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May 12, 2023

By U.S. Mail and email at bwhitney@moultonboroughnh.gov, dsassan@moultonboroughnh.gov; and rhstephensbc@gmail.com

Chairman Robert Stephens
Moultonborough Zoning Board of Adjustment
P.O. Box 139
Moultonborough, NH 03254

Re: Motion for Rehearing - Jurisdiction, Due Process, and Misapplication and/or Misinterpretation of the Zoning Ordinance Related to Carla Ann and Mark Taylor's Administrative Appeal of the Planning Board's February 22, 2023 Decision Conditionally Approving a Site Plan, Conditional Use Permit, and a Condominium Subdivision for Koss Construction, LLC for Tax Maps 140-16 and 170-12

Dear Chairman Stephens and Members of the ZBA:

I am writing on behalf of Carla Ann and Mark Taylor of 34 Bean Road in Moultonborough, NH (Tax Map 170-11). The Taylors' property abuts Mr. & Ms. Koss/Koss Construction LLC's (collectively, "Koss" or "developer") property located off of Bean Road (Tax Maps 140-16 and 170-12) in Moultonborough, NH ("Town").

Please accept this letter as a Motion for Rehearing ("Motion") of the Moultonborough Zoning Board of Adjustment's ("ZBA") denial of the Taylors' Administrative Appeal ("Appeal"). (Exhibit 1 - Taylors' Appeal). As provided in the April 20, 2023 Notice of Decision, the ZBA ruled: "Prior to the opening of a public hearing, the [ZBA] first discussed whether the ZBA had jurisdiction to hear the claims made in [the Taylors'] appeal. Upon careful review, discussion, and the recommendation of Counsel, the [ZBA] determined that [it] did not have jurisdiction to hear [the Taylors'] appeal."

On March 24, 2023, the Taylors timely provided the ZBA with an Appeal of the Planning Board's February 22, 2023 Decision Conditionally Approving a Site Plan, Conditional Use Permit, and a Condominium Subdivision for Koss for Tax Maps 140-16

and 170-12 (“Decision”). In said Appeal, the Taylors aver that the Planning Board erred by, *inter alia*, misinterpreting critical portions of the Town’s Zoning Ordinance (“MZO”):

1. Misinterpreted the goals and aspiration portion of the Ordinance (MZO 1.0) when it issued its ruling without DES first approving the community water system that would service Koss’ development;
2. Failed to consider or apply MZO 6.5.2.1.2 regarding Special Exceptions and more generally discussing setback/buffer related issues; Misapplication of MZO 9.3.1.3. This portion of the MZO encourages clustered and multi-tenant housing in the the West Village Overlay District (“WVOD”), however, the Taylors aver that the Planning Board failed to adequately consider the remaining portion of that subsection which provides that the character of the existing residential/mixed-use neighborhood needs to be maintained.
3. Failed to adequately consider MZO 3.8 regarding impacts on abutting properties;
4. Failed to consider applicable regional impacts, like those affecting the Town of Center Harbor; and,
5. Additional arguments challenging the wisdom of a community water system, which DES has not even permitted testing for yet given serious concerns that preliminary testing would pollute neighboring wells, such as the Taylors’ well. (Exhibit 2 – April 21, 2022 DES letter).

For clarity, this Motion focuses on the issues of jurisdiction, due process, and the Planning Board’s misapplication and misinterpretation of the MZO in its Decision.

I. Due Process and Jurisdiction

- a. In Denying the Taylors’ Opportunity to be Heard at the February 19, 2023 Hearing, and Denying the Appeal for Lack of Jurisdiction, the ZBA Violated the Taylors’ Constitutional Rights Under the State and Federal Constitution, and Committed Reversible Error.

The ZBA committed reversible error when it declined to even open the April 19, 2023 ZBA hearing to the public, in direct violation of the Taylors’ constitutional right to due process, and denied their Appeal for lack of jurisdiction. *See* N.H. CONST. PT. I, ART. 12 and 15; and U.S. CONST, 5TH AND 14TH AMENDMENTS. Their constitutional right to due process was further violated when the ZBA did not permit their counsel to provide any argument at the hearing, including on the issue of jurisdiction. *See Bethlehem v. Tucker*, 119 N.H. 927, 929 (1979) (“Notice and the opportunity to be heard are essential ingredients to the due process of law.”) (citing *Royer v. State Dep’t of Empl. Security*, 118 N.H. 673 (1978) and *Goss v. Lopez*, 419 U.S. 565 (1975)). The ZBA made its ruling despite the Taylors clearly having standing as aggrieved abutters/neighbors directly affected by Koss’ development.

See Weeks Rest. Corp. v. Dover, 119 N.H. 541, 542-44 (1979); *see also Nautilus of Exeter v. Town of Exeter*, 139 N.H. 450, 452 (1995) and *Price v. Planning Bd. of Keene*, 120 N.H. 481, 484 (1980). The Taylors had a due process right to be heard as aggrieved abutters with legitimate and reasonable concerns about their health, safety and welfare given that DES has not even allowed preliminary testing at the Koss' development due to concerns about CVOC and PFA contamination to their well. (Exhibit 2 – April 21, 2022 DES letter).

