



## COMMUNITY DEVELOPMENT

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

### Draft Zoning Board of Adjustment Minutes May 28, 2013

#### Board Members:

Heath Partington Chairman – Present  
Jim Tierney, Vice-Chairman – Present  
Mark Samsel, Member – Present  
Jay Yennaco, Member – Present

Mike Scholz, Member – Present  
Mike Mazalewski, Alternate – Present  
Tony Pellegrini, Alternate - Present

#### Staff:

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

#### Call to Order/Attendance

The Chair called the meeting to order, introduced the Board, and explained the meeting process.

#### Public Hearings

##### **Lot 20-B-100, Case # 11-2013** (continued from 4/9/13 meeting)

Applicant – Benchmark Engineering, Inc.

Owner – Mark Manson Family Trust, Mark P. Manson, Trustee

Location – 105 Lowell Road

Zone – Residence A District

Variations are requested from the following sections of the Zoning Ordinance to allow the conversion of a structure from a single family home with accessory apartment to a multi-family dwelling unit:

**Section 603.1.1** to allow a multi-family dwelling unit where one single-family detached dwelling is allowed per lot.

- An email was received on 5/22/13 from Joe Maynard of Benchmark Engineering to Ms. Nancy Prendergast requesting Lot 20-B-100, Case # 11-2013 be withdrawn without prejudice. Mr. Samsel read the applicant's email for the record.

**Mr. Samsel motioned to accept the withdrawn without prejudice for Case # 11-2013, seconded by Mr. Tierney. Motion passed 4 – 1 with Mr. Scholz voting not in favor.**

Mr. Samsel read Case # 14-2013 along with the abutters list into the record.

##### **Lot 17-C-14, Case # 14-2013**

Applicant – Meisner Brem Corporation

Owner – John and Soraya Lynch

Location – 19 Spring Street

Zone – Residence A, Cobbett's Pond Watershed Overlay

Variations are requested from the following sections of the Zoning Ordinance to allow a 2-bedroom seasonal home to be converted to year-round use, to allow the addition of a 3 season porch to the home, and to allow a deck within the side setback:

**Section 1200.1.3** to allow the seasonal to year-round conversion of a structure where the lot does not meet the dimensional requirements and other requirements in Section 700; **Section 702** and **Appendix A-1** to allow a side setback for the 3-season porch of 9.3 feet where 30 feet is required; and **Section 702** and **Appendix A-1** to allow a side setback for the deck of 18.8 feet where 30 feet is required.

- Mr. Kurt Meisner, of Meisner Brem Corporation on behalf of the applicant addressed the Board. Mr. Meisner stated the applicant couldn't be at the meeting. He had a letter of authorization from the applicant stating he could speak on their behalf. He stated there currently is a single-family seasonal home with attached decks and shed on the property. He is proposing to convert the seasonal home to year-round home, replace an existing deck with a three season porch, and would like a deck within the required side setbacks. He stated a new approve septic design is on file and he spoke about the new septic system and leach fields. Mr. Meisner read the five criteria into the record.

#### **Questions/comments from the Board**

- The Board asked the applicant if the septic system would be installed before the conversion to a year-round residence. Mr. Meisner stated his intent is to update the septic system.
- The Board asked the applicant about parking for this lot. Mr. Meisner stated currently the residents parked in different locations at the rear and back of the property. There is no driveway and they parked on a grassy area. Ms. Prendergast stated they are working on putting in a driveway.

The Chair opened the hearing to the public at 7:45 PM.

Ms. Joan Janice of 21 Spring St. stated she is in favor of the improvement to the property.

The public portion was closed at 7:46 PM

**Mr. Samsel motioned to go into deliberative session, seconded by Mr. Scholz. Motion passed 5 – 0.**

- The Board and staff discussed a plan for a parking location and staff stated the applicant was not looking for relief for parking.
- The Chair stated this was betterment to the situation, it was unique situation because there is not a lot of room on the lot, there is no diminishment to neighboring properties, and it benefits the public, the abutters, and the applicant.

**Mr. Samsel motioned in consideration of the five points for Case #14-2013, to grant the variances requested as posted for Sections 1200.1.3, 702 and Appendix A-1 with the condition of parking being conveyed on the certified plot plan which was presented to the Board on May 28, 2013, seconded by Mr. Tierney. Motion passed 5 – 0.**

The chair advised all of the 30 day appeal.

