

ZONING BOARD OF ADJUSTMENT
268B MAMMOTH ROAD
LONDONDERRY, NH 03053

DATE: MARCH 20, 2013

CASE NO.: 3/20/2013-2

APPLICANT: HSL REAL ESTATE TRUST
C/O GBI, TAI DEH HSU, TRUSTEE
2 WELLMAN AVENUE, SUITE 210
NASHUA, NH 03064

LOCATION: 304 NASHUA ROAD; 2-27; C-II, WITHIN THE ROUTE 102 PERFORMANCE
OVERLAY DISTRICT

BOARD MEMBERS PRESENT: JIM SMITH, CHAIR
LARRY O'SULLIVAN, VOTING MEMBER
JAY HOOLEY, VOTING MEMBER
JAMES TOTTEN, VOTING ALTERNATE
NEIL DUNN, CLERK

REQUEST: VARIANCE TO ALLOW CREATION OF A LOT IN THE C-II ZONE WITH LESS
THAN 1 ACRE, WITH NO FRONTAGE ON A CLASS V OR BETTER ROAD, AND
WITH NON-COMPLIANT SETBACKS AS REQUIRED BY SECTION 2.4.

PRESENTATION: Case No. 3/20/2013-2 was read into the record with four previous cases listed.

JAMES SMITH: Who will be presenting?

JACK SZEMPLINSKI: Good evening. My name is Jack Szemplinski with Benchmark Engineering. Also with me is Rick Welch. He's representing Hickory Woods LLC who is the developer of this particular property located on West Road. The property is tax map 2, lot 27. It is zoned C-II and it's a site of an existing cell tower and an old trailer park, used to be called Hilltop Trailer Park. As you already know, there is a very large development of 100 units elderly housing project that will be happening on this particular property. Actually, we're coming before the Planning Board in a couple of weeks with that one. But one of the things we're trying to do here today is we're trying to separate the existing cell tower from the remaining of the parcel. And the main reason why we're trying to do this is, because this could be also accomplished as a limited common area, the reason why we're trying to do it is basically to simplify all the documents and all the restrictions that will be required as part of the elderly housing condominium project. Just to give you a very brief explanation of what's proposed up there; the proposal is for 98 unit single family detached units with about 6,000 feet of road which will link Route 102 and West Road. The property will be getting water from the Town of Hudson. The water main will be extended from the existing location on Robinson Road along West Road and into this property. Just to cover your required points of law, again, what we're trying to do is we're trying to create a 15,000 square foot lot which will be used solely for utility for the cell tower. There was no sanitary or any kind

46 of water supply facilities associated with it. The cell tower is already existing. It's been there for a number of
47 years. So the lot would be 15,000 square feet. It does not have any frontage on a Town approved road.
48 Presently, it's being serviced by a driveway from Route 102. The driveway is nothing more than a gravel path.
49 It's pretty much overgrown. Probably big enough for one car. So the plan is that once this development takes
50 place, the existing driveway will be discontinued and we will be providing a much better access to the cell
51 tower from the new road, which will be called Black Forest Circle. Going over your five points of law; the
52 variance will not be contrary to public interest. Well, first, there is no additional uses proposed as part of this
53 plan. The subdivision will allow for two separate incompatible uses to be separated. The access to this lot
54 will be from a private road which will not utilize any public funds for construction or maintenance. The
55 proposed subdivision will allow simpler documents and simpler bookkeeping of this particular property. The
56 spirit of the ordinance is observed. The area that we're planning for the site is actually an existing lease area.
57 Then we added just a little bit of area where the driveway is, so it will be a totally separate lot. There will be,
58 again, no septic system and access to the site will be from a private road which will be under easement. The
59 parcel will continue as an existing use. There will be no changes to this particular property that is proposed.
60 Substantial justice will be done. The two incompatible uses will be separated and ownership and associated
61 record keeping, both by the Town and by the owner will be greatly simplified. There will be no need to
62 include complex restriction bylaws relating to cell tower and to condominium documents for the Hickory
63 Woods 55+ community proposed on the larger parcel. The values of the surrounding property will not be
64 diminished. This subdivision will be totally internal to all surrounding properties. And everybody's in favor of
65 this particular...the developer's in favor of this particular variance. There will be no new uses proposed as part
66 of this subdivision. Then getting back to item five, no fair and substantial relationship exists between the
67 general purposes of this ordinance provision and the specific application of that provision to this property. I
68 mean, first of all, most of the properties that were...this only deals with properties that use commercial uses
69 that will have water and sewer. This is basically a utility property that...you know, I think there was several
70 parcels done for like water pumping stations and things like that. The cell tower will remain on an individual
71 parcel. It will not require the installation of a septic system or well. It will separate two non-compatible uses.
72 Access to the cell tower will be from a private road which will be built to Town specification. Location of the
73 cell tower located at the highest point of the landscape is remote to any public road. The proposed use is a
74 reasonable one. The location of the existing cell tower is on the highest point of the landscape. Remote
75 public roads. Separating of the two uses, the cell tower and the elderly community, will provide for
76 substantially less complex documents than if they were on the same parcel. It will also simplify record
77 keeping. And again, as far as item B, which is hardship, I would like to answer that one as well, the tower's
78 really separate from any surrounding land. It does not...it's not a standard parcel where you have commercial
79 use with some kind of a building and a septic system and a well. It's basically a public utility property and
80 doesn't require any services. I'd be happy to answer any questions.

