



BOARD OF ADJUSTMENT

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

Zoning Board of Adjustment Draft Minutes March 27, 2012

Board Members:

Mark Samsel – Chairman
Heath Partington – Vice Chairman
Elizabeth Dunn – Member
Jim Tierney – Member
Jay Yennaco – Member
Mike Scholz – Alternate

Staff:

Laura Scott – Community Development Director
Patricia Kovolyan – Administrative Assistant

Vice-Chairman Partington introduced the Board Members and staff and explained the meeting process.

Election of Officers

Mrs. Dunn nominated Mr. Partington as Chairman; the nomination failed because there was no second.

Mr. Tierney nominated Mr. Samsel as Chairman; Mr. Yennaco seconded the nomination. Mr. Samsel was elected 3-2.

Mr. Tierney nominated Mr. Partington as Vice-Chairman; Mrs. Dunn seconded the nomination. Mr. Partington was elected 5-0.

Mr. Tierney nominated Mrs. Dunn as Secretary; Mr. Yennaco seconded the nomination. Mrs. Dunn said that she would be willing to act in the secretarial capacity as long as her name tag does not say secretary. Mrs. Dunn wants to be listed as a full member. Mr. Tierney amended his nomination and Mr. Yennaco seconded the nomination to omit the word *secretary* from Mrs. Dunn's name tag. Mrs. Dunn was elected 5-0.



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Lot 25-G-150, Case #10-2012

Applicant – Benchmark Engineering, Inc

Owner – Golden Pond Realty, LLC

Location – 30 Emerson Road

Zone – Residential A

The following variances are requested from the Town of Windham Zoning Ordinance and Land Use Regulations to permit the existing structure to be razed and to allow a new single-family dwelling to be constructed: **Section 405.2** – to allow for the increase in the area of the structure; **Section 405.3** - to allow for the increase in the non-conformity of the structure; **Section 405.5** - to allow for the replacement structure to be less conforming to the required setbacks; **Section 406.2** – to allow for the expansion of the non-conforming structure within the building setbacks whereby rendering the expansion more non-conforming; **Section 702-Appendix A-1** – to allow 10'+- & 14'+- side setbacks where 30' is required and 20'+- front setback where 50' is required. To allow for the construction of the new dwelling on a lot that is non-conforming due to frontage and area requirements.

Mr. Joseph Maynard of Benchmark Engineering, representing the owner, presented the case.

- This is an 11,000 square foot lot that is 140 feet from the pond.
- There is an existing structure that dates before zoning.
- In 2005 there was a new state approved septic system permitted.
- The existing structure will be razed and a new one built to today's standards.
- The existing home sits 14 feet from the property line and 30 feet from Emerson Road.
- There is a 10 foot wide Right-of-Way goes to a parcel owned by the Town of Windham.
- The footprint will be increased.
- Existing structure has a partial basement.
- The new septic system has been installed and is functioning properly.
- The well is functioning and giving ample water to support the new dwelling.
- The proposed one and one half story home will cover 10% of the lot.
- In answer to Mrs. Dunn's question Mr. Maynard said the proposed dwelling will be 12 feet higher than the existing structure.
- Mr. Maynard read the supporting facts into the record.

Ms. Karen Mello of 51 Woodland Road, Andover, Ma. said that the proposed dwelling would be close to the edge of her property at 35 Emerson Road. Ms. Mello asked if there would be blasting in order to build the proposed dwelling. Ms. Mello asked for the foundation dimensions. Mr. Tierney replied that the foundation dimensions would be 28' X 40'.



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Mr. Robert Pichie of 18 Teloian Drive, Hudson, NH asked if the right-of-way was going to remain and asked if it was possible to pull the house back. Mr. Tierney said that there is a large ledge crop in that area and that would require blasting.

Mrs. Dunn read into the record a March 27, 2012 memo from the Conservation Commission opposing the increase in the footprint.

Mr. Maynard explained that his client is trying to stay away from blasting.

Mrs. Dunn asked about runoff issues during construction. Mr. Maynard said that Shoreland Protection will require an erosion control plan.

Mr. Tierney asked if the grade in the slope toward Ms. Mello's property will need to be adjusted. Mr. Maynard said he would not be changing the grade on that side of the house.

Mr. Maynard said his proposal would not affect her septic design that has not been put into place.

The following were marked as Exhibits:

- Exhibit A rendering of proposed dwelling.
- Exhibit B tax card for 27 Emerson Road.
- Exhibit C tax card for 21 Emerson Road.
- Exhibit D tax card for 33 Emerson Road.

