

**BOARD OF ADJUSTMENT MEETING
FEBRUARY 25, 2003**

MEMBERS:

Bruce Breton - Chairman
Rob Gustafson - Secretary
Jack Gattinella - Member
Al Souma - Member
Chris Doyle - Member
Tony Pellegrini - Alternate
Dick Drummond - Alternate (Excused)

Lot #7-B-30, Case #6-2003

Samuel & Jean Nassar
62 Searles Road

An Appeal of an Administrative Decision is requested from Section 601.4.5 of the Zoning Ordinance. This Wetland Watershed Protection District Section of the ordinance has been interpreted to apply when the second hundred feet has an upward slope of 12% or more.

Mr. Gattinella read the case into the record. Mr. Nassar, the Applicant, presented his case. Mr. Nassar explained that it is both his opinion and that of his Engineer, Gary Spaulding of SFC Engineering, that Mr. Turner made an error when he established a 100-foot extension to the WWPD on parts of lot 7-B-30 as depicted on the plan. As allowed under the current Windham Zoning Regulations the 100-foot extension is required when that 100-feet has an upward slope of 12% or more. The 100-foot WWPD extensions required by Mr. Turner encompasses areas with slopes less than 12%. Mr. Nassar said that he is asking the Zoning Board of Adjustment to remove the additional 100-feet of WWPD where a 12% slope or more does not project across the entire 100-feet. The method used is not part of the ordinance and it is unreasonable to use a method that changes the meaning of the ordinance. Mr. Turner correctly notes that the voters amended the ordinance in March 1998 to include wording that raised the standard as to width so that after the amendment was passed, the 12% slope was required to be at least 100-feet wide. Mr. Turner failed to recognize, in his decision, that the complete wording of the original 601.4.5 was deleted and replaced by the current version. The definition of the section was completely rewritten in 1998. The amended 601.4.5 requires that the 100-feet adjacent to the WWPD have at least 12% slope for the entire 100-feet. Just as the amended ordinance raised the standard for width, the amendment also increased the standard for length. The 1998 change made it clear that after the change in 601.4.5, the standard to invoke the rule was increased by the requirement that mandated the 12% be at least 100-feet wide and that it would be for the entire 100-feet, the net effect was to make the ordinance less restrictive on the land. The words immediately adjacent were removed. Those words taken literally, meant that in the original version even a narrow strip of 12% or greater slope would require a 100-foot extension away from the WWPD with no regard to the topography involved apart from the 12% slope strip itself. If there were flatter areas or areas that actually sloped away from the WWPD, then the public benefit would be slight or non-existent, while the private burden would be great and the restriction would not be reasonably related to the Town of Windham purpose of protecting a distant wetland. Mr. Nassar said that the Administrative Decision that he received was so inflexible that if the required 100-feet went over the top of a hill draining the other way, it would still apply. Mr. Nassar went on to say that he was told by Mr. Flanders, Building Inspector that in cases like that some exceptions were sometimes made. Mr. Nassar asked Mr. Flanders what if the 100-foot mark just went level at the top, not down hill but not

upward, Mr. Flanders replied to the effect that there was room for give & take. Mr. Nassar asked if any of these administrative policies or additional modifiers were written down so that Mr. Nassar could find out if any would apply. Mr. Flanders said that they were not written down. The amended version repairs the defect by requiring 12% or more for 100-feet, if the 100-feet includes a reverse slope or a flat area that could not cause damage to a protected wetland, then the rule would work to provide justice by eliminating the extra 100-feet by right rather than a subjective unwritten enforcement policy. The 12% for the entire 100-feet would go further to show that the restriction was placed on the land for a reasonably related purpose. The net effect of the 1998 amendment was to lessen the burden on the land. There was a citizen petition in 1998 to amend the same section 601.4.5, the petition mentioned average slopes and defined the areas that would invoke the additional 100-feet as 50 X 50 and 15% slope. This petition was discussed and not recommended by the Planning Board. Mr. Nassar said that the wording of the Planning Board's amendment #3 and citizen petition #5 was well considered with adequate debate and the concept of average slope or areas of less than 100-feet of 12% slope must have been discussed and the language of the amendment could have included additional words, if that is what they intended. They did not include average nor did they indicate in any way that they wanted the 100-foot land area to be anything but 12% greater across the entire 100-feet. The interpreter of the ordinance is not entitled to add words that will change its meaning or yield results that a literal reading of the words provides. The Planning Board, through books from the Office of State Planning, is strongly urged by the state and federal experts not to try to make a site-specific buffer width requirement. There is no study or documentation that an additional 100-feet has the desired effect of keeping sediment out of a wetland already protected by the recommended 100-foot WWPD. Mr. Nassar said that protecting wetlands from sediment is a science; the Administrative Decision he received on December 6, 2002 is not based on science but convenience, economy and ease of application. Mr. Nassar introduced Mr. Gary Spaulding of SFC Engineering. Mr. Spaulding explained that the graphs provided illustrate that the 12% slope does not exist for the required 100-feet, therefore, the ordinance does not apply as a matter of fact. Mr. Turner referred to the December 6, 2003 letter that he wrote to Mr. Spaulding, an engineer, who has done no work in Windham except for this subdivision. In the second paragraph of that letter it states "the method used since 1976 has been to measure off an additional 100-feet and count the contours within that 100-feet. If there is 12-feet or more of upward elevation within that area then the second 100-feet is added". Mr. Turner said that the reason for buffers is to have an area that protects wetlands from whatever is coming downhill. The same interpretation has been used since 1974. No other Engineering Firm or Applicant has found it necessary to appeal; now since a couple of lots may be lost in their development there is reason for an appeal. Mr. Turner also said the major advantage to not understanding this ordinance and not understanding the interpretation is they get additional lots. Mr. Turner said he wanted the Board to understand the motive here. Mr. Gattinella asked what is the actual methodology? Three new phrases were introduced, "adjacent to", "along radius or 90 degrees" and "average" in the history written by Mr. Thorndike and submitted by Mr. Turner. These phrases are not used in Mr. Turner's interpretation. Mr. Gustafson said that the ordinance as written does not have the word average in it. There is some ambiguity in the ordinance; average is implied. It sounds like the ordinance is written for an intent of buffering the first 100-feet. Mr. Gustafson also said there are some downward slopes in these buffer areas which makes him wonder what is the intent of that additional 100-feet. Mr. Gustafson said that he wants to rely on the written ordinance because that is what the town voted on. The voters did not know the procedure in 1998. Mr. Russ Wilder said that the reason the second buffer zone was put on was because steeper slopes could damage the WWPD. Mr. Gattinella said that the comments he would be making would relate to intent. Mr. Gattinella said to Mr. Wilder that you're saying that all of this was primarily to protect the WWPD. Has the Planning Board looked at the permitted uses in the WWPD? Among other things agriculture, animal grazing, truck farming, overnight parking, etc. Mr. Gattinella went on to say the logic escapes him that all these things are allowed in the WWPD and then we voted to have these extremes to protect them. You don't want to disturb the land, well, what does farming do? Mr. Wilder replied that farming is subject to rules.

