



# BOARD OF ADJUSTMENT

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

## Zoning Board of Adjustment Minutes July 28, 2009

Mark Samsel – Chairman  
Jim Tierney – Vice-Chairman  
Dianna Fallon – Secretary  
John Alosso – Member  
Tom Murray – Member  
Bruce Richardson – Alternate  
Al Souma – Alternate

### Lot #18-L-1, Case #17-2009 (Continued from July 14, 2009)

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

A variance is requested from Section(s) 601 of the Zoning Ordinance to permit an existing garage to remain in place that was built relying on a town building permit and the counsel of the Town Attorney and the Director of Planning.

Mrs. Fallon read the case into the record. Mr. Tierney and Mr. Murray recused themselves from Case #17-2009. The Chairman asked Mr. Richardson to sit in for Mr. Tierney and Mr. Souma for Mr. Murray. The Chairman informed the audience that the Board has been advised by Counsel to address the case as if the request is to allow construction of a garage on this site. The Chairman asked that all testimony focus on building a garage not the history.

Attorney Greg Michael, representing the owner, displayed plans and presented the case. Canobie Lake is not the issue. The issue is a culvert pipe from a contributory drainage area. Attorney Michael said that Mr. Peter Zohdi of Herbert Associates will also be presenting. The WWPD is an overlay that restricts structures unless a use variance is granted. The underground pipe becomes the protected area. There will not be any diminution of the surrounding properties. If the garage would be pushed over, which would be very difficult to do, out of the WWPD, you would still have a garage. Apart from the pipe in the ground this is a permitted use. The structure does not produce pollutants. Attorney Michael referred to the November 8, 2004 letter from D. Forst, Shoreline Specialist, at NHDES Wetlands Bureau stating that they *determined that the proposed construction of the 26' X 40' garage would not violate the intent of, or rules established under, RSA 483-B, the Comprehensive Shoreland Protection Act...* This property is unique because the pipe is part of the WWPD and because of its proximity to the lake. The house



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is not architecturally suited to have a garage attached to it. Attorney Michael mentioned that the Board granted a variance for Case #6-2009, 16 Longmeadow Road on February 10, 2009 from Section 601.3 to allow a pool, accessories, fence, well and all existing improvements shown on the plan to remain in the WWPDP and on February 14, 2006 granted a variance from Section 601.3 for Case #7-2007, 10 Sheffield Street, to allow a garage within the boundary of the WWPDP. Attorney Michael read into the record a letter from Mr. Donald Ware, President of Pennichuck East Utilities, an abutter to 2 Woodvue. President Ware wrote ... *Pennichuck East Utilities has no objections to the existing garage... The nature of our water supply in the area, deep bedrock wells, is not impacted by the existence of this structure. We have seen no change in well water quantity or quality since the structure was constructed.* This structure will not cause substantial problems in the WWPDP. Attorney Michael read a portion of the April 10, 2007 letter from Gove Environmental. ...*The existing contributions of contamination come primarily from the presence of two roads: West Shore and Woodvue. The contaminations associated with those roads include, but are not limited to, road salt, road sand, oils and heavy metals from the auto traffic. These contaminants are washed into the streams and into Canobie Lake during rain and snow events. The garage would not contribute to the contaminates, because the roof runoff is considered to be "clean" runoff that does not carry any appreciable contamination...* The variance would not injure the public or private rights of others because there will be no impact to the water source. The structure is downstream from the protected area. There are no floor drains and no plumbing in the garage. There is no gain to the public by not allowing the garage. Granting the variance would do substantial justice because given the character of the land there is very limited buildable space for storage. The structure was built relying on permits issued by the town: building permit dated 11/5/03, electrical permit dated 11/20/05 and plumbing and heating permits. Deviation from the strict requirements of the ordinance is consistent with the spirit of the ordinance because mitigation measures included in the construction reduces the unfiltered runoff from the road.

The Chairman said that he would like it to be clear that the Zoning Board decided the location of the high water mark and it so happened to end at the end of the culvert.

