

**TOWN OF ALTON PLANNING BOARD
MINUTES 2019
DECEMBER 12, 2019 – SPECIAL MEETING**

APPROVED

Members Present:

Roger Sample, Chairman
Drew Carter, Member
Tom Hoopes, Member
Bob Regan, Member

Others Present:

Jessica A. Call, Town Planner
James Sullivan, Esq., Attorney for the Planning Board
Jason Reimers, Esq., Attorney for the Conservation Commission
Andrew Sullivan, Esq., Attorney for Keith Babb/Green Oak Development, LLC
Keith Babb, Owner of Green Oak Development, LLC
Thomas W. Varney, P.E., Engineer for the applicant

CALL TO ORDER

Mr. Sample called the meeting to order at 6:00 P.M.

APPOINTMENT OF ALTERNATES

APPROVAL OF AGENDA

Mr. Carter MOVED to approve the agenda of the December 12, 2019, Special Meeting as presented.

Mr. Regan seconded the motion, and it PASSED unanimously.

1. Continued from October 15, 2019

Case # P17-24 Andrew H. Sullivan, Esq., Agent for Keith Babb of Green Oak Realty Development, LLC, Owner	398 Suncook Valley Road Map 5 Lot 72	Request for determination of abutter status of the Alton Conservation Commission
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Attorney Reimers, agent for the Alton Conservation Commission, and Attorney Sullivan, agent for Keith Babb/Green Oak Development, LLC, came forward to present the case. Attorney Sessler was seated at the table with the Board.

Attorney Sullivan noted that the agenda appeared to be quite clear what was supposed to be discussed at this meeting, which was whether the Alton Conservation Commission was an approving or disapproving abutter. If the Conservation Commission was deemed not an abutter, then he would ask for a waiver and an exception, and the second step did not have to take place. According to the Conditions Precedent, the only outstanding condition was the submission of letters from approving or disapproving abutters. Attorney Sullivan asked for a point of procedure. He thought that the Board would address the abutter issue first, and if the Board voted in Mr. Babb's favor, then the waiver and exception process did not

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have to take place. If the Board decided not in Mr. Babb's favor, then the Board had to determine whether they had the ability to grant a waiver or exception.

Attorney Sullivan thought that the determination was based on statutory and regulatory interpretations according to RSA 155-E and the Town of Alton Excavation Regulations. At the last meeting, Attorney Sullivan noted that the Regulations referred to 672:3 for the definition of an abutter, but that RSA expressly talked about land owners. Attorney Reimers pointed out that at the last hearing, all parties presented their arguments about abutters or not, and he asked the Board if they were going through that again. Attorney Sullivan noted that the first item on the agenda was that the Board wanted to take three (3) issues into consideration, whether the Alton Conservation Commission should be given the status as an abutter. Attorney Sessler noted that at the last hearing on September 24, 2019, all parties made their arguments, the public hearing was closed, and it was determined that the Board was going to make a decision at the October 15, 2019, meeting. Prior to that date on October 14, 2019, Attorney Sullivan filed his Petition to present new evidence on issues that were discussed on September 24, 2019. Attorney Sessler noted that the purpose of tonight was to hear new evidence from Attorney Sullivan, and then the Board would make their decision. He noted this was an opportunity to present new evidence, not a re-argument.

Attorney Sullivan noted that he submitted a plan, not for purposes of changing things, but in terms of substantiating any decision to waive or accept based on the Board's Regulations and RSA 155-E, which was why he invited Thomas W. Varney, P.E., who visited the site this morning. He noted that Mr. Sample viewed the pit earlier this week. Attorney Sullivan wanted to introduce that stabilization was done on the slope and the precipice of the slope was back an excess of 10'. He thought this was important if the Board made a decision that the Conservation Commission was an approving abutter, and then made a decision regarding a waiver. This new information would allow the Board to look into the criteria of what was happening at the site in terms of any waiver exception situation. Attorney Reimers noted that this evidence did not have anything to do with whether the Conservation Commission as an abutter. Attorney Sullivan stated, correct, but it dealt with the slope as it stood today. Attorney Reimers thought that what Attorney Sullivan was trying to say was that the stabilization of the slope was relevant to whether a waiver should be granted. Attorney Sullivan stated, correct. Attorney Reimers thought that before the Board could hear anything, they should decide whether a waiver would even be grantable, and as he argued at the September 24, 2019, meeting, the Board could not, in fact, grant that waiver under the language of the Regulations. He did not think any of this new information was relevant.

Tom Hoopes thought that the Board was meeting on the concept of whether the Conservation Commission was an abutter. Attorney Sessler stated that there were three (3) steps. He noted that the first step was whether or not the Conservation Commission was an approving abutter within the terms of the Regulations and RSA 155-E. If the Board determined that the Conservation Commission was an abutter, then the Board would move onto the next step, which was whether or not the Board could grant a waiver to the Conservation Commission being an abutter or not, and if the Board determined they could grant waivers, then if the Board determined they could grant waivers, then the third step would be that new evidence could be presented. If in the first step the Board determined that the Conservation Commission was not an approving abutter, then the second and third steps did not have to be discussed. Attorney Sessler thought it did not make sense to hear the new evidence now because the Board needed to address the first step and then vote on it.

