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Wolfeboro Zoning Board of Appeals

Regular Meeting

June 2, 2014

Minutes

WOLFEBORO TOWN CLERK  
Book No. 100 Page 00000000

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**Members Present:** Alan Harding, Chairman, Suzanne Ryan, Vice-Chairman, Mike Hodder, Member, Fred Tedeschi, Member, Hank Why, Member, David Senecal, Alternate and Christine Franson, Alternate

**Members Absent:** None

**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 Town Hall Meeting Room. A quorum was present.

David Senecal stepped down from this meeting.

**Motion for Rehearing**

**Submitted by James Brown**

**TM# 133-28**

**Case # 13-V-14**

**Woodbine Senior Living, LLC**

**Variance**

**Agent: Jim Rines, White Mountain Survey & Engineering, Inc.**

Alan Harding commented the Board is here tonight to consider a motion for rehearing submitted by James Brown relative to Case # 13-V-14, TM# 133-28, Woodbine Senior Living Center. There will be no testimony received from the audience. This is a meeting of the Board to consider just two issues. Additionally the rehearing process was designed to afford a board an opportunity to correct its own mistakes before appeals to the courts. It is the petitioner, who has the burden of proof. In his Motion for Rehearing received May 21, 2014 he has not provided any evidence of a technical error and attempts to reargue his opposition to Case # 13-V-14 using arguments in his Petition based on information that was readily available at the time of the hearing on May 5, 2014. In fact, the petitioner as noted in the Minutes of the hearing, on four occasions was given the floor to rebut or object. At no time did he raise any of the issues now raised in his Motion for Rehearing.

The Board is not here to argue the merits of the decision that was made. The decision was made and the variance was granted. The Board is here tonight to discuss the petition before the Board.

Suzanne Ryan commented that in the application for rehearing, Item # 1 on the first page states that "Granting the variance shall not be contrary to the public interest". The size of the facility can affect the quality of the local aquifer by over drawing and by contamination. This is public health issue and should have had a more thorough examination before granting a variance." This is the first item she focused on and the idea came to her late in the day. She went to town hall and took information from the Natural Resources Section, (the information on aquifer and drinking water resources). She feels that in this portion of the request for Rehearing the ZBA did not do due diligence and did not make finding of facts. When you have conflicting testimony, which we did it is up to the Board to make fact finding. When you go back to the minutes and go back to how the decision was made, she finds – one members says he is "assuming the property can handle the design" and another member states "The Spirit of the Ordinance is observed because they are asking for a variance.", with no explanation. The ZBA had no finding of fact as to what they're asking for in a variance. "The values of surrounding properties he suspects will not be diminished. Unnecessary hardship has been shown as the lot is divided in two" - Suzanne Ryan commented the whole street is that way. "Regarding water usage, electrical usage and medical waste into the water system are concerns but he does not think they are sufficient to make him vote against the application." And another member was impressed with the application. As for herself she found reasons why about the five criteria she did not think they fit but she did not have specific finding of facts. In order to save time for the applicant (Woodbine Senior Living) she feels they should have a rehearing and make findings of facts.

Alan Harding stated that he had adjudicated the application by granting the variance.

Suzanne Ryan responded she is assuming the petitioner for the rehearing is asking the ZBA to overturn the decision. The Board did not do due diligence, finding of facts and if this goes to court because the ZBA does not rehear, that is a time delay for Woodbine, and a cost to the town when the ZBA can correct their mistakes and say these are the reasons, fact finding reasons ( the ZBA should have had a hydrogeologist and had the applicant bring in findings of fact as to why there would be no hazardous materials into the groundwater, as to why it would not pollute the aquifer, and the Board had none of that and the court has strongly recommended and required in many instances, specific findings of fact be stated and there is a whole thing in the ZBA Handbook about finding of facts and gave a handout to the Board.

Alan Harding responded she is losing sight of what was said at the beginning of this meeting. The ZBA has to approach this application, by Mr. Brown with a laser. There are two things to consider: 1) Did he point out in his application to the ZBA, that they made a tactical strategic error;

Suzanne Ryan responded that she is saying they did,

Alan Harding responded that Suzanne Ryan is saying he did but did Mr. Brown in his writings, did not. 2). The next important hurdle the ZBA has to overcome is did Mr. Brown present in his application information that was readily available to him at the time of the original hearing. There is nothing new in this application that was not available on the 5<sup>th</sup> of May. This is a critical issue.

