

**Moultonborough Planning Board
P.O. Box 139
Moultonborough, NH 03254**

Public Meeting

January 11, 2023

Minutes

Present: Members: Allen Hoch, Sandra Kelly, Scott Bartlett, Norman Larson, Brendan Connolly,
John Annaian, Kevin Quinlan (Selectmen's Representative)
Alternate: Peter Claypoole
Staff Present: Dari Sassan, Town Planner; Bonnie L. Whitney, Administrative Assistant

I. Call to Order: Chairman Hoch called the meeting to order at 7:00 PM.

II. Pledge of Allegiance: The Pledge of Allegiance was recited, led by Chairman Hoch. The members and staff then introduced themselves to the public.

III. Citizen's Forum – None

IV. Review/Approval of Minutes:

Motion: Mr. Larson made the motion to approve the Planning Board Minutes of November 9, 2022, as written. Ms. Kelly Seconded. Motion carried unanimously.

V. New Submissions: – None

VI. Boundary Line Adjustments: – None

VII. Hearings:

1. Continuation of Public Hearing for Koss Construction LLC (140-16 & 170-12) Bean Road – Voluntary Merger, Subdivision (Condominium form of Ownership), Site Plan Review, and Conditional Use Permit for a proposed condominium subdivision

Mario Focareto, Brown Engineering and Ethan Wood of Normandin, Cheney & O'Neil, Attorney of behalf of the applicants Mark Koss and Jacqueline Koss were present for the hearing. Mr. Koss participated remotely via telephone as he was unable to be physically present this evening due to the national grounding of flights imposed by the FAA across the US earlier today.

Mr. Focareto stated that he would provide a brief presentation of the changes to date. Mr. Hoch asked if he could provide detailed calculations as to how the quantity of proposed units was arrived at. Mr. Focareto provided a handout which detailed the Proposed Density Calculations for the 48 Units Proposed. He noted before the board were applications for site plan review, condominium subdivision, a conditional use permit for grading within the 50-foot wetlands setbacks, a waiver request for the deduction of the protective well radius in the lot size calculations, and an application for voluntary lot merger.

Mr. Focareto noted the major changes that have been made to the plan set since the last meeting and highlighted the changes that brought the design to where it is today from where the began with their

original submission. They have reduced the number of buildings to 24, for a total of 48 units, which represents a 20% reduction in from the original submission. By reducing the number of units from 60 down to 48 they were able to completely remove Roadway 5 and its associated infrastructure. Phase 1 of the project was reduced from 30 units down to 26 units. This allowed them to achieve an impervious coverage for approximately 13% within the Wellhead Protection Area, which is well within the 15% maximum coverage allowed by town regulations.

Mr. Focareto noted the reduction in units also affected the roadway. The original design had projected an ADT (average daily trips) of 432 average daily trips which was according to the traffic study that was conducted as part of the site plan application requirements. The proposed reduced number of units brings the projected ADT down to 346 which requires a 22 ft wide roadway as opposed to a 24 ft that was previously required by the town standards. The plans have been revised to reflect a 22 ft roadway which complies with the town standards and no waiver is necessary.

The deduction in the number of units allows for less of the site to be distributed, mainly to the back portion of the site that will now be undisturbed, naturally vegetated and wooded. Mr. Focareto noted while there was a 20% reduction in density, he believes that the reduction in disturbed areas is a larger percentage in the overall site. There are a lot of positives with the layout.

The other changes that have been made were on a much smaller scale. They tried to maximize the distance between the houses that are along the property line. Of the three units closest to the abutters on Bean Road the shortest setback is nearly two times the town required setback of 15 feet, and of the three buildings that abut the Bean Road abutters, the furthest is quadrupled the town setback at over 66 feet.

Mr. Focareto stated that great consideration has gone into screening the newly proposed homes from the existing homes located on Bean Road. The proposed plantings to serve as a screening have been increased since the original submission and are to be placed in a manner that will allow them to grow as densely as possible.

Mr. Focareto noted that those were the significant changes, adding there have been many small revisions, mainly to the detail sheets and notations. They have been working diligently with the third party reviewer and as of this afternoon they received an email from that reviewer who had pretty much completed his review and his only outstanding comments are regarding the state permits that are pending.

Mr. Focareto stated that Mr. Wood, Mr. Koss, or he would be happy to answer any questions or concerns of the Board.

Mr. Hoch asked that the board move onto the waiver request.

Attorney Wood spoke to the one waiver request which is a significant decrease from the previous position they had taken. The one waiver request deals with the exclusion of the well radius area from the density calculations. The purpose of that regulation is to make sure that the well does not have any issues which would result in contamination or pollution where things to be built to close to it. They believe that the waiver itself meets the requirements of the statute and of the ordinance.

