

CONWAY PLANNING BOARD

MINUTES

MAY 24, 2007

A meeting of the Conway Planning Board was held on Thursday, May 24, 2007 beginning at 7:04 pm at the Conway Town Office in Center Conway, NH. Those present were: Chair, Robert Drinkhall; Selectmen's Representative, Larry Martin; Vice Chair, Martha Tobin; Secretary, Steven Porter; Sean McFeeley; Hud Kellogg; Theodore Sares; Planning Director, Thomas Irving; and Planning Assistant, Holly Meserve.

REVIEW AND ACCEPTANCE OF MINUTES

Mr. Kellogg made a motion, seconded by Mr. McFeeley, to approve the Minutes of May 10, 2007 as written. Motion carried with Mr. Sares abstaining from voting.

TOWN COUNCIL PRESENTATION REGARDING EX-PARTE COMMUNICATIONS

Peter Malia, Esq., Town Council, of Hastings Law Firm appeared before the Board. Mr. Malia stated that he is before the Board this evening to discuss ex-parte communications and disqualification of a Board member. Mr. Malia stated that a question has been asked if a Board member has any contact with an abutter, developer, surveyor or even other Board members does it arise to a level to disqualify. Mr. Malia stated under RSA 673:14 there would be a conflict if you have a direct interest in the matter or if you would be unable to sit as a juror and there are a list of questions jurors are asked. Mr. Malia stated that you should also apply the rule of common sense; are you indifferent or if you have already formed an opinion then you should step down.

Mr. Malia read the questions that are asked of jurors. Mr. Malia stated if someone is not sure of his or her answers, but they don't feel like you have prejudged the applicant then they could put it on the table and discuss it with their fellow board members. Mr. Malia stated that they could ask for a non-binding advisory vote by the Board, but ultimately the decision is theirs. Martha Tobin joined the Board at this time. Mr. Malia referenced the 1984 case of Winslow vs. Holderness Planning Board.

Steven Porter joined the Board at this time. Mr. Malia stated public officials acting in good faith are immune to liability, but if they act in bad faith they could be liable. Mr. Malia handed out "Ethics for Land Use Board Members" packages to the Board. Mr. Malia stated the legislature currently has a bill pending to govern email communication and tighter reins on boards that email each other.

Mr. Drinkhall asked for Board comment; Mr. Sares asked hypothetically if someone was criticized by a local station both personally and politically and the TV program was sponsored by a developer and that developer comes to the Board, would their be a conflict of interest. Mr. Malia stated that you should ask yourself could I be indifferent. Mr. Malia stated if you believe you could be indifferent, but want it on public record then

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put it out there and request a non-binding vote. Mr. Martin asked as far as ex-parte communications if you meet with someone and you make a suggestion outside of this Boardroom, whether you're representing yourself, it is perceived that you are a part of this Board, should you have to recuse yourself. Mr. Malia answered not necessarily, but you would need to ask yourself if you could be indifferent, if called as a juror could you sit on this case or have I pre-judged this case. Mr. Malia stated that you should try to avoid any ex-parte communications.

Mr. Martin stated any suggestions or any communications made outside of the Board is perceived as an impropriety. Mr. Malia agreed and stated that those comments or suggestions were made off the record, plus you don't know who is listening or who this person is relaying the conversation to and by having ex-parte communications, it could become your word versus the another's word.

Mr. Kellogg stated that this involves himself as anyone and we are required to do our homework and need to be prepared. Mr. Kellogg stated part of that work is doing field work and site visits which may require you to speak to a presenter or a surveyor or an owner or be called by abutters. Mr. Kellogg stated that is part of the background of doing a proper job. Mr. Kellogg stated that there is nothing in the RSA, only the enabling legislature. Mr. Kellogg stated that he has prepared a chart, which is a blow up of our bylaws and we are required to have bylaws. Mr. Kellogg stated nowhere in the bylaws is there a statement that says that we cannot be doing our homework or things prior to a meeting that gives us background.