Suzanne Ryan stated that the ZBA they got new info this evening which she was reminded of by an abutter; this process went through the Zoning Board. Reference Handouts by Mr. Brown (attached). This is public information and not irrelevant. This is new information.

Alan Harding stated he is trying to explain why the ZBA is there tonight. The case referred to in the handout by Mr. Brown and referred to by Suzanne Ryan was adjudicated 10 years ago apparently, and has nothing to do with the reason the ZBA is here tonight. There will be no recess to read the handout.

Suzanne Ryan stated it is new information to the ZBA. It was not available to Mr. Brown previously.

Alan Harding responded it is old information and irrelevant.

Mike Hodder commented there are two issues to decide. 1) Is there any new evidence presented by the applicant that would require the ZBA to change their minds 2). Did the ZBA make a mistake in the original decision?

The application for rehearing does not present new evidence as it only restates many of the points Mr. Brown made in the original hearing. He does not see any new evidence. The only thing the Board would need to look at is if they made a mistake.

Fred Tedeschi pointed out the application for rehearing does bring the water quality issue into question.

Mike Hodder pointed out that it is not new evidence and the issue was raised by himself in the original hearing.

Fred Tedeschi responded that he is pointing out it is in the rehearing application. It would give the ZBA the right to say they should look at the issues more closely.

Mike Hodder stated the ZBA needs to be careful if they say they have made an error. If a member of the Board decides they have made an error based upon feeling then virtually any one of the cases could be reopened and therefore what is the point of having the ZBA. The Board needs more than just an applicant's statement they have made an error or there is new evidence to require reopening of the case; for protection of the system.

Fred Tedeschi noted in reason # 2 it is clear it says the ZBA did not have the authority to do what they did and he thinks it is something that requires consultation with counsel.

Mike Hodder asked for clarity what Fred Tedeschi means by the ZBA should not have done what they did.

Fred Tedeschi responded focusing on #2. In layman's terms it says the ZBA does not have the authority in this case, based on the evidence presented. IT was decided the neighborhood has so changed since the last time the zoning law was adopted (7 months ago), that the ZBA now has an obligation to change the zoning rules to fit facts of what they see in that particular neighborhood.

Mike Hodder stated that he is not as concerned or worried and does not feel they need to reach out to counsel. He asked to be more specific as to what the Board did they should have not done.

Fred Tedeschi responded it is his understanding that in order to grant this type of variance you need to show that the neighborhood has so changed from the time the zoning ordinance was adopted that the spirit of the ordinance is no longer applicable to those particular provisions. The spirit of what the ZBA is doing since the zone has changed so much there is now so much commercial on the other side of that so called line that it would be unequitable, unfair, and unjust to hold the applicant to the standard where other applicants have been allowed commercial uses. There have been a couple of cases where the City of Manchester—an argument if a gas station should be permitted and the Zoning Board said no, and the courts said yes because the basic ordinance had said you cannot have commercial in this zone, but there are were other commercials in that place, which in effect moved the zoning line.

Mike Hodder asked for clarification that Fred Tedeschi is not arguing the constitutionality basis of the ZBA's power but is arguing the application of the ZBA's power to grant a variance in this particular case.

Fred Tedeschi responded he is saying the ZBA was wrong in making the finding it made.

Mike Hodder responded in that case reason #2 falls because reason #2 Constitutionality of the ZBA powers is off the table.

Fred Tedeschi responded he is reading this as a common layman would interpret those words.

Mike Hodder responded it is understood but if you read what is written, the residential map has been set by legislative process and therefore is law. The ZBA cannot alter an ordinance and map. The ZBA cannot allow a commercial use....Zoning maps have been

set by legislative process. He is arguing the constitutionality of the ZBA's power to put the commercial use into a residential area.

Fred Tedeschi responded in a law school mock court case he would argue that, but for this purpose he would not argue that, he would try and interpret what the applicant is saying as in "we think you made a mistake in applying the law."

