

Zoning Board of Adjustment

Meeting and Hearing Minutes

January 15, 2008

ZBA Members present: Pete Carey (Chair), Maynard Young, Tom Gump, Ed Gempka, Roger LaFontaine, Doug McQuilkin (Alternate) and Earl LaFlamme (Alternate).

Others present: Attorney Bud Martin, Alan Barnard, Erik Simensen, Barbara and Richard Delaney, Martha Twombly, Mark Coulson, Phil and Betsy Twombly, Dick Cowern, Roger Larochelle, Randy Pitts, Steve Derochea, Chuck Beno, Jeff Hillier, Jay Hillier, George Bolln, and Ellie Lonske. Also present were Debra Mekula, court reporter, and Jane Ramsay, ZBA Secretary.

Time Convened: 7:04 p.m. **Time Adjourned:** 10:43 p.m. **Next Meetings:** Saturday, January 19, 2008, 9:00 a.m., site walk at Thistle property; Wednesday, February 13, 2008, 7:00 p.m., Thistle hearing continued; and Wednesday, March 12, 2008, 7:00 p.m., Limited Editions Properties, Inc. Ridgewater Commons hearing continued.

Agenda Items:

1. Administrative items.

2. Thistle Property Holdings, LLC, hearing continued from December 11, 2007 (Case #221)

3. Limited Editions Properties, Inc., hearing (Case #222)

The meeting was called to order by Chairman Pete Carey at 7:04 p.m. The meeting notice and agenda had been posted in three bulletin board locations in Hebron, posted on the Town's web site, and advertised in the *Laconia Citizen* newspaper. All abutters of Ridgewater Commons were notified of the hearing by certified mail. The Thistle abutters did not need to be notified because tonight's hearing was continued from last month's hearing.

Pete noted that all members of the ZBA, including the two alternates, Earl LaFlamme and Doug McQuilken, were present and thanked them for taking part in this important meeting.

The minutes of the November 6, 2007 meeting/hearing were reviewed. Ed Gempka moved, seconded by Roger LaFontaine, to accept them as written. The motion passed.

The minutes of the December 11, 2007 meeting/hearing were reviewed and voted on by the three members who had attended the December 11 meeting. Tom Gump moved, seconded by Maynard Young, to accept them as written. The motion passed.

Pete said last Saturday's site walk of the Thistle property was poorly attended and there were not enough Board members to constitute a quorum. He suggested another walk should take place before the next hearing. The Board decided to reschedule it for Saturday, January 19, 2008, at 9:00 a.m., at the Whip-o-Will Motel. Alan

Barnard, representing the Thistles, asked if there would be any discussion or decisions made at that time. Pete answered that there would not be any substantive discussions. The site walk would just be for the Board members to become familiar with the layout of the property.

Pete said he had received a request yesterday from Attorney Jack McCormack asking for the hearing scheduled for tonight to be postponed so that another site walk could be scheduled and to allow him time to meet with abutters who had expressed concerns about the Thistles' proposal. Jack McCormack said he thought some of their issues could be resolved before the next hearing. One of the abutters' concerns has to do with the Thistles' right of way to one of the Whip-O-Will Condominium Association beaches. **It was moved, and seconded to continue the Thistles' hearing to Tuesday, February 13, 2008, at 7:00 p.m. The motion passed.** Alan Barnard has a topographic map of the proposed subdivision which will be available in the Land Use Room.

Pete called the hearing for Barbara and Richard Delaney's Limited Edition Properties (Ridgewater Commons) to order at 7:20 p.m. Pete began by outlining some of the background of the case. The original application, submitted to the ZBA on October 16, 2007, appealed the September 5, 2007 decision of the Hebron Planning Board denying the Ridgewater Commons subdivision proposal. On November 12, 2007, the ZBA denied Limited Editions' request for a hearing under RSA 676:5 because the application did not offer any specific grounds for appeal. The Delaneys' attorneys then submitted a motion for reconsideration, and the ZBA, at its December 11, 2007, meeting, found that the application this time included specific grounds for appeal within the purview of the Board's authority.

