

ZONING BOARD OF ADJUSTMENT MEETING
JULY 11, 2013

PRESENT: Wendy Freeman, Chairman, Becky Doyle, Clark Baldwin, Marianne Graham, David Lage, Joanne Meshna

The meeting was called to order at 7:30 p.m. at the Town Office. Clark was appointed as a regular member for this evening's meeting.

7:30 p.m. USA Properties, Inc. - Continuation of public hearing for an Appeal of an Administrative Decision:

The hearing was continued from May 23, 2013. Mr. Simpson began by stating that their application had been grandfathered because they had began design reviews back in 2004. Any future changes to regulations did not apply to their application. Agreement had been made at the last meeting that the 2007 regulations applied.

Mr. Simpson referred to page 24, 2.d. of the Zoning Ordinance and read the first paragraph "The maximum number of allowed house lots in a cluster subdivision shall be one per two acres in the parcel, not including any area previously subject to conservation easements." When an amendment was made in 2009 that paragraph was changed to read "To determine the maximum number of buildable lots that can be created in a cluster subdivision, the applicant shall prepare a Yield Plan showing a feasible conventional subdivision plan of one family dwellings, consisting of conventional lots and street layouts, and which may be conceptual in nature and is not intended to involve significant engineering costs, but which would be reasonably capable of receiving subdivision approval in the opinion of the Planning Board. ...The number of lots shown on the Yield Plan is the maximum number of lots that can be allowed in the Cluster Subdivision." Wendy referred to the second paragraph of 2.d. of the 2007 regulations and Mr. Simpson read "The cluster development of lots shall be continuous in an arrangement with the 15% common area to promote a "village" concept with the surrounding open space. In order to accommodate the unique characteristics of a tract of land, more than one cluster arrangement may be permitted if, in the discretion of the Planning Board, this would lead to a site layout of the total development which would improve and enhance the appearance and preservation of natural topographic features and open space. No land within the buildable portion shall be wetlands or land of steep slopes." Mr. Simpson stated that the change in 2009 required submission of a yield plan and limited the number of lots allowed in a cluster subdivision to the number of lots in the yield plan.

Wendy read the purpose of the cluster ordinance, "...enable a developer of land for residential purposes to make such use pursuant to a plan which is in keeping with the overall density and open space objectives of these ordinances..." Mr. Simpson stated that when he reviews the ordinances there is not much that refers to density--the steep slopes ordinance is to prevent erosion and the purposes of the

wetlands ordinance is to protect the wetlands. David asked if the purpose of the cluster ordinance was to preserve open space. Mr. Simpson responded that the objective is to allow flexibility in design and save open space.

Mr. Simpson stated that the past practice of the Board has not been to require yield plans or to limit the number of lots to a yield plan. He submitted a front page of the Craven subdivision that was approved by the Planning Board and referred to note 6, which states the density permitted is the number of acres divided by two. The open space calculations were read. Becky noted that the density permitted was 82.7 lots and the density proposed was 62.9 lots. Mr. Simpson continued that yield plans were not required at that time. He referred to paragraph 2 of the Planning Board decision which reads "the density is not consistent with that of a conventional subdivision as required in the preamble of the cluster ordinance." He added that it does not come close to saying that the density has to be the same as a conventional subdivision; the maximum number of lots shall be one per two acres. He referred to a document from the Office of Energy and Planning. David noted that paragraph 2.d of the 2007 ordinance refers to the maximum number of lots allowed and that no land within the buildable portion shall be wetlands or land of steep slopes. David asked how a mathematical equation could be used to determine how many house lots if there is no building on wetlands and questioned if that means you remove those areas and then divide by two. Mr. Simpson responded that it did not, the minimum size of a lot is one-third acre.

Wendy summarized that the applicant is saying that he is not required to do a yield plan and he has interpreted the ordinance to mean a lot for every two acres regardless of steep slopes and wetlands. Mr. Simpson then referred to number three of the decision letter from the Planning Board which states that the Board did not have enough information to make a determination. Wendy referred back to the last meeting and noted that at that time, after review of the application for appeal by the Board and the applicant, it had been agreed that the Zoning Board had jurisdiction with number 8. (ii) only. Subdivision regulations cannot be appealed to the Zoning Board. Mr. Simpson responded that his attorney informed him that there is no direct law that regulations cannot be appealed to the Zoning Board. Wendy reiterated that the Zoning Board cannot grant relief to subdivision regulations. Mr. Simpson agreed that the only issue is the yield plan.

