

The Planning Board for the Town of Derry held a public hearing on Wednesday, January 21, 2009 at 7:00 p.m. at the Derry Municipal Center (3rd Floor) located at 14 Manning Street in Derry, New Hampshire.

Members present: Virginia Roach, Chair; David Granese, Vice Chair; Jan Choiniere, Secretary; Brian Chirichiello, Council Representative; Randy Chase, Administrative Representative; Phil Picillo, Ann Evans (7:30 p.m.)

Alternates present: John O'Connor, Maureen Heard

Absent: Gary Stenhouse, Town Administrator; Richard Tripp, and Mark Cooper

Also present: George Sioras, Director of Community Development; Elizabeth Robidoux, Planning Clerk, Mark L'Heureux, Engineer, Derry Public Works

Mrs. Roach called the meeting to order at 7:02 p.m. The meeting began with a salute to the flag. She introduced the staff and Board members present, and noted the location of emergency exits and agendas.

Mrs. Heard was seated for Ms. Evans and Mr. O'Connor was seated for Mr. Cooper.

Escrow

#09-03

Lampton Drive

JEMCO

06046, Lampton Drive

The request is to approve the release of the Letter of Credit held for the above noted project. This is the final release. The amount to be released is \$128,001.06. The amount to be retained is zero.

Motion by Granese, seconded by Choiniere to approve the release as presented. Discussion followed.

Mr. O'Connor questioned whether the 1 ½ inch wear coat had been completed. Mr. L'Heureux advised that the entire road has been completed per the plan. The town is in receipt of as built. The top coat was placed this past fall. Mr. O'Connor has a concern that as of today, only 5 of the proposed 41 homes have been constructed in this development. There will be heavy equipment traveling on the pavement and the equipment may harm the pavement. Mr. L'Heureux advised that the developer is aware that he will need to be careful when traveling

on the road. It is not appropriate for the town to hold funds until all of the homes are developed. The developer has completed all of the tasks on the plan to the satisfaction of the town and has a right to get back his escrow. The town has a mechanism if the road is damaged; the town can withhold Occupational Permits, so the developer will be careful. JEMCO has advised that they will only use wheeled vehicles on the pavement and will cross the lots to the rear. Mr. O'Connor confirmed this is a verbal agreement with the developer and nothing has been put in writing. Mr. L'Heureux reiterated the developer is well aware he can't cause tracks on the pavement.

The motion passed with Chirichiello abstained.

Minutes

The Board reviewed the minutes of the January 7, 2009 public meeting. No corrections or changes were noted and the Chair advised the minutes were approved as written.

Correspondence

Mrs. Choiniere acknowledged the following correspondence.

The Town of Derry has been selected to receive \$10,000.00 from the NH DOT CTAP Targeted Local Government Account to complete the Downtown Redevelopment Study and Marketing Plan. The Town of Bow has sent notification of a public hearing for a cell tower application to be held on Thursday, January 22, 2009, at 7:00 p.m. The NH Citizen Planner Training Collaborative is presenting four training modules. SNHPC has forwarded information with regard to the student competition for the 2008-2009 school year. The Board is also in receipt of the most recent edition of *Town and City*. For more information on any of these items, Board members can see Mr. Sioras.

Other Business

Formal acceptance of Lampton Drive

Mrs. Roach read aloud the memo from Mark L'Heureux, Engineering Coordinator, requesting that the Derry Planning Board recommend Town Council formally accept Lampton Drive as a town road. The road is recently completed and connects Stark Road to Derby Road. The road was completed to town approved plans and standards. All escrows have been released and there are no liens.