81
82 JAMES SMITH: Neil?

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84 NEIL DUNN: What does this do to the two lots that the easement is going to go over? It looks like it goes
85 between two house lots, unit lots, or whatever. What's it do to those?

86
87 JACK SZEMPLINSKI: As the first part of this subdivision process, do you see those two lots...these will be
88 subdivided from the remainder 60 acre parcel along with the cell tower lot if that's approved and the
89 easement will continue as the present until such time as the new roads are constructed and new utilities are
90 brought to this tower.

91
92 NEIL DUNN: This new map you gave us [see Exhibit "A"] where you're showing the new road?
93

94 JACK SZEMPLINSKI: Yeah.
95

96 NEIL DUNN: Let me...if I may step back one; do these become outright purchases by the residents? These
97 individual houses or lots or whatever?
98

99 JACK SZEMPLINSKI: Yeah, these will be condominiums.
100

101 NEIL DUNN: Okay, so this new road that you're putting in here between the two house lots...
102

103 JACK SZEMPLINSKI: Yeah.
104

105 NEIL DUNN: Does that change the square footage of the lots?
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107 JACK SZEMPLINSKI: The units will be on a 60 acre parcel of land, so they will own their own unit plus a
108 proportionate share of a common area. So there will be no individual lots here and that's why I'm saying the
109 condominium documents that would have to be written if the cell tower is not subdivided somehow will have
110 to deal with that particular use being a different use than everything else on that property.
111

112 NEIL DUNN: Why wasn't this included in the original plan that we had several meetings on?
113

114 JACK SZEMPLINSKI: Honestly, we as engineers, we never really...we always thought that's gonna be just a
115 limited common area which will be part of the condominium complex. Then when attorneys got involved in
116 preparing condo docs, they said this is getting a really complicated thing. And the present owner of the land
117 would like to retain the tower as he is still getting paid for a number of years. And it could still be owned by
118 him as a limited common area, you know, as part of the condominium project. But again, that would
119 complicate the documents that need to be prepared for the condo.
120

121 LARRY O'SULLIVAN: So if we put a restriction on this that if the use as a cell tower discontinues, the land will
122 revert to the common area of the association. Would that be an acceptable restriction? Because right now,
123 we're gonna have a...we're creating a lot that we've been trying to avoid throughout town for a long, long
124 time. And if we're going to create this, it had better be a good, very good reason...
125

