



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

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**Zoning Board of Adjustment**  
**Draft Minutes**  
**April 26, 2011**

**Board Members**

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

**Staff**

Tim Corwin – ZBA / Code Enforcement Administrator  
Patricia Kovolyan – Administrative Assistant

The Chairman said that Case #12-2011, Lot #24-F-2000 was withdrawn. Ms. Scott, Community Development Director, advised the Board that Case #12-2011 this was her misunderstanding and it was withdrawn because it did not need to be in front of the Zoning Board at all. All hearing notices and agendas were reposted as soon as we were made aware of the mistake.

**Lot 19-A-300, Case #11-2011**

Applicant – Edward N. Herbert Assoc., Inc.  
Owner – Sun Coast Properties, LLC  
Location – 66 Mammoth Road  
Zone – Rural District

Applicant proposes to construct 5 residential duplex buildings. The 10 dwelling units will be sold in a condominium form of ownership, and 4 of the dwelling units will be workforce housing per RSA 674:59. A variance is requested from Section 602.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the construction of 5 duplex residential buildings which is not a use permitted in the Rural District.

Mrs. Dunn read the Case 11-2011 into the record.

Mr. Peter Zohdi of Herbert Associates, representing the owner, presented the case. Mr. Zohdi displayed a site plan and an aerial photo of the area that showed the location of two near-by multi family and multi-unit developments. . Mr. Zohdi went on to explain that

they are working with Pennichuck to bring water to the site, which they are in support of. . Mr. Zohdi went on to show the location of the 22 foot private road and cul-de-sac, as well as the location of three bio retention areas, which meet the alteration of terrain requirements. The plan was sent to the Town Engineer by Ms. Scott, as part of the Planning Board process, who did not have any problems with the drainage design. At the December 14, 2010 TRC meeting there were no problems with the Fire or Police Departments and there are no wetlands or WWPD on the site. Mr. Zohdi attended a Planning Board meeting for conceptual review of this plan last week. All utilities will be underground.

In addition to Mr. Zohdi, Attorney John Cronin, with the firm of Cronin & Bisson in Manchester also represented the owner. Work Force Housing developed from a Court case called Britton vs. the Town of Chester. In that case an applicant wanted to build affordable housing that the ordinance did not permit. The Court found in favor of the developer because the ordinance didn't provide reasonable opportunities for regional needs for affordable housing,. Not only did the Court grant the builder the right to build their development despite contrary provisions in the ordinance, it also awarded that builder his costs and legal fees.

The legislature took up the matter a few years ago and adopted legislation regulating Work Force Housing that comes from the general zoning and planning enabling legislation in RSA 672:1 which is the statute that gives all land use boards their inherent power. In that particular section 672:1 III-E (read into the record by Attorney Cronin) *All citizens of the state benefit from a balanced supply of housing which is affordable to persons and families of low and moderate income. Establishment of housing which is decent, safe, sanitary and affordable to low and moderate income persons and families is in the best interests of each community and the state of New Hampshire and serves a vital public need. Opportunity for development of such housing shall not be prohibited or unreasonably discouraged by use of municipal planning and zoning powers or by unreasonable interpretation of such powers.* The legislature took it further and adopted RSA 674:58.

There were proposals put forward by the Planning Board at Town meeting in Windham to adopt Work Force Housing that were rejected. Because of that, it is Attorney Cronin's position that Britton vs. Chester would be the default under which to operate and you could place Work Force Housing in any particular area of the town, despite what the zoning and planning regulations say, providing it was reasonable. That is the only question. Is this particular proposal reasonable?

It was Attorney Cronin's opinion that because Windham did not adopt an ordinance, the applicant did not need to go before the Zoning Board or the Planning Board, but instead

could go right to court and seek relief. However, the recommendation of his client was to follow the process cooperatively.

Attorney Cronin incorporated the five criteria by reference previously as it is no longer required to repeat the language in the application. This particular project fits; it sits next to projects that are much larger in scale on a busy road and is well laid out.

