

PLANNING BOARD MEETING
NOVEMBER 5, 2014

PRESENT: Ed Dekker, Chairman, Liz Freeman, Tim Jones, Paul Termin, Bert Hamill, Ned Nichols (8:00 p.m.), Attorney Kinyon (7:25 p.m.), Joanne Meshna

The meeting was called to order at 7:00 p.m. at the Town Office.

John Sterrett and Maryann Hughes - Request for reconsideration: On October 9, 2014 Mr. Sterrett submitted a request for reconsideration of the Planning Board's decision on Oakwood Commons. Mr. Sterrett read his prepared statement summarized as follows. The Planning Board did not have sufficient information to make an informed decision. The TD Bank foreclosure deed is the basis of their appeal and states the bank grants to San-Ken Homes, Inc. the nine lots together with Old Beaver Road. The foreclosure deed includes Old Beaver Road, an existing subdivision approval and other properties such as underground services in place, survey work completed, etc. In August San-Ken appealed the Planning Board's request that they post a surety bond to assure Old Beaver Road would be built to town standards arguing among other things that they had only purchased nine lots and that the original subdivision approval did not apply to them. The Planning Board agreed with them and mistakenly believed that Old Beaver Road was common property and the current homeowners must have taken possession of the road at their closings. The Planning Board decision is invalidated because of the ownership status. San-Ken should seek a new subdivision approval.

Maryann Hughes stated there was a statement made that as part of their deed they had responsibility for the road but they could not recall anything about a road. There is a private road agreement and release document which states the owners have an easement to the road. There was also a statement made that there it is a homeowners' association but there is nothing that states that it exists. The Board stated it is de facto association and needs to be formalized. Mr. Watt had stated he would finish the road at the end of all the building and turn it over to a homeowners' association. In researching the above, they came across the foreclosure deed which states San-Ken Homes, Inc. owns Old Beaver Road. Ms. Hughes introduced their attorney Andrew Piela.

Attorney Piela referred to the issue of whether or not San-Ken can be considered a successor subdivider. He referenced RSA 356-A:1 which defines a subdivider as also being a successor subdivider. A successor subdivider is an entity that offers lots for sale and stands in the shoes of the prior subdivider. San-Ken is a successor subdivider and should be held to the same standards that the Board held 112 Chestnut. The Attorney General's office was contacted by Attorney Piela and would view San-Ken as a successor subdivider. He suggested the Board relook at that issue. He referred to subdivision regulation 3:12, the definition for a private road, which states a private road is built to town road specifications, and to B:03 P. which requires a two inch base course. Kent Brown concluded in 2014 that the road base was only 1/4-1/2 inch thick and \$40,000-\$80,000 would be required to bring the road up to standards. San-Ken offered to fix the road for \$8,700 and that is what the Board permitted. Attorney Piela questioned

if the Board thought the road would be brought up to town standards with the work San-Ken offered to do.

Attorney Piela noted there is no such thing as a defacto homeowners' association. The seven existing homeowners did chip in and pay for plowing, but a homeowners' association was not formed. When they bought the property they knew they would be maintaining the road but not building the road. When San-Ken bought the subdivision they bought it as a successor subdivider to sell the lots and not use for their own purpose.

Further, Attorney Piela stated the subdivision has to be registered with the Attorney General's office or an exemption granted. If selling lots out of a subdivision, notification must be made to the Attorney General's office or an exemption can be requested. The exemption that was granted to 112 Chestnut Street no longer exists. The Attorney General will be involved in making sure the sales are registered or acceptable and if there is adequate infrastructure. San-Ken has stepped into the original developer's shoes with the mission of completing the subdivision, and it is appropriate as the developer they finish the obligations that the Board put in place with the original developer.

Ed referred to note 12 on the original subdivision plan approval and asked Attorney Piela if he thought that was illegally insufficient or invalid. He responded that the road is an easement over the lots. The owners of the lot own the soil up to the midpoint of the road. The owners have agreed to maintain the road. Ed noted Attorney Piela's clients were asserting San-Ken was the owner of the road. Ms. Daley stated that her property ends before the road bed. Ed added that this establishes an ownership in common if it is not on the lots. The original developer made promises outside of the scope of the subdivision approval in particular that the road agreement would not be triggered until the road is completed, and Ed questioned what power the town government has to enforce what was a private agreement between the developer and the purchasers. Attorney Piela stated the maintenance of the private road is to be shouldered by the lot owners but the issue is whether the road is constructed in a manner satisfactory to the Planning Board.

