

Windham Zoning Board of Adjustment
In re: DiStefano Request for a Dimensional Waiver
Zoning Permit #688 Case # 2022-1
August 24, 2022

Chronology

On or about December 27, 2021, Randall and Mona DiStefano subdivided a 31.75 acre piece of property they owned at 4364 Windham Hill Road, which bordered on both Windham Hill Road and Wheeler Road. The DiStefano's sold 9.5 acres and a house on Windham Hill Road to Ruth Alden Wicker. They kept 22.5 acres bordering on Wheeler Rd for themselves. Mr. DiStefano testified at a public hearing on August 2, 2022 that he subdivided the property with the intent of building an 18th century style home close to Wheeler Rd.

The DiStefanos retained the services of Kevin Hollibeek, of Belmont Septic Design, who developed a Wastewater Disposal Area and Potable Water Supply Plan for them dated January 27, 2022.

Shortly before February 16, 2022, Belmont Septic sent letters to adjacent property owners informing them about isolation distances ("overshadowing") as a result of the DiStefano wastewater disposal plan. This alarmed Phil McDuffie, an adjacent property owner, who was concerned about possible adverse effects upon Wheeler Brook. Mr. McDuffie contacted Mr. Hollibeek and officials from the Agency of Natural Resources about his concerns. Nevertheless, Jeff Svec, Regional Engineer at the Springfield Office of the Drinking Water and Groundwater Protection Division, approved the plan and granted a Wastewater and Potable Water Supply Permit to the DiStefanos. The permit was recorded at the town office on March 30 by Ellen McDuffie, Town Clerk.

Also on March 30 the town clerk received, in person, a Zoning Permit Application from Mr. DiStefano for a new, single family house to be built on Wheeler Rd. Mr. DiStefano did not attach a sketch of the property showing its dimensions, setbacks from neighboring property lines, driveway location, etc. as the zoning permit application clearly requires. However, Mr. DiStefano testified during a public

hearing on August 2 that he did give Ellen McDuffie a photocopy of a portion of the Belmont Septic Design Plan that shows the location of the house in relationship to Wheeler Rd. and John Boynton's property line, the location of the driveway, well, septic tank and primary leach field trenches. The photocopy did not show setback distances from the middle of Wheeler Road or from a pin marking Mr. Boynton's property line. Mr. DiStefano admitted that he had not checked Windham's Zoning Regulations to find out what the setback requirements were. He said that he has made his living for roughly thirty years doing interior house restorations which do not require him to be familiar with town zoning regulations. He admitted that he had made a mistake by not checking the setbacks and said there was no intention on his part to be deceptive.

Mr. DiStefano testified that when he gave his zoning permit application and photocopy to Ellen McDuffie on March 30, she said that if Alison Cummings, the town Zoning Administrator, needed any more documentation, Alison would get in touch with him. Ms. McDuffie acknowledged saying this during her testimony on August 2.

Alison Cummings signed the zoning permit on April 6th even though it did not include a sketch showing that the house would conform to Windham's setback requirements. During her August 2 testimony Ms. Cummings immediately admitted making this mistake and said it was an honest error with no intent to deceive anyone. Ms. Cummings said she searched a state website online and was able to get the complete copy of Mr. Hollibeek's septic design plan. Once she had this document she felt Mr. DiStefano's permit application was complete, and she did not contact him for any additional information.

Having heard nothing from Ms. Cummings, and having a signed zoning permit in hand, Mr. DiStefano proceeded with plans to build his house. Over the course of the next three months part of the lot was cleared, a well was drilled, and Mr. Hollibeek staked out the area for the leach field. On July 6 a contractor arrived at the building site with concrete to pour the foundation. At that point a town lister, who apparently was at the site, told Mr. DiStefano that the foundation was too close to Wheeler Road and to Mr. Boynton's property line. (Zoning regulations state that the house must be at least 65 feet from the centerline of the road and at

least 25 feet from property lines. The foundation is approximately 41 feet from the centerline and 21 feet from Mr. Boynton's property pin.) Mr. DiStefano testified on August 2 that this was the first time he was aware that he was in violation of town setback requirements, and the first time he knew that any neighbors were upset with him. Up to that point no one had said anything to him.

