



MEETING MINUTES
NORTH HAMPTON PLANNING BOARD
Thursday, November 6, 2008 at 7:00pm
Mary Herbert Conference Room
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These minutes were prepared as a reasonable summary of the essential content of this meeting, not as a transcription.

Members present: Phil Wilson, Chairman; Shep Kroner, Vice Chairman; Joseph Arena, Laurel Pohl arrived at 7:20pm. Barbara Kohl, Tom McManus and Craig Salomon, Selectmen's Representative.

Others present: David West, RPC Circuit Rider and Wendy Chase, Recording Secretary.

Alternates present: None

Mr. Wilson convened the meeting at 7:03pm and noted for the record that the November 6, 2008 agenda was properly posted and there was a quorum.

With no objection from the Board, Mr. Wilson took up the 2nd application under new business first because he had important information to share with the Applicant Mr. Horne pertaining to his case.

New Business

08:13 – Peter Horne, PO Box 1435 North Hampton, NH. Applicant proposes a 3-lot subdivision. Property owner: F.S 123 Nominee Trust H.T.L.A.E.H. Nominee Trust, Peter Horne, Trustee. Property location: 110 & 112 Mill Road, M/Lots 006-147-2 & 147-3, zoning district R-2. The applicant requests the following waiver: (1) Section VIII.B.20 of the subdivision regulations – stormwater drainage control plan.

In attendance for this application:

Peter Horne, Owner/Applicant
Steve Oles, MSC Engineering

Mr. Wilson explained that there are two peculiarities in the Town's Zoning Ordinances (1) Non-conforming uses – *Non-conforming use is any use or arrangement of structures or land legally existing at the time of enactment of this Ordinance or any of its amendments, which does not conform to the provisions of this ordinance. *3/10/8*, and all of the lots in the proposed subdivision have structures on them that are within the current 100-foot wetlands setback making them non-conforming uses. (2) Section 414.5.H – *Non-Conforming Uses At the time of the adoption of this article, any non-conforming use may continue and may be maintained, repaired or improved, unless such use is determined by the Planning Board to be an imminent hazard to public health and safety. No non-conforming use may be expanded, changed to another non-conforming use, or*

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renewed after it has been discontinued for a period of 90 days or more. Mr. Wilson explained that the Planning Board does not have the authority to allow change to the lots without an approved variance. Mr. Wilson apologized for not realizing that at the ARC meeting on November 5, 2008.

Mr. Oles argued that the Applicant is not changing the way the land is being used. Mr. Wilson said that because it is a non-conforming use presently, the Applicant needs to apply for a variance with the ZBA.

Dr. Arena moved and Ms. Kohl seconded the Motion to deny taking jurisdiction of case #08:13 because the lots are currently a non-conforming use and the Planning Board does not have the power to change a non conforming use without a variance from the Zoning Board.

Mr. Oles asked for an explanation.

Mr. Wilson said that the way the Ordinance is written is to prevent the Planning Board from acting on any application which deals with a change in a property that is currently non-conforming.

Mr. Salomon asked if the change in question arises from the lot-line adjustment. Mr. Wilson said that both of the actions they propose (1) the lot-line adjustment and (2) subdividing one lot into two are the reasons to deny.

Mr. Salomon voiced concern that the Ordinance may be over broad in terms of what the State defines as a non-conforming [use](#).

Mr. Wilson explained that the Applicant would need a denial from either the Planning Board or the Building Inspector in order to go before the ZBA to request a variance.

Mr. Oles asked if the Board would consider waiving the application fees except for abutter notification fees and continue the case to next month.

Ms. Pohl arrived at 7:20pm.

The motion passed (3 in favor, 0 opposed and 4 abstentions). Mr. Kroner, Mr. McManus, Mr. Salomon and Ms. Pohl abstained.

Mr. Salomon moved and Dr. Arena seconded the motion to waive the application fees except for the abutter notification fees in the event the Applicant chooses to resubmit the subdivision application.

The vote passed (6 in favor, 0 opposed and 1 abstention). Ms. Pohl abstained.

Mr. Wilson had discovered later on in the meeting that in this case Article V – General Regulations, Section 501 Non-Conforming Uses, Paragraph 501.2, [rather than Section 414.5.H that is a similar provision applicable specifically to the Aquifer Protection](#)

District, is the correct citation of the Zoning Ordinance with respect to the requirement that the Zoning Board of Adjustment must permit any change in a non-conforming use as defined in Section 301, Definition 30.

Ms. Chase informed the Applicant that the deadline has passed for the November 28, 2008 ZBA meeting and that the ZBA does not meet in December.

Mr. Salomon informed the Applicant that by law the ZBA has thirty days from receipt of the application to hear the case.

Old Business

None

Thera Research, Inc. - third request for a one-year extension on the conditional use permit for the DAS; approved on November 7, 2005.