Ed asked how the obligation of the Lehtonens would be different if it was seven individuals in the Lehtonen family and each bought one lot and then seven unrelated individuals each bought one lot. Attorney Piela responded it would have to be determined if they were a successor subdivider or not. Ed stated that the argument could be made that San-Ken are the owners of a bulk purchase of lots in a subdivision that already existed. Attorney Piela referred to the definition of successor subdivider and stated San-Ken is offering the subdivided land for disposition and not keeping it for themselves.

Attorney Michael stated the Board met several times and decisions were made; there was no appeal within 30 days. San-Ken did not buy the lots from 112 Chestnut. They were purchased at foreclosure and the fact that they are developers makes no difference. The deed information is not new information. The road is a private road to be maintained by the owners. There was never any intent for the developer to own the road. Each person owns to the center of the private road. The Board has the power to waive any regulations and did so. There is no legal basis because the Board had the power to

amend the plan, to reach an arrangement that the Board felt was acceptable, and to issue a modification of conditions and did so and it has not been appealed. They are not a successor subdivider as it was never registered and they do not stand in the same relation. They did not assume the subdivision which had bonding in place which failed to set up the association. They were buyers at a foreclosure sale. The Board's decision was proper and fair and was not appealed.

Paul asked if he were to buy two lots and sell them would that make him a subdivider and who was responsible for setting up the homeowners' association. Attorney Piela responded that if you buy into the subdivision you are not buying a bare piece of land but a part of the subdivision and you have to follow a subdivision plan that was created by the Board. He did not know whether the intent was formed when the lot is sold or bought. The situation is San-Ken bought all of the remaining lots, bought into a subdivision with certain requirements, and bought with the intent to sell them. It is now finishing what 112 started. He questioned if San-Ken does not view itself as a subdivider, why would they have standing to come to the Board and seek a waiver of a subdivider plan. Paul asked who is responsible for forming the homeowners' association. Attorney Piela responded that when a lot sells, as part of that sales transaction the new owner becomes part of the homeowners' association.

Liz referred to the foreclosure document and questioned if the deed is selling not just the lots but the road as well and the utilities to the homes, how does the bank get to write the foreclosure deed this way. Attorney Piela responded that TD Bank had a mortgage on the entire subdivision and when an individual lot is sold TD Bank released part of the mortgage, and when 112 failed and TD Bank foreclosed, they took the nine lots and other rights that came with those lots. Attorney Michael responded that when each lot is purchased they purchase utility rights and the right to cross the road.

With regard to note 12 on the subdivision plan, Attorney Michael stated that each time a lot sells the owners become part owners of the roadway which was the intent of the developer. He disagreed that there is no homeowners' association. It technically exists, it is defacto; there is a relationship among the owners.

Bert stated there is one issue before the Board. San-Ken came before the Board because they were having difficulty getting building permits. The Board has the authority to waive regulations. The Board was aware that the road was not constructed to original standards set forth in the subdivision approval. It does not matter how many lots San-Ken owns, whether the Attorney General is involved, etc. The Board made a decision to waive certain standards on the road. San-Ken offered to do some patching and repairing and completed it to the satisfaction of the Road Agent; this is a done issue.

Mr. Sterrett related he had spoken to the Road Agent after he inspected the road and questioned how long the road would last. Mr. Goewey said the road is in bad condition and in the next 5-6 years it will need major repairs. The only way to prevent that is to finish the road. This will impose a large expense in 4-5 years that the owners are not prepared financially to make. They are in the process of forming a homeowner's association because they are going to have to take care of the road in the future.

When asked by the Board Ms. Deirdre Daley stated proposed that each lot assume a certain percentage of the remaining infrastructure. The Board did not feel it was good to write new law. The homeowners then proposed each successive lot then bares a proportional responsibility to finish the infrastructure and that should go with each lot.