The Chairman granted a five-minute recess.

The Chairman called the meeting back to order.

Mr. Gattinella read into the record the written comments submitted by the Conservation Commission. "We continue to support the ordinance as presently interpreted. However, we feel that this section of the ordinance could be better defined. The Commission would look forward to working with the Planning Board & Department in the future. A Member will attend the next meeting to express our concerns". The comment sheet is dated February 13, 2003 and signed by Pamela Skinner, Acting Chair. Mr. Rick Adams, spoke on behalf of the Conservation Commission and said that there are different ways of interpreting this ordinance. If this is a case-by-case problem the way to go is a variance. David DeVries said this is a very arbitrary ordinance, even the Conservation Commission just said it needs to be better defined. Mr. DeVries also said that the Board heard there have not been any challenges to this ordinance by Developers and Engineers. Mr. DeVries said he personally knows Developers and Engineers that think this is a rotten ordinance as the Conservation Commission does. This needs to be challenged. Mr. John Mangin said there should be some consideration to the landowner. Mr. Gary Spaulding said that Mr. Turner lined up the steps needed for this appeal. There is no new information; the same plan that Mr. Thorndike and Mr. Turner saw is the plan being used at this meeting. Mr. Spaulding said that he and the Applicant, Mr. Nassar were at this meeting because Mr. Turner said these were the steps they had to follow. This has nothing to do with losing lots; it has everything to do with being consistent. Mr. Nassar said that the interpretation of the ordinance must bear a reasonable relationship to its objective and will be found invalid if the infringement on private property rights is greater than necessary to effectuate the towns' legitimate interest. As a farmer Mr. Nassar has plowed, cultivated, tilled and hoed this exact same soil on a 12% slope and can say that in most cases the lower edge next to the grass does not show six inches of sediment transfer and even that is grassed up in weeks. The terms of the ordinance must be framed with sufficient clarity and in a definite manner so that the average person, after reading it, will understand when he is violating its provisions. Mr. Gustafson motioned to Continue Case #6-2003 to the March 25, 2003 meeting if possible have Bob Thorndike at the meeting and if necessary meet at 7:00 PM but have both parties supply their written interpretation of how to determine when that 100-foot has an upward slope of 12% or more. Mr. Doyle seconded the motion. Mr. Gustafson, Mr. Gattinella, Mr. Souma, Mr. Doyle and Mr. Breton voted to grant this continuance. Passed unanimously 5-0.

Lot #21-K-24, Case #2-2003 (Continued from January 28, 2003)

Denis Tremblay & Katrina Foss
74 Turtle Rock Road

An Appeal from an Administrative Decision RSA 674:41 concerning Section 702.2 of the Zoning Ordinance is requested to grant a waiver to allow access to Lot 21-K-24 over Turtle Rock Road which is not a Class V or better road.

Mr. Gattinella read the case into the record. Mr. Tremblay advised the Board that the Board of Selectman are scheduled to hear this case in early March. Mr. Tremblay requested his case be continued to the second ZBA meeting in March. Mr. Gustafson motioned to continue Case #2-2003 to the March 25, 2003 Zoning Board of Adjustment meeting. Mr. Doyle seconded the motion. Mr. Souma, Mr. Doyle, Mr. Gattinella, Mr. Gustafson and Mr. Breton voted to continue this case. Passed unanimously 5-0.

Minutes

Mr. Gustafson motioned to approve the February 11, 2003 minutes. Mr. Gattinella seconded the motion. Mr. Gustafson, Mr. Gattinella, Mr. Doyle and Mr. Breton voted to approve the minutes. Mr. Souma abstained because he did not attend the February 11, 2003 minutes. Passed 4-0-1.

Mail

1. Office of State Planning regarding the Tenth Annual Spring Planning Conference scheduled for

April 12, 2003.

2. Chester, N.H. Zoning Board will hold a public hearing on 2/27/03 regarding an application for a variance submitted by National Tower LLC.

Mr. Gustafson motioned to adjourn at 10:32 PM. Mr. Doyle seconded the motion. Passed unanimously.

The next meeting of the Zoning Board of Adjustment will be on March 25, 2003 at 7:30 PM at the Planning & Development Office.

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

