



OLD VALUES - NEW HORIZONS
COMMUNITY DEVELOPMENT

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**Draft Zoning Board of Adjustment Minutes
January 24, 2012**

Board Members:

Tom Murray – Chairman

Heath Partington – Vice-Chairman

Elizabeth Dunn – Member

Mark Samsel – Member

Dianna Fallon – Member

Jim Tierney – Alternate

Mike Scholz – Alternate (Excused)

Staff:

Laura Scott – Community Development Director

Mimi Kolodziej – Planning Assistant

Lot #16-Q-178, Case #4-2012:

Applicant – Brian Kelley, Winer & Bennett, LLP

Owner – Phyllis D. Churchill, Trustee

Location – 2 First Street

Zone – Residential A

Variances are requested from Sections 616.9.2, 1200.1, 1200.3 and 1200.4 of the Zoning Ordinance to permit the conversion of an existing seasonal dwelling to a full time year round dwelling on a lot that is nonconforming and that has a sewage-holding tank, which was installed in 1988. No improvements are proposed for the structure or the site in conjunction with the conversion.

Mrs. Dunn read the case into the record.

Mrs. Fallon recused herself from Case 4-2012.

Mrs. Dunn stated that it has been the Board's request to have a *Letter of Denial* for any case that comes before the Board.

Ms. Scott, Community Development Director, stated that Case 4-2012 was not her case. This case was worked on by former employee Tim Corwin. In the Assessor's data base the property is listed as seasonal but seemed to be lived in year round. There are code enforcement letters in the file. The property owner filed for a variance as a result of the ongoing code enforcement. There is a letter from the Building Inspector, Michael McGuire that was given to the applicant today, January 24, 2012.

Chairman Murray appointed Mr. Tierney to replace Mrs. Fallon for this case.

Attorney Brian Kelley of Winer & Bennett, representing the owner, presented the case. The owner, Phyllis Churchill, is the only occupant of the 1,085 square foot, one bedroom dwelling. The 4300 square foot lot has frontage on Cobbets Pond and 60 feet of frontage on First Street. The property was purchased in 1969 and for the first few years was used as a seasonal cottage. In 1988 a septic holding tank was installed and is still functioning today. In 2000 the cottage was upgraded to full time use. The owner received all the necessary permits from the Town. Ms. Churchill has resided in the cottage year round for the past 11 years. No further improvements are necessary. Many of the lots in this neighborhood have year round residences on them. As

mentioned earlier Ms. Churchill has occupied this property for the past 11 years, therefore, there will not be any increase in the septic load. Attorney Kelly read the supporting facts into the record.

The following residents spoke in favor of this request.

- Carolyn Webber of 19 Cobbetts Pond Road. There are 3 homes within 50 yards of Ms. Churchill's property that are year round and have holding tanks; there are 4 more within 1 mile.
- Paul Forde of 20 First Street said there is lower septic usage in the winter.
- Charlie McKaren of First Street encouraged the Board to have a favorable result and grant the variance.
- Carol Pynn of 19 Cobbetts Pond Road said Ms. Churchill is always considerate of the water body.
- Dick Forde of 14 Gance Road amplified everything that was previously mentioned.
- Tom Case of 70 Mountain Village Road stated that back in 1989 the regulations had nothing to do with dimensional variances only the building code had to be met. The owner received a building permit and a certificate of occupancy; once that happened, her occupancy should have vested and she should suddenly, 11 years later, not have to meet new regulations that came forth. The Chairman advised Mr. Case that a state approved year round septic system was not installed.

Mrs. Dunn read into the record a January 9, 2012 letter from Stewart's Septic Service of Bradford, Ma that stating they have been servicing the holding tank at 22 First Street since August 2002; that it is pumped regularly; and the condition of the tank is good.

The following letters of support were submitted.

- Steven Pierpont of 39 First Street
- Carol Pynn of 19 Cobbetts Pond
- Dennis Root of 15 Third Street
- Veronica Flynn Hewitt of 63 Searles Road
- Jim & Judy Lynch of 24 First Street
- Ruth Kovacs of 15 Viau Road
- Richard Forde of 14 Gance Road
- Gladys McCoy of 4 McCoy Avenue in Nashua NH
- James & Muriel Sullivan of 28 First Street
- Stephen & Janice DeSimone of 22 Second Street
- Bruce & Jeanne Eisnor of 31 First Street

Attorney Kelley advised the Board that the property began being used full time in 2000.

Mr. Tierney advised the Board that NH DES requires that a new plan be submitted when any septic system is at least 20 years old. The plan does not have to be installed but must be submitted and approved. That approval would be good for 4 years.

Chairman Murray explained the process of requesting a waiver from the state for a septic system because of the lack of space on the property.