Attorney Michael stated that San-Ken would be happy to pay their 9/16 interest to finish the road. That was on the table. A reasonable agreement was reached. Ed stated that is an old argument and the Board is interested in new information this evening.

Mr. Sterrett stated that when they bought their house 112 Chestnut St. took a portion of the sale and paid for a section of the road. The road was built in pieces and as houses were sold a portion of the sale was used to finish sections of the road. What Ms. Daley has suggested is what has been happening all along. The builder added money to the sale of the lot to pay for the section of the road and he reduced the bond by what construction was done.

Liz stated she understood all the issues but questioned if there was no appeal within the 30 day timeline was it going to do any good to discuss the issues at this point.

Attorney Piela stated there are two legal questions for the Board to consider. One is whether or not San-Ken is a successor developer. Second, Attorney Kinyon sent an e-mail to Joanne Meshna which listed three considerations for Mr. Sterrett. An appeal of an administrative decision could be made to the Zoning Board, an appeal could be filed with Superior Court and the third was to request reconsideration inside the 30 day window. The request was made within the 30 day window. If a motion was filed with Superior Court it would strip the Board from acting. There is a substandard road. He asked if the Planning Board was content to leave the road as is and hope it survives or if they were going to hold San-Ken to the same standard as 112 Chestnut to bring the road up to where it is acceptable to the Board.

Attorney Kinyon stated the matter was before the Board on August 6, September 3 and September 17. All the abutters had notice of the meetings and at that time they were given the opportunity to submit evidence of what they wanted the Board to do including evidence of expert opinion about the condition of the road and what would happen in the future. No expert opinion was submitted by the abutters. The only expert opinion was from San-Ken. The Board made its decision on September 17 to approve the application to modify the subdivision. Under RSA 677:15 any person aggrieved by any decision of the Planning Board may present a petition to Superior Court within 30 days after which the Board approved or disapproved the application. No appeal was filed with the Court. Within the 30 day period Mr. Sterrett visited Joanne to raise questions about the decision. Joanne wanted to help Mr. Sterrett as to what his rights were but was not entirely clear what it was he wanted to do. He presented a document to the Zoning Board for an appeal of an administrative decision and he also suggested to her that he disagreed with what the Planning Board had decided. Joanne contacted Attorney Kinyon for guidance on what he could provide to her that she could provide to Mr. Sterrett and he provided the e-mail on October 7. Joanne gave the e-mail to Mr. Strerrett. The e-mail listed three considerations for

Mr. Sterrett. The first consideration was to file with the Zoning Board. The second was to file an appeal with the Superior Court. The third was to file with the Planning Board a request for reconsideration. Attorney Kinyon noted that in the third consideration he had added that the filing of a request for reconsideration with the Planning Board did not stay or suspend the 30 day appeal period to Superior Court. Also he further stated in the e-mail that New Hampshire law gives a board inherent power to reconsider its decision during the statutory 30 day appeal period if it wishes to do so. Even though the request for reconsideration was filed within the 30 day period, Mr. Sterrett still needed to file an appeal to Superior Court within 30 days. Because the filing for reconsideration was not acted upon within the 30 day appeal period it becomes moot. It must be acted upon. If the Board had received a motion to reconsider and wished to act upon it within the 30 day period because it saw merit, it could. It was under no legal obligation to do so. The filing of the request for reconsideration within the 30 day period does not stay anything. After the 30 day appeal lapsed with no appeal to Superior Court, the Board's decision becomes final. The only role for the Planning Board tonight is to hear the arguments made but the only jurisdiction the Board has is to review the September 17 approval and see if there is anything further to be acted upon. For example, was the road work to be done completed and approved by the Road Agent. He disagreed with Attorney Piela that the mere filing for reconsideration stays anything and disagreed that the decision made on September 17 was a final decision. The Board can give final approval subject to conditions and if the conditions are met the date of the final approval is the date the Board voted to give final conditional approval. The Planning Board does not have the authority to keep reconsidering the issues once the decision becomes final. The Planning Board acted fairly to the applicant and the abutters. All evidence was considered by the Board and they voted and gave a final conditional approval to modify the subdivision. That approval is final and not capable of being challenged now.