In attendance for this application:

Denis Kokernak, Thera Research
Attorney Peter Loughlin

Attorney Loughlin explained that he and his Client, Denis Kokernak were before the Board to request an extension on an approval from the Board back in November of 2005 for a distributive antenna system (DAS).

Mr. Kokernak updated the Board on the status of North Hampton DAS and said that Thera Research maintains contact with several DAS developers and the wireless carriers and that there is strong DAS developer interest in the area. He explained that DAS technology has advanced greatly and is smaller and more efficient. Mr. Kokernak explained that his Company, Thera Research purchased phones for the North Hampton Police Department to use and to evaluate. He showed the Board the equipment (antennas and amplifiers) that will be installed onto the cruisers and the phones, and said that the same type of technology will be installed in the Police Department this month.

Attorney Loughlin explained that the Telephone Industrial Association is lobbying the FCC for a change in the rules concerning cell towers that could change the ground rules for setting cell towers and antennas throughout the Country. He explained that there has been a major change in New Hampshire with the cell tower case Daniels v. The Town of Londonderry where the ZBA granted relief. As a result from the Supreme Court ruling in July 2008 the test for evaluating hardship is going to be much more weighted on the side of the cell tower company.

Mr. Salomon Moved and Dr. Arena seconded the Motion to grant the request for an extension to the Conditional Use Permit application for the DAS approved on November 7, 2005 for an additional year.

The vote was unanimous in favor of the Motion (7-0).

Mr. Salomon thanked both Thera Research and Mr. Kokernak for their efforts on behalf of the Police Department and Fire Department.

08:14 – James G. and Karen S. Confalone, PO Box 415, Rye Beach, NH 03871. The applicants propose a 3-lot subdivision on contiguous land located in Rye, NH and North Hampton, NH. Property owners: James and Karen Confalone. Property location: 41 Causeway Road, Rye Beach, NH, M/Lots 005-012, 013, 014, zoning district R-2.

In attendance for this application:

James Confalone, Owner/Applicant

James Verra, James Verra & Associates, Inc.

Attorney Timothy Phoenix, Hoefle, Phoenix & Gormley, P.A.

Mr. Wilson commented that the application was unique because the land to be subdivided was in both Rye and North Hampton.

Mr. Verra explained that the land is in the Rye Beach precinct and the North Hampton Little Boar's Head precinct. He gave the following facts:

- He explained that the Rye Beach precinct is its own entity and has its own Planning and Zoning Board, and does not require approval from the Rye Planning Board or Zoning Board.
- There is Tidal marsh & fresh water marsh as well as poorly drained soils on the Confalone lot.
- The Rye Beach Planning Board has continued the Confalone case pending approval from the Little Boar's Head District Planning Board and the North Hampton Planning Board.
- The Applicant went to Little Boar's Head Planning Board, and after a settlement in Court, Little Boar's Head conditionally approved the plan.
- One of the conditions set by Little Boar's head is that each lot has to be at least 2-acres.
- The Confalone's have subdivision approval from the State, and does not need site specific approval from the State, but falls within the Shoreland Protection Act.
- When the lots are developed they have to adhere to the Shoreland Protection Act requirements.

Mr. Verra went over the proposed subdivision plan with the Board and gave a copy of the State subdivision approval to Ms. Chase for the permanent record.

Mr. Salomon disclosed that the wetlands consultant, NHSCCS is a client of his, but felt that there was no conflict of interest, so he did not recuse himself from Mr. Confalone's case.

Mr. Kroner said that there was nothing found at the Application Review Committee meeting that made the application unacceptable except that these are newly created lots, therefore the 100 feet wetland setback would in fact apply to them. He said that it is

complicated because the border (Town of Rye) runs through what would be North Hampton's setback and North Hampton does not have the authority to impose the setbacks on a different town. He further commented that one of the stipulations from the Superior Court ruling was that no building would be allowed in North Hampton.

Dr. Arena opined that the case is not complicated; the Town of North Hampton cannot impose conditions on the subdivision application because the land is in Rye. The applicant meets the requirements of Rye. The simple solution is to subdivide the land in North Hampton to separate it from land in Rye and donate the land or an easement to the Audobon Society or a similar organization. Wetland has no value for development in North Hampton.

Mr. Salomon asked Attorney Phoenix stated, for the record, that the plan submitted to the Planning Board that the Board was looking at is the same plan approved by the Little Boar's Head Planning Board, and conditionally approved by the Rye Beach Planning Board. The applicant's representative agreed that it was. Mr. Salomon asked if the plan identified areas of contiguous upland on each of the three lots. Mr. Verra explained that in Rye Beach 1-acre of contiguous upland is not required; lot one has 1-acre, lot 2 has less than an acre but meets the requirements of the Rye Beach Precinct.