A conversation occurred between Ms. Cummings and Mr. DiStefano shortly thereafter that day. There was some discussion about perhaps applying for a variance or a dimensional waiver. Ms. Cummings said she told Mr. DiStefano that she could not guarantee that he would get a waiver or variance, and that it was up to him whether to proceed with the pouring of the foundation. Mr. DiStefano chose to pour the foundation because the contractor said Mr. DiStefano would have to pay \$40,000 for the concrete whether or not it went into the ground.

Once the foundation was poured more people began to complain. On July 6, Mr. McDuffie sent Mr. Dunkel, as head of the Planning Commission, an email raising the setback issue. Mr. McDuffie talked with other neighbors, some of whom also contacted Mr. Dunkel, or other town officials. On July 9, Mr. DiStefano and Mr. Dunkel exchanged email messages in which Mr. DiStefano requested a dimensional waiver. On July 12 Mr. Dunkel visited the building site and met with John Boynton. They took measurements which confirmed the setback distances noted above. On July 13, Ms. Cummings issued a stop-work order to Mr. DiStefano. A public hearing for a dimensional waiver appeal was duly warned and subsequently was held in two parts: on August 2 from 6:00PM to 9:32 PM, and on August 10 from 6:05PM to 7:05 PM.

Deliberations

Section 304A of Windham's Zoning Regulations stipulates seven criteria that the Zoning Board of Adjustment must consider when deciding whether to grant a dimensional waiver. We have considered all seven, but spent considerable time wrestling with Criteria 1, 4e, and 5, in particular.

Criterion #1. “Reasonable use of the property is only possible if the Zoning Board of Adjustment grants a waiver of the dimensional requirement.”

Mr. DiStefano testified that from the beginning he wanted to build an 18th century style home close to the road because that is where homes in that era often were located. He and his wife did not want to live on Windham Hill Road because it is relatively busy and cars often travel at excessive speeds. While he could have put his house much further back from Windham Hill Road, that would have meant building and maintaining a long, expensive driveway, and his access still would have been off a busy highway. He might have been able to install a culvert and build a bridge across Wheeler Brook, which would have allowed him to build on the far (north) side of the brook. This would still provide access to his house from Wheeler Road, but from a considerable distance. Without a doubt, however, this option would be unreasonably expensive. (The cost to the town of replacing a culvert for Wheeler Brook after a storm a year ago was about \$250,000.)

Could the DiStefanos build their house on the near (south) side of the brook and avoid violating setback requirements? Apparently not. In an email to Mr. Dunkel, dated August 9, Mr. Hollibeek stated: “... with the current permitted configuration of the well and septic areas (septic is the primary restrictor in this instance) I can not move the house further from the road or the property line.”

Based upon the above information, the ZBA concludes that the applicants meet criteria #1.

In his presentation to the ZBA on August 2, Mr. McDuffie stated that he believes that the DiStefanos’ request for a dimensional waiver does not meet Criteria 3, 4b, 4d, and 4e of Section 304A of Windham’s Zoning Regulations.

Criterion 3 states “The proposed project will still conform to the Town Plan and the purpose of the zoning district in which the land development is located.”

Mr. McDuffie did not present any evidence that this criterion has been violated. The stated purpose of the Rural Residential Zoning District is to “Continue historic residential settlement pattern; prevent linear pattern of development; encourage compact development within district boundaries so as to preserve open space and minimize rural sprawl.” (Sec. 201.4) Ms. Cummings pointed out in her testimony on August 2 that there are many homes in Windham, particularly in our historic districts, that are located close to a road. No evidence was presented to suggest that this project does not conform to the Town Plan. Therefore, the ZBA does not feel that Criterion #3 has been violated.

