



COMMUNITY DEVELOPMENT

PO Box 120, Windham, New Hampshire 03087
(603) 432-3806 / Fax (603) 432-7362
www.WindhamNewHampshire.com

Draft Zoning Board of Adjustment Minutes August 28, 2012

Board Members:

Mark Samsel, Chairman - Present
Heath Partington, Vice-Chairman - Present
Elizabeth Dunn, Member - Present
Jim Tierney, Member - Present
Jay Yennaco, Member – Present
Mike Scholz, Alternate – Excused
Mike Mazalewski, Alternate – Present
Tony Pellegrini, Alternate - Present

Staff:

Nancy Prendergast, ZBA/Code Enforcement Administrator
Cathy Pinette, ZBA Minute Taker

Call to Order/Attendance

Chairman Samsel called the meeting to order at 7:32 pm, introduced the Board Members and staff, and explained the meeting process.

The Chairman announced that the agenda was not published in the Windham Independent but the Board has satisfied all legal requirements. Ms. Dunn stated the legal notices were posted the week before.

Public Hearings

Ms. Dunn recused herself from Case #31-2012.

The Chairman appointed Mr. Pellegrini to sit for Ms. Dunn.

Mr. Tierney read Case #31-2012 into the record along with the abutters list.

Lot 13-C-11 & 13-C-12, Case #31-2012

Applicant –Edward N. Herbert Assoc. Inc

Owner – Nassar Investment Trust, Samuel Nassar Jr., Trustee

Location – 11 McIntosh Hollow Road & 24 Stonehedge Road

Zone – Residential A District

Variations from the following sections of the Zoning Ordinance are requested to reconfigure the two lots: **Section 702** and **Appendix A-1** - to allow Lot (13-C-11) 0 feet of frontage where 175' is

required; and to allow Lot (13-C-12) 20,612 +/- square feet of contiguous area outside of the WWPD where 30,000 square feet is required.

- Mr. Peter Zohdi of Edward N. Herbert Assoc. Inc, representing the owner – Nassar Investment Trust, Samuel Nassar Jr., Trustee, addressed the Board.
- Mr. Zohdi stated he is asking for - to allow Lot (13-C-11) 0 feet of frontage where 175' is required; and to allow Lot (13-C-12) 20,612 +/- square feet of contiguous area outside of the WWPD where 30,000 square feet is required. Mr. Zohdi stated he had a colored map for the Board so they could see exactly what he was speaking about and gave it to the Chair. The Chairman accepted the map as "Exhibit A". (Ms. Prendergast stated that when she spoke with Mr. Zohdi regarding this case she thought it would be beneficial to the Board.) Mr. Zohdi pointed to Stonehedge and Macintosh on the map. He stated on Lot 12 that the buildable area was in the back. The 30,000 sq ft does not do anything for the lot. The second lot has legal frontage on Stonehedge. When the applicant built Stonehedge the Planning Board would not give Mr. Nassar a 50 foot right of way, they gave him a driveway. Now they would like the 30,000 sq ft for Lot 12, which is all wetland and is not doing any good. The other lot is on Macintosh. Mr. Zohdi explained how the land would be divided and showed it on the map to the Board. He stated one lot will lose frontage but has driveway access. There are wetlands and they have done a dredge and fill and have a culvert. They just want to change the lot lines.
- Mr. Tierney asked Mr. Zohdi what the proposed length of the driveway would be. Mr. Zohdi stated it would be the same length of what was originally done. Mr. Tierney asked if there has been TRC review. Mr. Zohdi stated many years ago. Mr. Tierney commented that they are now asking to take frontage away. Mr. Zohdi stated this case was already Planning Board approved and the applicant is cleaning up for more usable land.
- Mr. Zohdi read the 5 criteria into the record and also read from Mr. Nassar's letter explaining more for each criteria. He also stated Lot 11 will have more land outside the WWPD. The frontage for Lot 11 does nothing for that lot because the driveway is on Stonehedge.
- Mr. Pellegrini asked Mr. Zohdi if it needed to go through the Planning Board. Mr. Zohdi stated no, it is just a lot line adjustment.

The Chairman opened the Public Hearing at 8:00 pm, hearing no comments, the public hearing was closed.

The Chairman entertained a motion to go into Deliberative Session.

Mr. Yennaco motioned to go into Deliberative Session, seconded by Mr. Partington. Motion passed 5 – 0.

- The Chairman stated this was a unique parcel and it met the 5 criteria.
- Mr. Partington stated it was not contrary to the public interests. Character, health or safety is not going to change. Substantial justice would be done. It is a hardship as it is a skinny lot, the WWPD runs through the lots and the plan is reasonable.