Mike Hodder asked if the Board agrees lets get the constitutionality of the ZBA's action off the table and confine what the ZBA is talking about to whether the Board feels their decision was a mistake in fulfilling all five of the criteria for a variance.

Fred Tedeschi stated he feels one of them fails.

Alan Harding commented that the argument now is the same made on the 5<sup>th</sup> of May by Fred Tedeschi and he voted to deny the application on that basis.

Fred Tedeschi responded that it is in part the argument, yes.

Chris Franson noted the question that Fred Tedeschi raised and she was looking at the powers of the ZBA. It says that it interprets local land use documents and does not create or modify the ordinance or implement regulations. Maybe she did not state clearly at the last meeting. Having been on the Planning Board she knows there were a lot of reasons why they did not continue the line across the highway and to her she is questioning whether the ZBA has changed the line of that zone.

Mike Hodder asked if the Planning Board's arguments about keeping the line in the middle of Route 109E were made public; did they become part of the ordinance or spirit of the ordinance.

Chris Franson responded what she tried to have them look at was the purpose statement for the newly rezoned Route 28 district because they spent years 3-5 talking about what uses should be there and they eliminated. A lot of the ones that were eliminated are allowed in other zones, so by continuing that zone across the street, the ZBA is extending the zone contrary to how it was written.

Mike Hodder asked then the purpose of the ZBA if Planning Board decisions are hard and fast.

Chris Franson responded she is just raising the question as to whether that would be grounds for a rehearing, as to whether the ZBA gave that sufficient thought.

Alan Harding responded that it is not a question of sufficient, it is whether it is wrong.

Chris Franson responded that looking at the same set of facts she could see that it is maybe something the board may consider whether we made an error, before it goes to court.

Suzanne Ryan stated when looking at the Agricultural District purpose, one of the criteria is it should have a very low intensity in use and the land should be low density residential. The Mixed Business Use Zone is to protect the watershed area. This is what she focused on # 3 and she does not think the spirit of the ordinance or purpose was upheld by allowing the commercial use, with its intensity and effect of which we do not have any professional opinion on the water resources there. She stated she feels the Board made a technical error.

Mike Hodder responded when the case was heard, they heard the only professional testimony that was presented to the ZBA (water quality) and it came from the applicant's surveyor Jim Rines. They heard nothing from any of the abutters in rebuttal and there is nothing new in the application for rehearing that speaks to that issue. The Board made its decision based upon the best professional evidence presented to the ZBA, which was Jim Rines and material given to the ZBA (Pages 6 & 7 of the Minutes of May 5, 2014). He sees nothing in reason #3 to contradict what Mr. Rines offered as evidence. He sees no new evidence regarding water quality.

Suzanne Ryan responded that Jim Rines is not a professional water geologist and the ZBA had conflicting information from the abutter, versus Mr. Rines because this is not his field of expertise. In fact the ZBA asked the question about the citing of state septic approvals and the Board was going to get the information as to whether they looked into the residue of medicines into the septic system and then into the water quality. The ZBA did not do due diligence and that is a technical error. One of the reasons for having a rehearing is technical error. The Board did not do due diligence by getting professional information: if it's not going to affect the aquifer, if it's not going to affect water recharge or well water or the 18,000 gallons coming out to be used and is going back into the septic system somewhere, the ZBA did not do its due diligence, they did not have the information in front of them.

Alan Harding commented the ZBA had the Lake Wentworth Association.

Suzanne Ryan responded they are not hydro geologists. They were clambering about storm water runoff. They also asked to make a condition of approval that no phosphorous items are going to be used and get into the septic and the ZBA forgot to do that.

Hank Why commented he looked through the applicants statement and rethought what was discussed in May. As for the concern about the water quality septic rule, the state has significant rules and regulation and he felt very comfortable they would be adhered to. Any necessary studies at that time would be done. If there are issues in the aquifer

there are rules to cover all of that. Under Special Exceptions in that zone he found Veterinary / Hospital, does that mean animal hospital and if so, you can have a hospital for animals and not humans. In home day care is allowed and is not too far afield as the proposal is a large scale in home daycare. The proposal fits the site and as he drove by the site and looked at the applicant's property and across the street, it is totally screened by vegetation, and could be screened further so you would no longer see it from Route 28. He does not see how it has a significant impact on the presenter's property and is comfortable he voted in favor of the application.