126 JACK SZEMPLINSKI: Right.
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128 LARRY O'SULLIVAN: ...for creating it because right now, accounting, that isn't gonna cut it as far as I'm
129 concerned. And I don't mean to be a stickler about it but this is a variance. It's gonna be forever. So...
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131 JACK SZEMPLINSKI: I don't think we would have a problem with putting that kind of restriction on a property
132 that's really the intent for it.
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134 LARRY O'SULLIVAN: Good. Thank you.
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136 JAMES SMITH: Anyone else on the Board?
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138 NEIL DUNN: Richard, would this have changed any of the layout or the original proposal by...you know, it just
139 seems bizarre that we went through a lot of meetings on this. This was never brought up. Now it comes up
140 and we're splitting some areas where we let them encroach on buffers and everything else and now this
141 comes in. It almost seems like a backdoor approach. Would this have changed any of the lot's setups or the
142 layout, do you believe? I know it's kind of hard to say, but...
143
144 RICHARD CANUEL: Yeah, in that small diagram you have there, the road layout, that was part of the original
145 plan that was shown when the applicant applied for the variances originally. And as Jack has said, there
146 wasn't any consideration given to the tower as being a separate parcel until they started putting the
147 condominium documents together and found that it just wouldn't work legally. So I guess their attempt is to
148 try to create that as a separate parcel to split those two uses.
149
150 LARRY O'SULLIVAN: It wouldn't work legally you say?
151
152 RICHARD CANUEL: As far as their condominium agreements go, I guess.
153
154 JACK SZEMPLINSKI: There's absolutely no bearing on anything as far as number of units or location of units.
155 It's just strictly...it's a legal thing.
156
157 NEIL DUNN: How big is this area we're creating?
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159 JACK SZEMPLINSKI: Fifteen thousand square feet.
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161 NEIL DUNN: So in the elderly housing and the square footage, if we subtracted 15, would that have changed
162 maybe one unit less? I guess that's what I'm trying to go.
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164 RICHARD CANUEL: Yeah, I doubt that very much because the location of the tower was taken into
165 consideration when the subdivision was put together because you've got the tower fall height and so forth to
166 be considered, so that would not have changed the area at all.
167
168 NEIL DUNN: But the square footage of the land, which would have...
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170 LARRY O'SULLIVAN: Sixty eight [indistinct]...
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172 JAMES SMITH: The usable amount of land.
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174 NEIL DUNN: Oh, okay, well that's where I'm trying to...
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176 JAMES SMITH: In other words, because of the fall zone...
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178 NEIL DUNN: There wasn't...
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180 JAMES SMITH: ...that land was taken out anyways.

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RICHARD CANUEL: Right.

JAMES SMITH: Is that what you're saying?

RICHARD CANUEL: That's correct.

JACK SZEMPLINSKI: If you look at our zoning, if you do the actual density calculations, I think we can probably put physically almost double the number of units that we show there because we're bringing the water into the site. We originally planned this as having community wells, which would have taken a lot of land available for development.

NEIL DUNN: By virtue of creating this lot, could it be sold then? Or is it...you're saying it's still part of the condominium association or no?

JACK SZEMPLINSKI: No. If you create this lot, it can be sold.

LARRY O'SULLIVAN: But it would have the same owner.

NEIL DUNN: But it could be sold. Right now it would have the same owner.

LARRY O'SULLIVAN: Right.

JACK SZEMPLINSKI: Well...

NEIL DUNN: And then at that point, your argument that if it...the cell tower went away, it would go back to the condo association. I'm just trying to get the continuity of the whole...

JACK SZEMPLINSKI: Let me just clarify something. At present time, the property's owned by HSL Real Estate Trust, okay? HSL Real Estate Trust is selling the property to Hickory Woods LLC, who is the developer of the project, okay? HSL would like to retain, they will be retaining that lot on the bottom. The big lot. And also the cell tower. The easement from 102 to the cell tower presently runs through the big lot as well. So the lot can be sold to anybody, just like if you created this condominium unit, you can sell the condominium unit to anybody with certain age restrictions, et cetera. So it's not like if you're gonna keep it as one parcel it cannot be sold. It could be sold, it's just basically, if you look on Town records, it's gonna have a separate tax map and lot number and none of the condo docs will refer to the cell tower. I mean, it would still be there, but...

RICK WELCH: If I may? It's just an awkward...mostly, it's...

JAMES SMITH: Could you identify yourself?

RICK WELCH: Sure. Rick Welch, Hickory Woods LLC. It's mostly because it's an awkward situation to have the cell tower as part of a condominium area, so it would be difficult to explain, you know, the lawyers think it's difficult to put in language. Every time there's a closing, it would require a lot of, you know, looking into from the attorneys who are closing on the unit, so we were just trying to keep it clean. I'm not sure how it would

226 turn back into common area if it's a subdivided lot being owned by a separate entity. Because I know you two
227 have been talking back and forth and I'm just not sure how that would work. It's gonna have a separate
228 owner. I don't know how it turns into comm...

