

**TOWN OF JAFFREY NEW HAMPSHIRE
ZONING BOARD OF ADJUSTMENT
Meeting Minutes
December 6, 2022**

Present: Chairman Lee Sawyer, Members, Walter Batchelder, Erlene Brayall, Carl Jevne, Marc Tieger
Phil Cournoyer (alt), David Jeffries (alt)

Absent: Judy Lucero

Other: Elizabeth Webster, Conservation Commission, Pam Royce, Paula Geraghty, Attorney Jason Reimers,
Attorney Kelly Dowd, Tim & Annie Gordon.

Staff: Code Enforcement/Building Inspector Rob Deschenes, Recording Secretary Newton

MEETING MINUTES APPROVAL

On a **motion** by Jevne seconded by Batchelder the following minutes were approved as submitted (5-0-0)
November 1, 2022 Non-Public
November 1, 2022
November 2, 2022
November 16, 2022

PUBLIC HEARING

Chairman Sawyer called the public hearing to order at 6:00 pm. Notice of hearing for case No. ZBA 22-23, as advertised in the *Monadnock Ledger*, copies were posted in the Town Office building, the Library and the town website; copies were sent to the Planning Board, the Conservation Commission, and the Board of Selectmen; and notice of hearing was sent by certified mail to all abutters whose names were provided by the applicant.

PUBLIC HEARING NEW ITEMS

**ZBA 22-23 580 Mountain Rd LLC, Owner, BCM Environmental & Land Law, Agent
580 Mountain Rd Map 212 Lot 17 Zone: Mountain Zone, without town water**

Variance – The applicant requests a variance to replace an existing culvert (Land Use Code, Zoning Ordinance Section XX, 20.5.2)

Presentation: Attorney Jason Reimers

On Sept 7, 2022 a Stop Work Order (SWO) was issued by Code Enforcement Officer Deschenes (CEO) while replacing a culvert at 580 Mountain Road without the necessary permits. At that time, Attorney Reimers advised his client to file an appeal of the CEO's decision instead of applying for a variance. On Nov 2, 2022 the ZBA denied the appeal and upheld the CEO's decision. Because the owners continued work even after the receipt of the SWO, a Cease and Desist Order (C&D) was issued. The C&D instructed the owners to obtain a variance within 30 days and secure necessary approvals from NHDES, or, in the absence of approvals or timely filing for approvals, hire a NH licensed wetland scientist to produce a wetland remediation plan. They have chosen to file for a variance from section 20.5.2.

Certified Wetland Scientist Bruce Gilday is in the process submitting an after-the-fact permit to NHDES. He is awaiting the engineering plan that delineates the wetlands in order to complete the application. L Sawyer clarified that work should cease until the DES approval has been received. Attorney Reimers stated that they are asking for the Board to approve the variance with the condition that all DES approvals be received and those conditions met.

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Attorney Reimers addressed the five criteria. Existing Non-conforming Use: was the replacement of the single culvert with twin culverts an expansion or improvement? This variance request is for the expansion of the culvert.

The History of Jaffrey shows that the culvert had been in place since the 1930s and had been used to provide drainage but become less effective over time due to beavers and root infiltration. The field has essentially remained the same. The two new culverts were placed at the same depth, grade and slope as the original culvert. Settling ponds were used in the construction to ensure that the wetlands would not be drained.

Contrary to the Public Interest & Spirit of the Ordinance: The variance would not alter the character of the neighborhood or threaten public safety. The culvert will improve public safety as it would protect Rte. 124 in a significant rain event. An improvement is allowed by the ordinance, an expansion is not. The Board decided at the last hearing that this would be considered an improvement. Attorney Reimers contends that the degree of the expansion is so minor, that the variance should be granted.

Substantial Justice: Denying the variance would result in a financial loss to the applicant. Removal of the new culverts would cause a substantial financial loss, and may result in the field being unusable for agriculture.

The culvert replacement would not diminish the values of surrounding properties.

Unnecessary Hardship: The property is 337 acres with an established culvert system that has shaped the use of the field allowing it to be used for hay. Attorney Reimers maintains that the expansion of one, 24-inch pipe to two, 18-inch pipes is not the typical type of expansion that Section 20.5 was intended to prevent. This expansion is minor and almost entirely underground. In addition, NHDES will make the final determination of whether the culvert satisfies State law.