Alan Harding noted the two issues 1) either the Board made a technical error or 2) Mr. Brown is using information tonight that was not available to him and anyone else opposed on the 5<sup>th</sup> of May – There is no new information.

Fred Tedeschi asked Rob Houseman if animal hospitals are permitted.

Rob Houseman responded the Rural Agricultural and Rural Residential Districts did not change.

It was moved by Alan Harding and seconded by Mike Hodder to deny the Motion for Rehearing regarding Case # 13-V-14, TM# 133-28 because the petitioner has not provided any plausible evidence of a technical error on the part of the ZBA and has not provided any new information that wasn't available for the initial hearing on May 5, 2014.

Discussion:

Suzanne Ryan stated Mr. Brown has provided new info that most likely was not available to him 10 years ago until somebody must have told him about it. How could he provide that information with the history of what the town has done. Nobody here even knew about it. For the record Suzanne Ryan passed in the information from Mr. Brown for the record. Secondly she believes there was a technical error and she handed information about a technical error and findings of fact. She assumes that a judge will remand this back, so if it does it is too bad because they could have saved everyone time and money.

Hank Why noted the information was available as it is public information.

Suzanne Ryan responded who the heck knows what happened 10 years ago, what if he just moved here.

Hank Why also noted the information states College Road.

Alan Harding, Mike Hodder and Hank Why voted in favor of the motion. Suzanne Ryan and Fred Tedeschi voted in opposition. The motion passed.

Consideration of Minutes:

5 May 2014

Page 7: 3<sup>rd</sup> paragraph – second line change “service to surface”

Page 9 : 3<sup>rd</sup> paragraph – first line change “contentious to conscientious”

Page 15: last paragraph – sixth line change “analogist to analogous”

Page 16 : third paragraph – first sentence remove the second to the last word “not”

*It was moved by Alan Harding and seconded by Mike Hodder to approve the minutes as amended. All members voted in favor. The motion passed.*

Other Business:

Alan Harding noted a handout of NH RSA 91A relative to email. The Board members cannot get involved in email discussions before meetings and hearings and the Board cannot use the “reply to all” option. This has happened on two occasions in the last month and he asked the Board not to do this.

Fred Tedeschi commented he had emailed as a result, what is a clear exception to the open meeting rule and that is a request for consultation with legal counsel. Consultation is not a meeting; it is permitted to be held without minutes and does not require any motion to go into executive session. That is the one exception to the RSA 91A. There was an article written by Attorney Sager on this subject. It clearly states that any request for counsel should be made through the Chairman and as there are no procedures for doing that he felt emailing the Chairman and copying the Board was appropriate. He did not ask for a vote.

Alan Harding stated he was not aware of that information. What he was aware of was what was said at the joint meeting of the ZBA and the Planning Board that Laura Mitchell, Esq. said which was do not reply to all.

The Board discussed this and noted this will be addressed in the review of the Rules of Procedure.

Other Business:

Mike Hodder noted info from the NHOEP Spring 2014 Conference. Information can be obtained at the following website:

[NH.gov/OEP/Planning/resources/conferences/spring-2014/index.htm](http://NH.gov/OEP/Planning/resources/conferences/spring-2014/index.htm)



Chris Franson asked how much credence the ZBA gives to economic gain or impact on a community relative to applications.

The Board discussed the question and noted this is taken on a case by case basis and discussed various scenarios.

Alan Harding handed out information called “The Rule of Nobody”

There being no further business, this meeting was adjourned at 7:52 PM.