Mr. O'Connor inquired who currently plows the road? Mr. L'Heureux advised the developer has been plowing the road. Mr. O'Connor expressed his concern that there are only five homes on this road and there will be a large amount of development. He has concern with taking over a road that is less than 10% complete with regard to the number of homes on it, and would recommend that the Board pass on this action this evening. Mrs. Choiniere inquired if it was typical to accept a road if not all the homes have been developed? Mr. L'Heureux advised it is very typical, especially in these times. Not all lots are developed when the roads are accepted by the town. The road has been completed per the approved plan. Mr. Picillo inquired if there is a certain percentage per the regulations, of homes that must be complete before a road can be accepted? Mr. L'Heureux advised there is nothing in the regulations that requires a certain number of lots be developed prior to acceptance. Mr. Picillo wondered if accepting a road that does not have any lots developed on it would become a financial liability to the town. Mr. L'Heureux advised the town accepted Stonefence Drive and it did not have any homes on it. Mr. Picillo inquired if there is any reason, other than cost to not accept the road? Is it better for the town to plow it than the developer? Mr. L'Heureux stated there are now residents living on that road who pay taxes to the Town of Derry. The town has an obligation and the landowners are entitled to town services. He reiterated the road has been completed per the approved plan. Mr. Picillo noted he was just curious if there was anything in the regulations. Mr. L'Heureux stated the only regulation he is aware of is the one that states the developer is responsible for maintaining the road until the plan is complete and the road is accepted. Mr. O'Connor confirmed there is no written agreement with the developer regarding the condition of the road.

Motion by Granese to recommend to Town Council that they accept Lampton Drive as a town road. The motion was seconded by Picillo.

Chirichiello abstained. Picillo, Granese, Chase, Heard, Choiniere and Roach voted in favor. O'Connor voted no, stating he felt a document was required from the developer regarding no further deterioration of the road. The motion passed 6-1-1.

Request for Extension – Schibbelhute

Mrs. Roach read aloud a letter from Timothy Peloquin of Promised Land Survey, requesting a six month extension for the Schibbelhute subdivision plan. The land owner would like additional time to establish escrow for the project. The plan was originally approved on August 20, 2008. This is the first request. Mr. Granese inquired if Mr. Peloquin or the applicant was present this evening. Mr. Sioras advised that he received a call today from Mr. Peloquin who advised he

had a conflict and could not attend this evening. If the Board required his presence, he could attend and discuss the request at the next meeting. Mr. Granese said he had no issues with the request because it is the first one, but wanted to make sure 6 months would be enough time. Mr. Sioras felt it would be sufficient. He explained this is a subdivision which will create 2 new building lots. The parcel is located on the corner of Hampstead and Olesen Roads.

Motion by Granese to approve a six month extension for the Schibbelhute subdivision, located at 164 Hampstead Road, seconded by O'Connor.

Picillo, Chirichiello, O'Connor, Granese, Chase, Heard, Choiniere, and Roach voted to approve. The motion passed.

Request for Extension – Woods of Derry II (Cooper)

Mrs. Roach read aloud a letter from Tim Peloquin of Promised Land Survey requesting a six month extension for the subdivision plan approved on August 20, 2008. This applicant would also like additional time to secure escrow. Mr. Sioras advised this is a 10 lot subdivision located on Stark and Lawrence Roads.

Motion by Granese to approve a six month extension for the Woods of Derry II subdivision, located on Stark and Lawrence Roads, seconded by Picillo.

Picillo, Chirichiello, O'Connor, Granese, Chase, Heard, Choiniere, and Roach voted to approve. The motion passed.

Other – Community Profile Reminder

Mr. Sioras reminded the public that the Community Profile, which was to be held this Saturday, has been postponed to Saturday, April 4, 2009. It will take place at West Running Brook School and will be held between the hours of 8:00 a.m. and 4:00 p.m.

Public Hearing

Paul George/Brian Dumais

**Parcel ID 18029 & 18030, 19 & 17 Taylor Brook Lane
Acceptance/Review, Lot Line Adjustment**

Mr. Sioras provided the following staff report. The parcels are located on Taylor Brook Lane. This is for a lot line adjustment. A variance was granted by the ZBA on December 18, 2008 to allow a lot line change on two pre-existing, non-

conforming lots. There are no department signatures, waivers or state permits required. There is one abutter who has questions regarding the proposed easement. He introduced James Lavelle, the surveyor who is representing the applicants this evening.

Mr. Lavelle introduced himself and advised he is representing Mr. George and Mr. Dumais. The properties are located on the shore of Island Pond. The George lot is a small lot, approximately 100 x 70; the intent is to create a finger of land to allow for the future relocation of the septic and the potential construction of a garage. The replacement of the septic in this area will allow it to be further removed from proximity to the lake. The ZBA looked at those issues when it was reviewing the zoning application. It was felt this would improve the shore of Island Pond.