Attorney Martin explained that the Delaneys hired a court stenographer to record tonight's hearing and said he would give the ZBA a copy of the verbatim transcript when it is complete. Randy Pitts asked how the meeting minutes would be coordinated between Jane Ramsay and the court reporter. Pete said that Jane's minutes would be the official record of the hearing, but the Delaney team would share the court reporter's record with the ZBA.

Tom Gump recused himself from the Limited Editions' case because he is an alternate member of the Planning Board and actually voted on September 5 to deny its subdivision proposal. Doug McQuilkin also recused himself as a voting member because he had been on the Planning Board previously, was involved in the early stages of the Limited Editions case, and wanted to avoid any perception of bias. Attorney Martin said he had no objection to having Tom and Doug sit at the table and take part in the discussions as citizens. Pete appointed Earl LaFlamme to full voting member status.

Attorney Martin gave an overview of the current status of the Ridgewater Commons project on West Shore Road. He said there are three pending proceedings at this time: Application number one was heard in Superior Court and is on appeal at the New Hampshire Supreme Court; application number two will be heard by the Superior Court on February 7, 2008; and tonight's public hearing to reconsider the Planning Board decision on September 5, 2007. He said he hoped the ZBA would come to a decision to avoid further court hearings and added expense to both the Delaneys and the Town. He spoke to the three issues the ZBA has to consider:

1. Was the Planning Board in error when it determined the project was not a cluster development?
2. Was the Planning Board in error by setting a maximum size for the lots in the development?
3. Was the Planning Board in error by applying undefined environmental, public safety, and aesthetic standards to the development?

Attorney Martin then turned the floor over to Alan Barnard. Referring to Exhibit A, Alan spoke to the plan, using a map of the original property of 112.5 acres. He showed the boundaries of the property, the location of abutting properties, the snowmobile trail going through the property, the hiking opportunities and the wildlife corridors that exist on the land. In Exhibit B, Alan showed how the land could sustain a conventional subdivision of 21 lots. The lots would take up 80.93 acres, the open space 22.75 acres, and roads 8.82 acres. Superimposing a cutout showing the effect of the cluster development in the same subdivision, the open space was increased to 70.47 acres. Alan presented four pie charts to show the average size lot in the conventional subdivision (3.85 acres) and the cluster development (1.99 acres), open space in the conventional subdivision (22.75 acres) and the cluster development (70.47 acres), percentage of area of lots and roads in the conventional subdivision (79.8%) and the cluster development (37.4%), and the area of roads and road rights of way in the conventional subdivision (8.82 acres) and the cluster development (4.12 acres). Alan pointed out that there was a reduction in the size of the lots, reduction in the size and percentage of land used for roads and road rights of way and an increase in open land set aside in perpetuity for conservation. In Exhibit C, Alan showed how the proposed 19 lots would further add to the open areas (58.84 acres), land for recreation (37.91 acres), and would reduce lot size and land used for roads and rights of way.

Randy Pitts asked why there were no driveways shown on Exhibit C. He wanted to know if they had been shown on the final plans. Alan Barnard said the driveways are indicated on the map he was using to show the overlays and they had been shown on the plan presented to the Planning Board. Ellie Lonske, Vice Chair of the Planning Board, said she had not seen the plan set forth in Exhibit C. Asked whether she was speaking as a member of the Planning Board or as a citizen, she said the Planning Board did not have a chance to speak at court and she wanted to explain to the ZBA what had taken place over the years the Planning Board had tried to work with the Delaneys on their project. Roger Larochelle, the Chair of the Planning Board, said the Board had voted to have Ellie speak for them at this meeting. She said the site was very difficult to develop and the Delaneys were not interested in making smaller lots or in moving the lots back on the property where the land was more suitable for building because they felt the larger lots with the best views would sell for the most money. She said the view lots were on the steepest slopes and presented the most challenges from an environmental protection standpoint. She went over the steps the Planning Board and Delaneys went through and talked about some of the experts both the Board and the Delaneys had hired to review the project since 2006. She said the project seemed to be getting nowhere and nothing was being accomplished, and so, on September 5, 2007, the Board turned down the project.