Mr. Peter Zohdi of Herbert Associates advised the Board that he has an interest in the area. Mr. Zohdi displayed a copy of the subdivision plan, done by Mr. Thorndike, that was approved by the Windham Planning Board in 1969. The plan does not show a WWPDP on any of the lots. Since 1969 the WWPDP regulation was adopted. Mr. Zohdi asked if this regulation affects the lots of record. The tax maps submitted by Mr. Zohdi, that were done by Mr. Thorndike, showed all the culverts, all the catch basins and all the drainage ways. Mr. Zohdi said if the Board is not willing to grant a variance there will be a problem; entire lots will end up in the WWPDP. Attorney Donovan, representation for some of the abutters, spoke and objected to Mr. Zohdi's presentation. The Chairman allowed Mr. Zohdi's presentation. The Lane's own two lots that were combined. The majority of their lot ends up in the WWPDP. The first lot on the other side of the road ends up in the WWPDP. Half of the house on the next lot ends up in the WWPDP. Mr. Zohdi



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said that the Zoning Board has some obligation regarding pre-existing lots of record to grant the variance. Mr. Zohdi advised the Board that he was not arguing whether the town made a wrong or right decision. By removing the garage you will be causing more of an impact to the WWPD than if you leave it alone. This is an open drainage area and based on the regulation an open drainage system that includes an artificial pipe that connects to one acre of wetland will become WWPD.

The Chairman marked the following Exhibits:

- Packet submitted by Attorney Michael – Exhibit A
- Large Plan submitted by Mr. Zohdi – Exhibit B
- Small Plan submitted by Mr. Zohdi – Exhibit C

Mr. Schroeder of 14 Woodvue Road introduced Attorney Michael Donovan. Attorney Donovan submitted a 12-page packet marked as Exhibit D and photos marked as Exhibit D-1. Attorney Donovan said that the building is not a garage, per se. The second floor is habitable space which overhangs the first floor making it larger than the first floor garage space. The second floor space has electricity and heat and three picture windows overlooking Canobie Lake. The proposal is principally to create additional living space. There are no special conditions causing unnecessary hardship. There is room to put this building elsewhere on the lot without violating the WWPD or other setbacks. The Lanés could have a smaller garage or they can add onto their existing house without encroaching on the WWPD. The restrictions of the WWPD do not interfere with the reasonable use of the land. There is a fair and substantial relationship between the purposes of the WWPD and the application to this lot of the restrictions prohibiting structures in the WWPD. Any hardship which may exist is self-created. The variance request must be denied because it would conflict with the basic objectives of the WWPD and alter the essential character of the land draining into the public water supply which the WWPD is intended to protect. Granting the variance will not achieve substantial justice. To the contrary, granting of the variance would be an injustice. Granting a variances in this circumstance would negate the statutorily established right to bring an administrative appeal.

Mr. Tom Case explained that most WWPD's are perpendicular to the stream. The former Planning Director drew a semi-circle around the end of the culvert. Mr. Case said if you do that you then have a WWPD in Canobie Lake. If there is an adverse affect it would be from that building to the stream that is Canobie Lake.

Betty Dunn of 30 Woodvue Road spoke in opposition to this request.



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Mrs. Fallon read portions of the following letters of support into the record.:

- Mr. Donald Ware, President of Pennichuck East Utilities
- Christine & Eric Mawby of 7 Woodvue Road
- Patricia Kovolyan of 3 Woodvue Road

Mrs. Fallon read in summary format the following letters of opposition into the record:

- Albert Letizio, Jr. of 5 Woodvue Road
- James & Louise Labadini of 1 Woodvue Road

Attorney Donovan said that not a shred of evidence was submitted showing that the garage impacts the WWPD. Mr. & Mrs. Lane did not create their own hardship they received a building permit and a certificate of occupancy for the garage.

