



BOARD OF ADJUSTMENT

PO Box 120
Windham, New Hampshire 03087
Telephone (603) 432-3806

Zoning Board of Adjustment Minutes March 13, 2007

Rob Gustafson – Chairman
Mark Samsel – Vice-Chairman
Tony Pellegrini – Secretary (Excused)
Dianna Fallon – Member
Gail Webster – Member
Jim Tierney – Alternate
Al Souma – Alternate (Excused)
Tom Murray – Alternate

Seat Alternates

The Chairman appointed Mr. Murray to replace Mr. Pellegrini.

Lot #18-L-303, Case #7-2007 (Continued from 1/23/07)

Applicant – Mullett Custom Homes
Owner – Aragon Investment LLC
Location – 57 Range Road
Zone – Professional Business Technology

An Appeal of an Administrative Decision is requested from Section 405 (allows replacement of a pre-existing non-conforming structure) and Section 503 (there is no change of use or expansion of the structure or land) of the Zoning Ordinance. The applicant is appealing Mr. Turner's letter dated December 8, 2006.

Mr. Murray read the case into the record. Mr. Turner advised the Board that he was uncomfortable having Mr. Murray on this case because Mr. Murray has an Appeal of an Administrative Decision on the agenda. Mr. Murray said that it would not be a problem for him; he could be objective and has no pecuniary interest in Case 7-2007. The Chairman checked with all the Board Members and they had no problem with Mr. Murray sitting on case 7-2007.

Attorney John Michels, representing the owner, presented the case. The building permit was denied by a number of items listed in Al Turner's letter of December 8, 2006. This structure is next to the driving range and across the street from McDonald's. It was proposed that building be torn down and replaced. The use of the building has been the same for 15 years. The objections that were raised by Mr. Turner are as follows:



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1. The NH Energy Code form submitted is for residential construction and it is not signed or dated. *If you look at the directions for the application it also includes small commercial buildings up to 4000 square feet. The form has been signed and dated.* The Chairman marked the Energy Code form as Exhibit A.
2. Your ZBA application and approval did not include all the required variances listed on the November 15, 2005 permit denial. *Not asking for a variance from the Zoning Board; no variance is required to reconstruct this building.*
3. Site Plan approval is required as per Section 503 of the Town of Windham Zoning Regulations. Specifically this section requires a site plan approval when a structure is changing use from storage with limited retail to retail with limited storage. *Not requesting to change use and not proposing to change the use.*
4. The permit is in violation of Section 501 because the new building is being constructed in violation of the Zoning Ordinance. *Section 405 allows reconstruction.*
5. There is no demolition permit on record. The current building is below standards for health, safety and welfare of the people using this facility. It is not up to code and does not meet the barrier-free design standards. *The reason we want to tear it down is because it is below standard. The proposed building would comply.*
6. The change of use from limited retail, on a portion of the first floor, to two floors of retail is an expansion and change of a non-conforming structure. *Not asking to change the use; asking to rebuild the structure. The applicant has state and town septic system approvals. The old footprint was 2125 feet; the new footprint is 1887 feet. The gross space inside the envelope is going from 3786-feet to 3774-feet. There will be no increase in area or volume. The proposed building does not encroach any further into setbacks.*

Mr. Al Turner, Director of Planning & Development, submitted a photo of the existing structure. The staff has been working with the Applicant to replace this building. Once a new building is constructed there will be an increase in parking as shown in the drawing submitted by Mr. Turner. Half of the first floor of the existing building is used for retail; the back portion is used for repairs. The last legal use of the upstairs was as apartments. The existing building is not prime retail space because people are afraid to go into the building. Customers would be attracted to the proposed building. If there is testimony that the Applicant will be using the proposed attic or basement, Mr. Turner asked that he be allowed to give further testimony. The disagreement that the Town is having is if there is a change of use and whether there is expansion of the current use. A modern building will have a totally different impact on public safety issues. Parking for this store is also taking place at the farm stand. The farm stand will be gone because the DOT has purchased this building. Parking shown on the plan will cause customers to back all the way out onto Range Road. This is a safety issue that should be addressed by the Planning Board. The proposed building will have four sales areas; the existing building has one sales area. The current use needs setback, use, area and open space variances.



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The building is nonconforming to building code, nonconforming as to parking, number of parking spaces the access to the parking spaces and maneuvering isles. Section 503 states that change of use or expansion of any non residential building requires site plan approval except when the size of the building does not change. The use is not permitted; it is of the same type as the old use but will allow for more retail activity in the building and therefore requiring more situations to do with public safety such as drainage, lighting, parking etc. If the Zoning Board of Adjustment doesn't feel those items are within their purview then they should give it to the Board that can review the plan. Mr. Turner read from the Zoning Board of Adjustment Handbook, page 22, the test for the expansion of nonconforming uses. Mr. Gustafson read a portion of page 9 from the Zoning Board of Adjustment Handbook regarding Appeals to the Board of Adjustment. Mr. Gustafson said that although Mr. Turner made some good points for the need of site plan review, the ordinance allows the replacement of a pre-existing nonconforming structure. Mr. Gustafson said that he did not hear anything from Mr. Turner stating that the applicant is not meeting the conditions of Section 405. Mr. Turner said that the applicant does meet Section 405. Regarding Section 503 of the ordinance, Mr. Gustafson said that Mr. Turner talked about the intensity of use but not change of use. Mr. Tom Case and Mr. Peter Mullett spoke in favor of the request.

Attorney Michels said that the attic will not be useable; there will be trusses and there will not be a basement.

The Chairman closed the public portion of this case. Mr. Samsel motioned and Mr. Murray seconded the motion to go into Deliberative Session. Motion passed 5-0.

Deliberative Session, Case #7-2007

Mr. Samsel motioned and Mrs. Webster seconded the motion to grant the Appeal of an Administrative Decision as stated in the letter dated 12/8/06 specifically because the Board believes the applicant is not in violation of Section 503 and is not in violation of Section 501 because there is no change of use and the applicant is not in violation of Section 405. Motion passed 4-1. Mrs. Fallon voted against the motion because the uses proposed will put additional requirements on the lot beyond its current use.

Lot #14-A-701, Case #19-2007

Applicant – Robert Tabor
Owner – Robert & Elizabeth Tabor
Location – 54 Mammoth Road
Zone – Rural

A variance is requested from Section(s) 702 of the Zoning Ordinance to permit the building of a 50' X 22' +/- raised deck around an above ground pool resulting in 18-1/2' and 25-1/2' side setbacks where 30' is required.



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Mr. Murray read the case into the record. Mr. Robert Tabor presented his case. The proposed deck around the above ground pool would not be in view from Mammoth Road. The pool cannot be moved because of wetlands on the property. Mr. Tabor read the supporting facts into the record. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed 5-0.

Deliberative Session, Case #19-2007

Mr. Samsel motioned and Mrs. Fallon seconded the motion to grant an area variance for Case #19-2007 from Section 702 of the Zoning Ordinance per plan. Motion passed 5-0.

Lot #17-C-11, Case #20-2007

Applicant – Mark S. Hussey

Owner – Thomas S. & Mark S. Hussey

Location – 1 Summer Street

Zone – Residential A

A variance is requested from Section(s) 401, 702 Appendix A-1 of the Zoning Ordinance to permit the razing and reconstruction of a residential dwelling on a 20,750 square foot lot where 50,000 square feet is required, street frontage of 100 feet where 175 feet is required a front setback of 35-feet where 50-feet is required and a side setback of 20-feet where 30-feet is required.

Mr. Mark Hussey presented his case. It was Mr. Hussey's intention when he purchased the property to convert it to year round use. The abutting properties have all been converted to year round. The existing house is 20' X 40' and the proposed house will be 24' X 36'. The proposed house would be in the same location. After Mr. Murray asked about relief from Section 405 the Board decided that the applicant would need relief from Section 405.2. Mr. Hussey will apply for relief from Section 405.2. Mr. Hussey read the supporting facts into the record. Mr. Tom Case spoke in favor of this request. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mr. Murray seconded the motion to go into Deliberative Session. Motion passed 5-0.

Deliberative Session, Case #20-2007

Mrs. Fallon motioned and Mr. Samsel seconded the motion to grant an area variance for Case #20-2007 with side setbacks to be no closer than 22-feet and 32-feet. Motion passed 5-0.

The Chairman granted a five-minute recess.

The Chairman called the meeting back to order.



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The Chairman appointed Mr. Tierney to replace Mr. Pellegrini.

Lot #24-G-127, Case #21-2007

Applicant – J.M. Gray & Associates, Inc.

Owner – Adrienne M. Goyette

Location – 9 Princeton Street

Zone – Residential A

An Equitable Waiver is requested from Section(s) 601 of the Zoning Ordinance to permit the existing building, landscaping and site improvements to remain in the WWP. Some of these improvements include pedestrian bridges over wetlands, grading for driveways and walkways and piping for irrigation.

Mr. Jeff Gray, representing the owner, explained that he filed an application with the Planning Board for a special permit. Mr. Gray sought legal advice that he expected to receive in time for the Zoning Board meeting. Because Mr. Gray did not receive the information he asked for a continuance. Mr. Turner, Director of Planning & Development, told the Board that no testimony was heard by the Planning Board and they did not deny the application. Mrs. Webster motioned and Mr. Samsel seconded the motion to continue Case #21-2007 to the April 10, 2007 meeting. Motion passed 5-0.

Mr. Samsel motioned and Mrs. Webster seconded the motion to reverse the order of the next two cases.

Lot #22-L-81, Case #23-2007

Applicant – Thomas Murray & Lynn Pugliese

Owner – Thomas Murray & Lynn Pugliese

Location – 29 West Shore Road

Zone – Residential A

An Appeal of an Administrative Decision is requested from Section(s) 102.3, 401, 405.2, 405.3, 405.5, 406.2, 501, & 702.3 of the Zoning Ordinance. The applicant is appealing Mr. Turner's decision of February 5, 2007.

Mr. Tierney read the case into the record. Attorney David Lefevre, representing the owners, mentioned that the Engineer for this project, Mr. Paul Zarnowski was also present. Attorney Lefevre submitted a plan and presented the case. Attorney Lefevre read into the record a portion of RSA 674:33 paragraph II, *Powers of the Zoning Board of Adjustment. 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*



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administrative official from whom the appeal is taken. Mr. Murray is looking to get a sewage disposal system approved. Before he can get it approved by the EPA, it must be approved by the Town. Mr. Murray submitted the sewage plan to Mr. Turner for approval and Mr. Turner denied the plan (see Mr. Turner's letter dated February 5, 2007). On page two of the February 5, 2007 letter Mr. Turner states: *This office can not approve septic plans for a proposed building that is in violation of the zoning and septic system regulations.* None of the Section numbers listed in the letter 401, 405.2, 405.3, 405.5, 406.2, 501 and 702.3 are germane to approval of a septic system. Mr. Turner stated that according to RSA 676:5 a submittal of the appeal being presented should be filed with the Zoning Board of Adjustment and with the Code Enforcement Officer.

Mr. Turner said that he never received a packet from the applicant and now he is looking at new information. Attorney Lefevre said that Mr. Turner reviewed the plan displayed and did not approve the plan. During construction of the garage, Mr. Murray decided to finish the upstairs space and spoke with Mr. Ron Preble, Building Inspector, regarding any other permits that might be required. Mr. Murray pulled the required permits to install a bathroom but does not have a permit for a septic connection. There is nothing in the zoning ordinances that says you cannot have a bathroom in your garage. There are no zoning laws that are being violated. The second administrative decision dated February 15, 2007 clarifies Mr. Turner's position. In that letter Mr. Turner denies the approval under Section 102.3 of the Regulations Governing Septic Systems. Attorney Lefevre said that where this Administrative Decision is problematic is whether or not the plan meets DES regulations is up to DES. Mr. Turner's job is to see if the plan meets the Town's regulations. The Chairman read Mr. Turner's February 5, 2007 letter into the record. Each point of the February 5, 2007 letter was reviewed with Attorney Lefevre.