Mr. Wood noted that there are three specific criteria identified with regard to the waiver of request. Number 1 is that special circumstances exist where strict conformity with any specific requirements of these regulations would cause undue hardship or injustice to the owner of the land to be developed and reviewed. They believe based on the information they have submitted previously and with the additional information provided today they have covered that completely. He noted that the special circumstances with regard to this are the layout of the site itself, the requirements that both DES (New Hampshire Department of

Environmental Services) and the Town have set forth on community water systems, especially community water systems of this size, which will be more heavily regulated water systems with ongoing testing throughout the entire life of these systems is something that does not exist for smaller water systems. They are subject to a higher threshold with regard to the DES regulations and the reporting requirements. The primary purpose of this regulation is to make sure that there isn't pollution. Mr. Wood reiterated that this is an ongoing issue that is really under the purview of the DES. They anticipate continued working with DES and the regulations that exists in the Town as well as the well head protection that exists for the Senters Market which is also imposed upon this area. The injustice arises as a result of the "duplication" that continues on this as far as the protection that it's set to serve. They note in addition to that, the Master Plan of the Town of Moultonborough specifically is set up to promote denser development in specific nodes. The two nodes are the Village District and the West Village Overlay District. Those nodes are where there is supposed to be more dense development that have the services that permit more dense development, such as a sewer and community water systems. In this case they have both.

Mr. Wood stated the second criteria is where the review procedures have been in general conformity with these regulations and provided that the spirit, intent, and purpose of these regulations will not be adversely or substantially served and not adversely affected or harmed. He noted that a lot of the same points were covered here. The purpose of the regulation is to make sure that the water system isn't contaminated by septic systems, which is not going to happen because there is sewer, isn't contaminated by ground water issues, they have a 200 foot well radius around it, and the only infrastructure within that are related to the wells itself and they have additional area to the south that is undisturbed. Mr. Wood noted that approximately 50% of the area in the well radius is already protected as a wetland and is already excluded from the density calculation. You are not taking about the entire radius, but only a portion of it. Mr. Hoch asked if they had the numbers for that area. Mr. Focareto stated that is approximately 60,000 square feet.

The third criteria is that the public convenience and welfare of the citizens of Moultonborough will be substantially served and not adversely affected. Mr. Wood stated that this goes back to the Master Plan which is looking to have nodes of development where the density is greater in order to promote lower cost housing in order to provide the amenities that the town is looking to have in order to attract a younger work force. And because of its location, near Center Harbor, there are jobs that owners hopefully will be able to fulfill or to create by living and working in the area.

Mr. Wood stated with regard to the waiver, the believe the waiver is justified as part of this plan. They believe the hardship is a dual one. The reduction in the number of units increases the costs of the units which increases the cost of housing that nullifies the objectives of the Master Plan if you were to deny the waiver.

Mr. Wood spoke with regard to the Bay Sewer District. All of the development is going to have sewer systems. They are working with Bay Sewer at this time. They do not have any final numbers, which dependent on the waiver. They anticipate that this would be a prime location for it and tie into the existing sewer system.

Mr. Wood added that the information submitted in October addresses the concerns that were set forth with the Murphy (36 Bean Road) letter of December 13, 2022. Most of those concerns are with regard to the purview of the DES. Mr. Wood added that the board could condition the plan upon receiving approval from the DES, and he went on to further encourage the board to do so. For the board to deny the waiver on the basis that contaminants may be brought, or that water may be impacted, is not a valid reason for denying the waiver. In addition, you had discussion about what would happen were contaminants brought over, or if water was impacted. They have proposed a number of solutions they think would cover some of that. However, until additional testing is done, and additional work by the geologist and the water people is

completed, it's impossible to say whether or not the wells will bring contaminants over. No one knows that. The DES does not that. They don't know that. The abutters do not know that. It is all speculation at this point. They need to work with DES to go through the testing. They have hired all the appropriate professionals to find out how the water is flowing and where it's going. Mr. Wood welcomed any questions with regard to the waiver.

Mr. Hoch stated that a lot of what was said was based on the town's regulations, but by its basic purposes, zoning ordinance, subdivision and site plan regulations impose some hardship on all properties. And by setting lots size dimensions, allowable uses, and other criteria the imposition of such hardship is entirely legal, and most of the time such hardship does not constitute the type of unnecessary hardship which must exist to warrant the granting of a waiver. Mr. Hoch noted that he was still looking for that special hardship.

