

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

DATE: JULY 16, 2014

CASE NO.: 7/16/2014-3

APPLICANT: BALLINGER PROPERTIES  
FIVE-N-ASSOC. GENERAL PARTNERSHIP  
20 TRAFALGAR SQUARE, SUITE 602  
NASHUA, NH 03063

LOCATION: 30 INDUSTRIAL DRIVE, 28-17-4, GB

BOARD MEMBERS PRESENT: NEIL DUNN, ACTING CHAIR  
JIM TIRABASSI, VOTING MEMBER  
JACQUELINE BENARD, VOTING MEMBER  
ANNETTE STOLLER, VOTING ALTERNATE  
DAVID PAQUETTE, CLERK

REQUEST: VARIANCE TO ALLOW A SUBDIVISION TO CREATE A LOT WITH NO  
FRONTAGE ON A CLASS V ROAD AS REQUIRED BY SECTION 2.7.2.2.

PRESENTATION: Case No. 7/16/2014-3 was read into the record with no previous cases listed.

MORGAN HOLLIS: Mr. Chairman and members of the board, my name is Morgan Hollis. I am an attorney at Gottesman and Hollis in Nashua and I am here this evening representing the property owners Five and Associates and Ballinger Properties LLC. They are the owner of lot 17-3 and lot 17-4. 17-4 which is the subject lot for which we are requesting a variance is currently forty two point eight nine acres and lot 17-3 which is right next door is three point seven, seven acres. The zone is GB...and we are proposing to subdivide lot 17-4 and consolidate part of that lot with 17-3 to make 17-3 twenty four point twenty five acres...and that would be the subject of the Milton Cat development you just heard about. That would leave 17-4 end up being twenty two point forty one acres however...part of 17-4...which would be...is proposed to be going to 17-3 as one hundred feet of frontage on Industrial Drive and with the proposed subdivision you would end up with no frontage on Industrial Drive for the remaining twenty-two acres, therefore we would need a variance. I think the hardest part about the variance in this instance is probably understanding what it is that I just said...that is I think a picture speaks a thousand words so I am going to ask you if I gave you a package and I think I want to run through it quickly so you can see a roadmap of where we are headed. The first page is what I call a larger parcel of the industrial park up there and this property is shown in red as it exists today. The green so 17-3 as it exists today so you can see there is a small parcel and a fairly large parcel. The blue is what is known as Pettengill Road which is a Class six roadway currently a dirty road up there. Industrial Drive is just to the...as you look at it...the immediate right of the green space and then of course there is Kluber which is already a developed site and it is identified on that. Below Pettengill Road you see a black line which is marked as

45 Pettengill Road. This is the proposed site of the new Pettengill Road, much talked about in Town that has not  
46 been finalized as to where is it going to go and how it is going to be built but it is in the works. It just isn't  
47 finalized yet and that is important because that is one of the reasons we don't have any frontage today. We  
48 have...you can see the pink lot has plenty of frontage on Pettengill Road but that is a class six road and the  
49 requirement is you have to have frontage on a class five road. The frontage for the pink lot is on one hundred  
50 feet on industrial drive. If you turn to page two...

51  
52 NEIL DUNN: Be...before you go there...

53  
54 MORGAN HOLLIS: Yeah...

55  
56 NEIL DUNN: If I may Mr. Hollis...the existing red is one hundred feet on Industrial Drive?

57  
58 MORGAN HOLLIS: Yeah...