Attorney Martin said if the Planning Board had not seen the last proposal, it was obligated to reopen its proceedings and consider it. Pete called on Roger Larochelle to produce the entire Planning Board record of the Limited Editions case and directed a brief recess to determine whether Limited Editions' last proposal encompassed in Exhibit C was presented to and considered by the Planning Board before it reached its September 5, 2007 decision in the case.

[During the recess, Roger Larochelle turned the entire Planning Board record pertaining to the Ridgewater Commons Development over to Jane Ramsay for safekeeping. The original record and copy will be stored in the locked, fireproof file in the Land Use Room. Jane will be responsible for the record and will make it available to the public for review anytime she is in the Land Use Office or by appointment.]

Following the five-minute-long recess, Pete announced that the Planning Board record showed clearly that the Planning Board had, indeed, reviewed a plan identical to Exhibit C before it took its final action on the project on September 5, 2007.

Attorney Martin began his discussion of the three major points of Limited Editions' application. Pete asked him whether he preferred to handle public comment point-by-point during his presentation or at the end of his entire presentation. Attorney Martin agreed to take and deal with public comment as he went through each of his three major points.

Cluster development. Attorney Martin reviewed the Hebron Zoning Ordinance definition of and requirements for a cluster development and explained how he felt Ridgewater Commons met all of them:

- a. The subdivision is for single family dwellings. All the dwellings are single family homes.
- b. The proposed 19 lots are significantly reduced (48.3%) from conventional lots. This was shown in Chart 1, Average Size Lot in Acres.
- c. Natural topographic features are preserved, and land used for roads and developed areas are reduced. Charts 3 and 4 give the acres and percentage of increase in preserved land and reduction of land used for lots and roads.
- d. Undeveloped land is permanently saved for conservation, recreation, and wildlife habitat and cannot be subdivided in the future. Chart 2 shows a 210% increase of land saved from subdivision in perpetuity.

Determination of lot size. Attorney Martin said the Zoning Ordinance gave the Planning Board the authority to determine the minimum lot size, but nowhere in the Ordinance was the Board given the authority to determine the maximum lot size. Pete referred to the definition and purposes of "cluster development" in Article II and asked Attorney Martin whether a sensible interpretation of Articles VI.A.5.b and VII.B.9.b is that the Planning Board is limited to setting minimum, but not maximum lot sizes. After some discussion, Attorney Martin agreed that the more sensible interpretation of the Ordinance language, particularly in the context of cluster development, is that the Planning Board has the authority to determine lot sizes, minimum and maximum. However, he added that the Planning Board in this case never established a maximum lot size and erred in failing to do so. Attorney Martin pointed out the Board did set a minimum lot size of one-half acre. The Planning Board record indicates that all parties agreed that a minimum one-half-acre buildable lot size seemed appropriate.

There followed discussion about the engineering studies used in the Ridgewater Commons development to determine the size of specific lots and how each lot had different slopes, characteristics and topography which would make a single maximum lot size for the whole project impossible to determine. The State also has guidelines concerning septic systems, wells, and slopes. Any figure used by the Planning Board to determine a maximum size would depend on how the State-imposed regulations are met. However, Attorney Martin contended the Planning Board should have established a maximum as well as a minimum lot size and set clear parameters for the project. Pete pointed out the Cooperdock report reference to State standards on cluster development lot size and asked whether these were in the nature of regulations or guidance. Alan Barnard replied that they were regulatory. Pete said the ZBA needed to review the State regulations. Finally, Roger Larochelle said the consensus of the Planning Board was that it had tried to issue guidance on the lot sizes and the minutes of Planning Board meetings would reflect that. He asked that the minutes be referenced in another ZBA hearing on this matter.