Chairman Murray granted a five minute recess and then called the meeting back to order.

Attorney Kelley advised the Board that the owner would withdraw the request for a variance of all aspects of the septic requirements.

The Chairman advised Attorney Kelley that he could withdraw that portion of the request; or a motion could be made to grant relief; or the Board could vote on the individual Sections.

Mr. Tierney said that the Board could deny the request without prejudice or make a ruling as it ought to be done.

Ms. Scott said that if the case is continued there must be a date certain. If any variances are granted, then they would work with the Building Inspector to get DES waivers or approvals.

Attorney Kelley said that his client is fine with continuing the case.

Mr. Partington motioned and Mr. Samsel seconded the motion to continue Case 4-2012 to the April 10, 2012 meeting. Motion passed: 5-0.

Lot #18-L-450, Case 5-2012:

Applicant – Edward N Herbert Associates Inc.

Owner – Estate of Ruth I Bohne c/o Janet Weigel

Location – 43 Range Road

Zone – Professional Business & Technology District

A variance is requested from Section 614.2.12 of the Zoning Ordinance which allows eating & drinking establishments when the consumption is primarily intended to be on the premise and the proposal is for the construction of a Dunkin Donuts restaurant and drive through.

Chairman Murray removed Mr. Tierney from the Board and appointed Mrs. Fallon.

Mrs. Dunn read the case into the record.

Mr. Peter Zohdi of Herbert Associates, representing the owner, presented the case. Mr. Zohdi showed on the displayed plan the location of the proposed Dunkin Donuts. There are two houses and a garage on the 64,915 square foot lot. The proposal is to construct a 6,376 square foot building; 2,126 square feet will be used for the Dunkin Donuts. Thirty nine parking spaces are proposed. State of the art septic system will be installed in the rear of the building.

Mrs. Dunn said that this case was advertised as a Dunkin Donuts and Drive Through but only part of the building is for a Dunkin Donuts the balance is for other businesses. Mrs. Dunn said that sounds like a strip mall to her.

Mr. Zohdi said that he is not asking for a variance for any future tenant.

Mrs. Dunn asked for the Denial Letter for Case 5-2012.

Ms. Scott said that she met with the applicant a couple months ago and verbally told the tenant that they would need a variance and that they needed to talk with Mr. Corwin who would write the letter. Ms. Scott did not know that the letter was not written by former employee Tim Corwin before he left until the application came in. Ms. Scott said she would write the denial letter right then.

Chairman Murray said a denial letter specifically states staff's position on what is allowed. The denial letter is an important piece of information to have as part of the record. Chairman Murray went on to say that Mrs. Dunn's comments are well directed because the Board is trying to avoid any disputes, conflicts or misconceptions.

Ms. Scott advised the Board that all of the recent cases that have not had denial letters have been Mr. Corwin's cases and she assumed that the letters have been done.

Mr. Zohdi advised the Board that Attorney Cronin would go through the five criteria.

Mr. Partington asked Mr. Zohdi about the traffic flow for that area.

Mr. Zohdi explained that there is no center island and a left hand turn would be made for the customers of Dunkin Donuts just as it is done for the Delahunty customers and others.

Attorney Cronin submitted a letter of support from the Delahunty Nursery and corrected a typo on page two of the attachment to the application.

Attorney Cronin said that he does not see how there is any power or enabling authority regulating where people eat their food. Since the term “primarily” is ambiguous, the Board should not rule against the request. Attorney Cronin summarized the five criteria. Attorney Cronin asked the Board what the benefit would be to the health, safety and welfare of the community to require consumption in a premise.

In a letter from Mark McKeon, President of McKeon Appraisal Services, dated January 17, 2012 he states that he studied the area surrounding the property and the presence of a Dunkin Donuts with a drive-through window will have no additional impact on the value of the residential properties in the subject area. The public interest would not be harmed in any way based on where people consume their food. The addition of a Dunkin Donuts would not alter the essential character of the neighborhood. Substantial justice would be done.

Chairman Murray said that this is where a letter of denial comes into play. The purpose of the PB&T Zone is a low traffic generator.

Mr. Samsel said this is one of the worst pieces of the ordinance because of contradictory statements.

Ms. Scott advised the Board of the proposed change for Town Meeting that the *low traffic generating* clause was removed from the ordinance.

Attorney Cronin said a Dunkin Donuts is not a destination as the Common Man restaurant would be.

Mr. Tierney said drive thrus are not prohibited in this zone and should not have been part of the request listed on the agenda.

Chairman Murray asked Attorney Cronin to elaborate on the Equal Protection issue.

