

PLANNING BOARD MEETING
SEPTEMBER 3, 2014

PRESENT: Ed Dekker, Chairman, Liz Freeman, Tim Jones, Bert Hamill, Woody Meiszner, Ned Nichols, Joanne Meshna

The meeting was called to order at 7:30 p.m. at the Town Office.

San-Ken Homes, Inc. - Application for modification of approval for Oakwood Commons: Representatives from San-Ken Homes, Inc. along with their attorney, Greg Michael, and homeowners from Oakwood Commons, met with the Planning Board on August 6, 2014. A request for modification of the Planning Board's conditions associated with private road construction requirements was submitted by Attorney Michael.

Attorney Michael informed the Board he was working on amending proposed bylaws and hoped to have them finished by the end of the week. He obtained an estimate to fix the road that included fixing and cleaning the cracks, seal coat, and fixing potholes for a total of \$8,590 which San-Ken was prepared to do.

Deidre Daley, 63 Old Beaver Road, stated the homeowners were opposed to any changes requiring some type of surety. She distributed a handout on the investment of the homeowners. Taking the original bond amount and dividing by 16 homes renders a \$20,000 investment per lot. With the seven lots that were developed the investment would have been about \$142,000 which would have left about \$182,000 still coming. Even though the development went under, the underlying investment was still made. If there are 9 individual lots remaining and with the commitment left, the investment to the organization would be around \$9300/home. If the Planning Board grants the road base modification, the investment by the 9 lots would be \$5,236 per home. She stated the homeowners preferred the \$9300/home and felt this was a fair contribution compared to what the other 7 lots had invested. They are still working on trying to form the homeowners' association but do not feel there is a good working relationship. They would like to see \$9,300 be put into an escrow account or at a minimum \$5,236 as each building permit is approved.

John Sterrett, 49 Old Beaver Road, stated the developer had told them there would not be a homeowners' association until all the homes had been built and sold and at that point the road would be finished. Ed responded that was not going to happen. Further, Mr. Sterrett stated the best approach is to require a bond to ensure the road be completed. The homeowners are looking to the Town to be sure the road is done right. Ed reminded Mr. Sterrett of a previous discussion when town counsel advised the Board that the Lehtons cannot be considered to be the continuation developer. Ms. Daley referred to RSA:356 B3 which states that a subdivider and developer are synonymous and any successor or person who comes to stand in the same relationship in the subdivided land as the predecessor takes on those responsibilities. Attorney Kinyon stated there was nothing he could find

under NH State law that clearly states that the purchaser of nine lots takes and stands in the shoes or states they would not stand in the shoes of the developer.

Robert Mason, 227 Ashburnham Road, asked why San-Ken was not responsible for the 9 lots they bought. Liz responded NH law is not clear and the question is can the 9 lots and the remaining ones come to an amicable agreement.

Attorney Michael pointed out his client and their successors will be contributing to the road in the future. All the owners are part of the homeowners' association. There has been an association not technically formed. A written agreement is not needed in this State. He is trying to formalize the association and set up some bylaws. Tim remarked that Attorney Michael is confident that a homeowners' association will be formed while some of the other owners are not so confident. Attorney Michael replied there is an association verbally if not otherwise. Everyone in the subdivision is responsible for the roads and streets. The private road agreement states that. If a group of the owners maintain and repair the roads, they have a right of action against the other owners.

Ray Christian, 22 Old Beaver Road, stated they were all told that an association would be formed at the completion of the last dwelling being built. The road would be finished by the developer. The developer was accountable to build the road and houses even under hard times. If a new person buys the 9 lots, he is considered to be the same as Charlie Watt, the original developer; the responsibility falls on San-Ken.

Liz asked what San-Ken's response was to the other 7 homeowners' presentation. Attorney Michael responded they did not agree with their assessment. She asked if it was San-Ken's position that the other homeowners have not already contributed through what it cost them to buy their lots and what the developer had already put into building the road, and the homeowners have not contributed to the building of the road to its current state. Attorney Michael responded those owners bought their homes with certain infrastructure, San-Ken bought their lots at auction with certain infrastructure, anyone could have been at the auction. Ed asked if what Attorney Michael was saying is San-Ken's lots have the same amount of infrastructure built out as the other 7 lots do. Attorney Michael responded that in terms of the road structure they do.

