

**TOWN OF JAFFREY NEW HAMPSHIRE**  
**ZONING BOARD OF ADJUSTMENT**  
**Site Walk Meeting Minutes**  
**November 2, 2022**

**PUBLIC HEARING CONTINUED**

**SITE WALK**

*Chairman Sawyer reopened the hearing at 79 Turnpike Rd at 4:05 pm*

**Present:** Chairman Lee Sawyer, Members, Walter Batchelder, Erlene Brayall, Carl Jevne, Marc Tieger, David Jeffries (alt), Tom Coneys, Geoff & Elizabeth Murray, CEO Deschenes, Recording Secretary Newton

**ZBA 22-21 Geoffrey & Elizabeth Murray, Owner**  
**79 Turnpike Rd Map 244 Lot 95 Zone: Res B, with town water**

Variance – The applicant requests a variance to allow the construction of a 22' x 32' garage within the setback (Land Use Code, Zoning Ordinance Section V, 5.7 & VI, 6.1)

Mr. Murray identified the location of the proposed garage at 79 Turnpike Rd as staked out and the location of the property line. The garage would sit 90" from the house with a door facing the house and possibly a breezeway. The abutting property to the east is a treed hill with an industrial structure on the other side of the hill, not visible from the subject property. Mr. Coneys asked if there would be an overhang on the garage which would increase the impact to his property line. CEO Deschenes noted that approval will state "per plan submitted" which would include an overhang if there was one.

The Board spent a considerable amount of time discussing alternate locations for the garage to lessen the encroachment on the side setback. Moving the structure closer to the rear of the lot would still require a variance and only gain another two feet from the side setback. It was noted that the hill is much steeper in this location and construction there could destabilize the hill. In addition, the home owners would lose the use of their yard and a longer driveway would be required. CEO Deschenes suggested a retaining wall could be used to stabilize the hill. Retaining walls have no setback requirements.

Elizabeth Murray noted the gain to the abutter by moving the garage further back is minimal and the hill closer to the road is much less aggressive. Mr. Murray asked, could it be moved closer to the road? Mr. Coneys stated that he is concerned with the stability of the hill. Mrs. Murray stated that she would be happy to build a retaining wall and would prefer to do that rather than move the garage further back into their yard. Pushing it forward could impact the drain near the front of the house.

**Chairman Sawyer continued the hearing to the Fire Station**

*Chairman Sawyer reopened the hearing at 580 Mountain Rd at 4:53 pm*

**Present:** Chairman Lee Sawyer, Walter Batchelder, Erlene Brayall, Carl Jevne, Marc Tieger, David Jeffries (alt), Attorney Jonathan Sistare, Attorney Jason Reimers, Attorney Kelly Dowd, Paula Geraghty, Cody Gordon, Contractor, Carolyn Garretson, ConCom, Elizabeth Webster, ConCom, Bill Graff, ConCom, COE Deschenes, Recording Secretary Newton.

**ZBA 22-20 580 Mountain Rd LLC, Owner, BCM Environmental & Land Law, Agent**  
**580 Mountain Rd Map 212 Lot 17 Zone: Mountain Zone, without town water**

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Appeal from an Administrative Decision – The applicant requests an Appeal from an Administrative Decision related to a Stop Work Order/Notice of Violation alleging a violation of Section XX Wetlands Conservation District (Land Use Code, Zoning Ordinance Section XX, 20.3, 20.4 and 20.4.2)

Attorney Reimers clarified some details:

- The fill that was brought in was used in the culvert, the wetland soil that was excavated from site was used on top.
- The grade has not changed, if it was deeper it would not work as intended. A professional company was used for the project, elevations were checked with lasers.
- Erosion control was used during the construction process.

Attorney Dowd stated that it was brought to his attention that an Ex Parte communication was had immediately following the Nov. 1, 2022 ZBA meeting between Chairman Sawyer and CEO Deschenes with others present. As this is a quasi-judicial proceeding Attorney Dowd recommended that Chairman Sawyer recuse himself to avoid the appearance of impropriety. Attorney Reimers did not feel that Chairman Sawyer needed to recuse himself.

Chairman Sawyer responded that he did have a conversation with CEO Deschenes asking him to get together with the attorneys to try and work this out. In his opinion this was not a “Federal case, a little bit of fault could be attributed to everyone involved and that both attorneys made good presentations.” The Letter of Deficiency from NHDES “commended the contractor for the quality of the work.” He feels that the contractor was not involved just to make quick buck, even though he did seem to be in a hurry to complete the project. If they had stopped work, they would have had to bring in even more soil to make is useable. He noted that everything is still amiable between all the parties involved, and his intent was to try to make everybody happy. M Tieger added that Chairman Sawyer was trying to use common sense to solve an issue, the ZBA is here to help people. Chairman Sawyer stated that he believed that he could act fairly and did not feel it necessary to recuse himself.

