



BOARD OF ADJUSTMENT

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Zoning Board of Adjustment Minutes March 27, 2007

Mark Samsel – Chairman
Jim Tierney – Vice-Chairman
Dianna Fallon – Secretary
Gail Webster – Member
John Alosso – Member
Al Souma – Alternate
Tom Murray – Alternate

Election

Mr. Tierney nominated Mr. Samsel as Chairman and Mrs. Webster seconded the nomination. Passed 5-0.

Mrs. Fallon nominated Mr. Tierney as Vice-Chairman and Mrs. Webster seconded the nomination. Passed 5-0.

Mr. Tierney nominated Mrs. Fallon as Secretary and Mrs. Webster seconded the nomination. Passed 5-0.

Lot 14-B-5000, Case #10-2007 (Continued from 2/27/07)

Applicant – Michael Farris
Owner – Michael Farris
Location – 17 Mammoth Road
Zone – Neighborhood Business

An Appeal of an Administrative Decision is requested from Section(s) 100, 401, 501, 503, 609.4.1.7 & 609.5.1 of the Zoning Ordinance. The applicant is appealing Mr. Turner's decision of September 6, 2006 to stop the use of a portion of the site of the landscaping business.

Mrs. Fallon read the case into the record and a letter from Attorney Peter Solomon, dated March 27, 2007 requesting Case #10-2007 be rescheduled for May 22, 2007. Mr. Tierney motioned and Mr. Alosso seconded the motion to continue Case #10-2007 to the May 22, 2007 meeting. Motion passed 5-0.

Lot #18-L-1, Case #18-2007 (Continued from 2/27/07)

Applicant – Andrew & Christine Lane

Owner – A&C Revocable Trust

Location – 2 Woodvue Road

Zone – Residential A

An Appeal of an Administrative Decision is requested from Section(s) 601 of the Zoning Ordinance. The applicant is appealing the withdrawal of the building permit due to a misinterpretation of the application of the WWPD Ordinance and the NH Supreme Court Heron Cove decision.

Mrs. Fallon read the case into the record. Mr. Lane read into the record five points listed in Mr. Turner's letter dated 1/22/07 along with his (Mr. Lane's) answers to Mr. Turner's points. The points listed in Mr. Turner's letter reflect what he based his administrative decision on to withdraw the building permit are as follows:

1. The Zoning Board's decision of 1/9/07 to grant the Schroeder appeal and overturn my administrative decision to issue a building permit for the garage at 2 Woodvue Road.
2. The Zoning Board's decision that the brook or stream begins at the concrete drainage pipe outlets adjacent to the garage.
3. Section 601.4.1 of the Windham Zoning Ordinance that states that the WWPD covers "all the land within 100 feet of the normal high water mark of said bank or stream".
4. Canobie Lake shore land is not exempt from the WWPD overlay district anywhere a brook or stream enters the normal high water mark of the lake as per Section 601.4.4 of the Windham Zoning Ordinance.
5. The NH Supreme Court Heron Cove decision that decided that only the water body is exempt from the WWPD setback protection not the land around it.

Following are Mr. Lane's 9 points that address Mr. Turner's 1/22/07 letter:

1. Mr. Turner's point 3 suggests that 601.4.1 of the WWPD applies to lot 18-L-1; however, the ZBA determined in their decision of 1/9/07 that the normal high water mark of Canobie Lake runs up to the culverts under Woodvue and West Shore Roads. Therefore, there is no brook running beyond the culverts through Lot 18-L-1 and 601.4.1 does not apply.
2. Canobie Lake is exempt from the WWPD pursuant to 601.4.4 of the town ordinances. Wherein a pond would normally have a 100-foot WWPD setback from the normal high water mark pursuant to 604.1.1.
3. Pursuant to 651.4.4 "the WWPD associated with a ...brook entering any of the exempt water bodies shall (only) continue up to the normal high water mark of these water bodies".
4. Mr. Turner's points #4 and #5 misinterprets the Heron Cove decision and appears to apply a decision made about an entirely different lake and lot to this case in direct contradiction of the exemption intentionally provided to this lot by 601.4.4.
5. Heron Cove only states that a "brook and the wetlands through which it flowed are included in the WWPD".