Mr. Lavelle presented two colored sketches. They show the right of way through the two lots to the Biery parcel (18031) and others, and also show the potential relocation of the right of way. He pointed out that the lot line adjustment plan does not by itself, change the right of way. They prepared the plan to show the potential right of way to accommodate an abutter and the location was directed by Walter Biery. Abutters are concerned regarding the right of way and that the lot line adjustment plan will block it. This plan does not change the right of way; it only shows a proposed right of way which would be for the benefit of Mr. Biery. The only purpose of this plan is to provide extra area for a lot located on the shore of Island Pond.

Mr. Picillo inquired how the applicants access the existing parcels? Mr. Lavelle explained they cross the property to the north (across Sullivan's property). The access comes from Taylor Brook Lane and turns into the George lot. That is the primary right of way for the lots located further down the access. Mr. Lavelle pointed out the new home that is being constructed on Mr. Dumais' lot. They use the same access for now. The idea is to change the access so that Mr. George can eliminate the right of way from the Sullivan property. The purpose of the plan is to create the new area for a future garage and septic replacement.

Mr. O'Connor inquired how will the new easement read? Mr. Lavelle advised that has not been decided yet. He has spoken with the abutter and there seems to be some difference of opinion regarding the new location. He reiterated the lot line does not change until the deed transfer takes place, as the Board is well aware. The easements may or may not change in the new deeds.

The Board had no questions at this time and the Chair opened the floor to the public.

Attorney Mary Howie identified herself as representing the Biery Trust. Two of the children are present this evening. The elder Mr. Biery is not present. She introduced Attorney Sean O'Leary, who is representing the Holmes family.

Attorney Howie advised the Bierys, Gallaghers, Holmes, and O'Riordan families each own a quarter interest in lot 18031. The O'Riordan family owns lot 18041, which is currently for sale. A letter was faxed to the Planning office at 4:15 today from Brian O'Riordan. Mr. Sioras advised the Board does not have this as the office closed at 4:00 p.m. today. He retrieved the fax and it became part of the record. Attorney Howie read the letter into the record. "Dear Ms. Robidoux: I will be unable to attend this evenings planning board meeting but I wanted to voice my objection to the proposed lot line change on lots #19 and 17 Taylor Brook Lane. This is a section of town that requires a three (3) acre minimum and clearly these two lots do NOT meet this requirement. Also the proposed lot line change goes over a right of way into my lot at 5 Taylor Brook Lane. This is the only way I have to access my house and currently there has been a dispute with the owners of these two lots over my right to use this right of way. I have learned of this meeting yesterday evening and because I am in North Carolina I am unable to get back in time for tonight's meeting. Thank you for the board's consideration in protecting my rights. Sincerely, Brian O'Riordan."

Attorney Howie explained Mr. George purchased his lot from the four families. Mr. Dumais also purchased his lot from the same families. The deed conveyed for the property contains a description of the easement requirements. Specifically, the deed reads, "The Grantees, their heirs, successors and assigns shall have the right to relocate the easement across Lot 1830 provided (i) the entire cost of a new survey and plan, drafting and recording a new grant of easement and relocating roads, driveways and utility lines therein is born by the Grantees, (ii) the Grantees indemnify and hold harmless the Grantors, their successors and assigns harmless from and against any loss, damage or liability arising out of such relocation, (iii) such relocation does not unreasonably interfere or interrupt existing access or utility services to Lots 1831 and/or 1841, and (iv) such relocation provides reasonably equivalent access between Taylor Brook Lane and lots 1831 and 1841 to what presently exists."

She advised Mr. Dumais has constructed a foundation adjacent to the right of way. When cars are parked outside of the future garage, they will potentially obstruct the right of way. The extension of the lot line burdens the existing right of way, and if Mr. George builds he must build a new right of way and relocate it. The second area of the right of way is also burdened because Mr. George may build a garage and septic and that will burden the easement. The issue of the right of way has to be worked out so that it does not interfere with the access for all lots. She presented two pictures to the Board for review which were not retained for the record. One showed a van parked in the right of way in the road and the foundation for Mr. Dumais' home is very visible. It is evident from this picture how the right of way could be obstructed. Mrs. Roach noted that the access is narrow. Attorney Howie advised this is a complex issue and is not yet worked out. She recommends the Board table the application pending resolution of the question of the easements or a Court Order which may be required.