Mr. Samsel read Case # 15-2013 into the record along with a list of the abutters.

**Lot 24-F-4030, Case # 15-2013**

Applicant – Arra and Suzanne Yeghiayan

Owner – Same

Location – 16 Washington Road

Zone – Rural

Variances are requested from the following sections of the Zoning Ordinance to allow the Planning Board the authority to allow a Customary Home Occupation with more than one additional employee that does not reside on the property:

**Section 602.1.6.4** – to allow the Planning Board the authority to permit the employment of more than one employee that does not reside on the property where the Planning Board is currently only authorized to permit the employment of one additional non-resident employee.

- Mr. Yeghiayan of 16 Washington Rd. addressed the Board. Mr. Yeghiayan had a slideshow presentation for the Board and the audience. He would like a variance to permit more than one employee at his home business. He stated this is not a permanent use variance and would just like it to be for his business and not run with the property. He stated he has a home-based business in his basement, he has overwhelming support from his neighbors, it is a low impact business and his property is 26 acres. He showed the Board pictures of the driveway and the woods surrounding his property and stated there is no sign of a business at his location. He spoke about his handcrafted gift business and the fact that he currently has family and friends help out. He stated no customers come to the property and there are no signs. Mr. Yeghiayan read the five criteria into the record.
- There was a discussion between the Board, staff and the applicant as to why the applicant was before the Board. Ms. Prendergast stated someone had come in to the Community Development Office and asked what business was going on at this property and the Community Development Office was not aware that there was a business located at 16 Washington Rd. Mr. Yeghiayan stated he wasn't aware he needed to register his business.

**Questions/comments from the Board**

- How many employees does the applicant need? Mr. Yeghiayan stated he would like 5 – 12. He stated they would all be part-time, working four days a week and six hours a day, but hours would increase in the summer and holiday season.
- The Board asked how the applicant gets his materials to his business. Mr. Yeghiayan stated he uses his own personal truck. The Board stated that someone at some point noticed a lot of traffic. Mr. Yeghiayan stated it did not come from his residence, he doesn't feel he has a lot of traffic, and most people who work there presently car pool.

The Chair opened the hearing to the public at 8:15 PM.

- Mr. Don Barry of 14 Washington Rd. supports the applicant's request.

- Mr. James Dailey of 125 Lowell Rd. stated he is in favor of the application as there is 93 acres of conservation land surrounding this location and Mr. Yeghiayan owns 26 and he has never seen an employee or traffic at Mr. Yeghiayan property.
- Mr. Roger Parks stated he has never seen commercial traffic at this property and there is no visible evidence of a business.
- Mr. Duane Delfosse stated the Yeghiayan's are very good neighbors and he has never seen any traffic.

The public portion was closed at 8:20 PM

- The Board asked Mr. Yeghiayan how many employees per day. Mr. Yeghiayan stated there could be 12 in one day. The Board questioned Mr. Yeghiayan if it was a home business as he stated in the five criteria, but Mr. Yeghiayan stated if the variance was not granted he could lose his livelihood. Mr. Yeghiayan stated it is their home but they also have their business there.

**Mr. Samsel motioned to go into deliberative session, seconded by Mr. Scholz. Motion passed 5 – 0.**

- The Board discussed the number of employees, if it was actually a customary home occupation or if it was an actual business, if this is a reasonable use of their property, and if it met the hardship criteria. The following comments were made by the Board in the discussion: the applicant has successfully run his business at this location for 10 years, he has unique characteristics of how he runs his business; the ordinance is to keep customary home businesses small, the variance would go with the land and always will; there is no hardship as sometimes businesses outgrow their space; the ordinance says one additional employee because it's supposed to be in an incidental use to the house; there is substantial justice and there is no diminution of values of neighboring properties because the driveway is very long and you cannot even see the house.

**Mr. Scholz motioned in consideration of the five points for Case #15-2013 Lot 24-F-4030, to grant relief from Section 602.1.6.4 to allow the Planning Board the authority to permit the employment of up to three (3) non-resident employees where the Planning Board is currently only authorized to permit the employment of one additional non-resident employee, seconded by Mr. Tierney. Motion passed 5 – 0.**

Chair advised all of the 30 day appeal.

The Board took a recess at 8:50 PM was back in session at 8:57 PM.

Mr. Samsel read Case # 16-2013 into the record along with the abutters list. He also stated there was a letter of authorization from Mr. Rokel.