Attorney Cronin said if you allow a drive thru for a bank in order to use the ATM, or if you use the drive thru for an iced coffee there is no difference in the impact on health, safety and welfare, all other things being equal. If you don't allow the drive thru for the Dunkin Donuts, but you do allow it for the bank; you are treating people dissimilarly in terms of health, safety and welfare.

Mr. Zohdi explained that there are two traffic lights controlling the traffic flow. To answer Chairman Murray's question regarding a traffic study Mr. Zohdi said that would be done if a variance is granted because the traffic study would be a Planning Board issue.

The following residents spoke in favor of the request.

- Mr. Ken Eyring, Town resident, said his property taxes have doubled since he moved to Windham in 1998, and this is a perfect opportunity to bring a business into Town and generate some revenue.
- Mr. Shaun Foster, an abutter, spoke in favor of this request. Castle Commons is better than a dilapidated white house.

- Mr. Dennis Senibaldi said that there would be an increase in revenue and an improvement to the property.

The following residents spoke in opposition to this request.

- Michael Burke of 3 Searles Road spoke of car lights shining into his front window.
- Jonathan Sycamore of 15 Cobbetts Pond Road said it is troubling to him that a trickle of variances is going to change an area. Wanting PB&T to attract certain businesses and fast food was not one of them.

Chairman Murray read emails of support from Sharon & Norman Carleton, Eileen Masimo and Rick Okerman into the record, plus a letter from Jay Yennaco of Delahunty's Nursery.

Mr. Zohdi's map was marked as Exhibit A and Mr. Yennaco's letter was marked as Exhibit B.

Attorney Cronin said that the ordinance was not drafted in a good way and an applicant should not have to guess what the intent of an ordinance is.

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

Deliberative Session, Case 5-2012:

Mrs. Dunn stated that a drive-thru will cause more traffic per square foot than a sit-down restaurant. The spirit and intent of the ordinance is to have Professional Business & Technology. This is one step in the wrong direction. The increase of the traffic will diminish the value of the surrounding properties and the request does not meet the hardship criteria.

Mr. Partington said that he agrees with Mrs. Dunn in regard to the traffic, and the request does not meet the hardship criteria.

Mr. Samsel said safety is a Planning Board issue. All permitted uses will generate traffic.

Mrs. Fallon said that Professional Business has always been the primary use, and eating and drinking establishments, newsstands and barbershops would be subordinate uses; because they are supposed to support the people working in Professional Business to keep the traffic off the street.

Mr. Samsel said that there would not be businesses large enough in Windham to support those subordinate establishments.

Chairman Murray went through the criteria to make a decision for himself.

Mr. Samsel motioned and Mrs. Dunn seconded the motion to grant a variance for Case 5-2012 as requested from Section 614.2.12 of the Zoning Ordinance which allows eating and drinking establishments when consumption is primarily intended to be on the premise. Motion failed: 2-3. Mrs. Fallon, Mrs. Dunn and Mr. Partington opposed.

Mr. Samsel motioned and Mr. Partington seconded the motion to deny the request for a variance for Case 5-2012 as requested from Section 614.2.12 of the Zoning Ordinance which allows eating and drinking establishments when consumption is primarily intended to be on the premise. Motion passed: 3-2. Mr. Samsel and Chairman Murray opposed. Mrs. Fallon and Mrs. Dunn felt that the request was contrary to the spirit and intent of the ordinance. Mrs. Dunn also felt that it would diminish the value of the surrounding property, and it did not meet the hardship criteria. Mr.

Partington said that the request was contrary to the public interest; the traffic would cause health and safety issues, and there is no hardship because nothing differentiates this property from any other in a PB&T Zone.

Mrs. Dunn said that she did not think that the second motion was necessary.

Mrs. Dunn had to leave the meeting so Chairman Murray appointed Mr. Tierney to replace her for the balance of the meeting.

Review and approval of minutes:

Ms. Scott said that the November 8, 2011 minutes were not ready and asked if they could be moved to the February 14, 2012 meeting.

Mr. Samsel said he had a minor change to page 4 of the January 10, 2012 minutes. The third word in the last bullet needed to be capitalized. **Mrs. Fallon motioned and Mr. Partington seconded the motion to approve the January 10, 2012 minutes. Motion passed: 5-0.**

Mr. Samsel motioned and Mr. Partington seconded the motion to schedule a joint meeting with the Planning Board as requested for February 14, 2012. Motion passed: 5-0.

Adjournment:

Mrs. Fallon motioned and Mr. Samsel seconded the motion to adjourn. Motion passed: 5-0.

The next meeting of the Zoning Board of Adjustment is scheduled for February 14, 2012 at 7:30 PM in the Community Development Department.

These minutes are respectfully submitted for your approval by Mimi Kolodziej.