

**Moultonborough Zoning Board of Adjustment  
P.O. Box 139  
Moultonborough, NH 03254**

**Regular Meeting**

**July 16, 2014**

**Minutes**

Present:       Members:       Bob Stephens, Russ Nolin, Bob Zewski, Joe Crowe  
                  Alternates:     Jerry Hopkins, Paul Onthank, Richard Jenny  
Excused:       Member:         Ken Bickford  
                  Alternate:      Nick DeMeo  
Staff Present:  Town Planner, Bruce W. Woodruff; Administrative Assistant, Bonnie Whitney

**I.     Call to Order**

Mr. Stephens called the meeting to order at 7:30 PM and introduced the members of the Board to the public. Mr. Stephens appointed Jerry Hopkins to sit on the Board with full voting privileges in place of excused member Ken Bickford.

**II.    Pledge of Allegiance**

**III.   Approval of Minutes**

**Motion:**       Mr. Nolin moved to approve the Zoning Board of Adjustment Minutes of July 2, 2014 as written, seconded by Mr. Zewski, carried unanimously.

**IV.   Hearings**

1.       Continuation of Public Hearing for William Garber (130-48) (Gansy Lane)  
          Variance from Article III. B. (4)
  
2.       Continuation of Public Hearing for William Garber (130-48) (Gansy Lane)  
          Special Exception from Article III. B. (6)

Mr. Stephens stated that the Board was in receipt of a letter dated July 15, 2014 from Regina Nadeau Esquire who represents the applicant William Garber. Attorney Nadeau has requested, without prejudice, to withdraw the pending ZBA special exception and variance applications submitted on behalf of Mr. William Garber.

**Motion:**       Mr. Zewski moved to grant the request for withdrawal without prejudice for the application for special exception and an application for variance for William Garber, Tax Map 130, Lot 48, seconded by Mr. Hopkins, carried unanimously.

3.       Ed Batchelder (140-2) (144 Bean Road)  
          Variance from Article III. B. (1)

Mr. Stephens stated that this was an application for a variance for Ed Batchelder and that he would be stepping down from the Board for this hearing. Mr. Nolin assumed the role of Chairman for the hearing and started with seating Paul Onthank in place of Mr. Stephens with full voting privileges.

At this time there was no one present to represent or present the application to the Board. It was noted that this was the third hearing on the agenda, which moved quickly as the first two hearings were withdrawn. It was suggested that this hearing be tabled until after the hearing for Russell Brown.

**Motion:** Mr. Hopkins moved to table the application for Ed Batchelder (140-2) and to continue the public hearing after Hearing #4 for Russell Brown, seconded by Mr. Zewski, carried unanimously.

Mr. Stephens returned to the Board at this time with full voting privileges.

4. Russell H. Brown (198-8) (49 Grassy Pond Road)  
Variance from Article III. B. (3)

Mr. Stephens stated that this was an application for a variance for Russ Brown.

Russ Brown presented his application for variance. He noted that he had a full size plan for the Board to view. He had included photos in his application packet and provided the Board with copies of them this evening that had been blown up to make them easier to see. Mr. Brown said that this was a variance application for the replacement of the structure which is within the ordinance boundaries. He gave the history of the property and a back ground of the steps that he had taken up to this point. He had obtained a permit to raze the existing cottage which was about 700 sq. ft. He put in a full foundation to improve it and to preserve it. The lot was deeded in 1959 and the cabin was built in 59.

Mr. Brown stated that about two years ago he applied and received approval to replace the septic, noting the location towards the rear of the property. He stated that he had met with Mr. Cahoon to make certain he was doing it properly and was in compliance with zoning and his abutters. Last fall he applied for a Permit by Notification to replace the dilapidated structure and was under the impression the Permit by Notification notified the Town and piggybacked the preexisting building permit. He apologized to the Board for not knowing the process and missing that. The existing dilapidated structure has been in place since the 50's and was 7' x 20' and within 7 ft. of the property line. The proposal is to expand it to 12' x 26' to make it more functional. It is approximately 11.5 ft. Mr. Brown referred to the plan noting that he had run a sting between the property lines from pin to pin. He stated the retaining wall and fence is the abutters. He feels that the topography is a unique feature of the property along with the lot only being 100 feet in width. He feels that when applying the required 20 ft. side setbacks you are taking away about 40% of the property. Mr. Brown stated that he had applied for and has replaced the septic system to the rear portion of the lot. He stated that the structure was for storage for things such as his sailboat mast, a boat, a car, wheelbarrow or a lawn mower.

Mr. Brown went over each of the criteria for the granting of a variance as contained in his narrative provided with his application. He referred to the enlarged photos of the property taken from various locations of the site showing the proximity of the abutting property, screening, location of the "proposed" garage. Mr. Brown answered any questions from the Board.

Mr. Jenny questioned the height of the garage. Mr. Brown stated that it was 10 ft. and the overall height of the structure was an additional 4 ft. He noted the proposed structure is lower than the residence and doesn't affect anybody's view point or the abutter's view to the lake.