Mr. Wilson commented that since two of the three lots do not meet North Hampton's subdivision requirement of 1-acre of contiguous uplands then the Board cannot approve the plan.

Attorney Phoenix explained that the Rye Beach Planning Board considered the Confalone's application, and took it under jurisdiction and said that they were favorable to it, but did not finalize it because the applicant had to first get approvals from the Little Boar's Head District Planning Board and the North Hampton Planning Board. Attorney Phoenix submitted a copy of the Statute (RSA 674:53) that needs to be followed when a subdivision application has land in two separate towns. He explained that Section I of RSA 674:53 allows and an owner of contiguous land in more than one Municipality they to can treat a municipal boundary as a boundary between lots, and Section III states that the owner of contiguous land in more than one Municipality may treat the contiguous land as a single lot, and that all uses of land or structures shall comply with the regulations or ordinances of the Municipality in which they are located. The applicant proposes all construction, well and septic to be located in Rye, and not in North Hampton. Attorney Phoenix opined that the North Hampton Planning Board can't legitimately impose the North Hampton regulations and Ordinances on the applicant because all of the building is taking place in Rye. Attorney Phoenix referred to Supreme Court case Churchill Realty Trust v. the City of Dover Zoning Board of Adjustment, and opined that the case was similar because it dealt with land that straddled Dover and Rollinsford and the Court ruled that the developer had to adhere to the requirements of the City of Dover to develop the Rollinsford side because the only access to the property was through the Dover side.

Mr. Wilson asked if there were any facts involved in the aforementioned case that dealt with jurisdictional wetlands and the ~~affect~~ effect development of land in one Town may have on the other Town.

Attorney Phoenix said that there were no facts regarding jurisdictional wetlands.

Ms. ~~P~~Kohl asked if there were any studies required by Rye's Zoning Ordinances to determine ~~whether there was an~~ the impact of development ~~would have on~~ wetlands. ~~the tidal marsh wetlands in North Hampton.~~

Attorney Phoenix said that Rye did not require them to perform a study. He further opined that if there were no development in North Hampton then the only regulations his client needs to comply with is Rye's. He further added that the only reason his client is before this Planning Board is because of Section IV of the Statue that states *no plat or plan showing land in more than one Municipality shall be deemed approved for purposes of this title unless it has been approved by the Planning Board of all included Municipalities.*

Ms. Kohl said that the Board needs to know the impact on the wetlands in North Hampton prior to taking jurisdiction of the case.

Mr. Wilson quoted the subdivision regulation V.D. – Review Standards “In reviewing subdivision plans, the Board shall take into consideration the public health, safety and general welfare, the comfort and convenience of the general public, and shall ensure that proposed development does not have a detrimental effect on the abutters, the neighborhood, and the environment of the Town.”

Mr. Wilson said that RSA 674:53 III (a) appears to say that any use of land in an abutting municipality, including use for managing storm water runoff, means that the zoning regulations of both municipalities must be met. Hence, without a study of the effects of storm water runoff from the proposed development on the tidal wetlands in North Hampton the Board would not be able to ensure the development would not have detrimental impact on the environment of the Town.

Mr. Wilson referred to a letter from the abutters of the Confalone's that were not in favor of the application. It included pictures of the land in North Hampton under water.

Mr. Verra reminded the Board that anything built on the lot on the Rye side would need to meet the Shoreland Protection Act.

Mr. Wilson asked if the engineering escrow account was paid, and Ms. Chase said it was not.

Mr. Salomon Moved and Mr. Kroner seconded the Motion to take jurisdiction of the subdivision application for James and Karen Confalone, case #08:14 with the

stipulation that the applicant pay the amount estimated by the Town Engineer to set up an engineering escrow account within the week.

Mr. and Mrs. Confalone paid the fee with a check, and Ms. Chase wrote them a receipt.

The vote passed (4 in favor, 3 opposed and 0 abstentions).

Mr. Salomon Moved and Mr. Kroner seconded the Motion that Application 08:14 (Confalone) be continued to the December 4, 2008 meeting and that at that meeting the applicant provide the Board evidence as to the applicability of RSA 674:53 III (a) to include:

1. Identification of a building envelope on each proposed lot; depiction of a maximum amount of sealed surface (driveways, structures and any other sealed surface) located in North Hampton together with a drainage study based upon said assumptions. The purpose of this request is to determine whether or not land in North Hampton is being used to accommodate site drainage from the construction of homes in Rye in a manner which increases either the volume or velocity of storm water runoff onto land in North Hampton, including wetlands, as well as associated pollution risks.
2. A statement from a licensed septic system designer as to whether or not the design of the proposed septic systems on each of the proposed lots is dependent upon soil types and, if so, whether or not there is sufficient volume of said soils located in Rye for the septic designs to have been approved without regard to any such soils within the Town of North Hampton. The purpose of this request is to determine if any land in North Hampton is being used to accommodate the septic systems for the proposed homes to be constructed in Rye.
3. An analysis of the impact of the Comprehensive Shoreland Protection Act on the entire site, North Hampton and Rye, in order to determine if utilization of the property in North Hampton, consistently with the provisions of the act, could nevertheless result in an intensified use of land in North Hampton to accommodate the structures proposed to be built in Rye. By way of example, but not of limitation, whether or not tree cutting in Rye and/or North Hampton, as allowed by the act, in furtherance of the construction, use, occupancy and enjoyment of the structures in Rye would present a significant risk of increased runoff into the salt marsh in North Hampton (volume and/or velocity) or an increased risk of erosion or pollution.

