dunn said it needs to be noted as part of the record that in two of the letters of support there are other issues

that may account for some of the support. Mrs. Kovolyan is a direct abutter and has been put in the terrible position of being here as the recording secretary. Mrs. Kovolyan interrupted and



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reminded the Chairman that he said he wasn't going to allow this kind of testimony and that she did not need anyone to speak for her. Mrs. Dunn said that she was not speaking for Mrs. Kovolyan.

The Chairman granted a ten-minute recess.

The Chairman called the meeting back to order.

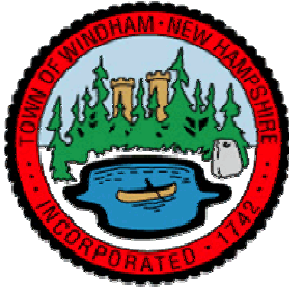
Mrs. Dunn asked if the letters of support will be taken into consideration during deliberations. The Chairman said they would, but without all individuals being here to defend their letters it is not appropriate (to comment on the letters pk). Mrs. Dunn said out of courtesy to the Board she would not comment on any other letters. The Lanes were on notice that there was an appeal period. Mr. Schroeder filed a timely re-hearing and a timely appeal to the Superior Court and during that period of time is when Mr. & Mrs. Lane went forward with their building; they had notice that there were was risk if they continued to build. When the Board makes its decision and looks at each of the criteria that is an important point in each one of the points that must be considered in granting an equitable waiver. There was discussion regarding a person of authority advising a resident not familiar with the rules of the Zoning Board to build and the resident not knowing the scope of the authority of that person.

Mrs. Fallon read into the record a letter from Albert J. Letizio, Jr. dated May 14, 2007 explaining that he could not attend the meeting because of a School Board meeting scheduled for the same time and wanted to go on record in opposition of both the variance and the exception. Mr. Letizio also asked that the Zoning Board inform him about the decision on his status as an abutter. Mr. Samsel mentioned that he thought Mr. Turner was going to send a letter to Mr. Letizio regarding the abutter issue.

Mrs. Lane said that both she and her husband are very responsible and are not trying to pollute the lake and love the lake as much as anyone else. Mrs. Lane felt that had to be said because it is coming across that they are horrible and putting poison into the water which is not the case. The trees that were removed were very small, which means they were new and not there for a long time, so it is ridiculous to say just because it is wooded that is what is creating a filter. Mrs. Lane went on to say that they fully support the WWPD but they have letters from both Pennichuck and Gove Environmental saying that the water is fine. The environmental stuff is a smoke screen; there is nothing bad going on at the site. In the May floods of this year Mr. & Mrs. Lane did get some water in the basement of their home but none in the garage.

Mr. Lane said that he didn't know what the motive of the people objecting has been all this time and was glad that Mrs. Dunn explained her motive which is enforcement of regulations. Mr.

Turner required that all the fill be removed from the middle before back filling. Mr. & Mrs. Lane were told that they had to construct a roof and then the floor could be poured to protect the foundation. Mr. Lane reviewed his construction costs and the four points.



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Mr. Schroeder said that Mr. Lane was aware that there was some risk. Mr. Schroeder said that it could be possible that the Lanes misinterpreted what Mr. Turner said. Mr. Schroeder did not know what Mr. Turner said but found nothing in the written record regarding Mr. Turner's statement. Mr. Schroeder asked that the Board not come to a decision until they check with Mr. Turner to find out what he said.

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

Deliberative Session, Case #30-2007

Mr. Souma requested Mr. Turner be subpoenaed to attend a Zoning Board meeting regarding the conversation that took place in the parking lot between Mr. Turner and Mr. & Mrs. Lane. Mr. Samsel said that there was an attorney present for that conversation and she would have to be subpoenaed.

Mrs. Fallon motioned and Mr. Alosso seconded the motion to continue Case #30-2007 to the May 29, 2007 meeting in order to subpoena Attorney Stephanie Burnham and Mr. Turner to give testimony. Motion passed 5-0.

Mrs. Webster motioned and Mr. Alosso seconded the motion to come out of Deliberative Session. Motion passed 5-0.

Lot #18-L-1, Case #17-2007 (Continued from February 27, 2007 & April 10, 2007)

Applicant – Andrew & Christine Lane

Owner – A&C Revocable Trust

Location – 2 Woodvue Road

Zone – Residential A

A variance is requested from Section(s) 601 of the Zoning Ordinance to permit the completion of the construction of a garage authorized by a building permit dated November 5, 2003 but withdrawn as of January 22, 2007.

Mrs. Fallon motioned and Mr. Alosso seconded the motion to continue case #17-2007 to the May 29, 2007 meeting. Motion passed 5-0.

The next meeting of the Zoning Board of Adjustment is scheduled for May 22, 2007 at 7:30 PM in the Planning & Development Office.

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