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The first vote was whether or not the Conservation Commission would be given the status as an abutter within the meaning of the Statute and the Regulations. Attorney Sessler recommended that the Board give their own reasons why they felt the Conservation Commission was an abutter or not for the record. A Board member should make a motion, it should be seconded, and then have discussion and give reasons why they would vote one way or another. Attorney Sullivan noted that he previously requested that each Board member give a reason for their vote.

**Mr. Hoopes MOVED that the Alton Conservation Commission was a full abutter.
Mr. Carter seconded the motion.**

DISCUSSION AND VOTE:

Mr. Sample called for a vote from each individual member.

Mr. Hoopes stated, “In reference to this case, the term ‘abutter’, in RSA 672:3, “For purposes of receiving testimony only...The term ‘abutter shall include any person who is able to demonstrate that his land will be directly affected by the proposal under consideration.” Our question is whether or not the Alton Conservation Commission (ACC) has the status of ‘abutter’ since only an ‘abutter’ can get permission for less than a 50ft setback from a property line for a gravel pit operation.

- 1. In 1990 the ACC was granted ‘caretaker’ status of the Barbarosa Conservation Easement held by the Town, under the care and custody of the ACC. Since a Conservation Easement is permanent and passes with title ownership, the ACC responsibility is permanent. The responsibility of the ACC involves annual inspections and filing monitoring reports to the State of NH; The ACC must perform these functions or lose control of the land to the Society for the Protection of NH Forests (SPNHF).**
- 2. The ACC must act as an ‘owner’ to protect not only the ‘Fee Owner’ but also the original intent of the Conservation Easement. As an abutter the ACC has ownership interests; the regulations of RSA 155-E are trying to protect the interests of abutters. The effects of the encroachment of the conservation easement land effect 1) the water table by draining a wetland, 2) debris from blasting is evidenced, and 3) trees on conservation easement land are falling into the pit area.**
- 3. The original grantors intentionally gave up certain rights when they created the conservation easement and it is the obligation of the ACC as the Grantees to protect those rights perpetually.**
- 4. In this case it is the setback distance to the conservation land that is in question and the ACC is being responsible by protecting their ownership interest by acting as an abutter to protect the Grantors intentions for the land.**
- 5. The applicant knew in advance of his ownership that there was a Conservation Easement on the abutting land that was held by the ACC.**
- 6. A deeded ‘conservation easement’ is very different from an electrical or power line easement or Right of Way easement. There are substantial legal requirements that are created in the formation of a conservation easement that permanently remain with the land and require action by the designated body.**
- 7. When the applicant submitted his application it happened to show that there is a 56 acre ‘Conservation Easement’ on his property; it had been created by the previous owner as**

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an offsite mitigation for the Hannaford development. He must have had some knowledge of what a Conservation easement was.”

Mr. Carter stated that he walked the pit on September 30, 2019, and he thought that it was one of the neatest and cleanest pits he had ever seen in his life. He also saw the restoration of the slope in process. He was in the construction business and he was not sure that he recognized that as an appropriate slope restoration process for long term life of the slope, but that was not for him to determine at this time. He also walked the conservation land on that same day and found chunks of granite that had been previously blasted as far as 50+ feet over the property line onto the conservation land. He also saw what was to be the former wetlands, which were pretty much dried up. He noted that the easement was granted for the Conservation Commission in 1990 and it placed a fiduciary responsibility on the Town of Alton to protect the land, which included its boundaries and setbacks. He stated that he had done some research and found that in 2015, the NH Supreme Court upheld a decision made in the case of Appeal of Robert C. Michele & a. (New Hampshire Wetlands Council), and it stated, (paraphrased), ‘that easement holders, despite their lack of possession, take by implication whatever rights are reasonably necessary to enable it to enjoy the easement beneficially’. Mr. Carter voted that the Conservation Commission did have the power to be an abutter.

Mr. Regan understood that when given notice of an activity on an adjacent property, the property owner had the right to take one of three (3) actions: 1) approve the activity; 2) disapprove of the activity; or 3) ignore the notice. He opined that the Conservation Commission did not have the right to these same three (3) choices, but rather they had the responsibility and the public trust to choose between the first two (2) actions. Therefore, Mr. Regan deemed the Conservation Commission to be an abutter.

Mr. Sample thought that although the Conservation Commission should have been notified, they were not an abutter. He thought that it was the author of the RSA that should have listed them abutters and holders of easements. He thought that his vote was correct.

Mr. Sample stated that the vote was 3:1. Attorney Sessler asked the Board if that was the consensus of the vote, all Board members agreed.

