From: Bernie Waugh
Sent: Sunday, September 09, 2012 4:13 PM
To: 'Linda'
Cc: Bill Dowling; Donna Foster; Erik Bergun; Ernie Temple; Evan Karpf; Kenneth Mills; Richard Nelson
Subject: RE: permit vs bond question

Hi Linda:

I should have added my response to this note to the one I just sent to Mr. Mills. However I tend to answer E-mails one at a time, since I know of no other way to get through them all.

Just to be clear, I am assuming you are referring to Section 4.19, not 8.19.

Your question is: "Is it better for the town to require a bond or is it better for the town to withhold building permits to insure that work is completed?"

DISCUSSION: I have re-read Section 4.19 as a whole, and I now have a better understanding of why you are asking this question. Section 4.19 as written is somewhat ambiguous, and nothing I can do as a lawyer can completely erase the ambiguity. I would strongly suggest that the Planning Board should try to fix the ambiguity at some point (amending the regulations using the procedure in RSA 675:6).

The first ambiguity is the one pointed out by Mr. Mills -- namely that the first paragraph says "except [where] each lot is an existing improved Town road..." That plainly means to refer to a situation where each lot has ***frontage*** on an existing town road. I don't truly think the meaning is unclear, although it would be a good thing to fix.

The more difficult ambiguity lies in the fact that the first four paragraphs (which clearly are meant to read together) says that (again, with the exception of where all lots are on an existing town road), that all applications ***must be*** accompanied by a surety bond, or cash deposit. But then in the next paragraph appears the language you quoted, which seems to contemplate that there may be times when no bond has been posted.

In my opinion the only possible consistent way to interpret this is that if the subdivider posts a surety bond, building permits will not be withheld, but if the subdivider posts cash, then building permits will be withheld. In my view the 5th paragraph which you quoted should ***not*** be construed as saying that the subdivider has the option of providing ***no*** security at all. In ***every*** case, it must be either a surety bond, or a deposit of cash into escrow, and if it is cash, then building permits must be withheld until the road is done.

But now the next question is whether this interpretation is consistent with ***state*** law. In my opinion it is not, because RSA 676:12, paragraph V says that building permits cannot be denied if the construction of streets and utilities has been secured by a bond ***or other security approved by the planning board***. Therefore in my opinion if a subdivider has posted ***either*** a surety bond or cash, then building permits cannot be withheld.

SUMMARY OF OPINIONS:

1. ***Every*** subdivider (except where all the lots are on existing town roads) must post ***some*** kind of security (under your regulations either a surety bond or cash - but I would recommend waiving this regulation so as to also allow the option of an irrevocable letter of credit if it is in a form approved by the Town's legal counsel.

2. If the security has been properly posted, then in my opinion there is no legal authority to withhold building permits until the street/utility work is done. Instead many towns withhold ***occupancy*** permits (which is consistent with what RSA 676:12, V allows a town to do - however I don't know whether the Town of Carroll even has occupancy permits.

3. I would recommend at some point in the near future for the Planning Board to clarify this section by amendment, so that (a) the typographical error in the first paragraph pointed out by Mr. Mills is corrected; (b) the language about withholding building permits is taken out (since - again with the exception of all lots being on existing town roads - there should not be any situation where the Board has not required some type of security); and (c) add the option of an irrevocable letter of credit. (I would be glad to help draft this if you get the point of amending the regulations.)

Sincerely,
Bernie Waugh

11 0833

From: Bernie Waugh
Sent: Tuesday, October 09, 2012 4:39 PM
To: Linda
Cc: Evan Karpf
Subject: RE: Carroll bond question

Hi Linda:

I just returned from a 10-day vacation (New Brunswick - very pretty!).

I can't make heads or tails of these documents. The only thing you sent me is a "rider" to a pre-existing bond (along with the power of attorney), but you didn't send me a copy of the pre-existing bond itself, hence I can't judge whether ***in combination*** they might be considered adequate.

The documents you sent me are, ***by themselves***, definitely ***NOT*** adequate. Again, there is no bond at all, merely a rider to another bond which presumably exists somewhere.

The main things I look for in a bond are (a) standard bond language (not present here, because there's no "bond"); (b) As you mentioned, a clear ID/description of the subdivider, and the subdivision, and the work to be performed (usually by a specific cross-reference to a specifically-dated written Board decision); and (c) the provisions of the bond regarding cancellation - I usually recommend at least a required 90-day pre-cancellation notice by certified mail to both Selectmen and Planning Board, plus language allowing the town to call the bond if the town receives such a cancellation notice and the subdivider has not provided substitute security.

Please let me know if I haven't fully responded as you wished.

Sincerely,
Bernie Waugh