Attorney Dowd wanted to clarify the comment “take a bucket of dirt out of the wetlands constitutes a violation.” He notes that this project covered a substantial amount of area that has been heavily impacted. One 24” culvert was removed and replaced with two 18” culverts. Gravel and other materials have been added to the site. The drainage characteristics and soil composition are different. The surface has been changed based on photos provided; this is clearly a violation of the ordinance. Attorney Reimers disagrees, as the wetland soil was put back.

Carolyn Garrettson stated she is very concerned with replacing one pipe with two. She believes that NHDES would not have allowed this. NHDES and the Conservation Commission should have been consulted before work was started. These are not recent wetlands; the pipes have been leaking for years. The culvert was put in for the airfield, not haying. The Conservation Commission asked that an independent, impartial wetland scientist review the site as Mr. Gilday was hired by the property owner.

Attorney Dowd clarified the question of the amount of the flow difference between a single 24” concrete pipe and two, 18” HDPE pipes. According to his calculations, the radius squared of a 24” culvert is 144 square inches, the radius squared of the two culverts together is 162 square inches, this is a 12.5% increase in size.

Chairman Sawyer believes that the culvert was put in to enhance agriculture with the added benefit of use as an airfield. Attorney Reimers reiterated that the Town History states that the use was agriculture first, then an airfield. It’s clear that agriculture had been done for many years before zoning was created in the 70s.

C Garrettson asked, this is in a wetland/wetland buffer, doesn’t it require a permit? Chairman Sawyer noted that the letter from NHDES states that a permit was required, Attorney Reimers agreed, that’s why they are working with

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NHDES now. C Garretson asked, why didn't they get a permit before starting the work? Cody Gordon stated that the need for a permit was discovered after they started the work. W Batchelder pointed out that the email from March 2019 states a permit was needed to do work in that area, the owner was aware. Attorney Reimers added that the owner spoke with NRCS to get guidance in 2019. Attorney Dowd stated they should have spoken to the CEO or NHDES. Attorney Reimers agreed that the owner should have spoken to NHDES.

CEO Deschenes oriented the Board to the site in relation to the photos submitted.

Contractor Cody Gordon explained that they could not get the same size culvert pipes as the original therefore two pipes were used instead; there was no intent to drain the wetland. The owner decided to take advantage of the dry conditions at the end of the summer to update the drainage. A wetland scientist was not consulted before the work commenced on Labor Day weekend. Mr. Gordon felt that he used his best judgement when deciding to complete the work after the SWO was issued because rain was predicted and he didn't want to leave an open trench. The owner agreed with his assessment and the project was completed as quickly as possible.

Mr. Gordon confirmed that they did dredge and fill, and they did dig within the 75-foot wetland buffer. The goal was to protect the hayfields so they could continue to hay it. In his opinion, this is getting blown out of proportion, however, they will comply with NHDES requirements. He does not understand what the Town of Jaffrey is looking for. Attorney Sistare clarified that the Board is deciding if the CEO interpreted the ordinance correctly. Mr. Gordon noted that he came across an RSA while working on a previous project that states: you can dig up to, but not impede, a wetland for agricultural use. Is that what was done here? C Garretson stated, they dug up the wetland.

Chairman Sawyer reiterated that the Board is deciding if the CEO's interpretation of the ordinance was correct.

**Chairman Sawyer continued the hearing to the Fire Station**

*Chairman Sawyer reopened the hearing at the Jaffrey Fire Station at 5:24 pm*

**Present:** Chairman Lee Sawyer, Walter Batchelder, Erlene Brayall, Carl Jevne, Marc Tieger, David Jeffries (alt), Geoff & Elizabeth Murray, Attorney Jonathan Sistare, Attorney Jason Reimers, Attorney Kelly Dowd, COE Deschenes, Paula Geraghty, Carolyn Garretson, Bill Graff, Jon Frederick, Recording Secretary Newton.

**ZBA 22-21 Geoffrey & Elizabeth Murray, Owner**  
**79 Turnpike Rd Map 244 Lot 95 Zone: Res B, with town water**

Variance – The applicant requests a variance to allow the construction of a 22' x 32' garage within the setback (Land Use Code, Zoning Ordinance Section V, 5.7 & VI, 6.1)

A compromise between Mr. & Mrs. Murray and Mr. Coneys was presented which entailed moving the garage closer to the road, the plan was updated with the new measurements and signed/dated by the owner.

