



BOARD OF ADJUSTMENT

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

Zoning Board of Adjustment Draft Minutes January 10, 2012

Board Members:

Tom Murray – Chairman
Heath Partington – Vice-Chairman
Elizabeth Dunn – Member (Arrived 9:10 PM)
Mark Samsel – Member
Dianna Fallon – Member
Jim Tierney – Alternate
Mike Scholz – Alternate (Arrived 7:51 PM)

Staff

Laura Scott – Director of Community Development
Patricia Kovolyan – Administrative Assistant

Seat Alternates

The Chairman appointed Mr. Tierney to replace Mrs. Dunn for this meeting.

Lot 13-C-1, Case #1-2012

Applicant – Samuel Nasser
Owner – State of New Hampshire
Location – Intersection of Range Road and Searles Road
Zone – N/A

Application is an Appeal of an Administrative Decision made by the Code Enforcement Administrator that the Applicant's temporary sign located at the intersection of Range Road and Searles Road advertising his Apple Acres farm located at 52 Searles Road is not permitted per Section 706.5.1.5, Section 706.6.1, and Section 706.6.2.8 of the Town of Windham Zoning Ordinance and Land Use Regulations.

Mr. Tierney read the case into the record.

Attorney Kristen Yasenka, representing the owner, presented the case. Attorney Yasenka mentioned the following exhibits that were submitted and included in the Board's packet.

- Exhibit A Location of sign.
- Exhibit B Photo of sign.
- Exhibit C 10/25/11 Memo from Code Enforcement Administrator.
- Exhibit D 11/2/11 Memo from Sam Nassar.



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- Exhibit E 11/16/11 Memo from Code Enforcement Administrator.
- Exhibit F 12/6/11 Memo from Code Enforcement Administrator.
- Exhibit G 1974 Town of Windham Zoning Ordinance.
- Exhibit H Sight Distance Information.
- Exhibit I Example of NHDOT signs.

Attorney Yasenka advised the Board that the seasonal 2' X 3' sign has been in the same location for 37 years. Mr. Nassar and his family have owned and operated Apple Acres, a family orchard and farm for almost seventy years. Apple Acres was established in 1943 by Mr. Nassar's father and is now operated by Mr. Sam Nassar and his wife Jean. There is both peach and apple picking from August through November and typical farm products are sold such as pies, cider, pumpkins jams and jellies.

For the first time in thirty seven years the Code Enforcement Administrator has taken issue with the sign. Mr. Tim Corwin, former Code Enforcement Administrator, sent a memo to Mr. Nassar stating that off site signs for businesses are not permitted. Mr. Nassar and Mr. Corwin met on November 2, 2011 and Mr. Nassar followed up with correspondence explaining why Apple Acres does not fall within the usual category of a temporary sign. Mr. Nassar explained in his memo that the sign is not temporary but a seasonal agricultural sign as defined in the Windham Zoning Ordinance adopted in 2011. In Mr. Corwin's memo of December 6, 2011 Mr. Corwin stated that the code enforcement action took place because of an anonymous complaint alleging that the sign is a traffic hazard and not permitted per the Zoning Ordinance and there was no evidence of any Town approvals for the sign and it is located off site.

Attorney Yasenka went on to say that the sign is a pre-existing use and is not subject to the current zoning. The Ordinance that was in effect in 1974 did not contain any restrictions regarding a seasonal agricultural sign. The Apple Acres sign is not subject to current zoning restrictions and does not violate any zoning provision determined by the Code Enforcement Administrator.

The Apple Acres sign is grandfathered and entitled to protection from zoning changes. The sign does not fit within the definition of temporary but does fit within the definition of seasonal. The sign is on display during the harvest season and is made of durable materials such as the plywood exterior; the copy board is professionally silk-screened with a green border and tree, apple and farm name.

The sign does not create a hazard. Mr. Nassar submitted an opinion from a professional engineer stating that the critical sight path for this situation would be for the driver turning right from Searles Road onto Route 111. The sight distance is measured from the driver's eye at three and a



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half feet above the pavement and ten feet back from the pavement line at the major intersecting road. The sign is only 24 inches tall, less than the height listed by the DOT Green Book to create a hazard. Mr. Nassar has never been made aware of any traffic or other hazards created by this sign in the thirty seven years it has been at this location. The sign is in the best interest of Windham. It fits the aesthetics of the Town and has for thirty seven years. The sign will not be expanded. Mr. Nassar has been encouraged by town officials to apply for DOT Tourist Oriented Directional Sign, the blue reflective signs found along state highways. Apple Acres would be required to cover this type of sign during its non-harvest season.

Mrs. Nassar informed the Board that the sign is important to their financial welfare and that the State knows about the sign.

The following abutters/residents spoke in favor of this request.