Alan offered for the Board's consideration Exhibit D, a table of estimated steep slope disturbance showing the approximate area of >25% slope disturbance done by Northpoint Engineering, LLC, for each lot in Ridgewater Commons. It showed a total of 31,001 square feet of steep slope disturbance in the final plan as compared to 210,000 square feet in a conventional subdivision. A chart of the lot summary was presented. It showed the total lot size as well as the useable area (buildable area = total area minus wetlands, rights of way, and >25% slope area) of each lot.

Environmental, public safety and aesthetic standards. Attorney Martin said the Planning Board can consider environmental, public safety and aesthetic concerns, but it must have measurable standards that can be met by the developer. Beyond the broad prefatory language in Articles I, VI, and VII of the Zoning Ordinance, there are no standards articulated in the Ordinance for these categories. He said that the Delaneys had met all the best practices standards for environmental protection and that the Board cannot just assume the developer will fail to comply as a reason for denial. He said the road safety issues had been addressed by the New Hampshire Department of Transportation, the Fire Chief pronounced the roads safe for the passage of emergency and fire vehicles, and the water retention issue had been addressed and resolved. There was nothing identified regarding public safety as a reason for denial. The aesthetic issues were also addressed and the Board's concerns met over the course of the application process. Attorney Martin said the developer agreed to moving lots back on the property, minimizing the cutting of trees, landscaping, and planting around the retaining walls. Again, he said there were no standards articulated upon which the application could be denied. He said every concern was addressed and the denial was based on unarticulated issues. There are enforceable standards set forth by the State and Federal Governments, and there is a process of bonding that insures that anything not done properly will be remedied. The Delaney team feels that the Planning Board did not establish sufficient, articulated standards and did not integrate the other safeguards that exist into their decision.

Pete asked Alan to point out the lake and rural districts on the development map. Alan explained that most of the development lies in the rural zone, but some of the land near and above West Shore Road is in the lake district. Chuck Beno, an abutter and Planning Board member who had recused himself from the Planning Board during the Ridgewater Commons project, expressed concern about where each home would be located on the lots and how much cutting would take place once the lots were sold. He said there was no language in the plan limiting tree cutting or drainage changes in the lots which could compromise the engineering plans in place now. Asked how the lots would be bought and owned, Alan answered the lots would be sold in fee simple and an association will manage the open recreation space.

Roger Larochelle said before the ZBA can make a decision on the Limited Editions' appeal, it should review the entire nine-page September 5, 2007 decision of the Planning Board. Richard Delaney stated his concern that the Planning Board record was not entirely correct and, for example, misstated some conclusions of one of his experts. Mr. Delaney said he had a letter from Peter Cooperdock, saying he had been misquoted. Roger replied that he had consulted the Town's attorney, Tim Bates, who said anything that happened after the Planning Board's decision could not be posted to the record. At this point, Attorney Martin asked for and Pete granted a brief recess.

After a two-minute-long recess, Pete called the hearing to order and explained that Tim Bates was the Town and Planning Board's attorney and, thus, could not advise the ZBA in this case as it would pose an apparent or actual conflict of interest.

Pete asked the ZBA members to review the Planning Board record before the next scheduled hearing. He again asked Alan to produce the State cluster development regulations before the next hearing on Wednesday, March

12, 2008, at 7:00 p.m. Pete asked if a site walk would be appropriate and helpful. The collective opinion of the Delaney team as well as other members of the ZBA was that it would not be a good idea at this time.

Ed Gempka moved, seconded by Maynard Young, to continue the Limited Editions hearing until Wednesday, March 12, 2008, at 7:00 p.m. The motion passed.

Maynard Young moved, seconded by Ed Gempka, to adjourn the meeting. The motion passed and the meeting was adjourned at 10:43 p.m.

Jane Ramsay

Secretary