Robert Mason stated he was present when the original subdivision was done and the developer at that time was going to do landscaping, pave roads, power, everything. Someone that buys up the development should be held to the original plan. Ed questioned if one person bought one lot at the auction, would they be considered a developer. Mr. Mason responded he did not think so but San-Ken Homes is taking up the rest of the development and they should finish up like they are supposed to.

Mrs. Daley stated it does not really matter if it is 10 individuals buying 10 lots. The bond travels with the subdivision and questioned why it would not in the future be prorated among anyone that buys those lots. Each new lot would be responsible for that prorated amount for the infrastructure. Ed responded their lots contributed to the infrastructure just as the first lots did. Mrs. Daley added the profitability of

most developers is that the first 50% of the homes is going to be where most of the infrastructure costs fall. There is an assumption that was made for long term in that property that the big profit is going to come at the end.

Chad Brannon, Fieldstone Consultants, stated bonds are in place to secure the completion of the infrastructure of the project. The development was approved with the understanding the road was going to be a private road. The responsibility for the infrastructure is shared among all property owners. The breakout of investment is not proportionally correct. A bond that remains would be the responsibility of everyone, 1/16 interest. There is equal ownership within the development.

Ed asked Mr. Brannon if the reason for a higher cost to complete the road is because of the asphalt costs or the degradation of the base coat. Mr. Brannon responded asphalt costs have raised expediently and gone through the roof. Ned noted that the bond had been reduced to \$17,000 and 18 months later the bond was to increase to \$34,000 due to substandard construction. Mr. Brannon noted that in 2009 the town engineer wrote a letter to the Board stating the bond amount was not going to cover the completion of construction and he believed it was mainly due to the cost of materials. Attorney Michael noted that in 2007 the bond was recommended to be \$17,000. In 2009 another letter suggested it be \$40,726. There was no action by the Board to increase the bond.

Liz stated that the road is a private road. The Board's interest is there is an approved subdivision plan that shows a road built to certain standards that is conditional upon formation of the homeowners' agreement. Neither of those things have happened. Therefore, the plan that was approved by this Board is non compliant. The Board's interest is to have a plan where current conditions comply with the plan that was approved. The Board approved a plan that had certain conditions and those conditions have not been met. The hope is that the owners can work together to come up with a modification of the plan that could be approved and everyone agrees to. In the absence of that, the only thing the Board can do is revoke the subdivision approval. The Board needs to have something where the conditions and the plan match or they have to revoke.

Attorney Kinyon agreed with what Liz stated. He stated he understood the disappointment of people that live on the road but that disappointment is really directed at the developer who made promises and did not keep them. The Town is not a guarantor of the completion of road improvements in general and in particular not in this case because of the agreements the homeowners signed that it is their responsibility to maintain the road. This is a situation where the people live in a subdivision with a plan that is not currently compliant and there is a new owner of the remaining 9 lots. It is clear that San-Ken is not going to take over the obligation of the developer. The Planning Board is not the advocate of the existing owners. The Planning Board's options are limited and in general for the Town its options are to refuse to issue building permits for the 9 lots or revoke the subdivision approval. Neither of those steps are going to lead to a solution that creates any certainty for any of the parties or keeps costs at a minimum. It is in the interest of the existing owners and San-Ken to come to some workable solution.

Bert asked Attorney Kinyon if the owner of each lot has an 1/16 interest in the road regardless of the conditions of the lot and the road. Attorney Kinyon responded it depends how the documents creating the subdivision were worded. Bert continued by stating following that isn't a homeowners' association mandated through the documents. Therefore the owners have no choice, they have to accept 1/16 ownership of the road based on the number of lots owned and a homeowners' association will be required. Attorney Kinyon added that the 16 homeowners have a responsibility to maintain the road because they are all together on the road. He encouraged both sides to discuss and be open to creative solutions to solve the issue.