229
230 LARRY O'SULLIVAN: Well, that's exactly my point though, is that if you stop using it as a cell tower, you've got
231 a 15,000 square foot lot that you have the right to sell or build on or do something with...

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233 RICK WELCH: So that's not the intent.

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235 LARRY O'SULLIVAN: ...because we gave you the variance.

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237 RICK WELCH: So that's not the intent, so obviously, you know...

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239 JACK SZEMPLINSKI: I think we will be happy to put a condition on it that it's a non-buildable lot. It's not
240 [indistinct] gonna come down and put another condo unit in there...

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242 LARRY O'SULLIVAN: Then you'd need another variance to build on that.

243
244 RICK WELCH: Well, I think that any restriction, because the intent is exactly what we're saying, so any
245 restriction that's required I think would be fine. Because the intent is to leave it as a cell tower. I'm not sure
246 how long the lease is on the cell tower. I don't know if anyone...

247
248 JACK SZEMPLINSKI: Well, once the cell tower's gone, the property is basically worthless to anybody, you
249 know.

250
251 RICK WELCH: It would just be vacant land owned by the cell...

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253 JAY HOOLEY: In theory then, would we accomplish what you're trying by conditioning this that the only
254 structure on the lot is the existing cell tower which can be repaired but that no additional construction could
255 take place on the newly created lot?

256
257 LARRY O'SULLIVAN: That would work, or some...

258
259 JAY HOOLEY: That would get us, I think, where...without trying to create future real estate dealings, you just
260 condition it that the only structure that will ever be on this lot is the existing cell tower and/or the repair, but...

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262 LARRY O'SULLIVAN: Hope you got the words for that.

263
264 JAY HOOLEY: I was floating an idea, but...

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266 LARRY O'SULLIVAN: I think it accomplishes the same thing. Richard, would it?

267
268 RICHARD CANUEL: More or less. I mean, you could make the variance specific to the use, being the cell tower
269 use. If the cell tower use goes away, regardless of whether the lot is there or not, the use is not approved for
270 a cell tower or any other use at that point.

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LARRY O'SULLIVAN: So either way, we would accomplish the same goal?

RICHARD CANUEL: Yeah. I mean, the variance is definitely specific to the cell tower. I mean, the lot wouldn't be created at this size if it were not for the cell tower. So the variance can be very specific to that. Once the cell tower is abandoned for whatever reason and the use itself as a telecommunications tower is abandoned, then the variance could become null and void.

NEIL DUNN: If you can help me, I'm trying to get through the five points and number 5 (A); the purpose...it's an unnecessary hardship and I think we had the discussion in the original case that this hardship was brought upon the applicant by himself for wanting to build around a tower that he already owned. So now you're asking us once again to look at a hardship that was self-induced and take that as a hardship and some geographic or some unique character of the property that was self-created.

JACK SZEMPLINSKI: Well, I'll tell you what the hardship is. The main hardship is that the cell tower has to be on the highest point of the land for obvious reasons; because it's got to service as many people as possible. Second, it's an already an existing use. It's not like somebody's proposing to do something new. And as far as whether it exists today on 60 acres or exists on its own 15,000 square foot acres, it's still the same structure, you know, and I think the Town's zoning was written, you know, one acre, 150 feet of frontage, was based upon a standard residential lot...I mean, a commercial lot.

LARRY O'SULLIVAN: Mm-hmm.

JACK SZEMPLINSKI: You know, if you want to put a gas station or you have bathroom facilities, you have wells and things like that. This parcel is a lot different because it doesn't have any of these facilities. It's strictly a utility parcel. We're doing, actually, exactly the same thing in the Town of Hudson, creating a little piece of land for a pumping station, for a water pumping station to be able to extend the water main into this site, which is pretty high. It needs a little bit higher pressure than is available now.

RICK WELCH: Also to be clear, we're not gonna be the owners of the cell tower. We're really building our development around the cell tower. We have to keep there. It needs to be there. So we purchased the land, the current owner is keeping the cell tower, so we're building...

NEIL DUNN: And I understand that. And I understand the intent...

RICK WELCH: Yeah.

NEIL DUNN: But as a Board, we're here for the five points of law. We're here in a...we have a fiduciary responsibility to look at those five points and we're getting back to the hardship case that was self-imposed by the builder and whoever split it up. So I'm just trying to get through that. I think you're talking to it not being a standard lot and the use is addressing it, but I still have issue with that self-imposed thing that started when...they could have made that an acre, a viable lot that when, if the tower ever did go away, you would have had a viable lot and we wouldn't be sitting here on this. I guess it...so I'm having trouble with that self-imposed hardship, I guess, is...

316 JACK SZEMPLINSKI: Well, unfortunately, it would be a lot easier if you could just build a tower next to 102,
317 you know, and basically slice off a little lot with its own frontage, but unfortunately, because of the lay of the
318 terrain, you're putting the tower on the highest point of land. So whether you had this project coming up later
319 or not, it still has to go in that one location. That, in itself, I think is somewhat of a hardship and makes it a lot
320 different lot than any other lot in town.

321
322 RICK WELCH: And today, we have to design...we had to design the subdivision around the cell tower fall zone,
323 et cetera, so the project is being built today with the idea of 'the cell tower's here today,' and even when it's
324 gone, there's nothing that can be done. This is how the subdivision is being designed and...

325
326 NEIL DUNN: But in the original proposal, I think I know I would have brought up, if the intent was to keep that
327 isolated, that we make it a viable lot...

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329 RICK WELCH: Well, we weren't smart enough to figure that out at the beginning. It came up with...

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331 NEIL DUNN: And that's what gets me back to a self-induced hardship. Okay. I'm good with that, I just...

332
333 JAY HOOLEY: Is there any reason that we would want to preclude that should the cell tower ever be
334 abandoned, that they had the option to merge that land back in and maybe this becomes the pool house? I
335 don't know...if it becomes...

336
337 JAMES SMITH: Well, I think the problem with that is it's gonna be owned by two different entities.

338
339 JAY HOOLEY: Yeah, I'm saying if they ever chose in the future to buy it back and merge it...

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341 RICK WELCH: I mean, think...

342
343 JACK SZEMPLINSKI: Well, along with the condominiums, there's gonna be 98 different owners that will own
344 condominiums in this property, hopefully.

345
346 RICK WELCH: So, essentially, it will end up a parcel in the woods that has no building rights. It will be isolated
347 from anything. No access, no ability to build anything. It'll just be woods which is what it is.

348
349 JAMES TOTTEN: If I may? If we do nothing, who would own the cell tower?

350
351 JACK SZEMPLINSKI: I don't think that anything would change from an ownership point of view because...

352
353 JAMES TOTTEN: Nothing's changing...

354
355 JACK SZEMPLINSKI: ...if you don't approve this variance, our option is, and I think that it's the only option, is to
356 create a limited common area around that cell tower, so it will be like a condominium unit which will be
357 like...there's 98 residential units and it will be, the 99th will be the cell tower unit. And it still can be sold and it
358 still can be done like anything else. It's just for a condominium rather than pure subdivision. So from the
359 ultimate result, what you're gonna see on the ground, there's absolutely no difference to you or to anybody.

360 It only makes a difference from a legal point of view, whether those documents will include the cell tower
361 stuff or they will be just strictly dealing with residential condominiums.
362

363 JAMES TOTTEN: And maybe this is obvious, but, so why not just include that in the condo docs? I don't
364 understand the complexity there.
365

366 RICK WELCH: Well, the attorneys will have...every time there's a closing, the attorney's will have, because it's
367 uncharted waters, the attorneys will have difficulty calling this a unit. They don't pay condo fees, it would be...
368

369 LARRY O'SULLIVAN: Isn't that just a disclosure thing?
370

371 JACK SZEMPLINSKI: Yeah, basically condominium documents will deal, for example, will stipulate that every
372 member, every person that purchases property in Hickory Woods will own their own unit, plus 1/98th of the
373 remaining land as common. Okay? So now with the cell tower, it will be a little different. How it's structured,
374 the space for plowing, who does all this over stuff will be a little bit more complex. I never said it absolutely
375 cannot be done. It can be done. It can be done. It's just much more complex.
376