6. The ZBA determined that there is no brook beyond the outlet of the culverts. Therefore the Heron Cove decision does not apply to this lot as suggested by Mr. Turner's Administrative Decision.
7. Mr. Turner's earlier decision made in consultation with James Gove of Gove Environmental Services that the edge of the WWPD is at a line drawn perpendicular to the end of the brook is correct.
8. We also believe Mr. Turner's original decision when he issued the permit is correct and that the brook and the WWPD ends at the inlet of the culvert because a culvert cannot be considered a wetland or part of the WWPD unless it is an interruption of a brook per 601.2.
9. Furthermore, if the 1/9/07 decision of the ZBA that a culvert can form the end of a brook were applied around the water bodies intended to be exempted from the WWPD pursuant to the 601.4.4 it would have the effect of negating the whole purpose of the exemption and would result in a discriminatory outcome.

Mr. James Gove of Gove Environmental Services, Wetlands Consultant was hired by Mr. & Mrs. Lane to determine and present testimony with regard to the location of the pond. Mr. Gove showed on a displayed map the modified location of the WWPD line. Mr. Gove stated that his WWPD line is a more corrected interpretation of the ordinance and the Heron Cove decision. Mr. Gove read a portion of the Heron Cove decision that states that the *WWPD overlay protects brooks with at least a 100-foot buffer on ether side of their centerlines...* The Heron Cove decision protects the brook, not the exempt water body. Based upon the topography, the slope and where the water goes, it is Mr. Gove's view as to where in fact the WWPD that protects the brook should be drawn. The Heron Cove decision points out that the WWPD is protecting the brook. If you have an area that does not contribute to the brook flow and is going well downstream of the brook's flow, it should not be in the area of the WWPD.

Mr. Turner, Director of Planning & Development and Code Enforcement Officer, read into the record his 1/22/07 letter and addressed the points made by Mr. Lane. Mr. Turner read Section 601.4.1 *Wetlands and Watershed Protection Districts shall include all lands within one hundred fifty feet (150') of the normal high water mark of Beaver Brook, Golden Brook and Flat Rock Brook.* Section 601.4.1 does not mention topography and the slope size does not matter. No where in the ordinance does it say that a pipe can begin a brook. On three displayed maps Mr. Turner showed his interpretation of the WWPD line. Mr. Turner read a portion of the Heron Cove decision, page 216 ... *Only the body of water comprising Cobbett's Pond is exempt, leading to the conclusion that the land surrounding it is to be treated like any other land...* Mr. Turner also read a portion of page 215 of the Heron Cove decision ... *The WWPD overlay protects brooks with at least a 100-foot buffer on either side of their centerlines and ponds with at least a 100-foot buffer from their normal high water marks. Thus, in general, when a brook flows into a pond, the land immediately surrounding the inlet of the brook into the pond is protected by virtue of its proximity to both the brook and the pond... We apply this definition to the terms of the ordinance. Section 601.4.4 exempts Cobbett's Pond from the operation of the provisions of the overlay. Hence, any protections that the WWPD overlay would otherwise have given to the land surrounding Cobbett's Pond by virtue of its proximity to the pond do not*

arise... If the WWPB was based on topo then every WWPB delineation made since 1974 is wrong. It is based on distance not topo.

Mr. Schroeder, of 14 Woodvue Road, spoke in support of Mr. Turner's decision and responded to Mr. Lane's points.

Mr. Lane showed how the diagram in Section 601.2 of the Zoning Ordinance is similar to the displayed maps of 2 Woodvue Road. Without Heron Cove the water body would have a 100' exemption. Mr. Lane's lot was approved in 1969. If there was a 100' foot buffer around Canobie Lake there would not be any homes on Woodvue Road. The Heron Cove decision that overrides the exemption is where we get the definition that the 100' buffer is on either side of the centerline of the brook.

