

**ZONING BOARD OF ADJUSTMENT**  
**AUGUST 2, 2016 FINAL MEETING MINUTES**

---

**Present:** Chairman - Jack Dearborn; Member ó Stu Richmond; Member - Malcolm Wright; Member - Marc Morette; Alternate ó Donald Rogers; Alternate ó Michael Meyer, Land Use Coordinator ó Chip Meany.

**Guests:** Craig Francisco; Kevin Umstead; Marla Umstead; Peter March; Jeff O'Hare ó Energy North; Bill Clark; Sean McSweeney.

## **I. CALL TO ORDER**

The meeting was called to order by Jack Dearborn at 7:30pm. All Board members present introduced themselves. Chairman Dearborn seated Michael Meyer as a voting member. Don Rogers will be seated as an alternate.

## **II. ADMINISTRATIVE ITEMS**

Chairman Dearborn said the way the meeting will be run, is all questions come to the Chair. He first will ask for a motion to accept the application to be heard, then he will ask the applicant to come forth and he will read the synopsis of the front page, he will then ask the Board if they have any questions of the application, then he will ask the applicant to come forward to state his name and speak to the five points of hardship that has been included in the application, then the applicant will be asked to sit down. Chairman Dearborn will then ask for approving abutters, disapproving abutters, public at large, other boards and then will ask the applicant to come back up and rebut anything if he wants, then he will go through the process again then he will close the public hearing. Chairman Dearborn stated that once the public hearing is closed the Board will deliberate and come up with position - approve with or without conditions, denied with conditions or continued pending issues that come up for more information should the applicant which that or if the Board needs to get a legal opinion.

## **III. PUBLIC HEARING**

**Case # 0616 – Craig Francisco is requesting a variance from Article 17.1.1 and Article 28.9, to build on a Class VI road and a buffer infringement at Map 107-024, located in the Residential Zone.**

Chairman Dearborn read the application for the record for Case #0616 and Case #0616A. Marc Morette moved to accept the application. Stu Richmond seconded. Motion passed. 5-0-0.

Craig Francisco presented the detail of the lot and explained the drawing. Mr. Francisco stated that the lot is bisected by a brook and associated wetlands that run parallel to Abijah Bridge Road. He is here to propose a driveway to access the buildable area. A detailed map was included in the package.

Craig Francisco went through the points of hardship for the record.

## **VARIANCE**

**The undersigned hereby requests a variance to the terms of Article 18, Section 18.2.3 and asks that said term to be waived to permit: a driveway to access the building area on this lot.**

**1) That the granting of the variance will not be contrary to the public interest because:**

There are least 5 residences currently using Wildwood Road for access. This lot is at the corner of Abijah Bridge Road and Wildwood Road. This will not be an extension of Wildwood Road.

**2) The variance requested, will not be contrary to the spirit of the ordinance because:**

This lot was created in 1972, obviously with the intent to access from Wildwood Road. The remainder of Wildwood Road was created in 1974. Wildwood Road is an existing private road and this proposal would not adversely affect the access of emergency vehicles.

**3) That through the granting of relief by variance substantial justice will be done because:**

A driveway from Abijah Bridge Road would require crossing the brook and disturbing over 2,000 SF of wetland and over 10,000 SF of wetland buffer. The cost of this driveway would be in excess of \$69,000. The proposed alternative would only disturb 100 SF of wetland buffer and no actual wetland disturbance.

**4) That by granting the variance, the values of surrounding properties will not be diminished because:**

The properties on Wildwood Road also use it for access. The other surrounding properties would not see the proposed driveway.

**5) To qualify for a variance, you must demonstrate that denial of the variance would result in unnecessary hardship. Pursuant to applicable law, the test for “unnecessary hardship” is set forth in two alternative parts, (Parts A & B), as follows:**

**A. “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:**

**(i.) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and**

**(ii.) The proposed use is a reasonable one.**

**Accordingly, while having the foregoing standards in Part A in mind; please provide the following facts relative to your application:**

**A: Please describe the special conditions of your property that distinguish it from other properties in the area:**

This lot is bisected by a brook and adjacent wetlands by a brook and adjacent wetlands. This area is environmentally sensitive. The brook is rather steep with approximately 200 acre drainage area. It also features some scenic waterfalls and supports, native brook trout. The ground slopes downward from Abijah Bridge Road, therefore requiring a significant amount of fill, which would also negatively affect the brook and surrounding area.

