Town of Carroll

From:	Bernie Waugh <BWaugh@townandcitylaw.com>
Sent:	Friday, May 10, 2013 1:11 PM
To:	Bonnie
Cc:	Town of Carroll; 'Paul Bussiere; Bill D.; Evan Karpf (drevannh@gmail.com)
Subject:	RE: I have a couple of questions please
Attachments:	Carroll 11-27-12 Dowling Re Bd Chair Files 0101, 0102.docx; Carroll 1-2-13 Karpf Re Hunt File 2710.doc; Carroll 9-7-12 PB Re Bond File 2710.doc

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CONFIDENTIAL AND PRIVILEGED LEGAL COMMUNICATION

Hi Bonnie and Selectmen:

I'll do my best to give full and complete answers to your questions. But please understand even today I do not have complete factual information. So the following comments are "in the abstract" and should not be construed as comments on what happened, because I don't truly know exactly what happened. I also know very well that the Hunt Properties project has been extremely controversial in the Town, and as I told both Evan and Mark Catalano back in February, nothing I say could possibly totally satisfy either side.

1. First, let me address what is the correct answer to your question. The correct answer (again, in the abstract) is – as your message says – that one member of a municipal board (including planning board) has no final authority at all, other than what might be delegated by action of the board as a whole (majority of a quorum). So, for example, it is hypothetically possible for a board to delegate enforcement authority to a Chair as part of the bylaws adopted by the board as a whole (as I stated in the attached E-mail to the Selectmen from back on November 27, 2012). But State law, in and of itself, does not give a chair any substantive authority like that, and where there is no such bylaw or regulation, any formal enforcement would have to be authorized by vote of the board as a whole.

On the other hand, individual members of a planning board are not absolutely prohibited from communicating individually with applicants. *See, e.g. Dover v. Kimball*, 136 N.H. 441 (1992), where a single member of a Board had approached an applicant to tell him his plan was unlikely to be approved because certain aspects of it did not meet the regulations. The Court held that such statements were not improper. So I know it's a fine line, but there's a big legal difference between the following:

(A) If an individual planning board member – without any action by the board as a whole – were to write a letter to an applicant saying "You are hereby order to cease from doing X," then that would be beyond that member's authority (unless previously authorized by the Board).

(B) But if that same member were to write an E-mail to an applicant which said: "It looks to me as if you're doing X, which is in violation of our regulations, and if you don't stop, the Board may have to issue a

cease and desist order," that kind of individual statement – according to the *Dover v. Kimball* case – would be perfectly proper.

2. I have just reviewed in detail all E-mails that I sent to any & all Town of Carroll officials regarding the Hunt Properties (Scalley) matter – searching back to April of 2012. The first E-mail I have about the subject is dated September 7, 2012, and addressed generic questions about what type of bonding was required. The fact that I discussed the issue of a chair's authority in my attached E-mail on November 27 (addressed to the Selectmen) would seem to indicate that any such conversation I had with Evan Karpf must have been prior to that – so between Sept 7 and Nov 27. I don't find any E-mails which discussed either a 3rd-party review or a cease and desist order.

3. I do have a copy of a letter from Linda Dowling to Mr. Scalley dated November 13, 2012 which says "This letter is to inform you that, upon the advice of Town Counsel, you are in violation of the…Subdivision Regulations and to stop any further work immediately and until such time as an acceptable bond is received…." That letter doesn't constitute an official "cease and desist order" as set forth in RSA 676:17-a, because it doesn't comply with all the requirements of that statute. Nevertheless I do recall wondering, at the time I first read the copy of the letter, about the wording – and about whether the Board had taken a vote prior to the letter being written (since the words "on advice of counsel" seemed to suggest otherwise. If there had been no such vote, and if I had been asked about the wording before the letter was sent (which I wasn't), I think I would have tried to make suggestions to make sure it sounded more clearly like example B above, rather than example A (in other words, something like "if you don't cease work, the Town may have to take enforcement action…").

4. Other than that, I have a vague recollection of a telephone conversation with Evan Karpf about this situation prior to having received a copy of Ms. Dowling's letter. I have several similar conversations with public officials every day, so there is no way I can reconstruct the conversation, or even be sure that I am remembering it correctly.

I admit that when I am speaking on the phone with public officials, I often use the word "you" in an informal way, as meaning "you the Town" or "you the Board." I tend to assume (usually correctly) that board members (and chairs) already know that they individually have no substantive authority, and so I do not cover that issue in every legal conversation I have with individual public officials (just as I often speak with public officials about holding meetings, without mentioning the required Right-to-Know Law notice, since I assume they already are aware of that). The attached E-mail dated Jan. 2 is an example of my informal use of the word "you," where I said: "you have the ability to clarify or modify the prior subdivision decision..." I very clearly meant "you the Board" not "you as an individual," and the context of the message makes that clear. But the point is, I can't completely discount the possibility that I used the word "you" to mean the Board, but Dr. Karpf understood it as meaning him personally. I just don't know, and certainly don't remember the exact wording of what was said.

That is the best I can do to answer your questions. Any of you can feel free to get back to me on this issue.

Sincerely,
Bernie Waugh

From: Bonnie [mailto:pbandjmore@roadrunner.com]
Sent: Thursday, May 09, 2013 7:58 PM
To: Bernie Waugh
Cc: Town of Carroll; 'Paul Bussiere; Bill D.
Subject: I have a couple of questions please

Bernie, I am now back on the Planning Board as the Select. Rep. and we had a rather "Lively" meeting last week and during that we were told something that you supposedly said in an e-mail.

What the discussion was about was a 3rd party invoice that was generated by Evan Karpf calling the company to inspect Hunt Properties (Dave Scalley) project. According to Evan you told him in an e-mail that he could as one member of the Planning Board (without the knowledge or approval of the other members) send out a "Cease and Desist" order to Hunt Properties and that he as one member could contact the company and order a 3rd party review on the road that was just told to cease and desist.

I have been told repeatedly and read many times that one person on any board in nothing and it takes at least a quorum to make a decision and do anything like that. I am asking that there is some hidden rule that I have never heard of that under "certain circumstances" one person is good enough, or if you did or didn't actually tell Evan this.

I need you to please clear this us, and as I always ask please give my the direct answer. What did you tell him and why. Please and thank you. Thank you, Bonnie