Mr. Wood replied that the special hardship is there are restrictions on top of restrictions on top of restrictions. Mr. Hoch commented that he mentioned the 48 units. Wherever you put 48 units you're going to have those restrictions. Mr. Wood said it's not wherever they put the 48 units if they're going to have restrictions, it's really a matter of the well radius as being excluded from the area that can count as buildable area for the units. So, reducing that number reduces the number of units but it increases the price of the units. It increases the costs to do this, and it results in something that is further away from the Master Plan that the town has adopted with regard to increasing density in specific nodes. That is why they think the waiver is justified with regard to this specific area. He understood that Mr. Hoch was looking for a specific hardship, noting that that was not the only criteria that's required under the statute. The other one is an injustice. When Mr. Koss came to the town and had an initial discussion back in 2018 or 2019 about this property, and doing his due diligence on the property, there were conversations with regard to what the density would be. Mr. Koss based money, time and effort on the representations that were made by the town at the time. While those representations were upheld by this board, they were subsequently not upheld by the zoning board and litigation did occur as a result of that. That has been resolved, so what they have done is come in with a plan that is substantially reduces the number of units in order to eliminate the areas that were wetlands and were being included in the density calculation. The hardship is to Mr. Koss with regard to representations made by previous town officials, and the plan that was produced based on that, the amount of money was not necessarily a hardship, so much as an injustice, which is the other criteria that is available on a waiver request under the statute and the town ordinance.

Mr. Annaian noted the full text of Section 13.2 of the Site Plan Regulations includes that fact that granting the waivers should not adversely affect the citizens of Moultonborough. The board does not know if citizens will be affected by this yet because of the possible contamination issues. Mr. Wood replied that was slightly different as they were talking about whether or not the wells that are drilled, when they're running, are going to pull contaminants that exist and are known to exist in Center Harbor, across the border into Moultonborough. There is no engineering, no science, nothing at this point that supports that. They are in the process of working with DES to do testing to determine that. However, there are ways that they can mitigate this issue. They know that they can clean PFAS from the water and they are certainly willing to make their community water system available to other residents that are abutters who might be adversely affected. But to the extent that anyone states with certainty that this project will do it, is just not accurate. DES does not know it. The DES letter of April 21, 2022, that was provided as Exhibit 3 in Attorney Rouvalis' December 13, 2022 letter to the board, specifically states that DES does not know, and additional testing needs to be done, but there needs to be a mitigation plan and they are working with DES in that regard. Mr. Annaian replied that DES does not know at this moment, but it could possibly adversely affect other lots that are close by. Mr. Wood stated that it is absolutely possible which is part of the reason they are working with DES to develop a mitigation plan that is acceptable to them and to remove the contaminants if they do get pulled. The water on their property is uncontaminated. It is clean. There is more than sufficient quantity to add additional homes to it since there project has been reduced in scope. Their

plans currently involve, regardless of whether or not they pull contaminants, a storage tank, and the ability to filter and mitigate any contaminants. This seems to be a solution that would work for the town and the people around it, in that they would have the ability to provide clean drinking water that is not currently available to those people who have wells that are not subject to DES regulations.

Mr. Quinlan asked if any of the abutter's wells have been tested for any of the potential contaminants? Mr. Wood replied some of them have been tested. A number of abutter's have declined the offer of testing or have accepted and subsequently rejected them. He did not have any test results.

Mr. Quinlan questioned the type of abutting wells, asking if they were dug wells, shallow wells, or of similar depth. Mr. Wood noted that they did have that information, but not readily available.

Mr. Connolly questioned if the amount of land that is existing in the well radius that is not already excluded by wetlands is roughly 60,000 square feet? It was noted that was correct. Mr. Hoch questioned the number of units that would be affected if they were to deny the waiver. It was noted it would probably reduce the project by six (6) additional units.

Mr. Bartlett made a statement that having been very involved with the formation of the West Village Overlay District and wanting to see development of that area of higher density, they did move to a much lower square foot requirement. As being advised by both the Town Planner and the town consulting engineer, this is protected property. It's already protected. It will serve its absorption characteristics, with the exception of a pump house and a gravel access road. It's still going to serve the purpose of absorption in that area. It is undisturbed land. He questioned why they were "double whamming" this and removing it from the calculation that is essential in order to improve the density of this area, which really was the intent of the Master Plan. Mr. Bartlett stated that he was in favor of granting the waiver as requested.

Mr. Hoch commented that he looked at it in the context of the wetland buffer areas, those cannot be developed, but they are counted in the lot size, and that is in the regulations. For the wellhead protection it is in two places that cannot be counted. When they were formed, they had that in mind with the wetland buffers can't be used but can be counted. The wellhead protection cannot be used and cannot be counted. Mr. Wood rebutted that there is a difference between the two. When you talk about wetland buffers, you're not actually talking about the wetlands, you're talking about a buffer area that is there as a buffer to protect the wetlands. The purpose of the well protection area is to ensure that the drinking water isn't contaminated by the development, and based on the location of these wells, and the well radius, they are being protected. There is no development in that area, other than a pump house and a gravel access road. The purpose of the requirement in the towns code is met, and the waiver relieves the injustice to the applicant.

