

Town of *Dunstable* Selectboard
Special Permit Hearing
October 29, 2014
Town Hall, Dunstable, MA 01827

Convened: 7:01 pm

Present: Walter F. Alterisio, Chair, Kenneth J. Leva, Daniel F. Devlin member; Madonna McKenzie, Town Administrator; Alan Chaney, Conservation Commission; Brian Rich, Fire Chief; Dana Kinne, Road Commission; James Dow, Police Lieutenant; Joan Simmons, Chair, Brett Rock, Planning Board; Richard Larkin, Town Counsel; Attorney Deschenes and his client

Call to Order

The hearing was called to order by Mr. Alterisio, who briefly explained the process and the purpose of the public hearing.

Mr. Alterisio then subsequently read a statement explaining his conflict of interest under the law both MGL and Dunstable by-law. Ordinarily he would recuse himself, but he was advised by counsel that due to the nature of the by-law he must invoke the Rule of Necessity against the conflict of interest law. He explained that the Special Permit requires 3 votes out of 3 in order to go forward, and according to both the Commonwealth Ethics Commission and Town Counsel it is therefore understood that Mr. Alterisio should participate. As a gesture of good faith, Mr. Alterisio steps aside as chair for these proceedings and cedes the chair to Mr. Leva.

Mr. Leva began the proceedings by reading the applicants petition, upon completion he invited the applicant to present his request to the Board.

Applicant's Presentation

Attorney Deschenes spoke to the Board about his clients plan for a subdivision, Alexander Estates off Lake Street. He explained his client's intentions and adherence to all requirements of the law. Attorney Deschenes explained how his client began to move earth on his property before becoming aware that Dunstable requires this permit to remove the earth. Upon discovery of this Carolina Properties immediately stopped removing any material and began the application process. The developers engineers have estimated they need to remove from the site about 4,228 cubic yards the by-law permits up to 5,000 under the permit. This material simply must be removed in order to make the subdivision's roadway. 30 yard trucks will be used to remove the earth. They would not have more than 20 trucks leaving the sight on any given days. Or 2.5 trucks per hour. Approximately 9 days would be needed to remove the material, there may be some variation. Based on the developers current understanding of the roadways, they would not have a great impact on Lake St itself, but they added the caveat that if they happened to cause damages to the street they would be liable, but they do not believe it likely that this would occur. They would use the quickest route to Rt. 3.

Questions & Comments

Following the applicants presentation, Mr. Leva entered into the record some comments and requests from different boards. He reported that the Conservation Commission had no comment except that the developer avoid any sensitive wetlands or other ecosystems. The Police Chief submitted requests for reasonable hours for the trucks and a few other public safety concerns and the Road Commissioners asked for a \$50,000 bond to be posted for potential damage to the road.

Approved and adopted on 12/17/14

The Board had several questions concerning the exact material being removed and how it is calculated. Attorney Deschenes explained that the by-laws allow them to remove earth for the house basements and septic systems. Only the roadway earth removal will require this permit. The follow up question concerns how much will be removed that is permissible without requiring this permit. At least 9 out of 11 lots, the earth for septic and basement will have to be removed. 5 to 6 trucks on average per lot. That would likely be done in one day for each lot. There will be time between the trucking for the roadway and the trucking for the lots. The lots will not be done all at one time. Developer projects 24 to 30 months for the housing lots. Board took the position that the \$50,000 bond would remain and apply for the entire period including both the roadway construction and the lot removals for this process.

The original plan had included an extra exit road, but there was concern due to possible sight issues on the road that it exited out onto. Attorney Deschenes said that the final approved plan does not include this for that reason. They dropped off lot 12 and fell down to 11 lots to remove this extra exit and added that land to the land to be donated to the town for open spaces. There is a proposed emergency access road that will go off the subdivision road. This road may also require removal of earth and Attorney Deschenes did not rule out returning to the Board asking for a separate permit for this instance. Mr. Alterisio expressed an interest in finding out what the ultimate solution to this issue would be. Attorney Deschenes said that the emergency exit is already in some manner approved by the Town Engineer. The exact design is approved, but what they do with the material is not yet clear. But if they have to, that material would, failing a separate permit being issued, likely be spread on the open space property.