59  
60 NEIL DUNN: And if you turn to page two it is an enlargement of the area so you don't have to strain your  
61 eyes...[chuckling]...I just wanted to have a bigger picture because I was here before and there were a lot of  
62 questions about the bigger pictures...I only brought a small enlargement...so now...you see what I just  
63 described on the front. You see Pettengill Road...the larger parcel in red...that is the current lot seventeen four  
64 and a current lot seventeen three is in green. So that is exactly what we have today. You can see the  
65 frontage...it is one hundred feet there. You can also see a long length of frontage on Pettengill...and I would  
66 point out one other thing and that is the existing DOT easement because I am going to talk about that when I  
67 get to the hardship part...that is a wildlife corridor which has been in...a result of a taking by the State of New  
68 Hampshire and it is where the wildlife have been determined that's there allowed corridor. Three hundred  
69 feet wide, we are not allowed to build there or cross it without some very special permission. If you turn to  
70 page three and at the top of that plan it says in compliance and again, this is the larger one, I will only spend a  
71 second on it but you can see how the red if you wanted to do a subdivision...and this is what's proposed is to  
72 subdivide this lot approximately in half...if you want to be in compliance you need that little red tail...that goes  
73 around Kluber and goes out to Industrial Drive. That is one hundred feet and that will give you one hundred  
74 feet of frontage. If you turn to page four it is the enlarged version of that and I put this out there because this  
75 is what is required under your ordinance and we are asking for relief from this requirement. Essentially we do  
76 not want to have the tail...we don't want to subdivide and end up with that tail; we want to end up with it  
77 being all green. If a variance isn't granted if the ordinance is enforced...that is what you have to do. Finally the  
78 proposed shows that all green...again, page five is the larger track...and page six shows the subdivision plan as  
79 being presented to the Planning Board, if a variance is granted. There is no frontage on industrial, there is no  
80 frontage for the remaining parcel...other than its frontage on Pettengill which is a different road but is not a  
81 lawfully determined to be class five...meaning maintained by the town road. So we need relief in order to  
82 move forward and not have those one hundred feet. So I think that explains why we are here. You have  
83 already heard what the proposed use of that green lot is going to be...the proposed use of the red lot is  
84 nothing and if you look at the plan again, it would have to be on page two or...or six...either one...it says right  
85 in detail non-buildable and we offer that as a condition if you grant the variance we would suggested as you  
86 did in the other time we came before you for a lot...lot without frontage, that this lot be designated as non-  
87 buildable until frontage is obtained. SO that's a condition we agree to and suggest you might propose so you  
88 don't worry someone might build on this without frontage. Having made my introduction, the only other thing

89 I would say as I...as I indicated I was here previously on lots that are located on page one...the FedEx lot...if you  
90 look at the bottom...it was the FedEx lot and the lot immediately above it designated a 14-45...14-45 ended up  
91 with a...with no frontage as a result of the subdivision creating the FedEx lot...and some of the questions and  
92 issues that I am discussing are identical. That lot remains non-buildable...it is an industrial lot that remains  
93 non-buildable until the final layout of Pettengill is decided...the frontage gets obtained.

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95 NEIL DUNN: So before you go to the points if I may...so...the...[chuckling]...what they have proposed  
96 seventeen...a where am I...

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98 ANNETTE STOLLER: 17-4...

99  
100 NEIL DUNN: ...dash four...ok so that...that's...CAT's going to be in the proposed 17-3...

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102 MORGAN HOLLIS: That is correct...

103  
104 NEIL DUNN: Thank you...

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106 MORGAN HOLLIS: Yeah the last page tells it all...CAT is in 17-3 in the green lot...that is there proposal...and  
107 this...seventeen four is going to be a non-buildable...non-frontage lot...no intentions to do anything until the  
108 decision comes about Pettengill. Access eventually will be through to the new Pettengill when it becomes  
109 developed. So the five points as covered under the variance application...it is not contrary to the public  
110 interest and I am not going to read the whole spiel...it is there in front of you but the bottom line is granting  
111 the variance will not alter the character of the locality nor in any way threaten the public health, safety or  
112 welfare. The public interest is served by the intent of the ordinance. When you have frontage it is for access  
113 for public emergency vehicles. We are going to end up with a lot...with nothing being built on it. If there is a  
114 question about access to the lot for fire...if there is a brush fire or a forest fire or if someone is  
115 hiking...someone is out there...needs to be rescued...there will be access on Pettengill. There is still access...it  
116 just won't be the kind of access you would want to have if someone was living there or working there...but the  
117 purpose...the public interest...is served. It is not contrary to the public interest to allow it as long as it is not  
118 being built on. The spirit of the ordinance will be observed...again same reasons. It won't alter the essential  
119 character and there is not threat of health, safety and welfare. There will be access for fire,  
120 police...etc....through the existing Pettengill Road, as long as nothing is built on there. The intent of the  
121 ordinance is to allow that and to allow spacing along the frontage of the right away...the minimum frontage  
122 requirements...is unnecessary without buildings. Substantial justice...this is where you have to determine the  
123 greater good which is actually being served by the ordinance and what is the impact on the public if a variance  
124 is granted...from that ordinance. How does that harm to the public way against the harm to the applicant if a  
125 variance is denied. So long as this remains non-buildable...there is no harm to the public and there is no  
126 impact to the public frankly...but if the ordinance is enforced and frontage is required...I can only point you to  
127 plan number four...[shuffling of papers]...shows what I call the snake and that is this crazy design of one  
128 hundred foot tail on a lot which goes around the outside of...lot identified as eighteen-four...three hundred  
129 feet one way and eight hundred feet the other...all the way down to industrial drive in order to provide it with  
130 frontage. No one is ever going to build that or use that and then they get to the existing DOT easement, which  
131 is a wildlife corridor and no one is ever going to cross that...so we would just be creating frontage for the sake  
132 of the ordinance. Doesn't make any sense. And there would be harm to the owner...with requiring that to be

