

ZONING BOARD OF ADJUSTMENT MEETING
MAY 23, 2013

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

The meeting was called to order at 7:45 p.m. at the Town Office. Clark was appointed as a regular member for this evening's meeting.

David made a motion to enter into a non-meeting to discuss advice from legal counsel. Becky seconded the motion and it passed unanimously. At 8:15 p.m. David made a motion to return to public session. Becky seconded the motion and it passed unanimously.

7:45 p.m. USA Properties, Inc. - Public hearing for an Appeal of an Administrative Decision application:

USA Properties, Inc. submitted an application for an Appeal of an Administrative Decision of the Planning Board for denial of the applicant's application for a cluster subdivision. Wendy noted that the Zoning Board has to resolve a jurisdictional question of whether or not the grounds of the appeal are under their purview. She suggested going through the items listed in paragraph 8 and determining which items are under the ZBA's jurisdiction. Mr. Simpson responded by referring to the RSA and noting that any decision made by the Planning Board pursuant to an innovative land use control is to be appealed to Superior Court; if the decision was made pursuant to the cluster ordinance, then jurisdiction is with the Superior Court.

Wendy referred to paragraph 6 of the appeal and read "It is unclear whether the cluster subdivision provisions of the ordinance (or any other provisions) are innovative land use controls adopted pursuant to RSA 674:21." It is also unclear whether, even if the cluster provisions are "innovative land use controls adopted pursuant to RSA 674:21, the planning board must have the further authority to grant conditional or special use permits with respect to cluster subdivision applications in order for the ZBA to acquire jurisdiction under RSA 677:15." She questioned if the applicant was saying that the Board did not have jurisdiction and did he want to withdraw his appeal.

Mr. Simpson stated there was no way of determining if it was an innovative land use control. He questioned if the cluster ordinance when adopted by the town was intended as an innovative land use control; the RSA allows the adoption but generally it says that the ordinance is adopted pursuant to the RSA that authorizes it.

Liz Freeman stated that when the Planning Board updated the cluster ordinance there was never any discussion about the ordinance as an innovative land use control; however, the RSA does list cluster development as an innovative land use control.

The Board reviewed the amendments to the Zoning Ordinance regarding cluster development and determined that the cluster section existed in 1990. Joanne was asked to get the original Zoning Ordinance from 1987 which was done. Wendy referred to the original ordinance and read Article X, E. cluster development as follows: "Cluster development is a type of subdivision allowed on lots of 10 acres or more and by special exception of the Board of Adjustment on lots less than 10 acres in order to promote an efficient use of land through an arrangement of lots, utilities and streets and to preserve natural topographic features. Proposals for cluster development shall be submitted to the Planning Board for review based on subdivision regulations and site plan review and no building permit shall be issued or instruction started without approval from the Planning Board." This was the entire cluster ordinance. The Board then referred to the Purpose and Authority section of the Zoning Ordinance.

David asked the applicant if he was appealing an innovative land use decision. Mr. Simpson responded that they were appealing the Planning Board's decision and questioned if that decision was pursuant to an innovative land use control. David noted that with the adoption of the RSAs including RSA 674:21 if the applicant is appealing something under the cluster ordinance, the Board does not have the jurisdiction to hear it. Becky did not agree and referred to RSA 676:5 III. which Wendy read: "If, in the exercise of subdivision or site plan review, the planning board makes any decision which is based upon the terms of the zoning ordinance, or upon any construction, interpretation, or application of the zoning ordinance, which would be appealable to the board of adjustment if it had been made by the administrative officer, then such decision may be appealed to the board of adjustment under this section; provided, however, that if the zoning ordinance contains an innovative land use control adopted pursuant to RSA 674:21 which delegates administration, including the granting of conditional or special use permits, to the planning board, then the planning board's decision made pursuant to that delegation cannot be appealed to the board of adjustment, but may be appealed to the superior court as provided by RSA 677:15." Her interpretation was that the Zoning Ordinance has to delegate administration including the granting of conditional or special use permits to the Planning Board in order for it not to fall under the ZBA's jurisdiction. David's interpretation was that RSA 674:21 delegates the administration. Wendy's interpretation was that the Zoning Board grants the delegation.

Wendy continued that her interpretation of RSA 676:5 III. is that if the Zoning Ordinance grants delegation then it would not be appealable to the ZBA. However, the ordinance is clear that the authority granted the Planning Board in the last paragraph of the cluster ordinance is for review of the cluster development for compliance with subdivision and site plan regulations; it does not grant the Planning Board authority to grant waivers or conditional approval or special use permits that deviate from dimensional controls. There are several dimensional controls that are part of the cluster subdivision ordinance. Mr. Simpson referred to the same section and he understood it to give the Planning Board administration over the cluster ordinance and that they can deviate from the dimensional controls.

Wendy stated that the Planning Board cannot approve a cluster subdivision with road frontage less than the required 75 feet. David stated RSA 676:5 III. states that 674:21 delegates administration including the granting of conditional or special use permits but our ordinance says it has to come back to the ZBA.

The Planning Board has not been given that authority. The innovative use which is the cluster development falls under the purview of the Planning Board. Becky stated she would agree if the controls were not specifically stated in the Zoning Ordinance such as lot size, setbacks and road frontage. Any deviations from the Zoning Ordinance dimensional controls have to go to the Zoning Board for a variance. David noted that the Planning Board cannot hear any subdivision until all the variances needed have been granted.