As due process is a fundamental right guaranteed under both the State and Federal Constitutions, in the event that this Motion is denied by the ZBA, and appealed to the Carroll Superior Court, a request for attorney's fees and costs will be included in the Complaint. *See Harkeem v. Adams*, 117 N.H. 687, 691 (1977) (Holding that a litigant forced to seek judicial assistance to secure a clearly defined and established right which should have been freely enjoyed without such intervention may be awarded attorney's fees and out-of-pocket costs); *see also Keenan v. Fearon*, 130 N.H. 494, 501-02 (1988) and *Aranson v. Schroeder*, 140 N.H. 359, 371-372 (1995). Put another way, the Taylors should not be required to incur the attorneys' fees necessary to appeal the ZBA's error to the Carroll Superior Court simply to enforce their constitutional right to due process.

b. The Taylors' Pro Se Appeal Should be Interpreted Broadly Under Relevant New Hampshire Case Law.

In regards to the contents of the Taylors' *pro se* Appeal, it would be consistent with New Hampshire law to interpret their Appeal more broadly than Attorney Mitchell's analysis would allow. (Exhibit 3 – Attorney Mitchell's April 19, 2023 Email to the ZBA). In *Colla v. Town of Hanover*, 153 N.H. 206, 209 (2006), the New Hampshire Supreme Court reversed and remanded the dismissal of a Superior Court Appeal where the Motion for Rehearing only listed the following grounds in their Motion: "Here, the ... motion for reconsideration to the ZBA stated that the ZBA's denial of their variance request on the ground that there were feasible alternatives to the screened deck they sought to build was unreasonable, denied their constitutional rights to due process and equal protection of laws, was contrary to *Boccia* and was contrary to the ordinance." Contrary to *Colla*, the ZBA's Counsel interpreted the Taylors' Appeal on an issue-by-issue basis and did so narrowly.

As the broad grounds referenced above were deemed sufficient by the New Hampshire Supreme Court in *Colla*, the Taylors' Appeal should have been similarly interpreted. The ZBA's failure to do so violated the Taylors' constitutional rights to due process. *See* N.H. CONST. PT. I, ART. 12 and 15; *see also* U.S. CONST, 5TH AND 14TH AMENDMENTS. Further, the ZBA made such a ruling despite the Taylors having standing as an aggrieved abutter to the Koss' development. *See Weeks*, 119 N.H. at 542-44; *see also Nautilus of Exeter*, 139 N.H. at 452, and *Price*, 120 N.H. at 484.

c. The ZBA Has Jurisdiction to Hear the Taylors' Timely Appeal.

The ZBA is the body vested with authority to hear and decide appeals if it is alleged there is an error in any order, requirement, decision, or determination made by an administrative official in the enforcement or interpretation of any zoning ordinance. RSA 674:33, I. a. An "administrative officer" is defined in the statute as an official or a board, like the Planning Board, who has authority to issue permits. RSA 676:5, II. (a).

In the exercise of subdivision or site plan review, if the Planning Board renders a decision or determination based upon the ordinance which would have been appealed to the ZBA had it been made by an administrative official, then the appeal is to the ZBA. RSA 676:5, III. The ZBA is therefore the proper authority to appeal decisions of both local zoning or planning officials and the planning board, as they relate to the enforcement, application, construction or interpretation of a zoning ordinance. *Hoffman v. Town of Gilford*, 147 N.H. 85, 88 (2001); *Dube v. Town of Hudson*, 140 N.H. 135, 137-138 (1995). This is intended to allow local officials to first review a local decision before the matter proceeds (if necessary) to Superior Court. *See* Loughlin, Peter J., 15 LAND USE PLANNING AND ZONING § 21.19 (2018) ("The rehearing process is designed to afford local zoning boards of adjustment an opportunity to correct their own mistakes before appeals are filed with the court. It is geared to the proposition that the board shall have a first opportunity to correct any action taken, if correction is necessary, before an appeal to court is filed.")

As set forth in detail below, the Taylors' Appeal was timely and, given the foregoing, the instant Motion should be granted, and a hearing should be scheduled before the ZBA on the matters raised herein.

II. Background and Analysis

a. The Taylors Filed a Timely Appeal Given the Procedural History of the Koss' Development.

Contrary to assertions made in Koss' April 19, 2023 Objection to the Taylors' Motion to Continue, the Taylors filed a timely appeal of the Planning Board's February 22, 2023 Decision on Friday, March 24, 2023. Up until then, Koss' Development had been greatly in flux since it was first proposed in 2021. The Planning Board made a separate vote related to the density of the development in March, 2022, which resulted in prior appeals to the ZBA and Carroll Superior Court in May, 2022 (described more fully in the next section). Following that stage of litigation, there were no other votes made by the Planning Board regarding Koss' development until the Planning Board's Hearing on February 22, 2023. Given the procedural history of this development to date, the Taylors' Appeal was

timely, and could not have been filed until the February 22, 2023 Decision was issued by the Planning Board.

Moreover, at any point between March/May, 2022 (if not 2021 when the development was first proposed) and February, 2023, the Planning Board could have correctly applied the relevant portions of the MZO discussed in this Motion. In particular, and as more fully detailed in below section II. c., the Planning Board could have, and should have, analyzed and applied MZO 9.3.9.1 and 6.6 to Koss' Development. Said portions of the MZO govern all commercial uses in Moultonborough. Giving careful consideration to these "mandated" portions of the MZO would have, at a minimum, eliminated the Units closest to the Taylors' property (Units 3 and 4), and likely other Units in the development as well. Further, such analysis would have led the Planning Board to conclude that a variance is needed for the location of the roadway and sidewalk that runs along, and almost over, the Taylors' property. (Exhibit 4 - Koss' Landscaping Plan). To date, the only variances approved by the ZBA apply to two stream crossings within the development, but not the location or layout of the road itself.

b. The ZBA's Decision is Inconsistent with Its Prior Ruling on the Town of Center Harbor's Administrative Appeal.

