

**Town of Milford
Zoning Board of Adjustment Minutes
November 7, 2013
Case #2013-22
Scott Cornett
Special Exception**

Present: Fletcher Seagroves, Chairman
Laura Horning, Vice Chair
Zach Tripp
Michael Thornton, Alternate
Joan Dargie, Alternate

Absent: Kevin Taylor
Bob Pichette
Len Harten, Alternate
Paul Butler, Alternate

Secretary: Peg Ouellette

The applicant, Scott Cornett, owner of Map 53, Lot 38-2, Mountain View Ct, in the Residence "R" District, is requesting a Special Exception from Article VI, Section 6.02.6:B to allow 864 SF of disturbance within the wetland buffer for placement of fill material associated with the construction of a new single family dwelling on an existing residential lot.

MINUTES APPROVED AND SIGNED ON FEBRUARY 6, 2014

Fletcher Seagroves, Chairman, opened the meeting by stating that the hearings are held in accordance with the Town of Milford Zoning Ordinance and the applicable New Hampshire Statutes. He continued by informing all of the procedures of the Board. He read the notice of hearing into the record. The list of abutters was read. Scott & Nancy Cornett, owners of 384 Nashua St., were present. No abutters were present.

Applicant's presentation: S. Cornett explained that as part of siting his home and septic within sideline and wetland buffer setbacks they will otherwise be required to build a 4 ft retaining wall. The plan, put together for the Conservation Commission, shows a retaining wall. The civil engineer has requested that the area in pink be an encroachment within the buffer to provide fill for a more natural grade and let the water infiltrate as it naturally would. He defined the 864 SF area impact and volume and stated that approximately 40 cubic yards of fill will be used. A lot of people would let fill spill over but he is trying to be respectful of wetlands and buffers.

F. Seagroves asked if there would be a big drop off.

S. Cornett said there would be a 3 to 4 ft high retaining wall that could cause pooling and more radical erosion that otherwise would infiltrate more naturally on a more gentle slope.

L. Horning asked whether the area referred to was a drop-off or an embankment.

S. Cornett said there was no drop-off. There was natural slope and existing contour grades on the plan are pretty regularly spaced.

Z. Tripp said it is gradual, from 550 to 554.

S. Cornett said there was rarely any moving water. It was more soggy, boggy.

F. Seagroves said it was a buffer.

S. Cornett said the buffer was leaves and blueberries. There were no cattails, no standing water. It was just seasonally wet.

Z. Tripp said the pad for the house was placed where it is somewhat flat. So raising the elevation from to 558 and 556 elevation, they have a quicker drop-off. He asked whether there was any reason not to move the house to the right.

S. Cornett stated he couldn't say there was nothing to stop that. The way the septic test pits were prepared to find proper percolating area, that is the location for it.

L. Horning said he had ability to extend that and adjust it for moving the house 5 to 8 ft.

S. Cornett said probably.

M. Thornton said he does have some room to play within the setbacks, etc.

S. Cornett said they had to find location for the well and separate septic system. He worked with a civil engineer to site the home to balance all aspects of the site.

L. Horning asked whether it was more aesthetic, since the lot looked large enough to take both septic and well.

S. Cornett said it was, but also financial, especially if it requires more fill or if there is ledge. In other test pits there is indication of a 4 to 5 ft ledge.

L. Horning asked if turning the house away from the wetland would be that substantial an impact as opposed to addressing the buffer.

S. Cornett said there's no way to quantify that because he would have to talk to an engineer.

Z. Tripp brought up the 75 ft protective well radius and the next lot.

S. Cornett said it is the allowed limit.

Z. Tripp inquired about the photos and where they were taken.

S. Cornett explained the views and orientation of where the photos were taken.

Z. Tripp said the top picture shows the buffer is heavily wooded there.

S. Cornett agreed and said he has since removed the woods, for clearing for construction.

F. Seagroves asked if that was where the fill would be placed.

S. Cornett said that was correct. Currently he has erosion control and nothing in that area, in anticipation of the outcome of this meeting.