Mr. Stephens commented the proposal is to locate the new structure 11.5 ft. from the sideline. He questioned what prevented him from moving it in 8.5 ft. forward. Mr. Brown stated that if it were moved forward he wouldn't be able to get a car in there if it were brought forward. He also stated he wouldn't be able to get around on the property. He stated that he would have to cut into the embankment to orient the garage so that it met the setback and he was able to maneuver a car into the garage. He also noted if the garage were moved to be compliant that it would then block somebodys view point and it would also be

more visible. He feels that the location is the best spot on the property to have the least impact to abutters, the public or anybody.

Mr. Stephens asked if any members of the Board had the opportunity to go out and look at the property. Mr. Zewski commented that he had been to the site and gave a brief overview of this observation and description of the site. Members viewed the plan provided, with Mr. Brown stating that it was not to scale.

Mr. Woodruff, Town Planner, referred to his staff memo noting it was given to members late. There were a few points of clarification that he made. First off all the applicant is asking for a side setback variance. The application did not how much of a variance he was asking for so he scaled the Shoreland Permit plan which scaled out to approximately 10 ft., noting Mr. Brown stated that it was 11.5 ft. The intent is to obtain a setback variance which removed a once existing 7' x 20' shed or accessory structure that was located approximately 7 ft. from the property line, and then construct a new 12' x 26' garage/structure. Mr. Woodruff stated as the Board may be aware, this application is a result of a compliance requirement from the Code Enforcement Officer. The garage does exist and the former grandfathered shed has been demolished. This means that any grandfathered rights that the shed had were gone as soon as it was demolished. He pointed out that the case does not meet the criteria for an equitable waiver mainly because the applicant did not ask for a building permit, which is the definition of inquiring. So there was a failure to inquire. If the Board were to grant the variance he respectfully asked that they place a condition on the variance that the Shoreland Permit be submitted at the same time the "after the fact" Building Permit application is submitted to the Code Enforcement Officer. Mr. Woodruff noted that he too felt that there are places where this garage could be moved. He does not know the extent of the foundation, which may be something the Board wishes to ask.

Mr. Brown asked if the Planner had been out to the property. Mr. Woodruff stated no. Mr. Stephens directed this question to members that had been to the site, asking if their description of the site was representative enough for those who did not go out, or do they feel that it would be beneficial for those who did not go out, to do so? Mr. Hopkins commented that the shoreland protection plan as presented shows a pretty flat area which he now knows is the location of the septic tank. Other than that he feels with the plan, the good photographs, and the good presentation, it is his viewpoint that there is space to where this can be conforming. He looks at what is out there with great compassion, with the funds that have been invested in, but unfortunately it's not what they look at here. Mr. Brown replied that he understands that and went back to the fact that yes he is asking for a setback variance but again it affects the use of the property significantly for everybody. Moving it makes it much more difficult to maneuver a full size truck or car. He thought that the location was a well-placed area and did not understand the procedure properly and it was his mistake.

Mr. Stephens opened the hearing for public input at this time, noting there was none.

Mr. Stephens asked if there were any additional questions from the Board at this time, it was noted there were none. He closed the public hearing and the Board went into deliberative session to discuss each of the criteria for the granting of the variance at 8:14 PM and came out of deliberative session at 8:23 PM.

Mr. Brown made the final comment that he thought that his property was unique due to the 100 ft. width of the property and the topography.

There was no further input from the Board or public. The voting members were Bob S., Russ, Bob Z. Joe and Jerry.

**Motion:** Mr. Zewski moved to deny the request for variance for Russ Brown, Tax Map 198 Lot 8, close the public hearing, and to direct staff to draft a formal Notice of Decision, for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be

reviewed for accuracy only, and signed by the Chair at the next scheduled meeting, seconded by Mr. Hopkins, carried unanimously.

Mr. Stephens noted the 30 day right to appeal in accordance with NH RSA 677:2 would begin tomorrow.

The Board took a five minute break at this time.

3. Ed Batchelder (140-2) (144 Bean Road)  
Variance from Article III. B. (1)

Mr. Stephens stated again that this was an application for a variance for Ed Batchelder and that he would be stepping down from the Board for this hearing. Mr. Nolin reassumed the role as Chairman for the hearing and once again seated Paul Onthank in place of Mr. Stephens with full voting privileges.

At this time there still was no one present for the hearing. Mr. Woodruff stated that the Board had the option of hearing the case without the applicant present, based upon his written application or they could choose to table the hearing to a date specific. It was the decision of the Board to table the application and asked that staff contact Mr. Batchelder notifying him of the continued hearing.

**Motion:** Mr. Hopkins moved to table the application for Ed Batchelder (140-2) and continue the public hearing until August 6, 2014, seconded by Mr. Zewski, carried unanimously.

Mr. Stephens returned to the Board at this time with full voting privileges.

5. Zaremba Program Development, LLC on behalf of Dollar General (52-18) (929 Whittier Hwy)  
Variance from Article XII.V (B) for Volume only.

