



Town of Merrimack, New Hampshire

Community Development Department

6 Baboosic Lake Road

Town Hall - Lower level - East Wing

Planning - Zoning - Economic Development - Conservation

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MEMORANDUM

Date: June 30, 2015
To: Robert Best, Chairman, & Members, Planning Board
From: Timothy J. Thompson, AICP, Community Development Director
Subject: **Valleyview Drive** – Letter from Attorney Panciocco requesting reconsideration of denial of subdivision reinstatement/extension on June 16, 2015.

Please review this under the “Planning & Zoning Administrator’s Report” portion of the agenda.

Following the Planning Board meeting on June 16, 2015, the applicant’s attorney submitted the attached letter for the Board’s consideration.

Staff and Attorney Panciocco have discussed the letter and the action of the Board. In addition, Staff has consulted with the Town’s legal counsel as well about the project and the actions the Board has taken to date. Without abridging attorney client privilege in this memo, suffice it to say that Town’s legal counsel has advised staff that the Board can consider the following options:

1. *Allow for reconsideration of the Board’s June 16 denial of the request to reinstate the conditional final approval for the project.* This could be done at the July 21, 2015 Planning Board meeting, with appropriate notice to abutters of the hearing to be sent out by July 10; or
2. *The Applicant has submitted a new application for the subdivision for the July 21 Planning Board meeting. The Board could consider the new application instead of reconsidering the decision from June 16 to deny the reinstatement of the previous approval.* Staff notes that the applicant has not paid any application or abutter notification fees with this new application. The Board would need to consider potential waivers to these fees as part of the consideration of the new application if it opts to go with this option.

Town legal counsel has stated that the Board is under no obligation to allow for the reconsideration of the decision, but is certainly free to choose to do so. In either scenario, legal counsel advises that proper notice to abutters needs to be provided and that any conditions of approval relative to the improvements that were part of the 2012 administrative approval (relating to the emergency access way and roadway improvements) should not be made part of any future reinstatement or approval for the 2 lot subdivision. The Board has called the surety for those improvements, and they cannot be used as conditions of approval for the subdivision, as they are now to be completed by the Town.

Given the appeal timeframe the applicant is considering, Staff recommends that the Board choose between the two options listed above at the meeting on July 7 to provide the appropriate direction to the applicant as he chooses how to proceed from this point forward.

Cc: File
Correspondence

Ec: Valleyview Revocable Trust, c/o Carol Maggio, Trustee

Michael Maggio, FHB Consulting
Pat Panciocco, Baroff Professional Association
Keriann Roman, Town Legal Counsel

Baroff Professional Association

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June 18, 2015

VIA FIRST CLASS MAIL

Town of Merrimack Planning Board
C/O Timothy Thompson
Community Development Director
6 Baboosic Lake Road
Merrimack, New Hampshire 03054

Re: ValleyView Subdivision

Dear Chairman Best & Members of the Board:

On June 16th, 2015 the Merrimack Planning Board ("Board") voted to call the performance surety for the improvements proposed for Valley View Drive that were administratively approved on August 24, 2014. The Board then denied my client's request to reinstate the Board's earlier approval of its 2-lot subdivision of Map 5C, Lot 142 ("2-Lot Subdivision"). This letter confirms our understanding of the consequences associated with these decisions and explains why the Board's denial of my client's 2-Lot Subdivision cannot stand.

Performance Bond

After hearing its concerns and gaining a better understanding of its frustration, I tend to agree that the Board's decision to call the surety may have been sound because the project's duration and its unique circumstances have created a climate of mistrust. Since it is clear this relationship is beyond repair, it is probably best that the Town complete the remaining improvements. However, although my client is now personally relieved of the requirement of a maintenance bond and other final details, a full accounting of amounts withdrawn from the surety will be required once that work is complete.

2-Lot Subdivision

While I appreciate why the Board felt compelled to call the surety, I disagree with its decision to not reinstate its earlier approval of my client's 2-Lot Subdivision. As I explained during the hearing, RSA 674:36 (III) clearly limits the Board's authority when it comes to a performance bond and requires the plan be signed once security is in place as was the case here; or defer signing the plan until security is provided when a subdivider wishes to complete certain of the improvements first to reduce the secured amount.

A cash bond was delivered to the Town to secure the improvements administratively approved for Valley View Drive. The purpose of the cash bond was to insure neither the Town nor the new lot owners were charged with completing the improvements and to allow 4 building permits to be issued.

The Board approved the 2-Lot Subdivision in July 25, 2013 in a wholly separate application with no conditions associated with the administratively approved improvements. As was the case then and remains the case today, the Board had no authority to impose a deadline on the completion of the improvements as part of this approval because they had already been secured with a cash bond.

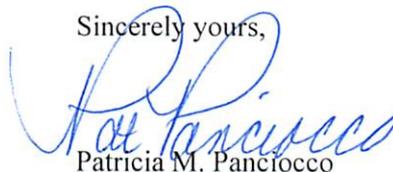
Nonetheless, the June 17, 2015 notice of decision states the 2-Lot Subdivision was denied "*due to the inability of the applicant to complete the required improvements (despite multiple extensions granted by the Board) and the calling of the performance security.*" Again, the improvements to Valley View Drive were not a condition precedent to the Board's 2-Lot Subdivision being approved, the Town still has cash securing these improvements and although not relevant, I have found no document imposing a deadline to complete those improvements in an official Board decision.

I do plan to meet with my client next week to discuss a possible appeal under RSA 677:15 because it was clear during the recent public hearing that residents within that neighborhood feel my client's "*bad behavior should not be rewarded*". While I can understand why they may feel that way, a reason to deny must be in the Town's regulations and I know of nothing under New Hampshire law which authorizes the use of this reason to deny my client's 2-Lot Subdivision. Therefore, in the interest of avoiding unnecessary expense for both the Town and my client, I am writing to suggest we explore a rehearing on July 7, 2015.

Although, not expressly authorized by statute, the N.H. Supreme Court held in 74 Cox Street, LLC v. City of Nashua, 156 N.H. 228, (2007) that "*municipal boards have the power to reverse themselves as justice may require*", provided it is done before the decision becomes final. The N.H. District Court has since agreed with this position. Signs for Jesus, et al v. Town of Chichester, Civ. No. No. 11-CV-101-LM (D.N.H. 2011). Since the Board's decision on the 2-Lot Subdivision will not become final until July 16th, 2015, this letter requests the Board rehear this matter during its July 7, 2015 public hearing, and because Valley View Drive will now undoubtedly be accepted by the Town.

Please discuss the content of this letter with Town Counsel and give me a call at your earliest convenience.

Sincerely yours,



Patricia M. Panciocco

Cc: Client; Steve Keach