- Mr. Yennaco and Mr. Pellegrini agreed that the 5 criteria were met.
- Mr. Tierney stated it is an improvement but there are two lots. He stated the applicant should be asking for two variances and two applications. He questioned which lot would get the variance.
- Mr. Partington stated the posting states which lot is getting which variance. Mr. Tierney stated it should have been 2 cases.

The Chairman entertained a motion.

Mr. Partington motioned in consideration of the 5 points to allow Lot (13-C-11) 0 feet of frontage where 175' is required; and to allow Lot (13-C-12) 20,612 +/- square feet of contiguous area outside of the WWPDP where 30,000 square feet is required as requested, seconded by Mr. Pellegrini. Motion passed 5 – 0.

The Chairman advised all of the 30 day appeal time.

Ms. Dunn was seated back on the Board.

Mr. Yennaco recused himself from Case #32-2012.

The Chairman appointed Mr. Mazalewski to sit for Mr. Yennaco.

- The Chairman stated that next on the agenda is an Appeal of Administrative Decision. He asked the Board if they wanted to hear the case. He stated they all had a confidential legal memo from Attorney Campbell in their packet.
- Ms. Dunn stated the Board should move forward with hearing the case.
- The Chairman stated it is different than before.

Ms. Dunn read Case #32-2012 into the record along with the abutters list. She stated there were two letters in the record from David Cafua and Janet Weigel giving Attorney John Cronin and an associate of Herbert Associates permission to represent them.

Lot 18-L-450, Case #32-2012

Applicant –Cafua Management, LLC

Owner – Estate of Ruth I. Bohne, C/O Janet Weigel

Location – 43 Range Road

District – Professional, Business and Technology District

An Appeal of Administrative Decision has been submitted by Cafua Management, LLC, on behalf of the Estate of Ruth I. Bohne, appealing the ZBA/Code Enforcement Administrators position in a July 9, 2012 memo, which was submitted to the Planning Board for Case #2012-21, that a Dunkin Donuts without a drive-thru is in violation of Section 614.2.12 of the Zoning Ordinance.

- Mr. Tierney questioned the date (7/8/12) on the application and the date on Ms. Prendergast's memo to Ms. Scott regarding the decision (7/9/12). Ms. Prendergast stated the letter of 7/9/12 is based on her decision of 7/7/12 regarding the Administrative Decision. Mr. Tierney stated the letter of 7/9/12 was an internal memo and questioned if the applicant received the memo.
- The Chairman asked where the letter to the applicant was. Ms. Prendergast stated she thinks Ms. Scott shared it with the applicant.
- Mr. Tierney stated the appeal was filed before the decision was made on an internal note. He stated if there is no formal writing to the applicant, he doesn't see how the applicant could submit an application. The Board is missing part of the case. The Chairman agreed with Mr. Tierney, he stated it appears the application is dated the 8th and the internal memo is dated the 9th. Ms. Prendergast offered the Board the Case file. Mr. Tierney stated the applicant is required to provide all information. Ms. Dunn stated Ms. Prendergast wouldn't have everything as it is an appeal to her case. She suggested Mr. Zohdi address the chronology of the decisions.
- Attorney Cronin addressed the Board. He asked that Ms. Dunn recuse herself in regards to some of the comments she has made in the past about Dunkin Donuts.
- Ms. Dunn stated she has absolutely no reason to recuse herself. She made those comments in prior Board discussions regarding diminishment of surrounding property values.
- Attorney Cronin stated that this plan had come through the Board before with a Dunkin Donuts drive thru and that was denied. The applicant then made a proposal without a drive thru. He thinks the decision was made on 7/7 and the memo came out on 7/9.
- The Chairman questioned if the Board was acting on an internal memo.
- Attorney Cronin stated he thinks it could be verbal, he doesn't have his file for that and he doesn't recall a denial letter.
- Mr. Tierney stated he would move forward with the 7/9 memo but thinks something is missing. He also stated the Board does not have the plan that the Decision was based on.
- Mr. Partington questioned Attorney Cronin and stated that they went to the Planning Board without the drive thru, it was denied and they needed relief. Attorney Cronin stated the plan was for limited hours.
- Mr. Zohdi stated the Police Chief said they had to put a curb in so there would not be a drive thru.
- Ms. Dunn stated they decided they could act on the application this evening but now looking at the dates on the application (7/8) and the memo (7/9) how can there be an appeal of a decision that was not made.
- Mr. Tierney stated even if it was an oral denial the letter should state when that happened. He also stated that there was a modification to the plan and the Board did not have that. This case is still in Court.

- Ms. Dunn stated the applicant has to appeal an administrative decision. She also questioned that if the appeal was filed before the denial was sent out, how can they appeal that.
- The Chairman stated that the applicant knows what the denial was otherwise they would not be here.
- Attorney Cronin stated that if you read Ms. Prendergast's memo of 7/9 it is all consistent with what is happening. He suggested the Board ask Ms. Prendergast. He stated if the Board wants to see the plan they can see what the Community Development Department has or he can bring the plan in if the Board postpones.