Mr. Stephens reminded the Board that this was an application for a water mitigation issue as it relates to the ordinance.

John Sokul, a Land Use Attorney from Hinckley Allen was present this evening. Also present this evening was their project team, Tom Sokoloski from Schauer Environmental, who is their wetlands expert, Bill McLean, an appraiser, Erin Lambert from Nobis Engineering, Civil Engineer, and Scott Holman, from Zaremba Development.

Mr. Sokul gave a brief history and back ground of this application, stating that this hearing is granted as a result of our motion for a rehearing based on the initial denial of our variance application. And you're right, this relates to a very specific provision in the Zoning Ordinance (Z/O) which provides that for projects that disturb over 20,000 sq. ft. of land, that post development peak runoff volume will not exceed the pre-development condition. And our site has unusually high water table and poorly drained soils and though we have designed a professionally designed stormwater management system the variance is needed because all though we can control the rate of runoff to the pre-development condition, the total volume or the duration of the runoff is slightly exceeded. So we came to the Board in February of this year and made our presentation and the Board asked us to go do a couple of things. One of the things that we had done at the initial presentation, was we had our wetlands scientist try to figure out where the runoff from the site would actually go. And this was done in the winter and the Board said go out, do an actual site inspection, try to get permission from as many of the land owners that you can, to go out and see their actual contours and topography and try and verify your findings. The other thing the Board asked was that the stormwater management design and the drainage calculations be reviewed by the Towns outside peer review engineer. Both of those things were done. The Town Engineer found that the stormwater management detention basin and drainage system had been professionally designed. Our wetlands expert went out, looked at the site, and as a result of that he did make a couple of adjustments to his original, which is the red projected flow contours, to the blue, which is now the actual flow contours.

He can talk a little bit more about that. So we came back to the Board, updated the Board on that. And, one other thing, while the site inspections were going on it was discovered that there were two culverts which run under Moulton "Road" [sic] here, and that the culverts are located right here, and that piece of road experiences occasional flooding as is right now, and so some concerns were raised about whether this was going to make it worse or exacerbate the condition or how would it affect the Moulton "Road" [sic] situation. It turns out that the two culverts, one is a 9 inch culvert, one is a 15 inch culvert, and the 15 inch culvert was partially blocked. And so in speaking with some of the land owners there Scott Holman offered that if the project was approved he will take a look at that, have it studied by the engineers and right size and repair those culverts if necessary so that the existing condition is corrected or the existing flooding is corrected. That's predicated on him being given permission to do that by the property owners and getting any necessary DES permits, but he offered to fund that endeavor and fund the design and the permitting effort and if necessary would install increased culverts. So we came back to the Board, we presented those updated findings. The Towns engineer corroborated our drainage report and the Board denied, after so deliberation, our initial variance application. Primarily it seems to me, reading the decision and having participating, under a belief that we were creating our own hardship. It's an eight (8) acre parcel that we subdivided into two pieces. One's just about shy of two (2) acres and the other is about six (6) acres, and that if we would just use more land, create a bigger parcel for our site, then you could more probably mitigate the stormwater runoff. So Scott instructed the engineers to figure out much more land he would need to properly mitigate the stormwater runoff, and as they were doing their calculations it turned out no amount of additional land could be bought that would up lead the need for a variance, and Erin will explain her calculations later. That was a little bit of a surprise to us. We suspected that, but the engineering proved it out. We also had an appraiser come and take a look at some of the issues a few Board members had raised concerning impacts on down gradient, downstream property owners and we had an appraisal done and primarily based on the engineering finally we decided to apply for a Motion for Rehearing because it seemed to us that the operating assumption of the Board in denying our original variance application had been faulty. So we submitted the rehearing package and at the June 18<sup>th</sup> hearing the Board voted to grant a rehearing and so that brings us here tonight. And I know some towns do this different than others. I'm going to treat this essentially as a de novo application, but be mindful of the fact that most of the people here, or all of the people have heard some or all of this before so everybody will speak about their findings but most of the focus will be on the new findings that the Board never heard at the public hearing concerning the calculations that no amount of additional land are going to obviate the need for the variance and the appraisal testimony. And we believe that a variance is warranted under these circumstances and after the experts speak I'll go through the variance criteria one by one. What we have here is very poorly drained soils, an exceptionally high water table, which prevents us from infiltrating the stormwater runoff to control the volume. The rate, it's important, the rate is being controlled to pre-development conditions and that's what allows the stormwater runoff as through the system as designed and located to run through existing contours. And all of the existing contours, none of them touch any improved property, any improvements, structures or anything else and they're all sloped away from the improvements so that there will no impact to any improved property, no wetland areas will be increased in size, so none of the downstream neighbors will have any impact other than in a 50 year storm event an area that is already wet will stay wet a little bit longer. The other thing is it's important to note is that based on the engineers calculations any commercial development on this site, that's subject to this zoning ordinance provision, the one that says if your disturbing more than 20,000 sq. ft. of land, would require a variance. Any of development of this parcel, whether it's 8 acres, whether it's 2 acres, whether it's 6 acres, no matter how you divvy it up, if you're disturbing more than 20,000 sq. ft. of land here, a variance is gonna be needed. And we're not saying, I want to make this clear, that anytime you have a high water table, and poorly drained soils, and you're disturbing C. that a variance should be granted automatically. We are saying that under the particular facts here where the rate is being controlled, the flow has been identified, and it's been proven out that there's not going to be any adverse effect to the downstream nearby property owners, that those conditions do merit the granting of a variance. We have had some of the questions studied by an appraiser and Mr. McLean will speak in a minute. We've made every effort to avoid the need for a variance here and I listened to one of the variance applications sitting here the night when our rehearing was considered and somebody said this is not the situation, I can't remember who the applicant was, of being between a river and a cemetery. This