Mr. Larson stated that he was comforted by a couple of points that were made and concerned about something that he had not seen yet. The fact that the well is being looked at by authorities that know a great deal about creating community water systems and they cannot do approval from the state set him somewhat at ease. The fact that the parcel being served entirely by a sewer system and does not deposit any of the sewage into the soils is a mitigating factor. Our regulations limit the construction on a site by imposing limitations on wetlands, well radius' and such is to avoid contamination that is being deposited in the ground from getting to the wells that are on the property.

Mr. Larson acknowledged that the applicant is making considerations for how in the future if there was a problem that developed with the neighbors' wells, that they could provide water service to them in lieu of their well. In reviewing the draft covenants, he did not see any reference to any requirement or how that may be resolved. Mr. Wood stated that has not been included as there isn't a definitive solution. If the board would like to make that a condition of approval, they would be happy to add that into the condominium documents.

Mr. Connolly commented that in his opinion the waiver before the board has nothing to do with the construction of the wells, nor the water that is impacted. That seems to be under the purview of DES. Therefore, the board is looking at the density calculations once again. It seems logical to assume that the wetlands are already excluded from the density calculation. It seems logical to not penalize or cause hardship there by doubling up on that. Excluding the remaining 60,000 square feet from the density calculation is the topic. Without knowing the feasibility of a delta of 6 units, it is hard for him to figure out where the hardship is. Does six units make or break this development? Be it physically, financially, that's his thoughts. Mr. Wood replied there is a hardship there as the price point the developer would like to reach is one that is a reasonable price point in line with market values for a condominium unit of this size which may increase home ownership of people in the area. The more units that get reduced, the higher those costs.

A brief discussion ensued regarding what was or was not market value.

Mr. Bartlett asked for input from Mr. Sassan regarding the waiver request. Mr. Sassan referred to his prepared December 30, 2022. He noted the the fact that the 3rd party reviewer's recommendation was that it was reasonable to grant the waiver request. Mr. Sassan pointed out in the letter from Attorney Rouvalis he questioned whether the radius is entirely on the subject parcel. Mr. Wood replied that it is. In addition, there is the idea that there is something unique about this property that warrants the granting of the waiver. There has been a lot of discussion about whether the purpose of the ordinance can be met as well as the Master Plan. Mr. Sassan encouraged the board, when determining whether to grant the waiver or not to consider that in particular. Is there something unique or not. Does the fact that 48 units requires a higher level of protection for that radius is unique? Mr. Hoch pointed out that anywhere you put 48 units you are going to be subject to these regulations. Mr. Focareto touched on a few things during his presentation may identify some unique aspects given that so much of the property is encumbered by the Ground Water Protection Ordinance.

Mr. Hoch referred to the draft condominium documents and that in two areas it states the condominium instruments will contain additional language protecting the well radii. He could not find the two locations. Mr. Wood stated that he would be happy to make sure that is included in the condominium documents. The site plan is a part of the condominium documents would identify that protected area and the site plan approval would also be something that the condominium would be subject to and could not change without coming back to the board. If the board believes that it is necessary to add additional language, they can discuss about what that looks like, or they can add it to the condominium documents if they believe that it is not sufficiently covered.

Mr. Annaian questioned when the first revision of the plan was submitted? It was noted that date was not available. It was noted that it was approximately 2021. Mr. Annaian questioned approximately when the Wetlands Overlay District was adopted, or the wellhead protection requirement. That information was not known without reviewing the amendments to the ordinance. Mr. Annaian's purpose of his question was that these regulations were in effect when they purchased the lot. He did not understand how someone could purchase a lot and then seek a waiver. You cannot just expect to get a waiver granted. Mr. Wood replied that there was not an expectation that they would absolutely get a waiver.

Chairman Hoch opened the hearing for public comment regarding the waiver request.

Mark Rouvalis with McLane Middleton – Attorney representing Bryan and Elana Murphy – 36 Bean Road. Mr. Rouvalis stated that the applicant fails to meet the standard for the waiver. The standard is Site Plan Regulation 13.2 which is quoted in his letter of December 13, 2022, “special circumstances exist where strict conformity with any specific requirements of these regulations would cause undue hardship or injustice to the owner of the land to be developed.”

One may ask if hardship is different than injustice? Mr. Rouvalis' view is that it does not really matter. It's some material problem or material impact to the developer that is severe. It's not a limited thing. Mr. Rouvalis stated that a hardship cannot be created by the excessive development of the developer. It has to be something unique to the land itself that creates a hardship.