The rear right corner of the garage would sit 8 feet from the property line.

The front right corner of the garage would sit 12 feet from the property line.

The front of the garage would sit 14 feet from the property line.

W Batchelder asked if this would impact the drain. Mrs. Murray said it would be in line with the drain but would not impede it.

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**Chairman Sawyer closed the public hearing**

**ZBA 22-20 580 Mountain Rd LLC, Owner, BCM Environmental & Land Law, Agent  
580 Mountain Rd Map 212 Lot 17 Zone: Mountain Zone, without town water**

Appeal from an Administrative Decision – The applicant requests an Appeal from an Administrative Decision related to a Stop Work Order/Notice of Violation alleging a violation of Section XX Wetlands Conservation District (Land Use Code, Zoning Ordinance Section XX, 20.3, 20.4 and 20.4.2)

Attorney Reimers - we are here to interpret the language of the zoning ordinance. Much of what was discussed will be dealt with by NHDES. He reiterated that use has not been abandoned. This was an improvement, not an expansion. The excavation did not “result” in an alteration of the surface configuration.

Attorney Dowd – 2017 photos show the marshy area as a low point, now it appears to be domed where the culverts begin. This was not a “temporary” surface alteration. The use was for the airfield, not drainage, and that use has been abandoned. If the use *was* for drainage, that has been expanded. Two pipes are able to drain more water than one. The two pipes at the lower elevation have more surface area for drainage.

**Chairman Sawyer closed the public hearing**

**DELIBERATION**

Chairman Sawyer stated we are here to decide if the CEO broke the law by issuing a SWO. Attorney Reimers responded that they did not allege that the CEO broke the law, he alleges that he misinterpreted the zoning ordinance.

W Batchelder – believes that there is no way the surface configuration wasn’t changed. The CEO did his due diligence in issuing a SWO. The owners were aware that there were wetlands and they chose to begin, and then complete the work even after receiving the SWO. The Letter of Deficiency from NHDES corroborates the decision that the CEO made. The Board would not even be considering this if the permits would have been pulled back in 2019 as they should have been.

M Tieger – agrees. He feels badly that it was done this way because there was opportunity to do it properly. The owners were made aware in 2019 that the area was wetland. The process would have been simpler if the applicant had come in for a variance before construction.

C Jevne and E Brayall also agree.

Chairman Sawyer was alone in his opinion. He feels that both attorneys presented good cases, and he sees merit in each. He does not think that the CEO was out of line based on the interpretation that Attorney Dowd presented. On the other hand, he understands why the property owner felt that was OK to proceed because they believed they were repairing an existing culvert that was backed-up. He is familiar with the area; he stated, that is not wetland, it’s backed up water in a wet area. It is obvious that there is friction between the CEO and Cody Gordon. He thinks the job was done and done right and the letter from NHDES backs that up. Conversely, Chairman Sawyer also stated that the CEO was correct in his interpretation and did what he was required to do. The photos provided indicate soil disturbance.

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The Board reviewed each of the findings of fact as drafted by Attorney Sistare, amending #12.

On a **motion** by Jevne seconded by Batchelder to accept the findings of fact as amended. (5-0-0)

**DECISION**

**ZBA 22-21 Geoffrey & Elizabeth Murray, Owner**  
**79 Turnpike Rd Map 244 Lot 95 Zone: Res B, with town water**

Variance – The applicant requests a variance to allow the construction of a 22’ x 32’ garage within the setback (Land Use Code, Zoning Ordinance Section V, 5.7 & VI, 6.1)

On a **motion** by Batchelder, seconded by Tieger, the motion to allow construction of a 22’ x 32’ garage within the front and side setbacks was approved as presented per testimony give and per amended plan submitted. (5-0-0)

Plans include: ZBA 22-21 Variance Application, 79 Turnpike Rd, Map/Lot 244/95, signed by Geoffrey Murray, Owner, dated Nov. 2, 2022

**Findings of Fact**

- The subject parcel is located at 79 Turnpike Rd Map/Lot 244/95
- The proposed 2-car garage is 22’ x 32’
- The subject property is 70 feet wide with 30-foot setbacks
- The agreement between the property owner and abutter would place the rear corner of the garage, 8 feet from the property line, the front corner of the garage 12 feet from the property line and the front of the garage 14 feet from the property line.