This project has already been before the ZBA. On May 4, 2022, the Town of Center Harbor ("Center Harbor") and the Taylors' neighbors, Bryan and Elana Murphy, challenged the Planning Board's March 23, 2022 decision approving an even more dense 60-unit condominium development (compared to the 42-unit condominium development currently before the ZBA).¹ A central issue in that ZBA appeal was whether the Planning Board failed to apply certain MZO provisions relating to setbacks, such as wetlands, well protective radii, and roadways as the same apply to the calculation of lot size/density. At the conclusion of the May 4, 2022 ZBA hearing, the ZBA reversed the Planning Board's

¹ The Murphys appealed to the Carroll Superior Court, and Center Harbor appealed to the ZBA. The Murphys later joined the ZBA appeal. Koss, the Murphys, and Center Harbor later dismissed the Superior Court appeal as the same was moot following Koss' decision not to appeal the ZBA's decision. The dismissal of the Superior Court appeal was also predicated, in part, on Koss providing the Murphys and Center Harbor with revised Plans that would comply with the Town's regulations and ordinance in advance of any Planning Board hearing addressing the development at issue in the instant appeal. Koss did not provide the Murphys and Center Harbor with new Plans that fully complied with the Town's Zoning Ordinance. Moreover, the Plans that were approved by the Planning Board at the February 22, 2023 hearing once again seek to circumvent applicable and pertinent Town rules and ordinances which are in place for, amongst other things, public health, safety and welfare.

decision by a 4-1 vote. Koss moved for reconsideration, which was eventually denied, and Koss chose not to appeal the ZBA's decision.

In ruling on Center Harbor's Administrative Appeal, the ZBA made findings that are relevant and persuasive for its analysis of the instant Motion and the Taylor's Appeal. For instance, Attorney Mitchell's broad guidance regarding the appeal process for matters involving the West Village Overlay District ("WVOD"), namely, that the ZBA has no jurisdiction, whatsoever, for any "... appeals having to do with an Innovative Land Use Provision[...]" conflicts with the ZBA's March 23, 2022 Decision. In that Decision, the ZBA found that the Wetland Resources Conservation Overlay District ("WRCOD") overrides the WVOD "as it is more stringent." (MZO 9.1.1 "The special regulations of this overlay district are in addition to the regulations of the underlying zoning ordinance.") That determination was not challenged by any party to this matter, and is now the law of this case. Consistent with that undisputed prior decision, there are numerous scenarios where a property located within the WVOD would still be subject to other portions of the MZO that the ZBA, and not the Superior Court, has jurisdiction over in the first instance. *See* RSA 676:5, III; *Hoffman*, 147 N.H. at 88; and *Dube*, 140 N.H. at 137-138. One such scenario is the interplay between MZO 9.3.9.1 and MZO 6.6, which is addressed in the following section (II. c.).

c. The Decision is Contrary to MZO 9.3.9.1 and MZO 6.6, Which Applies to All Commercial Uses in Moultonborough.

Like the ZBA's prior analysis of the applicability of the WRCOD to the WVOD, MZO 9.3.9.1 provides that "The Planning Board may authorize variations from the [WVOD Dimensional Standards Table], **except for any requirement provided by state regulation or mandated elsewhere in this ordinance.**" (emphasis added). One such mandate in the MZO applies to all "commercial uses" in the Town. MZO 6.6. ("Requirements for Commercial Uses"). The ZBA previously determined that Koss' development is a commercial use, and that determination was not challenged. *See* ZBA's March 23, 2022 Notice of Decision ("The Exemption Section 9.1.4 expressly states that it ... 'shall not apply to lots being developed for commercial purposes' such as the Project."). Given that prior determination, Koss development must comply with MZO 6.6.

If the property does not comply with the setbacks and buffers mandated in MZO 6.6, then it is incumbent on Koss to file an application for a variance with the ZBA, and to satisfy the 5-part test of RSA 674:33. In pertinent part, MZO 6.6 provides that "... **The following requirements and standards shall apply to all commercial uses throughout the Town...**[:]"

6.6.2 Setbacks and Buffers for Buildings and Structures.

	<u>Zone A</u>	<u>Zone B</u>	<u>Zone C</u>	<u>Residential/Agriculture</u>
Front	50 feet	50 feet	25 feet	50 feet
Side	25 feet	25 feet	10 feet	50 feet
Rear	25 feet	25 feet	10 feet	50 feet” (emphasis added).

Additionally, for commercial uses within Commercial Zone A and the Residential/Agriculture Zone there “... shall be a twenty-five (25) foot, vegetative buffer, natural or landscaped, within the front setback between the building and the roadway, along the full length of the lot.” MZO 6.6.

