

**Town of Milford  
Zoning Board of Adjustment Minutes  
March 15, 2007  
Brian & Winnie Harding  
Case #8-07  
Variance**

Present:        Len Harten, Chairman  
                  Kathy Bauer  
                  Fletcher Seagroves  
                  Ron Pieper, Jr.  
                  Steve Bonczar, Alternate

Absent:         Bob Levenson

Secretary:     Kathryn Parenti

The applicants, Brian F. and Winnie W. Harding, owners of 16B Johnson Street, in the Residence "A" district, Map 29, Lot 76-2, are requesting a variance from Article VI, Section 6.023.D to permit the construction of a dwelling three (3) feet into the wetland buffer.

Motion to Approve: \_\_\_\_\_

Seconded: \_\_\_\_\_

Signed: \_\_\_\_\_

Date: \_\_\_\_\_

L. Harten, chairman, opened the regular meeting of the Milford Zoning Board of Adjustment at 7:30 pm. He then stated that the hearings are held in accordance with the Town of Milford Zoning Ordinances and the applicable New Hampshire statutes. He continued by informing all of the procedures of the board. He then introduced the board. He continued by reading the notice of hearing into the record. He then read the abutters list; Brian & Winnie Harding, applicants, 16B Johnson Street and Bernerd Harding, 16 Johnson Street were present. He then invited the applicants to come forward to present their case.

Artie Byam, of Monadnock Survey stated he would be representing the applicants. He handed out copies of photographs of the site and a site map with the overlap into the wetland buffer colored in blue and the wetlands colored in green.

Daniel Pratt, builder of the home, stated the applicants were present tonight due to his mistake. He said he knew of the wetland buffer set back and tried to push close to the tree line. He did miscalculate when he dug the foundation hole. He had gotten as far as the sheet rocking of the new home when the bank measured for a certified foundation plan for the mortgage. This was the point where it was discovered the house was in the wetland buffer. He then went to discuss the situation with Kevin Lynch, building inspector.

L. Harten asked if a certified foundation plan is required before construction of a foundation begins.

D. Pratt stated he was used to larger projects and never saw the plot plan of this lot. He stated he measured from the seasonal stream and wanted to stay close to the trees. He thought, at one point, the wetland buffer was twenty (20) feet and not twenty-five (25) feet.

L. Harten asked when the certification would normally be done.

D. Pratt stated the certified foundation plan is not always required. He noted, from the photos, that the impacted area does not look like wetlands; it looks like and is a culvert.

A. Byam said the driveway had been there a number of years and the wetland buffer area there was very narrow. He stated there was a slight depression where the water flows and the wetlands ends at the culvert, as shown on the plot plan. The house is twenty-two (22) feet away from the culvert. He also stated that nothing coming off the roof would damage the wetlands. The wetland buffer is a manmade culvert. He also stated if they had to move the foundation, that process would cause much more damage than had already been done.

S. Bonczar asked how much of the buffer was impacted since the house was three (3) feet into the buffer.

D. Pratt stated that an additional four (4) feet was disturbed in the buffer. He stated he had kept the fill away from the wetland side of the foundation.

L. Harten asked if the disturbed area had been restored.

D. Pratt replied the area was graded but they had not put down loam and seed.

L. Harten asked A. Byam to go over the five criteria for an area variance request.

**1. The proposed use would not diminish surrounding property values because:**

A. Byam stated the three (3) foot incursion into the buffer is not apparent from Surrounding properties and therefore would not cause diminution of property values.

S. Bonczar asked him to clarify.

A. Byam replied that you don't see the impact from any other homes in the area.

L. Harten clarified the because of the minimal impact, there is no diminution of value of abutting property.

**2. Granting the variance would not be contrary to the public interest because:**

A. Byam stated leaving the house in place would avoid further disturbance of the buffer that would occur if the house had to be moved. It will not alter the character

of the neighborhood.

**3. Denial of the variance would result in unnecessary hardship to the owner because:**

**a. The zoning restriction as applied to the property interferes with the reasonable use of the property, considering the unique setting of the property in its environment such that:**

A. Byam stated the cost to move the house would far outweigh any gains to the public.

D. Pratt stated the house was completely finished.

**b. That no firm and substantial relationship exists between the general purposes of the zoning ordinance and the specific restriction on the property because:**

A. Byam stated the cost to move the completed house would be astronomical as there is no way to pick it up and move it.

**4. Granting the variance would do substantial justice because:**

A. Byam stated the wetland buffer would not be disturbed any further; they have disturbed the least amount of buffer they could.

**5. The use is not contrary to the spirit and intent of the ordinance because:**

A. Byam stated granting the variance would avoid further disruption of the wetlands buffer.

L. Harten clarified by stating there is no other reasonable way to solve this problem at this point.

R. Pieper asked if the applicant could walk the board through the sequence of events.

A. Byam stated Monadnock Survey did not have anything to do with the layout of the property. D. Pratt measured from the flagged wetlands from the 2005 subdivision that was completed by Monadnock Survey.

S. Bonczar asked if some of the flags had been moved.

A. Byam stated it was not easily apparent where the line was; some flags were on the ground.

L. Harten asked if the board had any questions.

S. Bonczar stated he had some issues and concerns that this had happened. He felt the builder should have known better. He stated impacting the wetlands buffer requires a variance and most applicants ask to do that before construction. This is a situation where the request comes after the fact and he was disturbed by it.

L. Harten reminded him the house would sit on the lot and not in the buffer zone, in normal conditions.

S. Bonczar stated he was not saying it couldn't be there. It could have been prevented if the house was placed differently. The applicant is asking for relief from the wetlands buffer and he was annoyed that this was an issue, either by mistake or carelessness.

L. Harten stated they would not have needed relief if the foundation was put in the correct place to begin with.

Bernerd Harding, Brian Harding's father and abutter, stated he had been involved with the land since 1948. His grandfather had bought the land in 1890 and his wife and her sister inherited the land in 1980 and he and his wife purchased the sister's half in 1980. He stated the land was all pasture before the high school was built and since the school was built, there are now three places where runoff comes onto his land. So much water came down Johnson Street that culverts had to be installed under every driveway. He stated no wetlands were

shown in the survey he had done in 1990. In his opinion, there is no wetlands area in that spot; it's just a culvert.

L. Harten asked if it was seasonal.

B. Harding replied yes; when it rains, the water from the high school fills up the culvert. He stated he was on the committee to recommend buying the land for the high school as well as the first Zoning Board of Adjustment. He stated again that the affected area is not a wetland but is runoff from the high school.

L. Harten asked if there were any more questions.

R. Pieper asked D. Pratt how the situation was discovered.

D. Pratt stated he had walked the property with Brian Harding and at the time, the land was green grass and leaves. They identified the wetlands in the rear and saw the culvert. He then measured from the center of the wetlands area and made the hole for the foundation twenty-six (26) feet from the wet area. He noted the area was not soaking wet and there were no ferns. He positioned the house by what he and B. Harding discussed and because of the lack of water on the side and the obvious wetlands below. He stated he did not put any dirt on the culvert side of the foundation; he just added enough fill to run his tractor by on that side.

R. Pieper asked if there were wetlands markers.

D. Pratt replied there were some on the trees down below.

R. Pieper asked if there was a site inspector to look at the location of the foundation before digging began.

D. Pratt stated the foundation drains and water proofing were inspected by the Milford building inspector. He stated the bank required the certified plot plan.

R. Pieper asked if there would be any other activity in the buffer, any sheds.

D. Pratt said there would be six (6) feet of lawn on that side and there would not be any placement of a shed there.

K. Bauer asked if the flagging could have been more obvious.

D. Pratt stated the property was surveyed a while back and they were aware of the driveway and he noted the driveway did not cross any wetlands. He stated he didn't see any pink and black flags in the culvert area.

A. Byam said they would have been placed on brush or branches in the area.

K. Bauer stated if the proper flags were there, this issue would not have happened. She stated she agreed with S. Bonczar, that this was an unfortunate thing to have happen. She said it was not fair to others who follow the rules but she did say it was not deliberate.

L. Harten asked who had dug the foundation footings and if it was dug wider than the foundation.

D. Pratt stated it was Dan Homeleski who had done the work. D. Homeleski had over dug all around to square the foundation pieces. He said he did not notice where the foundation was laid out. He did notice the foundation was close to the banking; he normally likes more space to shovel in.

R. Pieper asked if he and the homeowner had realized, after measuring twenty-six (26) feet from the wetlands and noting the buffer area was narrow, that they would be building their home abutting the buffer.

Brian Harding replied he knew the buffer was there and they tried to stay clear of it. He planned to plant grass there and then let it go natural.

D. Pratt stated they were planning on adding a garage on the other side, later on.

S. Bonczar asked how far from the other side of the property line the house was placed.

D. Pratt replied the distance was fifty (50) feet.

S. Bonczar wondered if they wanted to add a garage over on that side, could they have moved the house over since there was more than enough space; three feet would not have made a difference, on that side.

L. Harten stated they weren't trying to cheat by putting the house over the buffer line.

Brian Harding stated in the 1990 survey, done by Monadnock; no wetlands were indicated on the plan at that time. His contractor put the culvert under the driveway so the trickle of water would run under and not over the driveway. He said there were no wetlands until the parking lot of the high school was installed.

L. Harten reiterated that it was a manmade wetland. He asked if there were any additional comments or questions from the audience. He then closed the public portion of the hearing.

K. Bauer stated since the applicant had originally applied for an equitable waiver and were told to change it to a request for a variance, she felt it was pertinent to know why and asked if L. Harten could read K. Lynch's explanation into the record, which he did.

L. Harten then stated the board should establish the type of variance requested. The board voted unanimously that this is a request for an area variance. He then read the five (5) criteria for discussion.

**1. Could the variance be granted without diminishing the value of abutting property?**

No one had any problems with this item.

**2. Would granting the variance not be contrary to the public interest?**

R. Pieper stated the test is to show granting the variance could cause no harm to the public. In this case, there is minimal encroachment and the buffer is down hill from the wetland and it won't impede the water from flowing into the wetland; water may build up on the side of the house but he didn't see any harm to the public interest.

K. Bauer felt there would be no harm to the public interest.

S. Bonczar said the only harm is in the violation of the ordinance. He felt it was a weird situation that this was after the fact and not before, as normally occurs. He felt they were not following the proper processes.

K. Bauer stated the questions are pertaining to the ordinance that K. Lynch had broken out in the application. The board can be dismayed by this but the encroachment does not cause harm.

F. Seagroves felt it was not contrary.

L. Harten agreed; the wetland buffer is not significantly adjacent to the wetlands, is minimal and was created by the culvert system as a result of the drainage from the high school.

**3. Would denial of the variance result in unnecessary hardship taking the following into consideration:**

**a. The area variance is needed to enable the applicant's proposed use of the property given the special conditions of the property.**

**b. The benefit sought by the applicant cannot be achieved by some other method reasonably feasible for the applicant pursue, other than the area variance.**

S. Bonczar stated for a) under normal conditions, no, there is substantial room for the house on the property and for b) there is no other feasible method to correct the situation since the house is complete. He felt it was difficult to answer since the questions were not written for things that have already happened.

F. Seagroves agreed to both of S. Bonczar's comments.

K. Bauer stated that for a) the house usually is not there and because of this b) would cause substantial hardship to move the house.

R. Pieper stated there are special conditions present and that is why they are present tonight. For b), since the house is substantially completed, it would not be financially feasible to move the house.

L. Harten stated for a), it is what it is; the house is located in a buffer zone and that results in a special condition that would not have occurred if the house was located in the proper location. For b), he felt that there is no other feasible way to correct this; to demolish the house would be financially unfeasible.

**4. Would granting the variance do substantial justice?**

K. Bauer stated she agreed with the applicant; there would be more destruction in the buffer if the house was to be moved.

S. Bonczar said it is what it is and it's done.

R. Pieper said the test is to determine if denying the variance would be a gain to the public; in this case, the gain would be to send a message to the public to be more careful to measure before construction begins. He doesn't see that moving the house would be a gain to anyone so substantial justice would be done if the variance was granted.

S. Bonczar agreed with K. Bauer; it is what it is.

F. Seagroves agreed.

L. Harten also agreed. There is no need to set an example by making the applicant move the structure. He felt there was no malice intended and mistake was made. This is an attempt to rectify the mistake.

**5. Could the variance be granted without violating the spirit of the ordinance?**

K. Bauer stated the building is there and if the board asks the applicant to move the building; it would further disturb the buffer. Since it's already done, it does not make sense.

S. Bonczar wanted to reiterate that they have to look at this differently because the house is already built and has been built in a wetland buffer. He felt the ordinance has already been violated but it would not be violated any further. He felt they had to make the best of what went bad.

F. Seagroves agreed with S. Bonczar.

R. Pieper said the spirit of the ordinance is not to bar disturbances to buffers and wetlands but to manage them. There is some latitude in this case as there is disturbance; if there was more disturbance, it would be a different case. Here the amount of disturbance is tolerable; three (3) feet in from the edge of the wetland buffer is not contrary to the ordinance.

L. Harten agreed and said the spirit of the ordinance is there to protect the wetlands and the buffer zone. It would create a greater problem to correct the violation.

L. Harten asked if there were any more comments. Being none, they proceeded to vote.

**1. Could the variance be granted without diminishing the value of abutting property?**

K. Bauer – yes      R. Peiper – yes      F. Seagroves – yes      S. Bonczar – yes

L. Harten – yes

**2. Would granting the variance not be contrary to the public interest?**

K. Bauer wanted the board to be clear that if they voted yes on this question, the answer is yes, it would not be contrary.

R. Pieper – yes    F. Seagroves – yes    S. Bonczar – yes    K. Bauer – yes

L. Harten – yes

**3. Would denial of the variance result in unnecessary hardship?**

F. Seagroves – yes    S. Bonczar – yes    K. Bauer – yes    R. Pieper – yes

L. Harten – yes

**4. Would granting the variance do substantial justice?**

S. Bonczar – yes    K. Bauer – yes    R. Pieper – yes    F. Seagroves – yes

L. Harten – yes

**5. Could the variance be granted without violating the spirit of the ordinance?**

K. Bauer – yes    F. Seagroves – yes    R. Pieper – yes    S. Bonczar – yes

L. Harten – yes

L. Harten asked for a motion to approve case #8-07, request for a variance.

R. Pieper made the motion.

K. Bauer seconded.

**Final Vote:**

K. Bauer – yes    R. Pieper – yes    F. Seagroves – yes    S. Bonczar – yes

L. Harten - yes

L. Harten reminded the applicant of the thirty (30) day appeal period.