

(Unapproved – February 8, 2010)
HILLSBOROUGH PLANNING BOARD
MINUTES – February 3, 2010

The meeting was called to order at 7:00 p.m. by Herman Wiegelman, Chairman.

Members present: Herman Wiegelman, Arlene Johns, Elisabeth Olson, Ann Poole and Gary Sparks.

Robert Eckberg was designated as Alternate member voting in place of Fred Murphy.

Shane O’Keefe, Planning Director, was present.

MINUTES:

Arlene Johns MOVED and Gary Sparks SECONDED to approve the Minutes of the meeting of January 20, 2010, as submitted.

VOTED - YES: Arlene Johns
 Betsy Olson
 Ann Poole
 Gary Sparks

VOTED - NO: N/A

ABSTAINED: Bob Eckberg (due to his absence at the subject meeting).

MOTION passed.

OLD BUSINESS:

1. **JAMES MURPHY, PARTNERS FARM, LLC. – BLACK POND BROOK SUBDIVISION
222 Windsor Road (Map 7, Lot 119) – Case No. 07-007.
Surety proposals**

O’Keefe passed out copies of [the following](#) letter, dated January 26, 2010, from [Town](#) Attorney Michael Donovan to the Planning Board regarding the above-mentioned case. [It read as follows:](#)

You have asked me to advise the board on the surety mechanisms for subdivision Improvements proposed by the Black Pond Brook Preserve Subdivision applicant (hereinafter referred to as “Attorney Murphy”). Attorney Murphy wants to get the matter of surety resolved so that the plan may be recorded and obtain the vesting protection of RSA 674:49. The current economic situation precludes most developers from being able to obtain the letters of credit and bonds typically required by planning boards as surety.

Attorney Murphy proposes that the board accept one or the other of the following as surety and sign the approved mylars for recording.

- 1) Surety Covenant. This would be a recorded covenant agreeing that no lots would be sold until a cash bond or letter of credit in form and amount acceptable to the planning board it provides; or
- 2) Mortgage.

The June 18, 2007 Conditional Approval of the Black Pond Brook Subdivision included the following condition:

- 10) The applicant shall post a bond, irrevocable letter of credit or other surety in a form acceptable to the Planning Board and in an amount approved by the Planning Board engineer before work on each phase of the roadway, drainage system and fire cistern construction commences. Note to be added to the approved subdivision plat.

In his letter of December 18, 2009, Attorney Murphy states that the wording of the above Condition No. 10 indicates that the planning board recognized that surety would not be posted prior to signing and recording of the subdivision plat. That is a reasonable interpretation of the wording of Condition No. 10. The planning board itself is the ultimate authority on what is intended with respect to the wording of Condition No. 10.

If the board intended by Condition No. 10 that the subdivision plat could be recorded and that surety need not be posted until just prior to commencement of construction, the acceptance of Surety Covenants is appropriate. In that case, Parts 1 and 11 of this letter may be ignored, and the board may go to Part 111 (recommendations). If the planning board did not intend to allow the subdivision plat to be recorded without posting of a bond or letter of credit prior to recording, then a waiver of the subdivision regulations is required, and this entire letter should be reviewed by the board.

1. Legal Discussion.

Accepting Surety Covenants or a Mortgage as a performance guarantee would be a substantial deviation from the Hillsborough Planning Board's past practice and from the practice followed almost universally by planning boards in New Hampshire. Nevertheless, as discussed below, it would be legally permissible for the Hillsborough Planning Board to waive its subdivision regulations in order to accept either type of surety.

1) Statutory Authority. New Hampshire's planning enabling legislation provides that the "regulations or practice of the planning board" shall provide:

(b) in lieu of the completion of street work and utility installations prior to the final approval of a plat, the planning board shall accept a performance bond, irrevocable letter of credit, **or other type or types of security** as shall be specified in the subdivision regulations ...

RSA 674:36, 111. (b). (Emphasis added).

The above cited authority, which uses the words "other type or types of security," is broad enough to allow either of the mechanisms proposed by Attorney Murphy. However, the statutory authority requires that the "other type or types of security" be specified in a planning board's subdivision regulations. As noted below, the Hillsborough Subdivision Regulations do not specify other types of surety.

2) Hillsborough Subdivision Regulations. Section 201-8 of the Hillsborough Planning Board Subdivision Regulations provides for Performance Guarantee. Section 201-8 requires posting of “a performance guarantee in a form acceptable to the board and in an **amount** sufficient to cover the cost [the required improvements]” Subdivision Regulations, Section 201-8. A. (Emphasis added), When Section 201.8 is read as a whole, the repeated use of the word “amount” leads one to conclude that the types of surety intended to be allowed are those which can guarantee recovery of a specific amount of money in the event of default.

A mortgage could be structured to guarantee a specific amount of money as surety, but the concept of surety covenants, per se, does not guarantee a specific amount of recovery in the event of default. Therefore, I conclude that the acceptance of a Surety Covenant, as proposed by Attorney Murphy would require a waiver of Section 201-8 of the Subdivision Regulations.

