



# BOARD OF ADJUSTMENT

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

## Zoning Board of Adjustment Minutes May 25, 2010

### **Board Members**

Mark Samsel – Chairman  
Tom Murray – Vice-Chairman  
Dianna Fallon – Secretary  
Elizabeth Dunn – Member  
Heath Partington – Member  
Jim Tierney – Alternate  
John Alosso – Alternate (Excused)

### **Staff**

Michael McGuire – Building Inspector  
Patricia Kovolyan – Administrative Assistant

### **Lot #16-F-4 Case # 14R-2010**

Applicant – Joe Maynard, Benchmark Engineering  
Owner – James Frazier  
Location – 24 Ash St.  
Zone – Residential A

Variations are requested from the Cobbetts Pond Watershed Protection Ordinance Section(s) 616.2(a) where the special provisions of the Ordinance to apply to all development proposals within the District; 616.3(a) where the Windham Planning Board shall have sole and exclusive authority to administer the provisions of the Ordinance,; 616.6(a) where all new home construction and additions, modifications and repairs of existing homes must meet the review requirements of Section 616; 616.6(c)(1) to permit 30% lawn where 10% is allowed; 616.10(a) to permit an impervious driveway within 48' of the Pond where a 75' setback is required, 616.10(b) to permit 35% impervious area of a building lot where 30% is allowed, & 616.10(c) where a stormwater management and erosion control plan is required to be submitted, reviewed, and approved by the Planning Board to allow the redevelopment of the property.

Mrs. Fallon read the case into the record. Mr. Joseph Maynard, representing the owner, presented the case. Mr. Maynard was in front of the Board in January to raze the existing structure and build a new home in the same location with some dimensional relief. The variance was granted, and in the interim the Cobbetts Pond Watershed Ordinance was posted.



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Mrs. Dunn said that it was discussed at the last meeting whether these cases have vested rights. Mrs. Dunn wanted to talk about the time line prepared by Laura Scott, Community Development Director, to be sure Mr. Maynard was in agreement with the dates. Mrs. Dunn asked what else had been done on the project since the variance was granted in January.

Mr. Maynard replied that the Shoreline application is sitting on his desk ready to go. Shoreline permits are very specific; if the Shoreline application was submitted before receiving dimensional relief or relief from the Cobbetts Pond Ordinance, Mr. Maynard would have to reapply and pay the fees again. A substantial amount of work was done on this plan before the building permit application was submitted in November.

Mrs. Dunn said based on information she has this case is not vested. She has issues with whether that should be the case.

Mr. Murray said the applicant followed the rules and after looking at the time line felt that the case did not need to abide by the Cobbetts Pond Ordinance and does have vested rights. Mr. Murray said that he still believes that the applicant does not need relief from the Cobbetts Pond Ordinance

Mr. Tierney said that the application for a building permit that was submitted in November was denied for the setbacks. Under the State Statute building permit applications are good for six months before they expire or thirty days to submit an application to the Zoning Board. If the ZBA grants the variance the applicant has a year to act on it, but after 180 days from the first application the applicant needs to file a new application or has to submit to the Building Inspector, in writing, a request for an extension.

Mrs. Dunn read the timeline into the record.

The Members, along with Mr. Tierney, continued to discuss vested rights regarding this case.

Mr. Maynard continued with his presentation.

- Would like to circumvent Planning Board approval to avoid additional cost and time for his clients.
- Existing lawn coverage is approximately 40%.
- A vegetated swale is being created along the water to capture the runoff from the property.
- A drywell is proposed to have drainage in place to capture the runoff from the driveway.



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- The existing lot is at 41% impervious area the proposal will reduce that to approximately 35% impervious. There are drainage measures in place. By reducing the amount of impervious surface the amount of runoff to the pond is reduced.
- Existing gravel driveway is 40' to the water.
- Proposed driveway would be 48' to the water with a drainage provision.

Mr. Maynard read the supporting criteria into the record.

Mr. Marc Brodeur of 21 Ash Street and Mr. Joe Lannan of 22 Ash Street spoke in support of this request.

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

### **Deliberative Session, Case 14R-2010**

Mrs. Dunn motioned and Mr. Murray seconded the motion to grant a variance for Case 14R-2010 as requested per the CSPA (Comprehensive Shoreland Protection Act) approval. **Motion approved 3-2.** Mrs. Fallon and Mr. Partington voted against the motion because it violates the basic zoning objectives of the Cobbetts Pond Ordinance, is contrary to the public interest, no hardship and the spirit of the ordinance is not observed.

### **Lot #17-J-113 Case # 15R-2010**

Applicant – Joe Maynard, Benchmark Engineering

Owner – Matthew Gaudio

Location – 16 Rocky Ridge Rd.