Opponents Rebuttal

Joan Simmons from the Planning Board spoke to the Board concerning the special permit application. She claimed that the developer was aware of the requirement for the permit and suggested Attorney Deschenes had a fuzzy memory. As far as the material for the emergency access, she asked whether that was included in the amount calculated for the removal number. Attorney Deschenes responded that it was not. Ms. Simmons wanted to know how much earth will need to be removed to develop the emergency access road. She suggested that given the towns soon to be ownership of some of the land (she noted that the developer has received a \$1 million in waivers) should lead the town to be less willing to allow the developer to place material on it. Her point was unclear as to how it pertained to the requested permit and Mr. Leva reminded the audience to keep questions to the matter at hand.

Brett Rock, a member of the Planning Board voiced his belief that the developer did in fact know the requirement for the permit and expressed concern about the possibility for more earth removal needing to be removed at a later time. Attorney Deschenes rebutted. He pointed out that the Planning Board determined the requirements for the roadway and the emergency access roadway and that the Town Engineer approved the plans for the roadway. Mr. Rock asserted that the agreement was that they would not need to remove gravel. There was some debate as to whether the earth was gravel or sand and if it had any marketable worth. The Board asked the question of what if any money would be made off removal of the earth. Attorney Deschenes responded that no financial gain would be had by his client and asserted that the earth would be fill and the value would be equal to the trucking and loading expense and that it would constitute a wash out cost. Mr. Leva again reminded all to keep questions to the matter at hand and addressed the Road Commission.

Roadways, Safety, and Bonds

The Road Commissioner present noted that there is already damage to the roadway from the project, but assures that the bond should be able to cover this. Attorney Deschenes says the developer is fine with the requested bond and he suspects that once it is done, they would talk to the town about putting a bond in place to address any further truck removal. He also claims that there are no requests from the Police Chief

Approved and adopted on 12/17/14

that they cannot agree to. And makes clear to the Road Commissioners that the developer recognizes any liability they hold for potential road damage.

The Board asked Fire Chief Rich if he had anything to add to Police Chief Downes concerns and requests. Chief Rich responded that he had no further concerns to voice than what Chief Downes had already. Attorney Deschenes told the Board that he and his client had already meet with both Chiefs over their joint safety concerns and again informed the Board that his client had no objections to any of their requests.

A citizen from Lake St. wanted to know about safety concerning the trucks and questioned the planned route. Chief Rich explained why there was a feel that Hall and School was the best route. The Police Officer in attendance explained his own concerns about the issue of stopping and that Groton St. is not a wise choice and that School and Hall St. plan is the safest in his opinion. The citizen finished by asking that the loading part into the trucks be located towards the end of the proposed roadway to cause the least disturbance to the public in the area. Attorney Deschenes said this wouldn't be an issue.

Following this discussion, Mr. Leva declared the public comment portion of the hearing closed but reserved the right to go back to ask further questions on behalf of the Board.

Deliberations

Mr. Leva asked the Board to deliberate to determine whether it would be able to end this process tonight or continue it. There was a question as to the time frame concerning this permit. Mr. Alterisio clarified that the Board has 90 days. Attorney Deschenes asked the Board not to use its full 90 days. Mr. Leva reminded the Board that the plan was approved by the Planning Board and that this hearing is for the roadway and the removal. Mr. Leva addressed the Board and said that the Board should look at the facts. He stressed that the Board should concern itself with how much is being removed on *this* issue and noted that the developer is willing to meet all requirements asked of them by the town's boards, commissions, and relevant committees and departments.