is like being between a river and a cemetery. There's nothing we can do. Any commercial development of this property is going to increase stormwater volume. Any commercial development on that whole 8 acre parcel which disturbs more than 20,000 sq. ft. is going to need a variance. Under 20,000 sq. ft., you won't need a variance because that's what the ordinance says. Under 20,000 feet you're free. What's the most that could be built on this 8 acres site that doesn't affect 20,000 sq. ft.? You could put a 2,500 sq. ft. building with 10 parking spaces on the 8 acres. And we don't believe that's a reasonable use of an 8 acre site. So I'm going to let the experts talk, then I'd like to come back and run through the variance criteria one by one. Obviously any of us are available to answer any questions that the Board has and I think I'd like to start with Erin who will go over the design of the stormwater system in general and then focus on the calculations that we've discussed. Thank you.

For the record my name is Erin Lambert, I'm with Nobis Engineering, we did the stormwater design and site layout for the property. This is currently an 8 acre undeveloped wooded property. So what we do is we take a look at the existing stormwater conditions and the runoff from the site and your prescribed two 50 year storms and we compare that to the proposed development. And it does take into account upland, what flows through the property. So what we're proposing to do is construct a 9,100 sq. ft. Dollar General, 30 parking spaces, associated parking lots. In order to capture all of the runoff from the development there will be stormwater collection from the roof and all the runoff from the parking lot will be directed to this detention pond. So what the detention pond is going to do is it's going to release the runoff from your site at the same rate at which it leaves the site today. And that's how we're able to control the rate of runoff. The location that that detention pond is going to outlet is where the water naturally flows today. And that's how we are ensuring that that runoff flows into the same channel in which it leaves our property and flows through the downstream abutter's property. One other thing I should note is that there are a couple of wetlands that we're going to be disturbing on our property. We'll be applying for a wetlands permit. One thing that we are doing is creating a swale behind our development to take some of the water from the upland and direct it through our site so it doesn't get mixed with runoff from our site that will all be treated in the detention pond. So that again will continue through the site in the same drainage path it does today to continue and maintain the existing hydrology of the area. The reason we are before you tonight is because our design controls rate, but it doesn't control volume, so right now we have a wooded site and a proposed development changes that coverage to grass and impervious. There's less runoff from wooded areas than there is from grass and pavement, pervious areas, so the development is increasing the amount of runoff. We have high ground water and we have poorly drained soils which preclude us from infiltrating that water, so the water allows us to control the rate at which the water is leaving. In order to control volume we need to re-introduce the water, the runoff, into the ground through infiltration, which we're unable to do here and that's why the variance is before you. So following the hearing we took a look at if we had more land would we be able to then infiltrate that volume and were able to alleviate the need to have this variance. And what we found was even by adding more land we're not able to infiltrate that water because of the poorly drained soils and the high ground water table. We don't have separation of ground water to allow that stormwater to be infiltrated. In addition, as we clear more land to add those additional retention and detention measures we've increased the runoff again because we've changed that lot coverage from woods to grass. So we found that we weren't able to infiltrate the volume from our development and in fact we were adding to the amount of water we then needed to mitigate. In essence it couldn't catch up, so it's the nature of the sites soils that are leading us to request this variance from you tonight. With that I'm going to turn it over to Tom and he's going to explain a little bit about the wetland.

Mr. Stephens asked if the experts minded if as each individual presents that if the Board has questions they can address while they are fresh on their mind. Mr. Nolin questioned if they had a larger map of the Dollar General Lot. Ms. Lambert stated yes, and put the plan up on the bulletin board.

Mr. Hopkins said when you talk about you're not able to increase the amount of infiltration and that's the issue, the volume problem that you're encountering here. If your retention ponds are larger where they hold more, does that not give you the opportunity to control out flow rate at a lower rate which would allow you to comply with the ordinance? Ms. Lambert replied if we made a bigger pond it

could leave even slower so we would control the rate or send it off at a lower rate but it's not going to infiltrate the ground water because what happens is the pond intercepts groundwater so it's using that to obtain treatment but it's not infiltrating into the ground. In order to infiltrate we have to be above the seasonal high and allow it to percolate through, get treatment and then enter the ground water. And because our pond actually intercepts the ground water there's no opportunity for it to infiltrate so it would hang out there, but it would have to leave through the orifice. Mr. Hopkins asked if you reduced the rate that it left at the orifice would that not eliminate the volume problems that you would have downstream. Ms. Lambert stated that it wouldn't because it fills with ground water to a certain elevation. We've designed above that, but because it's going to have ground water in it, it will leave through the orifice. Otherwise it will continue to fill up and we wouldn't have that storage available to control the rate in the next storm. So unfortunately we're not able to infiltrate the water.