Mr. Kellogg stated if someone was to give **engineering type** advice that would be grossly wrong, but to ask questions and view is part of our homework. Mr. Kellogg stated between the RSA's and our regulations there is no limitation. Mr. Malia stated that you have to follow your own regulations, RSA 673:14 and case law. Mr. Malia stated site visits are important. Mr. Malia stated if you want to go as a Board it should be a noticed meeting and if you want to go as an individual, that's okay, too, but if an owner or an abutter wants to talk you should be in listening mode and if you need more information or want to make suggestions regarding the application then you should try to make those at the meeting. Mr. Malia stated if you make suggestions at a site visit you should bring them to the attention of the Board.

Mr. Kellogg stated that he had had a conversation with a developer where he suggested a cupola to help break up the roofline and the fellow from the company was extremely receptive. Mr. Kellogg stated you do it in advance so they can walk through the doors with it on the plans. Mr. Kellogg stated that it is a matter of a two-way street, the more the developer knows about our needs the easier it is to tailor their needs, the more they learn about the needs they're better **prepared** off.

Mr. Kellogg stated that the Town of Rochester has a member of the Planning Board meeting with developers and other town officials to make the process easier. Mr. Kellogg stated that this is a good idea.

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Mr. Drinkhall stated that Mr. Kellogg is not understanding certain aspects; the Board needs to do their homework, but you cannot conduct business outside of the meeting and you cannot be suggesting to the applicant or developer to do something as it must be done in public. Mr. Drinkhall stated that the Board does not have the right to enter someone's property without their permission. Mr. Malia stated if someone denies you site access then they probably would have their application denied. Mr. Malia stated that he is not saying you cannot conduct a site visit or say anything at all, as you can speak to people who speak to you, but you should be in a listening mode. Mr. Malia stated when you say something outside a meeting it can be exposing yourself as well as the Board.

Mr. Malia stated that you should avoid the appearance of improprieties or back room deals. Mr. Kellogg stated there is another town in New Hampshire that states writes on the all application forms that applicant hereby grants Town Officials and I'd Board members site access ~~are given to officials~~. Mr. Martin asked technically speaking are we town officials. Mr. Malia answered in the affirmative. Mr. Martin stated that they are powerless, except for when on this Board.

Mr. McFeeley stated that Article 8; section D of the Planning Board By-laws states that "No business shall be acted upon unless a quorum is present", and if your advising someone outside this meeting would that be considered as acting upon business. Mr. Malia answered in the affirmative and stated that it could be consider as conducting business. Mr. Kellogg stated not in a negative way. Mr. Porter stated that the Board should be allowed to conduct site walks if allowed by the developer, but should advise anyone at the site that they are there as an individual and not make suggestions, even if on a personal note. Mr. Porter stated that Board members should stay away from those types of comments. Mr. Porter stated once we leave this room on Thursday nights we our citizens of the Town of Conway. Mr. Malia stated that you should conduct site visits, but should not comment on the merits of the applications.

Mr. Malia stated that it is a good rule of thumb to not answer questions, but recommend contacting Tom Irving and inform them that you are just here to review the site. Mr. Drinkhall stated that would be true if someone contacts you as well. Mr. Malia stated that it is never a good idea to have that conversation.

Mr. Irving stated with respect to ex-parte communications it is never a good idea to contact another board member and sway their opinion. Mr. Malia stated that is correct. Mr. Irving stated if the Board wants to conduct a site visit with a quorum present we would duly notice the visit so there is some protection if something happens as they are acting as a Board. Mr. Irving asked if there are any risks or liabilities if an individual board member goes to a site. Mr. Malia answered in the negative and stated it is when the member acts in bad faith. Mr. Irving asked if the Town is at risk. Mr. Malia answered in the negative and stated it is when you cross the line that you lose your immunity.

Mr. Sares asked if someone crossed the line would they be endangering the entire board. Mr. Irving asked if there is a difference between liability for the building inspector and liability for an individual board member. Mr. Malia stated that he does not think so, as

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long as your doing your job you are immune. Mr. Martin stated if a town employee backs over someone on a job site, but I go as a Planning Board member and do the same accident am I liable or is the Town liable. Mr. Malia stated not sure your acting as an official when conducting a site visit, but if acting in good faith you have the same protection.

