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ELAINA L. HOEPPNER
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Please reply to our Meredith office

April 5, 2022

RETIRED
MICHAEL J. DONAHUE
CHARLES F. TUCKER
ROBERT D. CIANDELLA
NICHOLAS R. AESCHLIMAN

**VIA HAND DELIVERY
AND EMAIL TO bwhitney@moultonboroughnh.gov**
Bonnie L. Whitney
Administrative Assistant
Moultonborough Zoning Board of Adjustment
P.O. Box 139
Moultonborough, NH 03254

Re: Application for Appeal from an Administrative Decision by the Town of Center which Appeals the Zoning Ordinance Determination of The Moultonborough Planning Board ("**The Board**") on March 23, 2022, concerning Property Located on Bean Road Assessor's Map 140, Lot 16 And Map 170, Lot 12 (Collectively "**The Property**")

Good Afternoon Ms. Whitney:

Enclosed please find the following:

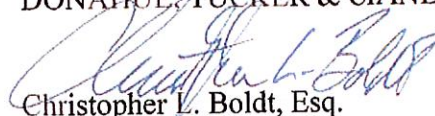
1. The original and Five (5) copies of the Application, including abutters list, Narrative of the Applicant's arguments in favor of this Appeal concerning the above-referenced Property; and
2. My Firm Check No. 70042 in the amount of \$525.00 to cover the various fees associated with the submission of this application as referenced on Page 1 of the Application.

While we are filing this Appeal well in advance of the 30-day deadline from March 23rd, we respectfully request (i) a continuance of the ZBA's deliberation on the pending Variances concerning the Property currently scheduled for April 6th until this Appeal can be heard on May 4th (and we have reached out to the Koss' Attorney Ethan Wood to gain his assent to this continuance but have not heard back from him yet), and (ii) that the ZBA consult with Town counsel independent of the attorney/Firm that has been advising the Planner and Planning Board on this matter.

DONAHUE, TUCKER & CIANDELLA, PLLC
16 Acadia Lane, P.O. Box 630, Exeter, NH 03833
111 Maplewood Avenue, Suite D, Portsmouth, NH 03801
Towle House, Unit 2, 164 NH Route 25, Meredith, NH 03253
83 Clinton Street, Concord, NH 03301

Please let me know if you, the Planner or the ZBA Chair have any questions. Many thanks for the collective time and attention to this matter.

Very truly yours,
DONAHUE, TUCKER & CIANDELLA, PLLC



Christopher L. Boldt, Esq.

cboldt@dtolawvvers.com

cc: Client (via email)
Ethan Wood, Esq. (via email)
Mark Rouvalis, Esq. (via email)

Moultonborough Zoning Board of Adjustment
P.O. Box 139
Moultonborough, NH 03254
(603) 476-2347

Date filed _____

(signed - ZBA)

Appeal from an Administrative Decision

Name of applicant: Town of Center Harbor

Address: P.O. Box 140, 36 Main Street, Center Harbor, NH 03226

Owner: Mark & Jackie Koss/Koss Construction, LLC
(if same as applicant, write "same")

Location of property: Bean Road, Tax Map 140, Lot 16 and Tax Map 170, Lot 12
(Street, number, tax map & lot number)

NOTE: This application is not acceptable unless all required statements have been made. Additional information may be supplied on a separate sheet if the space provided is inadequate.

APPEAL FROM AN ADMINISTRATIVE DECISION

Relating to the interpretation and enforcement of the provisions of the zoning ordinance.

Decision of the enforcement officer to be reviewed Planning Board Decision of March 23, 2022:
See attached Narrative.

_____ Date _____

article _____ paragraph _____ of the zoning ordinance in question: See attached Narrative.

Applicant *Clayton L. Boldt, Esq.* Date *3/5/22*
(Signature) *Town Attorney*

Note: This appeal must comply with all applicable current provisions of State and Local Ordinances.

Fee Schedule

\$200	-	Application Fee (Non-Refundable)
200	-	Hearing Fee
200	-	Re-hearing Fee
75	-	Advertising Fee
(25 x \$2) <u>\$50</u>	-	Notification Fee (Number of Abutter Letters by \$2 - Exclusive of postage).
<u>\$525</u>		Total Due

Abutters List:

Tax Map 140, Lot 13
Bruce A. Cohen Revocable Trust 2019
58 Bean Road
Moultonborough, NH 03254

Tax Map 140, Lot 14
Arthur, III & Mary S. Greenfield
P.O. Box 1322
Center Harbor, NH 03226

Tax Map 140, Lot 15
Brian Holton Russell
46 Bean Road
Moultonborough, NH 03254

Tax Map 140, Lot 17
Bay District
P.O. Box 1527
Center Harbor, NH 03226

Tax Map 169, Lot 67
Cobalt Properties NH Corp.
P.O. Box 868
Calais, ME 04619

Tax Map 170, Lot 3
Asquam Real Estate, LLC
P.O. Box 1552
Center Harbor, NH 03226

Tax Map 170, Lot 4
Jacqueline Hughes
P.O. Box 1477
Center Harbor, NH03226

Tax Map 170, Lot 5
Kate M. Downing
P.O. Box 1428
Center Harbor, NH 03226

Tax Map 170, Lot 6
Don T. Carey
P.O. Box 1251
Center Harbor, NH 03226

Tax Map 170, Lot 10
Bryan M. Murphy & Elena M. Kostk
P.O. Box 568
Center Harbor, NH 03226

Tax Map 170, Lot 11
Mark W. & Carla Ann Taylor
P.O. Box 76
Center Harbor, NH 03226

Tax Map 170, Lot 13
John, Chris and Holly Trinkwon
50 Odessa Boulevard
Canada, ON. L7C

Tax Map 170, Lot 14
George & Laurentina Hubbard Revocable Trust
P.O. Box 309
Tamworth, NH 03886

Tax Map 170, Lots 15 & 16
Douglas Windsor Murphy, Sr.
P.O. Box 508
Center Harbor, NH 03226

Tax Map 170, Lot 17
Craig J. Moriarty 1990 Trust
49 Old Hubbard Road
Meredith, NH 03253

Tax Map 170, Lot 18
Collins Brook, LLC
P.O. Box 856
Meredith, NH 03253

Tax Map 140, Lot 16 & Tax Map 170, Lot 12
Mark & Jackie Koss
172 Carli Boulevard
Colchester, CT 06415

Brown Engineering, Agent for Mark Koss
345 NH Route 104, Ste 7
New Hampton, NH 03256

French Land Services, Inc.
581 School Street
Rumney, NH 03266

Bag Land Consultants
43 Rockingham Street
Concord, NH 03301

ILEX Wetlands Consultants
P.O. Box 2185
Wolfeboro, NH 03894

Allen-Bentley Consulting
22 West Couchtown Road
P.O. Box 269
Salisbury, NH 03268

Ethan G. Wood, Esq.
Normandin, Cheney & O'Neil, PLLC
213 Union Ave
Post Office Box 575
Laconia, NH 03247

Mark C. Rouvalis, Esq.
McClane Middleton
900 Elm Street
10th Floor
Manchester, NH 03101

Town of Center Harbor
c/o Town Attorney Christopher L. Boldt, Esq.
Donahue Tucker & Ciandella, PLLC
164 NH Route 25, The Towle House, Unit 2
Meredith, NH 03253

APPLICATION FOR APPEAL OF ADMINISTRATIVE DECISION
THE TOWN OF CENTER HARBOR (“**Appellant**”) APPEALS THE ZONING
ORDINANCE DETERMINATION OF THE MOULTONBOROUGH PLANNING BOARD
 (“**the Board**”) ON MARCH 23, 2022, THAT KOSS CONSTRUCTION, LLC’S (“**Koss**”)
PROPOSED SIXTY (60) UNITS COMPLIES WITH THE DENSITY REQUIREMENTS
GIVEN THE WEST VILLAGE OVERLAY DISTRICT (“**WVOD**”) IN ZONING (“**the
Decision**”) CONCERNING PROPERTY LOCATED ON BEAN ROAD ASSESSOR’S MAP
140, LOT 16 AND MAP 170, LOT 12 (collectively “**the Property**”)

As the ZBA knows, Koss seeks to develop the Property into a subdivision of Sixty (60) dwelling units with a series of roadways, community wells and related infrastructure (“**the Project**”). As part of any Appeal of Administrative Decision, the underlying file from the Board should be made available by Town Staff to the ZBA. We trust that will occur so that we are not burdening the ZBA with additional copies as Exhibits to this Application.

The Appellant is a designated abutter to the Project pursuant to RSA 36:54 et seq. and the Board’s determination that this Project is one of regional impact. The Appellant has participated in the various public hearings before the Board and this ZBA. Accordingly, the Appellant has standing to raise this Appeal.