Mr. Rouvalis referred to his letter of December 13, 2022, which details the Murphy's objection to the Koss Waiver citing the Procedural History, location of the protective well radii and reason why they believe that the applicant fails to meet the requirements for a waiver of the lot size calculations that exclude the protective well radius. Also noted were other aspects of the amended plans fail to conform to applicable regulations. Specifically, the purpose for the protective radius under Town regulations is to "protect the long-term quality of each community well, to promote public health and safety and to prevent the contamination or pollution of water in community wells..." Subdivision Reg. 8.4.2.

Mr. Rouvalis noted the preface to the Subdivision Regulations talks about its purpose. The purpose includes protecting the public health due to water supply. There are no special circumstances and no injustice except for the applicant's own proposal. It is their own proposal that is causing the injustice. The second issue is as a matter of public health for the community and for the residents who live here already, never mind the residents that will come into this development if it is ever approved. Mr. Rouvalis stated that the DES has said that the operation of these wells, in their location, are going to adversely affect the aquifer in the Town of Moultonborough because it is drawing in contamination from neighboring properties. The proposal the applicant is speaking of indicates that they will treat any contamination, therefore they are conceding in effect that there is going to be a problem. It is incumbent on the Planning Board to look at the purpose behind this. Not just the West Village Overlay District regulations. This must be consistent with all the other aspects of this which includes being in a wellhead protection area. Mr. Focareto has stated that 70% of the site is in a wellhead protection area, yet they're proposing to build all over it. How is that protecting the wellhead area?

Mr. Rouvalis stated that the proposal as a whole is inconsistent with regulations the town has. They have not met the test. They did not show hardship. They did not show a special circumstance. They created the circumstances that they are trying to get a waiver of. They lost the waiver density once, and they are seeking a second bite at the apple and the board should not grant the waiver for that reason.

Mr. Hoch commented that a lot of Mr. Rouvalis' testimony was regarding what the proposed wells would do to the neighbors and denying this request is only going to affect six units, therefore they will still have the wells. Mr. Hoch noted one of the arguments was for zero development. Mr. Rouvalis replied that he did not say zero, but greatly reduced so as not to require the level of water pumping that is being proposed under their current permit. Mr. Rouvalis added that if the applicant comes back with something else, they will be back focusing on this very thing. The first thing the board must do is to send the applicant back to the drawing board and let them decide if they are going to come back with a 42 unit proposal, and whether they are going to address any of the concerns raised in that proposal as those concerns will still be out there.

Christopher Boldt with Donahue, Tucker & Ciandella, Attorney of behalf of the Town of Center Harbor. Mr. Boldt stated that they agree with Attorney Rouvalis that the applicant has not met their burden of proof to gain this waiver. The applicant has admitted tonight that there are two wellhead protected radii involved. One is shown on the earlier versions of the plan. The December 6, 2022, version now shows the Ground Water Protection Overlay which was designated as a well head protective radius earlier. The 1,000 foot radius is for the two wells and Senters Market. Those are pumping for all of the businesses at Senters Market. The smaller circles are for their community well. Mr. Boldt argued that what Attorney Wood has created with his argument on purpose, is non-existent. It is not in the Town ordinance or regulations. There is nothing that says the purpose of this exclusion is to protect the water quality of the well. What it does say is no portion of the well protective radius shall be counted for lot density calculation. Mr. Boldt noted that

Chairman Hoch was correct when referencing the two places in the regulations that it is said, and the distinction between the buffer treatment in them shows the intention of the voters to treat things differently. If the applicant does not like that, they can ask for the waiver, but they need to provide the evidence. They have not provided a full waiver request that sets out their claimed evidence for either of the two.

Mr. Boldt agreed that approximately 70% of the lot is burdened by the well protective radius next door in Center Harbor. He noted for the record that the laundry dry cleaner facility is not in Center Harbor, it is in Moultonborough, as well as the Irving station. They are proposing the wells approximately 400 feet from the property line. The wells are drawing over 50,000 gallons a day on the stratified aquifer. The property has no hardship that warrants the waiver. The developer might have a hardship because he wants to get more of a profit, but as Mr. Rouvalis said, he bought the property (17.5 acres) for \$285,000. There is no reasonably based market analysis expectation that would have this be a reasonable project at this size.

