



Town of Moultonborough Zoning Board of Adjustment

6 Holland Street – PO Box 139
Moultonborough, NH 03254
(603) 476-2347

August 18, 2022

Mark & Jacqueline Koss
172 Carli Boulevard
Colchester, CT 06415

Re: Request for rehearing submitted by Ethan G. Wood, Esq, agent for Mark and Jackie Koss and Koss Construction, LLC, regarding a decision rendered by the Zoning Board of Adjustment on May 4, 2022 with respect to an Appeal of an Administrative Decision filed by the Town of Center Harbor, joined by Bryan and Elana Murphy. The decision reviewed by the ZBA on May 4, 2002 was the determination of the Moultonborough Planning Board on March 23, 2022 regarding the permitted density for a residential subdivision proposed for property located on Bean Road (Tax Map 140, Lot 16 and Tax Map 170, Lot 12).

Dear Mr. and Mrs. Koss,

This letter is formal notification to you that at its regular meeting held on August 17, 2022 the Zoning Board of Adjustment (ZBA) considered your request for rehearing of the Board's decision rendered on May 4, 2002 with respect to the above referenced application for Administrative Appeal as filed by the Town of Center Harbor, joined by Bryan and Elana Murphy.

Upon careful review and discussion, the Board determined there was no new evidence provided that was not available at the time of the May 4, 2022 public hearing, nor was there any technical or procedural error made, therefore the ZBA voted unanimously to deny your request for rehearing for reasons cited in the attached Written Finding of Fact prepared by Michael Mills, ZBA Member, which was reviewed and agreed to be the position of a majority of the Board.

If you have any questions or comments in this matter, please contact our Town Planner, Dari Sassan at 603-476-2347.

Yours truly,

Robert H. Stephens
Chairman

cc: Mr. Dari Sassan (via email)
Ethan G. Wood, Esq. (via email)
Laura Spector-Morgan, Esq.(via email)
Matt Serge, Esq. (via email)

Christopher Boldt, Esq. (via email)
Mark C. Rouvalis, Esq. (via email)
Map Lot Document file

**Written Finding of Fact in the Appeal from an Administrative Decision by the Town of Center Harbor
Appealing the Zoning Ordinance Determination of The Moultonborough Planning Board on March 23,2022,
concerning property located on Bean Rd Map 140, Lot 16 and Map 170, Lot 12. Prepared by Michael Mills,
ZBA Member.**

The Matter of Jurisdiction

The decision in question was:

The proposed 60 units complies with the density requirements given in the WVOD in zoning

- This Decision is not a Waiver or authorization of a variation of the standards for WVOD or any other part of Article 9.3

In determining whether the ZBA has jurisdiction, we must decide if the planning board's decision involved the application, construction or interpretation of the zoning ordinance, mindful that RSA 676:5 provides that this board does not have jurisdiction over decisions made by the planning board pursuant to the ordinance's delegation of authority over an innovative land use control.

While we recognize that the property is located in an innovative land use district, the WVOD, a majority of the ZBA does not believe that the planning board's decision was made pursuant to the ordinance's specific delegation of authority over the WVOD. Instead, the ZBA agrees with the appellant that the planning board's decision involved the application, construction or interpretation of other portions of the ordinance, specifically Article 3. Therefore, the majority believes the ZBA has jurisdiction over the administrative appeal.

The ZBA voted 4 to 1 in favor of accepting jurisdiction of the appeal.

The Matter of the Appeal

The decision in question was:

The proposed 60 units complies with the density requirements given in the WVOD in zoning

It was the opinion of the ZBA majority that the Planning Board Decision comes down to if the ZBA believes that wetlands should be included (not subtracted) or excluded (subtracted) from the calculation of minimum lot size based on the text of the ZO outside of Article 9.3 (the WVOD). OR inversely if Article 9.3 specifically included the wetlands in the calculation and overrides any other part of the ZO. OR if a conflict exists between article 9.3 and any other part of the ZO whereby allowing 9.3 to override.

Points of fact:

These points were established at the public hearing and through research of the public record

- 1) This decision indicates that land associated with this proposed project meets the 10,000 sq-ft per unit requirement and as such the decision was not a waiver to the 10,000 sq-ft requirement.
- 2) This decision was not a conditional use permit. Although it may be foundational to such a permit in the future.
- 3) This decision is not a waiver or authorization of a variation of the published standards for the WVOD.
- 4) The conversation held prior to this decision indicates that the decision was agreeable to the calculation being done to include the wetland area in the minimum lot size calculation.
- 5) The calculation Sheet in the application is effectively blank and when asked to produce the actual calculation used to arrive at 60 units it was clear no such official calculation could be produced.
 - a. One calculation (email) was produced showing three scenarios demonstrating various possible waiver opportunities, but all three scenarios excluded the wetlands and none of the scenarios showed the land in question supported 60 units per the 10000 sf/unit requirement.
 - i. It was explained to us that the calculation provided to the ZBA was only meant to demonstrate the areas involved with the different exclusions required.
- 6) Concurrently the applicant was also seeking waivers to include the areas associated with the protective well radii and the roadway coverage which should also be excluded from the minimum lot size calculation according to the ZO.
 - a. Requests for these additional waivers were made on March 30th
- 7) The Planning Board Representative (Scott Bartlett) at the Appeal hearing stated that it was the intent of the planning board to include wetlands in the calculation for the WVOD when the Ordinance was drafted to allow for higher density.
 - a. However the history file provided to the ZBA does not mention wetlands once in the context of the WVOD in any of the documents provided.
 - b. It should also be noted that the chairman of the PB, who was also in the original drafting of the amendment, believes that the wetlands were to be excluded. (The opposite position)
 - c. In either event wetlands were not mentioned, in any context, in the ZO amendment for the WVOD, nor was it discussed at the public hearings. Therefore, the ZBA majority felt it could not be considered the will of the public, to include the wetlands in the calculation of minimum lot size, if it was not in the text of the amendment as it was a deviation from standard, long standing, practice of the town.