Attorney Sessler then guided the Board to come to a vote on the second issue, which was whether or not, by using the waiver provisions of the Statute and the Regulations, the Board should waive the requirement that the Conservation Commission be deemed an abutter. Attorney Sullivan stated that the other perspective was to have the Board waive the 50 foot requirement. He noted that whatever it took to waive RSA 155-E:4, which was the same as the Excavation Regulations #6 that noted that excavations could take place within 50 feet of a disapproving abutter’s boundary. He asked for those provisions to be waived to allow excavation to take place within 50 feet of a disapproving abutter. Attorney Reimers stated that he would go through his arguments that he presented on September 24, 2019, if the Board wanted him to that the Board could not even get to the question of whether they should grand the waiver, because the Board could not grant the waiver. Attorney Sessler stated that the Board already heard the argument, and at this time, it was up to the Board to determine whether they could waive the provisions of the Statue.

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**Mr. Carter MOVED that the Board do not waive the provisions.
Mr. Hoopes seconded the motion.**

Attorney Sullivan called for a point of order. He stated that the clarification was if the Board had the ability to waive, versus whether the Board chose to waive. He thought that the way Mr. Carter articulated the motion was that the Board did not want to waive, and was premature. Mr. Carter agreed with his statement.

**Mr. Carter MOVED that the Board did not have the right to waive or not waive the provisions.
Mr. Hoopes seconded the motion.**

DISCUSSION:

Mr. Sample noted that Mr. Carter motioned that the Board did not have the right to waive or not waive the provisions. Mr. Sample asked if it was up to the Board to decide whether they had that right. Attorney Sessler stated that was what the Board was being asked to do. Mr. Sample stated that it should not be the Board's decision. Attorney Sessler stated that he had known of some people that have had zoning violations, which had to do with having an industrial complex in a single-family zone, the regulations provide for it. The applicants had come in and asked to waive that provision, not a variance, so they could put the industrial complex in, or if someone asked for a waiver for their property, the zoning ordinance did not apply and the waiver could not be granted; it is contrary and violated the law, which was what Attorney Sullivan may be asking with this case, but the Board needed to take a vote. Mr. Sample stated that the Board could grant waivers. Attorney Sullivan stated that Mr. Carter's motion was that it was not appropriate to grant a waiver of that particular provision. Mr. Sample thought that should be addressed in item #3 and the Board had a right to grant waivers. Mr. Hoopes stated that the Board had the right to grant waivers, but the question was what type of waiver could be waived or not waived. Mr. Carter stated that to back up the reason for his motion was that the rights of an abutter are substantive and the Board should not be stomping on their rights, because the Board just voted that the Conservation Commission was an abutter. Mr. Hoopes stated, "The Planning Board can grant minor waivers in the application process, but they can't ignore all responsibilities to the citizens of the Town of Alton or the Zoning regulations. The Planning Board can't waive the provisions of the statutes that would allow an abutter to approve or disapprove an excavation closer than 50 feet of the property line because we would be denying the "abutter" their legal right to comment and make their property responsibilities known. They are representing the wishes of the original grantor". Mr. Hoopes did not think that was the kind of waiver that the Board could grant, and whether someone had three (3) parking spaces or two (2) parking spaces, he would have no problem with. Mr. Sample agreed that the Board should not tromp on the Conservation Commission, but he thought that the Board had a right to grant waivers.

Mr. Sample called for a vote of the Board. Mr. Hoopes wanted to get clarification on the wording of the motion. Mr. Carter restated the motion, "The Board did not have the right to grant a waiver for this particular provision. Mr. Hoopes stated, then a yes vote would

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represent his position; Mr. Carter stated, correct. Attorney Sullivan stated that what he asked was whether the Board had the ability to waive the prohibition against the 50 foot excavation under RSA 155-E:4 a., which stated that you could not excavate within 50 feet of a disapproving abutter's boundary. RSA 155-E:5 b. stated that the Regulator (the Town) upon application and following a hearing, may grant an exception in writing to the standards containing 155-E:4 a. Attorney Sullivan stated that the Board had the right to grant the exception. He wanted to make it clear what the Board was articulating as their motion. Mr. Hoopes did not see how the Board could grant that type of waiver when there was a disagreeing abutter. Mr. Sample pointed out that Attorney Sullivan stated that the Board did have the ability. Attorney Sullivan stated that he referred to two (2) regulatory items, which was RSA 155-E:5 b., which was the same as the Alton Excavation Regulations #2, which stated that the Board had the ability to grant an exception to 155-E:4 a. Mr. Sample thought that the Board should hear from the Conservation Commission. Mr. Sessler stated that the Board already heard the arguments. Attorney Sessler asked Mr. Carter if he wanted to change his motion that the Board was not going to or that the Board should not. Mr. Carter stated no, he wanted to leave it as is. He stated that this was relative because it would be contradicting an abutter's decision and their rights and he did not think that the Board had the power to do that. Mr. Regan thought in this instance, it was not an abutter's rights, it was the Conservation Commission's obligation to make a decision one way or another whether they were an approving or disapproving abutter.

Mr. Hoopes, Mr. Regan, and Mr. Carter all voted, Aye. Mr. Sample asked if all Board member were in favor, and he abstained.

The third item was not discussed.

Adjournment

At 6:26 P.M., Mr. Sample MOVED to adjourn.

Mr. Carter seconded the motion, and it PASSED unanimously.

The meeting adjourned at 6:26 P.M.

Respectfully submitted,

Jessica A. Call
Recording Secretary