At the last meeting Wendy had noted that the Planning Board had given the applicant the option of submitting something other than a yield plan as long as it took into account wetlands and steep slopes. Mr. Simpson had stated that the Planning Board had voted to require a yield plan and would hold him to the number of the lots shown on that plan. Mr. Simpson responded that was basically the reason the certiorari judgment had been filed. Wendy noted her interpretation of the certiorari judgment was that they should not be held to the number of lots, not that they had to prepare the plan. Mr. Simpson stated they should not be limited to the number of lots because that was not in the ordinance. Wendy referred to 8. (ii) and noted half of the argument is that they had to submit a yield plan and the second part is that they are limited to the number of lots on the plan. She asked if asking for a yield plan is probably not the issue but holding them to the number of lots that came out of the yield plan is the

issue. Mr. Simpson replied that it was clear to them that in asking for the yield plan it was their intention to go with that number of lots. David asked Mr. Simpson if he believed he should not have to submit a yield plan and be held to the number of lots less wetlands. Mr. Simpson responded when it refers to the density chapters of the ordinance there is nothing in there that states the purpose is to limit density except for the density table. David noted that was dimensional control and referred to the preamble of the cluster ordinance and the objective which is to promote open space; further he stated that there would be no need for an ordinance to promote open space if you could build on water. Mr. Simpson replied that where ordinarily you need two acre lots you can build on one-third of an acre and use a lot of the rest as open space in a cluster.

Wendy used an example of 100 acres with 50 acres of wetlands. You could not build on those 50 acres. The applicant is saying that he should be able to build 50 houses on the other 50 acres and preserve the 50 acres of wetlands as open space even though it was unbuildable land to begin with. Mr. Simpson responded that was correct until the ordinance was changed. Wendy noted that the purpose of the ordinance had not changed. David added that the 50 acres of wetlands was already unbuildable so using it as open space does not really save it.

Abutters were invited to speak. Mr. John Belliveau, 43 Hollyview Drive, stated the Board should deny the application. He was in agreement with the interpretation of the regulations and open space and wetlands. Stowell Road needs improvement and adding more cars to the road would jeopardize the safety of the abutters. He stated it would be irresponsible to allow the application to go forward.

Liz Freeman, Vice Chairman of the Planning Board, stated that the issue of the yield plan has been on the table since the first design review many years ago. She submitted minutes from 2012 and noted that there were references to previous meetings where a yield plan had been discussed. Wendy asked if a yield plan had been discussed before 2008. Liz replied that the density issue came up on 9/6/06 and was also discussed at meetings in 4/07, 9/07, and 11/07. Wendy noted that the density issue and the yield plan to show density came up nearly since the beginning of the application. Mr. Simpson stated that they objected to it whenever it was raised. Liz continued that the applicant claims that he is allowed one lot per every two acres; in the cluster ordinance it states the maximum number of house lots allowed. There are several places in the minutes that were distributed where it states that a yield plan or some other method of demonstrating under a conventional subdivision. The applicant could have found an alternative method for the calculation. Wendy noted that the applicant has stated that they can get a lot for every two acres and Liz noted that the Planning Board has consistently disagreed with that. Liz added that if previous boards could determine what a conventional subdivision would yield that was an alternative; it was not specified that a yield plan was required so it is up to those boards to determine if a proposed cluster meets the purpose of the cluster ordinance by whatever method they chose. In the minutes of 11/12 there is a lot of discussion when the yield plan was submitted and she referred to the paragraph "Jim stated that the yield plan looked reasonable and asked what the Board would be doing for the applicant this evening." Ed responded that "the Board

would agree to accept how many lots are shown on an approved yield plan after an appropriate review." The Board was then working on a yield plan because the applicant had submitted one.

David asked if the appeal could be reduced further as the only point now was the number of lots. Mr. Simpson replied that when they submitted the yield plan that they were doing so under duress, the submittal of the yield plan was not as important as the linking of the lots. Liz added that what they were doing under duress was demonstrating the number of lots that could be achieved in a conventional subdivision. Mr. Simpson added that they should not have had to submit the yield plan according to the regulations in place. Liz noted that the Board did not require a yield plan, they required them to show proof that the number of lots they were applying for could be achieved in a conventional subdivision. Mr. Simpson disagreed and stated that in the minutes of the November meeting the Board voted to require a yield plan. Wendy noted that the Board voted to restrict the applicant to the number of lots shown on the yield plan.

David asked if the yield plan submitted was accepted by the Board and Liz responded that it looked reasonable and they had not had a chance to review it or have the town engineer review it. Questions were asked by the Planning Board with regard to the yield plan (page I of the 11/12 minutes). Page 2, seventh paragraph, states that Jim noted the yield plan looked reasonable. What the motion on page 3 was indicating was that since the applicant had submitted a yield plan, the Board would use it as the demonstration of what the density would be under a conventional subdivision. Mr. Simpson stated that was not his recollection, that there were members of the Board who thought there were too many lots on the plan and other issues, and that the applicant had to bring in a new yield plan.

Marianne asked if there was an additional review by the Planning Board or engineer and the answer was no. She also asked if there was a request of the applicant to submit a new yield plan and the answer was no. Mr. Simpson said that if the yield plan had been acceptable the Board could have voted on it then. Wendy noted that the Board probably needed a chance to review it. Liz added that the normal practice would be to have the town engineer review it. Marianne asked what number the yield plan had shown and the answer was 26. Initially there had been 48 lots and changed to 47. Liz added that Mr. Simpson has stated that the Board is using the more recent ordinance to evaluate the application because the amended ordinance does require a yield plan; under the old ordinance the Board still needs some demonstration of the number of lots in a conventional subdivision.