Respectfully Submitted,

Robin Kingston  
Administrative Assistant



Attachments

FEMA and its mapping partners are creating digital, seamless, countrywide products. According to GRANIT, these improved products incorporate updated base maps, letters of map change (LOMCs), and revised studies. It is important to update **Figure 9** once this data becomes available for Carroll County. The following is a list of roads FEMA declares partially or totally within Special Flood Hazard Areas (SFHA):

- |                                |                             |
|--------------------------------|-----------------------------|
| <i>Beech Pond Road</i>         | <i>College Road</i>         |
| <i>Cotton Valley Road</i>      | <i>Pleasant Valley Road</i> |
| <i>Rocky Shore Road</i>        | <i>Sargents Pond Road</i>   |
| <i>Springfield Point Road</i>  | <i>State Route 28</i>       |
| <i>State Routes 28 and 109</i> | <i>State Route 109</i>      |
| <i>Walt's Lane</i>             | <i>Whitten Neck Road</i>    |

The current FIRM panels display three distinct floodplain categories in Wolfeboro: Zone A, Zone AE, and Zone X. Zone A are floodplains with no base flood elevations determined. Zone AE are floodplains with base flood elevations determined. Zone X areas are determined to be outside the 500-year floodplain. In addition to the floodplains associated with lakes and ponds in Wolfeboro, there are also Zone AE floodplains associated with perennial streams. In particular, extensive Zone AE floodplains are shown on Figure 9 for Young's Brook, Ryefield Brook, Wiley Brook and Heath Brook.

## 7.0 AQUIFERS

In town ordinance §175 article four, Wolfeboro defines an aquifer as, "Geologic formation composed of rock or sand and gravel that contains significant amounts of potentially producible potable water." Protecting Wolfeboro's aquifers from potential contamination is vital. Wolfeboro has adopted a Groundwater Protection Overlay District, which promotes health, safety and general welfare of residents by providing prohibitions and restrictions on town aquifers in the town codes, such as the prohibited disposal of solid wastes, liquid or leachable waste, etc.

The ability of an aquifer to supply water is called transmissivity, which is measured in ft<sup>2</sup>/day. Most of Wolfeboro's aquifers have a transmissivity anywhere from 0 to 2000 ft<sup>2</sup>/day. It is important to note that aquifers with a transmissivity of 1000 ft<sup>2</sup>/day or less are not considered adequate for a public water supply.

## 7.1 WOLFEBORO'S AQUIFERS

**Table 13** lists the aquifers mapped as occurring within Wolfeboro. These areas are also shown on **Figure 10**. It is important to keep in mind that many of these aquifers exceed town

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boundaries; because of this, changes to these aquifers affect not only the town of Wolfeboro but surrounding towns as well.

**Table 13: Aquifer Transmissivity Characteristics**

Aquifer ID	Maximum Transmissivity	Features
35	1000	Border of Brookfield, East corner of Lake Wentworth by Walker Rd.
38	2000	Within Aquifer 38.
39	1000	Northeast corner of Winter Harbor, West of Sewall Woods Conservation Area.
40	1000	Southeast corner of Lake Wentworth, Including Patten Corp. and Pleasant Valley Road.
44	1000	Northwest of Rust Pond.
46	1000	Southeast of Rust Pond, Including Marshfield Easement.
47	1000	Border of New Durham, Southeast of Rust Pond.
79	1000	Border of Tuftonboro, including Abenaki Ski Area.
83	1000	Largest aquifer located completely within town. North/Northwest of Lake Wentworth, Including Wiley Brook Conservation Area, Trask Mountain Road Lot, Center St./Route 28.
85	1000	Including Sargents Pond and Bill Rae Conservation Area.
87	1000	Northeast of Lake Wentworth, Including Wentworth State Park and Ryefield Marsh.
88	2000	Within Aquifer 83.
236	2000	Border of Wakefield, Northeast Railroad.
137	1000	Border of Wakefield, Brown's Ridge & N. Wakefield Rd. Lot.

**NHDES; June 2009**

Aquifer recharge is the process by which rainwater, snowmelt, and other precipitation runoff seeps into the soil into an underlying aquifer. Non-contaminated water must be allowed to seep into the ground surrounding an aquifer in order to protect the quality and quantity of water in an aquifer.

