

ZONING BOARD OF ADJUSTMENT
268B MAMMOTH ROAD
LONDONDERRY, NH 03053

DATE: MARCH 19, 2014

CASE NO.: 3/19/2014-3

APPLICANT: BALLINGER PROPERTIES AND FIVE N ASSOCIATES
GENERAL PARTNERSHIP
20 TRAFALGAR SQUARE, SUITE 602
NASHUA, NH 03063

LOCATION: 51 PETTENGILL ROAD; 14-45; GB

BOARD MEMBERS PRESENT: JIM SMITH, CHAIR
DAVID PAQUETTE, VOTING MEMBER
JACQUELINE BENARD, VOTING ALTERNATE
NEIL DUNN, CLERK

REQUEST: VARIANCE TO ALLOW A SUBDIVISION TO CREATE A LOT WITH NO
FRONTAGE ON A CLASS V OR BETTER ROAD, CONTRARY TO SECTION
2.7.2.2

PRESENTATION: Case No. 3/19/2014-3 was read into the record with no previous cases listed.

JIM SMITH: Who will be presenting?

MORGAN HOLLIS: Good evening Mr. Chairman and member of the Board, my name is Morgan Hollis, I am an attorney with Gottesman and Hollis, 39 East Pearl Street in Nashua and I am here this evening to represent the owners of the property which has been identified as tax map 14, lot 45...the owners of Five N Associates and Ballinger Properties, LLC...this parcel is one of several in a very large, soon to be developed industrial park, up near the airport. It is...the lot itself is eighty acres and...the industrial park is over 300 acres. The park is made up of...like I said...several...a number of lots. There are no...currently no public ways within this portion of the park...the park itself is bisected by Pettengill Road, which is currently a Class VI road and is proposed to become...a class five, when and if the Town builds it...and it...but as of right now it does not exist. The property has been used as a gravel pit for a long period of time. There are some unusually features about the property...probably the most significant being that...several years back the state of New Hampshire did a taking for a while life corridor, which...cuts through a great deal of the property...and you will hear about that shortly...they...the...the property owners are just now beginning development of this parcel of land and in fact they have identified the first lot to be cut out of the property. It's a property that is going to be occupies by FedEx ground...and in fact, they have made a presentation to the Planning Board proposing to, essentially rearrange the lots...for the lots to make three...and...it has gone through the Planning Board and approved subject to condition and one condition is that the Zoning Board grants the variance that we are asking for...we are here asking for a variance because this lot, lot 45, currently eighty acres, there is going to be a slice off of a

46 small portion of that property, which will be attached to another existing lot to make the FedEx lot. It will
47 leave approximately sixty-three acres of land, but before the subdivision there is not frontage, after the
48 subdivision there is no frontage, but it's a different lot. So you have a preexisting, non-conforming lot before
49 the proposed subdivision. By creating the subdivision, you're going to have a non-conforming lot and...it's
50 been ruled that a variance will be required, even though there is no change in status of the lot, you're still...by
51 slicing off a piece and creating a smaller lot, you're making in essence, as new lot which has no frontage.
52 So...we are simply asking for a variance to allow this new lot, which is sixty-three acres of undeveloped land,
53 instead of eighty acres of undeveloped land, neither of which have frontage...it is a little complication but I
54 hope I have explained it as clearly as I could...I have got a plan that is in front of me and it...it admittedly is only
55 a plan of a portion...it's the portion showing the piece being cut off and if you look at the plan, the area
56 outlined in green is the overall lot...the area outlined in yellow is the piece being cut off and the area in red is
57 what remains. Now...it...on this piece...[referring to map]...the red remainder as you can see...is up near the
58 corner of Pettengill and Industrial Drive, but also goes off the map...here...another thirty acres...so there's
59 another wing to it but this is the only relevant part, I just wanted to introduce that for the...for the purpose of
60 showing just how large this whole project is. There's this part being developed as industrial, there's another
61 part across Pettengill Road and then this back park over here...what essentially is happening is this piece in
62 yellow is being sliced off...a...and added to the parcel at the bottom of the page. The original lot is shown in
63 green and then after the subdivision, yellow gets added here and red remains. Neither the green nor the red
64 had any frontage...the only frontage in the area...down at the corner of Industrial and Pettengill. The proposed
65 subdivision plan shows a new road, Industrial Drive...coming to service the FedEx lot...however it doesn't
66 provide access to this piece and the only way to provide access to this piece would be to gerrymander the
67 subdivision line...lines, such that...you came down to the newly created road here, which is essentially over
68 wetlands and in a gully and parts of the wildlife corridor has been taken. What we are asking for is just relief
69 from the...[fixing and moving of microphone]...relief from the Ordinance which would otherwise require us to
70 someone rearrange all of these property lines, even though the reaming parcel, and lot we are creating is
71 going to be an undeveloped and unbuildable piece at this time until Pettengill Road, or further development
72 comes in, at which time they would have to get frontage in order to go forward...I am going to touch on the
73 five points...