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

Deliberative Session, Case 10-2012

The Chairman asked for the Board's thoughts regarding distance and change in the orientation. Mr. Tierney said that he would like to see the size of the screen porch reduced to get a better setback. Mrs. Dunn said now that the Board knows the structure can be turned it should be no more non-conforming on the south side than it is presently. Mr. Partington said unfortunately the Conservation letter does not offer an answer to the question *why*. The letter opposes the increase but does not give any indication as to what was discussed and led to the opposition. Mr. Partington briefly went through the five criteria. **Mrs. Dunn motioned and Mr. Tierney seconded the motion to grant a variance for Case 10-2012 from**

- **Section 405.2 to allow the increase in the area.**
- **Section 405.3 to allow the increase in the non-conformity.**
- **Section 405.5 to allow the replacement structure to be less conforming.**



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- **Section 406.2 to allow for the expansion of the non-conforming structure within the building setbacks.**
- **And specifically Section 702 Appendix A-1 to allow a 20' front setback, the south side setback would be 13'9" and 14' on the north side conditioned upon construction erosion control methods being in place.**

Motion passed 4-0-1. Mr. Yennaco abstained from voting because his legal counsel advised him not to vote due to article 19.

Mrs. Dunn said she was not aware of Mr. Yennaco's decision. This is an issue because any applicant has a right to a full board to make a decision. An affirmative decision requires three positive votes and if the Board does not have five people voting that lessens the applicant's chance of a positive vote. Mrs. Dunn asked what does the Board do now as a result of this action. Mr. Tierney advised the Board that he would be recusing himself from the next case. Ms. Scott advised the Board that a member can recuse themselves at any point during the hearing or can abstain from the vote. Applicants may feel they didn't get a fair "shake" because there was an abstention. Mrs. Dunn respectfully disagreed from Ms. Scott's analysis of the situation. Mrs. Dunn went on to say the Zoning Board has always advised applicants before the hearing if there are only four members to hear the case that they have the ability to request a full board and postpone the hearing.

The Chairman replaced Mr. Tierney with Mr. Scholz for Case 12-2012.

Mr. Yennaco said that he would recuse himself if that was the Board's pleasure but he ran because he wanted to serve the community and be a part of the Zoning Board. Unfortunately, due to recent events, it is difficult for him to put his business, his employees and his family in jeopardy by ruling on a case. Mr. Yennaco said he will sit on the cases but will not rule on any case. The Chairman said that if Mr. Yennaco is planning to abstain it would be prudent for Mr. Yennaco not to sit in on the cases. Mr. Yennaco said it is not his intent to harm any participant or any applicant or member of the Board. Mrs. Dunn suggested that the Board talk with town counsel about what the Board should do in the near future.

Mr. Yennaco recused himself.

Lot 3-B-625, Case #12-2012

Applicant – Benchmark Engineering, Inc

Owner – Murray Properties, LLC

Location – 183 Rockingham Road

Zone – Commercial A

The application is proposing to raze the existing building and redevelop the property with a new 25,000 square foot commercial building with associated improvements, including reconfiguring



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the parking lot. The proposal, as presented, requires variance relief from the following sections of the Town of Windham Zoning Ordinance and Land Use Regulations:

601.1 – Wetland and Watershed Protection District – Purpose; **601.1.1** - Wetland and Watershed Protection District – Purpose; **601.3** - Wetland and Watershed Protection District – Uses Permitted - to allow a portion of the proposed commercial building and associated parking within the W.W.P.D.; **601.3.8** - Wetland and Watershed Protection District – Uses Permitted - Driveways, streets and roads – to allow a portion of the site drives and parking spaces to be located within the W.W.P.D.; **601.3.9** - Wetland and Watershed Protection District – Uses Permitted - Utility systems - to allow the proposed solar trees to be located entirely within the W.W.P.D.; **602.2** – Rural District – Uses Permitted Upon Site Plan Application and Review; **702** – Area, Frontage, Yard and Floor Area Requirements, **Appendix A-1** - to allow for a minimum of a 35ft frontline setback where 75ft is required; **702.5** - Area, Frontage, Yard and Floor Area Requirements – to allow the proposed non-residential use closer than 100’ from a residential zoning district without required screening; **702.7** - Area, Frontage, Yard and Floor Area Requirements – Energy of Communications Systems – to allow the installation of “solar trees” within the 50ft required setback; **704.2.2.1** - Design of Off-Street Parking and Loading Spaces – to not require a 10 ft landscaped buffer for screening of adjacent residentially zoned land; **704.2.2.2** - Design of Off-Street Parking and Loading Spaces – to not require a 6ft high fence for screening of adjacent residentially zoned land; **704.2.7** - Design of Off-Street Parking and Loading Spaces – to allow parking within 5ft of the side property line where 10ft is required and 12ft from the front line where 20ft is required; **704.2.10** - Design of Off-Street Parking and Loading Spaces – to allow the proposed parking area for to not have interior landscaping areas.; **706.8** – Signs Regulations – to allow the proposed sign to have a setback of 5ft from the front lot line where 10 ft is required and 15 ft from the side property line where 50ft is required.