**PASTUREVIEW DEVELOPMENT, LLC – 3-LOT SUBDIVISION REVIEW
CONTINUED (PID 283-22.1) FILE #S07-07**

Mia Gannon of Thaddeus Thorne Surveys appeared before the Board. This is an application to subdivide 11.19 acres into three lots with a road right-of-way and infrastructure. This application was accepted as sufficiently complete on March 22, 2007.

Ms. Gannon reviewed the proposed lots and stated that there is an easement for a driveway access over lot 2 for lot 1. Mr. Irving stated that this application has been modified to be a two-lot subdivision and eliminates the need for a road right-of-way.

Ms. Gannon reviewed newly submitted plans. Since the Town Staff and the Board did not have time to review the newly submitted plans, **Mr. Porter made a motion, seconded by Mr. Drinkhall, to continue the Subdivision Review for Pastureview Development, LLC until June 14, 2007.** Mr. Irving reviewed his staff report in which he was considering a conditional approval. Mr. Drinkhall stated if there is something on the new plans submitted tonight that are not on the plans before the Board this evening than it would not be allowed. Ms. Gannon stated the wetland scientist mapped the poorly drained soils. Mr. Irving stated jurisdictional wetlands should be indicated on the plan. Mr. Martin asked if lot 1 could have access to Davis Hill Road. Mr. Irving stated that it is staff's recommendation to have a shared driveway. Mr. Sares asked what if we disagree with the Town Engineer. Mr. Porter stated then you should vote your conscience. Mr. Irving stated that staff simply gives you recommendations; the Board can do what they want. Mr. Kellogg asked if the client wants lot 1 to have its own driveway. Ms. Gannon stated that was her suggestion. **Mr. Drinkhall withdrew second and Mr. Porter withdrew his motion.**

Mr. Drinkhall read the requirements to grant a waiver. Mr. Drinkhall read the waiver requests for §131-30.E and §131-24.V. **Mr. Porter made a motion, seconded by Mr. McFeeley, to grant waivers for §131-30.E. and §131-24.V.** Mr. Drinkhall asked for Board comment; there was none. Mr. Drinkhall asked for public comment; Rodney King stated that he is still concerned that they have changed the design several times and now there is no one who is going to govern the driveway and want to make sure someone is going to monitor the quality of the road so that it does not adversely affect his property. Mr. Sares stated that a member of the public made a comment and he is a believer of waivers being negotiable and could tie his concerns in with the waiver. Mr. Irving stated that a remedy to address his concerns could be part of the approval, but his concern is not linked to the proposed waivers. Mr. Sares stated if this were next door to him he would

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be concerned and maybe link the construction of the driveway. Mr. Drinkhall stated that his concern is not in reference to the waivers. **Motion unanimously carried.**

Mr. Irving stated by having the Wetland Scientist delineate jurisdictional wetlands it would help, plus the Center Conway Fire Chief has expressed concern in regard to the driveway so the Board could require engineered plans for the driveway to show that it would not have a negative impact on abutting properties. **Mr. Porter made a motion, seconded by Mr. Sares, that engineered plans for the driveway along PID 283-22.2 and to be approved by the Town Engineer be part of the conditional approval. Motion unanimously carried.**

Mr. Porter made a motion, seconded by Ms. Tobin, to conditionally approve the 2-Lot Subdivision for Pastureview Development, LLC conditionally upon Town Engineer Approval; Center Conway Fire Chief Approval; add note that existing field road access to Davis Hill Road is to be eliminated; add note that a Town Driveway Permit shall be required prior to construction of the proposed driveway; clarify statutory wetlands per NHDES standards; add original stamp and signature of Wetland Scientist on all applicable plan sheets; add note that lot 1 is not to have access directly to Davis Hill Road; submit recorded access easement benefiting lot 1 and indicate book and page on plan; show underground utilities serving lot 1; revise waivers granted table; submit engineered drawings for driveway along boundary of 283-22.2 to be approved by the Town Engineer; submit supplement review fees; submit Mylar; a performance guarantee for all site improvements including driveway; when the conditions have been met, the plans can be signed out-of-session; and this conditional approval will expire on October 25, 2007. Motion unanimously carried.

**HAROLD WHITAKER AND THOMAS FADDEN – 33 – LOT SUBDIVISION
REVIEW CONTINUED (PID 243-12) FILE #S07-04**

Doug Burnell of H.E. Bergeron Engineers appeared before the Board. This is an application to subdivide 81.4 acres into 33-lots with associated road and infrastructure. This application was accepted as complete on March 22, 2007.

Mr. Burnell stated that they are still in negotiations with Ms. Johnston [PID 243-13] regarding her driveway. Mr. Burnell stated that there is a pathway reserved for the community only and working on easements for that. Mr. Burnell stated that a 100-foot access easement has been reserved at the end of one of the cul-de-sacs for possible future access to the Kennett Company land. Mr. Irving stated that the Town and the Board had concerns with the lot shapes and the new plans address those concerns.

Mr. Drinkhall asked for Board comment; Mr. Sares asked the location of Gilmore development. Mr. Burnell reviewed the location of the Gilmore Subdivision. Mr. Sares asked the location of the Kennett Company land. Mr. Burnell reviewed the location of the Kennett Company land. Mr. Sares asked what is the reason for access easement. Mr. Burnell stated that at this time there is no purpose. Mr. Martin stated that the applicant has addressed the Board's concerns.

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Mr. Drinkhall asked for public comment; Sharon Johnston stated that her driveway is the one that is potentially to be rerouted, but her other concern is to the number of lots for one access road since the road is at the edge of her property and it is a lot of cars.

Mr. Martin made a motion, seconded by Mr. Porter, to continue the Subdivision Review for Harold Whitaker and Thomas Fadden until June 28, 2007. Motion carried with Mr. Sares abstaining from voting.

JOHN NELSON, JR – SUBDIVISION REVIEW CONTINUED (PID 258-68) FILE #S06-16

Paul Bergman appeared before the Board. This is an application to subdivide 340± acres into 40-lots. This application was accepted as complete on June 22, 2006. Mr. Bergman stated that this subdivision was formerly known as Saco River Woods, but the Police Chief had concern with the name since there was a Saco Woods close by, so it is now known as Saco River Run. Mr. Irving stated there have not been any substantive changes to the plans only engineering changes.

Mr. Drinkhall read the waiver request for §131-68, Table 2, Intersection Approach Grade. **Mr. Porter made a motion, seconded by Ms. Tobin, to grant the waiver for §131-68, Table 2, Intersection Approach Grade.** Mr. Drinkhall asked for Board comment; Mr. Kellogg asked if the entrance off Route 302 would roughly be in the same location of the existing dirt road on Route 302. Mr. Bergman stated that the entrance would be west of the existing road. Mr. Kellogg asked if this prevents water from sheeting across Route 302. Mr. Bergman answered in the affirmative. Mr. Sares asked if this is for phase I and not the other phases. Mr. Irving answered in the affirmative. Mr. Drinkhall asked for public comment; there was none. **Motion unanimously carried.**

Mr. Porter made a motion, seconded by Mr. McFeeley, to conditionally approve the 40-Lot Subdivision for John Nelson, Jr. conditionally upon Town Engineer Approval; Center Conway Fire Chief Approval; indicate NHDES Subdivision approval number on plan; NHDOT Driveway Permit (entire subdivision) and indicate approval number on plan; NHDOT Driveway Permit (Lot #1) and indicate permit number on plan; Original seals and signatures (PE, Surveyor and Wetland Scientist) on final plan sets and Mylar's; submit Supplemental Review fee; submit Condominium/ Association documents; a performance guarantee for all site improvements; when the conditions have been met, the plans can be signed out-of-session; and this conditional approval will expire on October 25, 2007. Motion unanimously carried.

OTHER BUSINESS

North Conway Plaza, LLC (PID 246-24.001) – Conceptual Review §123-7.A: Jay Poulin of H.E. Bergeron Engineers appeared before the Board. Mr. Poulin stated that he would like to determine some of the Board's concerns regarding this site. Mr. Martin

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stated he would like to see trees along the road. Mr. Sares agreed and stated he has driven by Home Depot and the front looks really nice and the trees are incredible.

Mr. Poulin stated that the site is deficient of about 65 parking spaces and the applicant cannot reduce any of the parking or they will default with a current tenant. Mr. Poulin asked if the Board would accept shrubs as the greenspace areas are limited on the existing site and trees would be difficult to plant in those areas. Mr. Drinkhall asked width of area. Mr. Poulin stated approximately 8-feet wide and tapers to 3-feet wide, plus it slopes. Mr. Drinkhall stated there would also be a lot of road salt and heat from the parking lot. Mr. Martin asked if the parking area could be re-stripped for subcompact parking. Mr. Poulin stated that the site is already as tight as it can be.

Mr. Porter stated after the last meeting it was perceived that the Board was requiring the Christmas Tree Shops to do what Stop and Shop was proposing. Mr. Porter stated the site should be cleaned up. Mr. Drinkhall asked about cutting into the side of the embankment and using a retaining wall. Mr. Poulin stated there still would not be enough room for parking spaces as well as a travel aisle to the back of the building.

Mr. Porter asked about redoing the entire façade of the building. Harold Dennis, Executive Vice President for the Druker Company, stated under the T.J. Maxx lease they have control of their façade and it is hard to get them to do anything. Mr. Dennis stated that they also don't know who the other tenants will be. Mr. Drinkhall asked if T.J. Maxx would object to a new façade. Mr. Dennis stated that he did not know. Mr. Martin stated that this project is required to have a Minor Site Plan review and if the entire building is resurfaced then the Board might not require trees.

Mr. Sares asked if T.J. Maxx was not there and the Christmas Tree Shops wanted to come in what would be required. Mr. Drinkhall stated that it would depend on what they wanted. Mr. Irving stated if T.J. Maxx was not there now, Christmas Tree Shops could move in, but they were making changes to the building that required a Site Plan Review. Mr. Sares stated that he liked what they were proposing. Mr. Porter stated the applicant requested a Not Applicable from the Board because the applicant felt the changes were insignificant, but the Board has required a Minor Site Plan rather than a Full Site Plan Review. Mr. Poulin stated that the only difference between a Minor and a Full Site plan is a surveyor's stamp.

Mr. Porter stated that the applicant should make the façade more uniform. Mr. Martin stated that he would like to see more of the façade updated. Mr. Martin stated if the site could not be more eye appealing with the façade then he would want more trees. Mr. McFeeley stated another tenant would rather have a store front with a nice façade then what it there now. Mr. Dennis stated that he is not saying they don't want to redo the façade, but asking to allow it over time as tenants fill the spaces.

Mr. Kellogg asked if as part of approval the applicant could be given a certain amount of time to finish the façade to look like the Christmas Tree Shop. Mr. Porter asked why not extend from one end to the other. Mr. Sares stated that the Board couldn't make TJ

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Maxx update their façade to allow Christmas Tree Shop to open. Mr. Sares stated that we should be enabling and not fighting it. Mr. Sares stated that it is a chance to do something with an outdated building.

Mr. Drinkhall asked for public comment; Crow Dickinson stated that he was selectmen when this building was first built and was low so you could see the mountains. Mr. Dickinson stated that he thinks it would be a nice façade, but doesn't want to see a lot of islands in the parking lot.

Mr. Dennis asked if there could be a time frame for the space between Christmas Tree Shop and T.J. Maxx over a couple of years. Mr. Irving stated they might be able to have a subsequent condition that the center part comes back to the Board to review the proposed elevation, but he is hesitant to set a deadline; how do you make sure that it happens.

Mr. Martin asked the Board to be polled on extending the façade to T.J. Maxx and add shrubbery in the existing space where available. Mr. Sares and Mr. Drinkhall voted in the negative and Mr. Kellogg, Mr. McFeeley, Ms. Tobin, Mr. Martin and Mr. Porter voted in the affirmative.

Red Jacket Mountain View, LLC (PID 230-51) - §123-4.A.5: David Abraham of the Red Jacket Mountain View appeared before the Board. **Mr. Martin made a motion, seconded by Mr. Porter, that the Planning Board determined that based on the provisions of §123-4. A. 5., regarding applicability, that the modifications to the lobby entrance is not subject to a Minor or Full Site Plan Review because it has been demonstrated that the change of use and/or physical changes to the site are insignificant relative to the existing development.** Mr. Drinkhall asked for Board comment; there was none. **Motion unanimous carried.**

Appointment of Planning Board member to Board of Selectmen infrastructure sub-committee: Mark Hounsell and Crow Dickinson appeared before the Board. Mr. Drinkhall stated that a new sub-committee of the Board of Selectmen has been formed. Mr. Dickinson stated that there are various sub-committees to assist the Board of Selectmen and keep them informed and there is a infrastructure sub-committee that has been in existence for a while that we have decided to reform. Mr. Dickinson stated that the previous sub-committee had a lot of staff on it and has decided it would be better off if it was made up of other Board members.

Mr. Dickinson stated that the sub-committee was put in place when the Board of Selectmen believed they needed to be informed of grants or projects that the precincts were proposing. Mr. Dickinson stated that the Planning Board should be involved and they would like to extend an invitation to the Planning Board to have a member on the sub-committee.

Mr. Hounsell stated that this is an advisory committee and it will not decide on anything or set policy, it is only to gather information. Mr. Hounsell stated the precincts run pretty

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well and they are not trying to micromanage them. Mr. Hounsell stated that the Board of Selectmen feels it is time for the different areas of the town to come together to gather information and be an advisory board. Mr. Hounsell stated that this would enable staff to get out of an awkward position that may be construed as political and let the people be held accountable and work through the issues. Mr. Hounsell stated that this would cut down on the misconceptions.

Mr. Kellogg asked is this strictly on water issues. Mr. Hounsell answered in the negative. Mr. Sares asked what about the non-precinct areas. Mr. Hounsell stated that there is no governing body watching out for them other than the Board of Selectmen, but they do receive fire services. Mr. Sares stated that he is 150% against this concept and has sent an email to the Board of Selectmen as a citizen. Mr. Sares stated that the Board of Selectmen receives \$250 a month and an advisory committee is not necessary. Mr. Sares stated that he is happy with the Board of Selectmen in the non-precinct areas. Mr. Sares stated that he is dead set against this committee.

Mr. Hounsell stated that this is a legitimate concern. Mr. Hounsell stated that it is important to hear from everyone across the whole spectrum and the more people are looking at things and talking about them the better. Mr. Sares stated during the meetings of the Board of Selectmen there is a public comment period. Mr. Sares stated that they didn't have this infrastructure sub-committee a few years ago and he has had no complaints. Mr. Sares stated that he has not had the chance to hash this out, and he takes responsibility for that, but don't know what the rush is.

Mr. Drinkhall asked when did original committee begin. Mr. Hounsell stated two or three years ago. Mr. Hounsell stated that they did not meet very often and they met at a difficult time of the day and was not healthy for open government. Mr. Dickinson stated that this sub-committee is not going to be meeting very often other than when input is necessary. Mr. Hounsell stated that we have the Board of Selectmen meetings and they are open to the public. Mr. Hounsell stated that the Board of Selectmen discussed this and looked at this and not just something that popped up. Mr. Hounsell stated that they would like to offer an invitation to the Planning Board if they would like to participate.

Mr. Martin made a motion, seconded by Mr. McFeeley, nominate Bob Drinkhall as Planning Board representative on the Board of Selectmen's infrastructure sub-committee. Motion carried with Mr. Sares voting in the negative.

Meeting adjourned at 9:55 pm.

Respectfully Submitted,

Holly L. Meserve
Planning Assistant