Tim Gordon, abutter. Noted that much has changed since the 1930s, in particular the adoption of the Wetlands Protection Act. He would have supported the project had they applied for the appropriate permits to begin with and proved that new drainage could be installed without impacting the wetlands. There was no reason to increase the size of the pipes unless they wanted to increase drainage. He asked, is there a professionally engineered plan available that outlines what is being requested? L Sawyer asked what is the increase of drainage? W Batchelder stated it was a 20% net increase. Mr. Gordon noted that wetlands could be added to mitigate the damage that has been done. L Sawyer noted that two 18" pipes were used because a 24" pipe was not readily available. T Gordon stated that measurements were not taken prior to construction so it is difficult to determine the amount of change. An engineered plan should have been provided in advance. Attorney Reimers agreed with Mr. Gordon but notes that they are now taking the required steps; hiring a wetland scientist, seeking a variance, and completing the DES application. It would have been impossible to obtain a variance within 30 days as requested in the C&D.

L Sawyer asked is there a plan on file that details the completed work including elevations and measurements? Attorney Reimers responded no.

M Tieger stated that the CEO acted accordingly, the applicant was advised to file for a variance. He is unable to determine if this violation was intentional or done out of ignorance, but the applicant was wrong to proceed in the manner they did. Not having a plan to review is a concern.

Attorney Reimers agrees that DES should have been involved from the beginning. The applicant was instructed in the Stop Work Order (SWO) to appeal the decision and in the Cease & Desist (C&D) to apply for a variance. If they did not appeal the SWO, the violation could have been used in district court. By seeking the appeal, Attorney

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Reimers was hoping to avoid the need for a variance. M Tieger noted that the applicant was instructed to apply for the variance back in 2019. W Batchelder added that the owner was advised in the 2019 email that there were wetlands on site and to contact DES before beginning work.

M Tieger asked the CEO, was the applicant told that they needed to apply for a variance? The CEO responded that he directed the owner to engage a wetlands consultant to help them through the process which would include getting a variance. The wetlands ordinance is clear, you cannot excavate or add fill.

Attorney Kelly Dowd noted that the notice of violation calls out two specific violations; 20.5 non-conforming structure and 20.4 permitted uses, fill and excavation. The violation of 20.4 has not been addressed in this application.

Attorney Dowd addressed other concerns with the application. The C&D was conditional, directing the owner to stop work, apply for a variance and seek State approval before resuming work. It further states "in the absence of approvals or in the absence of timely filing for approvals, hire a NH licensed wetlands scientist forthwith to produce a wetlands remediation plan and remediate all damage to the wetland and remove the culvert system."

The information in the Town History was clear that the culvert system was installed for the airfield. The use as an airfield has been abandoned and there is no record of the drainage system being maintained. The argument that the hardship due to the size of the lot is irrelevant. The area in question is only 1.5 acres of a 337-acre parcel. In the letter from Heidi Konesko she refers to this area as "wet meadow which can be farmed in its natural condition, but you can't alter the drainage without a permit from the State."

The "hardship" in this case is self-created. The owner knew what the zoning was and actively create a non-conforming condition. Removing and replacing a culvert in the wetland area without any permits is an example of a self-created hardship.

The applicant has put a lot of money into the replacement of the culvert, knowing full well that they needed wetland permits to do so. This does not constitute substantial justice. Harm to the public is respect for the law. Everyone should be held to the same standard.

The Spirit of the Ordinance is to protect the wetlands. This expansion did not do this. They do not meet the five criteria in this application. Even if this variance is granted another should be submitted to address 20.4. It would be difficult for the ZBA to grant or deny this variance without more information on what the impact to the wetlands has been. Is it the same as it was? The report from DES should be considered before a decision is made.

Elizabeth Webster, Conservation Commission. More information is necessary and the ZBA should wait to see what DES has to say.

CEO Deschenes noted that the Town approval is separate from the State approval. Both State and Town approvals are required.

Attorney Reimers stated it was impossible to get an engineered plan within the 30-day time frame. The risk of not filing the application would cause them to be out of compliance. Attorney Dowd countered that the C&D was only issued because the applicant continued work even after receiving a SWO. The CEO is satisfied with the efforts that have been made since the C&D was issued and has not moved forward with legal proceedings.

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After conferring with his client, Attorney Reimers requested to continue the hearing until the engineered plan is ready and DES approval has been received.

On a **motion** by Batchelder, seconded by Tieger to continue the hearing until **April, 4, 2023**. (5-0-0)

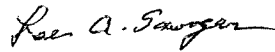
ADJOURNMENT

The meeting adjourned at 7:45 pm
Submitted:



Rebecca Newton, Recording Secretary

Attest:



Lee A. Sawyer, Chairman, Jaffrey ZBA