Additionally, pursuant to the provisions of RSA 677:15, the Appellant is raising these issues with the ZBA first to allow local determination of the issues raised herein before any matter is raised with the Carroll County Superior Court. To that end, the Appellant wishes to be clear that it is not raising issues that would be solely within the jurisdiction of the Planning Board under its Site Plan and/or Subdivision Regulations or Conditional Use Permit authority under only the provisions of Art. 9.3.7¹ of the Town’s Zoning Ordinance – on which the Planning Board has not yet made any final determinations.

As reflected in the minutes of the Board’s meeting of March 23rd, the Decision was a “split decision” with 4 members voting in favor and 2 members voting against.

As the Site Plans before the Board on March 23rd (bearing revised date of February 28, 2022) (“**the Plans**”) indicate, the Property is composed of approximately 17.57 acres (6.03 or 262,678 sq. ft. for Lot 12 and 11.03 acres or 502,674 sq. ft. for Lot 16). The Plans also indicate: (i) Lot 12 has at least 139,305 sq. ft. of wetland (equating to at least 53% wet) with some portions of the designated uplands inaccessible; and (ii) Lot 16 has at least 97,511 sq. ft. of wetlands – which apparently does not count the length of the “existing stream” shown on the Plans (equating to at least 19.4% wet) with significant portion of the uplands accessible only via a significant stream crossing already before the ZBA. Additionally, the Plans indicate that some portions of the wetland appear to go off the Property due to the “hard lines” of some wetlands at the Property lot line. This means that of the 17.57 acres of the Property at least 236,816 sq. ft or 5.43 acres are

¹ For example, ZO Arts. 9.3.7. – subsections 1, 3, 5, 6, 7 & 8 impose various conditions on the Board’s granting of the necessary Conditional Use Permit for this Project (which has not yet occurred) where the proposed development is not compatible with the adjoining/abutting uses or as here, potential poses a threat to public health and safety via the large community wells in so close a proximity to the Drycleaners and Irving Gas station sites with known pollution issues.

wet – which equates to approximately 1/3 of the Property being wet (not counting the inaccessible portions of upland).

Additionally, the Plans show not only a significant area of uplands on Lot 12 for the 200 foot well protective radius areas for the Project, but also a “wellhead protective radius public water system id 0396020” which encompasses all of Lot 12 and approximately half of Lot 16 – both areas of wetlands and uplands.²

Furthermore, the Plans show that Koss is not treating certain wetlands adjacent to the existing stream running through the middle of Lot 16 with any wetland buffers – neither the 50-foot general setback nor the 25-foot “no cut, no disturb” setback. Specifically, the Appellant calls the ZBA’s attention to (i) the 7,645 sq. ft. wetland adjacent to the Pond, Stream and the Abutter Murphy, and (ii) the various adjacent wetlands in the northern “point” of the Property with a total of at least 18,995 sq. ft. but with indications that the wetlands extend off the Property (“**the Ignored Wetlands**”).

In short, the Appellant asserts that Koss’s Plans and the Board’s Decision ignore numerous Zoning Ordinance (“**ZO**”) provisions to claim that Koss’ desired 60 units complies with density requirements of the ZO and are allowed on this very wet property as if it were wholly dry just because the Property is located in the WVOD.

The Appellant asserts that the following provisions of the ZO (“**the Provisions**”) were ignored or improperly applied by the majority of the Board in making the Decision:

- The Moultonborough Zoning Ordinance is replete with provisions stating the intention to protect wetlands in Town which include the Comprehensive Shoreland Protection sections of Art. 4.7, the Wetland Resources Conservation Overlay District of Article 9.1 and the Stormwater Management Ordinance of Art. 12.0;
- ZO Art. 3.2.1.3 & 3.2.1.7 (Table 1) which state that poorly drained and very poorly drained soils cannot be included in minimum lot size determination
- ZO Art. 3.3 the prohibits any use that is dangerous to the health or safety, comfort peace and enjoyment of the community;
- ZO Art. 3.8 – it is the specific intent of this ordinance to minimize impact created by use of property upon adjoining property
- ZO Art. 3.10 – “a dwelling...may be located, constructed and used only on a lot...having the minimum area for the soil and slope conditions as set forth at Table 1. This means that the amounts of poorly drained and very poorly drained soils must be deducted from the total lot area to determine the number of units allowed in this Project.

² The Appellant recognizes that the wellhead protective radius issue is to be excluded per the Board’s Subdivision Regulations 6.1.5 and 8.4.3, which are not within the ZBA’s jurisdiction and are raised here only for completeness of the factual background.