Mr. Zohdi showed again, on his displayed plan, the delineation of the wetland. Measured 100 feet from the delineation of the wetland. Mr. Zohdi explained and showed the edge of the wetland that comes to the culvert showing where he measured. Mr. Zohdi used the town's record that was also used in the court room. Regarding Section 601.4.7 you do not measure 100 feet from the culvert, you measure 100 feet from the wetland associated with the culvert and show the WWPD. Therefore, the entire garage is in the WWPD.

Mr. Schroeder explained that the plot plan that was submitted as part of the handout from Attorney Donovan shows the WWPD; a determination made by Al Turner in a letter Mr. Turner sent to Mr. & Mrs. Lane after the Zoning Board determined that the WWPD ended at the end of the culvert. At that time the Zoning Board decided that is where the brook ended but the Zoning Board was not sure of the location of the WWPD and told Mr. Turner to make that determination. The court declined to change Mr. Turner's delineation of the WWPD.

Attorney Donovan said that it is clear in the record that the WWPD is defined by the end of the culvert which the Zoning Board decided under the ordinance is a brook because a culvert is considered an extension of a brook in the ordinance and that is where the WWPD comes from.

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

The Chairman granted a 10-minute recess.

The Chairman called the meeting back to order.



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### **Deliberative Session, Case #17-2009**

Mrs. Fallon motioned and Mr. Alosso seconded the motion to deny Case #17-2009 for a variance from Section 601 of the Zoning Ordinance for a use variance because the zoning restrictions as applied for do not interfere with the applicant's reasonable use of the property. It appears that alternative locations on the property exist per the plot plans submitted by the applicant. Motion passed 4-1. Mr. Richardson denied the motion because any impacts would be minimal to the WWPD.

The Chairman replaced Mr. Richardson with Mr. Tierney and Mr. Souma with Mr. Murray for the balance of the meeting.

### **Lot 6-A-820, Case #21A-2009**

Applicant – Michael & Mary Beth Ryan  
Owner – Michael & Mary Beth Ryan  
Location – 23 Bedros Street  
Zone – Rural

A variance is requested from Section(s) 601, 601.3 & 601.4.8 of the Zoning Ordinance to permit an existing 10' X 12' shed to remain approximately 20' into the WWPD.

Mrs. Fallon read the case into the record. The owner, Mr. Michael Ryan, presented his case. Mr. Ryan explained that the slope of the yard dictated the location of the shed that is elevated from the ground. There are no contaminants in terms of absorption; the shed is used for storing landscaping supplies. Mr. Ryan the supporting facts into the record.

Mrs. Fallon read into the record a letter from the Conservation Commission, dated June 16, 2009, requesting the shed be moved out of the WWPD.

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

### **Deliberative Session, Case #21A-2009**

Mr. Murray motioned and Mr. Tierney seconded the motion to deny Case #21A-2009 as requested. It appears alternative locations exist on the property. Motion passed 5-0. Request denied.





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### **Lot #16-P-198E, Case #24-2009**

Applicant – Robert & Joan Thibodeau

Owner – Robert & Joan Thibodeau

Location – 3 Second Street

Zone – Residential A

A variance is requested from Section(s) 401 & 702 Appendix A-1 of the Zoning Ordinance to permit an 8' X 12' shed on a non-conforming lot to have a 10-foot front setback where 50-feet is required and a side setback of 4-feet where 30-feet is required.

Mrs. Fallon read the case into the record. The owner, Mr. Robert Thibodeau, presented his case. The shed, located on an undersized lot would be used for storage. The only other location for the shed would be on top of the septic system. Mr. Thibodeau read the supporting facts into the record.

Mr. Dennis Root of 15 Third Street spoke in support of this request.

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

### **Deliberative Session, Case #24-2009**

Mr. Alosso motioned and Mr. Tierney seconded the motion to grant a variance for Case #24-2009 from Sections 401 and 702 Appendix A-1 to permit an 8' X 12' shed on a non-conforming lot to have a 10-foot front setback and a side setback of 4-feet. Motion granted 5-0.