Mr. Leva clarified that he does not want to see the Board drag this out and was personally prepared to go forward that evening. Mr. Alterisio and Mr. Devlin wanted to leave this for a period of time and continue to discuss it as a Board. Ms. McKenzie suggested talking to the Town Engineer and reminded the Board that they have a meeting on Nov. 5th. Mr. Devlin clarified that he would be comfortable with making this decision on Nov. 5th at the Boards next ordinary meeting. Mr. Alterisio concurred. Ms. McKenzie suggested that a meeting be held with the Planning Board and the Board in the near future to make sure that there is no lack of clarity again and the developers know about the 5,000 limit and this permit. Mr. Leva called for order.

A motion was made by Mr. Leva to continue the hearing to Nov. 5th for 7:05pm. The motion was seconded by Mr. Alterisio, and passed without dissent.

Mr. Leva declared the public hearing to be continued until Nov. 5th and closed out at 8:30pm. The Board moved on to the affordable housing by-law question.

Affordable Housing By-Law Question

Mr. Larkin began the discussion with the Board by recommending a draft letter that the Board should consider sending to the Building Inspector concerning the Towns general by-law on housing and affordable housing/community housing. He explained that a lot of communities have attempted to promote a stock of affordable housing in a similar manner to the intentions of this by-law. Normally this has been done under a zoning by-law scheme. The Mass courts have essentially rejected these by-laws. The town attempted to reach

Approved and adopted on 12/17/14

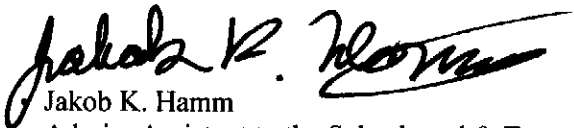
this same result through a “general” by-law. The enforcing mechanism is for the occupancy permits to be withheld by the Building Inspector unless certified in compliance. Typically you cannot achieve these sorts of results without using a zoning approach. This general by-law is a direct effort to get around the courts and Mr. Larkin feels that this is not enforceable.

Ms. McKenzie noted that one way to make such a zoning by-law or other mechanisms possible is by requiring something like a “cluster” development or more houses on the land than otherwise permissible so long as the developer includes so many units of affordable houses. Mr. Larkin noted that the issue isn’t that you can’t do that, but that you cannot directly attempt to do it in the manner Dunstable has. The general community by-law is simply trying to do something in a different manner than that already struck down by the courts. Mr. Leva expressed concern that this has been voted at town meeting. Ms. McKenzie informed the Board that this issue has bothered her all along. The fact that this is a general and not zoning by-law and that it concerns, essentially, a zoning issue is a problem. Mr. Leva continued that he is concerned about the will of the voters and that while he agrees with Ms. McKenzie the voters did express their will.

Mr. Larkin noted there are some mechanisms that would allow people in opposition to non-enforcement to take action, but he does not foresee the Commonwealth making the town do so given the issue with the courts. Mr. Devlin and Mr. Alterisio discussed how enforcement might cause court action. Mr. Leva asked counsel to attempt to clarify this. Mr. Larkin said that he is attempting to clarify with Commonwealth officials whether this is by-law is enforceable. The Board noted how broad the by-law is and the fact that it has many tentacles. The Board consensus was that time will need to be taken to determine what should be done in the future and how to replace this by-law with something better. Ms. McKenzie noted that really, we’re talking about two different by-laws and again spoke about the cluster zoning idea, noting choice and incentives. Mr. Larkin told the Board that what she was talking about could take the form of cluster zoning, tenements, or a few other options. In the end, according to Mr. Larkin the town cannot make the developer absolutely put in the affordable housing. But, he reminded, you can instead give options to encourage and entice them into doing it.

The Board essentially adopted town counsels opinion on the matter of the affordable housing by-law and adjourned at 9 pm.

Respectfully submitted by

A handwritten signature in black ink, appearing to read 'Jakob K. Hamm', with a stylized flourish at the end.

Jakob K. Hamm
Admin. Assistant to the Selectboard & Town Administrator

Approved and adopted on 12/17/14