- ZO Art. 3.13.6.2.3 – expressly states that ADU’s 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 counted for determining minimum lot size and density issues.
- ZO Art. 9.1.1 states that the Wetland Resources Conservation Overlay District’s (“WRCOD”) “special regulations of this overlay district are in addition to the regulations of the underlying zoning ordinance.”
- ZO Art. 9.1.2 states that the WRCOD shall include “rivers, lakes ponds, perennial streams, vernal pools, and all jurisdictional wetlands located within the Town of Moultonborough.”
- ZO Art. 9.1.3 states that the WRCOD 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, book, lake or pond, except as exempt under Section 9.1.4.” The exemption of 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.
- ZO Art. 9.1.10 which states that “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.

The Appellant respectfully asserts that nothing in the WVOD provisions of ZO Art. 9.3 deletes these Provisions. Indeed ZO Art. 9.3.9.1 expressly limits the ability of the Planning Board to waive provisions in the WVOD that are “mandated elsewhere in this ordinance.”

Furthermore, ZO Art. 9.3.3 describes the limits of primacy of the WVOD with respect to the remainder of the ZO: “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.” Appellant respectfully asserts that there is no such “conflict” between the actual provisions of the WVOD and the ZO Provisions referenced above because the WVOD is silent on the Provisions.

During the Board’s discussions on March 23rd prior to voting on the Decision, several members who voted in the affirmative pointed to the fact that Koss was presenting a good Stormwater Management Plan (“SMP”). Whether that is or is not the case, an SMP is not a valid reason for the Board to ignore the Provisions.

Additionally, some members who voted in the affirmative pointed to the fact that the WVOD allowed a lower square footage requirement per dwelling unit due to the existing of service by the Bay Sewer District. While such may well be the reason behind the Voter’s adoption of the WVOD reduced square footage requirement of 10,000 per unit rather than 20,000 per unit being the lowest in any other District in Town, that is no basis for ignoring the Provisions which expressly seek to

protect the numerous wetlands in Town as well as the adjacent waters of Lake Winnepesaukee and Lake Kanasatka.

The Appellant respectfully asks the ZBA to consider the Zoning Ordinance Provisions as a whole in keeping with the standard of review for Appeals of Administrative Decisions³ and find that the Board's Decision was unlawful and unreasonable so that Koss either reduces the number of dwelling units in the Project to be only those which are allowed with a proper calculation of only the upland portions of the Property and after honoring the wetlands setbacks for the Ignored Wetlands and, per the Board's Subdivision Regulations, the well protective radius areas.

The Appellant also requests that the ZBA continue the hearing on the Koss Variances currently pending before the ZBA to the ZBA's meeting of May 14, 2022, in light of both this Appeal and the attached letter from the New Hampshire Department of Environmental Services ("DES") dated March 30, 2022, requesting additional information from Koss, including a relocation of the "northern/second" stream crossing. A true and correct copy of that DES Letter is attached hereto as "**Exhibit A**". This continuance would also allow the ZBA to consult with independent counsel separate from the counsel previously advising the Town Planner and the Planning Board on the Koss matter, which separate counsel would be in keeping with the New Hampshire Bar Association's Ethic Committee Opinion # 2020-21-02, a true and correct copy of which can be found at <https://www.nhbar.org/2020-21-02-municipal-representation-and-potential-conflicts-of-interest/>.

³ See, e.g., Batchelder v. Town of Plymouth, 160 N.H. 253 (2010)(Planning Board interpretation of Zoning Ordinance provision allowing placement/removal of fill being "incidental to lawful construction"); Dartmouth Corporation of Alpha Delta v. Town of Hanover, 169 N.H. 743 (2017)(Zoning Officer's interpretation of Zoning Ordinance provision limiting student housing to situations "in conjunction with another institution" and meaning of "non-conforming use"); New Hampshire Alpha of SAE Trust v. Town of Hanover, 172 N.H. 69 (2019)(remand for ZBA to consider whether the Trust/fraternity was an "institution" itself under the Zoning Ordinance provisions); Working Stiff Partners, LLC v. Portsmouth, 172 N.H. 611 (2019)(interpretation of Zoning Ordinance definition of "dwelling unit" as distinct from listed "transient occupancy" such as hotel, motel, rooming house or boarding house to support prohibition of Airbnb type usage).