The properties at issue on Appeal are found within Commercial Zone A, the Residential/Agriculture Zone, the WVOD, and the WRCOD. To the extent there is any vegetated buffer between the development and the Taylors’ property, the same are grossly insufficient and fail to meet the 50-foot setback and 25-foot vegetative buffer requirements. Koss’ Landscaping Plan simply shows a line of short trees to replace the mature trees that exist on the property now. (Exhibit 4 – Koss’ Landscaping Plan).

As for the roadway shown on Koss’ Plans, there is no setback or vegetative buffer to speak of adjacent to the Taylors’ property. Were the roadway any closer, it would literally run over the back corner of their property. In sum, the Site Plan conditionally approved by the Planning Board violates MZO 6.6 and 9.3.9.1 and a variance must be requested and approved by the ZBA before Koss’ development can proceed.

d. MZO 3.8 Must Be Given Due Consideration.

As for the development as a whole, many of the units have no side or back yards, and are immediately adjacent to wetlands. Snow and stormwater are planned to be dumped nearby a neighboring property or right next to a pond and other wetlands. Within the development there is no vegetation, or shields, or other limitation that will prevent the Taylors, and their neighbors, from having either streetlamps, car lights, or building lights from being shined in their homes. The most recent lighting plan submitted to the Planning Board is unchanged from the plans filed in support of the larger 60-unit development. The developer proposes to take a dark area and make it light behind the Taylors and their neighbors. Further, the house across the street from the entrance to the development at 35 Bean Road will have light beaming into their home each time a car leaves the development with its headlights on (particularly if said car turns right when exiting the development). It is not clear whether the developer also wants lighting by the entrance of the development, or on the proposed sign for it.

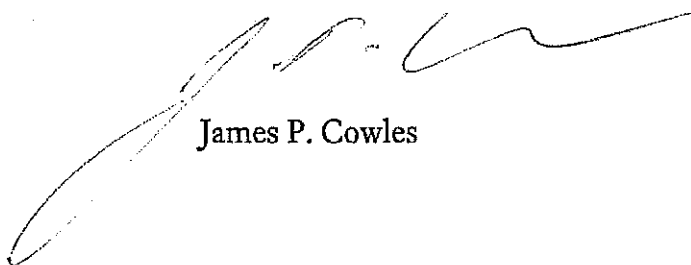
The failure to provide any meaningful sort of natural woodland buffer, landscaping, or take other steps to protect the neighbors from the adverse effects of this grossly over-developed plan, was yet a further reason for the Planning Board to deny the proposal, and shows that the Planning Board failed to consider the impact the development would have on abutters contrary to MZO 3.8. ("It is the specific intent of this ordinance to minimize impact created by use of property upon adjoining property, and specifically, but not limited to, proper provisions for parking, loading and unloading, noise, dust, glare from lights of vehicular traffic and/or illumination of site.")

III. Conclusion

For the foregoing reasons, the ZBA erred when it determined that it lacked jurisdiction to hear the Taylor's Appeal, and when it declined to even open the April 19, 2023 hearing to the public. In doing so, the ZBA violated the Taylors' constitutional right to due process. *See* N.H. CONST. PT. I, ART. 12 and 15; *see also* U.S. CONST, 5TH AND 14TH AMENDMENTS. Further, the Planning Board misapplied and misinterpreted the MZO in its Decision in regards to the application of MZO 6.6, 9.3.9.1, and 3.8 for the reasons more fully stated herein. The ZBA's denial of the Taylors' Appeal was unlawful, unjust, and unreasonable.

The Taylors respectfully request that the ZBA grant this Motion, and schedule a new hearing on this matter at its earliest opportunity.

Very truly yours,



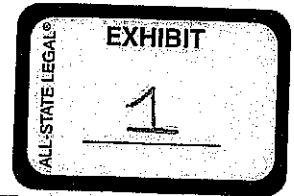
James P. Cowles

JPC/wak
Enclosures

cc: Carla Ann and Mark Taylor
Walter Mitchell, Esq., Counsel for the ZBA
Ethan Wood, Esq., Counsel for Koss Construction, LLC
Christopher Boldt, Esq., Counsel for the Town of Center Harbor
Mark Rouvalis, Esq., Counsel for abutters, Bryan and Elana Murphy

Exhibits for Taylors' Motion for Rehearing

1. Taylors' Administrative Appeal dated March 21, 2023
2. April 21, 2022 DES Letter Denying Koss' Preliminary Well Test Application
3. Attorney Mitchell's April 19, 2023 Email to the ZBA
4. Koss' Landscaping Plan dated September 28, 2021; Revised on October 21, 2022



Application for appeal of administrative decision, Mark and Carla Ann Taylor of Moultonborough Tax Map 170, Lot 10(**Appellant**) appeals, the Site Plan Review Permit, Conditional use Permit and Subdivision (**Condominium form of ownership**) of the Moultonboro Planning board (**the Board**) on February 22, 2023. That Koss Construction, LLC (**Koss**) Tax Map 140 Lot 16& Tax Map 170 Lot 12 proposed 21 Building/42 unit Condominium, complies with the Commercial use within the Residential/Agriculture Zone (6.5.2.12) of the West Village Overlay District (**WVOD**), complies with Overlay districts (9.3.1.3), (1) Zoning Ordinance Statement of Purpose and Authority.

The Appellant is a qualified abutter whose property has two large boundary lines adjacent to Koss. Additionally, pursuant with the provisions of RSA 677:15, the Appellant is raising these issues with the ZBA

The Appellant is raising issue with the Site Plan Review approval and or findings of fact, letter g *"DES will have the final say in the creation and operation of a community water system for this project"*. Approving the Site Plan Review prior to the findings of DES was premature and not in the best interest of the project, the abutters and relinquishes the ability to impose limitations based on the DES findings and or recommended mitigation plan to ensure carrying out the Town of Moultonborough's Zoning purpose and authority.

1.0 ZONING ORDINANCE STATEMENT OF PURPOSE AND AUTHORITY

The Zoning Ordinance of the Town of Moultonborough is intended to regulate land use Within the Town of Moultonborough. The ordinance is designed to take into account the impacts of land uses and to impose limitations on uses of land for the protection of the environment, the natural resources and the rural qualities of Moultonborough. The ordinance is further intended to promote health, safety, economic and social well-being, convenience, prosperity, and general welfare; it is intended to lessen congestion in the streets, to secure safety from fires and other dangers, to provide adequate light and air, to prevent overcrowding of land, and to avoid undue concentration of population and to facilitate the adequate provision of transportation, solid waste facilities, water, sewerage, schools, parks and to encourage proper use of natural resources.

The Appellant is raising issue with the Site Plan Review approval and or findings of fact, letter h. *The applicant has complied with all our ordinances*". The current plan has a cut line within 15 feet of the property line which will take all of the original vegetated buffer and the current building placement will be inside the 50 foot buffer stated for Residential/Agricultural Zone. The current type of homes are not like any in the adjoining residential area. The current approved site plan allows for a foot traffic on a permanent structure the sidewalk to be within 3 feet of the property line, allowing for noise, dust and etc to be within 3 feet of our property. The current cut line on the side boundary will eliminate all of the vegetative buffer and allow for lights from vehicular traffic to project light/glare into our home. All of these issues will change the quality of life of our property environment and affect our quality of life. The Board failed to give public discussion in regard to the construction, placement and size of the sidewalk. When the engineer was asked about moving the buildings to retain a larger vegetative buffer his reply was " we just don't have room". 1.0 ZONING ORDINANCE STATEMENT OF PURPOSE AND AUTHORITY gives the Board authority to protect existing property owners and proper growth in the town. The Board failed to exercise this by working with Koss to scale the Site Plan to meet all ordinances in regard to the buffer. The Appellant requested consideration of removal for building number three (3), number four (4) and number seven (7) to adhere to ordinance 6.5.2.12, 9.3.1.3 as well to make unseen from Bean Road. No discussion or response or change occurred leaving this Site Plan non compliant with current ordinances mentioned here. Meeting these ordinances would not restrict Site Plan yet bring it into compliance with 9.3., in its entirety, the very ordinance that speaks to, allows, this type of development.

6.5.2.12

If the site is in the Residential/Agricultural Zone:

The structures and activities contained on the site shall be screened from view on all sides by a vegetated buffer of not less than fifty (50) feet in width. Such buffer shall contain noise, light, and other impacts of the site so as to minimize the disturbance of the site on neighboring properties. In no case shall the activities on the site be disruptive to neighboring properties. The buffer shall prevent visibility of headlights and similar vehicle lighting from being visible off the site from all property lines.

9.3.1.3 Encourage development of a variety of housing styles and types with an emphasis on cost effective clustered and multi-tenant units while maintaining the character of residential and mixed-use neighborhoods which exist in adjoining residential and mixed-use areas.

3.8 Impact on Adjoining Property

It is the specific intent of this ordinance to minimize impact created by use of property upon adjoining property, and specifically, but not limited to, proper provisions for parking, loading and unloading, noise, dust, glare from lights of vehicular traffic and/or illumination of site.

RSA 36:54

2. Proximity to the borders of a neighboring community.

3/23 Mr. Claypoole shared in Mr. Larsons concerns with the development being on Bean Road and what you may see when driving by. He noted his concerns with what the current residents on Bean Road will see out the back of their houses and how that changes the experience of living in that quaint part of New Hampshire. There was a brief discussion as to what if any measures there may be to screen a two story unit.

3/23 Mr. Bartlett commented that the Applicant has done an admiral job on the well situation, and he requested that they seriously consider the things that they have heard at the hearing this evening about the necessity of providing additional buffer capability and also some comments from the neighbors about making sure they carry on the water testing program for a period longer than the minimum state requirements. Mr. Koss stated they could implement whatever DES regulation water bureau has into the bylaws of the condominium.

The Appellant is raising issue with the approval of the application for Site Plan Review for a multi-family, 42 unit condominium subdivision, subject to conditions, Conditions subsequent: to be continually compiled with: number 12 ***“Neighboring properties shall be allowed to attach to the community water system at their own expense, provided the system has the capacity to serve the additional properties”***. In addition to number 40. ***Condominium Documents should include provision for abutters experiencing new well contamination to tie into the community well for the first seven(7) years of operation of the community well. Expense of this shall be shared 50/50 between the abutter and the condominium association. A surety in an amount determined by the Town Engineer, shall be maintained for seven (7) years. Community water system shall be designed to serve a minimum of six (6) abutters in addition to all units on site.”***

Approval of the application was made prior to having a plan in place from DES to build an adequate sized and or safe Community water system. Placing a

clause to serve only a minimum of six abutters negates the provision in RSA 36:55 protection that this ZBA determined this project to be. While Koss stated an approval was needed to complete the plan that was no fact. The denial given to Koss was due to a failed mitigation plan in the event of contamination and part of the process with DES. While the Board is trumped by the findings and or authority of DES the Board acted prematurely in approving such Site Plan Review conditionally for a housing development with no approved water supply and further allowing potential well contamination or lack of water to surrounding wells. Appellant suggests having this knowledge prior to approval would have allowed for the Board to adhere to RSA 36:55 and 9.3.1.3. Furthermore DES requires the mitigation plan to be in agreement with all potential abutters so including this condition is not only premature it could be conflicting with what would actually be necessary also required from DES resulting in a civil matter in the event of failure.