- Carolyn Webber of 19 Cobbetts Pond Road said that small business needs to be encouraged.
- Daniel Rodgers of 7 Bayberry Road said this is not a traffic hazard.
- Tom Case of 70 Mountain Village Road said the Town does not have authority over state property and the sign should stay.
- John Bassett of 4 Netherwood said having the sign lets neighbors know if the farm is open therefore making an easier traffic pattern.
- Dennis Root of 15 Third Street has lived in Windham for 57 years and echoed comments already made and felt that the sign should stay.

Laura Scott, Community Development Director, said that Tim Corwin was the Code Enforcement Administrator that started this process but no longer works for the Town of Windham. This came in as an anonymous complaint and they felt the sign was a traffic hazard. Part of Mr. Corwin's thought process was that the sign was never on the applicant's property and there was nothing to show that there was ever authority by the Town or the State to put the sign on someone else's property, so how could it be a grandfathered use. Ms. Scott said that she was not sure who the right-of-way (the triangle) belongs to because it is a town road intersecting with a state road.

Attorney Yasenka said that this is a unique sign that predates ordinance provisions. Any consideration of state enforcement should be left to the State. Mr. Nassar has not been contacted by the State regarding any violation related to the sign. If Mr. Nassar is contacted he would address those concerns with the State. For the reasons mentioned, Attorney Yasenka requested that the Board reverse the decision of the Code Enforcement Administrator dated November 16, 2011.



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

Deliberative Session, Case #1-2012

Mrs. Fallon read into the record a paragraph from *Innovative Land Use Planning Techniques* Chapter 1.7.

Mr. Partington and Mr. Murray commented on the fact that this is state property.

Mr. Samsel said this request should have never come before the Board.

Mr. Tierney said this is not privately owned land and is a state enforcement issue.

Mr. Samsel Motioned and Mrs. Fallon seconded the motion to grant the request for an Appeal of an Administrative Decision for Case 1-2012 made by the Code Enforcement Administrator that the applicant's temporary sign located at the intersection of Range Road and Searles Road advertising his Apple Acres Farm located at 52 Searles Road is not permitted per Section 706.5.1.5 and Section 706.6.1 the Board believes the requested action relative to Section 706.6.2.8 is under the jurisdiction of the State and not the Town of Windham or the Zoning Board of Adjustment. Motion passed 5-0.

Lot 17-J-132, Case #2-2012

Applicant – Benchmark Engineering, Inc.

Owner – David and Lauren Turner

Location – 8 Bell Road

Zone – Residence District A

A variance is requested from Section 1200.1.3 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit the conversion of an existing seasonal dwelling to a full time year-round dwelling on a lot that is nonconforming with respect to minimum frontage requirements, minimum side yard setbacks, minimum shoreland setback, and minimum lot size area where such conversion is permitted only where the lot conforms to the dimensional requirements of Section 700 of the Zoning Ordinance.

Mr. Tierney read the case into the record.

Mr. Joseph Maynard of Benchmark Engineering, representing the owners, presented the case for a year round conversion.

- The property built around 1950 has been enjoyed by the Turners since the mid 1990's.
- No visible changes will be made to the building or property.
- Shape & size of lot and existing location of structure require relief from the ordinance.
- A Clean Solution septic system has been designed and is pending approval by the state.



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- The 5700 square foot lot has approximately 40 feet of frontage on a private road.
- A well is shared with a couple of neighbors.
- Other than the conversion to year round there will be no changes to the property.
- Existing structure is 9 feet from the lake.
- There is a paved parking area.
- Other year round homes in the neighborhood.

Mrs. Fallon motioned and Mr. Samsel seconded the motion to waive the reading of the five criteria. Motion passed 5-0.

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

Deliberative Session, Case 2-2012

The Chairman said that the request met all five criteria and there was no discussion.

Mr. Tierney motioned and Mrs. Fallon seconded the motion to grant a variance from Section 1200.1.3 of the Zoning Ordinance as requested. Motion passed 5-0.

Lot 17-I-201, Case #3-2012

Applicant – Benchmark Engineering, Inc.

Owner – Lakeview Farm, LLC

Location – Harvest Road

Zone – Rural District

A variance is requested from Section 610.6.1.1 of the Town of Windham Zoning Ordinance and Land Use Regulations to permit occupancy of each unit located within the Lakeview Farm housing for older persons development by one (1) person being 55 years of age or older and the remaining occupants to be 18 years of age or older where occupancy of each unit is restricted to persons 55 years and older.

Mr. Tierney read the case into the record.

Mr. Joe Maynard of Benchmark Engineering, representing the owner, submitted two exhibits the 2004 Declaration of Condominium marked as Exhibit 1 and the 2004 Zoning Ordinance marked as Exhibit 2 and presented the case.