Tim stated he hoped the homeowners did not think the Planning Board was insensitive to the situation they are in. They all totally understand and would like to see a way to make it a win/win. He asked what the Planning Board should require for some sort of group decision that is legally binding. Attorney Kinyon stated he would be reluctant to have the Planning Board dictate what the homeowners' association agreement should state. The Planning Board in the original approval required a homeowners' association agreement and the homeowners should work together to bring something to the Board.

Mrs. Daley stated their attorney feels it is tenuous to assume there is a homeowners' association. Forming a homeowners' association to agree to the maintenance of the road is not a big deal. They are prepared to write a check for the snow plowing right now. Once a homeowners association is formed, it is the quickest target of the Planning Board to say the developer went under and the responsibility falls to homeowners, and it is not clearly articulated in the subdivision rules. How do they pursue that without fearing they are going to be the body in a legal lawsuit. Attorney Kinyon stated the Planning Board's role is limited to look at the subdivision and see if the conditions have been met. There are two things not completed, one is the road not being built to the original specs, and second a homeowners' association was never formed. If those two things are met or if a proposal is brought in to modify those conditions that the Planning Board approves so they are met, the Planning Board oversight is done. Mrs. Daley felt there was no clear indication of what needs to be done. Liz responded there are specifications on the plan how the road is to be built and currently the road is not built to those specifications. The road either needs to be built to what is specified on the plan or a revised plan showing different specifications that the Planning Board could approve needs to be submitted. In the absence of an approved modification or the road being built to the specs on the original plan, the recourse for the Planning Board is to revoke the approval.

Attorney Michael stated his client will pay 9/16 of the cost to finish the final coat of the road but expects everyone else to pitch in. The road is in reasonably good shape and they have presented what they would do and pay for. That would require that the Planning Board modify the road conditions with no final coat, it would be the responsibility of the homeowners.

John Sterrett noted they received a copy of the proposed bylaws. San-Ken has 9 votes versus their 7 votes and they would be able to place a Board of Directors that they decide upon. Attorney Kinyon suggested they hire an attorney to suggest changes to the bylaws they would be agreeable to. Attorney

Michael stated he would make amendments to the bylaws so his client was not the majority controlling interest.

Liz stated there was not much more that could be done this evening. Everyone stated their positions, the Board understands there are different views, the Planning Board cannot advocate for one side or the other. The Planning Board's interest is either the road is built to the plan before building permits are granted, or there is a bond for the road to be built to the plan, or there is submission of an application for a modified plan. Ned noted San-Ken has stated what has been proposed is to complete the roads shared 16 ways. If that was agreed to, why would there be a problem. Ed responded several people have said they would not pay. Liz noted the road has to be built or bonded from the Planning Board's point of view or the plan modified and there needs to be homeowners' association.

Kenny Lehtonen stated they were willing to pay a 9/16 share of whatever the others want to do. If they want to put an inch and a half coat over the entire road like Brox Industries recommended at a cost of \$50,000, they're willing to pay a 9/16 share of the \$50,000. If they want to live with the road the way it is, and they do what they proposed with seal coating and pothole fixing, that could be done. If the Planning Board approves it minus the top coat, that does not stop them from top coating the road; they are willing to do whatever the others want to do.

Chad Brannon noted that their options are a function of whether the Planning Board will approve the relief of the top coat. The Board needs to make a decision on that request in order for the homeowners' association discussions to be more productive. Ed noted the Board had indicated their willingness to deal with solutions of that nature at the last meeting; they would like actual details before making a vote. Bert added that some document needs to be approved that can be registered.

Ray Christian, 22 Old Beaver Road, stated it was his understanding that San-Ken was willing to seal coat the road, fill the cracks, etc. and if the homeowners agree to pay their share of the top coat they would pay the 9/16. He asked if the 9/16 was binding. Attorney Michael responded if the lots are sold they would be responsible for a 1/16 share. Attorney Kinyon added there was no certainty when the top coat might be applied or if it will be applied. If there is no vote or consensus to put the top coat on in two years, what happens if two lots are sold in the meantime. Attorney Michael responded a covenant would be put in that they are part of the association. Attorney Kinyon stated if the Planning Board approved the modification it could be subject to a covenant being placed on each lot that if the association to be formed votes to put a top coat on the road, each lot would share 1/16 of the cost.