Mr. Boldt stated that he also said no to 48 units. Yes, they can have something. As suggested months ago, they can move the wells up to the north portion of the property and come in off the woods road to the rear. Proposed 8 buildings, 10 at most for 16 or 20 units. They would avoid the relocation of the stream and avoid having the units on top of the existing residences. All of this goes to the issue of "is there going to be impact" as a result of granting these waivers on the community at large. The burden of proof is to show that it's not. Common sense tells you that there will be impact as a result of granting the waiver to put the wells as proposed and to draw down that much water in the neighborhood where other properties are also burdened by the same well protective radius. The property is not unique in that regard.

Mr. Boldt noted the issue of economics was brought up. Affordability and market are two different things. Had they wanted to come in as a workforce project, they had every opportunity to do so when they came in for the first application. That allows them leniency under the regulations, but in exchange for that, that caps their ability to sell at a market rate. They have to have a percentage of the average income in the area for both rental and sale. Roughly between 60-80% of what a market based unit would be. The applicant chose not to go there. These are straight market units; therefore, they don't get to use the economic card. They don't get to claim workforce housing as any justification of hardship or injustice. There is not a case on injustice. They do have abundance cases on hardship, and hardship is to the property not to the applicant.

Mr. Boldt feels they can develop the property in a reasonable way, and in his opinion, the plan presented is not reasonable. The board should deny the waiver and send them back to the drawing board. He does not believe it's only a reduction of 6 units, but at least 12 units, really 13 units. Mr. Boldt stated the definition of the well protective radius says no portion of the protective well radius shall be included in satisfying any minimum lot size calculation.

Mr. Boldt explained his method as to what area (13,000 square feet) needs to be deducted from the Proposed Density Calculations provided by Mr. Focareto this evening. Mr. Hoch noted that a large portion of the well radius is deducted by wetlands. Mr. Boldt rebutted that in stating the ordinance does not say, not counting wetlands. It says no portion of. Many felt this was double deducting that area which is located in the wetlands.

Mr. Larson commented there was a question of hardship or injustice, noting that the applicant may feel he has an injustice because he came to the Town at the time of purchasing the property asking how much he could build. Using that answer that the Town gave as a reason to make the purchase. In the applicant's mind, is it just for the town to change its mind about the density? Mr. Boldt replied what did or did not happen is unknown. Before a project comes to the Board, there is no decision. It is similar to a conceptual design review which comes before the board, it is non-binding until an actual application is before the board. This appears to be something that was discussed with a prior planner. Regardless, before it comes before the board, there's no decision to be made. From an injustice standpoint the case law goes

to what is a reasonable market based economic expectation. Here there are 17.5 acres, in Moultonborough for \$285,000. It is not a reasonable expectation that they are going to get 60, 40, 30, whatever the number out of this very wet lot where a great deal of the uplands that are in the lower half are noncontiguous. In looking at Section 6.1.3 of the Subdivision Regulations, the board has the authority to say that not all land gets developed. You have to look at the propriety of the land in question. Mr. Boldt feels the propriety of this land says don't eliminate the well protective radii areas. The board should have the applicant come back with a plan, or at the least a waiver application that sets forth what their evidence is for special conditions, unnecessary hardship, injustice, no adverse effect, strict conformity cannot be met, things such as that.

Mr. Boldt asked that the board consider his argument and deny the waiver.

Mark Taylor – 34 Bean Road. Mr. Taylor commented on a few issues heard this evening. One regarding the testing of abutter wells. They received one phone call and several emails from Gilford Well during the Court stay that was in place. He provided that information to Gilford Well, asking they call back when the stay was lifted, and he has never received any further communications from them. Mr. Taylor spoke to the fact that this project will impact his property as they share two common boundary lines. They have concerns with the location of the driveway, the walkway, and a house on their back property line. He spoke previously with the Selectboard and was reassured that the Town was strict with wetlands because the 60+ miles of shorefront and we want to protect that. Mr. Taylor does not believe that the restrictions in place go against the Master Plan as stated by Mr. Wood. Mr. Taylor does not believe that the board should grant the waiver.

Carla Taylor – 34 Bean Road. Ms. Taylor commented on the discussions relating to hardship or injustice in that the applicant would need to decrease the number of units. The applicant has not stated any concern for the current residents in Moultonborough. It was noted that these regulations have been in place for years. The applicant is putting the board in a position, as well as DES, to protect the residents of the Town, all while Attorney Wood said they are being double duped and therefore will lose profit. This is not an injustice, nor a hardship. It could be for all the abutters. The applicant has not proven anything. Ms. Taylor does not believe that the board should grant the waiver.

Don Carey – 35 Bean Road. Mr. Carey noted that his well has been tested by DES. He received a letter in 2021 informing him of contaminants from the wellhead in Center Harbor as he was within 500 feet. Mr. Carey provided a letter dated January 10, 2023, which identified his concern of the possibility of contamination that may occur with the wells on the Koss property. Mr. Carey requested that the Board secure a bond as any condition of approval for the project.