**ZBA 22-20 580 Mountain Rd LLC, Owner, BCM Environmental & Land Law, Agent**  
**580 Mountain Rd Map 212 Lot 17 Zone: Mountain Zone, without town water**

Appeal from an Administrative Decision – The applicant requests an Appeal from an Administrative Decision related to a Stop Work Order/Notice of Violation alleging a violation of Section XX Wetlands Conservation District (Land Use Code, Zoning Ordinance Section XX, 20.3, 20.4 and 20.4.2)

On a **motion** by Batchelder, seconded by Jevne to deny the application and uphold the CEO’s decision “Based upon the evidence presented by both 580 Mountain Road, LLC as the applicant and the Jaffrey Code Enforcement Officer as the administrative official, both in writing, along with oral evidence presented at the public hearing held on November 1<sup>st</sup> as well as a site review conducted at the property on November 2<sup>nd</sup>, 2022, and after thorough deliberation by the ZBA, in the matter of the administrative appeal application by 580 Mountain Road, LLC, application number 22-20, to overturn the Jaffrey Code Enforcement Officer’s interpretation of Sections 20.4 and 20.5.2, I make a motion that the Zoning Board of Adjustment uphold the CEOs interpretation and decisions related thereto on both Sections 20.4 and 20.5.2. and thereby deny the administrative appeal of 580 Mountain Road, LLC.” (4-1-0) *L Sawyer opposed*

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**Findings of Fact**

1. The applicant admits that on or about Labor Day weekend of 2022, a contractor on the applicant's behalf removed one 24" concrete culvert which had been installed in the 1930's to help drain the large field so it could be used for agriculture and as a landing field for aircraft.
2. The applicant admits that on or about Labor Day weekend of 2022, a contractor on the applicant's behalf installed two 18" HDPE culverts in the same location where the 24" concrete culvert existed.
3. The CEO states it was made aware of this work, and on or about Tuesday, September 6, 2022 went to the property to investigate, and met with the owner, or owner's agent, to discuss the culvert replacement work.
4. There was no evidence of any local or state permits having been issued before the work began on Labor Day weekend.
5. The CEO states he issued the Stop Work Order with a date of September 7, 2022 and it was delivered to the applicant, or applicant's agent on September 8, 2022.
6. The Stop Work Order stated if the property owner was aggrieved by the Order, it could apply to the ZBA with an Administrative Appeal to challenge the CEO's Order and his interpretation of the Jaffrey Land Use Code on which he relied to issue the Order.
7. There is a copy of a letter from the State of New Hampshire Department of Environmental Services ("DES") in the applicant's file which indicates the DES has ordered the property owner to file an "After the Fact" permit for the work conducted on site.
8. The applicant filed its application for an Administrative Appeal on October 6, 2022 and was accepted for a hearing by the ZBA.
9. There were no challenges by either the CEO or the applicant that timeliness or procedures were an issue with the issuance of the Order by the CEO or of the application by the applicant.
10. The applicant challenges the CEO's issuance of the Stop Work Order and a separate Petition for Enforcement filed with the District Court stating one or the other should be used, but not both.
11. The applicant believes Section 20.4 should be interpreted to mean that the phrase, "...alter the surface configuration by the addition of fill, dredging or excavation..." means after a project is completed the surface configuration should be restored to its pre-existing condition, thus no alteration of the surface after all work is completed and the site restored to how it existed previous to the work.
12. The CEO interpreted Section 20.4 to mean that once the area is initially disturbed the surface configuration is altered, therefore, a review and/or permit should be issued before work begins.

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13. The applicant believes Section 20.5.2 should be interpreted to mean that the replacement of the culvert from one 24" concrete culvert to two 18" HDPE culverts should be considered an improvement and not an expansion of a non-conforming use.
14. The CEO believes Section 20.5.2 should be interpreted to mean that a change from one 24" concrete culvert to two 18" HDPE culverts is an expansion of a non-conforming use.
15. Both the CEO and the applicant admit that the area where the culverts were replaced is a designated wetlands area as depicted on the Town of Jaffrey Wetlands Map.
16. An email from March 22, 2019 from the CEO to 580 Mountain Rd LLC advised the property owner to contact a wetland soil scientist or an environmental consultant to determine how to proceed.

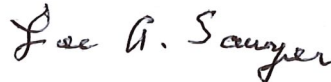
**ADJOURNMENT**

The meeting adjourned at 8:51 pm  
Submitted:



Rebecca Newton, Recording Secretary

Attest:



Lee Sawyer, Chairman, Jaffrey ZBA