

**LINCOLN ZONING BOARD OF ADJUSTMENT
REGULAR MEETING MINUTES
TUESDAY – APRIL 17, 2018 – 6:00PM
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

APPROVED

Present: Chair Jonathan Ham, Vice Chair Don Landry, Paul J. Beaudin II,
Members Excused: Raymond D'Amante, Jack Daly, Alternate Jim Martin, Alternate Myles Moran

Members Absent: None

Staff Present: Planner Carole Bont

Staff Excused: Recorder Ellyn Gibbs

Guests:

- **Dr. Brian Holub DVM**, Countryside Veterinary Hospital, 289 Littleton Road, Chelmsford, MA 01824, and "Real Estate Developer" d/b/a Brian E. Holub 2011 Trust, whose addresses are: 10 Eagle's Nest Road, Westford, MA 01886, and 22 Liberty Drive #5B, Boston, MA 02210 and owner of 23 Hemlock Drive, Lincoln, NH 03251 (Map 121 Lot 001) which is in South Peak Resort. Investor in New Jefferson Holdings, LLC that owns LO Parcel 3 (Map 408, Lot 001), Pond Woodland Loop (M115 Lot 010), Woodland Loop LO (Map 114, Lot 0800001-00-00000), and Parcel 2 Forest Ridge (Map 115, Lot 017).
- **Attorney Jill Zimmerman**, 10 Eagle's Nest Road, Westford, MA 01886 and 22 Liberty Drive #5B, Boston, MA 02210 and significant other of Dr. Brian Holub, DVM.

- I. CALL TO ORDER** by the Chairman of Zoning Board of Adjustment; announcement of excused absences, if any, and seating of alternates(s), if necessary.

Chair Ham brought the meeting to order at 6:00 PM. The following members were excused: Ray D'Amante, Jack Daly, Alternate James Martin and Alternate Myles Moran.

- II. CONSIDERATION** of regular meeting minutes from:

- March 7, 2018
- April 4, 2018

Motion to approve minutes as written.

Motion: Mr. Beaudin

Second: Mr. Landry

All in favor: 3-0

- III. CONTINUING AND OTHER BUSINESS** (Staff and Zoning Board Member/Alternates).

IV. NEW BUSINESS

- A. 6:00 PM. Lincoln Zoning Board of Adjustment (ZBA) Administrative Appeal per RSA 676:5,ii(b)**

- 1. Case #:** **2018 ZBA AA 2018-01**
- 2. Location:** 23 Hemlock Drive (Tax Map 121, Lot 001)
General Use (GU) District
- 3. Applicant:** Brian E. Holub
22 Liberty Drive #5B
Boston, MA 02210

4. Applicant's Agent: Daniel J. Pasquarello, Esq.
Pasquarello/Fink, LLC
185 Devonshire Street, 3rd Floor
Boston, MA 02110

5. Property Owner: Brian E. Holub. Trustee
Brian E. Holub 2011 Trust
22 Liberty Drive #5B
Boston, MA 02210

Petitioner is appealing a decision of the Planner made on January 9, 2018, to the ZBA. Petitioner requests ZBA grant an administrative appeal to be presented to the ZBA on **Wednesday, March 7, 2018 at 6:00 PM** in the Conference Room of the Lincoln Town Hall on 148 Main Street, Lincoln, NH 03251.

Petitioner is Brian Holub. Property owner is Brian E. Holub. Trustee, Brian E. Holub 2011 Trust. Holub will be represented by Daniel J. Pasquarello, Esq.

The petition was filed in connection with an application for a Land Use Authorization Permit (LUP) filed by Brian Holub to remodel the interior space of his basement in order to add two bedrooms and two bathrooms in a single-family home constructed on property located on 23 Hemlock Drive, Lincoln, NH (Tax Map 121 Lot 001) located in the General Use (GU) Zoning District.

The Administrator denied the Petitioner's second Application for a Land Use Authorization Permit (LUP) because (1) the application was incomplete; (2) Petitioner did not submit any written authorization from his Homeowner's Association for the proposed alterations; and (3) Petitioner did not submit plans of sufficient detail to determine compliance with the Town of Lincoln's Land Use Plan Ordinance. No plans for the areas as proposed to be finished were submitted with the application.

Petitioner argues that the Town has "no basis to require authorization of a homeowners'/condominium association approval as a condition for approval" for a Land Use Authorization Permit. Petitioner argues that the modeling of interior space is an "As-Of-Right" project; the Town's authority is limited to collecting water and sewer tap fees and bedroom impact fees.

ACTION: Upon a finding by the ZBA that the application meets the submission requirements, the ZBA will vote to accept the application for a variance as administratively complete.

ACTION: If the ZBA finds the application to be complete, then the ZBA may conduct a public hearing on the merits of the proposal immediately or schedule a public hearing at some future date established during this meeting.

ACTION: The ZBA will vote to approve, approve with conditions or disapprove the application. Should a decision not be reached at the public hearing, this application will stay on the ZBA agenda until such time as it is either approved or disapproved.

Presentation**No Quorum**

Planner Bont said that at time of this ZBA public hearing, there is no quorum to hear Petitioner Holub's presentation tonight. Planner Bont recommended the Board move to recess and reconvene at a later date. Planner Bont informed the Board that Raymond D'Amante had recused himself. Jack Daly had recused himself. Don Landry had recused himself although he is present at this meeting for the purposes of continuing the meeting. