Wolfeboro Zoning Board of Adjustment
Regular Meeting
November 1, 2010
Minutes

Members Present: Alan Harding, Chairman, Suzanne Ryan, Vice Chairman, Steve McGuire, Clerk, Kathy Barnard, Member, David Booth, Member, Mike Hodder, Alternate, David Senecal, Alternate, Geordy Hutchinson, Alternate and Charlene Seible Alternate

Staff Present: Rob Houseman, Director of Planning & Zoning and Robin Kingston, Administrative Assistant

Alan Harding called this meeting to order at 7:00 PM in the Wolfeboro Public Library Meeting Room. A quorum was present. The procedures for the hearings were reviewed.

TM# 243-43
Case # 09-V-2010
Russell J. & Melissa L. Merka
Variance
Agents: Jim Rines, White Mountain Survey Co., Inc. and Attorney Vanderzanden
Continued Public Hearing

Variance form Article X, Section 175-71 & 72 to permit the operation of a certified community residence for up to three (3) disabled adult individuals recovering from brain injuries and other neurological deficits and disorders. The home will be staffed 24 hours per day by one (1), but no more than two (2) residential rehabilitation therapist(s).

The applicant is seeking a variance for a use the applicant defines as a "certified community residence for up to three disabled adult individuals recovering from brain injuries and other neurological deficits and disorders. The home will be staffed 24 hours per day by one but not more than two rehabilitation therapists".

The use was reviewed by Town Counsel and she found the proposed use, a care facility, is not a use permitted in the district by right or by exception.

Alan Harding made a statement and referenced and read a letter from Attorney Christine Lavallee, NH Legal Assistance dated 10/28/2010. Copies Attached.

Suzanne Ryan added contact was made with Mr. Houseman after which the applicant submitted the application 8/30/2010. A hearing was held on 9/20/2010 and continued to tonight. The Board has proceeded in a timely fashion

Kathy Barnard noted the applicant raised no concern with the continuance.

Questions the Board is seeking answers to continued from the 9/20/2010 hearing as follows:

1. Are there any proposals to alter site beyond what is on the plan to address parking, lighting, security, fencing, or any issue related to site improvements?
2. Are there issues that have not been spoken about that would be addressed by outside staff? i.e. Drug delivery, drug dispensary, drug storage, alarm system to police and fire
3. How do the subdivision covenants affect this application?
4. Federal and State Fair Housing Act issues: Minutes and questions that identify the issues will be forwarded to ZBA Counsel – both sides will provide opine on their position.
5. Commercial use and entity being the applicant vs. Individual (disabled) - ZBA Counsel will be asked to opine on this matter.
6. Question to ZBA Counsel: If this application were to be approved is it subject to Site Plan Review and what conditions and restrictions can be imposed by the Board – What is the Scope and Limits of Conditions that can be placed on this application?
7. ZBA Counsel - Review of cited case law to specifically determine if this case law requires accommodations be provided for specifically "in" the community or can it be located "anywhere" in the community?
8. Is it a resident of the community seeking approval or some other entity?
9. Certifications be provided by the applicant.

There has been a request from Attorney Panciocco asking for a continuance on behalf of the Fairview Estates residents. Her firm was retained to assist with Fair Housing Questions. She noted these questions had not been adequately answered. The additional time would allow her time to review the application. Federal Law is what the Board is dealing with.

Alan Harding noted DHHS Rep.'s who oversee certification process who disabled individuals live in within the community.

Suzanne Ryan asked if the attorney was aware they have a temp certification. The DHHS rules have been received by the Town Planner and questions raised have been answered.

Attorney Panciocco responded that her client's questions do not have answers. The residents have questions and are not familiar with Federal Law and learning about that may alleviate concerns and oppositions.

Steve McGuire asked if there is anything she can point to.

Attorney Panciocco stated it is not unreasonable request as the board requested info.

David Booth commented as for the requirements of licensing, life safety codes and medications are taken care of by other agencies. This does not rise to continuing the hearing.

Alan Harding commented this is new to the Board and residents. The abutters have spent a lot of time and with the more info the Board receives there could be a compromise with reasonable accommodations.

Steve McGuire stated the hearing should continue tonight.

Suzanne Ryan, David Booth, and Kathy Barnard agreed with Steve McGuire.

David Booth asked for the names and phone #'s of the State Contacts. Rob Houseman has been in contact with Mr. Bacon. His superior was also willing to assist to help with supplying information.

Attorney Vanderzanden asked for a copy of the letter of appointment as agent for the Residents of Fairway View Estates.

It was decided by the Board to continue with the hearing.

Chairman Harding was also copied on another memo from Dick Hamilton. This has been acknowledged and is made part of the record.

Rob Houseman addressed question; "are there other places in town where the use of group homes can be accommodated?" In 2009 an Office Intuitional Overlay District was created and a change is 2010 affected all of the residential districts. The issue is what is allowed in the Village Residential District (VRD) versus the balance of the residential zone. The VRD is the most lenient in density for residential homes because they are on sewer and water but it is more restrictive on uses other than residential uses given the compact neighborhoods.

Attorney Vanderzanden addressed the Board and reviewed some of the questions Attorney Panciocco raised and responded to the brief filed by Attorney Haskell. As for the continuance, the Temporary Certification was signed by Mr. Bacon and it is her understanding they are supportive of this application. Additionally there are no residents in the home now and there will not be until this is resolved. This application is limited to 3 disabled individuals with traumatic brain injuries. They are funded under the State of NH Programs; one of the individuals would receive his compensation through Workers Compensation. They are NH residents, capable of caring for themselves in many regards and at least one of them could be capable of working in a sheltered workshop. None of them can or will drive. There will be no more traffic than a home in the neighborhood with 2 driving parents and 1 driving teenager. There will be 3 shifts a day and live as a family. They will work together as a family, sharing chores and care of the home as they are physically and mentally capable of doing. None of them or any subsequent will have behavioral or psychiatric issues. There are no safety concerns. The residents have either had a stroke or head injury. Each of these residents will live here until they die. The facility would replace the resident with another resident who meets the same criteria. The facility cannot expand by its number and it would be for three patients cared for by a maximum of 2 workers at any given time. This facility will be inspected by the state and has to meet all requirements. Drug storage and similar issues are regulated and inspected by the state. The issue of standing relative to Attorney Lavallee has been addressed by numerous courts. The Board

may not refuse standing to someone who represents a disabled applicant. The ordinance does not define a family or a household. The 2010 change excluded the closest common definition to this type of facility which was a Group Home which this type of facility is closest to.

Rob Houseman noted Group Homes are no longer defined and they are not permitted.

Attorney Vanderzanden noted there is no area in Wolfeboro where a home of this type could be located. Relative to Attorney Haskell submission to the Board, she relies heavily on a case - Community Organization for Justice and tries to distinguish it from Travato. This case is apples and oranges in comparison as it was for a Halfway House for former convicts. Former Convicts are specifically excluded under the definition or disabled persons under the Rehabilitation Act of 1982 - Section 4 which defines disabled persons who are entitled to the protections of the Fair Housing Act, the ADA and specific language if the FAA. The is no reasonable accommodation that need to be granted because persons that had engaged in criminal activity, unless they have other qualifying disabilities which impair one or more life activities, do not qualify for treatment under and of those federal status. With the 2010 Amendments having completely excluded Group Homes this Board has an even greater duty to make reasonable accommodation and the burdens upon the Town and Abutters are insignificant compared to the rights of these disabled individuals. This home will bear much less cost to the Town than most because it will yield no children in the schools, no drivers on the roads other than the employees, no greater fire safety and police provisions, and probably less because of the HHS inspections. The tax burden will be small. The property value as pointed out in the brief has been determined by the courts to be a falsilicous argument. With respect to the balance in this case weighs heavily in granting the variance and is probably mandated by the Fair Housing Act (FHA).

Alan Harding noted what constitutes Reasonable Accommodation is a case by case determination according to the Dept. of Justice and noted the FHA does not preempt Zoning Laws.

Attorney Vanderzanden agreed that has always been the opinion of the Dept. of Justice but it does however trump those portions of the local housing law which create either intentional or defacto discrimination under the facts of this case. What you are looking at is a family with 5 members at a maximum. Attorney

Haskell made reference to an application that was denied and not appealed for property located on Warren Sands Road. This was a case where the application for 16 residents in a group home and not a certified family residence, which this application is. The HHS regulations limit the population for this type of residence. The Warren Sands application also had concerns over fire and police road access to the property. These concerns are not applicable in this case. The ordinance has excluded group homes entirely and this is the type of discriminatory ordinance that has been addressed by numerous federal courts across the nation and has been found to be invalid.

Steve McGuire asked about HEM 101001 effective 4/23, the adoptive rules for housing. There is a definition of acquired brain disorder, but no other type of background check on the people as to determine the qualification of the individual. There are when it comes to the contractor but nothing about the resident.

Attorney Vanderzanden explained there is a regulatory definition of their disease. As for screening they cannot even be funded and they must qualify under HHS definition to live in a Certified Community Residence versus a rehabilitation facility which is what Lakeview is. There are certain levels of need a patient has that will entice the fenders to fund the resident is either a nursing home, psych facility, rehab or training facility or this the least restrictive a Certified Community Residence. One of the driving goals if they should live in the least restrictive environment, in which they can be safely provided for and the greater good of both the individuals and the community is served by integrating them as much as possible into the community. How the residents would be qualified would be a matter of the HHS, a recommendation of their present care providers and by her experience, a person gets to a certain level or rehabilitation and is found no longer to be supported at the much more expensive rehab facility. These al all people except for the fact they have no family that can care for them, would be living in the homes of their family members. They are not people who need to be institutionalized.

Steve McGuire asked if there is any screening that refers to these people who suffered brain injury.

Attorney Vanderzanden responded the short answer is yes. It would be in their record and protected under federal law from disclosure.

Steve McGuire asked where the regulations are from the DHHS that state - you have been convicted of theft and we will not place you in a group home.

Attorney Vanderzanden responded they are in the regulations in how a community residence can be certified and what characteristics and demographics of the individuals provided for are. HEM 1000 is not applicable to this. HEM 1010 she believes relates to a higher level of need.

Steve McGuire reiterated that there are clear standards for the persons they hire however he cannot find any standard for the resident other than having a brain injury.

Sue Bartlett, Lakeview Rehab addressed the Board and explained the residents recommended have been in treatment at Lakeview. Their exam's includes many things. An explanation of their assessment and how they arrive at that standard was reviewed. It is only with the recommendations of the professionals these people would be placed.

Steve McGuire stated he understands that but how do these professionals arrive at that standard? Do they have to get a B, A, or A+? He has read through and understands how they got their brain injury but what standard do they have to meet to be released into this group home?

Sue Bartlett responded it is inherent to the clinical evaluation process in where safety, risk to the individual and the community are all looked at. These are physicians making their judgment based on the persons overall profile. It is not a checkbox questionnaire; it is a lengthy clinical process through clinical treatment. This takes at least 30 days and in many cases several months.

Steve McGuire asked again that other than their signature on the document that says we think this person is ok to live there, there is nothing to be pointed to this is the standard they have to meet.

Attorney Vanderzanden responded that according to the regulation there can be no criminal or violent behavior. It is not in HEM 1000 it is in the materials presented last time and she does not have a copy with her. If you look at the

completed evaluation, there are historical records, evaluation of the client's behavior, etc.

Steve McGuire stated again he does not see standards in writing.

Attorney Vanderzanden responded like any health care evaluation, it is made by the individuals licensed by the State of NH and their area of expertise. These people have to be ambulatory and have no violent behaviors as a result of the injury. There is a lengthy list of criteria before the final determination is made with a final insurance that if a facility is found to accept clients that are unsuitable, it falls to the State. This is what the inspections are about. When the State agrees to fund, they have looked at the evaluations of the entire team that has been dedicated to making a decision about the appropriate, least restrictive, most integrated place for this individual. The State either gives approval or not.

Suzanne Ryan noted the FHA affords no protection to what kind of individuals. There is a list of what types of people are not protected.

David Booth asked who are the disabled that we are talking about that might be harmed, if we are to make a negative decision. The applicant is not disabled. He wants to sell the property to his father or his father's business, who is not disabled. Who are we harming? Are there people that are going to be disadvantaged, they are housed now? You are asking for a blanket approval to house brain damaged folks to be named in the future. It seems vague, like a board granting a variance for a business, but we do not know what business will go into a place. We do not do those kinds of things. We are granting a variance for someone who wants to sell their house. Who are we harming?

Attorney Vanderzanden replied you are harming a Class of People which have been identified by State Federal law. These people have been deemed capable of living in the community and are handicap as defined under the FHA, under the ADA Rehabilitation Act 1977 Section 504. Identification of the specific individuals has been made in this case. They can be identified by initials. The standing arguments which have been made in federal courts for a long time have found uniformly that an appropriate representative of those people can either be the individual, their guardian, counsel for that individual, as Attorney Lavallee is, or an applicant intending to provide services to them either a corporate entity, an LLC, a for profit or a not for profit organization. The individual you least want to hear from

is the HUD. That is the next step in these reasonable accommodation inquiries. An offer had been made to supply the Board with the cases cited in her brief. She did not receive a response to that offer so she did not bring the cases tonight. She will be happy to supply them electronically.

Rob Houseman noted Attorney Vanderzanden's office has already sent them.

Suzanne Ryan asked if the email of October 8th from Attorney Vanderzanden is in the file so the abutters could read it.

Steve McGuire noted that Rob Houseman just supplied him with information and the selected individuals must meet the standard of HEP 804 -4:12. License Application Submission.

The qualifications were read by Rob Houseman.

Charlene Seible asked for clarification between what Rob Housemen stated about the HEP 804-4-12 and Attorney Vanderzanden stated about a possible conviction of a marijuana charge at the age of 18 and an injury occurring later in life that may not disqualify them from being placed in this type of home.

Attorney Vanderzanden explained it is conceivable that someone may have had a marijuana conviction for possession at age 18 with no other criminal behavior since, and then suffers an injury which disables them at age 40 - 45. The conviction has no relationship to their current disability or behaviors. This is not a sex offender. They would not be able to live in this residence under state regulations.

Attorney Christine Lavalle representing one of the identified individual's met with the individual and explained he wants to live in the home. She is a housing attorney with NH Legal Assistance.

Suzanne Ryan asked if she was going to peruse the issue of the Board not acting in a timely manner.

Attorney Lavallee responded she cannot answer what action she will take right now.

Attorney Panciocco asked if there are anticipated changes expected to the exterior of the building.

Attorney Vanderzanden responded there are no plans for changes.

Attorney Panciocco noted it requires a 2/3rds vote of the association for exterior changes. She asked what happens if the property is sold and serves a different population?

Suzanne Ryan stated this would be for 3 individuals and any changes would need approval.

Attorney Panciocco asked what if it served a different population. What about drug storage of controlled substances – if property changes hands and the population changes what happens about with the drugs. If the approval is denied it harms a Class of people. The offending parties are minding their own business and they are now the ones violating fair housing laws (abutters). Her clients see this as being thrust upon them. There are restrictions in place when the property in the neighborhood was purchased. They cannot violate any fair housing laws but they cannot be ignored either. He clients observe all restrictions agreed and if approved this owner should adhere to all these restrictions.

Attorney Haskell addressed the Board. The issue is a variance and how do they satisfy hardship? The property is no different from others. The Association is concerned with the change in their community. The use is going to change. There have been opinions of traffic and use and employees are a concern. The criteria for residents is not screening criteria. Employees would need to provide a list of their convictions but it does not say they will not be allowed in the home. Where is the regulation that states a sex offender cannot live in the home? There is no traffic study. Care of the home will be done by the resident, plowing and yard work. There are covenants and restrictions and the owners who own it have to abide by the restrictions. Attorney Vanderzanden previously stated this is not a group home but tonight she said it is most like a group home so the criteria should apply and there is no criteria. Is it a group home or not. Can it change? Reasonable accommodations – Travato is apples and oranges to this situation. They are only asking to put this home where they want to put it. The Merka's own the home subject to the restrictions. They have made changes that did not abide by the rules so what is to say they are going to abide by the criteria put in place. The Association's world is going to change. All the employees driving will impact the association. The loss of property values is an issue. Three brokers have given that

opinion. In terms of local housing law that creates intentional or defacto discrimination, granting or denying a variance is not evidence of that. If the Use impacts the residents, the applicant has no hardship. The impact to abutters and residents in terms of the Fair application denied is anomalous to this application in that those impacted by that home being there, raised the issues that are being raised here; traffic effect to the road and neighborhood. Screening is a concern as there has been no information provided. If there is no basis, fact or authority who you can point to, then it is just opinion which can change at any time. This is also a reason they are looking for a continuance. If the state finds something unsuitable, this would be after the fact. There is a concern that the individual identified to move into this home was identified for the purpose of this application. Just naming someone so they have standing is a concern.

David Booth asked if Attorney Haskell understands the theory Reasonable Accommodation can override negative variance approval. i.e. Substantial Justice - can't the board come back and say even though it has not been met, based on the overall facts and law, reasonable accommodation can be made and we will ignore those negatives on variance criteria.

Attorney Haskell responded she does not think reasonable accommodation is asking for from something that is subjective or a theory. The facts are the facts; if substantial justice has not been met then substantial justice has not been met. Granting the variance is not a reasonable accommodation. It is waiving the Zoning Ordinance because if you apply the variance then they would not get approved. A reasonable accommodation is providing the ability to put ramps all over the house if exterior changes are not permitted in the Zoning Ordinance. A reasonable accommodation would be as in the Travto Case permitting a drive to the front door because drives were not permitted in the front yard according to the zoning ordinance. Reasonable accommodations are specific requests for relief. The applicant is asking for blanket relief.

David Booth responded in all the Federal Rules they are reading local zoning cannot frustrate the in spirit and intent the of these disability requirements for housing. Local Zoning has variance criteria and if they fail on a couple of them, is she saying that is it?

Attorney Haskell responded not when the can go to institutional overlay district and apply for residence. The criteria is different and the use is allowed even

though a group home is not listed. They can apply for a variance and in that district the criteria is not the same.

Rob Houseman clarified that the original site quoted was incorrect. It is HEP 81406 - C .

Alan Harding noted Region Ten Client Management Inc. vs. Town of Hampstead, decided December 26, 1980. The NH State Supreme Court Decision noted that what David Booth. The decision was read. In an additional statement the judge suggested "The State may wish to be cooperative with municipalities by consulting with them so that proper planning for town services such as transportation and fire protection may occur. The do not want the state policy be frustrated by local zoning and also suggest the municipalities talk with the state." Maybe they are suggesting compromise.

Fred Tedeschi - Direct abutter to 15 Eagle Trace made a statement which will be attached to these minutes as requested by the Board. Photos were submitted of what was described as a 1.5 story shack which is the only thing you can see from the road, that Mr. Tedeschi referred to.

Representative from Lakeview responded that it is located in Farmington.

Richard Hamilton - 10 Eagle Trace commented he is elderly. There are between 25 & 30 elderly in the neighborhood. They should get some recognition in this. He pled with the Board for continuation. This application is designed to bail out a personal asset converted to a cooperate asset. There is transparency although this is not the Boards issue. The court proceedings heard about do not cover the unique situation this property is in. The son of the owner is transferring it. There is no hardship on the applicant and the applicant will gain and Town will lose. Is the Board really sure what they are going to vote on? When reading the application and when he reads the file 5 years from now, what was approved. When the application is read years from now it could be anyone in there, a criminal, a sexual deviant or anyone. Are these the kind of people you want to put in housing near housing populated by young and old people? Under the employee what is the criteria? We are a town sensitive to handicap issues and the town has worked hard to correct its past failed performance. These people are not going to drive, they are going to walk. Clipper Drive and Clark Road are busy. Sysco food trucks come down the road to deliver to Wolfeboro Bay Rehab. There is additional traffic with

shift changes. There is Brewster Beach as well as McKinney Park. This application is the business of the Merka's and Lakeview. Renovations were done before the Board view the property. The Board also questioned advertisements. The Board has now caused undue hardship in acquiring the information they need and the Town needs? That is not a legitimate suggestion. This house has been vacant for 2-3 years. The home in Farmington is totally different. The People in the town do not know what it does or where it is because they were lacking in the application process. This is stealth and this seems to be a pattern. If approved, it will shred the Zoning Ordinance and Master Plan. Provisions were made to deal with this type of use and he remembers working on the ordinance and hearing the words if we don't provide it, it will be forced upon it. With the number of homes in Wolfeboro that people need or want to sell, could the all be community residences? This is not what we want as a variance runs with the land forever. The regulations are changing daily. This property could be sold many times and who knows what would the use would be. Do not allow a commercial use in a residential district and urged a continuance to give everyone the opportunity to understand what is happening.

Melissa Hanson, former Fairway View Estates resident commented there is no guarantee property values will not diminish. If they can offer this guarantee, have them so. How would the Board members feel about this type of facility being located next to them?

Jen Todesco, Tuftonboro resident noted her husband was an 8 year survivor of traumatic brain injury and she has dealt with the DHHS and urged the Board not to locate this facility there. She begged the Board to reconsider options and seek legal advice.

Jim Rines, WMSC, Agent for the Applicant, as a licensed professional engineer in the State of NH and having completed may traffic studies spoke about traffic generation. The Institute of Transportation Engineer - ITE- notes the average household generates 10 trips per day. A vehicle going out and one coming back constitutes 1 trip. There will be three shifts with a maximum of 2 persons on each shift. This equals 6 trips per day which is less than a single family home generates. ITE focuses on averages. Attorney Haskell had been seeking clarification or some sort of evidence and he is offering that evidence now. Traffic will not be greater. As a resident of Center Ossipee for 52 years he can verify the stockade fence on the side of the VIC House (a much larger facility) was installed when the ball field was there at the school before a chain link fence was put around it so the balls

would not go over. The proximity to commercial operations is no closer than commercial operations at this location; the Clipper Home and Brewster which generate many trips. Anyone could purchase this home such as a criminal or sexual deviant.

Dick Hamilton noted a sexual deviant could buy the house and would be subject to their covenants.

Attorney Lavallee noted there has been good advice and the Board should seek a continuance and she will not act on her previous letter.

Attorney Vanderzanden addressed the Board again. Under standing there is a very long line of cases for any person who is aggrieved under the FHA. This includes the present and contemplated property owner and relatives of the persons who might be suffering discrimination. Further it is not reasonable accommodation for a town to say where the disabled person can live. The disabled person has a right to choose to live in a place of their choosing, the same as all the rest of us do. That is the core of the statutory intent. The Case cited in their brief, referring to whether another parcel of land could ever considered reasonable accommodation under the FHA is doubtful. That is the holding of City of Chicago Heights 161 F2nd @835. The case was briefly reviewed. The statute itself entitled 42 USC, Section 3604 sub.f (3)(B) dictates that a handicap individual must be allowed to enjoy a particular dwelling not just some dwelling, somewhere in the town. Ms Haskell possibly misunderstood when, she, Attorney Vanderzanden analogized this facility to a group home. The Group Home definition is the closet the Ordinance ever came to a definition, but group homes are no longer allowed. Courts in other states with homes similar to this, with even up to 8 people, have held that the character of these facilities is that of a family. MI and PA have also held that a family residence such as this have the generic characteristics of a family, and therefore may fit within the ordinance of single family dwellings. The Board has correctly gotten its arms around the issue of the applicant meeting the hardship of requirements. This applicant does not have to show a hardship. All of the arguments the Board has heard are discriminatory. They are the type of arguments that have been rejected by all courts of this nation. The argument basically turns on the fact these people are disabled and must have caregivers in order to allow them to live in a family setting. This is their disability - The must have caregivers and must live with others. If you discriminate against them by denying this variance, the Board is performing exactly the act that has been

rejected by every court that has been posed this question. Arguments about drugs, safety and all the rest of it are the blanket assumptions about a person with disabilities that are totally unsupported in the record. If she misquoted a citation in her presentation she will be happy to supplement after the close of the hearing. It was suggested the Board allow a limited continuance and let the record be supplemented for any questions the Board feels have been unanswered.

Alan Harding asked referencing the September 20, 2010 Minutes - Page 7, where Attorney Vanderzanden was speaking about reasonable accommodation as follows: The Court found, "The reasonable accommodation requirement of the FHAA clearly can apply to zoning ordinances. "Courts interpreting the reasonable accommodation provision of the [FHAA] have ruled that municipalities must change, waive, or make exceptions in their zoning rules to afford people with disabilities". Case citation for the Travato Case is 992 F. Supp. 493 - First Circuit Court of Appeal - US NH - Upheld on appeal. Alan Harding asked relative to the law cited, does it require a municipality to make available through the zoning ordinances the type of business the applicant wants to run. Attorney Vanderzanden yes. Alan Harding then stated we will leave it at that.

Attorney Vanderzanden responded the cases addressed the distinction whether there is cooperate applicant versus and individual applicant; The courts have said they cannot compel the provider of service to do so for free, at a loss or a minimal gain such there is interest in provide this kind of integrated housing to families. That is the correct answer.

Alan Harding responded he is talking about the answer that the Town of Wolfeboro provides reasonable accommodation and Attorney Vanderzanden and responded yes. Alan Harding noted that the town does provide for this in the institutional overlay.

Attorney Vanderzanden responded she must have misunderstood his question. She does not believe the Town meets reasonable accommodation. These individuals have a right to live on Eagle Trace and not just a commercial district or a ghetto the Town sets aside for them.

Alan Harding explained his question was, "is reasonable accommodation made available in Wolfeboro?

Attorney Vanderzanden responded that it is not.

Alan Harding responded he misunderstood her answer.

Rob Houseman noted the Board has received a substantial amount of info and it has been strongly encouraged to seek counsel. He does not feel the Board is at a point where they can make a decision. A continuance was suggested in order to allow time for outstanding information to be received and give the Board time to digest the info given this evening as well as any new information as a result of this hearing. The meeting could be held the 15th of November in the Library Meeting Room.

David Booth requested a Brief from both parties. If the majority of the Board for purely objective reasons finds that one or more of the variance criteria are not met, how then, if we vote and deny the request because one or more of the criteria are not met, where do we go from there? Does reasonable accommodation come into play? How can you grant it if you have to deny it?

Suzanne Ryan suggested they set aside the Zoning Overlay question to the Board's attorney and the change made in 2010.

Rob Houseman explained that "Group Home" was a definition and existed in the Zoning Ordinance but was never a permitted use. The issue she is talking about is something the Board's attorney needs to address with the Board.

Rob Houseman asked for the issues the applicant's and abutter's attorneys need to address.

Steve McGuire suggested NH Legal Assistance, Attorney Christine Lavallee should also submit a brief and asked if the public hearing should be closed and only open it to receive these 3 documents.

Rob Houseman answered no because once received there needs to be an opportunity for comments on the issues. It can be narrowly opened to focus on these issues. The end result is a decision by this Board. At some point the hearing will close. The Board was encouraged to consider going through a process in which the merits are deliberated on and then assign a Board member to draft a motion to be reviewed by counsel and then reconvene to act on that motion.

Attorney Vanderzanden asked for clarification on the motion to be submitted. Counsel will want to copy it and respond to it.

Rob Houseman explained the Board would deliberate on the merits of the case, go through the process but not entertain a motion. Set the course based on the feel of the Board and then assign the duty of drafting a motion to go to attorney. This can be done on November 15th with the Briefs from the three attorneys submitted by the 8th of November.

It was moved by Suzanne Ryan and seconded by Kathy Barnard to continue Case # 09-V-2010 to November 15 2010 in the Wolfeboro Public Library Meeting Room 7:00PM with the Attorneys representing abutters, applicant and potential resident submitting briefs by November 8th. All members voted in favor. The motion passed.

TM# 205-40/21
Case # 11-V-2010
Applicant: Amy Knapp
Variance

Steve McGuire read the public and abutter notice for the record. A site visit was held at approximately 4:15 PM.

The applicant was not present due to the length of the continued hearing and the information the Board had given her about being present about 7:20 PM.

It was moved by David Booth that based on the conditions this evening, and the instructions that we gave her previously this evening, the Board continue the Public Hearing for Case # 11-V-2010 to December 6, 2010 in the Wolfeboro Public Library Meeting Room 7:00PM. Kathy Barnard seconded the motion. All members voted in favor.

Motions for Rehearing:

AMK Revocable Trust of 2009
Case # 06-AAD-10
Decision of July 19, 2010

Received on October 8, 2010

Alan Harding noted the Motion for Rehearing was not timely.

It was moved by Steve McGuire to deny rehearing consideration of the AMK Revocable Trust based on the timeliness of their request for a rehearing. Kathy Barnard seconded the motion. Alan Harding, Steve McGuire, Kathy Barnard and Suzanne Ryan voted in favor of the motion. David Booth abstained. The motion passed.

Applicant: Thomas R. & Stacy B. Miller & Janice Boyce
Case # 7-V-2010
Decision of September 20, 2010
Received on October 19, 2010

David Booth stepped down. Charlene Seible seated.

Rob Houseman reviewed the process in which the Board looks at cases where the violation is found after the fact. The Board may wish to be view them as if they were vacant today. There's is some risk as if viewed as an action other than a clean slate it being perceived as punitive.

Suzanne Ryan asked for something in writing on that and also self imposed hardship.

Rob Houseman explained that if you can view it as a clean slate as it is not there.

Suzanne Ryan responded that when you view it, and it is there, it is self imposed. Someone puts a potting shed somewhere that does not meet the criteria, you do not penalize them for not getting a building a permit. You say, they put is there themselves and brought the hardship on themselves.

Rob Houseman explained you do not view it as an existing structure. The Board only rules on the merits of the case. Would you permit this if it were before the fact.

Alan Harding commented that he would be in favor of rehearing this.

Steve McGuire responded if that is the case, that it is already there, we are supposed to disregard it? All of these run contrary to the public interest because all we have is guidelines and suggestions on what setbacks can be. How do you take the " I am going to build it and then ask for forgiveness" away?

Rob Houseman responded if the Board viewed it as if the structure were not there and the Board was being asked for a boundary line adjustment that would include a variance for one of the setbacks that would allow for the construction of said shed, then B: goes through the criteria and if the application meets the criteria, the Board approves it. If it does not meet the criteria then it does not get approved. The perspective in the Boyce Miller case is the issue is there new evidence that has come to light or was there an error. From the Miller perspective, the Boards action viewed the subject as a whole - Communal property, meaning the shed could be picked up and moved to Boyce's property but it is Miller's property.

Steve McGuire noted that Boyce, Miller and Terkelson all discussed where it could be located and the communal group could have found another place to put it.

Charlene Seible responded there are two perceptions she reads from what was submitted: In the motion for rehearing #4. Denial was based on ability to relocate the shed. - That was their perception. They also stated in a letter that they wrote on October 19th, 2nd sentence of the first paragraph - However we left the hearing with a definite sense that underlying the denial was the fact that the shed was built without a permit. If I can remind everyone the two criteria on which we based our denial was # 3 & #5,. The only time the fact they had not gotten a building permit was discussed was under #2 and we did not even base our decision of the Spirit f The Ordinance condition which was when the discussion took place about them not getting a building permit. So, she does not feel that we made an error in judgment and I believe we looked at all the evidence and there were other places where this shed could have been located in the grand scheme of things. As presented to us by the applicants agent and because it's a communal piece of equipment that needed a communal place to be store and the applicants agent volunteered it could have gone to other places. She does not think that left us with any recourse that hey, you haven't met #3 and you haven't met #5, so she is not understanding the need for a rehearing unless we just want to go on the record with basically what I just said, which I guess is already on the record now. So I do not know. I understand what you are saying that it is important to pretend it's not

there but at the same time, especially with #5 it's kind of hard to pretend it's not there.

Alan Harding commented there seems to be at pattern with contractors as developed with the Knapp case. Rob Houseman has mentioned he is going to begin some type of outreach program to educate them.

The Board felt this was a good idea as there seems to be a lot of information.

Rob Houseman explained the confusion, what must comply with building code, not what requires a building permit. A building permit does many things it ensures setback, but a structure less than 200 sq. ft. are exempt from building code. We are beginning to do an Outreach program on a range of issues. This one has been added to it based on the two recent cases.

Charlene Seible stated one thing she was struck by when she reviewed the DVD of the meeting, was under the discussion of Substantial Justice # 3, one comment Steve McGuire, made "there is a lot of area there and questioned if this building should exist at all. There are garages the snow blowers and equipment could be stored in. I just think it is overcrowding". This goes back to her discussion about 175.62 which is the purpose of the Shorefront Residential Ordinance. That to me was an important aspect of substantial justice because had it gone before the Planning Board perhaps it would not have been allowed.

Steve McGuire commented had it come here first he does not think he would have voted for it in that location.

Suzanne Ryan commented she did not vote to be punitive, because they did not get a building permit and there are many reasons why people don't. They could get information from the Town as well. So her reasons were based on the criteria and also Charlene gave great weight to the Shoreland Protection Act and density and all those sorts of things.

Rob Houseman stated the purpose of his comments were not to try the case tonight but rather to express the issue when reviewing these view them as vacant and apply the standards as if it weren't there already. The issue tonight is was there an error or new evidence that has come to light.

Kathy Barnard commented she voted in favor of granting the variance. When they were considering the application, they were looking at a site off the subject property and this was point made in their Motion for Rehearing and she felt this is a legitimate issue.

It was moved by Suzanne Ryan not to rehear based on the ZBA did not make any technical error and the applicant did not produce any new evidence that was not available to them or us at the time of the hearing. Steve McGuire seconded the motion. Steve McGuire, Charlene Seible and Suzanne Ryan voted in favor of the motion. Kathy Barnard and Alan Harding voted in opposition. The motion passed.

Consideration of Minutes:

September 20, 2010

Charlene Seible has submitted amendments to the minutes.

It was moved by Suzanne Ryan to approve the minutes as amended with the printout Charlene provided to us. Kathy Barnard seconded the motion. All members voted in favor. The motion passed.

July 19, 2010

The board noted the July 19th Minutes were missing the even # pages. Staff explained the minutes were filed in the book in the Planning Office and copies were made from that.

Board members obtained the minutes from the website.

Charlene Seible added the July 19, 2010 that appeared in the September 20th packet was complete. Somehow when they got to the Town Clerk they were incomplete.

Suzanne Ryan commented staff forwards them electronically to the Town Clerk.

Charlene Seible has submitted amendments to the minutes.

Alan Harding amended the minutes on page 3, 3rd paragraph from the bottom: Chairman Harding responded to Mr. Kimball's assertions that Zoning Board Decisions are negative and he, Alan Harding explained the Board tries to be fair and impartial and does their homework. Mr. Kimball asserted.

Charlene Seibel also submitted a copy of an NH Town and City Article Index on the role of Alternate Members to Land Use Boards, which was discussed that the July meeting.

It was moved by Suzanne Ryan to accept the minutes as corrected. Kathy Barnard seconded the motion. All members voted in favor. The motion passed.

Minutes Discussion:

Alan Harding noted discussion of changes to the minute procedures. Changes are made but they do not appear as amended minutes; they are the original plus the amendments. Is there any way to incorporate with colored ink?

Charlene Sieble said the Board could do what the Selectmen do now and include a copy of the approved minutes with corrections incorporated. The School Board does it all the time.

Rob Houseman responded we work at the Boards pleasure but this will come with an added cost. The statute did not envision a process like what the Selectmen do. They label a version draft and there is no such thing as draft minutes.

Suzanne Ryan asked if we could take the amendments and staple them to the approved minutes as amended so they are there and you do not have to keep going forward.

Charlene Seible said that is more paper and more trouble when you can take the corrections and incorporate them into the approved minutes with included amendments.

Rob Houseman stated he understands the concern and he talk to those who know better than he about minutes.

Suzanne Ryan asked why can't we get them electronically? They have to be filed electronically from staff when they are sent over to Pat Waterman.

Staff responded the minutes are not given to the Town Clerk electronically. The original copy with her signature on them is what is filed. They are the official record. The minutes do not have to be posted to the website within 5 days. When Terry uploads them to the website they can be forwarded to the rest of the Board.

Suzanne Ryan requested that a hard copy not be made for the packets to save time, energy, and paper.

Rob Houseman responded to the Chairman if the Board does not want a hard copy in their packet as a collective body and they want them electronically instead, when they are posted to the website, staff can accommodate them.

Charlene Seible stated the secretary for the School Board emails the minutes to all the Board Members and they have the opportunity to see them ahead of time and make some revisions.

Kathy Barnard stated that any changes need to be made in public.

Charlene Seible said but they come to the public meeting for discussion.

Staff will send them electronically as a PDF and remove them from the packet.

Alan Harding thanked the Board members for being prepared for the meeting tonight.

There being no further business, this meeting was adjourned at 10:20 PM.

Respectfully Submitted,

Robin Kingston
Administrative Assistant

attachments

As Chairman of the Wolfeboro Zoning Board of Adjustment I was copied on a letter dated October 28, 2010 to Robert T. Houseman, Director of Planning and Development for the Town of Wolfeboro Re Case # 09-V-2010. The letter was signed by Christine Lavallee, Esq , Housing Justice Project Director for New Hampshire Legal Assistance.

In this letter Atty Lavalee alleges that her "client has been harmed by the town's actions that have delayed the opening of this group home; actions that implicate violations of both state and federal discrimination laws and constitutional protections". The truth is that neither the town nor the ZBA have acted to delay the opening of this facility.

The ZBA has held one public hearing on the variance application submitted by the applicants Mr. and Mrs. Russell J. Merka. That public hearing on September 20, 2010, 41 days ago, was continued to obtain additional information from the applicant and to carefully review the voluminous material presented to the ZBA, for the first time on the evening of the September 20, 2010 hearing.

The ZBA has a profound responsibility to exercise due diligence in in determining whether the proposed facility will be housing disabled individuals and whether the accommodations sought by the applicant are reasonable. The ZBA has exercised that diligence in a timely and thoughtful manner, at all times evaluating this application under the law.

Furthermore, Atty. Lavalee has not been authorized to serve as agent for the applicants, is not an abutter and therefore has no standing in this matter.

W. Alan Harding, Chairman, Wolfeboro ZBA
November 1, 2010

NEW HAMPSHIRE LEGAL ASSISTANCE

Working for Equal Justice Since 1971

www.nhla.org

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Administration
117 North State Street
Concord, NH 03301
603-224-4107
Fax: 603-224-2053

TTY: 1-800-634-8989

COPY

October 28, 2010

Via email (wolftwnplnr@metrocast.net)
And First Class Mail
Robert T. Houseman
Director of Planning and Development
Town of Wolfeboro
P.O. Box 629
Wolfeboro, NH 03894

Re: Case No. 09-V-2010

Dear Mr. Houseman:

I am writing to inform the Town of Wolfeboro that New Hampshire Legal Assistance represents a young man, J.M., who is scheduled to move into the proposed certified community residence at 15 Eagle Trace Road. Our client has been harmed by the town's actions that have delayed the opening of this group home; actions that implicate violations of both state and federal discrimination laws and constitutional protections.

I will be in attendance at the Wolfeboro Zoning Board hearing this coming Monday, November 1st to monitor the progress of this variance request on behalf of our client. Please do not hesitate to contact me if you have any questions.

Sincerely,

Christine Lavallee, Esq.
Housing Justice Project Director

Cc: Alan Harding, Chairman, Wolfeboro ZBA (First Class Mail only)
Edwinna C. Vanderzanden, Esq.(email and FCM)
Jennifer G. Haskell, Esq.(email and FCM)

Robert Houseman

From: Charlene Seibel [whatazoo2@gmail.com]
Sent: Monday, November 01, 2010 2:38 PM
To: Robert Houseman
Subject: Corrections to Minutes
Attachments: New Hampshire Town and City.pdf

Dear Rob:

Here are my corrections to the minutes of both 19 July 2010 and 20 Sept 2010.

19 July 2010:

1. Pages 2, 3, 4, 8: "Ms. Seibel," not "Mrs. Seibel."
2. Page 1, line 2 of "Paul Kimball, agent for" paragraph: "history," not "History."
3. Same paragraph, line 4: "an error," not "and error."
4. Page 2, line 1 of "Mr. Kimball stated if" paragraph: "have," not "has."
5. Page 3, line 3 of "Mr. Kimball stated 10 years" paragraph: "pane," not "pain."
6. Page 3, line 1 of "Ms. Cline stated it is" paragraph: "lose," not "loose."
7. Page 5, line 2 of "Carl Gehring of" paragraph: "non-biased," not "non-bias."
8. Same paragraph, line 3: "a request from," not "a the request for."
9. Next paragraph: "non-biased," not "non bias."
10. Page 6, line 2: "why," not "whey."
11. Page 8: After "Vice-Chairman Ryan appointed Michael Hodder to sit for Steve McGuire and Dave Senecal for Alan Harding," delete the period and insert the following: ",and invited Charlene Seibel to sit as the fifth member of the board."
12. Page 8: After "Ms. Seibel stated she had some corrections she would like to make to the minutes," insert the following paragraph: "Mr. Senecal objected to Ms. Seibel's participation because she was not present at the June 7 meeting. After a brief discussion, Ms. Seibel voluntarily left the table."
13. Page 8: "Vice-Chairman Ryan noted" paragraph: delete "noted she was not in attendance of the meeting, but would present the changes for her", and replace with "stated that she would present Ms. Seibel's corrections to the minutes for her."
14. **Please attach to these minutes a copy of the attachment to this email.**

20 Sept 2010 (I have only substantive corrections to these minutes):

1. Page 4, item 2, line 1: Insert period after "observed" and delete remainder of that sentence and the following sentence. Replace with: "Steve McGuire stated that building without a building permit is not applying the spirit of the ordinance. With a permit it would have triggered a number of events, including 'contrary to the public interest' and over-crowding of the lakefront."
2. Page 4, item 2, line 7: After sentence ending with "permit," insert the following: "Charlene Seibel asked which ordinance are we talking about? It is section 175:62, to maintain the integrity of existing shore front residential developments, but yet here is a structure that was erected and one of the things the shore front ordinance seeks to prevent is a proliferation of buildings."
3. Page 4, item 3, line 5: delete entire line. Replace with: "that it would be better to have the structure located on a small portion of the substantial, impermeable asphalt area and it would still be accessible to everyone."
4. Page 4, item 3, line 6: after "area there," insert "for this to be placed."
5. Page 4, item 3, line 7: after "garages," insert "and other outbuildings."
6. Page 4, item 5, line 3: delete entire line. Replace with: "configurations all over the place along Sewall Road. We've had to decide many of them, and boundary line adjustments along Sewall Road are nothing new. He does not know if this property is truly special in that regard."

7. Page 7, paragraph 3, line 4: delete "992."
8. Page 7, paragraph 5, line 6: delete "A" after "FHA."
9. Page 8, paragraph 3, line 1: delete "that would be correct." Insert "yes."

That is all I have at this point. I trust that other ZBA members and alternates will bring forward their corrections tonight.

Please forward these corrections to the ZBA members and alternates ASAP for their consideration prior to tonight's ZBA meeting? Thank you. Also, my printer is acting up, so please bring a few hard copies of this email for the ZBA tonight? (I'll bring a hard copy of the attachment.) Again, thank you.

Regards,
Charlene

New Hampshire Town and City Article Index

What is the Role of Alternate Land Use Board Members?

New Hampshire Town and City, July/August 2007

By C. Christine Fillmore, Esq.

Alternate members are the unsung heroes of local land use boards. Both planning boards and zoning boards of adjustment (ZBAs) may be authorized to appoint standing "pools" of up to five alternate members for each board. RSA 673:6. Alternates are vital to the proper functioning of these boards because conflicts of interest often disqualify one or more members from participating in an application or appeal. While the process of appointing alternate members is fairly straightforward, many questions arise regarding the legal role of alternates and how they may be used most effectively.

Q: Is there really a difference between alternate members and regular members?
A: Yes, there is an important difference. If land use boards were baseball teams, regular members would be the team's starters; alternates would be the relief pitchers in the bullpen and the pinch hitters and runners in the dugout waiting to be called into the game.

The terms "members" and "alternate members" are not used interchangeably. For instance, different sections of the law explain how to choose "members" and how to choose "alternate members." See RSA 673:2 (selecting planning board members); RSA 673:3 (selecting ZBA members); RSA 673:6 (appointment of alternate members). There are also different terms of office for "members" and "alternate members." See RSA 674:5 (terms of land use board members); RSA 673:6 (terms of alternate members).

This distinction is important because in New Hampshire, towns and cities can only act when there is a statute granting them the power to do so. "Towns only have such powers as are expressly granted to them by the legislature and such as are necessarily implied or incidental thereto." *Girard v. Allenstown*, 121 N.H. 268 (1981). This means that unless a statute specifically grants alternate members the authority to act as full board members, we must conclude that they do not have this authority. No statute allows alternate members to participate in any matter as a board member unless and until they have been "designated" by the board's chair to sit in the place of a member who is absent or disqualified. RSA 673:11. In addition, no statute permits alternate members to be appointed as chairman or other officer of the board; those offices may only be held by regular members. RSA 673:8.