Jim Mardis – 118 Lake Shore Drive. Mr. Mardis noted that he was involved in the sale of the property. In speaking with Mr. Koss, he advised him to go and speak with the Town Planner before completing survey work of spending money. Mr. Koss spoke with the Planner and was encouraged to move forward with the project as it was something that the Town had been looking for for years.

Mr. Boldt replied that while his advice to developers is that they speak with the Planner. If there is any project that they are contingent on buying the property, obtain the approval as a condition of the sale. Get that before you close on the property. Any discussion with the Town is non-binding. Mr. Boldt spoke briefly about the Declaration and Covenants. Those covenants should contain a number of things, especially about the well if the board is to grant the waiver.

Mark Koss commented that the waiver before the Board was not based on the price of the land, not the price of the property, or his due diligence, it is based on the zoning regs that they had designed the entire project off of the zoning regulations in conjunction with the two town planners as well as the engineering team members. He believes that what is in front of the board is a waiver for the wellhead protection zone

that is currently shown on the plans and the waiver for that to not have that area be removed from the calculations for the density. Mr. Koss believes that Mr. Wood and Mr. Focareto have done a stellar job laying that out for the board so that they can have them make a favorable decision on that. Mr. Koss does not feel that all the other information is relevant to this decision about the well head protection area. Mr. Koss offered to answer any questions in regard to the waiver.

Mr. Larson asked what Mr. Koss thought his hardship was. Mr. Koss noted that he did do his due diligence prior to purchasing the lot. They have removed the wetland area out of the calculations, and the hardship is that they were reduced from 60 units, which the Planning Board voted on. That was challenged and they chose not to spend money fighting it on a legal battle. They conceded and agreed to reduce the number to 48 units. There is a portion of the wellhead protection area that is within the wetlands and is unbuildable. They have deducted the wetlands. They are not asking for an unreasonable waiver such as roadway width, it is a wellhead protection area that you cannot build in. There is no purpose to build in it and he believes that is the hardship.

Mr. Wood addressed a point made by Mr. Rouvalis with regard to the April 21, 2002, DES letter. Mr. Rouvalis noted the second paragraph of the letter says NHDES cannot approve the preliminary application at this time because the proposed contamination control program does not adequately assess, (and the synonym for assess is determine) or control nearby known contamination sources that have been shown to be hydraulically connected.... The DES does not know with any certainty, and no one does at this time, whether or not the wells are actually going to pull the contaminants from Center Harbor. This is unknown. It needs to get determined. DES believes that it may be, but they don't know with certainty. They need to do testing to figure it out. DES does not want them to do testing until they have adequate controls in place. They are working with DES to determine what those are. Once those are determined they will do testing and figure out whether or not it gets drawn. They want to make certain that no other wells are contaminated. Mr. Wood noted that their well is not contaminated, they are both clean and they do not want contaminants in their well. However, because they are having a community water system, they have to have a plan in place to deal with it if it does occur. Part of that plan makes sense to figure out if they can include the abutters and make sure that they have clean water too. That is a general benefit to everyone even if they don't want it.

Mr. Hoch questioned how deep are the wells? Mr. Focareto replied approximately 600 feet. Mr. Hoch indicated that he thought that the contaminants were ground level. There was a brief discussion regarding the direction in which the water flows.

Mr. Quinlan questioned the size of the water storage tank, the number of gallons to be drawn down, noting if the waiver were to be granted, what would the language be, and where would it be documented. In addition, Mr. Quinlan feels that it should go in a deed that is recorded as they are potentially providing water to abutters.

Mr. Rouvalis said that he wanted to be clear about what the applicant was saying "we have a plan when we pollute your property." Right now, the test results don't show any of these contaminants that we are concerned about MTBE, CVOC, PFAS or anything. His clients (Murphy) well is clean. The applicant is saying they are going to bring pollution onto your property, but hey, don't worry about it because maybe we'll provide you with water. That may be part of a solution, but it does not cover any of it.

Mr. Boldt noted one of his concerns is that there is a lot of missing information as stated by Mr. Wood. He thought the proper course would be to deny without prejudice. Allow the applicant to get the testing done by DES. DES may not allow this well here. They may not allow 50,000 gallons; it may allow 12,000. If you use the standard unit of how many gallons a single family home will get on a septic system, you're looking at over 16,000 gallons coming out for a total of the 48 units. Deny without prejudice allows

them to come back with the missing information when they have it. It doesn't allow Fisher v Dover to apply against them. They can come back and say okay, DES has said no to this well, but yes to that well, or no to a well there with X number of gallons but yes to Y.