RSA 36:55 Definition. -

In this subdivision "development of regional impact" means any proposal before a local land use board which in the determination of such local land use board could reasonably be expected to impact on a neighboring municipality, because of factors such as, but not limited to, the following:

II. Proximity to the borders of a neighboring community.

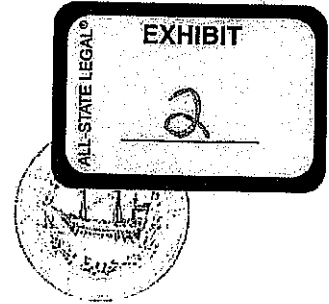
V. Proximity to aquifers or surface waters which transcend municipal boundaries.

The Appellant respectfully asks the ZBA to consider all the town Zoning Ordinances that were overlooked and find that the Boards Decision was not in keeping with the towns ordinances set forth to protect all property owners/ abutters from having their rights/privacy's infringed on. This Site Plan Review and Site Plan Application are in the WVOD. The WVOD encompasses portions of existing Commercial A and the Residential/Agricultural Zones The Appellant request a re hearing for the Site Plan Review and application for Site Plan review approval. The Appellant understands this is the first of this type development in the Town and of which the Board has handled no precedent has been set. In addition the Appellant would recognize that the ZBA would have the authority to set forth a correct precedent for the Town with adhering to all ordinances and in addition seeking additional calculation of the density requested in the conditional approval for a clear precedent.



The State of New Hampshire
Department of Environmental Services

Robert R. Scott, Commissioner



April 21, 2022

Abigail Thompson Fopiano
Edgewater Strategies, LLC.
26 Chalet Drive
Gilford, NH 03249

transmitted via email to abby@edgewaternh.com

Subject: Preliminary Application Response
CWS Moultonborough: Harbor Landing; PWS ID: NEW SYSTEM
Proposed BRW1 and BRW2; NHDES#DR006013

Dear Ms. Fopiano:

The purpose of this letter is to respond to the recent submittals regarding the proposed pumping test plan for two bedrock wells at the Harbor Landing project in Moultonborough. Two letters were received by NHDES, on March 7, 2022 and on April 14, 2022, submitted by Edgewater Strategies, LLC. in response to the New Hampshire Department of Environmental Services (NHDES) letter dated October 1, 2021. The project is seeking the approval of their preliminary application for the small community wells under the requirements of New Hampshire Administrative Rule Env-Dw 305, Small Production Wells for Small Community Water Systems.

NHDES cannot approve the preliminary application at this time because the proposed contamination control program does not adequately assess or control nearby known contamination sources that have shown to be hydraulically connected to the proposed community wells. In accordance with Env-Dw 305.16(c), *Criteria and Procedures for Approval of the Preliminary Report*, NHDES is advising the applicant not to proceed further with this proposed well siting process until additional work is done to establish an adequate contamination control program. NHDES has provided the attached figure to highlight the issue based on information collected and submitted by the applicant and NHDES data sources.

Given the nearby extent of contamination in bedrock and the potential spread of the contamination to other nearby private wells that may be caused by pumping at the proposed wells, at this time NHDES will not be able to approve these sources as new community water supply wells and remain in compliance with Env-Dw 305.23, *Contamination Control Program*, and Env-Dw 305.29(d)(1), *Criteria for approval of New Small Production Wells*.

If you would like to schedule a meeting to discuss this project further, contact (603) 271-3918 or Andrew.T.Koff@des.nh.gov.

Regards,

Andrew Koff, P.G.
Drinking Water and Groundwater Bureau

Abigail Fopiano, Edgewater Strategies, LLC
Preliminary Well Siting Response
CWS Moultonborough: Harbor Landing; PWS ID: New System
Proposed BRW1 and BRW2; NHDES#DR006013

April 21, 2022
Page 2 of 2

cc: Mark Koss, Koss Construction LLC (email)
David Hisz, Thomas Willis, Kelsey Vaughn, Stephen Roy, Tom Fargo, Amy Doherty, Rene Pelletier, Jeff
Marts; DES (email)
Town of Center Harbor (email)
Town of Moultonborough (email)





Bonnie Whitney

From: Walter Mitchell <walter@mitchellmunigroup.com>
Sent: Wednesday, April 19, 2023 10:50 AM
To: Robert Stephens
Cc: Bonnie Whitney; Laura Spector-Morgan; Dari Sassan
Subject: RE: Moultonborough ZBA

Follow Up Flag: Follow up
Flag Status: Flagged

Hi Bob – I write to follow up on our recent phone call and to confirm the advice I provided at that time.