- This Project went through the Planning Board process in 2004 and was approved as 24 single detached 55 and older dwelling units.



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- Section 610.6.1.1 of the 2004 Zoning Ordinance had an occupancy restriction that all persons had to be 55 or older except a spouse under the age of 55 being married to a resident 55 years or older or an adult over the age of 21 if their presence is required to provide medical care to a resident 55 years or older or to the resident's spouse or employees of the elderly housing project (and family members living in the same unit) who are under 55 provided the employees perform substantial duties related to the management of maintenance of the project's facilities.
- In 2007/2008 the original site plan approval was amended to take four of the units and convert them to duplexes for a total of 28 units.
- In 2008 the senior housing ordinance changed stating that both persons had to be 55 years or older.
- Federal standard only requires one person to be 55 years or older.

Mr. Maynard read into the record a January 9, 2012 letter from Paul Yarmo of Keller Williams Realty. Regarding Lakeview Farm Mr. Yarmo made the following three points. ...

1. *First, we've had a number of people visit us who do not meet the stricter 55+ requirement of both unit owners being over 55 in age. All of the buyers that fall into this category are disappointed to learn of this restriction. Most politely leave wondering why this restriction was enacted.*
2. *Second, Potential buyers who have and have not met this requirement have wondered what this requirement will do to their ability to resell in the future.*
3. *Lastly, it is clear that 55+ units in neighboring communities and other similar condo projects in Windham that do not have this restriction have an unfair marketing advantage...*

Mr. Maynard asked that the Board grant a variance to the age restriction to allow this housing project to go back to the way it was originally approved. The change has drastically affected the ability to sell units.

Laura Scott, Community Development Director, explained that Mr. Tokanel went back to the Planning Board to make the changes for the duplexes and at that time legal counsel and the Planning Board required Mr. Tokanel to change his condo documents to the new zoning. It was not something Mr. Tokanel did willingly.

Mr. Maynard read the supporting facts into the record.

The following residents spoke in favor of this request.

- Mr. Edwin Walkey of 22 Walkey Road said Mr. Tokanel has every right to go back to the original approval.



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- Mr. Ed Wood a Lakeview Farm resident was concerned with the wording that was in the newspaper but had no problem going back to the original wording.
- Mr. Bill Martineau of 6 Harvest Road said it is important for all residents to get the houses occupied in order to turn the development over to the association.
- Mr. Tokanel, the Developer, explained the difference in the site plan.

Mr. Maynard stated that everything was done in good faith and they would like the wording to go back to the 2004 approval.

Elaine Lonergan of 26 Harvest Road questioned the ages allowed to reside at Lakeview Farm.

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

Deliberative Session, Case 3-2012

Mr. Partington said that although the request does not meet the hardship requirement, generally it is a good idea.

Mr. Samsel motioned and Mr. Tierney seconded the motion to grant a variance for Case 3-2012 as requested from Section 610.6.1 of the Zoning Ordinance to permit occupancy of each unit located within the Lakeview Farm housing for older persons development by one person being 55 years of age or older and the remaining occupants to be 21 years of age or older where occupancy of each unit is restricted to persons 55 years and older. Motion passed 4-1. Mr. Partington voted against the motion because he felt the request did not meet the hardship criteria. Motion passed 4-1.

Review and Approval of 11/8/11 and 12/13/11 Draft Meeting Minutes

Ms. Scott advised the Board that at the December 13, 2011 meeting the Board had many edits to the November 8, 2012 minutes and staff was going to make those edits but there was no sound on the tape. Mr. Partington said he did not have specific edits just that there was no deliberative conversation on a 3-2 vote. Mr. Partington offered to go back and listen to the tape and bring his findings to the next meeting. The Chairman postponed approval of the November 8, 2011 to the next meeting.

Mr. Samsel motioned and Mr. Partington seconded the motion to approve the December 13, 2011 minutes as submitted. Motion passed 4-0-1. Mr. Tierney abstained because he did not attend the December 13, 2011 meeting.

Miss Scott advised the Board that the revised ZBA By-Laws are on record at the Town Clerk's office.



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The Chairman shared a confidential letter from Attorney Campbell regarding 49 Range Road with the Board.

Miss Scott said that Board of Selectman Chairman McLeod will discuss at the January 23, 2012 meeting whether there should be a joint meeting.

Miss Scott said that she sent out an email to the Board Members regarding the procedures for their legal budget. Miss Scott asked if the Board wanted this added to their January 24, 2012 agenda. Chairman Murray said that the process was discussed at the December 13, 2012 Zoning Board meeting.

Adjournment

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

The next meeting of the Zoning Board of Adjustment is scheduled for January 24, 2012 at 7:30 PM in the Community Development Department.

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