Zone – Residential A

Variations are requested from the Cobbetts Pond Watershed Protection Ordinance Section(s) 616.2(a) where the special provisions of the Ordinance to apply to all development proposals within the District; 616.3(a) where the Windham Planning Board shall have sole and exclusive authority to administer the provisions of the Ordinance & 616.6(a) where all new home construction and additions, modifications and repairs of existing homes must meet the review requirements of Section 616 to allow the redevelopment of the property.

Mrs. Fallon read the case into the record. Mr. Joseph Maynard of Benchmark Engineering, representing the owner, presented the case.

After Mrs. Dunn read into the record the time line that was prepared by Laura Scott it was decided that this case did not have vested rights. Mr. Murray disagreed with that decision.



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Mr. Maynard continued with his presentation.

- Shoreland approval has been received.
- In general, this lot meets the intent of the Cobbetts Pond Ordinance less the Planning Board approval portion.
- All approvals or submissions for approvals were submitted before the posting of the Cobbetts Pond Ordinance.

Mr. Maynard read into the record the supporting criteria.

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

### **Deliberative Session, Case #15R-2010**

Mr. Murray motioned and Mrs. Dunn seconded the motion to grant Case 15-R-2010 as requested per the plan submitted. **Motion passed 3-2.** Mrs. Fallon and Mr. Partington voted against the motion because it violates the basic zoning objectives of the Cobbetts Pond Ordinance, is contrary to the public interest, no hardship and the spirit of the ordinance is not observed.

The Chairman granted a six minute break.

The Chairman called the meeting back to order at 9:56 PM.

### **Lot #17-M- 22 Case # 16R-2010**

Applicant – Joe Maynard, Benchmark Engineering

Owner – Richard Armstrong & Alan Armstrong

Location – 19 Oak St

Zone – Residential A

Variations are requested from the Cobbetts Pond Watershed Protection Ordinance Section(s) 616.2(a) where the special provisions of the Ordinance to apply to all development proposals within the District; 616.3(a) where the Windham Planning Board shall have sole and exclusive authority to administer the provisions of the Ordinance 616.6(a) where all new home construction and additions, modifications and repairs of existing homes must meet the review requirements of Section 616; 616.6(c)(1) to permit 24% lawn where 10% is allowed; 616.10(a) to permit an impervious driveway within 75' is the required setback, & 616.10(b) to permit 44% impervious area of a building lot & 55% of Oak Street where 30% is allowed to allow the redevelopment of the property.

Mrs. Fallon read the case into the record. Mr. Joseph Maynard of Benchmark Engineering, representing the owner, presented the case.

Mrs. Dunn read the time line into the record.



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Mr. Maynard explained that it is difficult to maintain one year for a variance when the permitting process takes six months. A portion of the septic system was placed under the Oak Street right-of-way that the Armstrong's own in fee.

- Existing impervious area on the house lot is 56.4%; proposed 44%.
- Existing impervious area on the road is 68.2%; proposed 55%.
- Proposed drainage improvements.
- Proposed dry wells on Lake Side.
- Existing lawn 45-50%; proposed lawn 24%.

Mr. Maynard read the supporting criteria into the record.

Mrs. Dunn reviewed the supporting criteria.

Mr. Murray motioned and Mrs. Dunn seconded the motion to go into Deliberative Session.

**Motion passed 5-0.**

### **Deliberative Session, Case #16R-2010**

Mr. Murray motioned and Mrs. Dunn seconded the motion to grant a variance for Case 16R-2010 as requested per the plan submitted. **Motion passed 3-2.** Mrs. Fallon and Mr. Partington voted against the motion because it violates the basic zoning objectives of the Cobbetts Pond Ordinance, is contrary to the public interest, no hardship and the spirit of the ordinance is not observed.

### **Lot #17-L-50 Case # 17R-2010**

Applicant – Joe Maynard, Benchmark Engineering

Owner – Derek & Jessica Monson

Location – 18 Turtle Rock Rd.

Zone – Residential A

Variations are requested from the Cobbetts Pond Watershed Protection Ordinance Section(s) 616.2(a) where the special provisions of the Ordinance to apply to all development proposals within the District; 616.3(a) where the Windham Planning Board shall have sole and exclusive authority to administer the provisions of the Ordinance 616.6(a) where all new home construction and additions, modifications and repairs of existing homes must meet the review requirements of Section 616; 616.6(c)(1) to permit 20% lawn where 10% is allowed; 616.10(b) to permit 33% impervious area of a building lot; & 616.10(c) where a stormwater management and erosion control plan is required to be submitted, reviewed, and approved by the Planning Board to allow the redevelopment of the property.