Criterion 4b requires that the proposed project will not have an undue adverse effect upon “The character and aesthetics of the neighborhood, as defined by the purpose of the district in which it is located.”

No evidence was produced to support the claim that this criterion has been violated. There appear to be no neighboring houses that have a clear sight line to the proposed house site, though that may change when the trees are bare. Although there are not any other houses on Wheeler Road that appear to violate setback requirements, there are at least two structures, including a garage, that are within 65 feet of the centerline. The ZBA does not see proof of a violation of Criterion 4b.

Criterion 4d states there must be no undue adverse effect upon “Public health, safety and utility services.”

Although Mr. McDuffie presented compelling evidence, including photos, of the destructive power of Wheeler Brook during the flood that occurred on July 29, 2021, he presented no clear evidence that granting a dimensional waiver will unduly affect public health or safety. The damage that occurred a year ago obviously occurred before the DiStefanos cleared trees and underbrush from their house site. The hilly topography of the land adjacent to Wheeler Road, and the confluence of several streams running down from the mountains to the east, make this an area that is prone to flooding during torrential rainfall. The inherent danger

to public safety from flooding will remain regardless of whether or not a waiver is granted.

Criterion 4e states that granting a waiver must have no undue adverse effect upon storm water management.

This criterion is more problematic and the ZBA spent considerable time deliberating about it. At the August 2 public hearing, Mr. McDuffie raised the issue of the slope of the property out of concern that runoff from intense rain might cause erosion and contaminate the brook. He pointed out that Sec. 207 of the Zoning Regulations prohibits “Development on slopes of 20% or greater.”

Section 207 was added to the Zoning Regulations in September of 2019, primarily with the intent of protecting development on Windham’s ridgelines. As far as can be determined, never before has slope been taken into consideration when determining whether to grant either a zoning permit or a dimensional waiver in Windham. In this case, Sec. 207 seems relevant within the context of determining whether a dimensional waiver would violate Criterion 4e.

The Windham Zoning Regulations precisely define Development as “The division of a parcel into two or more parcels, the construction...of any building or structure...and any changes to the use of any building or structure, or land...” However, the regulations say nothing about how or, more importantly, where slope should be measured.

Throughout the public hearing, three different opinions were offered about where to measure slope:

- 1.) Mr. McDuffie calculated the slope from the Boynton property pin near the road to the high water mark of Wheeler Brook at flood stage to be, on average, 29.9%.
- 2.) Mr. McDuffie also calculated the slope going across the primary leach field to be an average grade of 18.8%.

3.) Mr. Hollibeek, who designed the septic system, calculated the slope of the land the foundation sits upon as 16.7% at the right (uphill) side of the foundation as viewed from Wheeler Road, and 21.6% at the left (downhill) side of the foundation. He affirmed that the average slope of the land the foundation rests upon is 19.15%. Note that Mr. Hollibeek's calculations relied upon lidar data which enabled him to calculate the slope of the foundation site before the land was cleared for development.

Which of these three calculations of slope is most valid? Windham's regulations offer no answer to this question. Charlie Rockwell, a licensed surveyor with many years of experience, and a member of the Pawlet Selectboard and Development Review board, testified that the towns of Rupert, Dorset and Pawlet all calculate slope where actual development occurs, not on the overall slope of the property. Mr. Rockwell identified himself as a cousin of Mr. Boynton.

Faced with no precedent to guide us, no directions about where to measure slope in the Zoning Regulations, and three different calculations of the slope of the property from three different locations, the ZBA does not feel it has sufficient evidence to conclude that Criteria 4e has been violated.

Criterion #5 states "The need for a waiver was not intentionally self-created by past decisions of the applicant."

If Mr. & Mrs. DiStefano knew when they subdivided their property what Windham's setback requirements were, and that the only possible location for a house on their land along Wheeler Road would violate those requirements, they might be guilty of intentionally creating the need for a waiver. However, there is no evidence that supports this conclusion.