**(i) No fair & substantial relationship exists between the general public purposes of the ordinance provision & the specific application of that provision to the property:**

The best access off Abijah Bridge Road is shown as proposed driveway on the attached plan. This location provides adequate sight distance, but is on a very steep grade. The driveway would be 100 ft. from Wildwood Road and 90 ft. from Beal Road, which creates a potential hazard condition. By granting this variance, and allowing access from Wildwood Road, this potentially hazardous condition is eliminated.

**(ii) And how the proposed use is a reasonable one:**

Wildwood Road is a private road allowing access to 5 residences. This lot is at the beginning of Wildwood Road. The variance would eliminate a potentially hazardous driveway intersection, eliminate over 2,000 SF of wetland impact to a sensitive brook and vastly reduce the impact to the adjacent wetland buffer.

**B: If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.**

**Accordingly, while having the forging standards in Part B in mind, please provide the following facts relative to your application:**

**B. Please describe the special conditions of your property that distinguish it from other properties in the area:**

This property has an environmentally sensitive area and the topography is rather steep in some areas. The building site is in the southeast corner of the property. The brook has a 200+ acre watershed and supports native trout.

**Please indicate how owing to the special conditions identified above, your property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it:**

The access off Abijah Bridge Road would damage the environmentally sensitive areas and the brook, and create a potentially unsafe intersection on a very steep grade. This variance would eliminate all wetland impacts, vastly reduce the wetland buffer impacts and eliminate

a hazardous driveway intersection. The proposed driveway would be relatively flat sloping upwards from Wildwood Road.

Chairman Dearborn asked if there were any questions from the Board before he opened it up to the public. There were none.

Chairman Dearborn asked for approving abutters. There were none.

Chairman Dearborn asked for disapproving abutters. Marla Umstead asked if she could describe the existing conditions of Wildwood Road for anyone that is not familiar with it. They are adjoining property. Wildwood Road is a dead end dirt road that starts at Abijah Bridge Road and slopes up. The property adjoining the marsh is fairly flat and the side where the homes are slopes up, so there is some runoff that happens. They have lived on the road for not quite 30 years. They were here 8 years ago, same variance, same owner, and same lot. That was disapproved mainly because their concern is the people on the road own maintenance of this road. At the beginning of Wildwood Road and Abijah Bridge Road there is a culvert and that has washed out twice in their time there. It has cost them and others that live there thousands of dollars to get it fixed. Any of the people that live on Wildwood Road own that responsibility for grading, plowing, and any repairs. They never get everyone to pay, so when the culvert washed out you have to get that fixed right away. It is the only access so it got fixed and hoped that everyone will contribute to it. Their concern today and it was 8 years ago is, this driveway off Wildwood Road would create runoff down the driveway, which would be in a critical area. It is the responsibility of everyone there when something occurs in the critical area. They would own the consequences. They feel that the owner bought the hardship.

Stu Richmond asked if there was a maintenance agreement. Ms. Umstead stated there is a winter snow removal agreement, not everyone pays. All maintenance is done by the people that live there.

Don Rogers asked if this person would be part of this agreement. Ms. Umstead stated that would be the hope. Chairman Dearborn stated that who pays and does not pay is civil amongst the parties on the private road. Nothing the Town is going to get involved with. Chairman Dearborn explained the betterment assessment route. Marc Morette asked Ms. Umstead to point out the location of her home.

Chairman Dearborn asked for public at large.

Chairman Dearborn asked for other boards.

Being none, Chairman Dearborn asked Mr. Francisco if he would like to add anything more. Mr. Francisco stated that at this time the intent for a retirement home, possibly a ranch for he and his wife and he would expect to be part of it. If that doesn't work, whoever lives there should be part of it. The runoff to the culvert, if he built it off of Abijah Bridge the impact to the culvert would be greater than if the driveway came off of Wildwood Road.

Ms. Umstead asked if the driveway came off a public road the responsibility would be for the Town to control. Chairman Dearborn asked how putting in that little driveway could create a tremendous amount of runoff to that culvert. He doesn't understand how putting in a driveway will add more runoff to the existing culvert. Whichever driveway gets built is going to impact the culvert.