74
75 JIM SMITH: Ok...before you do that...I...just to make sure I understand. The part that...the green line that's
76 going to go away is going to cause that piece which is being cut off...to be...to be attached to this other existing
77 lot...right...

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79 MORGAN HOLLIS: Yes...the yellow gets cut off.

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81 JIM SMITH: Correct.

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83 MORGAN HOLLIS: The green is the overall big lot...the yellow is being cut off.

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85 JIM SMITH: Ok...so that's going to be a conforming lot?

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87 MORGAN HOLLIS: That is...

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89 JIM SMITH: Where that's...

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91 MORGAN HOLLIS:...that it's consolidated with other lines...

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93 JIM SMITH: Ok.

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95 MORGAN HOLLIS: ...down here...this is the remaining non-conforming lot. This is the whole portion of
96 it...about sixty-three acres of it.

97

98 NEIL DUNN: So if...if I may...so it's still going to remain 14-45 as we see it on the map.

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100 MORGAN HOLLIS: Yes...that is correct. Just be smaller by seventeen acres...[long pause]...number one the
101 proposed variance is not contrary to the public interest, it will not change the current status of the property
102 that is very large, open...unused...unbuildable lot at the moment. It will not create a new buildable lot...it will
103 not affect or change to character of the neighborhood, it will not affect the public health, safety and
104 welfare...it...in essence there's really no change. The spirit of the ordinance will be observed if the variance is
105 granted. The property...the purpose of frontage is obviously to provide access, emergency vehicles...to provide
106 distance between buildings...so that you have appropriate size lots. This is going from one unbuildable lot with
107 no frontage to another small, unbuildable lot with no frontage...it...it's really just sort of warehousing, waiting
108 for future development...the reason for the frontage requirement really don't come to play in this particular
109 instance. Substantial justice will be granted and that...if the ordinance were obeyed, it would have to carve out
110 a series of unusual...[missing dialogue due to space in CD]...under 'A' there is really no fair unsubstantial...first
111 of all this is...this is a unique property base upon its size...and the fact that this lot creates...exists right in the
112 middle of this industrial park...and...to try to give it frontage would require cutting other parcels up and adding
113 them...just for the purpose of temporary frontage and that wouldn't be the future development plan. No fair
114 unsubstantial relationship exists between the overall purpose...and the application...and its application to this
115 particular parcel. Again, just because of both the uniqueness of the location of this lot...in the middle of the
116 industrial park, the fact the no frontage is necessary and the only place to put the frontage would have to
117 go...where the wild life corridor is...you could not put a road in the wild life corridor, it must remain
118 undisturbed. It means you would have to find another location to have access even though you have frontage
119 there...so there is really no purpose in creating this frontage...but I think that covers the five points...and I
120 would be happy to answer any questions.

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122 NEIL DUNN: If I may Mr. Chairman...so...is this the...the abutting property the same...owners?

123

124 MORGAN HOLLIS: Yes...they are all by the same...

125

126 NEIL DUNN: So it's a large industrial park and it is because it's a large industrial park it is hard to subdivide, I
127 am having trouble with that rationality.