Mrs. Fallon read the case into the record. Mr. Joseph Maynard of Benchmark Engineering, representing the owner, presented the case. Mr. Maynard read into the record a portion of the



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April 9, 2010 letter from Kathleen Difruscia, legal advisor to the Cobbetts Pond Improvement Association clarifying the intent of the Cobbetts Pond Watershed protection Ordinance. ...*It was not the intent of the new Ordinance to regulate projects that received approval prior to the posting of the Ordinance. Approvals include a variance, shoreline redevelopment waiver and/or septic system approval. ...The intent is to cap impervious coverage at 30% if the coverage is under the 30% before any changes are made to the land. The intent is to see a betterment in drainage. There was recognition that not all projects would meet the impervious surface coverage requirements under the Ordinance, under these circumstances if the landowner improved the property such that there was a reduction in the overall impervious area even if it were greater than 30% then the intent was that the Planning Board and/or the ZBA could, in their discretion, approve impervious coverage in excess of 30% on a case-by-case basis... The intent was to prevent large expansive lawns directly along the shoreline in conformity with the Comprehensive Shoreland Protection Act's (CPSA) Vegetation Maintenance Regulations. ... The intent was not for the landowner to have to remove established lawn as established lawn can minimize erosion and sedimentation, which is in keeping with the intent of the ordinance and where applicable with CSPA...*

Mrs. Dunn said that she agreed 100% with Attorney Campbell's comments regarding Attorney DiFruscia's April 9, 2010 letter. Mrs. Dunn read into the record a portion of page 6 of the letter dated April 30, 2010. ... *The interpretation of a zoning ordinance is treated the same way as the interpretation of State law and traditional rules of statutory interpretation apply. See, Mountain Valley Mall Associates vs. Municipality of Conway, 144 NH 642 (2000). When the language of the zoning ordinance is plain and unambiguous, a reviewing Court need not look beyond the ordinance itself for further indications of legislative intent. Duffy vs. City of Dover, 149 NH 178 (2003). The Supreme Court has repeatedly held that the individual comments of "drafters" of legislation should be rejected in favor of the actual words used in the adopted legislation. Pollard vs. Gregg, 77 NH 190 (1914); See also Bradley Real Estate Trust vs. Taylor, 128 NH 441 (1986); In Re: Routhier, 143 NH 404 (1989). Consequently, regardless of the "intent" of the drafters, without a specific "grandfather" clause within the ordinance, it will apply like any other newly adopted ordinance, unless there is specific vested protection from it (See discussion above). Likewise, unless the terms of the ordinance are ambiguous, the scope of its application will be governed by the language used. ...*

Mrs. Dunn read the time line into the record.

Mr. Maynard continued with his presentation.

- Proposed garage will be 1% smaller than was presented at the last meeting.
- Applicant is willing to go to the Planning Board
- NHDES allowed the lot across the road for loading.

Mr. Maynard read the supporting criteria into the record.





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

### **Deliberative Session, Case #17-R-2010**

Mrs. Dunn motioned and Mr. Murray seconded the motion to grant a variance as requested with the condition that a file is created for the lot across the road, #21-K-68 as stated by Mr. McGuire.  
**Motion passed 3-2.** Mrs. Fallon and Mr. Partington voted against the motion because it violates the basic zoning objectives of the Cobbetts Pond Ordinance, is contrary to the public interest, no hardship and the spirit of the ordinance is not observed.

### **Approval of April 27 & May 11, 2010 Minutes**

The April 27, 2010 and the May 11, 2010 minutes will be reviewed at the June 8, 2010 meeting.

### **Miscellaneous Board Business**

Salvatore Basile of 10 Galway Road, Applicant for alternate position.

Mr. Basile a retired graduate engineer and a 30 year resident of Windham said he has the time and interest to be an alternate member of the ZBA. The Chairman asked Mr. Basile what his impressions were of the meeting. Mr. Basile replied that at times it seemed as if the Board was getting caught up in circles and some of the issues could have been resolved in a shorter amount of time. Mrs. Dunn advised Mr. Basile that the Board expects an alternate to be familiar with the ZBA Handbook which is available on line. The Chairman thanked Mr. Basile for his attendance.

Mrs. Dunn said RSA 673:6 IIa states an elected Zoning Board of Adjustment may appoint 5 alternate members for a term of 3 years each, which shall be staggered in the same manner as elected members pursuant to RSA 673:5 II.

Mrs. Fallon read into the record a letter from Mr. Steve Johnson regarding his request for the withdrawal of Case 18-2010. Mr. Johnson will locate the shed off the back side of his home and will be in compliance with the Zoning Regulations.

The Chairman reminded the Members to have their changes for the By-laws ready for the next meeting.

Mrs. Dunn asked that the Planning Board notify the Zoning Board of any workshops regarding the Cobbetts Pond Watershed Overlay Ordinance. The Chairman will send a memo to the Planning Board Chairman regarding Mrs. Dunn's request.



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### Correspondence

- May 12, 2010 Memo from Laura Scott to Board of Selectmen regarding the Waiver of ZBA fees for four cases.
- May 2010 Issue of *NH Town and City*.

Mrs. Dunn motioned and Mr. Partington seconded the motion to adjourn. **Motion passed 5-0.**

The next meeting of the Zoning Board of Adjustment is scheduled for June 8, 2010 at 7:30 PM in the Community Development Department.

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