

# Town of Newington, NH

## PLANNING BOARD

Meeting Minutes, Monday, January 12, 2015

**Call to Order:** Chair Denis Hebert called the January 12, 2015 meeting at 6:30 PM.

**Present:** Vice Chair, Mike Marconi; Bernie Christopher; Chris Cross; Jack Pare; Justin Richardson; Alternate Member, Ken Latchlaw; Board of Selectmen Rep, Rick Stern; Jane Kendall, Recorder; and Thomas Morgan, Town Planner

**Absent:** Alternate Member, Peggy Lamson

**Public Guests:** Attorney Chris Mulligan; Robert Stowell and Doug LaRosa with TriTech Engineering; Attorney Bernie Pelech; Joe Calderola

### 1) Public Hearings:

A) Proposal by **Bruce C. Belanger** for a 3-lot subdivision at the corner of **Nimble Hill Road and Fox Point Road, Tax Map 17, Lot 11-2.**

Board member, Justin Richardson recused himself from the hearing.

Attorney Chris Mulligan said they had issues pending with DES so they were not seeking final approval because it was premature. He said in December the ZBA ruled that the Planning Board's requirement for a Special Exception for a driveway to cross wetlands was contradicted in the Ordinance. He said during the hearing that they would need a variance, and Town counsel, Attorney John Ratigan agreed, but said they had to return to the Planning Board for an official ruling. Attorney Mulligan said they were entitled to obtain approval from State agencies and Town boards to gain access through wetlands to their buildable lots and he disagreed that they needed a variance for the same reasons they disagreed that a Special Exception was required because of conflicts between Section 6 and Section 4.

Board member, Bernie Christopher said he understood what the applicant was saying, but the Board paid their Town counsel to advise them. Chair Hebert said the ZBA had originally agreed with the Planning Board's ruling that a Special Exception was required, but had changed their minds during the appeal. As a result, the rest of the Ordinance "is what it says", just as Attorney Mulligan had said about the Special Exception.

Mr. Richardson said he had recused himself from both the Planning Board and ZBA hearings and spoke as a citizen. He passed out the document he gave to the ZBA explaining that the Ordinance had been adopted because the variance criteria made it too hard to get a permit, and there were other examples of Special Exception approvals in town for driveway crossings through wetlands to show there was precedence. He

# Town of Newington, NH

## PLANNING BOARD

Meeting Minutes, Monday, January 12, 2015

said the Board couldn't over rule over the ZBA's decision, but the Ordinance meant exactly what it said in the requirement for a Special Exception for water and utilities to cross wetlands. He said it was an absurd world with debates whether access way or driveway definitions applied, but the Minutes of the various meeting showed that the Special Exception was intended as a vehicle and if not, they would still need a variance. Chair Hebert added that appealing the Planning Board's ruling for a Special Exception resulted in reverting back to the more stringent 2004 Zoning Ordinance that required a variance.

Attorney Mulligan agreed that it would be more difficult to get a variance than a Special Exception, but it had already been determined that an access way to a buildable lot was a permitted use and his argument that a Special Exception wouldn't apply to a permitted use also stood in regards to a variance.

Mr. Christopher said he never put a driveway in without putting in the power and water lines and asked for an explanation of the difference between a Special Exception and a variance. Chair Hebert said he originally thought there would be a Special Exception for everything, but because the ZBA didn't consider that the more stringent Ordinance applied when there were two conflicting ordinances, the variance would be for the driveway going through the buffer, and the Special Exception would be for the waterlines. Attorney Mulligan said it didn't make sense that would need a Special Exception to put lines in and a variance to go through the buffer. Chair Hebert said they thought so too, but that was what they did by appealing the Planning Board's ruling that a Special Exception was also required for a driveway to cross the wetlands.

Mr. Richardson said not absurd if they followed the intent of the ordinance and Mr. Pare added that breaking off the requirement for a Special Exception for one didn't make the other requirements illegitimate. Vice-Chair Marconi, Mr. Cross and Mr. Christopher all agreed. Chair Hebert said dismantling the intent of the Special Exception for all left them with a requirement to process two steps instead of one. Vice-Chair Marconi thought they should get further clarification from Attorney Ratigan. Mr. Morgan said he heard what they were saying, but advised the Board to still take a vote.

*Vice-Chair Marconi moved to send the proposal by Bruce C. Belanger for a driveway and utility crossing the wetlands on the property at the corner of Nimble Hill Road and Fox Point Road, Tax Map 17, Lot 11-2 to the ZBA for a Special Exception and variance. Mr. Christopher seconded and all were in favor.*

Mr. Cross said the lower lot was a marginal lot and he was still concerned that each time the wetlands were crossed it had an accumulative affect on the wetlands. He said the uplands on the lower lot complied, but it was only 2 ' higher than the wetlands and the Board was trying to develop lots that would conform to the rural community. Chair Hebert recommended that Attorney Mulligan talk with Attorney Ratigan, who would talk with Mr. Morgan for the Board to consider further.

# Town of Newington, NH

## PLANNING BOARD

Meeting Minutes, Monday, January 12, 2015

### B) Proposal by **Dennett Farm LLC** regarding property at **233 Nimble Hill Road, Tax Map 17, Lot 4:**

Mr. Richardson returned to his seat.

Chair Hebert asked why the application had changed from Beane Farm to Dennett Farm and applicant. Mr. Joe Calderola said Beane Farm was taken three times over when he tried to register the LLC.

Chair Hebert said he had just received the attorneys' documents earlier in the day. Attorney Bernie Pelech said he had provided documents to Attorney Ratigan months ago and Chair Hebert said Attorney Ratigan had said he would only review them after all the changes were done. Mr. Calderola agreed. Vice-Chair Marconi asked Attorney Pelech if he had seen Attorney Radian's comments. Attorney Pelech said he had not and was given a copy.

Mr. Calderola said the condo plans had been approved by Comcast, Fairpoint and PSNH, but PSNH wanted signed paper plans to show the plan had been approved. Mr. Calderola submitted the plans to Chair Hebert and Chair Hebert asked where the engineering stamp was. Mr. Doug LaRosa with TriTech Engineering said he had never seen engineering stamps before. Mr. Calderola said Mr. Rick St. Cyr who was in charge of the Newington area had signed the plan. He said he had similar approvals from Comcast and Fairpoint.

Mr. Calderola said Altus Engineering reviewed the plans as complete except the bond categories. Mr. LaRosa said the bond would be posted prior to work, but they required an approved subdivision first.

Mr. Calderola said they would also submit documents on the pipe size for water lines to the back lot. Mr. Morgan said Altus wanted to give them a seconded look. Chair Hebert said he wanted to see the water lines stay in the common area and not going through someone else's back yard. Mr. Calderola said the water lines were determined by the State and setbacks. He said if the Board felt strongly about it they would need to go through the building. Mr. Robert Stowell with TriTech Engineering said the middle lot was driven by septic restrictions. Chair Hebert asked why they couldn't go under the driveway and Mr. Cross said they would still be restricted by the State. He said he too was concerned with crossing someone else's lot, but not so much when crossing within one lot. Attorney Pelech said it was covered under a blanket easement and Mr. Calderola said there was a conflict with changing where the waterlines ran and Mr. LaRosa agreed that they had considered the best options. Mr. Calderola said buyers would also be agreeing to conditions when they purchased a condo. Mr. Cross said it was not the Board's concern and Chair Hebert said it was just his opinion.

Chair Hebert said he was also concerned that septic systems on one lot were in the common area, which could be a burden to a neighbor. Mr. Calderola said there would be wording in the declaration that each owner would be responsible for his or her own septic.

Mr. Calderola went on to say that the condominium site plans were submitted for review, but would need to be finalized with recording after they were built. Mr. Richardson asked where the architectural reference was in reference to the conditions

# Town of Newington, NH

## PLANNING BOARD

Meeting Minutes, Monday, January 12, 2015

of approval from the ZBA. Mr. Calderola said it was on page 4 of the condominium declaration and also in the homeowner's agreement under special architectural control. Mr. Richardson read through page 4 and said it was short of the ZBA's intent in saying they should go back to the ZBA, who did not have the authority to review the condominium documents, instead of the Planning Board who did.

Attorney Bernie Pelech disagreed with Mr. Richardson's recollection of the conditions. He said one of the ZBA Board members had said there was no problem with changing the windows, doors or siding chg, but they didn't want to see the architectural character of the barn changed. Chair Hebert said it was reasonable and Mr. Richardson said they should just take out the replace the reference to the ZBA approval with the Planning Board's approval because the ZBA didn't have authority over condominium documents. Chair Hebert agreed, but said the Planning Board didn't want to get involved with the architectural character. Mr. Morgan said discussion of the conditions was in the December 2014 meeting Minutes.

Chair Hebert said he had never seen condominium plans like the ones submitted before where each lot was owned by different three different parties and wanted to discuss them further with Attorney Ratigan. He said it might be the way it worked, but it seemed like there would be three lots in three lots, which would result in a 9-lot subdivision. Attorney Pelech said he was selling a duplex and it was divided similarly. Mr. Calderola said there were different ways of defining condominium space where some only defined the interior wall surfaces and others included the exterior and yards as this one did. He said they could accomplish the same thing with a limited common definition, but he found that people wanted control of their yards. Attorney Pelech said it was called land condominiums and it was legitimate with the Attorney General and common in other parts of the State. Vice-Chair Marconi said it started in Derry, New Hampshire.

Mr. Richardson said duplexes were allowed under one owner, but different towns had different definitions of whether condominiums were or were not subdivisions and Newington considered them subdivisions that had to be treated the same as any other project under a different form of ownership and had to comply with the Ordinance. Mr. Pare said it seemed that they would need to put ownership within the interior walls in order to meet the subdivision laws.

Attorney Pelech said treating a condominium differently than a duplex or another development that was identical would discriminate against a different kind of ownership. Mr. Richardson said the issue was in selling the common property. Mr. Christopher said duplexes and condominiums had been done this way for years and any owner buying a condominium wouldn't like thinking there was another owner that could make decisions on their condominiums. Chair Hebert said he was having Attorney Ratigan look into whether a condominium could be subdivided into smaller parcels.

Mr. Cross said it was a learning experience, but he became more comfortable with the idea after he looked into it further, understanding that the owners would be assessed by what they owned plus 50% of the common portion. Mr. Calderola said he was describing a condominium area with limited common areas, but there were different approaches that could be considered.

# Town of Newington, NH

## PLANNING BOARD

Meeting Minutes, Monday, January 12, 2015

Discussion ensued on tax assessments and Chair Hebert said the Town tax assessor would make that determination.

Mr. Richardson said he was also concerned with the long driveway, considering the Town didn't allow shared driveways and that it would set a precedent by putting it into a condominium form. Chair Hebert said the Ordinance didn't say anything about a shared drive on a single lot, only shared drives for more than one lot. Mr. Richardson said a dispute between two owners would result in a 50/50 tie that would need to go to arbitration and he wanted to see a tie breaker to prevent that. He asked what the regulation mechanism would be to break a tie in a dispute. Attorney Pelech said it was a binding resolution clause. Attorney Pelech said a driveway was allowed for a duplex and this would be discrimination. Mr. Cross said the Ordinance said driveways shall serve one owner and could serve two owners if in one dwelling, but the Town did not exclude shared drive unconditionally. Mr. Stowell agreed that was listed under #8 of the Driveway Regulations. Chair Hebert read the regulations noting that the key word was "residential building...and no driveway shall cover more than one building", which would apply to a condominium as one residential building. Mr. Richardson said he was trying to look at problems going forward and concerned with how would resolve a dispute. Mr. Calderola said anyone that agreed to purchase one of the condominiums would agree to comply with maintenance conditions in the condo declaration and a lien could be put on the property if they didn't.

Mr. Cross said they had previously discussed closing the current driveway along the Nimble Hill Road frontage and matching the other areas and the stonewall. He said also thought were going to retain character of stonewall with granite post, but he didn't see it on the plans. Attorney Pelech agreed and Mr. Stowell said the roadway plan referred to the stonewall. Chair Hebert said the plans typically showed what would be built before approval.

Mr. Calderola said ditching worked better in cold temperatures and he wouldn't be able to start for 30 days after approval so he asked if the Board would vote on that during the meeting and postpone the condominium conversion until later. Chair Hebert said the next meeting on Monday, January 26, 2015 would be light so they could make a decision on that date and would review their questions with Attorney Ratigan to make sure there were no unintended consequences.

Chair Hebert said Dumping Cove was failing because the waterlines crossed the road instead of running along the side of the road and not crossing the road, which was his preference. He added that only soft concrete could be used around the conduits and Mr. LaRosa agreed. He said he would also like to see title information and engineering stamps of anyone signing plans.

Mr. Morgan shared his memo with conditions for the application to approve the subdivision and everyone agreed that they needed to know more about condominium documents. Chair Hebert said he also wanted to make the conditions from Altus mandatory by changing "should" to "shall". Mr. Pare said they also needed to revise the bond as recommended by Altus and Mr. LaRosa said he would address it and revise their response. Mr. Morgan said he thought Mr. LaRosa had said it was his assumption that would be a condition of the Certificate of Occupancy. Mr. Richardson said a bond

# Town of Newington, NH

## PLANNING BOARD

Meeting Minutes, Monday, January 12, 2015

was usually posted before the plan was signed and everyone agreed. Chair Hebert said it was usually before construction could begin.

Mr. Morgan asked if there was any problem with the conditions in his memo that said the bond would be submitted before the plan was signed. Mr. Stowell said it was a matter of having an approved plan to take to the bank. Mr. Richardson even if the Board approved the plan, it would be 30 days before it was signed and someone gave them a letter of credit. Mr. Cross said he understood it was easier to go to the bank with an approved plan. Mr. Morgan said Attorney Ratigan gave him the recommendations.

Mr. Calderola said the construction of the driveways wouldn't be at the same time as the building of the roads and he was not used to posting the bond for driveways before the road was built. Mr. Richardson said one of the driveways was very long and he thought they should. Chair Hebert agreed because they might start some of the construction of the driveways while doing the road.

Mr. Pare said the easement proposed by the applicant on Condition 5 should be listed out. Mr. Morgan said that had already been done and approved by legal counsel. Chair Hebert said four should also be listed and Mr. Richardson said he would want avoidance there was a recording of the development agreement in the document. Mr. Morgan and Chair Hebert said it should be listed on by title on the plan and condition of approval.

Mr. Morgan said he and Chair Hebert agreed that it was consistent with the RSA for the applicant's attorney to certify the condominium documents. Attorney Pelech said that would be no problem.

Chair Hebert continued the hearing to Monday, January 26, 2015.

(Board of Selectmen representative, Rick Stern arrived at 8:43 p.m.)

C) Proposal by **Wilcox Industries** and the **Town of Newington** for a lot line adjustment at **25 Piscataqua Way, Map 27, Lot 22.**

Mr. Stern said the Board of Selectmen said they discussed Wilcox Industries transferring the property back and had no issue with the lot line adjustment, noting that Wilcox stated that they were not interested in making any payment since they were already making several concessions to the Town by working with them on the Shattuck Way extension plan.

Chair Hebert opened the public hearing, noting that representatives of Wilcox Industries were not present. to give a wedge of land back to Wilcox. Mr. Morgan added that the wedge was originally conveyed when Wilcox first came to Town, but since then it was determined that the road would go straight and the land was not necessary.

*Vice-Chair Marconi moved to accept the proposal by Wilcox Industries and the Town of Newington for a lot line adjustment at 25 Piscataqua Way, Map 27, Lot 22.* Mr. Christopher seconded and all were in favor with Mr. Stern abstaining.

Mr. Morgan said he would be meeting with Wilcox and DES the next day. Chair Hebert said DES was looking at fines due to fill. Mr. Morgan said they were no fines

# Town of Newington, NH

## PLANNING BOARD

Meeting Minutes, Monday, January 12, 2015

when a developer proposes to fill. He said they were creating a joint application with DES to fill half an acre so the Town would have no expense. He said they would probably work out some kind of mitigation.

**Minutes:** *Mr. Christopher moved to approve the Minutes for the December 8, 2015 meeting. Vice-Chair Marconi seconded and all were in favor.*

### **Discussions:**

Chair Hebert said he wanted to see an improvement in the process of meetings, including limiting the length of extensive discussions, while encouraging others to contribute their thoughts more to give everyone equal opportunity to speak in a reasonable amount of time. Mr. Christopher said if someone had something to say, then they should say it, but he didn't want to hear people repeat themselves. Chair Hebert said he spoke with each member privately and he didn't have a problem with feedback either.

Vice-Chair Marconi suggested that he be a timekeeper.

Chair Hebert said he hoped to start a technical advisory committee (TAC) that would review plans prior to presenting to the Planning Board. Mr. Christopher said it wouldn't do much good for plans and revisions that came in the day before a meeting.

Chair Hebert said Mr. Morgan reviewed the applications and complete plans first, then writes a memo with recommendations for the Boards consideration and decision whether a plan is substantially complete before sending it to TAC to make recommendations before sending it back to the Planning Board for final approval. Mr. Morgan said it would prevent scattered reviews. Vice-Chair Marconi agreed would make board more productive.

Chair Hebert suggested the committee be comprised of the Town engineering consultant, building inspector, fire and police departments, the sewer commission, and the City of Portsmouth's Water Department engineer. Vice-Chair Marconi offered to serve on the committee. Chair Hebert said he would like to be on the committee to make sure it went in the right direction and asked if any other members would be interested in sitting on the committee. Mr. Morgan said having members sitting on multiple land use boards would be a conflict of interest, as was evidenced when members often had to recuse themselves when they represented two boards such as the Planning Board and the ZBA.

Chair Hebert said they would talk with Mr. Morgan more on how to set the committee up. Mr. Morgan said a technical advisory committee would also be subject to the right to know law and require recording of their minutes, which was always a valuable tool for the Planning Board to review before their meetings.

**Adjournment:** *Vice-Chair Marconi motioned to adjourn, Mr. Christopher seconded. All were in favor and meeting adjourned at 9:19 pm*

# Town of Newington, NH

## PLANNING BOARD

Meeting Minutes, Monday, January 12, 2015

**Next Meeting:** Monday, January 26, 2015

**Respectfully  
Submitted by:** Jane K. Kendall, Recording Secretary