**Lot 1-C-1900 & 1-C-2550, Case # 16-2013 (Re-noticed)**

Applicant – George Rokel

Owner – Mary E. Devlin (Lot 1-C-1900) Devlin Family Trust 1997, Robert E. Devlin (Lot 1-C-2550)

Location – 101 Londonderry Road, Londonderry Road

Zone – Rural District

An Application to Appeal an Administrative Decision has been filed against a decision made on April 12, 2013 by Ms. Nancy Prendergast, ZBA/Code Enforcement Administrator. The applicant believes that Ms. Prendergast incorrectly determined that the excavation on the properties was incidental to onsite construction.

- Mr. Robert Dietel of Gallagher, Callahan and Gartell, PC on behalf of the applicant George Rokel addressed the Board.
- Attorney Dietel stated in early April Mr. Rokel observed trucks hauling earth materials off of lot 1-C-2550. He was concerned about this and also concerned for his neighbors. He filed a complaint on April 10, 2013 with Ms. Nancy Prendergast, Z BA/Code Enforcement Administrator regarding on-site excavation and removal of materials. Ms. Prendergast stated in her letter to Mr. Rokel dated 4/12/13 that Mr. Devlin has an approved subdivision plan and septic system on file and will soon be applying for building permits. She also stated that he has been processing and stockpiling materials on-site necessary for site work and hauled the excess material off site. This is allowed under RSA 155 – E: 2-a. Attorney Dietel read his Exhibit A of his application to an Appeal of Administrative Decision which the Board had in their packet. He stated that material that is excavated from a property has to be used on the same premise. He stated there is no provision to take it off site per the Town of Windham Regulations. He stated Ms. Prendergast should have concluded it was not incidental. Ms. Prendergast’s memo stated Mr. Devlin was applying for a permit. The regulation states all permits have to be issued before hand. Attorney Dietel would like Ms. Prendergast’s decision to be reversed and the owner to put back the material and possible fines to be imposed.

#### **Questions/comments from the Board**

- The Board asked Attorney Dietel if this property has gone through site plan approval. Attorney Dietel stated yes, it is a large parcel and two lots are being turned into three. He stated where the excavation was done was in the water table.
- The Board asked what is being constructed on the site now. Attorney Dietel stated no permits were pulled for the excavation and nothing is being built now.
- There was a lengthy discussion where the Board and Attorney Dietel discussed the meaning of excavation, and incidental and commercial excavation, the Town regulations, and the RSA. Attorney Dietel pointed out that in 1984 the previous owner and the Town of Windham entered into an agreement that there would be no more excavation permits issued to this property.
- Ms. Prendergast addressed the Board. She stated there is an approved subdivision plan and a driveway easement. She stated there was a variance granted in 2012 for a driveway access. Ms. Prendergast went to the property and walked the site and Mr. Devlin had built his construction driveway. She spoke to Mr. Devlin about getting his permits. She did not see any excavating at that time. She has spoken to the tax assessor and Mr. Devlin has filled out the forms to remove 700 cubic yards. The Board asked Ms. Prendergast if she witnessed any removal. Ms. Prendergast stated no. Mr. Rokel stated he followed a truck from Mr. Devlin's property that was removing earth. The Board discussed Ms. Prendergast decision of April 12, 2013 regarding the complaint received by Mr. Rokel and the wording she used. Ms. Prendergast stated he was excavating with

his approved subdivision plan. The Board stated the Town of Windham Ordinance states that all permits have to be issued.

