Town Counsel's e-mails re bonds + hunt rep. 1 of 23
9-7-12 Thru 11-28-12

From: Bernie Waugh
Sent: Friday, September 07, 2012 3:56 PM
To: 'Linda'
Cc: Bill Dowling; Donna Foster; Erik Bergun; Ernie Temple; Evan Karpf; Kenneth Mills; Richard Nelson
Subject: RE: Carroll Planning Board

Hi Linda and Planning Board members:

I have the following comments in response to your E-mail of today:

1.

The proper interpretation of Section 4.19 is to a degree dictated by state law – it must be interpreted consistent with paragraph III of RSA 676:36 – especially III(b), which covers subdivision security.

2.

It is my interpretation that the term "public improvements" in your subdivision regulations covers ALL streets, including those which a developer intends to remain in private ownership. Any facility (street, water pipe, sewage disposal, etc.) which is going to serve more than one lot or unit is basically a "public improvement" as that term is generally used in the subdivision laws. (I note that the Carroll regulations do not contain their own definition of the term – at least the version on the Town's website). My conclusion is based in part on:

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The fact that a planning board in NH has no final legal authority over whether a road will ever become a town road or not - that is up to the Selectmen and/or town meeting, see Beck V. Auburn, 121 N.H. 996 (1981).

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The word "street" in the subdivision laws (RSA 672:13) – which is a key term in 676:36, III – is defined independent of the issue of whether it becomes a public highway.

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The planning board cannot know the future. In fact one of the most common types of advice that I give to planning boards is to remember that ANY roadway they approve could become a public road. It is very very common in NH for the developer to try to escape having to comply with road standards by saying a road will always be private, whereas in fact once the developer sells all the lots or units, the residents then come to the town petitioning to have it accepted as a town road. Nothing the planning board can legally do (such as conditions of approval or deed covenants) can ever guarantee that this will not happen. Therefore the Board should always assume, when deciding what standards to apply, that any road can become a town road.

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Deed covenants aren't reliable because generally they aren't enforceable by a town, and the parties to the deeds can get together and alter them.

3.

So in summary, I think Section 4.19 does apply, even to roadways which everyone expects to remain private, if they in fact serve more than one lot or unit. In answer to your final question, the cost to be covered by the security should enclude the entire length of any portion of road which serves more than one lot or unit, and not just the portion connecting to a town highway. Unlike the regulation of driveways under RSA 236:13 – whose purpose is to protect the Town's existing highways -- the purpose

of subdivision security is to protect, not just the interests of taxpayers, but also the interests of the purchasers of lots or units. Please don't get me wrong - it isn't as though those lot purchasers could actually sue the town if the security doesn't work out (after all, the planning board's decisions, being discretionay judgment, are generally protected from liability) . Nevertheless the planning board has a duty to protect future owners of the land being subdivided, and that is the purpose of the bond or other security.

4.

In terms of the alterantive types of security, the statute permits a bond from a bonding company, a letter of credit, or a cash deposit in escrow, or "other forms". This is pretty much up to the Board in its regulations. Your regulations don't mention a letter of credit, but in my experience that is a device which can be the most trouble-free. Obviously I recommend that whatever form of security it is must be required to be reviewed by legal counsel to determine its adequacy. One form of security sometimes sought by a developer who's low on resources is a security interest in the land itself (such as a mortgage). I definitely do not recommend that. For one thing, it's complex - instead of simply calling the bank security, the town has to go through foreclosure, which can be complex and costly. And secondly, I have real doubts that the Planning Board has the legal authority (without a town meeting vote) to acquire an interest in real estate on the part of the town, and a mortgage is definitely an interest in real estate.

Please let me know if there is some aspect of your question that I have not answered to your satisfaction, or if there is anything else you'd like to discuss.

Sincerely,
Bernie Waugh