128

129 MORGAN HOLLIS: No, it's not hard to subdivide but it is unnecessary at this time. All we would be doing is
130 creating and gerrymandering the lines so as to bring a neck down for frontage...when the frontage is
131 unnecessary and serves no purpose. It doesn't have frontage today, the lot isn't going to change...it is not
132 going to be used sometime in the future when it does get developed it will either have frontage on Pettengill
133 or there will need to be connection to another...a...public way...but at the moment there is really no need to
134 do it so...requiring someone to gerrymander lots simply for the purpose of accomplishing a...touching base on

135 an ordinance which really has no purpose in this particular entrance...instance a large undeveloped industrial
136 park makes no sense

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138 NEIL DUNN: So they are doing this to accommodate...I think you mentioned something about a FedEx project
139 and so that's on a different lot...an adjacent lot?

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141 MORGAN HOLLIS: That is on the adjacent lot that is at the end of a...if I might Mr. Chairman...[moving of
142 microphone]...at the bottom of this map...this is the corner of Industrial and Pettengill up by the airport and
143 the park is all in here...Pettengill is planned to go straight out and extend along this frontage eventually, but it
144 does not right now...it's Class VI...so the proposal is they are going to build a brand new industrial drive
145 extension with a cul-de-sac, servicing this lot...[referring to map]...and this lot is right here...and this lot will be
146 FedEx...this lot remains cut out as a separate lot...this lot remains having back area here, but obviously waiting
147 for future development. All of this will be one lot. So the only frontage access that could be obtained would be
148 to cut out this land...from this side and make it somehow come down here to get on Industrial Drive...this is
149 already an existing spot so it can't go there...it would have to come in at this intersection, which makes no
150 sense because it ruins this lot...it could come right across the wetlands...this wetlands is a conservation
151 easement that the State took...you can't build in that so...even if we got frontage coming down here...that
152 would not be where the access would be, which is really the purpose of having frontage, access would be
153 somewhere else. Currently there are private easements across to get to it, so that one could get to it if
154 needed...but...for right now because it is going to remain undeveloped, and if you are concerned you can make
155 a condition on approval that it remains an unbuildable lot...there really isn't any logical sense to somehow cut
156 a lot this way and give it the frontage and say...you now have frontage.

157
158 NEIL DUNN: I guess I'm...I'm...where I am having trouble...is were...were isolating some properties that, down
159 the road...I mean we know it's all part of a big industrial area down the road someone is going to be coming
160 back and looking for another variance because we allowed them to be kind of isolated, now out in that
161 direction.

162
163 MORGAN HOLLIS: Well this...this isn't changing anything. It is what it is today...it's isolated today. It sits there
164 as a separate isolated lot of eighty acres. We are simply carving this piece off and leaving the remainder...but
165 because of the quark of the ordinance, we need to create a smaller lot than what's out there, it's a new lot,
166 and the new lot must meet the requirements, even though the old lot didn't have to...so...if...if I were to...if I
167 was leaving myself two acres here and saying this is going to be a buildable lot now, I would understand your
168 concern, but it's remaining, it's just keeping it as a potential future development...so whenever this gets
169 developed, it's going to have to have frontage and you will have to have access, it's going to have to be done
170 in coordination with the abutting properties and where Pettengill Road goes.

171
172 NEIL DUNN: So you are adding land to the FedEx lot...

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174 MORGAN HOLLIS: ...adding...to the FedEx...

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176 NEIL DUNN: Hate to use that term...

177
178 MORGAN HOLLIS: That's correct.