3) Waivers. The Hillsborough Planning Board may waive its Subdivision Regulations. (See Section 201-II,C of the Subdivision Regulations). In 2009, the NH Legislature amended the waiver authority of a planning board to make waivers easier for developers to obtain. Now, a waiver may be granted if:

- 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 subdivision, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations.**

RSA 674:36,II (n) (Emboldened language added to statute in 2009).

The planning board closed its public hearing on this subdivision application more than 2 years ago and issued a Conditional Approval. In order to grant a waiver (and the required amendment to the 2007 decision), the board would have to hold a public hearing with notice on the waiver application.

II. Policy/Practice Discussion.

1) Potential Administrative Complications. As a general rule, keeping municipal post-plat approval tasks few, administratively simple and not legally complicated is a good practice. One downside of these alternate methods of surety is that they do not adhere to this rule in the event the subdivision improvements are never built. Holding a mortgage as surety will require a foreclosure proceeding in the event of default. Even if there is no default, it will require a series of releases as phases of construction are complete. Foreclosure or releases will involve additional administrative time by the board and legal expense. A Surety Covenant will require continued vigilance on the part of the Town, beginning with the assessing staff, to be sure lots are not sold in violation of the covenant.

2) Recording the 42 Lot Plan. The act of recording a subdivision plat before surety for improvements is posted could also be problematic.

- The first question is: How long may the plan remain recorded without construction of the improvements taking place? It would be inadvisable to answer “forever” to this question.
- In the event a time limit is imposed by the board and no construction has occurred, a revocation proceeding by the board must be commenced. An additional administrative proceeding and additional legal expense will be required.

If the plan is recorded and a Surety Covenant is violated by the subdivider or a subsequent purchaser of the subdivision, then the Town will not be able to “undo” the sale of the lot(s).

At best, the planning board would be able to revoke the unsold part of the subdivision. Even with revocation of the remainder of the subdivision, the former streets serving the sold lots would likely exist under law as "paper streets" providing private right-of-way access to the sold lots. This would present a legally complicated situation in which the Town would become entangled.

Notwithstanding the above-described complications, there is an advantage to the Town of accommodating Attorney Murphy's request. Upon recording of the subdivision, the common open space and conservation easements would be deeded to the Town. Even if the subdivision improvements were never built, the remainder of the subdivision plan could be revoked, but the Conservation Commission would still own the common open space and easements.

III. Recommendations.

As noted, it is legally permissible for the planning board to accept either form of surety proffered by Attorney Murphy subject to the procedural requirements discussed in this letter.

- If it was the intent of Condition No. 10 to allow recording of the plan without posting of a bond or letter of credit, then the board may proceed with surety covenants; or*
- If that was not the intent but if the board wants to accommodate Attorney Murphy's request, then I recommend that it allow the Surety Covenants (rather than a mortgage) because the covenant approach is less complicated to administer and enforce.*

However, I also recommend that the legal instruments establishing the Surety Covenants be structured as a "Development Agreement." I have no problem with the language proposed by Attorney Murphy in the draft instrument he has prepared being included in a Development Agreement, but there needs to be additional provisions on record protecting the Town.

- 1) A time limit. The recorded plans should not be allowed to remain forever without the improvements being built.*
- 2) An understanding as to vesting against changes in local land use regulations.*
- 3) Required deeding of the common conservation land and easements along with a statement indicating that the conveyances would not be revoked if the subdivision improvements are never built and the remainder of the plan revoked.*
- 4) Enforcement provisions in the event the covenant is violated, including that no building permits will be issued for lots sold in violation of the covenant.*

If the board agrees that a Development Agreement inclusive of surety covenants is appropriate, then there should be a final "compliance hearing" on the subdivision after a Development Agreement is prepared.

A discussion was held.

Members are to review Attorney Donovan's letter at their leisure and attend the next meeting with questions and comments.

Board members were in favor of inviting Attorney Donovan to be present at a non-public session to be held on February 17, 2010, for one-half hour starting at 7:00 p.m., at which time

further discussion will be held and a decision made [on how to proceed with the question of surety for the project.](#)

~~O'Keefe is to schedule a public hearing on February 17, 2010, to consider amendments to the subdivision regulations.~~

O'Keefe noted that Ted Millspaugh, Chairman of the Conservation Commission, had communicated with him regarding [conservation lands involved in](#) this case. O'Keefe passed out copies of Millspaugh's printed comments regarding Partners Farm Surety Covenant [noting that they were Millspaugh's comments and not necessarily those of the Commission :](#)

The proposed subdivision is contingent upon the transfer by Partners Farm, LLC of 25.77 and 68 acres to be deeded in fee simple to the Hillsborough Conservation Commission and the execution of two conservation easements to be held by the Hillsborough Conservation Commission on 8.77 and 9.7 acres and associated access easements. These open spaces and preservation easements are required to comply with the applicable subdivision rules and regulations.