The Chairman asked the Board if they wanted the plans and should postpone.

- Mr. Partington asked if the applicant was asking to move the case. He thinks the Board should hear it this evening.
- Attorney Cronin stated that if someone needed to see the plans to make their decision he would like to continue the case.
- Mr. Mazalewski stated that the Board needs to make sure the plans they see are the right ones.
- Ms. Prendergast stated she had the original plan with the drive thru and that was what she based her decision on.
- Mr. Zohdi placed a plan on the wall board. He stated that since Ms. Prendergast is the one who they are appealing her decision, he would like to get all the dates he had discussions with her and Ms. Scott.
- The Chairman stated the dates are becoming immaterial at this point.
- Ms. Dunn stated the dates are material.

The Board took a recess at 8:40 pm and was back in session at 8:47 pm.

- The Chairman stated that unfortunately they could not locate the plan, he finds it appalling and a tremendous waste of time.
- Attorney Cronin stated he spoke with his client and he would like to hear it tonight or move the case 30 days.
- The Chairman stated that it is material to have the plan that Ms. Prendergast made her decision on.
- Mr. Mazalewski agrees with the Chairman and wants to see the plans the decision was based on.
- Ms. Dunn was concerned about the dates because she wants to make sure the applicant is appealing the correct decision.

- Attorney Cronin stated he is certainly comfortable with Ms. Predergast's decision. He stated she said she would not change her decision if the drive thru was removed.
- Ms. Dunn asked if Attorney Cronin can state he is appealing on the basis of the appeal on the memo of the 9th.
- Attorney Cronin stated he agrees with the memo of the 9th and it is consistent with what was said on the 7th. He would be happy to take depositions from Ms. Scott and Ms. Prendergast.

The Chairman polled the Board on whether to hear the application.

- Ms. Dunn said the dates were an issue. The Chairman stated he was ok with the dates. Mr. Partington stated he was ok with the dates but had an issue with no plan. He stated the abutters were here again tonight and if Attorney Cronin wants it heard it should be heard. Mr. Tierney stated if Ms. Prendergast is to go on record that she made the decision on the 7th he is ok with that, but he is concerned as the Board should have a copy of what she reviewed and if the Board does not have the plan they shouldn't consider.
- Ms. Prendergast stated that the 7th was on a Saturday and she would not have made a decision on a Saturday. She might have spoken to Ms. Scott on the previous Friday. She also had plans for this without a drive thru. The Chairman asked if the plan on the board was the same one she based her decision on. Ms. Prendergast stated no.

The Chairman polled the Board on whether to hear the application.

- The Chairman stated that if Mr. Zohdi had the correct plan he would hear the case. Mr. Tierney stated if this was not the correct plan that Ms. Prendergast reviewed the Board should not hear the case tonight.
- Attorney Cronin stated the Planning Board would be making the decision on seating, parking, etc. He explained what they plan on doing with the restaurant, i.e., more lunch and dinner items. He stated the provisions of the Ordinance are vague.
- Mr. Partington questioned why a plan was needed and Mr. Tierney stated they already voted on a variance, voted not to hear a previous case and that it is in Court.
- Attorney Cronin stated his client would like a continuance for 30 days.

The Chairman entertained a motion.

Ms. Dunn motioned to continue Case #32-2012, at the applicant's request, to September 24th, 2012, seconded by Mr. Tierney. Motion passed Motion passed 5 – 0.

The Chairman advised all of the 30 day appeal time.

Mr. Yennaco was seated back on the Board.

Mr. Tierney excused himself from Case #33-2012.

The Chairman appointed Mr. Pellegrini to sit for Mr. Tierney. The Chairman asked The Vice Chairman, Mr. Partington to chair for this case.

Ms. Dunn read Case #33-2012 into the record along with the abutters list. She stated there was a letter from Mr. Murray giving Mr. Joe Maynard permission to represent him.

Lot 3-B-625, Case #33-2012

Applicant - Benchmark Engineering, Inc.

Owner – Murray Properties, LLC

Location – 183 Rockingham Road

District – Business Commercial A

Variations from the following sections of the Zoning Ordinance are requested:

Section 615.6.3 to allow a minimum offset distance of 60' +/- between driveways where 275' is required; and **Sections 601.3** and **601.4.8** to allow a dumpster to be installed within the WWPD.