133 imposed...so substantial justice would be...would prevail if you grant the variance. The value of the  
134 property...of the surrounding properties would not be diminished if you granted the variance because this is  
135 going to remain undeveloped. It is a large industrial piece of land...it really needs to remain some flexibility in  
136 design when you start developing this industrial park, particularly where the town hasn't quite finalized the  
137 determination of Pettengill Road. There will be no change to any of the surrounding properties. You have  
138 already heard from one of our neighbors and that is Milton CAT and they actually need this in order to go in  
139 there and they are in agreement with it. The hardship is the final argument. The property must be unique and  
140 because of its uniqueness, application of the ordinance to this site must bear no fair and substantial  
141 relationship to the purpose of the ordinance. We think it is unique for a lot of reasons. It has the wildlife  
142 corridor which bisects it and essentially interferes with the access which might otherwise be required. It has  
143 Pettengill road which is class six and that is not frontage but it is...it is not legal frontage and yet it is frontage  
144 on a roadway. You have this industrial park which is yet to be developed. It is all dependent on Pettengill  
145 Road. When that decision gets made and...funding occurs and development constructs the road...which we  
146 believe is not vary far off...the parties are almost in an agreement...than you will see this parcel be  
147 merged...you will see that part of Pettengill road...the blue part be discontinued and it will be merged to cross  
148 with the adjacent parcel. It will also have other access for lands farther to the west. It will also have other  
149 access for the lands farther to the west. So all of that access will develop as Pettengill Road develops. We think  
150 it is unique for those reasons and we also think that enforcement of this provision requiring frontage on this  
151 particular parcel and this environment has no fair and substantial relationship to the intent of frontage which  
152 would be to gain access when you develop property. We think the use is reasonable...it is going to be vacant  
153 land. And with that I am happy to answer any questions...I have Mr. Nash here if you have any questions.  
154 Thank you.

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156 NEIL DUNN: I don't know if anyone else has a question...?

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158 ANNETTE STOLLER: Well...if I understand what you're saying...you will essentially be putting that parcel in  
159 something it can to current use...is that correct?

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161 MORGAN HOLLIS: Well It's in...it's in...I don't know that it is legally in current use...is it...it's not....but it...

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163 ANNETTE STOLLER: It wouldn't be because you don't...have carved out a housing portion.

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165 MORGAN HOLLIS: No it wouldn't be because we didn't declare it in current use...

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167 ANNETTE STOLLER: Right...

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169 MORGAN HOLLIS: It is part of a much larger parcel which is a gravel pit operation and lumber and so it has not  
170 been declared in current use. The legal definition of current use...but...we are agreeing that it should be  
171 conditioned to be non-buildable. It is non-buildable now...for a variety of reasons...once you remove the  
172 frontage we don't want to build on it until Pettengill Road is decided on...part of the remainder of the  
173 industrial park.