F. Seagroves opened the meeting to public comment.

Suzanne Fournier, of 9 Woodward Dr, said the town has an easement on some of the wetlands and drainage on this property and has already planned out slope drainage and wetlands. The town is an abutter because it has an easement. She would like to see the function of drainage and wetland unchanged and undamaged. The problem is that the applicant is aiming for maximum useable space according to his phrasing to the Conservation Commission, which is putting the project into the wetland buffer. He has .9 acres within which to build a house and garage, which would be plenty of space. He has other alternatives. The Chair of the Conservation Commission told some of the other Conservation members at their site visit on July 18 that the proposal was not the least impact alternative. Mr. Cornett doesn't recognize the scientific fact that negative impact on the wetland buffers negatively impacts wetlands themselves. The Chair of the Conservation Commission was concerned about creating lawn so near the wetlands because the back yard would slope toward the wetland and fertilizer would leach into the wetland. This is confirmed by conservation science. The seven criteria should have been reviewed by the Conservation Commission. At a recent meeting the Commission stated they will review the seven criteria for future projects. Why not allow them to do so for this case before the ZBA decision? In stating there was no impact to wetlands, Mr. Cornett failed to acknowledge that impact to buffers also impacts wetlands. The fact that it is seasonally wet could be an indication that there is a vernal pool which could sustain certain species. Spring would be the time to assess that. The Conservation Commission failed to understand importance of healthy buffer and wetlands. They went against science in deciding that a gradual slope would allow absorption implying it is not worse than the natural conditions existing pre-construction. They claimed the fill would not alter the functionality of the buffer. She said environmental and biological science of buffers is explained by NHDES. Mr. Cornett would fill and destroy buffer within 5 ft of the wetland at its closest point. Her major point is that there are functions and values lost when a buffer is destroyed. She referred to page 200 of NHDES publication "Innovative Land Use Techniques" stating that when areas of buffer are destroyed there will be loss of functions and values and the definition of functions and values. She read the list of values and functions from the publication. She quoted from another NHDES publication "New Hampshire Water Resources Primer" page 514 regarding the impact of wetlands from impacting wetlands and uplands. She said Mr. Cornett doesn't understand the damage filling in 900 SF will do to the buffer and wetlands, stating that a retaining wall would be worse. Why doesn't he have a third alternative? She disagreed it will improve natural filtration and that the retaining wall will do more than the fill. She said the applicant denied damage from cumulative impact to buffers and has denied that pollution will make its way from a sloped yard into the wetland. She disagreed.

F. Seagroves said the Board was going by what is in the ordinance, not the DES manual.

J. Dargie said nor what the Conservation Commission did. Whatever the Conservation Commission did, they already decided and Ms. Fournier should have spoken to them. They can't go back and say the Conservation Commission was wrong. Ms. Fournier would need to go back to the Conservation Commission.

L. Horning agreed she needed to address that concern directly with the other Commission.

S. Fournier stated she was presenting facts.

F. Seagroves and L. Horning said it was her opinion. L. Horning asked her to continue by stating it was Ms. Fournier's personal concern.

S. Fournier mentioned a bull pine tree the applicant told the Conservation Commission he would not cut down. She provided a packet with a photo.

L. Horning asked the Chair if they had anything from the Conservation Commission packet.

F. Seagroves said there was a letter.

S. Fournier referred to lawn furniture in the same photo that was in the actual wetland. She wanted to know when those would be cleaned up. There is a photo showing cleared land and silt fencing which she didn't know if it was placed in the 25 ft buffer. She asked the ZBA to bring science to the seven questions and said that Special Exceptions are to be "made in harmony with the general purpose and

intent of the Zoning Ordinance” according to RSA 674:33. She quoted from the ordinance regarding the purpose and intent. She asked the Board to act in harmony with the ordinance.