Mr. Hopkins asked the square footage of disturbance. Mr. Lambert replied the square footage of disturbance is just over 80,000 sq. ft. and the proposed Lot is 85,000 and we're disturbing most of it with the exception of this corner which is an existing wetlands. It's about 82,000 of the 85,000 square foot Lot. The lot coverage, which is a different number, is a lot less than that, but that's the total disturbance. Mr. Hopkins commented so it's the 20,000 sq. ft. disturbance that got you into this portion of the ordinance. Ms. Lambert stated that it correct, they are just over 80,000.

Mr. Nolin stated he had a number of questions about the forest land commenting when he dealt with this before they had a certain amount of stormwater that is runoff from forest land that's certain amount of percentage of that is in the ground from the roots and other things and then the use of water from the trees and what was the percentage? Usually there is a percentage before and after. Ms. Lambert commented that there is a curve number. Mr. Nolin stated it would be easier for him to understand the percentage of stormwater that the forest land absorbs as opposed to runoff, and then the difference between the two. Ms. Lambert stated that pavement is 98%, meaning that 98% of what hits that runs off. The woods depend on the type of soils and the quality of the vegetation. The woods here are 70% and grass is 74%. Mr. Nolin stated that he thought 70% runoff sounded very high for the woods and Ms. Lambert stated that was partly because there are hard pan soils that don't infiltrate very well so you don't see as much infiltration in this woods as you would if you had sandy type A soils, these are type C, when you raise that threshold to 98 with your impervious and 74 with the grass that's the volume of additional runoff that they don't have in the undeveloped condition. Mr. Nolin commented again that he thought 70 seemed very high. Ms. Lambert stated it was because the soils don't receive water very well and the ground water is really high.

Mr. Nolin questioned what mitigation they had for snowmelt. Ms. Lambert stated the snow will melt and flow through a grass line swale, so it will get treatment through the swale and it will melt slowly over the course of the thaw. It is a grass lined treatment swale that meets the states criteria for treatment. It is a treatment swale per the NH DES AOT Stormwater guideline.

Tom Sokoloski, certified wetland scientist of Schauer Environmental Consultants stated his initial role in the project was to review the site wetlands, the drainage that they contribute to offsite properties and to get a general sense of the flow path of that wetlands system that leads towards Garland Pond. He gave a brief history of the materials and literature he had reviewed and observations from his site visit of the site and of the abutting properties down gradient. He determined that the flow path of the wetlands down gradient of the property initially followed red line as shown on the plan, and following the site walk determined there was a slightly different flow path as shown in blue on the plan. Essentially their wetland drainage exits the site at the point at which the stormwater management system is designed to direct drainage. He explained the flow path from the wetlands through the culvert and eventually onto Garland Pond. He noted that they had looked at the wetlands that were delineated by Nobis and agreed that the site in general has hardpan soils that have a high water table. Typically what they find in sites such as this would be a deeper water table for moderately well drained to well-drained soil. You'd expect the water table to be between 24 and 40 inches and here they found it was much higher, more in the order of 15-18 inches. With hard pan situation you will have seepage which is very typical of that. In conclusion he

stated in general the drainage path is well defined. The storm water management system as designed is not going to be increasing the height of water at any given moment in time because the rate of flow off the site is being controlled to replicate the existing conditions and there is separation between the wetland boundaries, the stream flow path, and the developed parts of the lots. Based upon the design of the stormwater management system it will not increase the rate of runoff, therefore not increase the height of water down gradient, there won't be any expansion of wetlands on the adjacent properties down slope and there won't be any potential damage to developed portions of those properties based upon this. Overall their conclusions are that the site is typical in many ways to New Hampshire normal hard pan sites, with the exception of it having a slightly higher than typical water table.

Mr. Crowe commented that Mr. Sokoloski is saying that it won't do this and it won't do that and won't do the other thing based on your findings. What happens if it does? Mr. Sokoloski stated then our premises is wrong, but I don't see that happening because the design has been put together to meet state stormwater management standards and the engineering calculations show that the post development runoff rates are comparable to pre development runoff rates.