- d. To be clear, according to the record, no indication was given to the voting public that the wetlands in the WVOD should be considered any different than the rest of the town when it comes to minimum lot size.
- 8) The WVOD provisions as written in the ZO do allow for higher density if it pertains to a project that is serviced by Bay Sewer District (10000 sf/unit vs. 20000 sf/unit) satisfying the higher density that was the stated intent for the WVOD.

The Majority agrees with the following assertions made by the Appellant:

- 1) ZO Art 3.2.1.3 & 3.2.1.7 Table 1 which states that poorly drained and very poorly drained soils cannot be included in minimum lot size determination.
 - a. This table shows no special treatment or consideration for WVOD
- 2) ZO Art 3.10 “A dwelling ... may be located, constructed, and used only on a lot, (to include R.V. and mobile home parks and campgrounds) having the minimum area for the soil and slope conditions as set forth at Table I. This means that the amount of poorly drained or very poorly drained soils must be deducted from the total lot area
 - a. This article shows no special treatment or consideration for WVOD
- 3) ZO Art 3.13.6.2.3 expressly states that ADUs shall not be counted as an additional dwelling unit for purposes of determining minimum lot size or development density. This means that all other additional dwelling units have to be considered for determining minimum lot size.
 - a. The majority finds this to be a logical, common-sense assertion.
- 4) ZO Art 9.1.1 states that the Wetland Resources Conservation Overlay District’s (“WRCOD”) states “The special regulations of this overlay district are in addition to the regulations of the underlying zoning ordinance.”
 - a. The majority finds this to indicate that the more stringent elements of either the WRCOD or the other district applies. In this case the WRCOD would override WVOD as it is more stringent.
- 5) ZO Art 9.1.2 states “The Overlay District shall include rivers, lakes, ponds, perennial streams, vernal pools, and all jurisdictional wetlands located within the Town of Moultonborough”
 - a. Plain text, no assumption needed.
- 6) ZO Art 9.1.3 state “This Article shall apply to Wetlands that are greater than 20,000 square feet in their entirety and Wetlands of any size that are contiguous to a river, brook, lake, or pond, except as exempted under Section 9.1.4. The Exemption Section 9.1.4 expressly states that it only applies to lots smaller than 5 acres created prior to January 3, 2008 and “shall not apply to lots being developed for commercial purposes” such as the Project.
 - a. Plain text, no assumption needed.
- 7) ZO Art 9.1.10 which states “The land area contained within the 50-foot wetlands setback shall not be counted as wetlands and may be considered in lot density calculations.” –which also means that the wetlands themselves do NOT count toward density.
 - a. The majority finds this to be a logical, common-sense assertion.

None of the above assertions by the Appellant conflict with any part article 9.3 so no conflict applies, satisfying Article 9.3.3.

The other assertions by the Appellant were not found to be as relevant to the foundation of the appeal or the ZBA’s decision concerning the appeal.

Although this is a decision that was made in advance of a pending decision concerning a CUP for a project located in an innovative land use region (the WVOD), the majority felt this decision was related to other portions of the ordinance that do not fall under the WVOD umbrella (Article 9.3) and will affect future decisions in consideration of minimum lot size calculations moving forward both in the WVOD and out. This decision, is on its face more an interpretation by the planning board of the ordinance **outside of 9.3 WVOD**. And 9.3.9.1 clearly prohibits this.

Further it is believed by the majority of the ZBA that no clear conflict exists between Article 9.3 and the remainder of the ZO that would allow the language of 9.3 to override per 9.3.3.

It was felt by the majority of the ZBA that if the intent was to exercise the planning boards authority to waive or adjust the elements of the standards in 9.3.9 the appropriate action by the planning board would have been to waive, or authorize, a variation to the standards of the WVOD, (9.3.9) but based on the minutes of the planning board meetings, this was not the intent of this decision. Their authority to issue such a waiver is clear, and such a waiver would not be appealable to the ZBA.

Other Points Considered by the ZBA:

- 1) Article 9.3.3 States “To the extent there is any conflict between the provisions of the WVOD section and another article or section of the Moultonborough Zoning Ordinance, the WVOD regulations control for applications within that overlay district.” However no clear conflict was apparent to the majority.
- 2) If the wetlands were intended to be included in the calculation, or the calculation was to be altered in any way for ILUDs it was not apparent to the majority in the text of the ordinance. And even if it was some PB members understanding of how it was intended, was that the understanding of all of the planning board members when the WVOD was adopted. And further was that clear to the public when it voted to adopt the WVOD if the text of the ordinance did not make it a clear intent.
- 3) The majority of the ZBA felt it had to base its decision on what is documented in the text of the Zoning ordinance. Not on un-documented intent or recollections, that were not clear to all.
- 4) Based solely on the text of the ordinance the majority saw nothing that would allow the wetlands to be included the calculations of minimum lot size as per the long standing practice throughout the town.
- 5) The Majority also felt because no actual official calculation could be produced it was problematic to state that any number of units could be considered ‘correct’.
- 6) And further based on the numbers presented by the Appellant, and the area data provided by the Town Planner, the majority felt that the land in question will not support the proposed 60 units without a waiver of the standards for the WVOD.

Based on all the above facts and considerations the ZBA voted 4 to 1 in favor of upholding the appeal and ruling that the Planning Board’s Decision, effectively including wetlands in the minimum lot size calculation, was not reasonable or lawful based on the text of the Zoning Ordinance.