Z. Tripp said, to clarify, the survey drawings show that the greatest point of impact is about 10-15 ft from the wetland and the other intrusions are less than that.

F. Seagroves said if you break the 864 ft. down, that would be a 28 x 28 SF area he is going to affect.

F. Seagroves asked Mr. Cornett if he wanted to rebut Ms. Fournier’s comments. S. Cornett declined.

Z. Tripp asked about the existing surface covering and plantings and also what landscaping would be there if approved.

S. Cornett said currently a combination of mountain laurel, blueberries and junipers. If approved, he would prefer grass. He had told the Conservation Commission he would use natural, not chemical, fertilizer but if it was important to this Board, he would be willing to replant with the native species.

L. Horning said she would prefer that because of the proximity of the encroachment to the buffer and there is no way of knowing, if he sells, what future owners would do.

J. Dargie asked about the utility easement.

S. Cornett said there was a swale and a town drainage easement which is just off the plan that goes toward Federal Hill Rd.

F. Seagroves closed the public portion of the meeting.

F. Seagroves then read a letter from the Conservation Commission.

S. Cornett read the application into the record.

F. Seagroves asked the Board to discuss the seven criteria.

J. Dargie suggested, in response to Ms. Fournier’s statement that the Conservation Commission hadn’t reviewed the seven criteria, that this Board request them to do so and a brief discussion followed.

F. Seagroves referred to Sec. 6.02.7 of the Zoning Ordinance that states... for all projects requiring Special Exception the applicant shall demonstrate the following factors:

1. The need for the proposed project;

Z. Tripp said given the current placement of the house, there is a need. The question is whether the house needs to be in that location. Given that several test wells have been drilled, the current well is already 10 ft into the surrounding property, he had no reason to doubt it was the best compromise on that lot. There is a need to manage the slopes and there is a need for it.

L. Horning agreed with Zach. Her concern is placement of the house. Looking into the project, hearing applicant, and considering measurements & placement of the well and septic and lot and running into the granite, puts him in a precarious position with the encroachment. She struggled with it but decided there is a need to manipulate the lot in a manner that helps to build the home with least impact.

M. Thornton said the biggest caution he would make is that with more change directly adjacent to what is there, the more trouble there will be maintaining it. He cited his situation where he has an embankment put there by the town and the ability to maintain it is difficult. Maintenance is ongoing, so the smallest change the applicant can make would be best.

F. Seagroves said he saw the need; the applicant is limited as to the placement of the house because of wetlands, the requirement for septic system to be a distance from the well, and the granite. He saw the need for the project to put a house there. It appears he is limited as to where he can put the house.

2. The plan proposed is the alternative with the least impact to the wetlands, surface waters and/or their associated buffers;

Z. Tripp said, given the location of the house and need to restore the slope more in line to the slope prior to construction, this would have least impact. He believed a retaining wall would have greater impact and would disturb the pre-existing slope; having a 3 to 4 ft drop off is less similar to the pre-existing slope than the proposal for fill.

L. Horning agreed. Regarding the applicant’s testimony and the Conservation Commission’s letter, she agreed with J. Dargie’s suggestion to have them look at these seven questions, but given the testimony at this point it is the location with the least impact.

M. Thornton agreed.

J. Dargie said this is area with the least impact and a retaining wall would have more impact.

F. Seagroves agreed. He didn't think it would impact the buffer that much. It may help and it may be filtering the water or slowing it down. A 28 x 28 ft house is not as big as it sounds.

3. The impact on plants, fish and wildlife;

L. Horning said the Conservation Commission didn't address concerns regarding this. She didn't see any, but it would depend on the Commission's looking at the seven questions.

Z. Tripp said he wouldn't talk about direct impact to the wetland but to the buffer and potential impact to fish and wildlife in the buffer. He didn't think fill would add erosion, sediment or pollution in the wetland. Attempting to restore to a natural slope would be best for wildlife in the buffer and a retaining wall would probably impede any natural movement there.