Mr. Sterrett stated that the foreclosure deed was never presented and questioned how were they to know and respond within 30 days. They were at a disadvantage from day one to have a fair appeal. Attorney Kinyon disagreed and if they did not think they had a fair chance and at this point if they do not think they had a fair chance, relief must be made to Superior Court.

Ms. Daley stated Mr. Sterrett brought the request to the office on October 14. There were at least some business days left to be heard. If the Board was consulted and of the opinion the applicants would be heard today, that was action the applicants would move forward. If the Board had no intention to move forward, why was it not returned to Mr. Sterrett. Attorney Kinyon responded a Planning Board is not required to meet, convene and act on applications at any time they are filed. The Board received the application and processed it and put it on the agenda for tonight as it does with any other application. The Board does not do an instant review of an application and make a decision. The Board can only consider an application at a public hearing.

Mr. Sterrett stated that the e-mail was given to him. Joanne returned the check for the Zoning Board and gave him Attorney Kinyon's e-mail. Mr. Sterrett then said he wanted to file for the reconsideration. Joanne responded that she needed to give ten days notice and the earliest would be today. He was being advised by the Board's secretary that this was the earliest date it could be heard. Attorney Kinyon

stated that 30 days from September 17 the abutters were bound to file an appeal with the Superior Court as stated in his e-mail. Ms. Daley asked if the Board could reconsider it tonight and Attorney Kinyon responded that they could not.

Bert stated that the Board could reconsider under certain unusual circumstances such as fraud or misrepresentation or overwhelming new evidence. However, there is no new evidence, no fraud, no misrepresentation. He was satisfied with what had been done.

Mr. Ray Christian questioned if the Board and attorneys were aware of the foreclosure deed. The abutters were never apprised of the deed. Attorney Michael responded it is not relevant. The roadway goes with the subdivision, everyone owns part of it when they get their deeds. The deed is on record and was on record and available for anyone to look at. Ed added that note 12 on the subdivision approval states the owners of the lots own the road and not San-Ken.

Liz made a motion to deny reconsideration on the grounds that it is past the Board's jurisdictional authority to do so. Tim seconded the motion and it passed unanimously.

8:30 p.m. Builders Land Co., Inc.

Mr. Gary Litchfield and Mr. Thomas Murray were present for Builders Land to discuss Jacqueline Drive and Green Farm Road.

Mr. Litchfield stated they plan to pave Green Farm Road late spring. He noted that he would be in touch over the winter with Kent Brown for items to be done on the roads. Jacqueline Drive will be paved late fall 2015 or early spring 2016. The bonds are more than sufficient to finish the roads.

The Board noted that the bond amount for Jacqueline Drive may not be sufficient using the 2009 estimates from Brown.

Bert asked if it would be worthwhile for the Board to have Kent do an update on the estimates so the bonds could be adjusted accordingly. Mr. Litchfield said he planned to contact Mr. Brown.

Mr. Litchfield noted that part of the subdivision approval was 15 lots on Kennybeck Court. No development has taken place. He questioned how long the approval was good for. Attorney Kinyon responded vested rights are acquired if substantial improvements have been done. Mr. Litchfield noted it is probably another year to a year and a half before anything is done on that road.

Liz noted it would be good to have an up to date estimate from Kent. Ed asked if Builders Land would be willing to pay for Brown to go over their numbers. Mr. Litchfield stated he was not sure he was. He would like to get together with Brown Engineering, use the numbers they have and set a time frame for the road to be done before they go to the bonding company. Ed stated it was not for a bond number but rather a number for the Board. Mr. Murray stated he would like a comprehensive letter from

Brown as to what has to be done. Mr. Litchfield stated in answer to Ed's question that they probably would not be willing to pay for Brown's review. Mr. Litchfield stated he would be in touch with Brown to get new numbers from him probably within 30 days and by now and between the end of year will have the figures back.

The meeting adjourned at 8:50 p.m.

Respectfully submitted,

Joanne Meshna
Land Use Manager