Bill McLean a Certified General Appraiser addressed the Board next. He gave his background of his qualifications as an appraiser, noting that provided with the application package was his Appraisal Report. He stated that he would not go into detail of the 48 page report and stated that he would highlight beginning on page 30. He I have been asked to address the question of diminution of value. That if this facility is built as has been presented to you, is there any reason to believe that there will be a loss in value to surrounding or nearby properties. Mr. Stephens requested clarification at this point stating again this Board is here to review and determine whether or not the additional time duration of water flow downstream can or cannot happen. So when we talk about diminution of value it needs to be specifically related to that, not to the physical structure that's being proposed because that's not what's before the Board. I just want to make sure that we're clear on what we're talking about. Mr. McLean commented that that will significantly limit my presentation. On the bottom of page 30 I address site conditions and I indicate I review the reports provided by Schauer Environmental Consultants and pretty much what has been presented to you here today. I note and quote specifically from the report and based upon my own reading of the report, and I indicate earlier in my appraisal report, I'm not an expert when it comes to soil conditions, I'm not a soil scientist, like you, my responsibility to take the professional reports, to read them, to put them in context of what I've actually seen on the site, and I would simply conclude that based upon the plan that has been presented here and the mitigations that have been presented, I see no reason to believe that there would be a diminution of value resulting in this construction. I also mention I have been appraising commercial properties here in the area for 25 years and have seen numerous properties in which retention ponds have been a necessary part of the development plan. I note in my report a recent experience in Plymouth on Boulder Drive which sits well above quite a steep gradient down to where the Walmart is and other stores. There are multiple retention ponds that sit above commercial development that is lower and along Tenney Mountain Highway and having done numerous appraisals and studied the data on Tenney Mountain Highway for years, again zero evidence what so ever that the existence of those retentions ponds in any way resulted in a loss of value to the properties below. Mr. Stephens commented summarizing for his personal understanding that it is your professional opinion that the additional duration of water running down there will not affect the property values of the downstream properties. Mr. McLean stated that's correct. Mr. Nolin added and volume. It isn't just a time limit there is a volume in total. Mr. McLean stated he would answer the question the same way. Mr. Hopkins asked Mr. McLean when he visited the property. Mr. McLean stated he saw the property this afternoon, walked down Moulton "Road" [sic] and actually observed the culverts that are there and put in context this plan showing where the runoff would be and showing how it follows the natural contours of existing wetlands and runoff. Mr. Hopkins asked if that was the first time he was on the property. Mr. McLean stated it was the first time I inspected the property, very familiar with the location. Mr. Hopkins commented so you made the report before you inspected the property? Mr. McLean replied I made the report before I inspected the property. That is correct.



Bruce Woodruff, Town Planner addressed the Board next, pointing out to the Board that their consultant/peer reviewer is present tonight, Ray Korber from KV Partners, noting he did submit a memo but believed that Mr. Korber could present his finding to them, answer questions or both.

For the record my name is Ray Korber. I'm a principal with KV Partners. We're consulting engineers and serve essentially as the Town Engineer. We did do a peer review on this project with respect to the stormwater management plan. Initially we did that review back in May. We submitted our comments on the stormwater management plan as submitted by the applicant. We had several comments subsequent to that and the applicants engineer addressed all those comments and I notified Mr. Woodruff that the comments were satisfied from our standpoint. Most recently we were asked to review what was presented here tonight by Nobis Engineering with respect to the expanding the lot size in order to try to find a way to keep the volume of runoff to the predevelopment conditions. So my comments are just to address our review on that in terms of the information that was submitted. I will say that we have not walked the site and do not confirm the conditions on the ground. We simply reviewed the information that was presented to us and that was principally the Nobis Engineering Report that was dated June 5<sup>th</sup> of 2014. In summary the hydraulic analysis that was completed and submitted on the June 5<sup>th</sup> report was consistent with the previous analysis. Essentially the revision was to include the expansion of the three ponds on the northwest side of the property. The purpose of those ponds is basically a series of depressions to encourage the infiltration of water into the subsurface which really tries to address runoff volume issues which is the issue at hand before the Board. In terms of the methodology, the results of the analysis and the conclusions in findings offered by Nobis Engineering, we think they did a reasonable job and we're not here to concur whether or not they were accurate in terms of the analysis, but the effort and the information that was presented to us we feel was professional, reasonable, met the standard of care, and those findings are articulated in the June 5<sup>th</sup> report. Essentially what they presented here tonight is what was presented in their report. Mr. Stephens stated as I understand it a peer review, or anytime you're asked to do a peer review, effectively what you're doing is looking at the analysis and the methodology and the approach that a peer has done to determine whether or not the process and the approach is the correct one. You are not specifically looking at the soil test data per say, but rather do they have the soil test data and how did they apply that to the process. Mr. Korber stated that's correct. So basically with respect to soil test data, how did they derive that data, what is the methodology that they did, is it reasonable, if they're looking for infiltration rates, do perc tests and that sort of thing, did they do it the right way, I guess would be the best way to put that. So that is the level of a peer review. Mr. Stephens asked if that evaluation process that you conducted, is that standard practice for a peer review. Mr. Korber stated it varies. We get requests to do more detailed analyses on occasions, but it's the level of review that we did in this particular case and we thinks it's appropriate for the level of project that's being proposed here. Mr. Stephens asked at present based on your review you don't have any concerns. Mr. Korber commented I don't have any concerns in terms of the results that were derived from the analysis. I would concur with the engineer that given the soil conditions, again we didn't check those out, given the soil conditions as articulated, given the high ground water level as articulated, given the design that they presented here, you're going to be hard pressed to meet that condition, that between the pre- and post-development runoff volume, and meet that requirement as articulated in the Zoning Ordinance. Mr. Zewski followed that up with a question, comment #5 "Based on the May 6, 2014 Stormwater Management Plan Report, the expected runoff volume between pre- and post-development conditions is expected to increase by approximately 10%..." is that correct? Mr. Korber stated that is correct. Mr. Hopkins referred to #3 of the same memo "As stated in the report, a) increasing the lot size and area of ponds will not address the runoff volume differential and b) given existing conditions (soil type, high groundwater) no development can meet a net-zero condition between pre- and post-development runoff volume." asking Mr. Korber if that was what he meant to say? Mr. Korber replied basically we were articulating what was stated worked there. That increasing one side in the area of the ponds will not address the runoff volume differential. They concurred they came to that conclusion and secondly that given the existing conditions, soil type, high ground water, no development can meet or met your condition between pre- and post-development on the Lot. That was essentially the result from the analysis from Nobis Engineering. Mr. Hopkins asked is that your opinion or is that just a comment, you just restating what they stated? Mr. Korber replied yes. Given the information that was presented to us in

what we reviewed, we believe that you cannot, any development that's going to exceed the 20,000 sq. ft. threshold is not likely to meet the requirement. Does that mean that there's a commercial development less than 20,000 sq. ft. without that, my answer is potentially there is, in which case they don't have to meet the runoff volume. Mr. Hopkins further you could say that no development exceeding 20,000 sq. ft. Mr. Korber stated correct. Mr. Hopkins stated you can't put a residence on this and you can't put a two-family on it. Just for clarification you could put a farm stand on there.

Mr. Woodruff made the following comment that limiting the runoff from development it increases runoff on a pristine site to the same amount of runoff off the property boundaries is a generally accepted planning technique because you don't want to affect other properties by adding either a greater rate of runoff or a greater volume of runoff. That's one thing that you always do with stormwater management criteria. Sometimes they're just called drainage criteria, but that's morphed into this area where you really want to manage the stormwater not just for the rate and volume that comes off your development onto other peoples properties, but the quality of the water. That's why you want to manage the stormwater because what's in the water, whether it's sediment, whether it's chemicals, whether it's salt, whatever it is, you want to try and have the infiltrated and filter out. This development appears to have done that and they are only here before you with regard to this issue that they've got a greater volume of water that comes off but it's being metered over a longer period of time. So why could this be better? Well, because there's a defined channel. And as I've said in previous staff memos, I don't think you should grant this variance if the applicant does not promise to mitigate what happens in that channel, in that dam portion. The dam portion is Moulton Drive. Today it can't handle the stormwater runoff down the hill just from the forested condition, so now you're going to add some volume. I think that this variance is necessary, that's my professional opinion, but only if there is a condition on the variance that the condition down gradient is mitigated by the applicant, funded and paid for and constructed. Mr. Woodruff stated this is a commercial district. The intent of the zoning ordinance was that the uses here be commercial uses, not residential uses. Although they are allowed, but why would you zone an area commercial if the intent was to a residential use?

Mr. Zewski noted what they are talking about is Article XII.V.B. Post-development peak runoff rate and volume shall not exceed pre-development levels for a 50 year storm event. That's what this is all about. Mr. Woodruff replied that's right, but only the volume of that.

Mr. Stephens opened the hearing for public input at this time, noting there was none.

Attorney Sokul took a few moments to address each of the specific variance criteria as detailed in his narrative in support submitted as part of the application and why he felt that this this proposal meets them. They believe that this property cannot be reasonably used without the need for a variance and the variance is therefore necessary to enable a reasonable use of the property. Mr. Sokul noted the special conditions of the site. The most that could be built here by disturbing less than 20,000 sq. ft. of disturbed area for the entire 8 acre site was a 2,500 sq. ft. building with 10 parking spaces. Again, even that would result in an increase in stormwater volume it just would not require a variance because the of the ordinance requirements. Mr. Sokul stated that he tried to submit everything for this rehearing a new, but requested that any information that was submitted prior to their submittal tonight just be included as part of the record for this hearing.

The question was asked and there was a brief discussion as to the purpose or reasoning why B was include in Section XII.V of the ordinance. Mr. Sokul and a few members of the Board gave their opinions as to why they felt this was in the ordinance and how it came about.

Mr. Stephens asked if there were any additional questions from the Board at this time, it was noted there were none. He closed the public hearing and the Board went into deliberative session to discuss each of the criteria for the granting of the variance at 10:00 PM and came out of deliberative session at 10:37 PM.