Copies of all Zoning Board of Adjustment applications and materials are available for review at the Community Development Department; open Monday – Friday, 8 AM – 4 PM.

Mr. Maynard said he appreciates having a five member board and is not sure how to proceed until he can get a full five member board. Mr. Maynard asked to be continued to a date specific time so that he can get the case back before the Board without having to through any additional notification processes.

Mrs. Dunn suggested that the case be opened and then have a formal request for a continuance.

Mrs. Dunn read case 12-2012 into the record.

Mr. Maynard requested to be heard on April 10, 2012.

Mr. Scholz motioned and Mrs. Dunn seconded the motion to continue Case 12-2012 to the April 10, 2012 meeting. Motion passed 4-0.



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Lot 20-E-250, Case #9-2012

Applicant – Edward N. Herbert Assoc., Inc.

Owner – Robert Czekanski

Location – 52 Lowell Road

Zone – Neighborhood Business District

An Equitable Waiver is requested from Section 6.11.6.5.3.3 of the Windham Zoning Ordinance and Land Use Regulations to permit an existing single-family dwelling to remain 9 ft 6 in from the lot line where otherwise the dimensional requirement is 15 ft.

Mr. Tierney returned to the Board and the Chairman appointed Mr. Scholz to replace Mr. Yennaco.

Mr. Wes Aspinwall of Herbert Associates representing the owner, presented the case. The bank came up with the zoning conflict when the applicant applied for a re-mortgage. There was an existing house on this 20 lot subdivision, an extension of Bear Hill Road, that escaped everyone's attention. This house is closer than the zoning setback. Mr. Czekanski bought the house in 2005 and has lived there for the past seven years. There are two well easements on the open space lot that are restrictive for protection of the wells. The mistake was discovered on January 11, 2012 and the violation, the result of the subdivision was approved on May 23, 2005. The house built in 1978 is 330' back from Lowell Road and not visible from the street and is 260' from the nearest abutting house. The home was built prior to any of the other houses in the Bear Hill Road Subdivision. The only feasible correction would be to move the existing house or demolish the house and rebuild in a conforming location further back on the lot. Either of these would involve a large cost to the owner with very little or no public impact as well as construction impacts within the flood zone and the WWPD. Mr. Aspinwall read the supporting facts into the record.

Mrs. Dunn asked if this was part of the open space subdivision or was it a pre-existing lot around which the open space subdivision was built. Mr. Aspinwall showed on the displayed map that this was an approximately 25 acre parcel and this lot was part of the development and part of the open space subdivision.

The Conservation Commission submitted a memo stating that they had no concerns regarding this request.

Mr. Case said that he noticed this property is zoned Neighborhood Business which has a 30 foot requirement not 15 feet.



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Mr. Aspinwall said it would take care of the problem if the equitable waiver was granted because it would be a pre-existing non-conforming use, by virtue of that, they would be allowed to continue the pre-existing use as long as there is no change or expansion.

Mrs. Dunn said she thought there should be an equitable waiver request from two sections, so she was concerned that the problem would not be solved. She did not have an issue granting an equitable waiver on the open space section but the building is in the Neighborhood Business Zone and it needs an equitable waiver from that.

Mr. Tierney said the structure itself is not the problem; it is the recorded site plan where the violation is because technically the Planning Board could not approve it and could not record the plan with that violation existing on the property. Once that is clarified and meets the zoning, when the plan is recorded the equitable waiver will stand, therefore any new development will go on neighborhood business.

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

Deliberative Session, Case 9-2012

Mr. Tierney said that the Equitable Waiver will vest the plan and will clear up the error that was made.

Mrs. Dunn said that the request meets the criteria for an Equitable Waiver.

