

**TOWN OF CHESTERFIELD, NH
PLANNING BOARD**

Monday, April 3, 2017

Present: Davis Peach, Joe Parisi, John Koopmann, James Corliss, Joe Brodbine, Richard Aldrich, and Jon McKeon

Call to Order

James Corliss called the meeting to order at 7:03

Seat Alternates

Richard Aldrich seated in place of Rolland Vollbehr

Review of the Minutes

March 20, 2017

Joe Parisi motioned to accept the minutes as amended from March 20, 2017. The motion was seconded by Davis Peach and passed unanimously.

Appointments

Anderson NH, LLC - This is a continuation of an application for Site Development Review and Condominium Conversion of property located at 45 South Shore Road (Map 5A, B-9 and A-47) consisting of approximately 1.3 Acres in the Residential Zone.

Corliss noted that he was not here for the last meeting. Corliss noted he has read the minutes and read a settlement agreement and an application many years ago that was started and that was never signed off by the Planning Board because of conditions not met. Tom Hannah noted that this is not a correct statement. McKeon noted that Hannah has stated that a Plan was not found in the Town Offices and he has provided what he believes to be the plan that should have been signed.

Hannah noted that the Planning Board issued a Notice of Decision on 5/8/02 and the plan provided has a revision date of 5/7/02. Hannah noted that there is no question that this is the plan that was approved.

Peach noted that at the last meeting it was discussed that the Board was going to talk to DES and also to an Attorney . McKeon noted that he sent out questions to the NH Municipal Association and then Corliss also sent questions to another Attorney. Hannah noted that he was not informed of the questions or their answers.

Corliss noted that he read the minutes of the previous meeting and formulated a set of questions for the town attorney. Corliss read the email which states:

In accordance with your request for a legal opinion on Planning Board procedures on a condominium conversion, I provide the following:

Question: As LDR 201.4 defines condominium conversion as a major site development, is the PB required to apply regulations as of the current application date?

Answer: The short answer to that question is most likely yes. New Hampshire law states, “[n]o proposed subdivision or site plan review [regulations] or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 674:4 I(d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment.” *See N.H. Rev. Stat. Ann. §676:12 (VI)*. Basically, the purpose of this provision in the statute is to prohibit efforts to institute regulations or ordinances that would prohibit and/or discourage certain development once that application is pending before the Planning Board [commonly referred to as a “grandfather clause”]. *See Rallis v. Town of Hampton Planning Board, 146 N.H. 18 (2001)*. This is one of the rare occasions that the Planning Board would not apply the current regulations to any pending application.

Question: Would there be any basis for not applying current standards to a new application?

Answer: Possibly. Every Planning Board, within their regulations, must provide for the opportunity for waivers from such. *See N.H. Rev. Stat. Ann. §674:44*. In review of Chesterfield’s Land Development Regulations, the Town has clearly set forth provisions that do allow for this type of relief. With that said, the Board’s decision to grant waivers should be the exception, rather than, the rule when faced with such requests. In fact, the State legislature only provided two situations in which such relief may be granted:

- (1) *Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations; or*
- (2) *Specific circumstances relative to the site plan, or conditions of the land in such site plan, indicate that the waiver will properly carry out the spirit and intent of the regulations. See Id. at (III)(e).* [These conditions are for site plan review, however, subdivision review has very similar standards for waivers.]

Aside from the Planning Board granting certain waivers or a case of grandfathering (as discussed in response to the first question), I don’t know of any other reason why the Planning Board would not apply current regulations to a pending application for site plan review.

Question: Does the apparent failure to comply with past agreements affect the current proposal?

Answer: No. The courts has routinely held that neither the character of an applicant nor his/her/its prior conduct should have any role in any land use board’s decision on an application or appeal. Basically, the Board must examine this application as though in a vacuum where nothing other than the proposal’s compliance with the applicable regulations serves as the basis of the Board’s decision. The applicant may have various zoning violations throughout Town and may have violated several site plan/subdivision approvals. The Board must ignore all of that current or past conduct and view this application as though the Board had never seen or heard of this applicant before. I realize that this can be difficult, especially if the applicant is a repeat offender, but any

denial or conditional approval may be subject to a successful legal challenge if the Board bases any of its decision on conduct or character as opposed to the merits of the proposed project.

Question: We have a previous plan that was approved with conditions in 2001 that were not met and the final plans were not signed. As it has been more than 5 years can we assume that that approval is not in force today?

Answer: Yes, but for reasons other than the application of the vesting statute. If the plan was not signed by the Board (and by extension recorded) and/or conditions precedent were not met then, I don't see that the applicant has "final" approval. Basically, the plan is in limbo as any attempt to get it signed now will likely require further review of the proposal under current regulations as well as a review of compliance with the prior conditional approval. In essence, the applicant would likely have to start over in order get the plan signed by the Board at this stage.

In terms of the application of the vesting statute as set forth in RSA 674:39. Within that statute, a plan must first receive final approval from the planning board and be recorded at the applicable registry of deeds. Further, the five year exemption from compliance with any new land use regulation only applies if the development: a) begins "active and substantial" work on said project within 24 months of approval or as provided in any conditional approval; b) the project remains compliant with public health regulations and ordinances; and c) the project complies with all current regulations at the time of approval/recording. *See N.H. Rev. Stat. Ann. §674:39.* In the case at hand, the applicant did not get the plan signed nor recorded [the initial steps for protection under the RSA 674:39] so, the vesting statute has no bearing on this situation. The applicant basically never even got to the first step of this statutory framework in order for such to apply.

Corliss asked if the board would like to make the email public information.

Joe Brodbine moves to make the email public. The motion was seconded by Davis Peach and passed unanimously.

The board would like Lachenal to send the email to Hannah. Parisi noted he could forward the email to Hannah now. Parisi forwarded the email to Hannah.

Corliss noted that from the email it appears that the board needs to treat this application as a new application.

Corliss read the email from NH Municipal Association which states:

The PB in chesterfield has an application to discuss that is asking to convert 13 seasonal cottages and one main house over to condominium use. there are several concerns with this piece of property

one it is a non conforming use (grandfathered as it was in existence before the zoning reg was adopted), the lot is non conforming but grandfathered for the same reason and the use. there was a court ordered settlement in 2002 between the town, a previous owner and abutters. there was a document describing conditions of the agreement and a site plan. The Current applicant and the town both agree that the 2002 site plan was not complied with completely and there are items not followed through with from the plan and other items installed not to the plan.

Now for our question

Can the planning board now insist that the site modification be remedied to the 2017 standards as they were not completed prior to this application

Does the PB have the latitude to revisit the site overall, not just those areas that were not complied with on the 2002 plan?

Does the board have any authority to impose further restriction to this property. the applicants attorney is stating that it is a simple swap as a type of use but the use has not changed.

is there nothing the board can do with the change of ownership type i.e. single ownership rental of cabins now to a condominium ownership? I am attaching a memo from attorney Hanna on his version.

The received response is as follows:

On your first question, I think you're referring to new regulations that were adopted at your meeting this year. Pursuant to RSA 676, VI, this application would not be subject to newly-adopted regulations if notice under RSA 676:4, I(d) was given prior to the first legal notice of the proposed change:

VI. The provisions of paragraph I shall not apply to any plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) prior to the first legal notice of a proposed change in a building code or zoning ordinance or any amendment thereto. No proposed subdivision or site plan review or zoning ordinance or amendment thereto shall affect a plat or application which has been the subject of notice by the planning board pursuant to RSA 676:4, I(d) so long as said plat or application was the subject of notice prior to the first legal notice of said change or amendment. The provisions of this paragraph shall also apply to proposals submitted to a planning board for design review pursuant to RSA 676:4, II(b), provided that a formal application is filed with the planning board within 12 months of the end of the design review process.

If such notice had not been given, the application would be subject to any changes adopted this year in your zoning/regulations.

As to your other questions: I do agree with Attorney Hanna that, based on RSA 356-B:5 and the *Town of Rye Bd. Of Selectmen v. Town of Rye Zoning Bd. of Adjustment*, this change in use cannot be denied on the basis that it is being changed from seasonal rentals to condominium ownership. Therefore, I do not believe, on that basis alone, the planning board could revisit the 2002 site plan and impose new conditions. That being said, any conditions in the original site plan approval that were never complied with can be made part of the new approval. Whether new conditions can be placed on the plan will depend on the extent of the change. If, for example, this change to condominium ownership was also going to entail a change from seasonal use to year-round living, the board may be able to take the impact of that change into consideration—e.g., whether the units are fit for year-round living, impact on schools, etc. Another factor to take into consideration is whether Chesterfield has included converting to a condominium in its definition of “subdivision,” meaning that this application would also need subdivision approval.

This is just general guidance and information. The planning board will certainly need to consult with town counsel before proceeding.

Corliss asked if the board wanted to make it public. McKeon noted that the board cannot have a conversation, discussing the content of the document, about a privileged document without making it public.

Val Starbuck noted that she spoke at the last meeting and asked about changing a non-conforming use into another non-conforming use. Starbuck noted that currently the rentals are grandfathered, and they are requesting to change it to another non-conforming use. Starbuck noted that she did not hear any mention of this question being posed to legal counsel. Peach noted that this question fell through the cracks.

Parisi asked that based on the things on the table from the applicant and attorneys, is this application able to be viewed by today's standards? Corliss noted that from what he has read, it appears the board must take this as a current application under current regulations.

Peach stated that the board needs to find an answer to the question raised by Val Starbuck regarding non-conforming use being converted into another non-conforming use.

Charlie Donahue noted that he and his wife implore the board to take their time with this decision and make a thorough evaluation because there is a lot at stake.

Charlie Paquette noted that there is a lot of internal discussion on the board and it is pretty confusing and hard to hear from the audience.

Hannah noted that they applied for a Major Site Plan and a subdivision as part of the application. Hannah noted that the applicant has agreed to restore the site to the approved plan from 2002 and according to State law, mere change in ownership from rental to ownership does not trigger the right to deny an application on that basis. Hannah noted that the applicant has agreed to make right what was not done on the site or what was done that was not allowed. Hannah noted that the current applicant purchased the property in September and is trying to do what the law allows him to do. Hannah noted that the board needs to keep this reasonable and accept the fact that the plan that was provided as C-2 in the application with a revision date of May 7, 2002 is the approved plan. Hannah noted that this previously went to court and the decision came down, then the site plan review and there were drainage studies done and all of that resulted in the Notice of Decision in 2002. Corliss noted that for a new application we need to apply current rules and noted that he assumes they are different from the rules 15 years ago. Hannah noted that if this board is making the decision that there is no approval of the 2002 plan, then he will need to act on that as there is irrefutable evidence that the May 7, 2002 plan is the approved site plan. Hannah noted that it would be fair for the board to start from the premise that the 2002 plan is the current site plan. If that is done and the boards previous acceptance as complete enough for review, the mere conversion from rental to ownership is not something that can be denied for that reason. That leaves a 2002 plan with a couple of things that were not done that the applicant will make happen.

Joe Parisi noted that we have received three (3) different opinions from three (3) different attorneys. Parisi noted that if the board put the legal issue aside, the board would look at the application in the 2017 standards and in parallel deal with the legal questions. McKeon noted that the board needs to decide if they are dealing with an unsigned plan or a signed plan from 2002. McKeon noted that if it is viewed as a signed plan then it brings everything back to the restrictions and guidelines when it was signed. If it is treated as not signed then the board starts at 2017. Parisi noted that this board is not going to make the legal call and this is a new application that should be treated as a new application for the best interest of the Town. Joe Brodbine noted that if we view it at the 2017

Standards and it gets approved, the legal issue is moot. Peach noted that the first thing that should be answered is the question raised by the public regarding allowing a non-conforming use to change to another non-conforming use. Richard Aldrich noted that it seems there is a court decision that set all of this up and everyone agreed but they did not say that you can make changes whenever you get around to it and he believes the 2002 plan is out the window.

Charlie Donahue noted that when the applicant purchased the property, a title search must have been done and therefore the court order would have been found and it does reference a site plan, so having to adhere to a site plan was not a surprise.

Val Starbuck noted that some things in the plans such as the notion of people owning those little houses and the idea of not renting dock space lends itself less risk to the lake. Starbuck noted that overall, she is for the project but wants the Town to proceed in ways that are lawful and protect the lake.

Hannah noted that there was a site visit by DES on March 28th. There were people from Wetlands and shoreland protection, the selectmen, code enforcement and the conservation commission. It was noted that there is a septic system that is in compliance with a modern system. Hannah noted that RSA 485 A:29 deals with sewage disposal systems. Hannah noted that the applicant will have to apply for the State subdivision approval from DES. Hannah stated that if the subsurface system is less than 20 years old then it will be reviewed for viability and may be considered adequate. Hannah noted that the DES representative did make suggestions on site and that information was incorporated into a memo written by Rob Hitchcock. Hannah handed out a copy of the memo written by Hitchcock. Hannah noted that there are multiple regulatory places in this kind of application. Hannah noted that DES wants to see approved plans from the Town prior to an applicant coming to them. Hannah noted that the applicant is not avoiding DES, they are the next step. McKeon noted that the board has the memo, but nobody at the table was at the meeting to be able to speak to the accuracy of the memo and drawing.

Joe Parisi motioned to move forward with the Andersen application holding it to the 2017 standards. The motion was seconded by Jon McKeon and passed unanimously.

Corliss noted that this will be treated as a new application without the history. Corliss noted that there are a number of requests for waivers and the board will look them over as they come up. Hannah asked if that vote disavows the 2002 approval. Corliss noted that it is the boards opinion that this is a stand alone application.

Rob Hitchcock noted that the clean solution septic system is as good as you can get on the market today. Hitchcock noted that the lot loading has not changed in the last 20 years and he does not see how DES can find anything other than this being acceptable. It was noted it was just inspected after purchase of the property. Hitchcock noted that standards have not changed, regulations may have changed, but the standards and practices have not changed.

Susan Donahue noted that in order to get approval from the state, there must be no additional loading, but a Laundromat would be considered additional loading. Donahue noted that they demolished and old garage, and put a new one up which now looks like a cabin and are calling it a laundry mat.

Hannah noted that the building being referred to has never been used as a garage, it has always been called a garage, but has always been storage and has had a washer and dryer. Dan Andersen noted that it was used for laundry from the cabins when he purchased it. Andersen noted that there will not be rentals of the cabins anymore, so it will not be used for the cabin linens, but will remain for the owners use.

Corliss went over the review for completeness questions the board previously noted.

It was noted that no changes have been made to the plans to date as they figured there may be additional changes to make in the future.

The board took a 5 minute break.

Corliss noted that the board will go over the application with the board checklist. Hannah noted that the Planning Board is going over an application that does not exist. The application before the board was based on the 2002 plan and the Planning Board is now applying a checklist on an application that was premised on the fact that a 2002 site plan existed. Hannah noted that he would like a continuance until he can address what the Planning Board has dictated by stating the 2002 plan is void.

Hannah noted that the reason the Topographical and other waivers were requested is because they were unnecessary based on the 2002 plan and what it signified. Corliss asked if all of this information was created in 2002. Hannah noted that he knows there were many drainage sheets done. Hannah noted that he is no longer prepared to justify waivers that are no longer based upon the application as it was submitted. Corliss noted that the board voted as counsel advised that this is a stand alone application and it is not the intent of the board to have any surprises for the applicant. Hannah noted that he does not have the names of the legal counsel that was consulted. Hannah noted that he would like to know if he has the right to appeal the Board's decision right now, so he would like to continue the hearing.

Davis Peach moves to continue the Andersen hearing for Site Development and Condominium Conversion of property located at 45 South Shore Road to Monday May 1, 2017 in the Town Office Building at 7:30 PM. The motion was seconded by Jon McKeon and passed unanimously.

Items for Discussion

Election of officers

Joe Parisi nominated James Corliss for Chair. The nomination was seconded by Davis Peach, accepted by James Corliss and passed unanimously.

John Koopmann nominated Joe Parisi as Vice-Chair. The nomination was seconded by Davis Peach accepted by Joe Parisi and passed unanimously.

John Koopmann nominated Davis Peach as Secretary. The motion was seconded by Jon McKeon, accepted by Davis Peach and passed unanimously.

Aaron MacQueen – Conceptual

Nobody Present

Pat Paquette/Paul Saba - Conceptual

Nobody Present

Beach Plans

McKeon noted that the Planning Board is reviewing these plans to make sure they are up to the Planning Board drafting standards. It was noted that the Planning Board was provided the

settlement agreement at the last meeting, but wanted to look at the plans to ensure they abide by the Town regulations.

The board reviewed the plans.

It was noted that there is no abutters list. Koopmann noted that one abutter is missing from the plan. It was noted that there is acreage on parcel 4, but not on the other parcels. There was a question of who signs the document as there is only a place for the Selectboard to sign.

Parisi noted that looking at Google maps satellite, it appears there is a part of the road missing from the drawing where the driveway intersects the power line easements. Rob Casper noted that he has been on the property and the extra spur does not exist. Joe Brodbine noted that the power company may have cleared an area in there. McKeon noted that the applicant has stated that there is nothing there and the plan reflects nothing, so there will not be anything allowed there.

Rob Casper (Attorney for Beach) was present and provided the board with new drawings. Casper noted that the only difference with the new plans is that they include a signature block for the Planning Board. Casper noted that the comment previously from Koopmann regarding a missing abutter is inaccurate as Lot 7 D9 is not an abutting property. Casper noted that the State of NH is the abutter because they own Route 9.

McKeon noted that the new drawing does show a revision date of 3/31/17 and does now include acreages that were not present on the previous plans. Corliss noted that there is no square footage for the lot that is .98 acres.

Koopmann noted that he has more familiarity with the property and is aware of the intersection that this road is discontinued and does not show the property line. Koopmann noted that on a previous application there were lots considered abutting properties that are not listed here. The majority of the board was satisfied with the abutters the way it stands.

The board would like the change made to indicate the square footage on parcel 5 as required by the regulations.

Koopmann noted that he is concerned with the bit of Forest Avenue which was discontinued by Town meeting and is not shown on the plan to be discontinued. Casper noted that Forest Ave was not discontinued, Glebe Road was and it is shown on the plan that way.

Corliss noted it states on the plan to see note 5, but there are only 3 notes on the plan. This issue will need to be addressed by the applicant as well.

Casper asked if he agreed to make the two changes he could have an approval. Koopmann noted that the board could come up with more information regarding the discontinuation of Forest Ave between now and the next meeting. It was noted that he does not have plans ready for signature. Casper noted that the agreement was to have the Planning Board review and comment. McKeon noted that the Board of Selectmen have asked the Planning Board to ensure it follows the drafting standards and with the changes this board needs to sign off on the plan and then the Selectboard will sign off on the plans.

ADU process

The Planning Board received an email from Code Enforcement regarding the procedure regarding Accessory Dwelling Units.

It was noted that the regulations will go into effect 30 days after Town Meeting. The Planning Board will review the request. There is no fee from the Planning board and no notification of abutters.

An applicant will apply for a building permit, which will be kicked to the Planning Board for review and input. The applicant will be invited to the meeting, but not required to attend.

Rules of Procedure

The board noted that the most recent change was to move elections from April to January. The board reviewed the Rules of Procedure.

Joe Parisi moved that the Rules of Procedure be approved as presented. Jon McKeon seconded the motion which passed unanimously.

The new rules of procedure will be signed at the next meeting.

Signs

McKeon indicated he will take a look at this again in the future.

Spofford Boat Sales

McKeon noted there is a letter of violation going out.

Items for Information

Other Business

Items for Signature

Adjournment

Peach moves to adjourn at 10:03. Mckeon seconded the motion which passed unanimously.

The next meeting will be held in the Town Offices at 7:30 PM April 17, 2017.

Respectfully Submitted by:

Patricia Lachenal

Planning Board Secretary

Approved by:

James Corliss, Chairman

Date