M. Thornton said it seemed that the least intrusion on the land as it exists would be best and to have a 3 to 4 ft retaining wall has a greater down-the-road chance to create an unnatural situation, with runoff, than this proposal.

J. Dargie said they would have to go by the Conservation Commission's advice.

F. Seagroves said the house would be a bigger impact on the animals and plants; the applicant had stated he would replace the blueberry bushes. If replanting what was there, there will be no impact. This is a buffer; he didn't feel it would affect fish.

4. The impact on the quantity and/or quality of surface and ground water;

Z. Tripp said there would be little impact to the quantity of surface water, per the Conservation Commission's July letter. Maintaining what is there currently is least impact to the buffer. He would request the Board to require a condition that the junipers and blueberries be restored so it has the same filtering ability.

L. Horning agreed. She also agreed with Joan's request to send it back to the Conservation Commission and have them look at answering all seven questions. If all seven are answered to their satisfaction, that would satisfy her.

M. Thornton didn't see a net negative when considering that a steeper gradient is generally less desirable than a gradual one.

J. Dargie didn't see any impact on quality or quantify of surface or ground water.

F. Seagroves agreed. One of the functions of the buffer is filtering. By increasing amount of fill, it might filter water a little before it gets to the wetland.

5. The potential to cause or increase flooding, erosion, or sedimentation;

Z. Tripp said he didn't believe it would have potential to cause increase, with the requirement to replant.

L. Horning agreed.

M. Thornton said this was the least harmful that he could see. He would support it.

J. Dargie agreed.

F. Seagroves agreed, thinking this would probably decrease flooding and erosion.

6. The cumulative impact that would result if all parties owning or abutting a portion of the affected wetland, wetland complex and/or buffer area were also permitted alterations to the wetland and buffer proportional to the extent of their property rights;

L. Horning said in this case, a cumulative effect would not apply. The topography of the lot has created need to go into the buffer. It is not in the wetland and there would be minimal impact. Cumulative impact if the whole neighborhood was doing the same thing was a non-issue in her opinion. The Board and Conservation Commission would take that into consideration in each case.

Z. Tripp agreed. This question is tricky to answer because he can't see into the future. Per public testimony, there are lots on either side and we could ask what if all lots were graded the same. If the surrounding lots made the same percentage impact to the buffer and similar distance from the wetland and maintain similar erosion and restore original vegetation as requested, the impact would probably be minimal.

M. Thornton said it is a little late to worry about cumulative impact when all the other properties are already there and previous impacts cannot be seen. All things considered, this impact seemed rather benign.

J. Dargie said the impact is not such that would be affected by a cumulative impact.

F. Seagroves agreed that if every other property owner were granted the same special exception, the impact would not be that great.

7. The impact of the proposed project on the values and functions of the total wetland or wetland complex;

L. Horning said the Commission stated they didn't believe it would create negative impact on the wetland buffer or its functions and values. It could improve them. It is adding soil to create a deeper buffer to the existing one. It is adding to the buffer, not taking away or redirecting it or digging it up. That is a positive. She was relying on the testimony of the Conservation Commission and the impact will be positive, not negative.

Z. Tripp agreed. Reading the definition of the wetland buffer in the ordinance, Sec. 6.02.3.D he said he didn't believe this alteration would facilitate any additional pollution, sedimentation or harmful effect or, as testified, a similar slope so the runoff. It is already sloping as it goes to the wetland, so regardless of what systems may be used, it is going to run off. With the requirement of restoring vegetation, adding to the buffer should not impact the wetland.

J. Dargie asked what the fill would consist of.

S. Cornett said it would be natural material that exists; taking some from the high side and filling in the low side, using what is already there.

J. Dargie said she was okay with that.

S. Cornett said, for the record, he is importing fill into the site for final grading but will use natural material from the site in areas of impact.