Chairman Dearborn closed the public hearing on this case and asked Mr. Francisco to go through Case #0616-A.

**The undersigned hereby requests a variance to the terms of Article 28, Section 2 and asks that said term to be waived to permit:** the disturbance of approximately 100 square feet of the wetland buffer.

**1.) That the granting of the variance will not be contrary to the public interest because:**

This variance would allow disturbance of 100 square feet of the wetland buffer. There is no access available that would disturb less area.

**2.) The variance requested, will not be contrary to the spirit of the ordinance because:**

This is the least impactful alternative to access the buildable area. This lot was created in 1972 prior to any ordinance, town or state that protected the wetland buffer. Any alternative access to this lot would disturb 100 times this area.

**3.) That through the granting of relief by variance substantial justice will be done because:**

This variance is for only 100 feet of disturbance. Any other alternative would greatly increase the disturbance. I believe this section was added to the ordinance to increase the protection of wetlands. I believe that 100 sq. ft. of disturbance versus 10,000 sq. ft. of disturbance minimizes any effect on the wetlands.

**4.) That by granting the variance, the values of surrounding properties will not be diminished because:**

The abutting properties on Wildwood Road use Wildwood Road for access. All of the surrounding properties would not see this driveway.

**5.) To qualify for a variance, you must demonstrate that denial of the variance would result in unnecessary hardship. Pursuant to applicable law, the test for “unnecessary hardship” is set forth in two alternative parts, (Parts A & B), as follows:**

**A. “unnecessary hardship” means that, owing to special conditions of the property that distinguish it from other properties in the area:**

**(i.) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property; and**

**(iii.) The proposed use is a reasonable one.**

**Accordingly, while having the foregoing standards in Part A in mind, please provide the following facts relative to your application:**

**A. Please describe the special conditions of your property that distinguish it from other properties in the area:**

This lot is bisected by a brook and adjacent wetlands. These areas are environmentally sensitive. The brook is rather steep with a 200 acre watershed. It also features some scenic waterfalls and supports native brook trout. The building area is in the southeast corner of the lot.

- (i.) **No fair & substantial relationship exists between the general public purposes of the ordinance provision & the specific application of that provision to the property:**

Access to this lot is not possible without a variance to disturb the wetland buffer.

- (ii.) **And how the proposed use is a reasonable one:**

Any other alternative access would require some disturbance to the wetland buffer.

- (B) **If the criteria in subparagraph (A) are not established, an unnecessary hardship will be deemed to exist if, and only if, owing to special conditions of the property that distinguish it from other properties in the area, the property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it.**

**Accordingly, while having the forging standards in Part B in mind, please provide the following facts relative to your application:**

- B. Please describe the special conditions of your property that distinguish it from other properties in the area:**

This property has an environmentally sensitive area and the topography is rather steep in some areas. The building site is in the southeast corner of the lot. To access this area the wetland buffer has to be disturbed.

**Please indicate how owing to the special conditions identified above, your property cannot be reasonably used in strict conformance with the ordinance, and a variance is therefore necessary to enable a reasonable use of it:**

The building area cannot be accessed without a variance to the wetland buffer. This proposal is 100 sq. ft. of disturbance and this is a minimal disturbance.

Chairman Dearborn asked if the board had any questions before opening it up to the public.

Chairman Dearborn asked for approving abutters. There were none.

Chairman Dearborn asked for disapproving abutters. Ms. Umstead asked if it was just on the wetlands aspect of it. Chairman Dearborn stated yes on the 100 SF, a 10 x 10 area. It's a minor issue but you can't go into the buffer unless you obtain a variance.

Chairman Dearborn asked for public at large. There were none.

Chairman Dearborn asked for other boards. There were none.

Being there were no further comments, Chairman Dearborn closed the public hearings for the Board to deliberate the two cases.

Chairman Dearborn stated the Board will deliberate the cases individually, starting with Case #0616.