180 NEIL DUNN: Ok...ok...
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182 MORGAN HOLLIS: Adding land to the FedEx, leaving sixty-three instead of eighty-eight...
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184 NEIL DUNN: Which will be...ok...alright...
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186 JIM SMITH: Ok, the lot to the north of the...
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188 MORGAN HOLLIS: North up here...
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190 JIM SMITH: Oh ok, to the top of the map...
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192 MORGAN HOLLIS: West...
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194 JIM SMITH: Ok but...right in there...
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196 MORGAN HOLLIS: Yes...
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198 JIM SMITH: Is that owned by the same...
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200 MORGAN HOLLIS: That is not. That is owned by Peter King.
201
202 JIM SMITH: Ok...
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204 MORGAN HOLLIS: That's owned by someone different and that also does not have frontage.
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206 JIM SMITH: Ok
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208 MORGAN HOLLIS: Again, all waiting for Pettengill Road. Now the back side of King has some frontage on the
209 new highway, the new...roadway going to the airport...but this piece doesn't and this back piece also
210 doesn't...so you have got a lot of acreage out here that...is going to have to wait for a roadway to get in to do
211 something...and if Pettengill Road...that's the plan if Pettengill comes right down here, right along the
212 frontage...
213
214 JIM SMITH: Would you trace the...outline of the FedEx propose property...?
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216 MORGAN HOLLIS: Yes...I...if you...if you follow along where it's the dual colored line...and then it comes
217 straight down here, down to this corner...and then wraps around here...this is again conservation area, that's
218 why the funny line....so it's all...
219
220 JIM SMITH: Ok...
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222 MORGAN HOLLIS: All...this land having frontage on the new roadway they are building. And that was created
223 to...give it frontage.
224

225 JIM SMITH: Any other questions?

226
227 NEIL DUNN: Not at the moment.

228
229 MORGAN HOLLIS: And I...I guess I just want to clarify as I said, the...the subdivision plan in which the FedEx lot
230 is created which was made out of an existing lot, in consolidation of this piece and another piece...another
231 lot...that has been conditionally approved by the Planning Board in condition upon the remainder lot, lot 45
232 being granted a variance this evening. The Planning Board is well aware of this and went through it.

233
234 NEIL DUNN: I...I guess it's one point...and...and your clarification helped and I...I have a much better feeling...I
235 think that...that first line where you are saying the property very large and undeveloped with geographic
236 features, is at all a large lot...so...but I agree with the rest of it and I see where you are going...it just seems a
237 bit...

238
239 MORGAN HOLLIS: I think the unusually feature was it's hard unless I had a plan I could show you exactly where
240 the...how the wild life corridors kind of cut it up that...it...I...you could make, what I call subdivision tails, from
241 this piece, somehow winding their way out eventually to a public way...but it...because it is temporary in
242 nature, there is no reason to do that.

243
244 NEIL DUNN: Thank you.

245
246 JIM SMITH: Ok...any further questions from the board?...No? I will open it up to the audience since there is
247 only one person...if he or she or if anyone else back there...either of you have questions or in support or
248 whatever, approach the mic and identify yourself.

249
250 SHANNON VOLMOUNT: My name is Shannon Volmount, I live in Manchester, on the Manchester/Londonderry
251 line and I really just had a question...I don't know a lot and I haven't really been able to look at that map but
252 the back...the west part of that property, I looked at the plans online...that is...the wild life corridor is in the
253 middle of that back piece and then there's more wetland along the property line, there isn't any plans to do
254 any work there?

255
256 MORGAN HOLLIS: No plans...

257
258 SHANNON VOLMOUNT: So FedEx is on the other side?

259
260 MORGAN HOLLIS: That is correct.

261
262 SHANNON VOLMOUNT: Ok and that lot is the part that you're talking about that is being cut off by the
263 wetland corridor?

264
265 MORGAN HOLLIS: ...No...the part I was speaking about being cut off by the wetland corridor is right next to
266 FedEx...

267
268 SHANNON VOLMOUNT: Ok.

269

270 MORGAN HOLLIS: There is...

271

272 JIM SMITH: Do you want to come around and take a look at this, it might help you.

273

274 [INDISTINCT CONVERSATION TAKING PLACE OUT OF RANGE OF MICROPHONES].

275

276 JIM SMITH: Ok...

277

278 MIKE SPELTZ: Mike Speltz, 18 Sugarplum Lane...it...it seems to me there must be an easier solution. You know
279 we have...there is a reason that we sort of have this trap when you have a non-conforming lot and you change
280 it and we try to make it so it's conforming so I...I hate to see us...if there is a simple solution...which I think
281 maybe there is. FedEx is not buying the land; they are only going to buy a building and then lease it from the
282 land owner...why not just merge lot 45 and 46...let the FedEx facility sit on a big fat...63 acres lot or whatever it
283 is and...when the time comes and you know who the next person is going to be to develop something on this
284 large industrial park...then you can carve it up in a way that...it will be informed by what you know at that
285 time? I...I just can't see that there is a need to bend over backwards to do this unless I am missing something.
286 Just merge those two lots. They are owned by the same...an...entity...and...and merging is a lot simpler process
287 than subdivision.