377 JAMES TOTTEN: Thank you.
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379 JAMES SMITH: Anyone else with questions?
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381 LARRY O'SULLIVAN: Just as an aside, you have 100 units going in?
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383 JACK SZEMPLINSKI: Ninety eight.
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385 LARRY O'SULLIVAN: Ninety eight units going in?
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387 JACK SZEMPLINSKI: Plus a clubhouse, yeah.
388

389 LARRY O'SULLIVAN: Are they going in at one time? Are you gonna spread it over years?
390

391 JACK SZEMPLINSKI: Six phases.
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393 LARRY O'SULLIVAN: Six phases? Is that six years or is that a number of years or...?
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395 RICK WELCH: Closer to four, I would think.
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397 LARRY O'SULLIVAN: Four years?
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399 RICK WELCH: I think the market...
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401 LARRY O'SULLIVAN: Were you subject to the GMO? The Growth Management? Yes?
402

403 RICK WELCH: I'm sure it is, right Richard?
404

405 LARRY O'SULLIVAN: Just wanted to check. Thanks.
406
407 RICHARD CANUEL: Not under the Growth Management Ordinance, but under the phasing, yes.
408
409 RICK WELCH: Right.
410
411 LARRY O'SULLIVAN: Thank you.
412
413 JAMES SMITH: So basically, what you're trying to do is simplify the legal researches that attorneys would have
414 to make when there's a transfer of ownership of a condo unit? That's what they're really trying to do.
415
416 JACK SZEMPLINSKI: That, also simplify the Town Assessor's job as far as, you know, having that one
417 assessment for that. Simplify the owner's job so they don't have to explain to every single homeowner, you
418 know, about the tower. It's just trying to clean this thing up, basically.
419
420 RICK WELCH: I mean, the people that do our closings now, the title companies and stuff, they're scratching
421 their heads as to how complicated it will be and I think...I'm sure it could get done and maybe after the first
422 ten or eleven, we'd find a way to sim...you know, but we're not sure. So it's just we're afraid of the
423 unchartered waters and what it's gonna mean in the closing, so we're just trying to keep it clean because
424 having a cell tower as a resident, so to speak, in a condominium is awkward.
425
426 JAMES SMITH: Would you have the same problem if you had a separate lot for, say, a pumping station for a
427 water company?
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429 JACK SZEMPLINSKI: Yeah, exactly.
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431 RICK WELCH: Well, if it was owned by somebody else like the water company, yeah. I would think so. It
432 would be the same thing. Until it was owned...I mean, I would think a pumping station in a development itself
433 would probably be owned by the association normally, unless...
434
435 JACK SZEMPLINSKI: I mean, there are utility parcels. The one I can immediately think of is right at the end of
436 Gilcreast Road. There was a little parcel for a water pumping station there and that doesn't meet any
437 standards as far as size or frontage. You at the end of...
438
439 LARRY O'SULLIVAN: But that's not a condo association.
440
441 JACK SZEMPLINSKI: ...Gilcreast Road? At south, there's a water pumping station right there and that's a
442 substandard lot. I can't think of any other one.
443
444 JAY HOOLEY: The other one that comes to mind is the case with the, and I think it was a residential lot that a
445 building was constructed in, I guess, a commercial fashion up near Seasons Lane and I can't think of the name
446 of the street.
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448 LARRY O'SULLIVAN: Off of Seasons?
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450 JAMES SMITH: No...
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452 RICHARD CANUEL: That would be Coteville Road.
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454 JAMES SMITH: Coteville.
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456 JAY HOOLEY: Coteville Road. That's the one. And do you remember on that lot we also had the separate
457 little, and I think it was a pumping station...
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459 RICHARD CANUEL: That's right.
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461 JAY HOOLEY: ...that was...
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463 LARRY O'SULLIVAN: There's a handful of those around.
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465 JAY HOOLEY: There wasn't even access to it. It was, you know...
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467 LARRY O'SULLIVAN: Right.
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469 JAY HOOLEY: ...a donut hole in the middle.
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471 LARRY O'SULLIVAN: But that was an easement though, wasn't it?
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473 RICHARD CANUEL: No. There was a variance granted to create that lot...
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475 LARRY O'SULLIVAN: That was a separately owned?
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477 RICHARD CANUEL: ...for that pumping station.
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479 LARRY O'SULLIVAN: Okay, what do we call that, Richard? We didn't call it a specific use lot or...?
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481 RICHARD CANUEL: I don't know offhand if it was very specific, but I know it was a variance that had to do with
482 that lot so that it would subdivided off of that parcel just for that utility.
483
484 JAMES TOTTEN: Just another...So this changes who's privy to the rent from the cell tower, right?
485
486 RICK WELCH: No, that's gonna stay the same. We're never gonna be collecting the rent from the cell tower.
487 The current owner needs to keep that lease. We're building, literally, around it. You know, buying around it,
488 so he...
489
490 JAMES TOTTEN: And they were gonna retain that income regardless>
491
492 RICK WELCH: They can retain the income forever, for as long as the lease will go on.
493