Mr. DiStefano admitted that he did not check the setback requirements before filling out his application for a zoning permit, and he testified that he was not aware that his foundation was in violation of them until July 6th. No one has produced any evidence to refute this. He maintains that his work doing interior restorations does not require him to be familiar with zoning regulations. Some people have suggested that because Mr. DiStefano built a house in Grafton about

two decades ago, he must be aware of zoning regulations. It appears, however, that Grafton had no zoning regulations then; indeed, according to the Windham Regional Commission, it still has none to this day. The website Mr. DiStefano maintained while doing business in North Carolina confirms that he did interior work and did not build houses from scratch. Furthermore, Mr. DiStefano testified that he originally wanted to locate his house further downhill from Mr. Boynton's property line, but the septic engineer said that would not be feasible. Based upon all of this information, the ZBA concludes that the DiStefanos did not intentionally create the need for a waiver.

During the course of the public hearing, no one argued that any of the other criteria listed in Sec. 304A would be violated by the granting of a dimensional waiver. Nevertheless, in the course of its deliberations the ZBA did consider criteria 2, 4a, 4c, 4f, 4g, 4h, 6 and 7. We believe that a waiver would not violate any of them, and would be in accordance with all of them.

Conclusion and Ruling

After taking into consideration, and weighing carefully, all of the above information, the ZBA believes it is appropriate and fair to award Randall and Mona DiStefano a dimensional waiver, with certain conditions attached. Undoubtedly, mistakes were made by several parties in this process. Mr. DiStefano should have consulted Windham's Zoning Regulations before applying for a zoning permit, and he should have included a sketch with his permit clearly noting the setbacks from Wheeler Road and neighboring property boundaries. Ms. Cummings should not have approved the permit in the absence of the missing information. Both parties have candidly admitted their errors, apologized and testified that they acted with no intent to deceive anyone. No one has submitted any credible evidence to prove otherwise. Mr. DiStefano acted upon the fact that he had a signed zoning permit. Three months went by before he had any indication that there was a serious problem. Under these circumstances, it would be unfair and unreasonable to require that he knock down the foundation and permanently cease all development on this part of his property.

The ZBA's decision to grant the dimensional waivers with certain conditions is further based on the doctrine of "equitable estoppel," a legal doctrine that "precludes a party from asserting rights which otherwise may have existed as against another party who has in good faith changed his [or her] position in reliance upon earlier representations." My Sister's Place v. City of Burlington, 139 Vt. 602, 609, 433 A.2d 275, 279 (1981). As explained in the case of Langlois/Novicki NOV Town of Swanton v. Heller, 2017 VT 76 (April 2017), the doctrine is "based upon the grounds of public policy, fair dealing, good faith, and justice, and its purpose is to forbid one to speak against his [or her] own act, representations or commitments to the injury of one to whom they were directed and who reasonably relied thereon." Dutch Hill Inn, Inc. v. Patten, 131 Vt. 187, 193, 303 A.2d 811, 815 (1973). As we have repeatedly acknowledged, the doctrine must be applied with great caution when the party against whom estoppel is sought is the government, but when a government agent acts within that agent's authority, it is a defense that must be available."

"The equitable estoppel doctrine has four elements: (1) the party being estopped must know the relevant facts; (2) the party being estopped must intend that his or her conduct be acted upon; (3) the party asserting estoppel must be ignorant of the true facts; and (4) the party asserting estoppel must rely to his or her detriment on the estopped party's representations. *Id.* Additionally, where, as here, the party against whom estoppel is sought is the government, the party asserting estoppel must also demonstrate that "the injustice that would result from denying the estoppel outweighs the negative impact on public policy that would result from applying estoppel." *Id.* See also *In re Griffin*, 2006 VT 758.

In the Langlois/Novicki case, the issue centered around a pergola that a landowner built without a permit. In that case, the landowner had approached the zoning administrator and had been told that no permit was required (when in fact such determination was incorrect according to the Town's zoning bylaws). The landowner built the pergola only to later face a zoning violation action from the Town. The landowner asserted the equitable estoppel defense and the Supreme Court affirmed the lower court's decision denying the Town's enforcement action.