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175 NEIL DUNN: Help me with...number five in the special conditions and...twenty years ago they...probably the  
176 developer would have put in Pettengill road and your argument that it is not on a road...I mean other than the

177 fact that it is a big piece of property...the wildlife corridor I understand...but in totality of all of the property  
178 that is owned or that's up there...I guess getting back to my point...and I...the developer would have went in to  
179 put in a road to make it a class five or better and then the land would have been fine so using the fact that the  
180 road is not there because we are in discussions to who is going to build it whether it is the town or developers  
181 which was more typical years ago...I...I kind of see the wildlife corridor but I mean...  
182

183 MORGAN HOLLIS: Well if I were arguing we want to make this...we want a variance to make this a useable lot.  
184 Than I would agree with you Mr. Chairman...but when we agreed to put a condition on it that it is non-  
185 buildable until such time as that Pettengill road layout is decided and frontage arrives...that is why it is a  
186 unique piece. Pettengill is class six. We can't...we could...go build it but there is no sense in us building that  
187 road on the current Pettengill layout and spending all of that money if that is not what that lot is going to be  
188 used for. We might end up building a road that is not what the town wants because that is not the location  
189 that Pettengill road should be located. If you look on page one you can see...this is actually the layout that the  
190 town has in mind. If we built the blue...that might not be what the town wants out there. So we are kind of  
191 stuck with what is there until there is a final decision.  
192

193 NEIL DUNN: And who owns the triangle piece that is left between the blue and the...  
194

195 MORGAN HOLLIS: My client...  
196

197 NEIL DUNN: Ok...so my...to my point is years ago your client built the road where the proposed work makes  
198 sense where the town is looking at it and then the land would have been usable and that wildlife easement  
199 would have still left a pretty large chunk of development.  
200

201 MORGAN HOLLIS: And they may still do that.  
202

203 NEIL DUNN: And that is valid and that is why I bring it up because it has been progressing better than a lot of  
204 people thought so...  
205

206 MORGAN HOLLIS: They may still do that and that's...in all likelihood what is going to happen it is just the  
207 difficulty here is...we are only one little element of it. We don't own everything around Pettengill road so until  
208 that final layout occurs and that final decision comes down, we are left with a class six road which we could  
209 improve and build and gain access to and you could make us do that but it wouldn't serve either the town  
210 or...anyone else...well to build a road that is not what the end result is going to be.  
211

212 NEIL DUNN: So that triangle is a different lot?  
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214 MORGAN HOLLIS: That is a different lot...  
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216 NEIL DUNN: Thank you. Anybody else?  
217

218 DAVID PAQUETTE: If we were to approved your variance, with condition that lot 28-17-4 would not be  
219 buildable until a class five road would be presented to it...you would be comfortable with that?  
220

221 MORGAN HOLLIS: Yes.  
222  
223 NEIL DUNN: Anybody else?  
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225 ANNETTE STOLLER: I am just curious you said that triangle is a different lot...is it just a coloring error  
226 there...[chuckling]...some of the pink or the red dips below it.  
227  
228 MORGAN HOLLIS: Oh yeah...that is my fine coloring error. If you turn to page two you see...you'll see the  
229 better coloring...not better but it doesn't bleed over the Pettengill Road.  
230  
231 ANNETTE STOLLER: A different presentation?  
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233 MORGAN HOLLIS: Yes...you see where the blue is...  
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235 ANNETTE STOLLER: I do...  
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237 MORGAN HOLLIS: And then if you look below it, it has 28-17...that is the separate lot...28-17. And the...the lots  
238 were created by the layout of Pettengill...the original of Pettengill Road so you can't have lots that merge if the  
239 road is in the middle and that road exists...class six road.  
240  
241 ANNETTE STOLLER: This may be an impertinent question...why would you come forward with this now when  
242 changes are occurring?  
243  
244 MORGAN HOLLIS: Milton CAT is ready to go...  
245  
246 ANNETTE STOLLER: Oh because it...it's based on them...  
247  
248 MORGAN HOLLIS: Yeah...if...Milton CAT wants to use that land and the only way to do it legally is for us to  
249 create a subdivision that looks with the tale...the long tale...and that is just an unreasonable determination.  
250 First of all there would be one hundred foot band that Milton CAT couldn't use because it is not there land.  
251 Second of all it is preserving one hundred feet for future right of way or future driveway which will never be  
252 created. It will never be built there so its...it's a really useless act and you can't even if you did it dirt...you  
253 couldn't get across that wildlife crossing there. That's the reason we are here...Milton CAT is ready to go.  
254  
255 NEIL DUNN: Anybody else?  
256  
257 MORGAN HOLLIS: Thank you.  
258  
259 NEIL DUNN: Thank you. Anyone in the audience who would like to speak in favor of this application? Anybody  
260 in the audience opposed or having questions about this application? So you are all here for the next one.  
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262 [Chuckling]  
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264 NEIL DUNN: Back to the board. Any more questions, thoughts...comments? Is that a no?