Attorney Kinyon noted that costs escalate as time goes on. The Planning Board should consider as a condition for the top coat a limited time period for completion or some consideration of how it is addressed; you do not want it to be expressed as a fixed number but rather 1/16 of the cost.

Bert asked why the Planning Board could not waive the top coat with the understanding that San-Ken is going to provide a letter for the repairs they are going to do. Upon receipt and acceptance of the letter the Board could vote to remove the top coat requirement, accept the road as is possibly with a bond

with the amount they state for the work they are going to do, and allow the lot owners to establish a homeowners' association at their leisure. Ed added rather than establish, to formalize, the homeowners' association.

Ray Christian, 22 Old Beaver Road, noted originally there was a proposal that when the last house was built and sold a homeowners' association would be formed. Ed responded that has no legal status, the approval of the subdivision required the formation of the homeowners' association, not after the last lot was sold.

Deidre Daley stated she did not have a clear indication the Planning Board considers there is no further obligation to the original bond outside of a homeowners' association. Ed responded the original bond evaporated with the bankruptcy. Ms. Daley continued that with the completion estimate that is on the books, there is no single entity responsible for completing that work, and the Planning Board considers it the responsibility of the homeowners' association. The existing plan can be modified and the Board can waive the bonding. Ed responded there is no bonding. Mrs. Daley noted there are estimates that are required to meet the subdivision plan, the estimates still go with the plan. The Board responded that they were estimates taken at one point in time. Chad Brannon added there would be no obligation if the Board waives the requirement for the wearing coat. Right now in order to satisfy the subdivision approval there is a requirement for a top coat. They are asking the Board to waive that requirement so there are no obligations to the homeowners. Mrs. Daley stated there are four outstanding issues on the cost estimate dated 8/4 - base coat, top coat, monuments and signs. She asked if the Planning Board assumed they were going to get done. Ed responded there is no money to complete those items; there is no developer at this point.

Maryann Hughes, 49 Old Beaver Road, asked Bert to restate his position. Bert stated the requirements of the top coat could be waived. San-Ken would submit a recordable document stating what they will do prior to obtaining building permits and they would then perform those actions on the road and the building permits would be granted. The homeowners' association could be formalized at their leisure.

Attorney Kinyon suggested if a modification is approved with conditions, one condition would be that no building permits would be issued until the work is done. Ed asked if setting the monuments would be one of the conditions and Attorney Michael stated it would not.

Attorney Kinyon recommended to the Board that a motion would state all prior road completion requirements and specifications are waived and that the existing road with the improvements proposed by San-Ken be approved provided San-Ken does the improvements at their expense. Therefore, there is no further reference to the old road specs.

Tim was in agreement with Bert as long as the work is done by a date certain. Woody stated an agreement needs to be reached because when San-Ken makes a reasonable offer as he thought they had, the Board will have to release the building permits and hopefully there will be something in place by then. Ned agreed with Woody and thought it should not be approved tonight but in two weeks

there has to be an agreement of the association. Ed was in favor of approving San-Ken's plan tonight. His view was there is an implicit homeowners' association and the representative of 9 votes made a proposal to the Board. Liz stated the offer is reasonable but needed some indication there are more people on board than just San-Ken. The people that bought their lots bought them based on a plan and if a good number of them agree it is a reasonable offer, then she had no problem.

Chad stated he understood from the Board and town counsel that it is not in the Board's interest to get involved in the homeowners' association process. An application has been made to the Board and he hoped that the homeowners' association dealings would happen outside the Planning Board meeting. Ed added the Board could adopt the position that there is an implicit homeowners' association. The association exists but needs to be formalized.

Bert made a motion to continue the hearing to September 17, 2014 at 7:30 p.m. Ed seconded the motion and it passed unanimously.

The hearing ended at 9:05 p.m. and the Board entered into a non public session with Attorney Kinyon.

The meeting adjourned at 10:05 p.m.

Respectfully submitted,

Joanne Meshna
Land Use Manager