In our case here in Windham, the ZBA concludes that a denial of the dimensional waivers would trigger the equitable estoppel doctrine. Here, the Town (the zoning administrator) knew the relevant facts, albeit as discussed above there were mistakes made by both the zoning administrator and by the applicant, Mr. DiStefano. In issuing the zoning permit, the zoning administrator intended that her action would be acted upon by the applicant—indeed the purpose of the permit was to enable the landowner to move forward with his house construction for which he had applied. The evidence shows that Mr. DiStefano was ignorant of the true facts- meaning that he did not know about the setbacks and had not adequately reviewed the zoning bylaws when he made the application. While there are limits to intentional ignorance, the evidence does not show that Mr. DiStefano acted with intention in not providing the setbacks on the application.[1] The evidence shows that Mr. DiStefano acted in reliance on the granting of the zoning permit in constructing the foundation and paying for the concrete. Even prior to the day the concrete was poured, Mr. DiStefano had acted in reliance on the permit in having the property prepped for the foundation, all of which cost money to Mr. DiStefano.

Finally, the ZBA concludes that an injustice would result to Mr. DiStefano if the equitable estoppel doctrine were not invoked. Here, the ZBA weighs the impact to Mr. DiStefano, including his financial detriment, against the impact on the public policy of enforcing its zoning regulations. Generally speaking, it is against public policy to allow land development which fails to meet the strict requirements of the zoning district, including set-backs. Allowing people to build in disregard to the district's requirements sets poor precedent and is against the public policy of adherence to a town's zoning bylaws. In the

[1] Similarly, the Court in *Langlois/Novicki* weighed the ignorance of the facts issue: "The Environmental Division found that Langlois's general knowledge that a zoning permit is required in some instances did not put him on notice that the proposed pergola required a permit. Specifically, it found that "[t]here was no evidence that anyone had informed Mr. Langlois that pergolas required permits, and to the layman, whether an unenclosed structure proposed for an already existing concrete slab or patio area required a permit likely would have seemed ambiguous." "While as a general rule [Langlois's] ignorance of the law would not excuse failure to comply with its requirements, this is an exceptional circumstance." *Lyon*, 2005 VT 63.

Langlois/Novicki case, the Court discussed this balancing decision:

“Here, we agree with the Environmental Division that the equities weigh in favor of estopping the Town's enforcement of the zoning regulations. That determination is one which is not lightly made. On the one hand, Langlois reasonably relied on information Kilburn provided to him and he spent over \$33,000 based upon that information. Kilburn was the proper person to whom Langlois should have directed his questions. The inquiry itself was reasonable, given the nature of the structure contemplated and the use of an existing footprint. On the other hand, the citizens of the Town are entitled to rely upon proper enforcement of their zoning regulations, and estopping the Town will result in Langlois receiving a benefit, in the form of an unpermitted pergola, that others in the Town cannot obtain.”

The Supreme Court ultimately decided to estop the Town's enforcement in the Langlois/Novicki case, concluding:

“If we do not estop the government in this instance, Langlois will be without recourse for the \$33,000 he spent in constructing the pergola and he will be penalized for following the conclusion of the zoning administrator that no permit was needed, which was given to him on multiple occasions. Were we to not estop the government in this instance, we would be hard-pressed to tell Langlois, or any other citizen in the Town, what Langlois was required to do differently than what he did here. We agree that such an injustice outweighs any negative effect upon public policy that will result from estopping the Town. It is likewise reasonable to conclude that applying estoppel against the Town in this instance may result in it taking a more studied approach in the future to opinions rendered about the need for zoning permits.”

