
——Original Message——
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Sent: Thu, Nov 15, 2012 1:35 pm
Subject: RE: Hunt Properties Bond Issue

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Hi Linda:

You sent me two attachments to your E-mail. One was a series of E-mails, the most recent of which (Nov. 14th, from David Scalley) contained a suggested description (to be added to the bond) of the project being bonded. That amount of detail is just fine (assuming the information is correct - which I don't know, since I have received no documentation on what this this project consists of, or what work the bond is meant to be securing). That language ***would*** therefore take care of Item #1 "Description" which is the first of the 2 items I noted in my E-mail to you dated October 24 (again, assumign the details are factually correct).

With respect to the second issue I raised (how the bond is terminated) you sent me two things: One was an E-mail from Teresa Dodge of Hunkins & Eaton agency in Littleton (Nov 1), saying basically that my recommendation was unreasonable because neither the DOT nor the Town of Whitefield had required any similar provision. The other was a letter dated November 14 from Mr. Scalley saying he is still working with the bonding company to try to comply with my recommendation. Since there is no new language to review on this issue, my understanding is that what you are asking me to do is reconsider my original recommendation.

To try to prevent misunderstanding, let me make a few comments about the recommendation I have made concerning termination.

1. As a preliminary, Ms. Dodge's E-mail uses the term "street opening bond." I'm not sure what that term means. I have been assuming that the purpose of this bond is to provide security for required subdivision improvments, as set forth in RSA 674:36, III(b) [or site plan improvements per the parallel provision in RSA 674:44, IV(b)]. The normal term used is "subdivision performance bond" although the details are more important than what title is attached. If in fact the purpose of this bond is something else, that could affect the validity of my comments. [For example if there is no subdivision, and the sole purpose of this bond were to secure against damage to a town highway when a private driveway was installed (RSA 236:9-13), that would be a somewhat different situation.]

2. Despite Ms. Dodge's comment (and again assuming the purpose of this bond is subdivision security under RSA 674:36, III(b)), I stand by the reasonableness of my recommendation. In smaller towns in New Hampshire, where local government is largely volunteer, it is not uncommon for correspondence addressed solely to the "town" to sit on someone's desk for much longer than the 10 days provided in this bond. This problem is not hypothetical -- I am aware of numerous instances where security bonds lapsed due to the unintentional inaction of town officials. That is why I make this recommendation, and I know from experience that there are companies which will write bonds complying with that recommendation.

3. Granted, there ***is an alternative*** approach to the 90-day notice provision. That would be: (a) if the planning board's decision specified an exact deadline for the work to be done; (b) for the bond or other security (for example letter of credit) to be one which could not terminate until after that deadline; ***and*** (c) for the bond or other security to have a provision stating that it was ***automatically*** to be considered to have been called unless the Town prior to that deadline notifies the bonding company that the work is complete in compliance with the deadline. I did not mention that alternative before, because my experience has been that bonding companies are much more hesitant to write bonds with automatic call provisions, than they are to write them with a 90-day notice provision. Just to show that I am not at all out-of-step with other municipal attorneys on this point, please see Loughlin "15 N.H. Practice, Land Use Planning & Zoning (4th Edition) at Section 29:17 (Most practical type of subdivision security is an irrevocable letter of credit with a "self-calling" feature).

4. Finally, I do want to stress that my recommendation was only that - a recommendation. The actual decision is up to the Town's officials, not me. If the Board were to believe that the 90-day provision is not necessary, and that the Town's officials would have no problem taking action, if needed, within 10 days, then they are certainly free to accept a bond with that provision -- especially if there are practical (i.e. non-legal) considerations arguing against my recommendation.

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After drafting the above, I received a copy of an E-mail from Kenneth Mills, asking about what is the public interest in requiring this bond. Let me respond briefly to that. solely in a generic manner (again I do not have knowledge of the details of this specific project).

Again, I am assuming this is a subdivision situation where the provisions of RSA 674:36 would apply. Section III(b) of that statute says that a planning board "***shall*** provide that, in lieu of the completion of street work and utility installations prior to the final approval of the plat, the planning board ***shall*** accept a performance bond, irrevocable letter of credit, or other type or types of security..." With the use of the word "shall" my view is that this state law constitutes a non-discretionary state law mandate for planning boards to require adequate security.

In addition to that, the whole theory of subdivision performance security is there is a public interest in preventing future purchasers from getting into a situation where the streets or utilities serving the properties are incomplete, and the original subdivider has gone bankrupt or does not have adequate resources, because whenever that happens, there is a lot of pressure on the town (other taxpayers) to pick up the tab. And, in order to remain impartial, the same requirements must be applied to all applicants, regardless of what resources they may appear to have at the time of application.

An example is the situation in *Stillwater Condo. Assn. v. Town of Salem,* 140 N.H. 505 (1995). The planning board had approved a development subject to a condition that the developer would install a water line from across the border in Massachusetts. The board's regulations required that security be posted, but the board for some reason did not require it, and when the developer went bankrupt prior to installing the water line, the unit owners sued the town for not complying with their regulations and RSA 674:36, III (above). Basically the Court held that the Board should have required the security, but was ***not*** liable in damages to the landowners. That case illustrates both the purpose for requiring security, but also the fact that the Town will probably not be held liable if it neglects to require the security.

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I would be glad to respond further if anyone wishes.

Sincerely,
Bernie Waugh