Wendy stated that just because it is a dimensional control and because the Planning Board has not been given the authority to grant variances in the cluster ordinance, if the applicant wants changes to dimensional controls, including the number of lots, that requires a variance. The Planning Board does not have the authority to grant a variance to a dimensional control. David stated he could agree up to the number of lots; that is not a dimensional control. Wendy referred to and read the purpose of the cluster development. David continued that the cluster requirement of a one-third acre lots and the number of lots is in the purview of the Planning Board; however, if the size of the lot is less than one-third acre that is a dimensional control and not in the purview of the Planning Board. The Board agreed that a dimensional control in the cluster development section of zoning is under the jurisdiction of the Zoning Board and if it is more subjective and not a dimensional control in the cluster development section that is not under the Zoning Board's jurisdiction.

Mr. Simpson asked why the issue of dimensional controls were important here. Wendy responded by referring to paragraph 3. of the cluster development section. There is no granting of relief for dimensional controls by the Planning Board including those in the cluster ordinance. Mr. Simpson stated that if an innovative land control is in place and the authority has been delegated to the Planning Board to administer it, any decision pursuant to that innovative land control is appealable to Superior Court. Becky stated that the administrative authority has not been granted to the Planning Board for dimensional controls. Marianne referred to RSA 674 which states that the ordinance may designate the administrative control to other boards. Wendy stated that if the applicant is arguing that the Board does not have jurisdiction, the applicant could withdraw their application; however, if they are appealing an interpretation, then the Board can answer what is under the purview of the Board. Mr. Simpson stated that they were not looking for clarification but to have the Board overrule the Planning Board. David responded that the Zoning Board cannot overrule the Planning Board's decision but can determine if they erred or not. Wendy added that the Zoning Board cannot determine if the Planning Board erred in not granting the subdivision but they can determine if they erred based on the points presented by the applicant.

David made a motion that the Zoning Board has jurisdiction on all dimensional controls including those that are listed in the cluster development section of the Zoning Ordinance. Becky seconded the motion and it passed unanimously.

Wendy asked the applicant if he believed there were any other grounds for appeal other than that identified in the application (8. ii) that deal with the zoning ordinance or a dimensional control. Mr.

Simpson responded that he had left the appeal documents at home. He was given a copy. He asked if the density issue was a dimensional control and the Board responded that it was.

The Board and the applicant went through each item of the appeal under paragraph 8. and agreed that items (i) and (iii) through (xx) did not fall within the jurisdiction of the Zoning Board. The Board and the applicant agreed that the only item to be appealed to the Zoning Board was section 8. (ii). Wendy stated that the Zoning Board needs to determine if the Planning Board misinterpreted or misapplied the ordinance by limiting the number of lots as demonstrated on the applicant's yield plan.

Mr. Simpson stated that a yield plan was prepared and submitted under duress. There are 95 acres in the lot. The proposal was for 48 lots and later changed to 47. Wendy noted that the application to the Zoning Board exceeded the number of lots allowed by one. Mr. Simpson stated that the number of lots had been changed to 47 lots based on the density requirement of the cluster ordinance which was one lot per two acres. Wendy questioned if the applicant in a conventional subdivision, between the steep slopes and wetlands requirements, would have been able to adhere to the one lot per two acres. Mr. Simpson responded that there is no requirement in the ordinance that states one lot per two acres of usable lot. Wendy stated that it was her understanding of the purpose of the cluster ordinance not to increase overall density as to what would be allowed in a conventional subdivision and she asked what the yield plan had yielded. Mr. Simpson responded twenty-four lots because of wetlands and steep slopes. At the time they submitted their application density controls in the ordinance and the density was one lot per two acres. Wendy asked what ordinance was being used and Liz noted that the Planning Board had determined the 2007 regulations. Mr. Simpson noted that those regulations were prior to the inclusion of the need for a yield plan and they were not required to submit a yield plan.

David stated that the applicant needs to submit to the Board exactly what they are appealing. Mr. Simpson responded that they were appealing the fact that they were required to submit a yield plan. Under the 2007 ordinance they were not required to submit a yield plan. David further stated that the Zoning Board's jurisdiction is to hear an appeal based on whether the Planning Board erred or not; the Board needs the facts that the appeal is based on. Becky stated that if the plan submitted fits the number of lots does it matter what the yield plan actually says; the applicant is appealing that they had to submit a yield plan. Mr. Simpson stated they were appealing the number of lots on the yield plan. Wendy asked how, other than a yield plan, it could be shown that the applicant meets the density of a conventional subdivision. The Planning Board gave the applicant the option of submitting something other than a yield plan as long as they took into account wetlands and steep slopes, etc. Mr. Simpson disagreed and stated that the Planning Board had voted to require a yield plan and voted that they would be held to the number of lots shown on a yield plan and the minutes state that. He did not have the minutes. He agreed to a continuance to allow time for him to prepare his argument.

David made a motion to continue the public hearing to July 11, 2013 at 7:30 p.m. Marianne seconded the motion and it passed unanimously.

The meeting adjourned at 9:50 p.m.

Respectfully submitted,

Joanne Meshna, Land Use Manager