288

289 NEIL DUNN: I think you would end up at the same spot...maybe Richard or...or... ..someone else can speak to
290 the fact that you end up making another lot not on a classified road, and that's all we are really here about,
291 not being on a classified or better road.

292

293 MORGAN HOLLIS: I think the...if I understand the suggestion it is...take the eighty acre lot and instead of
294 cutting off seventeen acres and...merging it and making it one lot for the FedEx parcel, it is...take the eighty
295 acres and merge it with all of the FedEx lot to make one large lot having frontage on Industrial Drive...is that
296 what I am hearing?

297

298 MIKE SPELTZ: Right...

299

300 MORGAN HOLLIS: And...and the simplest answer is that FedEx won't do it...that is the simplest answer and nor
301 would anyone else who wants to...and nor would the property owner...want to tie up the entirety of the parcel
302 under a single lease. When you lease you lease by...by parcel. If you create a lease on less of a parcel, than you
303 are...bordering on a subdivision problem. So what has been identified is...what the property they are going to
304 improve is. It would not make it simpler frankly in that you now have to come before the Planning Board with
305 a site plan for not just the FedEx lot, but with the entirety of the back lot which...if you don't have a plan to
306 improve that...you have got to get all kinds of approvals form the Planning Board to leave it as vacant as it
307 is...putting up fencing or whatever it is going to be...it is actually simpler to subdivide...the only drawback is we
308 are taking a lot which has no frontage and cutting a piece off of that...when you do that under your
309 ordinances, because you have changed and diminish the lot size, it is considered a new lot. That new lot
310 therefore must have frontage. My argument is pretty simple; we are not changing a thing out there except
311 giving a piece of land to the next person. We are not opening Pandora 's box, we are not suggesting that
312 someone can come in and develop on this piece without having frontage. We are agreeing that the stipulation
313 is that it remains unbuildable...without frontage. We are just warehousing as it is and as it has been for the last
314 multiple years...so...I guess I just take issue with the fact that they all be consolidated.

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JIM SMITH: Ok...did anyone bring this to the Planning Board as a possibility?

MORGAN HOLLIS: ...the consolidation?

JIM SMITH: Yeah...

MORGAN HOLLIS: No...

JIM SMITH: Ok.

MORGAN HOLLIS: Not that I recall...I don't recall you raising that issue.

JIM SMITH: Ok...any further questions? If not, we will close the public hearing and take this under advisement at this point.

DELIBERATIONS:

JAMES SMITH: Any comments Jackie? I'm putting you in the hot seat.

JACKIE BERNARD: That is ok...it would be in the best interest...for the Town of Londonderry to have...development in this one parcel...all these parcels...I see...revenue increase for tax space...I see a lot of positive here. What I am hearing is that this chunk is going to be unbuildable...put a condition that it remains unbuildable and that is part of our requirement...I don't...I don't see any...negative to that only negative in the future when they come back, if that parcel...is to be...is to be built on at that time...than you have to deal with it. I don't think anything is unreasonable...to...do an unnecessary hardship...and require that the parcel remains as it is...puts undo unnecessary hardship to the land owners because they potentially have...a lease with FedEx...and...that is just a win for the Town of Londonderry. FedEx is well known. They are a reputable...company...they are the type of businesses that are...socially responsible...that is what we want in the Town of Londonderry, we want businesses that are thriving and that will...do what is right to be in any town that they can build in...so I don't...I...the only thing I would say is that since the land owners, from what I am hearing, don't...disagree...that it just remains as it is today. Don't build on it and that is the condition that we should leave it with.

DAVID PAQUETTE: All that land is waiting on Pettengill anyways...so...it's a...neither here nor there.