494 JACK SZEMPLINSKI: I mean, a typical problem with your residential lots that has some kind of utility easement
495 on it, people that buy residential lots, they really don't want to see an easement on their lot to, I don't know,
496 whether it's a pumping station or whatever it may be, they would much rather just separate it out than own
497 land outside of that.

498
499 JAMES SMITH: Any other questions from the Board? Not seeing any, anyone who is in favor of this? Anyone
500 in opposition or has questions? Seeing none, I'll bring it back to the Board. Any further questions?

501
502 LARRY O'SULLIVAN: I'm good, thank you.

503
504 JAMES SMITH: We'll close the hearing at this point and take this under advisement.

505
506 DELIBERATIONS:

507
508 LARRY O'SULLIVAN: You know, I agree with you, Neil, about people who create their own messes. But at the
509 same time, you know, the issue's gonna be only if this particular lot has any other use ever than that. And it's
510 15,000 square feet. They're not gonna be able to put anything on it, so I think it's kind of moot.

511
512 NEIL DUNN: The only thing it does, though, and I think the applicant or Mr....from Benchmark spoke to it is if
513 we don't approve it, then if it does disappear, then it goes back as common area to the plot that was approved
514 on the original submittal. The way you're doing it, they would not necessarily get that back as common area
515 for this big circle lot. Under the condo association, if we did not approve it, if that ever went away, then
516 because it would be useless, it would still stay under, it seems like, because it is part of this whole grouping, it
517 would get back to the residents in that area better for a common area. And I still have trouble when you go
518 through the points of law of self-imposed hardships. I...how do you come to terms with those? You know?
519 There's no unique...you know, unnecessary hardship. Well, it's self-imposed. How do we...? I can't get
520 around that too easily. I understand what they're trying to do but it seems to me that if it ever goes away
521 because of technology or lack of need, at least the way it is now, the people who own that condo association
522 will all have 1/98th and they can make it a playground or whatever they want. And by making a separate lot
523 that can have condo rights, they'll never get back at it. And it's self-imposed. So you get back to the points of
524 law and then if we had looked at this in the very beginning, would we have thought differently, is my point.
525 And it seems like an end run partially, too.

526
527 LARRY O'SULLIVAN: Well, I don't see it doing a sneak around. I think this is significant, you know, unintended
528 consequence of...

529
530 JAMES SMITH: Yeah.

531
532 LARRY O'SULLIVAN: ...the original. And then the subsequent, when you get right down to the brass tacks of
533 selling these things and starting to do the development, that's when all this stuff pops up. So I can understand
534 the need for it.

535
536 JAY HOOLEY: And I'm not sure...I mean, we've had this, I guess, discussion on many times. 'My house is here,
537 my septic's here and the garage is there, so the only place I can put the pool is...' Well, sure, on day one, if you
538 designed it all in, you could have made it fit but it's not what's been there for 60 years, so, you know...Self-