Mr. Focareto commented that the waiver is not about pulling water out of the ground, it's about clarifying the density, so they have an idea about what's going forward with this project. As a design standpoint they are still trying to figure out how many units there are. They don't have a sewer permit because they can't submit flowage rate as they don't know how many units there are. The waiver is about the density.

Mr. Focareto spoke to the contaminants in that not one abutter has said ... "Jeeze, there's PFAS in the water and I have the chance to get onto a public water system, yeah!" They (the abutters) are strongly against having a tested, monitored drinking water system. They (the applicant) are working with DES to see if this possibly is a solution to the PFAS problem in the area. It is not the cause of the PFAS. If this project goes away, the PFAS will still be in the ground, and it still is migrating. With this here, they may have a solution to get people onto clean tested water.

Speaking on behalf of his clients, Mr. Rouvalis commented that they had not received any proposal from anybody about water coming from a public source. Attorney Wood and he have had it mentioned in passing, but this is the first time they are hearing that as a "official" proposal. It's still problematic. The notation that they should be jumping at the chance to join a public water system where they have no vote, no say, nothing, doesn't sound like a great deal to him. This is not before the Planning Board and should not be considered as a solution to the problem that they are going to create.

Mr. Wood stated they did not create the contamination. They didn't create the problem. They didn't put the PFAS in the ground. They didn't put the VOCS in the ground. They are concerned about it and because they are concerned about it, they have come up with a solution to help. Again, if no one wants that solution that's fine. They can drink their water and they don't have an issue with that.

Carla Taylor – 34 Bean Road. Ms. Taylor commented that she did not believe that "we" would all be here right now if there were three house lots being put in that, and three wells being drilled. She wouldn't care. They are trying to get too much, move too much. That's been proven here. They could put in three or four house lots and they wouldn't have this issue. So where is the issue? They're trying to ask for a waiver for something that isn't realistic and isn't safe, and they don't have a policy in which they're going to protect it. Everyone is entitled to water. They were told that by their expert. They're not entitled to drag up all the contaminants. The water is fine the way it is. If you put three wells out back, it would still be fine. What they are trying to do is not fine.

Mr. Hoch CLOSED the public input at this time on the waiver request.

Discussion ensued with the members regarding the direction they wished to proceed.

Motion: Ms. Kelly moved to deny without prejudice, the waiver request for section 6.1.5 of the subdivision regulations as submitted, dated October 21, 2022, for Koss Construction LLC (140-16 & 170-12) to not deduct the protective well radius in determining the minimum lot size calculation. Mr. Hoch Seconded. A roll vote call was taken. Brendan – Aye; Norman – Aye; Scott – Nay; Sandra – Aye; Kevin – Aye; John – Aye; Al – Aye. Motion passed 6 to 1.

Mr. Bartlett noted that there were many other items to be voted on regarding this application, and given the time this evening, he suggested that the Board move for a continuance. Mr. Larson suggested they hear input from Mr. Koss or his agent(s). Attorney Wood requested the Board take a 5-minute recess to allow

him the opportunity to confer with his client with regard to how he would like to proceed at this point. Members agreed with Mr. Woods request.

Upon reconvening, At the request of his client, Mr. Wood asked that the Board continue the hearing to January 25, 2023.

Motion: Mr. Quinlan moved to continue the public hearing for Koss Construction LLC (140-16 & 170-12) to January 25, 2023. Mr. Larson Seconded. Motion carried unanimously.

VII. Other Business/Correspondence:

1. Mr. Hoch asked if members would reconsider an amendment to the approved 2023 meeting dates, specifically December 27, 2023. He suggested cancelling the regular meeting date as it falls between the two holidays, and many are busy that week. He noted that if at a later date the Board would like to schedule a work session for the 27th, they could do so with only a 24 hour public notice. Members agreed with this.

Motion: Mr. Hoch moved to amend the schedule of the 2023 meeting dates and to cancel the regular meeting date of December 27, 2023. Mr. Larson Seconded. Motion carried unanimously.

2. Ms. Kelly noted the Public Information meeting regarding the NH Rout 25 Intersection Improvements at Lake Shore Drive and Glidden Road that was recently given at the Select Board meeting on December 1, 2022. The informational meeting was to present citizens and public officials with information regarding the proposed Moultonborough NH Route 25 Project. As part of the process, they are gathering public input via a survey. Please [click here](#) to go to complete the Public Input Survey. Additional information about the project can be found on the project website NHDOT web site at: <https://www.nh.gov/dot/projects/moultonborough40639/index.htm>

IX. Committee Reports: - None

X. Project Updates: - None

XI. Adjournment: Mr. Quinlan made the motion to adjourn. Mr. Larson Seconded. The Motion carried unanimously, and the Board adjourned at 9:40.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant