

**Moultonborough Zoning Board of Adjustment
P.O. Box 139
Moultonborough, NH 03254**

Public Meeting

April 19, 2023

Minutes

Present: Members: Bob Stephens, Robert St. Peter, Nick DeMeo, Sean Poloian, Michael Mills
 Alternate: David McDonough
 Alternates: Jerry Hopkins, Steve Buy
Staff Present: Dari Sassan, Town Planner; Bonnie L. Whitney, Administrative Assistant

I. Call to Order: Chairman Stephens called the meeting to order at 7:00 PM and led the Pledge of Allegiance. He then introduced the members of the Board to the public.

II. Pledge of Allegiance

III. Review/Approval of Minutes: 04/05/23

Motion: Mr. St. Peter made the motion to approve the March 15, 2023, minutes as written. Mr. Poloian Seconded. The Motion carried 4 in favor with Mr. Mills abstaining.

IV. Hearings:

Alternate Member McDonough stepped down from the table for the Swindell application.

1. David Swindell (198-1) (358 Redding Lane)
 Variance from Section 3.2.2.4

John Smits was present representing the Applicants David and Gail Swindell. They have owned the home for thirteen years and recently became full-time residents. The request is for a variance from Section 3.2.2.4 to permit construction of an open deck and hot tub, with a footprint of approximately 130 square feet, to the existing residence. The deck will be located 41.62 ft from the lake setback line at its closest point, where 50-ft is required. The existing corner of the dwelling is currently 48.76 ft from the lake setback line at its closest point. The measurements were documented by French Land Services and Brown Engineering LLC, dated 3-29-2023.

Mr. Smits noted the location of the proposed deck and hot tub is adjacent to an existing screen porch and will allow ease of access directly from the residence as well as screening the hot tub from the street, lakefront, and their adjacent neighbor. Mr. Smits answered any questions from the Board.

Mr. Stephens pointed out an error on the plan, note #3 under General Notes, refers to the Town of Laconia, and should be Town of Moultonborough. He then questioned how many members were able to view the site. Members Mills, Poloian and Stephens indicated that they had been to the site.

Discussion ensued with members' feedback stating that they felt the location of the proposed deck was reasonable. It is shielded from almost everyone and not visible from the road. Members referred to the DES Permit by Notification (PBN 2023-00536), noting the impact area during construction will be 386 SF, with the permanent impact area is 160 SF. They questioned if that was the disturbance when they were building it, or what was in the setback area. Mr. Smits replied the 386 SF is what is within the construction area. The 160 SF was the original size of what was applied for with DES. DES did not agree with their

interpretation of the 12' encroachment distance into the lakefront as the lake jogs in. They reduced the size of the deck down to 130 SF, and DES has approved the PBN. The deck will be 130 SF with the hot tub sitting on it. There was discussion as to when the house was constructed and if they met the provisions of the DES regulations. It was noted that this was a moot point as DES has approved the PBN and the applicant is applying for a variance as submitted.

Mr. Stephens asked that the Board determine whether this development has the potential of Regional Impact and take a vote on that determination. Mr. Stephens polled the Board by roll call vote asking each if they felt that this project for the Swindell's (198-1) would have any potential for Regional Impact? Roll call: Mike – No; Nick – No; Sean – No; Rob – No; Bob – No.

Mr. Stephens opened the hearing for public input.

Adam Pierce, the contractor, stated that he had texted the owners of the property who indicated that the home was constructed around 1975.

The Chairman asked if there were any additional questions from the board. It was noted that there were none. The board went into deliberative session to discuss each of the criteria for the granting of a variance at 7:26 PM and came out of deliberative session at 7:40 PM.

