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Date: Friday, November 16, 2012 5:49 PM
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Attach: Carroll 9-7-12 PB Re Bond File 0102.doc; Carroll 9-9-12 Dowling Re Bond File 0102.doc; Carroll 9-9-12 PB Re Bond File 0102.doc
Subject: RE: Hunt Properties Bond Issue

Hi Mark & a:

Sorry for the delay in responding, but today was the day the Motion for Reconsideration had to be mailed in the Rines case in order to be in on Monday. (That has now been done.)

In order to make sure I was not mistaking the facts and the purpose of the bond, I have reviewed the relevant Planning Board minutes (as contained on the Town's website) for the original subdivision approval (April 7, 2011), and also the meeting where the amount of work to be bonded was reduced (September 6, 2012). For the sake of completeness, I have attached copies of my prior opinions concerning this topic.

CAVEATS:

I can tell from the various E-mails that I have received that there is a disagreement among the Town's officials about this issue. My job as the Town's Attorney is to call the law as I read it, and not to take sides any any such disagreement. The ultimate decisions are to be made by the Town's officials (in the case of subdivision issue, by majority vote of the Planning Board), based in part on legal advice, but also based on other factors which Board members may be weighing against legal advice. I am required by the Rules of Professional Conduct to give you the best, most objective, impartial legal opinion that I can, even when I know that a client may not like that opinion. If I didn't do that, I wouldn't be worth anything as a municipal attorney. But I am certainly not dictating anyone's decision. On the contrary, I work in the field of law that I do because I truly love the way local government works in New Hampshire, which includes the notion that it isn't the lawyers who actually make the decisions (thank goodness).

I needed to say the above, in part because this afternoon I received a direct E-mail from Mr. Scalley (apparently without copies to any Town officials) castigating me for supposedly "instructing" Ms. Dowling to issue a notice of violation. I did not do that. I had some correspondence with Ms. Dowling regarding whether completing certain work, prior to any type of security being posted, did or did not constitute a violation of the subdivision approval. I indicated my opinion that it was a violation (and after reviewing the situation again, I still believe that it is). But in so doing I was certainly not indicating that a notice of violation was mandated. A police officer on a corner is not legally mandated to ticket all speeders, and a Planning Board is not mandated to cite all violations. In both cases there is a degree of enforcement discretion involved (in this instance discretion ultimately to be exercised by the Planning Board, which, in the realm of subdivision decisions, has the authority to overturn any enforcement decision made by someone to whom it has been delegated).

I have not been instructed by anyone to reply directly to Mr. Scalley. Therefore at this point -- unless the Town's officials say something different -- I am not going to respond to him (except perhaps to let him know that I'm not authorized to respond). Please let me know if you want me to respond otherwise to him.

YOUR QUESTIONS:

1. With respect to your first paragraph: Thank you, I do now recognize that due to the September 6 decision by the Planning Board, the work to be secured by the security bond now being discussed is not the complete road, but quite a bit less work, which was, as you say, "broken out" from the remainder of the project. (You are

correct that I had not previously reviewed the September 6 minutes, and did not appreciate what was meant by "street opening bond" -- an uncertainty I expressed previously (in yesterday's E-mail, below)). Nevertheless, now that I ***have*** reviewed those minutes, and although the amount of the work required to be bonded (and hopefully the cost of the bond) was substantially reduced, the work to be done still counts as subdivision improvements under RSA 674:36, III(b), and therefore I have no reason to change my ***legal*** analysis or recommendations, neither of which had anything to do with the amount of the work, or amount of the bond. (This is ***not*** the case, for example, of a bond under RSA 236:9 through :13 - which was the other type of situation I wondered about). So in summary, the question of what constitutes a reasonable bond termination provision is an issue that has nothing to do with the amount to be bonded.

2. Your question #1 asks whether a 90-day cancellation notice provision is "usual and customary" for this situation. I can't really answer the question that way because (a) Frankly, I haven't done any kind of survey of towns (other than anecdotal) to know this is "usually" done; (b) Moreover my impression is that a vote such as that taken on September 6 to break out a portion of the subdivision road work happens fairly rarely, and hence isn't truly "usual and customary" in the first place; (c) But most importantly, my advice was not based on what is "usual and customary" but rather was based on my experience that many towns in the past have been caught short when a bond expired before they could react. Again the Board is free to ignore that recommendation if it has what it believes are good reasons to do so. You can go with 45 days; you could go with the 10 days. I do know that my recommendation is consistent with that of other municipal attorneys I know, and I did cite the Loughlin treatise (below) as being also consistent.

> [However, as I said (below in the discussion of the *Stillwater Condo* case), even if the Board decided it didn't want to require any bond ***at all***, the chances are that this would not lead to any town liability. The type of problems it ***could*** lead to (I'm talking purely in the abstract, now, not this particular case) are the following: (1) If a subdivision had objecting neighbors, they could take the Town to court (although such a suit is unlikely), and if so, I think a judge would likely order the Town to require a bond; (2) Some particular developer might go bankrupt, leaving a lot of lot purchasers without a road, and they would come complaining to the Town and it would be politically difficult for the Town to do nothing; (3) Another developer at some future time, where the Town ***WAS*** requiring a bond, might complain (including complaining in court) that the Town was not treating everyone alike with respect to bonding, and was thus violating the principles of Equal Protection.]

3. Your question #2 and #3 are very similar. #3 asks whether the Town has the legal right or authority to require a subdivision bond for a project on private property. The answer to that question is an unreserved yes. In fact virtually all subdivision roads are installed on private property (even where a town does take over a road, it usually doesn't happen until later), and all of the legal discussion I have provided has assumed as a premise that the work was going to be done on private property. Your question #2 asks whether it is in the Town's best interest to have Dave Scally secure a second bond (I assume you mean when work is going to be done beyond the work broken out in the 9/6/12 meeting), in light of the fact that the road is going to be on private property. My answer is that the laws as I have described them apply to subdivision roads on private property, but the question of what is "in the town's best interest" is ultimately up to the Town's officials and citizens, not to me. The laws were written the way they are by the Legislature in the belief that it is in everybody's best interest to try to prevent the situation where an innocent third party buys a lot or unit where the road has not been built because the subdivider has run out of money, and also to prevent the situation where there is a fire or a heart attack at a residence, but the emergency vehicles can't reach it because the road was never built. However, there are certainly towns in the state where the citizens have decided to "let the buyer beware" on those issues, and have disbanded their planning boards. That is a political decision, not a legal one.

4. To be complete, I should mention that under state law, ***there is an alternative to bonding***, where a subdivider agrees to it. I haven't mentioned this before because Linda told me the subdivision plan in this case had already been recorded in the Registry of Deeds, and because bonding was one of the conditions in the April 2011 subdivision decision. However, paragraph III(a) of RSA 674:36 allows a planning board (again, if this is what a subdivider wants) to permit the road and/or other improvements to be built without any bonding, ***but prior to final approval of the plan.*** If this option were used, the plan cannot be signed and recorded until the work is finished. I suppose it is theoretically possible, in ***this*** case, for the Board to legally waive the bonding requirement, but in order to fully comply with 674:36, the Board would have to (with the owner's agreement)

record a notice in the Registry that the approval was "on hold" until the road was finished (similar to the notice which was recorded in the case of Dartmouth Brook), which would mean that no lots could be sold until the work was done. The intent of the bonding option, by contrast, is to allow lots to be sold before required work is complete.

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I would be glad to discuss any of these issues further.

Sincerely,
Bernie Waugh