Attorney Sokul made the a comment that in listening to the deliberations it seemed to me that the Board was considering, some of the Board members as they discussed the spirit of the ordinance, public interest, substantial justice as well as hardship, a common theme arose that if we could do a project on the site that disturbed less than 20,000 sq. ft. we ought to go do that and therefore there is no hardship, spirit of the ordinance wouldn't be achieved, substantial justice would not be done and it would be contrary to the public interest. So that is really a variance standard that says the applicant is required to prove that the benefit the applicant seeks cannot be achieved by some method not requiring a variance that is reasonably feasible for the applicant to pursue. That hardship standard, that variance analysis, that type of thought process was struck down by the Supreme Court for the State of New Hampshire in 2004 by a case called *Boccia v. City of Portsmouth*, and it was replaced by a variance standard that's sort of articulated in what the Board has here, mainly now an applicant need only demonstrate that special conditions of the property exists which make the proposal a reasonable use of the property. The fact that we could put something on this site less than 20,000 sq. ft. and not be required to get a variance is illegally, erroneous standard to employ in analyzing whether a variance should be granted here as found by the New Hampshire Supreme Court. I pointed this out in my request for rehearing that I thought the Board had misapplied the variance standard the first time. I would hope that the Board would get back on track with the current variance standard in analyzing the proposal here. The other thing is I'm a little surprised everybody, we need a variance. That's why we've come here and requested it and the fact that we need one, I don't think is justification for turning us down, and that's what I'm hearing too. The fact that there's this 20,000 sq. ft. threshold in the ordinance where, and if the entire 8 acre parcel does make a difference, this property owner owns 8 acres of land that the engineers have demonstrated if you build more, if you disturb more than 20,000 sq. ft. on it a variance is going to be needed. So the Board in essence is saying tonight that the development potential of this parcel is nothing other than a 2,500 sq. ft. building and I don't know if the tax assessor is listening, but they ought to. I don't know if this is a taking of the property, but it's certainly, certainly a major reduction of the property's value and the entire 8 acres needs to be considered. I'm also a little perplexed at just the general statements that the fact that there will be an increase in the volume of the stormwater drainage will logically and be necessity have a negative impact on the down gradient property owners. That could happen. It could happen in most instances. It could happen in many instances, and that's probably why the provision is in the zoning ordinance. But it's not happening here. It's not happening here. We said we would fix an existing condition that's a problem and make it better. We've demonstrated that the water flows through existing wetlands courses and will not be expanded or made worse. And because the rate is being controlled, everything that's there today will stay the same except in a 50 year storm event it will remain wet for a little bit longer, less than a day. Where's the negative impact? We've had it studied by an appraiser who found no diminution in value. I remember the comment the other board member made about he was concerned about uphill people being down below a detention pond. Frankly it was that comment that prodded us to go out and hire an appraiser, who not only did an appraisal and assessed the property values, he did a separate section. There is no diminution in value. There is increase in value. This commercial development will over time enhance this commercial area. The Board is really saying that all the commercially zoned land in this area is undevelopable. You are not going to get a better variance application than this one. You're not. The special conditions, the way we've mitigated the existing courses. Every variance for anybody who owns commercial property in this area is going to need to be denied. This Board is here to put a reasonable gloss on things so people can do reasonable things with the property and that's the variance standard as it exists today.

Scott Holman made a comment regarding the culverts. Dollar General would be purchasing this property. This isn't a franchise. Dollar General doesn't have any franchises. They have leased stores. If the culvert (Moulton Drive) were a condition of the variance would be installed during construction of the site.

There was no further input from the Board or public. The voting members were Bob S., Russ, Bob Z. Joe and Jerry.

**Motion:** Mr. Hopkins moved to deny the request for variance for Zarembo Program Development Group, LLC, Tax Map 52, Lot 18, close the hearing, and to direct staff to draft a formal Notice of Decision, for Board discussion only, based on the Finding of Facts during tonight's hearing, which will be reviewed for accuracy only, and signed by the Chair at the next scheduled meeting, seconded by Mr. Nolin, motion passed, three (3) in favor (Nolin, Crowe, Hopkins) and two (2) opposed (Stephens, Zewski).

Mr. Stephens commented Attorney Sokul knows the right of appeal, and that the 30 day period begins tomorrow morning.

**V. Correspondence**

**VI. Unfinished Business**

1. Review and possible authorization for the Chair to sign the formal Notice of Decision for the July 2<sup>nd</sup>, 2014 granting of a variance from Article VII. E. (1) for Todd A. & Brenda M. Pulis (271-13)(112 Deerhaven Road).

The Board reviewed the Draft Notice of Decision prepared by staff, as directed by the Board at the hearing on July 2<sup>nd</sup>. There were no changes made to the draft.

**Motion:** Mr. Zewski moved to direct the Chairman to sign the Notice of Decision as written, for Todd A. & Brenda M. Pulis (271-13)(112 Deerhaven Road) and staff to mail said notice to the applicant or applicant's agent, seconded by Mr. Hopkins, carried unanimously.

**VII. Adjournment**

**Motion:** Mr. Zewski made the motion to adjourn at 10:50 PM, seconded by Mr. Nolin, carried unanimously.

Respectfully Submitted,  
Bonnie L. Whitney  
Administrative Assistant