Attorney Cronin said if the Zoning Board chooses to deny this request he could quickly get the “builder’s remedy” in an expedited hearing in Superior Court.

This project would apply toward the town’s quota of being short approximately 1000 units of Work Force Housing.

Attorney Cronin submitted a packet containing the case of Britton vs. the Town of Chester, General Enabling Legislation RSA 672:1, relevant sections of the Work Force Housing Statute RSA 674:58, 59 & 60 and fact sheets regarding the Town of Windham that the Chairman marked as Exhibit A.

Attorney Cronin said again that he believes that his client did not need to be before the Zoning or Planning Boards but his client chose this path in the spirit of cooperation.

Mrs. Fallon asked Attorney Cronin where the number 1000 short came from. Attorney Cronin replied that if you take the projections for workforce housing from the regional assessment done by the Rockingham Planning Commission for 2008 and 2015 and compare it with the figures listed on the town staff memoranda and do the math you will come up to that number.

Mrs. Dunn said that the Zoning Board was being asked to grant a variance based on a special need of the Work Force Housing and yet we need to have statistics that show we do not meet our quota. Attorney Cronin replied that would be your obligation to do that by adopting an ordinance. There is no hard data that would typically come with an ordinance. Usually a town would hire a consultant to do a survey and review the income base.

Attorney Cronin went through the supporting facts of the Variance application.

The proposed use would not diminish surrounding property values because the use is not out of character for the area. Windham Meadows Phase II and Whispering Winds Adult Community are located to the south of the property. Anyone would be hard pressed to say that this project would diminish surrounding property values.

Granting the variance would not be contrary to the public interest and would not be contrary to the spirit of the ordinance because the public interest is clearly stated by the statute. This project allows people to buy something other than a 4,000 or 5,000 square foot house in Windham. This project can't be contrary to the ordinance because Windham does not have an ordinance.

Denial of the variance would result in unnecessary hardship to the owner owing to the special conditions of the land because no fair and substantial relationship exists between the general public purposes of the ordinance and the specific application to the property. The enabling authority lays it out. This criteria is met.

The proposed use is reasonable. This project is neat, clean, small in scale and size and generally consistent with the neighborhood.

By granting the variance substantial justice would be done. Attorney Cronin said you don't have to take his word for this just look at the Britton case.

The criteria have been satisfied.

Attorney Cronin requested that if the Board chooses to deny this request that there be votes on each criteria and a specific vote on whether this project is reasonable. If the Board chooses to deny it Attorney Cronin would like to have a clear record so that at the next step there wouldn't be any guessing or wind up with a remand. If a motion is made to grant the variance as applied for and the motion passes 3-2 that is fine and Attorney Cronin wouldn't need the record.

Mr. Samsel asked Ms. Scott, Community Development Director, about the project being allowed in a zone other than rural. She believes that duplexes would be allowed in the Residential B, C and Village Center Districts without a Variance.

Attorney Cronin said if Windham had adopted a Work Force Housing Ordinance and allowed Work Force Housing in whatever zones you deemed appropriate but not in the rural zone that would have been a different case. Windham did not do that and Britton vs. Chester says the Town is your target and Work Force Housing can go anywhere.

Mr. Zohdi explained the reason ten units are planned is because that is in compliance with the State of New Hampshire lot loading requirements. A copy of the calculations went to Windham's consultant, Mr. Thorndike, as part of the Planning Board application, who agreed that the loading requirements were met.

Mr. Partington asked about a consultant that was mentioned at the Planning Board meeting that was going to provide financial figures. Ms. Scott said that financial

information would be provided by Mr. Zohdi when he returned to the Planning Board as part of his final application.

Mr. Partington asked whether the design of the dwelling units as shown in the picture presented by the applicant is a true reflection of what the units will look like. Mr. Zohdi responded that the displayed photo was conceptual and he will have final design when applicant submits to the Planning Board.