### **Lot #11-A-161, Case #25-2009**

Applicant – Radial Properties

Owner – Radial Properties

Location – 8 Ledge Road

Zone – Limited Industrial

A variance is requested from Section(s) 601.3 of the Zoning Ordinance to permit the expansion of an existing materials storage yard in the WWPD.

Mrs. Fallon read the case into the record. Mr. Karl Dubay of MHF Design, representing the owner, presented the case. Mr. Geln Cairns, property owner was also in attendance. Mr. Dubay showed on the displayed plan the 17 acres owned by Radial Properties. This property was approved for a contractor's yard, commercial and office buildings. Gove Environmental delineated the wetlands. The contractor's material yard is gravel. Approvals have been received from the Planning Board and the State of New Hampshire. The existing yard is in the WWPD. The applicant is in need of more area for inventory. A complete review of the site has been done by Steve Keach. The materials yard expansion will meet all setbacks and buffer requirements



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and will be further buffered by wooded wetlands beyond the district boundary. No blasting will be required and no increase in water or septic system usage will be needed, no increase in site lighting or off site drainage peak flows will occur. The WWPD extends and overlaps onto the upland dry portions of the site, due to the unique shape and topography of this particular parcel. In some areas, the normally standard 100-foot WWPD is extended to 200-foot widths in both directions or 400 feet. This unreasonably affects the large upland central portions of the site which can otherwise be safely developed within the controls of the NHDES and EPA. The existing previously permitted materials yard exists within and along the WWPD with no degradation of water quality. The previous approval extended the WWPD into the yard areas where no WWPD existed prior to the project, due to the steep riprap slopes and the definition of the WWPD measurement. The proposed expansion replaces the existing high perimeter riprap embankment design with lower and shallower vegetated slopes and generous intercept, treatment and groundwater recharge systems. The expansion will actually reduce the effective WWPD footprint in certain yard areas because of the improved slopes. Extensive new federal, state and local regulations affecting road and site construction place higher demands in materials re-use, environmental protection products and treatment materials, safety controls and a more complex and sophisticated array of materials and components. In accordance with Section 601.3 Uses Permitted, the materials yard expansion does not result in the erection of any permanent building, nor does it conflict with the intent and purpose of Section 601.1 of the Ordinance. The mitigation design is reviewed by the NHDES Alteration of Terrain Permit criteria.

The following residents spoke in opposition of this request:

- Peter Livingstone of 2 Yorkshire Road.
- Walter Brandes of 78 Blossom Road. Mr. Brandes submitted his comments that were marked as Exhibit A by the Chairman.

Mr. Dubay showed on the displayed plans the location of the wetland and logging road.

Mr. Glen Cairns advised that they are not destroying wetlands. His operation has grown and needs more space. In regard to tenants they are allowed uses. The original building was built larger than needed. When US Construction Fabrics, a Windham based company, was displaced by the highway project, they became a tenant of Radial Properties. Radial Properties uses US Construction materials on a regular basis. When building the garage an extra bay was built on the end of the structure and that bay is rented by a trucking company that mostly works for Radial Properties.

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



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### **Deliberative Session, Case #25-2009**

Mr. Murray motioned and Mr. Alosso seconded the motion to grant a variance from Section 601.3 of the Zoning Ordinance to permit the expansion of an existing material storage yard in the WWPD per the plan dated June 17, 2009. Motion passed 4-1. Mrs. Fallon voted against the motion because the applicant already has reasonable use of his property.

### **Approval of July 14, 2009 Minutes**

Mr. Tierney motioned and Mr. Alosso seconded the motion to move approval of the July 14, 2009 minutes to the July 29, 2009 meeting. Motion passed 5-0.

Mr. Tierney motioned and Mr. Alosso seconded the motion to adjourn. Motion passed 5-0.

The next meeting of the Zoning Board of Adjustment is scheduled for July 29, 2009 at 7:30 PM in the Planning & Development office.

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