The Town's access to the 93.77 acres to be deeded in fee and the two conservation easements depends on completing construction of the planned roads. Unless and until the applicable roads are constructed as set forth in the subdivision plans the Town owned land will be landlocked. Therefore, the land to be deeded to the Town will have no value to the Town until the roads are constructed. Also, the Conservation Commission will not be able to carry out its obligations under the related conservation easements and could be exposed to potential liabilities.

The purpose of the land to be deeded to the Town and the conservation easements is to provide open space for the residents of the subdivided property. It does not make any sense to carve up the land to be transferred to the Town and encumber it with restrictions before the roads are built.

Finally, we note that Conditions 26 and 27 of the DES Permit No. 2008-00240 require that the easement area be surveyed by a licensed surveyor, and marked by monuments prior to construction, and that DES be notified of the placement of the monuments to coordinate on-site review of their location. The Conservation Commission has also required that Partners farm, LLC comply with the Conservation Commission's Boundary Marking Standards for Acceptance of Easement and Fee Ownership of Conservation Lands. The Conservation Commission would appreciate being notified when DES performs its on-site review of the monuments so someone from the Conservation Commission can attend.

Members discussed Millspaugh's comments.

Eckberg stated that he owns land abutting Partners Farm, LLC; there are 300 acres of land located across Black Pond Brook, and he doesn't want any trespassing on his property.

Members reviewed the phasing exhibit submitted by Attorney Murphy which now proposes five phases, ~~with~~ \$300,000 surety for each phase.

Johns noted that originally there were two phases; this new proposal of five phases needs to go to the ~~B~~oard's engineers for their review.

Eckberg said that the proposed phase one contains the most desirable land; the phase two land gets somewhat steeper; a water supply would be needed for the fire department.

It was O'Keefe's opinion/recollection that the fire cistern would be installed in the phase one area, near the road.

Eckberg spoke on roads to be built for phases one, two and three; the phase four land goes up hill. Eckberg questioned what would happen to phase three when phase four goes in, and was told it would be necessary to have erosion control.

Fees for the Planning Board's attorney, Attorney (Donovan's), were brought up, and members agreed that Attorney Murphy should be aware that he is responsible for Attorney Donovan's fees.

2. LARGE WIND ENERGY SYSTEMS.

~~This subject has been discussed at previous meetings.~~

This subject has been discussed at previous meetings. It was noted that the Zoning Task Force would be meeting next week and could bring this up.

It was the opinion of Sparks that the Planning Board should work on this project.

Johns thanked Sparks for his opinion and suggested that the Board conduct a work session.

Further discussion was held.

3. PROPOSED EMERALD LAKE VILLAGE DISTRICT MASTER PLAN.

~~The original draft submitted by the Central New Hampshire Regional Planning Commission was not acceptable to the Town's committee working on this project.~~

The original draft submitted by the Central New Hampshire Regional Planning Commission was not acceptable to the Town's committee working on this project.

O'Keefe reported that progress is now being made with the change of the CNHRPC staff working on our project. O'Keefe was in receipt of an early draft from the CNHRPC.

Johns said she would like to see the draft when it was further developed.

The implementation program was discussed.

Poole questioned the payment made to the CNHRPC and Johns answered that what is to be paid has been paid.

A discussion was held.

NEW BUSINESS:

1. PLANNING BOARD APPLICATION SUBMISSION SCHEDULE – 2010.

O’Keefe passed out copies of the ~~Board’s meeting above mentioned~~ schedule for the year, and noted that applications for exemption from Site Plan review may be submitted no less than two weeks prior to the meeting at which time it is to be considered.

A discussion was held.

2. BUDGET PUBLIC HEARING WITH THE BOARD OF SELECTMEN, FEBRUARY 11, 2010.

Wiegelman invited Bboard members to attend the budget hearing.

He noted that compensation for the Bboard members will be included in the warrant articles.

A discussion was held.

OTHER BUSINESS:

**1. PHILIP HUNTLEY REVOCABLE TRUST – Authorization of voluntary lot merger.
25 Melody Lane (Map 13, Lots 34 and 35).**

O’Keefe ascertained that lots were adjoining (in the Emerald Lake Village District) and Chairman Wiegelman executed the Notice of Voluntary Merger.

**2. DEPARTMENT OF ENVIRONMENTAL SERVICES DRINKING WATER SOURCE
PROTECTION PROGRAM.**

The Bboard was in receipt of a copy of *The Source*, a quarterly newsletter.

3. ANNUAL REPORT.

In answer to Johns, Wiegelman replied that he is working on the 2009 annual report.

Wiegelman asked if there was any other business to come before the Bboard this evening.

7:47 p.m. Gary Sparks moved and Arlene Johns SECONDED to adjourn.

*VOTED - YES: Arlene Johns
Betsy Olson
Ann Poole
Gary Sparks
Bob Eckberg*

VOTED - NO: N/A

ABSTAINED: N/A

MOTION passed unanimously.

Respectfully submitted,

Patricia M. Cote
Recording Secretary