## 8.0 DRINKING WATER RESOURCES

Currently, Lake Winnepesaukee and Upper Beech Pond are the main sources of drinking water for the residents and businesses of Wolfeboro. The immediate watershed around Beech Pond is regulated by the Town of Wolfeboro as a municipal watershed district. Much of Wolfeboro is considered a source water protection area to Lake Winnepesaukee (which is used by other communities) and Upper Beech Pond. Protecting source water provides public health protection and economic and environmental benefits.

### 8.1 WELLS & WELLHEAD PROTECTION AREAS

Although the Town of Wolfeboro mainly relies on surface water for drinking water, groundwater is also a resource found in the town and must be protected. High quality groundwater supplies many residents with drinking water; currently, there are 477 recorded water wells located in the town of Wolfeboro. Most wells are either dug or drilled, although they could also be driven. Wells and other forms of groundwater resources will remain a significant water supply source for many years, and it is important to keep this resource protected.

Groundwater is very susceptible to contamination; most often from leaking underground storage tanks, poorly maintained septic systems, improper disposal of hazardous chemicals, and vehicular accidents. Listed below are the underground storage tanks located in Wolfeboro:

<i>Bell Atlantic</i>	<i>Lakes Region Airport</i>
<i>Brewster Academy</i>	<i>Lakeview Service Station</i>
<i>Carpenter Elementary School</i>	<i>Pierce Camp Birchmont Inc</i>
<i>Christys #32506</i>	<i>Pollution Abatement Facility</i>
<i>Citizens Bank</i>	<i>Public Works Garage</i>
<i>Clipper Home of Wolfeboro</i>	<i>Sugar Hill Retirement Community</i>
<i>CPT Petroleum Inc</i>	<i>The Corner Store</i>
<i>Crescent Lake School</i>	<i>Weston Auto Body</i>
<i>Diamond Lumber</i>	<i>Winnepesaukee Lumber</i>

*Dockside Gas Inc*

*Wolfeboro Corinthian Yacht Club*

*Goodhue & Hawkins*

*Wolfeboro Incinerator*

*Huggins Hospital*

*Wolfeboro Irving*

*Kingswood Regional High School*

*Wolfeboro Texaco*

Aboveground storage tanks also have a negative impact on drinking and groundwater resources when managed improperly. Listed below are the aboveground storage tanks located in Wolfeboro. It is important to make sure these tanks are maintained properly for the health of the town's residents.

*Umbrella Point*

*Electric Department*

*H C Avery Trust*

*Public Works Garage*

*Wolfeboro Oil; Center St.*

*Wolfeboro WWTF*

*Wolfeboro Oil; Railroad Ave*

*Wickers Sportswear*

According to the Environmental Protection Agency (EPA), in order to maintain high quality drinking water and to prevent contaminants from reaching drinking water sources, the 1986 Safe Drinking Water Act requires states to develop Wellhead Protection Programs. Through this program, states help communities to:

- Form a local team which will assist with protection of public supply wells in there area;
- Determine the land area which provides water to public supply wells;
- Identify existing and potential sources of contamination;
- Manage potential sources of contamination to minimize their threat to drinking water sources;
- Develop a contingency plan to prepare for an emergency well closing and to plan for future water supply needs.

Wolfeboro has eleven active Wellhead Protection Areas, which serve populations ranging from 50 to 210 individuals. The following lists Wellhead Protection areas in Wolfeboro.

*Wentworth Estates*

*Sherwood Forest*

*Trites Chevrolet Chrysler*

*Cornerstone Christian Academy*

II. When uncertainty arises as to the application of paragraph I to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.

III. If a member is disqualified or unable to act in any particular case pending before the board, the chairman shall designate an alternate to act in his place, as provided in RSA 673:11.

Any member of a board of adjustment who has a direct personal or financial interest in an appeal brought before the board should excuse himself from participation in that hearing. The chairman, when informed of this fact, would designate an alternate member of the board to act in place of the disqualified member. The records of the hearing should clearly note the disqualification and replacement by an alternate member.

The legislature, in 1988, extended the provisions of RSA 673:14 to planning boards and historic district commissions. At the same time, the non-binding process in paragraph II. was added to allow any member of the board to seek clarification of a potential conflict. The prerogative to request a vote rests with a member of the board unless the local zoning ordinance or the board's rules of procedures provide otherwise.