Q: How are alternates "designated" to act, and why does it matter?
A: Alternates are "appointed" to be- come part of a standing pool that is available to be called into service when needed. Just as relief pitchers do not enter the baseball game until the starting pitcher has been pulled, alternates do not participate as members of a land use board until the chair "designates" them to do so. Whenever a regular member of a planning board or a ZBA is absent or is disqualified from participating in a specific matter due to a

conflict of interest, the chair of that board will designate an alternate to sit in that regular member's place. RSA 673:11. At this point, the alternate has authority to act as a full board member for the duration of their "designation." Depending upon the situation, an alternate may be designated to sit in place of a member for an entire meeting, or for one specific matter (which may extend over several meetings or hearings).

Q: Should alternates participate in discussion and voting all the time?
A: No. Unless and until they are designated to sit in place of an absent or disqualified member, alternate members have no authority to participate as board members. During a hearing or other formal proceeding involving an applicant, alternates should not participate in board deliberations, ask direct questions of applicants, or vote on applications or appeals. It is important to avoid confusion about who is a participating member and who is not at any particular time, which means that alternate members should not sit at the table with the board during hearings or other formal proceedings unless they are designated to sit in place of a member. Although alternates should be encouraged to attend all meetings, and perhaps join discussions at work sessions or other meetings where no formal action is to be taken, they should sit with the public unless they are sitting in place of a member.

If alternate members do participate as a board member without being designated to sit in place of an absent or disqualified member, it is no different from allowing members of the public to participate as a member of the board. No planning board or ZBA would consider doing that, and it is really the same with alternates.

Q: So if they can't participate, why should alternates attend the meetings?
A: Alternates are critically important. Land use boards simply cannot function without alternates because conflicts of interest are so common in those matters. Alternates are the safety net that allows these boards to function properly and continue to serve the public. Alternates are also the most common source of future board members, so the experience they gain through both observation and participation are important preparation for these future roles.

It is essential to have alternates in attendance to serve when they are needed. This is particularly important for ZBAs because at least three concurring votes are required in order to find in favor of any applicant. RSA 674:33, III. If only three ZBA members can participate in a matter, 100 percent of them must agree in order to reverse any action of an administrative official or decide in favor of any applicant. The availability of alternates helps ensure fairness to the applicants, and prevents both planning board and ZBAs from being unable to act at all if a quorum is not present.

It is also very important for alternates to be knowledgeable enough about the board's business to be able to participate fully when they are called upon. Alternates should be encouraged to attend meetings to observe and learn in preparation for those times when their service is needed, and to become familiar with the facts of cases on which they may be asked to substitute during a later meeting or hearing.

Q: If a position on the board is vacant, can an alternate member fill the seat until a permanent replacement is appointed?
A: No. The law only allows alternates to be designated to sit in the place of an "absent" or

"disqualified" member. RSA 673:11. These are temporary conditions in which a board member cannot serve at a particular time but remains on the board. In contrast, a "vacant" position is one that is not filled; the member who vacated the position is not returning to the board at all. No law allows the chair to designate an alternate to sit in that situation. That position remains completely vacant until a replacement is appointed. While alternates are likely to be the best source of replacement members to permanently fill vacancies, they cannot be used as temporary members.

Q: What if an application or appeal is continued during several meetings? Does the same mix of regular and alternate members have to participate in each of those meetings?
A: The law does not specifically require this, but it is the better practice to ensure that those who participate in and vote on a matter have been present at all sessions and hearings on that matter. This is a much easier task if alternates regularly attend meetings and hearings. However, no statute specifically requires board members to step down if they have not been present at all hearings on a case, or gives a board the authority to force members to recuse themselves in that situation.

The only real guidance on this issue comes from *Fox v. Town of Greenland*, 151 N.H. 600 (2004). This case involved a ZBA member who missed two of four hearings on an application but participated in the board's deliberations and vote. The Court decided the case on other grounds and did not have to decide whether or not the member should have participated in the decision. However, the opinion in this case suggests that a member who was absent for some of the hearings could still participate in the deliberations and vote if he familiarized himself with all of the evidence that was developed at the hearings he missed. The implication is that if the board member had participated without becoming familiar with all of the information, the Court might have invalidated the board's decision.

Based on this case, and the waste of time and effort that results when a board's decision is invalidated, the best practice is for the same combination of regular and alternate members to participate in all phases of a matter if possible. For instance, if a regular member were absent at the first hearing on a case (but not disqualified because of a conflict of interest) and an alternate were designated to sit in his or her place, it would be safest for the alternate member to continue to sit in the regular member's place for the duration of the matter. However, if the regular member were available for later meetings and wanted to resume his or her place, he or she should be brought up to speed on the issues and facts by familiarizing himself or herself with all of the evidence developed during the earlier hearings. Otherwise, the decision might ultimately be invalidated by a court.

Along the same lines, alternates should be encouraged to attend meetings and hearings so that if they are needed to substitute in a later phase of the case, they have observed all hearings up to that point. It is important for anyone voting on a case to have all of the relevant information that was developed in the hearings. Hopefully, alternates who have attended the hearings will be familiar with the information and able to step into the shoes of a regular member who is unable to attend deliberations.

Q: How do ex-officio members fit into all of this?
A: An ex-officio member is "any member of a board who holds office by virtue of an official

position and who shall exercise all the powers of regular members of a local land use board." RSA 672:5. For instance, planning boards in towns must include one ex-officio member appointed by the board of selectmen. RSA 673:2, II. This means that on a seven-member board, six positions are filled by election or appointment (as the case may be) and the seventh position is always filled by a representative chosen by the board of selectmen. This person may either be a selectman or another administrative official of the town. The ex-officio member is a full, voting, member of the board with all powers of other board members, except that he or she may not serve as the board chairman. RSA 673:9, II.

An ex-officio member differs in one other way from other regular members—he or she has a special alternate appointed by the same board that appointed the ex-officio member. When the ex-officio member is absent or disqualified, only the ex-officio alternate member may sit in that person's place. RSA 673:11.

Q: If alternates are so important, can the board of selectmen have them, too?
A: No, but nice try. New Hampshire law does not authorize selectmen to create a standing pool of alternates, or even to appoint a "temporary" alternate to fill in for an absent selectman. This may present certain logistical challenges, particularly with three-member boards of selectmen, but that is the way the law is written. However, if a selectman is disqualified from participating in a specific matter because of a conflict of interest, the remaining members of the board may appoint a former selectman to fill in for that one specific matter. RSA 43:7. The disqualified selectman continues to be a board member and to participate in all other matters as usual except the one from which he or she is disqualified. In the unlikely event that an entire board of selectmen is disqualified, the board may ask the superior court to appoint former selectmen to handle the matter. RSA 43:8.