The ZBA concludes that injustice would result to Mr. DiStefano if the Town were to deny the dimensional waivers. Akin to the Langlois case, the ZBA would be hard pressed to tell Mr. DiStefano what he should have done differently after receiving the zoning permit from the zoning administrator. He acted in reliance on the permit to his detriment. The zoning administrator should have asked him, prior to issuing the permit, for additional specifications on the setbacks, and

failing to meet those setbacks would have then pointed Mr. DiStefano to applying for the dimensional waivers pursuant to section 304, which ultimately he did. While the house may be too close to the road and too near the neighbor's boundary, these dimensional short-comings can be off-set by the conditions that the ZBA will impose. Therefore, in conclusion, the ZBA concludes that based on the evidence presented on the criteria in section 304A, and with the application of the doctrine of equitable estoppel, the request for dimensional waivers is hereby GRANTED subject to the conditions set forth below.

Although the ZBA believes that the applicants have met the criteria for a dimensional waiver, we certainly are cognizant of the concerns that have been raised, particularly in regard to protecting Wheeler Brook. In the presentation he gave on August 10, Mr. McDuffie stated, "Civil Engineers can plan property development, even on relatively steep slopes to minimize risk by using retention ponds, terraced slopes, (and) protective walls." Taking this into consideration, along with all of the evidence and testimony mentioned above, the ZBA GRANTS a dimensional waiver under the following conditions:

- 1.) Prior to the stop-work order being lifted, the applicants, at their sole expense, must present, and adhere to, a plan created by a licensed civil or environmental engineer, and approved by the ZBA, such that the rate of stormwater runoff from development of the building site will not exceed the rate of runoff prior to development. The engineer shall certify to the Zoning Administrator the completion of the stormwater plan.
- 2.) No additions including, but not limited to, porches, patios, a garage or carport, may be made to the front of the house or to the side of the house nearest Mr. Boynton's property line.
- 3.) Prior to occupancy, areas where trees were felled and bushes removed shall be revegetated to prevent erosion.
- 4.) There shall be no parking area, other than the driveway, and especially not in front of the house.

5.) The front of the house shall be screened, at least in part, from the road by planting a year-round solid vegetative barrier of non-invasive, zone appropriate plant materials which also help absorb stormwater runoff. (See Sec. 401C,c of the Windham Zoning Regulations.)

A Note about Precedent

At the public hearing, and via email, several people have expressed concern that if a dimensional waiver is granted to the DiStefanos, it will create a precedent that will eviscerate Windham's Zoning Regulations and send a signal that in the future individuals will be able to build whatever they want, wherever they want, with impunity. This simply is not true, for several reasons.

First, Sec. 304B,6 states very clearly that "Any waiver granted under this section shall be limited to the specific property to which it has been granted. A waiver on one property shall not be construed as a general guideline or standard for any other property." In short, this ruling does not create a precedent.

Second, a zoning permit is still required to develop land or build a house in Windham. Nothing in this decision alters that requirement. If the DiStefanos had cleared their land and poured their foundation without a permit, in blatant disregard of Sec. 301A of our Zoning Regulations, and then requested a waiver, it would have been denied.

Third, the very fact that a four and a half hour public hearing was held, that all abutting landowners and members of the public were given an opportunity to testify, that a stop-work order was issued and still is in effect, and that the ZBA labored for many hours to carefully weigh all the evidence before rendering an opinion should reassure people that the procedures for enforcing Windham's Zoning Regulations were followed in this case, and will continue to be followed in the future.

We, the undersigned members of the Windham Zoning Board of Adjustment, hereby affirm the decision to grant a dimensional waiver, with conditions, to Randall and Mona DiStefano.

<u>PRINT NAME</u>	<u>SIGNATURE</u>	<u>DATE</u>
<u>William P. Dunkel</u>	<u>William P. Dunkel</u>	<u>8/24/22</u>
<u>Thomas E Johnson</u>	<u>Thomas E Johnson</u>	<u>8/24/22</u>
<u>Kate Wright</u>	<u>Kate Wright</u>	<u>8/24/22</u>
<u>Pam J Bower</u>	<u>Pam J Bower</u>	<u>24 Aug 22</u>
<u>Vance Bell</u>	<u>Vance Bell</u>	<u>24 Aug 22</u>