As the Chair of the Moultonborough ZBA, you have received, and provided to me, a copy of an Appeal from an Administrative decision filed with the Board by Mark and Carla Ann Taylor. The Taylors seek to appeal to your board a decision made by the Town's Planning Board on February 22, 2023, approving an application by Koss Construction. (Curiously, the Taylors describe their appeal as filed under the authority of RSA 677:15, which is the authority for appealing to the Court. However, I don't believe the Board should treat this misstatement as dispositive of any issues).

You sought guidance from our office on the question whether the ZBA has jurisdiction to hear the claims made in the appeal.

The Taylor's appeal document contains multiple claims. After review of the entire document, my conclusion is that the ZBA does not have jurisdiction to hear any of these claims. I explain below why not, and I make recommendations on how to proceed.

The organization of the document submitted as the appeal is somewhat challenging, but I identify the following claims that the appellants set forth as their justifications for this appeal:

1. First, the appellants challenge the judgment of the Planning Board in its ruling that "DES will have the final say in the creation and operation of a community water system for this project", rather than waiting to learn what the content of that DES approval may be. The appellants basically are complaining that it would have been wiser to wait.

The authority of the ZBA to rule on administrative appeals from a Planning Board decision is limited to issues involving the Planning Board's *construction, interpretation or application* of a particular term in the zoning ordinance (RSA 676:5, II (b)). That is not what is involved here. While this section of the appeal document does include as a next paragraph text from the zoning ordinance, the cited provision (MZO 1.0) is merely a description of the goals or "aspirations" of the ZO. This provision is not regulatory, and for that reason I don't believe the ZBA has jurisdiction to hear this particular claim. This claim, to the extent that it might have merit, needed to be appealed to the Court.

2. The applicants next challenge the look of the proposed residences and claim that there is a buffer required between this development and adjoining residential properties, citing to MZO Section 6.5.2.12. This claim is that the Planning Board misapplied or failed to apply this zoning section to the Koss development proposal. Similar to #1 above, I don't believe that the ZBA has jurisdiction to hear this claim, for two separate reasons.

First, Section 6.5.2.1.2 is not a stand-alone requirement. Instead, it is a requirement to be applied in the context of considering the grant of a Special Exception. The ZBA does not have before it an application for a Special Exception; therefore, the requirements cannot apply.

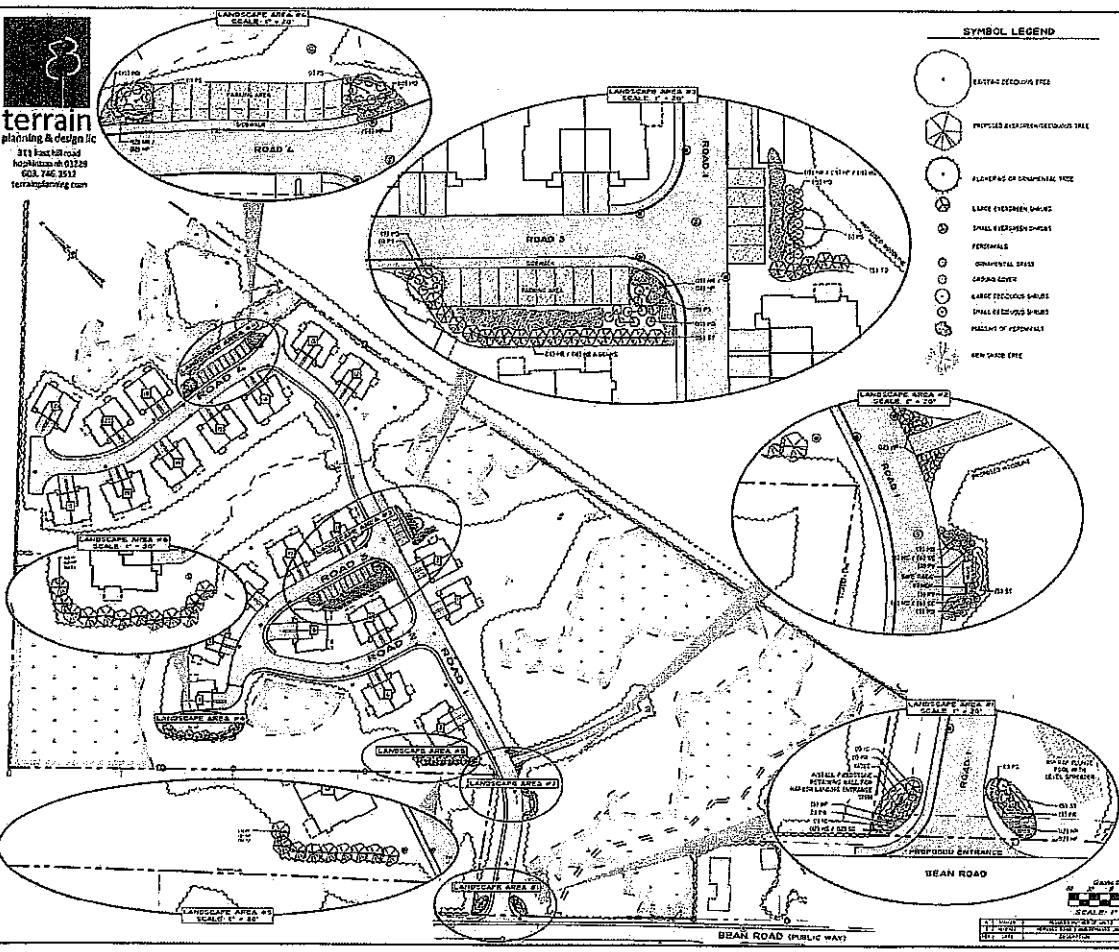
And second, even if the requirements of Section 6.5.2.1.2 did apply, there are conflicting provisions in Section 9 that may override any conflicting provisions in Section 6.5.2.1.2. However, since Section 9 is an Innovative Land Use regulation, and appeals regarding such a section cannot be brought to the ZBA, the ZBA does not have jurisdiction to determine which sections get applied to the Developer's application. Only the Court can make that determination.