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DAVID PAQUETTE: Yeah, that is a no...

[Laughter]

ANNETTE STOLLER: It's still a little bit of confusion...

NEIL DUNN: No...no...if you need more time than that's fine...I tend to take more time too so that...that is all I am asking. You're fine...go ahead think about it...that's good...that's better to think now than to walk out there...

ANNETTE STOLLER: I guess my question is...are we technically and I guess this goes to you...allowed putting a condition in of a non-buildable lot...it just seems...it's strange to me...that's all.

RICHARD CANUEL: Normally the board doesn't really have the authority to tell someone they can't develop their property.

ANNETTE STOLLER: That's what is troubling me...we would put that down and it doesn't hold any water...as I see it.

NEIL DUNN: Even if the applicant is agreed to it...

ANNETTE STOLLER: Yeah I would...

NEIL DUNN: Even with a verbal contract here the board is contingent of the approval.

RICHARD CANUEL: I think under the circumstances that would apply.

NEIL DUNN: We could ask the lawyer.

[Chuckling]

MORGAN HOLLIS: I would be happy to give you my answer as to whether a zoning board can impose conditions and the answer is the Supreme Court says you can impose conditions.

ANNETTE STOLLER: I know we can...

MORGAN HOLLIS: They must relate to your findings so for example in this case you might find that the spirit and intent of the ordinance can only be preserved if the lot is...is remains as non-buildable. That would be a condition that allowed you to make that finding only upon the condition. You are just previously granted a variance with a condition saying we find all of these points only if the Planning Board approves the site plan. If the Planning Board doesn't improve the site plan you wouldn't have made those findings. So in this case you could say I am only going to grant the variance if it remains non-buildable because otherwise the spirit and intent isn't met. That's....that's what the Supreme Court is ruled. I can't tell you whether in this case I will give

309 you my advice but I don't represent you...you have to make that decision...but that's what the law says is...you  
310 can impose conditions as long as they are connected with one of your findings.

311  
312 ANNETTE STOLLER: Mr. Chair if we were to impose that condition...I imagine we can extend it to request that  
313 they come back before us when...if and when that change occurs. Wouldn't they have to?

314  
315 NEIL DUNN: They might not necessarily have to. Oh you want them here anyway...

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317 ANNETTE STOLLER: Well they might not have to.

318  
319 NEIL DUNN: Well that would be my only thought...they might not have to come here if Pettengill goes through  
320 they can combine the lots and they are in compliance with everything there would be no need but you would  
321 like to see them back is that what you are saying?...

322  
323 ANNETTE STOLLER:...[Chuckling]...well no...I think it is really nice and good presentation but what I am saying is  
324 I think it's...it's an order to do that because if we put that condition in...who's going to be the remover of that  
325 condition? I guess that is what I am saying. I believe we have to be that person or that board.

326  
327 MORGAN HOLLIS: Well if you have made the condition suggested by a...Mr. Paquette...that it is non-buildable  
328 until such time as frontage is obtained on a classified road than it extinguishes automatically.

329  
330 DAVID PAQUETTE: That was my suggested restriction is that...that lot be non-buildable until...classified road  
331 access is built...Pettengill Road and site plan approval.

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333 NEIL DUNN: Ok...

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335 DAVID PAQUETTE: Or classified road access is built.

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337 ANNETTE STOLLER: That makes more sense.

338  
339 DAVID PAQUETTE: It's the words I was going to use.

340  
341 NEIL DUNN: Ok anything else from the board?

342  
343 DAVID PAQUETTE: No sir.

344  
345 NEIL DUNN: Did that raise any questions from anyone out there? Alright, we will go into deliberations. Thank  
346 you.