The Chair opened the hearing to the public at 9:37 PM

- Attorney Dietel stated he wanted to clarify that based on review of site plans and variances; those are not permits which are required.
- Mr. Bob Devlin of 98 Londonderry Rd. addressed the Board. He stated the driveway is 600 to 800 feet long, he is preparing the driveway, he is preparing the site and he hauled dirt out because he needed it on another site. Mr. Devlin stated he is only removing 132 yards and his permits are all in order now. He stated he wasn't aware he could not do that and he still has more earth to remove from the site. Mr. Devlin also stated he will be bringing in a lot more earth material to finish the project He stated he applied for a gravel permit but he wasn't hauling enough earth.
- Attorney Dietel stated there are two questions of law related to the finding of facts in the Notice of Decision. He stated the excavation that occurred was unlawful, there are penalties that could be applied under the statute, and the Board could have Mr. Devlin return the property to its original state. Attorney Dietel stated that Mr. Devlin said he removed materials. The Board questioned if 132 cubic yards are removed by Mr. Devlin and he is bringing in more material than that, if this applies. Attorney Dietel stated that was not the case when Ms. Prendergast visited the site.
- Mr. Walter Framer of 1 Brentwood Rd. does not want to see an excavation site in his neighborhood. The Board asked Mr. Framer if he could see where the excavation was done. Mr. Framer stated he could when he walked by.
- Mr. Devlin stated he has no intention of making the site a gravel pit. He stated he is building a house for his son
- Ms. Ellen Hus of 2 Brentwood Rd. stated it is been eight months since a large tree has been cut down and it is still on the property. She stated there is an old trailer there. She stated she is concerned with her property value. She stated there is work done on Sundays and they are very noisy. She asked the Board and Mr. Devlin if the site could be cleaned up.

The Chair admitted the Plan of Subdivision as Exhibit A and the pictures taken at the site by Ms. Prendergast as Exhibit B.

**Mr. Samsel motioned to go into deliberative session, seconded by Mr. Tierney. Motion passed 5 – 0.**

- The Board discussed commercial excavation versus development of the site. The Town Ordinance provides examples of noncommercial excavation. The Board was mixed in its discussion regarding whether this was a commercial excavation or the taking of earth and building two homes. The Board discussed Ms. Prendergast's decision. The Board also stated there was no permit in place. The Board discussed the Town Regulations. The Board discussed remedies and stated it is the code enforcement officer's job. The Board stated testimony was also given from Mr. Devlin and he will be bringing more back than he took out. The Board stated they weighed the testimony from both sides and they're not inclined to grant any remedies.

**Mr. Scholz motioned to grant the appeal of the Administrative Decision for Case # 16-2013. There was no second and the motion failed.**

**Mr. Samsel motioned to deny the appeal as requested for Case # 16-2013 as requested upon the testimony and documentation presented to the Board, seconded by Mr. Tierney. Motion passed to deny 3 – 2. Mr. Scholz and the Chair voting against.**

- Mr. Tierney stated the intent of the NOD letter is correct and the Chair stated the Board should read the plain language of the ordinance and the decision would be reversed.

The Chair advised all of the 30 day appeal.

Mr. Samsel read Re-hearing Request – Case # 13-2013 into the record.

#### **Re-hearing Request – Case # 13-2013**

The applicant submitted his Appeal of Administrative Decision which is on file in the Community Development Office.

The Chair read Point 1 of the applicant's appeal.

- The Board stated this was not a variance, this was a question of standing and the applicant is addressing the Board's procedure for variances. There was no technical error made.

The Chair read Point 2 of the applicant's appeal.

- The Board stated the line of testimony was more to establish the question of standing and does not understand what rights the applicant was denied. The Board had all the information available to them. There was no technical error made.

The Chair read Point 3 of the applicant's appeal.

- The Board stated they followed all the time regulations on hearing appeals on this case. There was no new information. The Board did discuss the immediacy of the injury in prior discussions. There was no technical error made.

The Chair read Point 4 of the applicant's appeal.

- The Board discussed the fact that no plan was given to the Board at the previous hearing. The plan the Board had was the development of the site and showed nothing about the use increasing. The Board was mixed on whether or not a plan should have been submitted. The Board discussed how the determination would be made without a plan for the use and how every application would be different.

**Mr. Samsel motioned to deny the re-hearing request for Case # 13-2013 as the Board believes no technical error was made and no new evidence provided, seconded by Mr. Yennaco. Motion to deny passed 3 – 2 with the Chair and Mr. Scholz voting against.**

## **Review and Approval of Draft Meeting Minutes**

5/14/2013

**Mr. Samsel motioned to accept the minutes of May 14, 2013 as written, seconded by Mr. Scholz. Motion passed 4 – 0 – 1 with Mr. Yennaco abstaining.**

### **Old/New Business**

Court Cases: Roberts (Pending), 21st Century (Superior Court 5/29/13 9AM)

The Chair stated he would be attending the 21<sup>st</sup> Century court case with Ms. Prendergast on May 29th.

### **Adjournment**

**Mr. Yennaco motioned to adjourn, seconded by Mr. Samsel. Motion passed 5 – 0.**

Meeting adjourned at 10:55 PM

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