Marc Morette moved to accept point #1; Stu Richmond seconded. Motion passed. 5-0-0

Marc Morette moved to accept point #2; Stu Richmond seconded. Motion passed. 5-0-0

Marc Morette moved to accept point #3; Stu Richmond seconded. Motion passed. 5-0-0  
Marc Morette moved to accept point #4; Stu Richmond seconded. Motion passed. 5-0-0  
Marc Morette moved to accept #5 in entirety; Malcolm Wright seconded. Motion passed. 5-0-0

Chairman Dearborn stated now the Board will deliberate on Case #0616-A

Marc Morette moved to accept point #1; Malcolm Wright seconded. Motion passed. 5-0-0  
Marc Morette moved to accept point #2; Malcolm Wright seconded. Motion passed. 5-0-0  
Marc Morette moved to accept point #3; Stu Richmond seconded. Motion passed. 5-0-0  
Marc Morette moved to accept point #4; Stu Richmond seconded. Motion passed. 5-0-0  
Marc Morette moved to accept #5 in entirety; Stu Richmond seconded. Motion passed. 5-0-0

Chairman Dearborn stated with the votes cast, both variances carried.

Chairman Dearborn seated Stu Richmond, Marc Morette, Mike Myers, and Malcolm Wright with him for the following case.

**Case #0716 – NH Signs; owner ENI 99 John Stark Highway, LLC, 99 North Stark Highway, Tax Map 203-35 for an Administrative Appeal that alleges that an error has been made in the decision by Code Enforcement Officer Chip Meany on June 16, 16 in relation to Article 34.9.5 and 34.7.**

Chairman Dearborn read the application indicating that the proposed use or existing use affected: gasoline service station modifications to existing sign LED price changer. They are proposing modifications to the sign that are not allowed, which requires an appeal to the Zoning Board. Attached to the application was the denial letter from Code Enforcement Officer Chip Meany, a copy of the building permit; a letter from Energy North Group giving NH Signs authorization to present this case; a copy of the property card; a copy of the tax map locating the property; and a copy of the proposed sign.

Chairman Dearborn recognized Paul March from NH Signs to present the case. Mr. March stated that he is speaking only for the LED price changer, not the Mobil part of the sign. Currently the sign has three prices for gasoline and one for diesel. The intent is to change the three gas prices to two LED lit prices for gas and one for diesel.

Mr. March stated they applied for a building application for the replacement. They felt that it is a pre-existing sign that they would be upgrading. Mr. Meany denied it on two grounds 34.7 replacement signs which states: When an existing sign is substantially altered physically, the new sign shall conform to the provisions of this ordinance. Also cited in the denial was 34.9.5 which states: All internally lit and electronic signs, including but not limited to animated, changing message or electronic moving or stationary letter signs, and signs containing reflective and/or phosphorescent or similar signs.

Mr. March claimed that they are appealing under RSA 674:19 which states.

*674:19 Applicability to Zoning Ordinance – A zoning ordinance adopted under RSA 674:16 shall not apply to existing structures or to the existing use of any building. It shall apply to any alteration of a building for use for a purpose or in a manner which is substantially different from the use to which it was put before alteration.*

Mr. March indicated that just like the previous applicant and having to address 5 points of hardship the NH State Supreme court in its ruling of New London Land Use Assn. v. New London ZBA, 130 N.H. 510 (1988) establishes 4 criteria for a natural expansion:

- (A) Does the proposed change arise “naturally” (through evolution, such as new and better technology) out of the “grandfathered” use;
- (B) Is it required for the purpose of making the existing use more available to the owner; or does it constitute a new and different use?
- (C) Will the change or expansion render the premises proportionally less adequate for the use, in terms of the requirements of the ordinance?
- (D) Will the change or expansion have a substantially different effect impact on abutting property or the neighborhood?

Firstly, section 674:16 of the NH code applies in this case. The preamble of the Weare code states:

Article 1

1.1 Preamble:

In pursuance of authority conferred by Title LXIV, Chapter 672 to 677 NH Revised Statutes Annotated, 1955, and within the framework established by the Master Plan for the Town of Weare, NH, this ordinance shall be:

Secondly, the sign is internally illuminated, where only external illumination is allowed so it thus is non-conforming.

Thirdly, it is clear that the sign is a structure under this: For example, in *Town of Jackson v. Town and Country Motor Inn, Inc.*, 120 NH 699 (1980), Jackson’s ordinance requiring removal of pre-existing signs was held *preempted* by RSA 674:19, because signs are “structures”.