JIM SMITH: Neil?

NEIL DUNN: I...my bigger concern is...was that I was misconstruing that it was a...such a unique piece of property and as far as I am concerned, it doesn't really change to the...presentation...it really doesn't change anything about the land other than to make it right size it for the new client that is going to come in there. I don't see a problem with anything there. my initial concern was that...you know we are trying to call it a unique property because it's hundreds of acres and...and...has things...that a hundred acres anywhere would have...but the clarity to the fact that they are trying to right size it for the project they have on the tables

359 is...makes sense to me and nothing really changes it...where it is right now...it would be...you know...upon
360 them to get access to the property so...I...I am really not having any issues with it...I was just looking for clarity.

361
362 JIM SMITH: So...considering that it meets the spirit of the ordinance and does substantial justice, it doesn't
363 really affect that value of the surrounding properties...if we have no other comments...I am going to throw it at
364 Neil to make a motion...

365
366 RICHARD CANUEL: Mr. Chairman...before you proceed if...if I could make a comment to the Board just to give
367 you some guidance, if the Board so chooses to grant the variance to allow creation of this lot without
368 frontage...I would suggest that you place a condition on that variance...so that in the future, the development
369 of that lot...the variance will sunset...otherwise it can be misconstrued that once you grant the variance for a
370 lot without frontage, that variance goes with that property forever...so someone could get the
371 misunderstanding that it would be allowed to develop that lot without frontage.

372
373 NEIL DUNN: So we are allowing it to be created pending development and implementation of a Class V road or
374 better road according to our Ordinance?

375
376 RICHARD CANUEL: Sure...yeah...and that way it would sunset the variance. Something to that effect.

377
378 JIM SMITH: Something to the effect that this lot would remain and unbuildable lot until a...new subdivision
379 provides frontage...

380
381 RICHARD CANUEL: Sure...yeah...and...and I would also make the comment that it would sunset this variance...

382
383 NEIL DUNN: Oh I see...

384
385 RICHARD CANUEL: Because that...

386
387 NEIL DUNN: It clears out the variance...

388
389 RICHARD CANUEL: Yeah because once you grant the variance, the variance goes with the property for
390 forever...so you don't want to have a situation where someone comes back at some point in the future and
391 says that the variance is granted for this lot without frontage...that gives me a right to develop this property
392 without having frontage on that property.

393
394 [Long pause]

395
396 JIM SMITH: Ok...you want to incorporate that into...This is the tricky motion...

397
398 [Laughter]

399
400 KIRBY WADE: I got it covered...

401
402 [Long pause]

404 JIM SMITH: Ok...would you like to make your motion now?
405

406 NEIL DUNN: Yeah...we will give it a shot. Mr. Chairman, I would like to make a motion to grant case
407 3/19/2014-3 based on compliance with the five points of laws as presented because in essence it is making the
408 property larger for potential...development and doesn't change any of the existing conditions of the property
409 and that the...the variance be granted on condition that the lot is developed with proper frontage on a Class V
410 or better road or...as per the Town ordinance at the time, at that time this variance sunsets.
411

412 DAVID PAQUETTE: Second it.
413

414 JIM SMITH: Ok...Dave seconds...all those in favor?
415

416 JACKIE BERNARD: Aye.
417

418 NEIL DUNN: Aye.
419

420 JIM SMITH: Aye.
421

422 DAVID PAQUETTE: Aye.
423

424 RESULT: THE MOTION TO GRANT CASE NO. 3/19/2014-3 WITH RESTRICTIONS WAS APPROVED, 4-0-0.
425

426 RESPECTFULLY SUBMITTED,
427



428 NEIL DUNN, CLERK
429

430 TYPED AND TRANSCRIBED BY KIRBY WADE, EXECUTIVE ASSISTANT
431

432 **APPROVED APRIL 16, 2014** WITH A MOTION MADE BY NEIL DUNN, SECONDED BY DAVID PAQUETTE AND
433 APPROVED 4-0-1 WITH JIM TIRABASSI ABSTAINING AS HE DID NOT ATTEND THE MEETING.
434