

March 29, 2009

To: Hebron Planning Board

From: Eleanor Lonske, Vice-chair

Subject: Response to *Applicant's Request for Action Relating to Planning Board Member*

I have served on the Planning Board for over five years, first as an alternate, later as a member and as vice-chair. During this time I have taken advantage of programs and resources offered by the State of New Hampshire Office of Energy and Planning (OEP) and the Lakes Region Planning Commission (LRPC) to educate myself on land law so as to better serve the people of Hebron. One of the resources that the State provides to town planners is a Listserv called Plan-link.

Municipal and Regional Planning Assistance
Plan-link Information & Guidelines (revised December 2004)

General Information:

The Office of Energy and Planning (OEP), with support from the New Hampshire State Library, offers the Plan-link Listserv (Listserv) to enhance the communication and sharing of information among New Hampshire planning, zoning and land use regulation officials and interested individuals through the use of Internet E-mail. Only subscribers can participate and anyone may subscribe to the Plan-link Listserv. The Listserv allows subscribers to share information relevant to land use and zoning regulations and is not moderated by OEP or the State Library.

Those persons serving in either elected or appointed positions in New Hampshire government (state, county or local) along with planners, code enforcement officers, zoning administrators and other employees are especially encouraged to subscribe. Access to the Internet and an Internet e-mail address are necessary in order to subscribe and participate.

Plan-link Guidelines:

In utilizing the Plan-link Listserv, participants are encouraged to discuss and share information on aspects of land use regulation in New Hampshire. Since OEP does not operate a moderated listserv, subscribers may post only information that is relevant to planning, zoning and land use regulation in New Hampshire.

I have followed Plan-link threads of a wide range of topics, but have only posted queries to it twice: the first time several years ago, when the Board was considering the Hebron Country Estates application, to research how other towns defined "dead-end" road. The results of this legal research, which I brought back to the Board at a public hearing, resulted in changes to the proposed road design, improving fire and safety vehicle access. Neither the applicant, his attorney, nor any member of the Board raised objections to my posting the query on Plan-link.

After the Planning Board meeting on February 4, 2009, where there was lack of consensus as to the meaning of "minimum" when applied to road standards in the Hebron Subdivision Regulations, I again did legal research on Plan-link.

From: elonske@metrocast.net
Subject: road standards: minimum standards
Date: February 4, 2009 10:27:11 PM EST
To: plan-link@maillist2.nh.gov

The Hebron Subdivision Regulations state:

"The Planning Board will also require **as a minimum** the following requirements:

a) grades of streets generally not to exceed ten (10) percent unless otherwise approved by the Selectmen and the Board;

...

n) Horizontal Curves shall have a center line radius of not less than 150 feet, except turnarounds on dead-end streets.

Here is my question: Can the Board hold a proposed road to higher standards than the minimum? To be more specific, if a proposed road has a very long stretch of 10% grade that meets a curve with 150' radius, can that combination be a legitimate reason to require the developer to either flatten the grade near the curve or widen the curve radius?

Thank you for your advice.

Ellie Lonske
Vice Chair, Hebron Planning Board

As is the case in most Plan-link threads, the query elicited a brief burst of responses, some relevant, some not, and then died out the following day. During that period, I posted responses to specific questions to clarify my original question, but did not in any way express my personal opinion as to whether the Board *should* hold a road to standards beyond the minimum, only if it *could*. On March 12, in a meeting with Town Counsel, I raised the same question; got the same answer.

The *Applicant's Request for Action Relating to Planning Board Member* charges that my posting the above message on Plan-link was an "improper communication". The Board has copies of the legal brief, so I won't quote from it except to make the following points:

1. The *Request for Action* charges that my closing "*Thank you for your advice*", elicited "*advice*" from an attorney and engineer. That's nonsense. When one closes a letter, "*Sincerely yours*", no one interprets the closing in a literal sense.
2. "*And whether the communication or contact extended over a prolonged period of time*". My Plan-link query was posted at 10:27 pm on February 4th. The final message in the thread was posted at 2:07 pm on February 5th. By no stretch of the imagination can that be considered a *prolonged period of time*.

Planning Board Chairman consulted Town Counsel as to how to respond to the *Request for Action*. Here are excerpts from Town Counsel's response:

“The disqualification of board members is addressed in RSA 673:14. It provides that a board member shall not participate in deciding or sit upon a hearing in a judicial capacity (i.e. making a decision on an application) if the member has a “direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter[.]” This is called “the juror standard.” **Disqualification is not required when the member has “knowledge of facts involved gained in the performance of the member’s official duties.”**”

The bold emphasis in the final sentence is mine. In my opinion, my legal research on Plan-link to clarify the meaning of “minimum” was in performance of my official duties as a Vice-chair of the Planning Board. Chairman Larochelle and I act as co-chairs in that he chairs public hearings on applications, and I chair workshops to discuss possible amendments to Hebron’s Subdivision Regulations, Zoning Ordinance, and other matters that require extensive research, writing, and editing. Chairman Larochelle’s only requirement is that any question to Town Counsel must go through him for budgetary reasons.

“Pursuant to RSA 673:14, only the involved board member can decide to remove himself from sitting on an application. The board member may do this on his own volition if he believes he is disqualified.”

I cannot in good faith remove myself of my own volition because I do not believe that I am disqualified.

“The board, at the request of either the involved board member or another member, may vote as to whether the members believe the involved board member is disqualified. That vote is advisory only – the involved board member still makes the decision.”

“Neither the applicant nor a non-board member can require the board to vote. However, the applicant and/or other interested parties do have an obligation to bring a reason for disqualification to the board’s attention as soon as it is discovered; they cannot appeal the board’s decision on the basis of disqualification if they do not do so. Attorney Martin’s “motion” constitutes notice that there may be a reason for disqualifying a member. The board is not required to take any action in response to the “motion.””

I do not request that the Planning Board vote as to whether its members believe that I am disqualified, but if the Board decides to put the question to a vote, I will follow the advice of the Board for the following reason.

“If a board member participates in a decision and the decision is appealed on the ground that the member was disqualified, and the court agrees, the decision will be invalidated and the application sent back to the board. **The board will have to start on the application all over, from the beginning, without that member.**”

Again the bold emphasis is mine. I would not want to be responsible for the Board having to rehear this application. Life is too short.