Mr. Tom Murray, an alternate member of the Zoning Board, read into the record RSA 674:33 Paragraph II. *In exercising its powers under paragraph I, the Zoning Board of Adjustment may reverse or affirm, wholly or in part, or may modify the order, requirement, decision, or determination appealed from and may make such order or decision as ought to be made and, to that end, shall have all the powers of the administrative official from whom the appeal is taken.* Mr. Murray said that he brought RSA 674:33 to the Board's attention in regard to an equitable waiver, whether it is front of the Board or not, the Board can hear a request for an equitable waiver. Mr. Lane then said that he would make the points for the equitable waiver. The Chairman said the Board would only hear the appeal. Mr. Lane said that Mr. Murray advised the Board that they could hear the equitable waiver even though it had not been raised and could be a line of defense. Mr. Murray agreed that the Board could hear the equitable waiver. The Chairman said that Mr. Lane could speak in favor of the appeal but did not want Mr. Lane to bring up another case. Mr. Lane said it is a line of defense that he is entitled to. The Chairman said his interpretation is that the Board is dealing strictly with an appeal. Mr. Murray said the points to that appeal are clear in paragraph II as to the powers of the Zoning Board and is clearly stated in the last sentence *decisions as ought to be made.* Mrs. Dunn asked for a point of information and said that we are hearing only on an appeal of an administrative decision. This Board made a determination on the location of the high water mark. As a result, Mr. Turner determined the location of the WWPB and is in agreement with the Board's decision of a month ago. Mrs. Dunn said that she did not see how anything to do with an equitable waiver has to do with what was posted and noticed to abutters for tonight. Mr. Murray said that the Zoning Board of Adjustment has the power to issue an equitable waiver this evening; it is clearly in RSA 674:33. Part of what the Zoning Board is hearing is the letter concerning all the ordinances which directly reflects an equitable waiver situation and is clearly in the Zoning Board's power to issue an equitable waiver tonight. Mr. Murray said he did not bring this up to discount anyone's testimony but if you look at the four prong test it could save a lot of time in regard to this case. The Board decided to proceed with the appeal. Mr. Turner suggested that the Board could refer this question to Attorney Campbell.

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

Deliberative Session, Case #18-2007

Mr. Alosso motioned and Mrs. Fallon seconded the motion to deny the appeal for Case #18-2007, Lot #18-L-1. Motion passed 4-1. Mr. Tierney voted against the motion because of his interpretation of the inlet of the culvert.

The Chairman granted a five minute recess.

The Chairman called the meeting back to order.

Lot #21-H-14, Case #24-2007

Applicant – Crossroads Contracting

Owner – John & Cheryl Albert

Location – 19 Lake Shore Road

Zone – Residential A

A variance is requested from Section(s) 401, 405.5, 406.2 & 702 Appendix A-1 of the Zoning Ordinance to permit the razing of the existing structure and the installation of a new foundation, remodel the second floor and convert an existing deck to a screened porch. Relocate the existing structure 6-feet back from its current location on a .54 acre lot where 50,000 square feet is required, street frontage of 100-feet where 175-feet is required, 22-foot side setback where 30-foot is required and 29-foot shoreline setback where 50-feet is required.

Mrs. Fallon read the case into the record. Mr. Todd Wallace of Crossroads Contracting, presented the case for the owner. Mr. Wallace advised the Board that in the posting the word *raze* should have been *raise*. The dwelling will be elevated to allow the removal of the failing stone foundation. The dwelling will be moved 6-feet back from Cobbetts Pond and will make the home less non-conforming. A second floor will be added. Mr. Wallace read the supporting facts into the record. The Chairman marked a map as Exhibit A and 13 pages of supporting facts as Exhibit B. Mr. Gregory Carlson of 17 Lake Shore Road and Mr. Gregory Moe of 12 Lake Shore Road spoke in favor of the request. Mrs. Fallon read into the record a portion of the Conservation Commission's minutes of March 22, 2007. *After reviewing Case #24-2007 the Commission suggested that the proposed dwelling be sized appropriate for the lot and it is located within the Shoreland Protection area.* Mr. Wallace said the footprint is not increasing; the existing structure will be used. Mr. Tierney motioned and Mrs. Webster seconded the motion to go into Deliberative Session. Motion passed 5-0.

Deliberative Session, Case #24-2007

Mrs. Webster motioned and Mr. Alosso seconded the motion to grant an area variance for Case #24-2007 as presented from Sections 401, 406.2 & 702 Appendix A-1. Motion passed 5-0.

Lot #13-K-42A, Case #25-2007

Applicant – David & Gail Catalano

Owner – David & Gail Catalano

Location – 40 Doiron Road

Zone – Rural

A variance is requested from Section(s) 401, 405.2 & 702 Appendix A-1 of the Zoning Ordinance to permit the razing of an existing foundation and one shed and the construction of a 24' X 36' dwelling with a 12' X 16' open deck with a lot area of 21,000 feet +/- where 50,000 feet is required, frontage of 166.5 feet where 175 feet is required and a front setback of 19 feet +/- where 50 feet is required.

