

**PUBLIC HEARING & BUSINESS MEETING
DRAFT**

A. CALL TO ORDER: The Chairman called the meeting to order at 7:07 p.m.

B. ROLL CALL

Members: J. DeLeire, Chairman; S. Bryant, Vice Chairman; L. Job, member; M. Call, member

Alternate Member(s): A. Dittami

Non-Members: M. Sikorski, Building Inspector; L. Jordan, Town Secretary

Not Present: Patricia Young, Alternate; S. Almeida, member.

4 members are available and 1 alternate present. The Chairman designated A. Dittami as a voting member for tonight's meeting.

C. PUBLIC HEARING, continued from 6/25/2020:

Case #20-02: Application from **NM Cook Development LLC** for a variance to the terms of Article III, Section 8.5 and asks that said terms be waived to permit a 10-foot setback in Zone BUS at property located at 19 Lafayette Road (Map 7, Lot 68).

N.M. Cook Development LLC, owned by Miles Cook, restated that his request is for a 45-foot set-back. The Board acknowledged that at the previous meeting, they reached a consensus, after discussion, that it is a 45-foot set-back, as indicated in the body of the application and site plan, not the 10-foot set-back as indicated in the original application for Case #20-02.

R. Orvis and John P. Hayes III CSS, CWS are in attendance to present their findings as wetland, soil scientists and septic system designers for 20+ years. Miles Cook is presenting for himself at this hearing, even though he was represented by H. Boyd of Millennium engineering at the previous meeting.

R. Orvis is adding to his previous report with a presentation. He handed out a 1971 aerial photo before the hotel and a 1992 photo where the topography has changed. In the 1971 photo the land is entirely dry, but there are signs of wetland in 1992. The Building Inspector presented information that the septic system for the abutting hotel was installed in 1985.

J. Hayes first commented that the soil type was "Eldridge" soil, which is common in New Hampshire dry land/ inland but not marshes. Based on these photographs and other data, he feels that all kinds of construction has happened in addition to the septic system, land filling, digging etc. He feels that the topography has been altered by human action in many ways since 1971.

J. Hayes reported that he feels the wetland area in question, an area 30 feet wide, 90 feet downhill from the abutter's septic system, is resultant of the hydrology created by the leakage of the septic system. He pointed out a line of cat-tails that follows the flow out of the tank that can only thrive with consistently wet conditions as a visual indicator of this field. In July 2020, he took water

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samples and took them to a laboratory in Concord. The fecal and coliform levels were extremely high, about double that would close a beach and at a level that does not occur naturally. In his opinion, the data speaks to the septic system contributing hydrology as well as contaminating the soil.

J. Hayes and R. Orvis concur that the septic system would also not have been placed where it was if there were wetlands. The area is not flat, and the soil specifications/standards were different in 1985 than current. Thus, some tell pits showed a watermark but overall, the highest waterpoint is utilized then to set the system. The method used today would result in a smaller system in terms of area that would be less of a mound.

A. Dittami asked if it was the septic system or the construction that caused the wetland? J. Hayes reiterated that there are three criteria: soils, vegetation and hydrology, and that the 30' x 90' contaminated area is just the plume from the system leak. He claims that the system is the source of hydrology. He also confirmed that there are several manmade topography alterations. He claims all the evidence points that at a minimum the soil E. coli and coliform levels and the general hydrology source was created but for the septic system failure alone. This addressed the specific question by the Board.

A. Dittami proceeded to inquire J. Hayes whom he represents. He replied that was irrelevant, even though Mr. Cook hired him for this report, because he has ethical clauses as a soil scientist, and would produce the same opinion and data set whether hired by Cook, Town or State. S. Bryant reminded all the Zoning Board of Adjustment did not make this a specific requirement for the applicant, but appreciated the answer.

The Building Inspector, who had run the plans, etc. by a certified Army Corp. Engineers Civil engineer via email, referenced test pits 1 and 6. He wanted to discuss test pit 1 as that had caught the attention of his colleague. He mentioned that the civil engineer's first impression, looking at the plans for the original 1985 septic system, is that it was a wetland. The Building Inspector posited if the soil was good, why was the system designed above ground and required to be on top of the ground?

R. Orvis took a look at the plan and answered that in 1985 water level averaging (current practice in the 21st century) had not been implemented, so systems had to be set four feet above the highest point. Additionally, a large leach field was required that had to be leveled. That system could be installed much more compacted and lower today.

Having heard a sufficient amount of information from the two scientists present, the Chairman then asked M. Cook to show him where he would want the 45-foot line to be for Board consideration of Variance. Vice Chairman S. Bryant complimented J. Hayes on the thorough degree of his report. Mr. Cook referenced a plan with a red circle indicated that only the driveway would be in the setback.

A. Dittami then asked J. Hayes to look in detail at the proposed driveway plan, and if the applicant has taken enough steps in design to keep drainage away from the existing wetland and his Stormwater mitigation arrangement. To mitigate any effect on the wetland, M. Cook communicated

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the driveway would be curved so the storm water will go into N.M. Cook drainage mitigation system, and away from the wetland, thus not affect it.