The New Hampshire Supreme Court, in a discussion of the test for disqualification of board of adjustment members, said "...they (must) meet the standards that would be required of jurors in the trial of the same matter....A juror may be disqualified if it appears that he or she is "not indifferent." (citations omitted) Winslow v. Town of

Holderness Planning Board 125 NH 262, (1984). In that case the Court applied the test to a planning board member because the board was acting in a quasi-judicial capacity. The decision reached by the board was ruled invalid, even though the disqualified member's vote was only one of six affirmative votes, because "... it was impossible to estimate the influence one member might have on his associates." Ibid

#### FINDINGS OF FACTS

After the public hearing is closed, the board should deliberate, in public, and in a manner such that all discussions can be heard by the public, on the essential facts that the testimony has established. For example, if a variance has been requested, and conflicting evidence has been received about whether the proposed use will diminish property values in the neighborhood, the board should vote to find as a fact that values either will, or will not, be diminished, and why (because of increased density, noise, congestion, traffic, or what have you).

The Court has strongly recommended, and has required in many instances, that specific findings be stated.

In the case of Alcorn v. Rochester 114 NH 491, (1974), the Supreme Court remanded a decision of the board of adjustment stating that "...the failure of this board to disclose the real basis of its decision prevented the plaintiffs from making the requisite specification and thus denied them meaningful judicial review."

In that decision, the Supreme Court cited, as authority, Anderson, American Law of Zoning where it is stated at 20.41, (1977):

"In general, a board of adjustment must, in each case, make findings which

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disclose the basis for its decision. Absent findings which reveal at least this much of the process of decision, the reviewing court may remand the case to the board for further proceedings. Thus a bare denial of relief without a statement of the grounds for such denial will be remitted to the board for further action. A decision granting a variance will be remanded, if the board fails to make findings which disclose a basis for its determination."

Since the Alcorn case, the New Hampshire Supreme Court has specifically required that findings of fact be made by other administrative bodies. In each case the findings were not required by statute, but the court indicated that there could be no meaningful review without them. In the case of Trustees of Lexington Realty Trust v. Concord 115 NH 131, (1975), the Court pointed out that the requirement to make findings of fact is part of the common law even though the board of taxation is not required by statute to do so. In Society for the Protection of N. H. Forests v. Site Evaluation Committee 115 NH 163, (1975), the Court again indicated that findings of fact were necessary in order for decisions to be made by a state board. The Supreme Court in Foote v. State Personnel Commission 116 NH 145, (1976), stated that findings of fact must be made even though not required by the Administrative Procedure Act, RSA 541, because the "reviewing court needs findings of basic facts ... so as to ascertain whether the conclusions reached by it (the administrative board) were proper."

In NBAC v. Town of Weare 147 N.H. 328 (December 27, 2001) it's clear that the Selectmen could have done a much better job specifying what facts were the basis of their decision. They were saved from having to defend their thin findings simply

because NBAC failed to specify this point in its motion for rehearing. This is a harsh rule for developers, because it requires them to come up with all of their reasons for litigating a decision (at least in skeleton form) in a very short period of time. The important lesson to local boards in this case is that you should specify in your decision any and all reasons in support of it. Supporting the reasons with facts is good, too, but you have to have the conclusions on the record--say what you mean, and say why you're right. Don't assume that everyone knows it. Above all, don't follow my grandfather's advice ("Give them one good reason!"). Local boards must give any and all reasons.

See Findings of Facts form in Appendix C.

#### STATEMENT OF REASONS

The board of adjustment, after conducting the hearing, could simply vote to approve or disapprove the application. General fairness to all parties concerned, however, reinforced by New Hampshire Supreme Court decisions, strongly indicates that the board should prepare a statement of its reasons. Since the decision of the board of adjustment is so important, it is necessary for both the appealing party and the municipality to have a clear record of what occurred. The Court has stated it does not feel the entire record should have to be reviewed to determine whether or not the action of an administrative board is appropriate.

As a source of documentation for the community's position in a given case, the board should state all of the reasons for its decision to allow for proper review if that should be necessary (see Work Sheet: Statement of Reasons form in Appendix C). The reasons may be found defective if they