539 imposed? Sure, because you built the house, then you built the septic. Twenty years later, you put in the
540 garage and now you want the pool. Could you have designed it? Yeah, you could have shuffled all those
541 pieces on day one, but not 40 years into it.
542
543 NEIL DUNN: Nothing's built yet.
544
545 JAY HOOLEY: Other than the tower, yeah.
546
547 JAMES SMITH: Any other comments? I think as long as we put a restriction on it that's it's a non-buildable lot,
548 I think that would be the key.
549
550 LARRY O'SULLIVAN: I think what Jay was talking about with his suggestion with the way to write this with the
551 restriction I think was better way to go. It literally will be what you've asked for, Jim, in the way of making it
552 non-building and it gives us the option at the end, if I recall this properly, that it reverts.
553
554 JAMES SMITH: Well, I think the problem with that is...
555
556 JAMES TOTTEN: You can't do that...
557
558 JAY HOOLEY: Yeah.
559
560 JAMES SMITH: ...it's not owned by the same entities.
561
562 LARRY O'SULLIVAN: Once it stops being useful as a cell tower, there's no need, as they said, for the owner to
563 have it.
564
565 JAY HOOLEY: And he may...
566
567 JAMES TOTTEN: He may still own it. They'd have to sell it.
568
569 JAY HOOLEY: They...
570
571 LARRY O'SULLIVAN: They could give it away at that point. That's the point. So let him sell it. What are they
572 gonna sell it? Who are they gonna sell it to? Who's gonna want to buy it? There's nothing gonna be there.
573 It's surrounded by all these properties and roads and buffers and whatever else. You can't do anything else
574 with that. So I think we've really got this one, with that restriction, we've got it pinpointed that this is either
575 gonna have a cell tower on it or there's not gonna be anything built on it.
576
577 JAY HOOLEY: Or nothing. Yeah, I don't think we condition, though, to dictate a future real estate transaction.
578
579 LARRY O'SULLIVAN: I don't think it would. I don't think it would.
580
581 JAY HOOLEY: Okay.
582

583 JAMES SMITH: That's the point I made. I think as long as we restrict it to this one use and it's non-buildable
584 for any other use, that's all we can do.
585
586 LARRY O'SULLIVAN: That works. That's fine with me. That's what I thought Jim's restriction was doing. I'm
587 sorry, Jay's restriction was doing. So anyway, are you ready for a motion?
588
589 JAMES SMITH: Unless anybody else has any other comments. Okay.
590
591 LARRY O'SULLIVAN: Well, we didn't hear from Jim. No?
592
593 JAMES SMITH: Okay.
594
595 JAMES TOTTEN: No. I'm good.
596
597 JAY HOOLEY: In that case, I'll make a motion to approve case 3/20/2013-2 with the condition that any
598 construction on that site be limited to the existing cell tower, which can be repaired or replaced if damaged.
599
600 LARRY O'SULLIVAN: You were gonna have a date or a timeframe that this would be, you know, the variance
601 would expire if they don't, you know, continue along with their...? Or is this not one of those that needs a
602 date?
603
604 JAY HOOLEY: Once the cell tower is gone, I would...
605
606 LARRY O'SULLIVAN: I like to do everything with this 18 month window. If nothing's done in 18 months, the
607 variance disappears.
608
609 RICHARD CANUEL: Well, the thing is if you grant the variance, the parcel's gonna subdivided and the lot will
610 be created in accordance with that variance. However, the variance condition can be very specific to the use
611 because the variance is being requested for the tower use specific. So it can be restricted to nothing but a
612 tower use.
613
614 LARRY O'SULLIVAN: Okay, so Jay's..
615
616 JAY HOOLEY: I think we covered that.
617
618 LARRY O'SULLIVAN: You've got that covered. Okay, I'll second that motion.
619
620 JAMES SMITH: All those in favor?
621
622 JAMES TOTTEN: Aye.
623
624 JAY HOOLEY: Aye.
625
626 LARRY O'SULLIVAN: Aye.
627

628 JAMES SMITH: Aye. Opposed?

629

630 NEIL DUNN: Aye.

631

632 JAMES SMITH: Four, one.

633

634 RESULT: THE MOTION TO GRANT CASE NO. 3/20/2013-2 WAS APPROVED, 4-0-1 WITH NEIL DUNN IN
635 OPPOSITION.

636

637

638 RESPECTFULLY SUBMITTED.

639

640

641

642

A handwritten signature in cursive script that reads "Neil Dunn". The signature is written in black ink and is positioned to the left of the typed name.

643 NEIL DUNN, CLERK

644 TYPED AND TRANSCRIBED BY JAYE A TROTTIER, SECRETARY

645

646 **APPROVED APRIL 17, 2013** WITH A MOTION MADE BY LARRY O'SULLIVAN, SECONDED BY JAY HOOLEY AND
647 APPROVED 5-0-0.