At 8:35 p.m. the hearing was close and the Board deliberated:

David - when you read the ordinance as a whole the purpose of the cluster development is to preserve open space, there is a maximum number of lots and nothing referring to minimum numbers and you cannot build on water; the purpose of the cluster ordinance is to preserve space and not to allow more construction; the decision the applicant is appealing about not requiring the plan, even though they did submit it, he could not agree based on what the cluster ordinance purpose states referring to the ordinances as a whole. The Planning Board made the right decision.

Marianne agreed.

Clark agreed and noted that where it states site layout it could be a yield plan.

Becky stated that when they design the open space for a yield plan they have to preserve no more than 50% of wetlands and steep slopes. Wendy responded they have to preserve a minimum of 55% of the tract and of that no more than 50% of any combination of wetlands and/or steep slopes. David stated that if you cannot build on water you cannot use that to determine the number of lots that can be built. Becky asked where the strong tie is back to the number of lots and Wendy responded the purpose statement. Becky also stated that there is no discussion by the Planning about the issues that are causing the number of lots and David responded that it is not a negotiating item; the applicant is appealing the decision of whether or not they are required to submit a yield plan and is the Planning Board allowed to determine the number of lots based on the yield plan. Becky responded that as the Zoning Board has not seen the yield plan, the Board does not know all the factors that were considered. David replied that it is not the Zoning Board's decision on how many house lots can go there and Becky thought it was sad that there was no discussion of any of the things on the yield plan. David noted that Jim Shultz had stated that the plan looked reasonable. Wendy added that you have to presume the applicant is going to produce a yield plan that puts it in the best light they can.

David made a motion to confirm the Planning Board's decision to require the applicant to provide a plan to show the number of lots obtainable in a conventional subdivision to determine the number of lots allowed in a cluster development. The appeal of an administration decision is denied. Marianne seconded the motion and it passed unanimously.

8:55 p.m.: Recess.

9:05 p.m.: Gerald and Olive Katz/Ryan Varela - Public hearing for a variance application:

The applicants submitted a variance application from Article XII.A. of the Zoning Ordinance in order to permit two single family residences on one lot. Each applicant owns a condominium on Lot 13/21-4, rural district, 2.71 acres, and want to divide the lot in half in order to have two single family homes. There is a third building on the lot owned by the Katz that is used for storage and will be demolished. There are 2 wells and 1 septic system. The issue the applicants are having is difficulty in getting refinancing for the property; comparables cannot be found for the situation they are in with their condos.

Wendy noted that if the property were divided there would need to be deeded rights for the wells and septic system. The plan is to divide the property in half; there is no plan drawn up yet. Frontage requirements, property line setbacks and lot size requirements could not be met. The proposal would

make a non-conforming property more non-conforming. The buildings were built in 1905 and 1932. There is a homeowner's association but no reserve funds.

The Board reviewed the variance criteria:

- 1) The proposed use would not be contrary to the public interest - there is no development being proposed; no increase in density or population; plan on taking down one of the structures.
- 2) The use is not contrary to the spirit of the ordinance - the use is not changing; will stay exactly as is.
- 3) Granting the variance would do substantial justice - allows owners to get a mortgage; better for the town.
- 4) The proposed use would not diminish property values - would increase property values.
- 5) Literal enforcement of the ordinance would result in unnecessary hardship to the owner because the following special conditions of the property distinguish it from other properties in the area - cannot get a mortgage for the property; nothing else like it in town.
 - a) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property - no additional building planned.
 - b) The proposed used is a reasonable one - it would allow for future stability within these homes.

Tracey and Nick Collins, abutters to the property, were present. Trees buffer their property from the applicants; no problems with the proposal.

The Board agreed that applicants need relief from Article XII.A, dimensional controls, for the purpose of subdividing the lot in half. Any new structures would have to conform to the current regulations. Deeds would have to include all easements.

At 9:50 p.m. David made a motion to close the public hearing. Becky seconded the motion and it passed unanimously.

The Board reviewed the variance criteria:

- 1) The proposed use would not be contrary to the public interest - not changing the use.
- 2) The use is not contrary to the spirit of the ordinance - not changing anything.
- 3) Granting the variance would do substantial justice - provides relief to the property owners.
- 4) The proposed use would not diminish property values - will increase property values and make the property more marketable.
- 5) Literal enforcement of the ordinance would result in unnecessary hardship to the owner... - there is hardship to the owners; there are special conditions of the property that distinguish it from others.

- a) No fair and substantial relationship exists between the general public purposes of the ordinance provision and the specific application of that provision to the property - no additional buildings planned.
- b) The proposed use is a reasonable one - already exists.

The Board reviewed the parking for both buildings and assumed there was adequate parking. If the Planning Board determines there is not adequate parking, they may have to remove their fencing.

David made a motion to approve the variance application from Article XII. A., dimensional controls, for the sole purpose of subdividing the lot in half with the conditions that deeds are to include easements for the wells and septic systems and there is to be no change in use. Marianne seconded the motion and it passed unanimously.

The meeting adjourned at 10:10 p.m.

Respectfully submitted,

Joanne Meshna, Land Use Manager