During deliberative session, the Members discussed each of the criteria for the granting of a variance. They agreed that granting the variance would not be contrary to the public interest as the proposed structure does not alter the essential character of the neighborhood or threaten the health, safety, or general welfare of the public as there will be minimal impact, they have received DES approval, and many structures are close in this neighborhood, and it does not change the character. For the same reasons as referenced for the first criteria the variance observes the spirit of the Ordinance. Substantial justice is done as there would be a clear loss to the Applicant that is not outweighed by any gain to the public as the intent of the ordinance regarding setbacks (to curtail overcrowding, ensure safe access, ensure adequate space for buildings and septic systems, and to ensure the lake water quality is protected) is not negated at all and denying it would be a substantial injustice. The proposed use will not diminish surrounding properties as it is new construction and will improve the value of the Property and the value of the surrounding properties, therefore increasing taxes, and there was no testimony indicating other. Literal enforcement of the provisions of the ordinance would result in an unnecessary hardship as special conditions exist such that a literal enforcement of the provisions of the Ordinance will result in unnecessary hardship due to the unique shape of the existing dwelling, the location of the house to the shoreline, and there being no other alternate location. The deck is a small area, will not be visible to most. The Property has obtained the necessary PBN from DES. Therefore, the variance is reasonable.

There was no further input from the Board or public. The voting members were Mike, Nick, Sean, Rob, and Bob.

MOTION: Mr. St. Peter made the motion to grant the request for a variance from Section 3.2.2.4 for David Swindell, Tax Map 198, Lot 1 for the construction of a 130 SF deck with hot tub to be located no closer than 41.62 feet from the lake setback line at its closest point where 50 ft. is required, subject to the following conditions: 1) Project shall obtain necessary state and local permits, to include approval of a town building permit, and all conditions of such permits shall be perpetually complied with; 2) An approved building permit must be obtained prior to commencing construction and all necessary inspections shall be successfully completed prior to use; 3) All representations made by the applicant and applicant's agent shall be incorporated as a condition of approval. 4) The applicant and owner are solely responsible to comply with the conditions of approval; 5) Per RSA 674:33, approval expires on 4/19/2025 if use is not substantially acted on, and further to close the public hearing and to direct staff to draft a formal Notice of Decision for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be reviewed for accuracy only and signed by the Chair at their next meeting. Mr. DeMeo Seconded. The Motion carried unanimously.

Mr. Stephens noted the 30-day right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

Mr. McDonough returned to the table at this time as a non-voting member.

2. Great Waters Music Festival (408-002-001) (483 Ossipee Park Road)
Owner of Record – Castle Preservation Society
Limited Special Exception/Temporary Use Permit – Section 11.3

Barbara Lobdell was present representing Great Waters Music Festival. Ms. Lobdell stated that she had been acting as the administrative coordinator for Great Waters Music Festival until such time that they were looking for a new Executive Director. Present with Ms. Lobdell was Joan Smith, the new Executive Director.

The request is for a Limited Special Exception/Temporary Use Permit to allow Great Waters Music Festival (DBA Great Waters) to hold six events during their 2023 summer season, consisting of five music performances on July 15, 22, and 28 and August 5 and 19 (7:30 pm start times) and a gala on August 16 (6:00 pm start time). The events will be held on the grounds at the Castle in the Clouds.

Mr. Stephens noted that the request is for a temporary use permit and asked for comments or questions from the Board. Members indicated that they were familiar with the property. The applicant has provided a map of the area which depicts the location of the tents, seating plan in the big tent, parking, as well as photos of prior concerts.

Members questioned if they had received input from the Fire Chief and Police Chief. It was noted that Great Waters is beginning their third year of holding concerts at the Castle. They are in contact with the Fire Chief and Police Chief. They are required to have the necessary place of assembly permit issued by the Fire Chief for each event.

Mr. Stephens asked that the Board first determine whether this development has the potential of Regional Impact and take a vote on that determination. Mr. Stephens polled the Board by roll call vote asking each if they felt that this project for Great Waters Music Festival (408-2.1) would have any potential for Regional Impact? Roll call: Mike – No; Nick – No; Sean – No; Rob – No; Bob – No.

Mr. Stephens opened the public hearing for public input, noting there was none.

Mr. Stephens asked if there were any additional questions from the board. Hearing none, the board went into deliberative session to discuss each of the criteria for the granting of a Limited Special Exception/Temporary Use Permit at 7:47 PM and came out of deliberative session at 7:48 PM.

During deliberative session members discussed the criteria for a limited special exception for temporary use (Section 11.3) beginning with the first criteria that the specific site is an appropriate location for the use. Members agreed that the location was appropriate as the site is located on a commercial site and is surrounded by open space, conservation land. They agreed that the use was compatible with the character of the neighboring land uses as it a commercial site. Property values in the surrounding area will not be negatively impacted or reduced by such a use as there a no surrounding residences and no testimony indicating otherwise, and the activities as proposed will not impact values. There will be no nuisance or serious hazard to vehicles or pedestrians from any activity generated from the site as they proper space for the event for access or egress and will have the applicable fire and traffic control measures in place. The events are to be held on Saturday evenings and as in the past have had the assistance of volunteers to direct patrons to designated parking areas. The capacity of the existing roads and highways to carry related traffic shall be adequate as the property is located on NH Route 109 and events have been held on the Castle Preservation property for the past two summers.

There was no further input from the Board. The voting members were Mike, Nick, Sean, Rob, and Bob.

MOTION: Mr. DeMeo made the motion to grant the request for a Limited Special Exception/Temporary Use Permit for Great Waters Music Festival, Tax Map 408 Lot 2.1, subject to the following conditions: 1) Project shall obtain any necessary state and local permits and all conditions of such permits shall be complied with; 2) All representations made by the applicant and applicant's agent shall be incorporated as a condition of approval; 3) The applicant and owner are solely responsible for complying with the conditions of approval; 4) Per Section 11.3, the limited special exception/temporary use will expire on 4/12/2024 and may be renewed upon reapplication to the zoning board of adjustment. Such occupancy and use shall be of a temporary nature, with no expectation of becoming permanent, and further to close the public hearing and to direct staff to draft a formal Notice of Decision for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be reviewed for accuracy only and signed by the Chair at their next meeting. Mr. St. Peter Seconded. The Motion carried Unanimously.

Mr. Stephens noted the 30-day right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

3. Mark & Carla Ann Taylor
Appeal of Administrative Decision concerning Property located on Bean Road
(Tax Map 140, Lot 16 and Tax Map 170, Lot 12)

Mr. Stephens noted that there was one more matter before the board and before they get into the hearing he believes that the board has a responsibility, because it is an element within the innovative land use statute ([NH RSA 676:5, III](#)) in terms of jurisdiction, whether the board has jurisdiction over the requested appeal.

Mr. Stephens stated that he had taken the appeal document and requested legal advice for the board, and the members had been provided with the information. Mr. Stephens felt that it was incumbent upon the board to make the determination of whether or not it has jurisdiction over this to hear the appeal. Members had been provided with the attorney's evaluation/opinion and suggestion to the board with regard to the elements of the administrative appeal request.

Members questioned if the opinion was now public record. Planner Sassan commented that it could be. At this point it was a conversation between the attorney and the board at this point. It could be considered privileged, or the board could choose to remove that protection. It is up to the board. In the interest of transparency, it was the general feeling of the board to make the document publicly available.

Mr. Stephens stated for the record that at this time, this was a conversation of the board, not open to the public, and it is not a hearing. It is only a board conversation for a board determination as to where they move forward from here. This happened one other time for this particular case in the planning board process where the ZBA had to confront the issue of jurisdiction.

Mr. Stephens noted that he had spent a lot of time researching and was not comfortable in the absence of having the Town Planner back at that the time to converse with him, therefore he contacted the firm that represented the board on the last jurisdictional question. That attorney was unavailable, and he spoke with the owner of the firm who was provided with a copy of the appeal request. Mr. Stephens requested his guidance and input as to the relevance or the authority that the board had under that. A response was provided to Mr. Stephens and was passed on to the members of the board. The attorney dealt with the appeal on an individual item by item statement.

Mr. Mills stated that the request before the board is different from the appeal they heard before. And to him those are two clearly different issues. The issue before was a decision by the planning board of an interpretation of the ordinance. It was not an approval of a site plan. It was not an approval of a project inside or outside of the district. It was clearly an interpretation of the ordinance. In that case, Mr. Mills

firmly believed that they had jurisdiction as they voted and did. This case is a decision by the planning board to approve a site plan within an innovative land use district. Everything that he read in the RSA, as well as the attorney's advice, says they do not have jurisdiction on this one.

Mr. McDonough stated that the board is discussing whether or not they have jurisdiction, to the extent that the matter that the applicant seeks to appeal involves an innovative land use control, then he thought that under 676:5, III, it's pretty clear that the planning board's decision cannot be appealed to the board of adjustment but may be appealed to the superior court.

With respect to jurisdiction, Mr. McDonough added that he was a little concerned that the applicant's attorney filed a letter seeking a continuance to permit the applicant to further explore the issue of jurisdiction. Mr. McDonough added that in speaking as a non-voting member, it might be fairly clear as to what the determination is. If the board votes that they do not have jurisdiction, then the applicant is out before the zoning board and has remedy to the superior court. If there's something that the ZBA is missing, or Attorney Mitchell has missed that the applicant's attorney seeks to address, would it be prudent, if they could craft a way to permit that to happen without asserting that they have jurisdiction.

Mr. Stephens replied that there were a couple of things that played into that. Number one is that the application of an appeal contains a block of elements, these specific items. Nothing else could be introduced because they were not introduced within the statutory time limit of appeal. Number two is that the in depth analysis that was provided by Attorney Mitchell was on each of the individual items. He did not just categorically say it's not appealable under 676:5, III. He went through each individual component of that and said this does not have merit because it is not an appealable thing, listing his reasons why. The document has been made a matter of public record so the attorney's can certainly have that for their edification in terms of if the applicant decides to move forward to superior court. They will have that information if the board is to decide what their justification was.

Mr. St. Peter noted his concern in reading the letter, was not just responding to each point, was that Attorney Mitchell was saying categorically there was absolutely no jurisdiction for a ZBA to hear an issue involving an innovative land use. Mr. Stephens replied that was a general statement, but he further clarified that. Mr. St. Peter stated that he had researched online on the state RSA's, in support of what he was saying.

Mr. Mills summarized what Mr. St. Peter was saying in that the blanket comment was a little broad stroked. Mr. Mills agreed with a decision on a site plan that is very true. The Planning Board has wide sweeping authority to approve projects within an innovative land use district, and the ZBA does not have jurisdiction over those approvals. The initial appeal was a decision on an interpretation of the ordinance outside of that section that would have far reaching implications to all kinds of projects in town. Not just that one, or in that thing. It wasn't an approval of their plan. That decision was a very measured and detailed decision based on an interpretation. This was why Mr. Mills thought it was different and they had jurisdiction previously but not on this appeal. In this case however, what we are talking about is in the context of the decision by the planning board's approval of the site plan. Mr. St. Peter agreed with Mr. Mills.

Mr. Stephens requested clarification of what both Mr. St. Peter and Mr. Mills were saying. Mr. St. Peter stated that as far as the points that Mr. Mitchell raised about this appeal and his position on each of the elements of the appeal, Mr. St. Peter agrees with Attorney Mitchell that they do not have jurisdiction. What he did not like was the statement that all cases appealing an administrative decision involving a ILUD needs to go to only to the court. Mr. St. Peter did not disagree with his opinion in terms as he broke down each of the elements of this specific appeal.

Mr. Stephens stated all the board can do is to determine whether or not the document of this specific appeal, as filed with the town, with the elements of that document is appealable to the ZBA. Mr. St. Peter stated for the record while he understood and respected Attorney Mitchell's legal opinion in terms of this appeal, he was okay with it. He did not like him saying that across the board there isn't any situation where

a zoning board has jurisdiction when there's an innovative land use district case involved. He does not want to see it come up in the future.

Mr. Stephens noted that the board needed to keep their focus on the information that was provided to this board for the purpose of an administrative appeal.

Planner Sassan commented that it was important to bring up the fact that Attorney Mitchell did not use innovative land use controls or innovative land use techniques as the reason in every single one of his points. There are other reasons. Some points in the appeal brought up aren't innovative land use controls. For example, the DES well approval. The reason the ZBA has been advised that it does not have jurisdiction over that is because it is not a requirement of the zoning ordinance. It's not because it's an innovative land use control. It was a condition provided by Planning, which has the authority to provide conditions.

Mr. Mills commented that given what he has seen, and given the advice they have, this is a clearer case to him that the ZBA does not have jurisdiction.

Mr. DeMeo asked what question was before the board. He did not think that the applicant was asking them for any consideration of these terms. They were asking for a continuance so that they can go and do some homework. Mr. Stephens replied that in his opinion, before they can open the hearing, which is the venue to continue, they have to decide whether they have jurisdiction. You cannot continue a hearing that you have no authority to open. Mr. DeMeo stated correct. All members agreed with the points made by Attorney Mitchell about this specific appeal. Mr. St. Peter commented that he did not like the language that said "any". Mr. McDonough commented that the applicant could not withdraw their appeal and refile as they would be outside of the time.

It was noted if the ZBA determines that they don't have jurisdiction then the appellant can choose to file with superior court, prepare whatever documentation they need at that point, within 30 days. The decision not to hear the appeal will trigger an appeal right that they can go to superior court with. The superior court could conceivably remand it back to the ZBA if they feel that the ZBA erred in its judgement.

Mr. Mills commented that he was comfortable voting on this, but wanted to make sure that the email from Attorney Mitchell was made public record.

MOTION: Mr. Mills made the motion to make the advice from Attorney Walter Mitchell, Mitchell Group, a part of the public as stated by an email dated Wednesday 4/19/2023 10:50 AM to Chairman Robert Stephens. Mr. DeMeo Seconded. The Motion carried Unanimously.

MOTION: Mr. St. Peter moved that the Board made the determination, based on the information of the record and Attorney Walter Mitchell's recommendation, indicating that the Board does not feel that they have jurisdiction for the application as submitted by Mark & Carla Ann Taylor. Mr. DeMeo Seconded. The Motion carried Unanimously.

Mr. Stephens noted the 30-day right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

V. Correspondence: - None

VI. Unfinished Business:

1. Review and possible authorization for the Chair to sign the formal Notice of Decision for the April 5, 2023, granting of a Limited Special Exception/Temporary Use for Christopher & Deirdre Maroun for a parcel located at 483 Ossipee Park Road (Tax Map 135 Lot 7).

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on April 5, 2023. There were no changes made to the document.

MOTION: Mr. St. Peter made the motion to approve the formal Notice of Decision as amended for Christopher & Deirdre Maroun for a parcel located at 483 Ossipee Park Road on Tax Map 135 Lot 7, and staff to mail said notice to the applicant or applicant's agent. Mr. Poloian seconded. The Motion carried with Mr. Stephens and Mr. Mills abstaining.

2. Review and possible authorization for the Chair to sign the formal Notice of Decision for the April 5, 2023, granting of a Special Exception for Big Dog Holdings, LLC for a parcel located on Whittier Highway (Tax Map 18 Lots 37, 39 & 40).

The Board reviewed the draft Notice of Decision prepared by staff, as directed by the Board at the hearing on April 5, 2023. There were no changes made to the document.

MOTION: Mr. DeMeo made the motion to approve the formal Notice of Decision as written for Big Dog Holdings, LLC for a parcel located on Whittier Highway (Tax Map 18 Lots 37, 29 & 40), and staff to mail said notice to the applicant or applicant's agent. Mr. St. Peter seconded. The Motion carried with Mr. Mills abstaining.

3. Mr. Stephens noted that there were no new submissions or continued hearings for the May 3rd meeting date, therefore he cancelled the Zoning Boards regularly scheduled meeting of May 3, 2023.

VII. Adjournment: Mr. St. Peter made the motion to adjourn. Mr. DeMeo Seconded. The Motion carried Unanimously, and the Board adjourned at 8:19 PM.

Respectfully Submitted,
Bonnie L. Whitney
Administrative Assistant

NOTICE: These DRAFT Minutes have not been formally approved by the Zoning Board of Adjustment. Please contact the Land Use Department after the next meeting of the Moultonborough Zoning Board to learn if any corrections, additions, or deletions were made.