The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner



TIME EXTENSION AGREEMENT – WETLANDS PERMIT
LAND RESOURCES MANAGEMENT
WETLANDS BUREAU

2021-03677
Project Location: 33 BEAN ROAD, MOULTONBOROUGH
Tax Map #170, Lot #12
Date: March 30, 2022

Pursuant to RSA 482-A:3, XIV. (a)(3) Where the NH Department of Environmental Services (NHDES) requests additional information pursuant to subparagraph (a)(2), within 30 days of NHDES' receipt of a complete response to NHDES' information request:

- A. Approve the application, in whole or in part, and issue a permit; or
- B. Deny the application and issue written findings in support of the denial; or
- C. Schedule a public hearing in accordance with this chapter and rules adopted by the commissioner; or
- D. Extend the time for rendering a decision on the application for good cause and with the written agreement of the applicant; or

(4) Where no request for additional information is made pursuant to subparagraph (a)(2), within 50 days from the issuance of the notice of administrative completeness for proposed projects under one acre of jurisdictional impact, or 75 days for all others:

- A. Approve the application, in whole or in part, and issue a permit; or
- B. Deny the application and issue written findings in support of the denial; or
- C. Schedule a public hearing in accordance with this chapter and rules adopted by the commissioner; or
- D. Extend the time for rendering a decision on the application for good cause and with the written agreement of the applicant.

I Marl or Jackie Koss or Mario Focareto consent to this mutual

Print Applicant Name

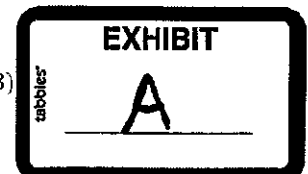
Print Authorized Agent Name

agreement to extend the review of my application based on the outstanding items listed below.

The reason(s) for requested extension:

1. Observations made by NHDES while on site on March 23, 2022 raised questions and discussion regarding potentially less-impacting alternatives for the proposed stream crossing location/configuration. Please assess the practicability of the alternatives discussed, including:
 - Relocating the proposed crossing approximately 280 feet upstream, where it appears to be a narrower and straighter stream reach; potentially providing for less impact to jurisdictional areas
 - The concept of incorporating floodplain culverts alongside the structure, as proposed. This could represent a more geomorphically compatible design by retaining the stream's natural ability to access its floodplain during higher flows (rather than channelizing it where it would otherwise spill over its banks in this lower/more sinuous stream reach.

www.des.nh.gov
29 Hazen Drive • PO Box 95 • Concord, NH 03302-0095
NHDES Main Line: (603) 271-3503 • Subsurface Fax: (603) 271-6683 • Wetlands Fax: (603)
TDD Access: Relay NH 1 (800) 735-2964



File #

Click or tap to enter a date.

Page 2 of 2

- Widening the proposed crossing to accommodate a more geomorphically compatible configuration. We discussed the balance of not over-widening and possibly incorporating simulated stream banks within the structure.
- 2. Provide CWS verification of possible wetland area in question; downstream and north of the proposed structure location.
- 3. Applicant/agent address the comments received as they pertain to RSA 482-A jurisdiction
 - Provide a response to the following comments submitted to the file
 - Feb 18, 2022 email from Maranda Blacky
 - Feb 18, 2022 comments from Carla Taylor
 - Feb 18, 2022 comments from Ande Hubbard
 - Feb 23, 2022 comments from Center Harbor Conservation Commission
 - March 11, 2022 comments from the Center Harbor Conservation Commission
- 4. Submit information to the file demonstrating whether or not this meets the "substantial public interest" as discussed in Env-Wt 104.32.

By executing this agreement, you agree to provide revised plans and application to NHDES no later than April 29, 2022. If additional time extensions are needed, requests shall be made to NHDES prior to the April 29, 2022 response deadline to be considered. NHDES agrees to extend the final decision until May 29, 2022, to allow adequate review time.

If the project is amended beyond the scope of the original application, and the changes are considered a significant amendment per RSA 482-A:3, XIV(e), a new application and appropriate fee will be submitted in accordance with RSA 482-A:3.

Signatures

The applicant and NHDES, by mutual agreement authorized RSA 482-A:3, XIV(a), agree to extend the response time for NHDES to review the final application proposal in accordance with time frames set out in RSA 482-A, XIV(a), upon receipt of the final plans and full response to all items in the request for more information.

The applicant agrees that if the information required under the Env-Wt 100-900 is not submitted by the date specified in this agreement or 60 days from a Request for More Information by NHDES, the applicant shall agree to withdraw its application and re-file a new application and supporting information, including a new application fee.

Signature of Applicant or Authorized Agent

Date

The NHDES Wetlands Bureau agrees by the signature below the information submitted meets the Administrative Completeness requirements and will withhold the technical review of the application proposal until the revised project materials are submitted before or on the date noted above.

Dale R. Keirstead

March 30, 2022

Dale R. Keirstead

Date