Referring back to the tests applied in *New London Land Use Assn. v. New London ZBA*; we argue as follows:

- (A) **Does the proposed change arise “naturally” (through evolution, such as new and better technology) out of the “grandfathered” use;**

The key element is the adoption of electronic price changers.

LED price changers are a new technology that is replacing the old technology of manual reader boards. The LED digit displays on this sign are designed to display fuel prices only. They will change only when an end-user actively changes the sign via remote control or internet connection. These signs do not have the ability to display information other than number digits, nor do they have the ability of displaying moving images, flashing or animation. They are only able to display numbers, not graphics or text.

LED price changers:

1. Make it easier for the public to read gas prices, and as such improves traffic safety when approaching this busy station.
2. The older type signs are difficult to change in windy or icy conditions, and the track system is prone to failure so the letters fall out from time to time.
3. The LED signs are changed from inside the building, and this improves the safety of employees and passersby.
4. Critically, these signs link into a network that allows the owner to change prices on the dispensers, at the till, and on the sign simultaneously and remotely.



**(B) Is it required for the purpose of making the existing use more available to the owner; or does it constitute a new and different use?**

There is no change of use anticipated as the site was a gas station, and will remain so. It is clearly essential for the owner to display current Mobil image sign while selling Mobil Gas. In addition, the addition of digital gas price changers makes the use more available to the owner by:

1. Allowing him to link into a network
2. Limit the liability vis a vis employee injury

**(C) Will the change or expansion render the premises proportionally less adequate for the use, in terms of the requirements of the ordinance?**

This asks if I change the sign, will the gas station become less of a gas station or clearly not! Nonconforming uses may be expanded, where the exception is a natural activity, closely related to the manner in which a piece of property is used at the time of the enactment of the ordinance

We must also consider the extent to which the challenged use reflects the nature and purpose of the prevailing nonconforming use, whether the challenged use is merely a different manner of using the original nonconforming use or whether it constitutes a different use

**(D) Will the change or expansion have a substantially different effect impact on abutting property or the neighborhood?**

Changing the sign from one Mobil sign to another clearly has no effect on the neighborhood at all.

As for the LED price changers, do they have a substantial effect on abutters or clearly not, as they are essentially out of view of any residential abutters. As for their effect on the neighborhood?

I would argue that the effect on the neighborhood of adding LED price changers is minimal. The net effect is to replace one lit sign or the lit digit panels or with other lit digits or the LED's.

1. The sign faces are the same size.
2. The digits are the same size as before.
3. These LED price changers are used widely in towns all over the country and common cause would hold that they are not substantially more adverse to the neighborhood.
4. They can be made to emit the same or less light.

As concerns section 34.7, we submit that this is an attempt to subvert the protections afforded non-conforming structures, and is thus void. This is an attempt at amortization.

Case law in numerous instances states that local legislation cannot restrict the right of an owner to natural expansion of a legal non-conforming use.

In conclusion, we submit that this is clearly a case where the NH Code under 674:19 Applicability of Zoning Ordinance should have been followed and this request should not have been denied.

In addition, section 34.7 is unenforceable for 2 reasons ó firstly, it is invalid under 674:16 of the NH code and secondly, it is an attempt to affect the owners use of his property without due process or compensation.

Chairman Dearborn spoke of reflective quality of natural light versus electromagnetic light. The lights will be adjusted from by the owner from the garage, so there is a negative effect in illumination. Marc Morette questioned programming ability to flash. Mr. Marsh responded no, the lights cannot flash. The current light is illuminated. This new sign will be slightly different just behaving slightly different. Instead of the person outside changing the numbers the person will be doing it inside the garage. The sign goes off when the gas station closes and that will not change.

Stu Richmond moved to accept Case #0716 in its entirety; Marc Morette seconded. Motion passed 5-0-0

**Carl Landon, LZL Inc. requests to extend a variance on Russell Drive. Malcolm Wright moved to grant the extension as requested; Marc Morette seconded the motion. Motion Passed 5-0-0**

## **V. MINUTES**

The Board agreed to hold off on approval of the minutes until the minute taker returns.

## **VI. ADJOURNMENT**

Chairman Dearborn moved to adjourn at 8:30 pm. Marc Morette seconded. Motion passed. 5-0-0.

*Naomi L. Bolton*  
*Transcribed from recording*

.