3. Next, in support of the same complaint described above, the appellants also cite to Section 9.3.1.3, having to do with the character of the neighborhood. However, as explained above, that section of the ordinance has been enacted as an Innovative Land Use restriction in accordance with RSA 674:21. The ZBA does not have the authority to hear appeals having to do with any Innovative Land Use provision. Any such challenges must be taken directly to the Court. (See RSA 676:21, III – "...provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board or adjustment, but may be appealed to the superior court as provided by RSA 677:15.")
4. Next, the appellants include a cite to MZO Section 3.8. This is somewhat confusing because I don't see anything in the appeal explaining why this zoning ordinance section is claimed to have been violated by the Planning Board. Further, the zoning section itself is strangely positioned. It is located in a regulatory section of the ordinance; yet there is nothing in it that is regulatory. It contains vague statements with no standards to guide how compliance can be achieved. In effect, it contains goals or "aspirations", perhaps to be achieved in some other part of the ordinance. Yet, no other section is referenced. Therefore, I recommend treating this section of the appeal as one over which the Board has no jurisdiction.
5. The appellants next cite to RSA 36:54 and later to RSA 36:55. There is no clear explanation of how or why the appellants believe these relate to appealable issues. Those statutes have to do with procedures and requirements that apply when a proposed development is judged by the Planning Board to have a Regional Impact. Whether or not the Planning Board made a mistake in choosing not to apply those statutes are not questions that can be appealed to the ZBA; they should have been appealed to the Court. Therefore, the ZBA has no jurisdiction to hear this any such claim.
6. Finally, the appellants also challenge the wisdom of other parts of the Planning Board's decision, again relating to the proposed community water system. However, again the applicants fail to explain how this relates to the construction, interpretation or application of a particular section of the Zoning Ordinance. The ZBA does not have jurisdiction that would allow it to substitute its judgment for that of Planning Board. Therefore, since no jurisdiction exists, the ZBA should also decline to hear this section of the appeal.

Please let me know if there are any further questions.

Walter

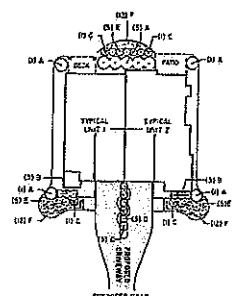
terrain
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Hopkinton, MA 01728
508.746.3513
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SYMBOL LEGEND

- EXTERIOR DECORATIVE TREE
- PHYSICAL BARRIER/DECORATIVE TREE
- PLANTING OF DIMENSIONAL TREE
- LARGE EVERGREEN SHRUBS
- SMALL EVERGREEN SHRUBS
- PERENNIALS
- ORNAMENTAL SPICES
- GRASS COVER
- LARGE DECIDUOUS SHRUBS
- SMALL DECIDUOUS SHRUBS
- PALMS OR FERNS
- NEW SHADY TREE

Plant	Quantity	Scale	Notes
Large Deciduous Tree	10	1" = 10'	Plant in 2021
Small Deciduous Tree	20	1" = 10'	Plant in 2021
Large Evergreen Shrub	15	1" = 10'	Plant in 2021
Small Evergreen Shrub	30	1" = 10'	Plant in 2021
Perennials	100	1" = 10'	Plant in 2021
Ornamental Spices	50	1" = 10'	Plant in 2021
Grass Cover	1000	1" = 10'	Plant in 2021
Large Deciduous Shrub	10	1" = 10'	Plant in 2021
Small Deciduous Shrub	20	1" = 10'	Plant in 2021
Palms or Ferns	5	1" = 10'	Plant in 2021
New Shady Tree	1	1" = 10'	Plant in 2021



TYPICAL LANDSCAPE AROUND BUILDING
NOTES:
1. PLANTING SHALL BE DONE IN ACCORDANCE WITH THE LANDSCAPE PLAN.
2. PLANTING SHALL BE DONE IN ACCORDANCE WITH THE LANDSCAPE PLAN.
3. PLANTING SHALL BE DONE IN ACCORDANCE WITH THE LANDSCAPE PLAN.
4. FOR PLANTING DETAILS SEE 100-100-100

LANDSCAPING PLAN
TAX MAP 140 LOT 16
BEAN ROAD, MOUNTAINBOROUGH, NH 03254
PROJECT FOR
Brown Engineering LLC
377 Main Street
Keene, NH 03501
603.352.1234
www.browneengineering.com
DRAWN BY: BROWN ENGINEERING LLC
CHECKED BY: BROWN ENGINEERING LLC
DATE: SEPTEMBER 29, 2021
JOB NO: 2325-01



NO.	DATE	DESCRIPTION
1	09/29/21	ISSUED FOR PERMIT
2	09/29/21	ISSUED FOR PERMIT
3	09/29/21	ISSUED FOR PERMIT