Attorney Sean O'Leary advised he represents the Holmes Family Trust, who own a quarter interest in Lot 18041, which is for sale. His clients have echoed the concerns of the Biery family. He also advised the deed reference cited earlier by Attorney Howie is Book 4875, Page 2881 [RCRD January 4, 2008]. There has been some discussion relative to whether the easement has been intentionally blocked or not by the applicants. It has been suggested to Mr. George that they all work out the issues to the benefit of all. To allow the Lot Line Adjustment now and to allow Mr. George to construct or install a septic may impair future access to lot 18041 and abutters. His client has stated that the easement has been blocked on occasion and there has been a suggestion of uncooperative behavior by the applicants. His client will have difficulty selling his property if the easement is blocked and a potential buyer attempts access to the property to view it.

The four family members who own lot 18041, have had dialogue with regard to filing for injunctive relief regarding the continued obstruction of access by Mr. George and Mr. Dumais. He hopes to avoid that. The problem is that the easement affected by the Lot Line Adjustment could be further impaired and create irreparable harm. It would be of benefit to the Holmes family if this application could be tabled for 90 days and he is making that request. The current weather conditions may affect the ability of the George and Dumais families to construct or excavate anything, so they do not feel this would impact Mr. George or Mr. Dumais at this time. If there was an impact they will take that into consideration.

There was no other public comment and the review went back to the Board.

Mr. Picillo inquired if lot 18041 was using the existing access and how does that come from Taylor Brook Lane? Mr. Lavelle explained lot 18041 has frontage on Taylor Brook Lane and frontage on Island Pond itself. They do use the right of way. Attorney O'Leary explained there is a structure on lot 18041 on the south side, closer to the water, and that is why the easement is in that location. Construction to the north side of the lot could potentially impact wetlands. Mr. Lavelle confirmed the owners of 08041 do use the right of way to access the home.

Mr. Lavelle stated that as far as he is aware, the right of way has not been blocked. Mr. George plows it into the point providing access to the other lots. He submits that the construction of a garage or a septic system to the rear of the George lot would not infringe on the easement and there are a number of homes on Island Pond that have garages and septic located across the street. The same could occur here.

He would request a continuance of this application to the next meeting and he will submit a plan that shows the right of way in its existing location, as well as a plan showing a proposed location. He indicated the proposed easement on this

plan is an attempt to accommodate Walter Biery, who has been in his office to discuss this about three times. This [the easement] is not Mr. Lavelle's issue, but he will come back with a plan that shows the existing right of way. Mrs. Choiniere asked that the revised plan show a more complete map of the area and how the lots are laid out in their entirety. Mr. Lavelle said he would do that and submit it prior to the meeting so the Board can review it.

Mr. Granese inquired as to the size of Lot 18041. Attorney O'Leary advised the lot is 6.398 acres. Mr. Granese inquired as to the size of lot 18031. That is about one acre in size. Mr. Lavelle advised he prepared the original subdivision that divided off the lots. He has a plan that shows all of the lots. Mr. Granese inquired who maintains the existing gravel driveway? All of the residents do.

Mr. O'Connor stated that at the ZBA hearing, Mr. Lavelle received approval for the non-conformity, and stated he would change the deed and easement. When he comes back to the Planning Board, will he bring the new easements with him? Mr. Lavelle said no and explained that he thought the easement issue had been decided with Mr. Biery and they are as shown. Apparently, his children are not in line with Mr. Biery's thinking. He will need to ask for some direction from his clients. Mr. Lavelle wondered if the original proposed easement reviewed by the ZBA would compromise the vote of the ZBA if the easement was changed?

Paul George introduced himself. He felt the best thing to do with regard to the easements and the controversy is to table this plan. He can continue to use the easement as it exists and do nothing at this point. He will withdraw the application and live with it. The lot line adjustment is not that important if the abutters can live with the easement they have had for the past 8 years.

Mr. Lavelle requested the Board withdraw the application without prejudice. The Board agreed to do so. **The application was withdrawn.**

Motion by Granese, seconded by Choiniere to recess and enter a non-public meeting with legal counsel, pursuant to RSA 91-A:3,II (e).

Picillo, Chirichiello, O'Connor, Granese, Chase, Heard, Choiniere and Roach all voted in favor.

The Board recessed at 7:50 p.m. The Board reconvened at 9:05 p.m.

A motion was made and seconded to adjourn. The motion passed and the meeting stood adjourned at 9:06 p.m.

Minutes prepared by Elizabeth Robidoux, Planning Clerk