347  
348 DELIBERATIONS:

349  
350 DAVID PAQUETTE: So I think with the...the applicant being comfortable with the...with the restrictions  
351 that...feels like we fit all five. I guess...if...if we look at them one by one and I do appreciate the guidance  
352 and...that was very kind of Mr. Hollis there...it does make sense that the spirit is...really defendant on that



353 staying un-buildable and them agreeing to that and...and...not making it bigger so at first looking at the  
354 application...if we look at the public interest...I think they are ok with that. I don't think anyone has any issues  
355 or I don't mean to...I don't have any issues with number one public interest as presented. I guess I don't know  
356 if anyone else does? We will go through item one first. So the only thing that would be...the spirit of the  
357 ordinance would be observed. It was argued that the current status is un-buildable...future access to come  
358 from Pettengill road remains unchanged the variance will prevail....and it would not...let me restate  
359 that...granting the variance would not affect the essential character nor will it...and to our point that we are  
360 looking at the spirit of the ordinance and...and...perpetuating a...lot...subdividing a lot on the non-class...five or  
361 better road and to your condition...number two...doesn't really hold up now so the only way it does hold up if  
362 we make it part of the...the condition I guess if your...seeing where I am going.

363  
364 ANNETTE STOLLER: Right...yeah...

365  
366 NEIL DUNN: So the way number two was presented and the way we want to protect that lot from being  
367 buildable...we are making number two part of that spirit part of the contingency...so that clears up number  
368 two for me I am just pointing that it is different than the way it is presented.

369  
370 DAVID PAQUETTE: Right...ok...

371  
372 NEIL DUNN: I don't know if everyone agrees with that or...by saying that that is the way I am reading it so  
373 based on what sounds like a motion that might be coming I guess the spirit needs to be addressed. Is everyone  
374 good with two?

375  
376 DAVID PAQUETTE: Yeah I think that the restriction has defiantly helped toward the spirit.

377  
378 NEIL DUNN: Absolutely...ready for three?

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380 ANNETTE STOLLER: Yeah...

381  
382 NEIL DUNN: Substantial justice...is to remain...have the remaining lot have a configuration providing frontage  
383 and existing way when it requires significant expense the loss of property owner...while the gain to the general  
384 public is negligible...we are good with that. We are addressing...[chuckling]...lot seventeen dot three I think has  
385 the proper frontage...better frontage by changing the layout and four will down the road based on our future  
386 development and buildable lot and all of that. Everyone good with three?

387  
388 ANNETTE STOLLER: Yeah...

389  
390 NEIL DUNN: Four, I think that we agree that it will not diminish the property value.

391  
392 DAVID PAQUETTE: Mm-hmm.

393  
394 NEIL DUNN: And...number five the...unnecessary hardship due to special conditions...there is the wildlife  
395 corridor and it is...without frontage...I guess I am not in complete compliance with it...it is a large lot being a  
396 unique thing...I am good with the overall sentiment of the...

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DAVID PAQUETTE: Yeah that lot doesn't have any frontage anyway...because of that wildlife easement.

NEIL DUNN: So if anything we are just helping make it get to the end point...

DAVID PAQUETTE: Right...

NEIL DUNN: Any thoughts on that? I will take that as a no...

DAVID PAQUETTE: Yeah...no

[Laughter]

NEIL DUNN: The...it is a reasonable use to reconfigure it...for the purpose of meeting this sole require...has that relationship to the public purpose of the land so...

[Space between CD's]

DAVID PAQUETTE: Or be non-buildable until a classified road is built.

NEIL DUNN: And site plan approval....

DAVID PAQUETTE: And site plan approval.

[Talking amongst one another while voting slips are collected]

DAVID PAQUETTE: Case number 7/16/2014-3 has been approved on a vote of five to zero...with restrictions...that lot 28-17-4 be non-buildable until a class five road is built and site plan approval is obtained.

RESULT: THE MOTION TO GRANT CASE NO. 7/16/2014-3 WITH RESTRICTIONS WAS APPROVED, 5-0-0.

RESPECTFULLY SUBMITTED,



DAVID PAQUETTE, CLERK

TYPED AND TRANSCRIBED BY KIRBY WADE, EXECUTIVE ASSISTANT

**APPROVED SEPTEMBER 17, 2014** WITH A MOTION MADE BY DAVID PAQUETTE, SECONDED BY JIM TIRABASSI AND APPROVED 3-0-1 WITH JACKIE BENARD ABSTAINING AS SHE HAD NOT ATTENDED THE MEETING.