The following residents spoke in opposition:

- Wayne Morris of 14 Jordan Road said that 25% of Windham's housing stock is Work Force Housing. This project scares him. Having 10 houses on 2.6 acres blows everything out of the water. There are not impact fees being paid by the development.
- Tom Case of 70 Mountain Village said he thought he was listening to a Planning Board meeting with the applicant trying to get approval to put in Work Force Housing. Mr. Case said he thought the applicant was before the Zoning Board for a variance to allow ten units where only one is allowed in a Rural Zone. There is probably a need for Work Force Housing but the Planning Board should get together and come up with a set of rules to allow Work Force Housing.
- Ms. Mattleman of 27 Telo Road is for Work Force Housing but is not in favor of nickeling away rural properties. If the applicant wants ten units then make them all Work Force Housing; there should be a price for losing our Rural land. Ms. Mattleman also expressed concern about brining in public water – many hormones, etc. come with public water and the Town needs to think long term about the water problem.
- Mr. Ross McLeod of 4 Nottingham Road read part of RSA 674:59 III into the record. Mr. McLeod submitted a copy of the Hooksett Work Force House case that the Chairman marked as Exhibit B. Documents were provided by Hooksett's Code Enforcement Officer stating that 10 Percent of the Homes in Hoosett qualify as Work Force Housing. In Ms. Scott's March 30, 2011 memo (marked as Exhibit C) she states that (approximately) 21% of the total homes in Windham meet Work Force Housing criteria. Windham's Work Force Housing needs will be based on your federal housing and urban development areas and overlay that with the RPC demographics. This is comparing apples to oranges because Windham is lumped in with the Lawrence, Massachusetts area. Windham's Work Force Housing is being generated on the same data as that of Atkinson. There is an attempt to homogenize many of the towns in the Rockingham Planning Commission. The applicant is saying that this application will help to close the gap. Mr. McLeod said that he is not sure how having 40% Work Force Housing helps to close the gap when you need 46%; in fact the opposite is true. Only providing 40% is increasing the gap. The more you build the further behind you get. By the applicant's admission Windham would be going backwards with this

development. Mr. McLeod went on to say that this subdivision will pay no impact fees and this will be a big problem for the school district and would be contrary to the public interest. Mr. Scholz asked Mr. McLeod if all the homes were Work Force and paid impact fees would he still be opposed to it. Mr. McLeod said he doubted that he would still be opposed.

Ms. Dunn asked Mr. McLeod why impact fees will not apply to this development. Mr. McLeod responded that Ms. Scott might be in a better position to address that question. Ms. Scott said the applicant would be paying Public Safety impact fees on all the units. This is not eligible for school impact fees, not because it is Work Force Housing but because it is a condo development. The Planning Board adopted school impact fees do not apply to condos; they only apply to single family fee simple lots.

Mr. Zohdi said that Pennichuck agreed to provide water to this site for residential use and fire suppression. Pennichuck Water according to an agreement can extend their pipe, they can sell their water, they can do whatever they want because it is their water. Mr. Zohdi said he could also drill a well on the site.

Attorney Cronin said in order to clear up a misconception that has been stated, this is not Mr. LoChiatto's project; Mr. LoChiatto is the Project Manager.

**Mr. Samsel motioned to go into Deliberative Session.**

Mrs. Dunn suggested that this issued be left open so that the Members could study the submitted exhibits.

Mr. Scholz would like to have time to review the Hooksett case.

**Mr. Samsel withdrew his motion.**

**Mr. Samsel motioned and Mrs. Dunn seconded the motion to continue Case 11-2011 to the May 10, 2011 meeting. Motion passed 5-0.**

The Members requested that the Hooksett decision and the three exhibits that were submitted be part of the May 10<sup>th</sup> meeting pack and they would like to meet with Town Counsel prior to the May 10<sup>th</sup> meeting.

#### **Approval of Minutes**

**Mrs. Dunn motioned and Mr. Samsel seconded the motion to approve the February 22, 2011 minutes as amended. Motion passed 4-0-1. Mr. Murray abstained.**

**Mr. Samsel motioned and Mr. Partington seconded the motion to approve the April 12, 2010 minutes. Motion passed 5-0.**

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