Mr. Tierney motioned and Mr. Scholz seconded the motion to grant an Equitable Waiver for Case 9-2012 for lot #20-E-250 from Section 611.6.5.3.3 to permit an existing single-family dwelling to remain 9'6" from the side lot line. Motion passed 5-0.

Mr. Aspinwall requested a 10 minute recess to discuss his concerns with his client.

The Chairman granted a 10 minute recess and called the meeting back to order at 9:23 PM.

Lot 11-A-1620, Case #11-2012

Applicant – Edward N. Herbert Assoc., Inc.

Owner – Kenneth & Susan Hebert

Location – 53 Blossom Road

Zone – Rural Residential

A variance is requested from **Article 702** and **Appendix A-1** to permit a two lot subdivision such that the proposed lot with the existing house will have a contiguous buildable area of 18,004 square foot. outside the W.W.P.D. where 30,000 square feet. is required.



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Mr. Wes Aspinwall of Herbert Associates, representing the owner, respectfully requested to withdraw Case 11-2012 without prejudice and reassign a date; then Mr. Aspinwall requested a postponement to the next meeting.

Mrs. Dunn read the case into the record.

Mr. Aspinwall said that he did not want to go into his concerns because he would like to check to see if they are valid.

Lillian Garcia-Palmer of 3 Greenway Road, an abutter, said that she found it odd that two minutes before he is going to present his argument all of a sudden Mr. Aspinwall has unanswered questions and issues. Ms. Palmer said that she took the day off in order to attend the meeting and strongly disagreed with granting a postponement.

Mrs. Dunn said that the request for a continuance should be denied.

Mr. Partington said he agrees with Mrs. Dunn.

Mr. Tierney said the applicant was forth coming.

Mr. Scott Palmer of 3 Greenway asked if the numeric identifier was the problem. Ms. Scott said she did not believe that was why the applicant was requesting the postponement.

Mr. Tierney explained that any abutter that is not in attendance could make the claim that the improper posting would be a reason that the hearing would not be valid.

Mr. Scholz discussed possible continuation dates with the audience.

Mr. Scholz motioned and Mr. Partington seconded the motion to continue Case 11-2012 to the May 8, 2012 meeting conditioned upon reposting. Motion passed 4-1. Mrs. Dunn voted against the motion.

Approval of March 13, 2012 minutes

Mr. Partington motioned and Mr. Tierney seconded the motion to approve the March 13, 2012 minutes as amended. Motion passed 3-0-2. Mrs. Dunn and Mr. Samsel abstained.

The Chairman replaced Mr. Scholz with Mr. Yennaco.

The Chairman requested a meeting with Attorney Campbell to ask how to proceed with the situation with Mr. Yennaco.



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Mrs. Dunn said that Mr. Yennaco did vote. He voted on the election of the officers.

Mr. Yennaco said that his advice from his lawyer was not to rule on any cases.

Mrs. Dunn said Attorney Campbell did not opine at the Board of Selectmen's meeting what the Zoning Board should do if there are only four members and what that does to the Board procedurally.

Mr. Yennaco said there was not a true sense of clarity for his position from Attorney Campbell during the Board of Selectmen's meeting.

Mr. Samsel said they will have to find another alternate to sit in.

Mr. Tierney said it will not be the first time they had to reach out to former Board Members to fill the gap.

Mr. Yennaco said his point is not to hurt anyone else, himself or the people around him.

Ms. Scott explained that when you reach out to anyone to sit on the case they will fall under Article 19 immediately if they sit on the Zoning Board. They will not have the grace period of 180 days to decide whether to stay or leave or consider the implications. That may make it more difficult to find someone to sit on the case.

Ms. Scott advised the Board that there would be a new ZBA/Code Enforcement Administrator, Nancy Prendergast, and new minute taker at the meeting.

Mrs. Dunn asked to discuss the process of getting former members to be substitutes. Mrs. Dunn would like to be sure that the Board is following the appropriate procedure.

Mr. Tierney said they appointed former members for a specific case.

Mr. Samsel said they have not had to reach out to the Board of Selectmen.

Board Members will receive updated Zoning Ordinances and maps.

Mrs. Dunn asked the Board if they wanted to continue to meet at 7:30 or if 7:00 PM would be better. The consensus was 7:30 PM.

Mr. Scholz mentioned making it a part of the application to have a denial letter.



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Mr. Samsel requested the Board have their top three by-law changes ready for the next meeting.

Mr. Tierney 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 April 10, 2012 at 7:30 PM in the Community Development Department.

These final minutes are respectfully submitted by Patricia Kovolyan.