The Building Inspector agrees the septic system is leaking, and as Health Inspector, a role he also performs, the information will go to hotel to inform repairs and the soil contamination and septic system failure would be resolved through those channels as a separate issue. The Building Inspector commented that once granted a variance, that the building plan will be altered to squared off. M. Cook confirmed that if the Board would grant the variance, he will have updated plans before the Planning Board for the next application deadline.

M. Call wanted to clarify if the consensus was if it is a man-made, contiguous wetland. R. Orvis and J. Hayes concurred that “artificial” is superior descriptive terminology to “man-made”, and that yes, either way, the wetland is contiguous.

S. Bryant stated he feels that there are unique and special circumstances in this case, and asked the Board to consider any conditions that would be required if a variance were to be granted. S. Bryant in particular would require the engineer to stamp the Stormwater Management system onto the plan and final mylar.

The Building/Health Inspector asked both scientists their professional opinions on rectifying the septic system failure. In particular, he was curious as to if there would be any method to fix the septic system without taking it apart. R. Orvis commented rebuilding that system is a ~\$500,000 project, and also it needs to be redesigned in the current space. However, he commented that the State would likely be helpful and generous with exemptions to bring to code such an old system to mitigate the issues and contamination.

The Chair said that is an unfortunate circumstance for the hotel to repair, but that should not affect the Cook application. The Chair said that the applicant has at this time brought forth much more compelling evidence to allow the Board to bring this matter to discussion and to vote.

PUBLIC COMMENT

The Chair opened the meeting to Public Comment.

The Secretary inquired as if to there were any remote public comments submitted through Cisco Webex, and there were none. No members of the public were present.

The Chairman closed public comment.

The Board discussed the application further and moved onto the five criteria of granting a variance. A. Dittami then made a motion to approve the variance requested, with conditions, and stated his opinions, relative to the five criteria for granting a motion, as follows:

1. **The variance will not be contrary to the public interest.**

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The condition on the abutting property was created by and is as a direct result of the failure to act by an abutter. But for this failure the applicant would have no need of a variance and arguably could have gone forward without making the application. The applicant, however, acted in the best public interest by bringing the matter forward immediately and honestly, which, brought a matter of public interest (third party contamination of the soil) in front of the appropriate Town authorities.

2. The spirit of the ordinance is observed.

The spirit of the ordinance is to protect public health, prevent the development of structures and land uses which will contribute to pollution. The evidence presented showed that the applicant's proposed mitigation measures will accomplish the spirit of the ordinance, as the wetland will not be affected. Further, the applicant bringing the matter before the Town will result in steps being taken to bring the abutting property back into compliance with the spirit of the ordinance.

3. Substantial justice is done.

Variances go with the land. We should not hold victims guilty for the crime that was committed by another, i.e. if the neighboring septic system changed the hydrology of the lot. The applicant would not have needed a variance but for the failure of the abutter, over whom he had no control, to act responsibly. To hold the applicant hostage to or punish him (the property) for the actions of the abutter would be unjust. Granting relief as requested is the only way substantial justice can be done.

4. The values of surrounding properties are not diminished.

The development of the property as proposed would enhance the value of the surrounding properties.

5. Literal enforcement of the provision of the ordinance would result in an unnecessary hardship.

The condition on the abutting property was created by and is as a direct result of the failure to act by an abutter. This failure caused the "accidental" formation of a wetland area were, according to the expert testimony, no wetland area would have or could have developed. This unusual or special condition has restricted the use of 45-feet of the Applicant's property. But for the effect on the abutting land of this septic system failure, the Applicant would have no need of a Variance as the constraints of the wetland setbacks would not put any limitation on the development of this property.

MOTION: To approve a variance to the terms of Article III, Section 8.5 and that said terms be waived to permit a 45-foot setback in Zone BUS at property located at 19 Lafayette Road (Map 7, Lot 68), **subject to the following conditions:**

1. That a signed Certified Engineering Plan for storm water and wetland mitigation, which include the Building Inspector's previously provided recommendations to the applicant's Engineer, as well as all of the existing mitigation measures shown on the plot plan, be

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developed (in line with what was presented to the Zoning Board of Adjustment at the meeting).

2. That said plan be presented to and approved by the Building Inspector, and
3. That the project be built and the property be developed in strict accordance with the Variance Application and accompanying plot plan that was submitted to and acted on by the Zoning Board of Adjustment.

MOTION: A. Dittami
SECOND: S. Bryant
UNANIMOUS

D. REVIEW AND APPROVAL OF PREVIOUS MEETING MINUTES (6/23/2020)

The Board amended the previous meeting minutes from June 25, 2020.

A sentence was added on page 3, paragraph 1:

A. Dittami asked R. Orvis if he had a NH wetlands license and, if so, for how long did he have it, to which he replied affirmatively and since 1999. A. Dittami also asked what testing has he done to determine hydraulic conditions of that soil. ***R. Orvis answered, "None."***

MOTION: To approve the minutes as amended.

MOTION: J. DeLeire
SECOND: L. Job
UNANIMOUS

E. OTHER BUSINESS

No other business was discussed at this time.

F. COMMUNICATIONS TO BOARD MEMBERS

No communications were made to board members at this time.

G. ADJOURN

MOTION: To adjourn the meeting at 8:23 p.m.

The next meeting of the Zoning Board of Adjustment is scheduled for Thursday, August 25, 2020