F. Seagroves felt eliminating the slope would cut back on erosion.

L. Horning said the Conservation Commission also mentioned that.

F. Seagroves didn't think there would be a great impact.

There were no other questions from the Board, so they moved on to discussion of the criteria.

1. The proposed use shall be similar to those permitted in the district:

Z. Tripp – yes. He is constructing a new house, which is permitted.

L. Horning – yes. It is an acceptable use. The Ordinance provides for a Special Exception in special circumstances.

M. Thornton – yes.

J. Dargie – yes.

F. Seagroves – yes.

2. The specific site is an appropriate location for the proposed use because:

Z. Tripp – yes. The applicant has done diligence in trying to place the house in best location for this lot which has some impact to the buffer.

L. Horning agreed it was appropriate location. It has been looked at by the Conservation Commission and addressed by applicant.

M. Thornton said it was appropriate location.

J. Dargie agreed it was an appropriate location for the proposed use.

F. Seagroves agreed the location was appropriate location.

3. The use as developed will not adversely affect the adjacent area because:

Z. Tripp – yes, because of the seven questions just answered.

L. Horning agreed.

M. Thornton - yes.

J. Dargie – yes.

F. Seagroves – yes.

4. There will be no nuisance or serious hazard to vehicles or pedestrians:

Z. Tripp – yes; there will be no impact by restoring the original slope to the buffer.

L. Horning agreed. It is nowhere near the road.

M. Thornton said because of the gradual slope versus a 3 to 4 ft drop off, the applicant is acting to eliminate what could be adverse.

J. Dargie didn't see any nuisance.

F. Seagroves agreed there would be no nuisance. There should not be vehicles in that area and anyone walking around there would not have that slope to fall down.

5. Adequate appropriate facilities will be provided for the proper operation of the proposed use because:

Z. Tripp said it is going through the permitting process, with engineering drawings and the Conservation Commission.

L. Horning agreed because they will put a stipulation to go back to the Conservation Commission and address the appropriate vegetation.

M. Thornton said they will have dotted all the 'I's and crossed all the 'T's and everything in between.

J. Dargie – yes.

F. Seagroves - yes.

Chair requested a motion to approve with condition that, if approved, the original vegetation would be replaced inside the buffer.

Z. Tripp so moved.

L. Horning seconded.

All voted in favor

L Horning made a motion to send the case back to the Conservation Commission for review of the seven criteria questions for evaluation. Pending that outcome, they will stipulate approval of the application.

J. Dargie seconded the motion.

F. Seagroves asked how they would do that and discussion followed. Bill Parker asked if they only want the Conservation Commission's comments sent back for information, or if they are requiring the applicant to come back to ZBA.

L. Horning thought they would have to have the applicant return.

Discussion followed.

Katherine Bauer said if the Conservation Commission approves this, they don't need anyone to come back. If the Commission didn't approve, she didn't know.

L. Horning said if the Commission didn't approve, they would have to review the information.

J. Dargie said, because they are pending their approval.

L. Horning agreed, saying the applicant would not have an approval if they say no.

L. Horning made a motion to send the applicant back to the Conservation Commission. If they approve or don't change their decision based on the seven questions there is no need to come back to ZBA; but if they make any changes or don't approve after re-considering the seven questions then the applicant would have to come back before the ZBA.

J. Dargie seconded.

All voted in favor. The motion passed.

Is the special exception allowed by the Ordinance?

L. Horning – yes; Z. Tripp – yes; J. Dargie – yes; M. Thornton – yes F. Seagroves – yes

Are the specific conditions present under which a special exception may be granted?

M. Thornton – yes; J. Dargie – yes; Z. Tripp – yes; L. Horning – yes; F. Seagroves –yes

F. Seagroves informed the applicant he was approved pending the findings of the Conservation Commission.

The applicant asked if he was entitled to a copy of the packet provided in the public comment and was told he could obtain one by contacting the Office of Community Development.