- Mr. Joe Maynard addressed the Board. He stated as the Board knows this property was previously occupied by the Windham Inn. He has been to the Board for variances before and as part of the process with the TRC. He is asking for 2 variances, to allow a minimum offset distance of 60' +/- between driveways where 275' is required and to allow a dumpster to be installed within the WWPD. He stated there are three existing driveways going into the property and none are across the street from another driveway which the Ordinance requires. Ms. Prendergast informed him at the TRC meeting that they needed to meet the driveway requirements. Mr. Maynard stated they can only have approximately 60' between driveways. The second variance they are requesting is that they need a dumpster. They have moved all of the parking out of the WWPD. The placement of the dumpster is opposite the detention pond and swales. They are keeping it off the Rt 28 sight line.
- Ms. Dunn asked Mr. Maynard if he was on the Planning Board agenda for 8/28. Mr. Maynard stated yes. He said the Planning Board asks for a preliminary hearing first but he has asked to skip that. He has a letter from Keach Nordstrom. There are a number of waivers he will be asking for and they are very minor. Ms. Dunn stated that the Planning Board will have input into the site plan and could make you place the driveway across from the other driveway. Mr. Maynard stated yes, but DOT would not approve it. Ms. Dunn asked about a traffic study. Mr. Maynard stated he would not need one. There is nothing to make it meet sight distance and this is the best place for it on this property. Ms. Dunn had concerns about how it all fits together with the Planning Board.
- Mr. Partington asked why they are not putting the dumpster behind the building. Mr. Maynard stated that where the building is situated they would not be able to get a curb cut in.
- Mr. Maynard read the 5 criteria into the record.

The Chairman opened the hearing to the public at 9:27 pm.

- Mr. Jim Tierney, Lowell Rd, questioned the variance on the dumpster. He stated he has seen other presentations where dumpsters are not a permanent structure and doesn't think it needs a variance.
- Mr. Maynard stated he didn't show a dumpster on the previous plan. This will have screening and a pad.

- Mr. Tierney stated that the application says dumpster to be installed.
- Mr. Maynard stated that is for the whole thing, pad and fencing.
- The Vice Chairman stated there was a letter from the Conservation Commission suggesting the Planning Board require permeable surfaces. Mr. Maynard explained what he would be using. The Vice Chair and Ms. Dunn stated it is not a ZBA item.

The Vice Chairman entertained a motion to go into Deliberative Session.

Motion by Mr. Yennaco, seconded by Ms. Dunn. Motion passed 5 – 0.

- Ms. Dunn stated the applicant has met the 5 criteria but expressed concerns how this would coordinate with the Planning Board review. She stated it is a unique parcel due to the sight distance coming down the hill. She stated it is imperative that the driveway is located as far south as possible.
- The Chairman agreed with Ms. Dunn.
- Mr. Yennaco agreed with Ms. Dunn. He stated the road is winding and the dumpster is in a good location.

The Vice Chairman entertained a motion.

Ms. Dunn motioned in consideration of the 5 points to grant Case #33-2012 Section 615.6.3 to allow a minimum offset distance of 60' +/- between driveways where 275' is required; and Sections 601.3 and 601.4.8 to allow a dumpster to be installed within the WWP, seconded by Mr. Pellegrini. Motion passed 5 – 0.

The Vice Chairman advised all of the 30 day appeal time.

Mr. Tierney was seated back on the Board.

Review and Approval of Draft Meeting Minutes

July 24, 2012

- Amendments and edits were made to the minutes of July 24, 2012.

The Chairman entertained a motion to accept the minutes as amended.

Mr. Partington motioned to accept the minutes of July 24, 2012, as amended, seconded by Mr. Yennaco. Motion passed 4 – 0 – 1 with Ms. Dunn abstaining

August 14, 2012

Amendments and edits were made to the minutes of August 14, 2012. The Board would like the edits to come back for an approval.

By-Laws Discussion

- The Chairman deferred the discussion on By-Laws until the September 11, 2012 meeting.

Old/New Business

RPC recommendation to BOS

- The Chairman stated he had a letter from Ms. Scott regarding RPC presentations. The Board can let Ms. Scott know or have a committee. Ms. Prendergast asked if the Board used the RPC. The Chairman stated the Planning Board does and the ZBA is looking into it. He doesn't see any need for a Committee. Ms. Dunn and Mr. Partington agreed with the Chairman. Ms. Prendergast will let Ms. Scott know that the Board has no comment.
- The Chairman stated the Board had a list of the upcoming Municipal Law Lecture Series in their packets. They should let Ms. Prendergast know if they would like to attend. Ms. Dunn would like to sign up for all three. The Chairman suggested the alternates go.
- Ms. Prendergast stated that OPS is not having a fall conference, but LGC will be having one but there is no date as of yet.

Adjournment

The Chairman entertained a motion to adjourn

Mr. Partington motioned to adjourn, seconded by Ms. Tierney. Motion passed 5 – 0.

Meeting adjourned at 9:55 pm.

These minutes are in draft form and respectfully submitted for approval by Cathy Pinette, ZBA Minute Taker.