The vote passed (4 in favor, 3 opposed and 0 abstentions). Ms. Pohl, Ms. Kohl and Dr. Arena opposed.

Other Business

GFI- Greystone Village revised plan for sedimentation basin 3 and follow up on issues discussed at the October 21, 2008 Work Session meeting.

In attendance for this discussion:

Steve Duncanson, Construction Manager for Greystone Village

Mr. Duncanson explained that he received an email from NH DES regarding the alteration terrain permit and has been granted a two year extension with the option to apply for a five-year extension after that. He said that GFI is willing to put up surety for \$130,000.00.

Mr. Wilson explained that the Town had called in the previous ~~bond surety~~, a self-calling irrevocable standby letter of credit, for \$751,000.00, and has recently heard back from TD Banknorth's Attorneys that the bond has expired and the Town will not be receiving any of the money. He explained that the letter of credit was originally set up as a self-calling letter of credit and the Town should have received a check automatically from the bank when the letter expired. The denial letter from the Bank's Attorney is being reviewed by the Town's Attorney. He further commented that he has spoken with the Building Inspector and it was the Building Inspector's opinion that the \$130,000 would not be adequate to complete what needs to be completed for phase I. There is a lot of ~~development~~ infrastructure that still needs to be completed, such as the loop road and sedimentation basins, including the large detention pond in the southeasterly corner of the lot.

Mr. Salomon said that the Town's professionals need to tell the Board the amount of the surety required for completion of all remaining work on the project in order to bring it to a point that it is suitable for occupancy by residents of the development.

Mr. Duncanson said that the amended plan that the Board had asked for a couple of weeks ago is not complete.

Mr. Wilson suggested that an amount that is mutually agreed upon needs to be established and arrangements would need to be made to actually post the surety.

Dr. Arena stated that the surety bond needs to be established as soon as possible. He asked if the problems brought to the attention ~~to~~ of the Board by the people who actually live there have been resolved.

Mr. Duncanson said that due to money issues everything has been put on hold.

Mr. Wilson asked Mr. Demar, a resident of Greystone Village if any of his issues that he brought to the Board's attention a couple of weeks ago had been resolved, and Mr. Demar said they had not.

Mr. Duncanson said that the manufacturer of the housing units had addressed some of Mr. Demar's problems.

Mr. Salomon encouraged Mr. Duncanson to meet with the Building Inspector and come up with an amount that everyone agrees upon, and that GFI would be able to post.

Mr. Duncanson asked if he would be able to receive building permits for lots 1 and 16.

The Board concluded that he would first need to meet with the Building Inspector to come up with a surety amount and to produce proof that a bank is willing to post the agreed upon amount before anymore building permits or occupancy permits were issued.

Mr. Duncanson was asked to meet with the Board at their Work Session meeting on November 18, 2008.

Dr. Arena commented that the people who already live at Greystone Village are GFI's best salespeople.

Mr. Wilson informed the Board that he is investigating the complaint made by Mr. Rudy Nadillo from Wings your Way regarding the engineering invoices incurred by his recent Planning Board application. Mr. Wilson spoke to Steve Oles of MSC Engineering who provided the engineering services to Mr. Nadillo and asked why the amounts were so high. Mr. Oles explained to Mr. Wilson the reason the costs were driven up was because the ~~Father~~ father and ~~Son~~ son disagreed on the plan – [the father wanted only to build a deck on the restaurant; the son wanted to build a deck and to expand the parking lot](#). Mr. Wilson [said that he had](#) left a [voice](#) message for Mr. Nadillo requesting ~~him~~ to meet with him to discuss [the engineering bills, memos from the various professionals involved in reviewing and developing the plans, and changes in the plans](#) ~~further,~~ [and Mr. Wilson also said that he](#) has not heard from ~~him~~ [Mr. Nadillo](#) yet, but would still like to meet with him.

Mr. Wilson informed the Board that the Committee is still working on the workforce housing Ordinance and will soon be sending the draft ordinance to the Board for their review, and to the Town Attorney for legal review.

The meeting adjourned at 10:00pm.

Respectfully submitted,

Wendy V. Chase
Recording Secretary