Mrs. Fallon read the case into the record. Attorney Peter Bronstein, representing the owner, presented the case. Because of the size, shape and topography of the lot a two-bedroom single family dwelling is suitable for this location. There is no adjacent land to purchase. There are two sheds on the lot, one will be removed and one that is marked as *existing* will remain. Lot coverage is less than 10%. Attorney Bronstein read the supporting facts into the record. Minutes from the March 22, 2007 meeting were read into the record. *After reviewing Case #25-2007 the Commission suggested that the proposed dwelling be sized appropriate for the lot and is within the Shoreland Protection area.* Mr. David Catalano, the owner, said that there will a garage underneath the dwelling with two floors and an attic. Mrs. Fallon motioned and Mr. Tierney seconded the motion to go into Deliberative Session. Motion passed 5-0.

Deliberative Session, Case #25-2007

Mrs. Fallon motioned and Mr. Alosso seconded the motion to approve an area variance for Case #25-2007 as requested from Sections 401, 405.2, & 702 Appendix A-1 with no full attic staircase access but will allow a pull-down. Motion passed 5-0.

Mrs. Fallon motioned and Mr. Alosso seconded the motion to resequence, move Case #13-2007 before Case #26-2007. Motion passed 5-0.

Mrs. Webster motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed 5-0.

Lot #3-B-200, Case #13-2007 (Originally heard on February 27, 2007, Continued from 3/13/07)

Applicant – Benchmark Engineering, Inc.

Owner – Granite Oaks, LLC

Location – 129 Rockingham Road

Zone – Neighborhood Business

A rehearing is requested regarding the decision made by the Zoning Board of Adjustment on February 27, 2007.

Mrs. Fallon read the case into the record and a letter from Mr. Maynard of Benchmark Engineering regarding Case #13-2007. After reviewing the information submitted. Mr. Alosso motioned and Mrs. Webster seconded the motion to grant the rehearing of Case #13-2007 because of a technical error regarding the proper size of the sign. Motion passed 4-1. Mrs. Fallon voted against the motion because she did not agree that the Board made a technical error.

Lot #3-B-200, Case #26-2007

Applicant – Benchmark Engineering, Inc.

Owner – Granite Oaks LLC

Location – 129 Rockingham Road

Zone – Neighborhood Business

An Appeal of an Administrative Decision is requested from Section(s) 706 of the Zoning Ordinance. The applicant is appealing the decision made by the Zoning Board of Adjustment on February 27, 2007.

Mrs. Fallon read the case into the record. Mr. Maynard requested that Case #26-2007 be withdrawn. Mr. Tierney motioned and Mrs. Fallon seconded the motion to withdraw Case #26-2007. Motion passed 5-0.

Lot #14-A-1100, Case #27-2007

Applicant – SAI Communications, Cingular & T-Mobile

Owner – Waterhouse Realty Trust, Kevin Waterhouse, Trustee

Location – 18 Mammoth Road

Zone – Neighborhood Business

A variance is requested from Section(s) 701.3.1 of the Zoning Ordinance to permit the construction, operation and maintenance of a wireless telecommunications facility.

After Mrs. Fallon read the case into the record she questioned the completeness of the list of abutters. Mr. Jeff Roelofs of Anderson & Kreiger advised the Board that a complete list of abutters will be provided. Mrs. Fallon motioned and Mr. Tierney seconded the motion to continue Case #27-2007 to the April 10, 2007 meeting subject to proper notification of required abutters within a 20 mile radius. Motion passed 5-0.

Approval of March 13 2007 Minutes

Mrs. Fallon motioned and Mrs. Webster seconded the motion to approve the March 13, 2007 minutes as amended. Motion passed 5-0.

Other Business

Mr. Samsel advised the Board that he discussed with Attorney Campbell fees and the septic process.

Mrs. Kovolyan will make changes to the fees listed in the By-laws and then e-mail them to the Board Members for review and/or changes.

Mrs. Webster mentioned the length of time being used for cases.

Mail

- Southern NH Planning Commission Workshop scheduled for March 29, 2007 in Manchester, NH.
- March 20, 2007 Letter from Attorney Campbell to Mark Samsel regarding Approval of Septic Systems.
- March 23, 2007 letter from Attorney Loughman regarding BOS v Town of Windham.

At 12:15 AM on March 28, 2007 Mr. Tierney motioned and Mrs. Webster seconded the motion to adjourn. Motion passed 5-0.

The next meeting of the Zoning Board of Adjustment is scheduled for April 10, 2007 at 7:30 PM in the Planning & Development Office.

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