Mr. Al Turner, Director of Planning & Development and Code Enforcement Officer, advised the Board that two packages of the appeal should have been submitted. Because Mr. Turner never received the package, he would proceed under protest. Mrs. Fallon asked what new information did Mr. Turner not have the opportunity to review. Mr. Turner said that he doesn't know what was brought and what was not brought to the meeting, but he should have had the opportunity to study anything submitted and should have received the information 10 days in advance of the meeting. Attorney Lefevre stated that Mr. Murray gave the application to Mr. Turner. A lengthy discussion regarding the completeness of the application and the application process took place between the Board Members and Mr. Turner. Mrs. Fallon motioned and Mrs. Webster seconded the motion to proceed with Case #23-2007 over the objections of the Administrative Officer based on the Board's belief that the application presented was complete and there was sufficient amount of time for a review. Motion passed 5-0. The Members reviewed permits and inspection reports in the building file. Mr. Turner said that the Applicant was granted a setback variance and the abutters may be concerned about the setback if they knew the room was not being used only for storage. Mr. Turner said that he looked into this case because of complaints from neighbors.



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If the Zoning Board approves the finishing of the upstairs then the septic plan can be reviewed for approval. Approval from Shoreland Protection and additional variances are needed or the property should be returned to the original approved variance. Even if the Building Inspector approved a permit, it would not be legal, because the Building Inspector cannot overrule the Zoning Board.

Ms. Debbie Drake of 7 Pine Ridge Road spoke in favor of this request.

Attorney Lefevre said that the use is not prohibited and the Shoreland Protection Agency and DES will not review the plan until it has Town approval.

The Chairman closed the public portion of this case. Mr. Samsel motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed 5-0.

Deliberative Session, Case #23-2007

Mr. Tierney motioned and Mrs. Fallon seconded the motion to grant the Appeal of an Administrative Decision based on the fact that the second floor finished condition space with a bathroom, not to be habitable, is not in violation of the November 12, 2002 variance. Motion passed 5-0.

Lot #22-L-81, Case #22-2007

Applicant – Thomas Murray & Lynn Pugliese

Owner – Thomas Murray & Lynn Pugliese

Location – 29 West Shore Road

Zone – Residential A

A Variance is requested from Section(s) 401, 405.2, 405.3, 405.5, 406.2, 406.4, & 702 Appendix A-1 of the Zoning Ordinance to permit the removal of an existing two-bedroom nonconforming primary dwelling structure in its entirety and reconstruction of a three-bedroom primary dwelling structure on an existing nonconforming lot 20-feet from the front setback where 50-feet is required, 7-feet from the side setback where 30-feet is required and 32 feet from the shoreline where 50-feet is required.

Mr. Tierney read the case into the record. Attorney David Lefevre presented the case for the owner. The existing house is 28-feet from the lake; the proposed house will be 15-feet further back from the lake. Attorney Lefevre read the supporting facts into the record. Mr. Tierney read into the record a letter of support from C. Stephen Miers and Mr. Eric Nickerson. Mr. Tierney read into the record a letter of opposition from the Conservation Commission. Mr. Murray showed on the display map areas of mitigation. The Chairman closed the public portion of this case. Mr. Samsel motioned and Mrs. Fallon seconded the motion to go into Deliberative Session. Motion passed 5-0.



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Deliberative Session, Case #22-2007

Mr. Samsel motioned and Mrs. Webster seconded the motion to grant an area variance for Case #22-2007 as requested from Sections 405.2, 405.3, 405.5, 406.2, 406.4 & 702 Appendix A-1 per the plan dated 7/7/06 and labeled Shoreland Impact & Detail Plan. Motion passed 5-0.

On behalf of the Zoning Board Members and the residents of Windham, Mr. Samsel presented a plaque to Mr. Gustafson, to thank him for his eleven years of service to the Zoning Board of Adjustment.

At 1:15 AM on March 14, 2007 Mr. Samsel motioned and Mr. Tierney seconded the motion to continue the remainder of the meeting, two requests for a rehearing of Case #64-2006 and Case #13-2007, request for rehearing, approval of three sets of minutes, other business and mail to Thursday, March 15, 2007 at 7:00 PM. Motion passed 5-0.

At 1:17 AM Mr. Samsel motioned and Mr. Tierney seconded the motion to recess. Motion passed 5-0.

March 15, 2007

Continuation of March 13, 2007 Meeting

Rob Gustafson – Chairman
Mark Samsel – Vice-Chairman
Tony Pellegrini – Secretary (Excused)
Gail Webster – Member (Absent)
Dianna Fallon – Member
Al Souma – Alternate (Excused)
Jim Tierney – Alternate (Excused)
Tom Murray – Alternate

The meeting was reconvened by the Chairman.

Seat Alternates

The Chairman appointed Mr. Murray to replace Mr. Pellegrini.

Mr. Samsel motioned and Mr. Murray seconded the motion to shuffle the agenda; move out of Deliberative Session and Continue with approval of minutes. Motion passed 4-0.



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Approval of Minutes

Mr. Murray motioned and Mrs. Fallon seconded the motion to accept the January 23, 2007 minutes. Motion passed 4-0.

Mr. Samsel motioned and Mr. Murray seconded the motion to accept the February 13, 2007 minutes. Motion passed 4-0.

Mr. Murray motioned and Mr. Samsel seconded the motion to accept the February 27, 2007 minutes. Motion passed 4-0.

Other Business

The members discussed the new application fees and that the by-laws and check list should be updated.

Mail

- Invoice from Attorney Loughman.
- February 27, 2007 letter from Attorney Campbell regarding Lane, 2 Woodvue Road.
- March 5, 2007 letter from Attorney Campbell regarding Lane Variance request.
- March 8, 2007 letter to Mr. & Mrs. Lane from Al Turner regarding Case 17-2007.
- March 8, 2007 letter to Mrs. Kovolyan from Attorney Campbell regarding the Lane Variance request.
- March 9, 2007 letter from Attorney Campbell regarding Lane Variance application.
- March 2007 issued of Town and City.
- March 14, 2007 letter from Jeff Gray regarding a supplement to his Equitable Waiver application for 9 Princeton Street.

Mr. Samsel motioned and Mrs. Fallon seconded the motion to pay the new charges on Invoice #39581 in the amount of \$666.77. Motion passed 4-0.

Mr. Gustafson instructed the secretary to send a letter to Mr. & Mrs. Lane regarding the submittal of an application for an area variance with a copy to Attorney Campbell.



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Deliberative Session

Lot #18-L-1, Case #64-2006 (Originally heard on January 9, 2007 and Continued from 2/13/07)

Applicant – Andrew Lane, Trustee

Owner – A&C Revocable Trust

Location – 2 Woodvue Road

Zone – Residential A

A rehearing is requested regarding the decision made by the Zoning Board of Adjustment on January 9, 2007.

Mr. Gustafson read into the record Attorney Steven Shadallah's letter and rehearing request into the record. After reviewing all twenty points listed in the request Mr. Murray motioned and Mrs. Fallon seconded the motion to deny the rehearing of Case #64-2006 requested by Andrew Lane because no error was found and no new information was submitted. Motion passed. 4-0.

Lot #18-L-1, Case #64-2006 (Originally heard on January 9, 2007 and Continued from 2/13/07)

Applicant – William Schroeder & Al Letizio, Jr.

Owner – A&C Revocable Trust

Location – 2 Woodvue Road

Zone – Residential A

A rehearing is requested regarding the decision made by the Zoning Board of Adjustment on January 9, 2007.

Mr. Gustafson read into the record the Schroeder/Letizio request for a rehearing. After reviewing all 10 points listed in the request Mr. Samsel motioned and Mr. Murray seconded the motion to deny the request for rehearing of Case #64-2006 requested by Schroeder/Letizio because the Board did not hear new evidence and did not find any technical error. Motion passed 3-1. Mrs. Fallon voted against the motion because of the normal high water mark versus the reference line.

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

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.



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Mr. Samsel motioned and Mrs. Fallon seconded the motion to continue Case #13-2007 to the March 27, 2007 meeting. Motion passed 4-0.

At 10:22 PM, March 15, 2007 Mr. Samsel motioned and Mr. Murray seconded the motion to adjourn. Motion passed 5-0.

The next meeting of the Zoning Board of Adjustment is scheduled for March 27, 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.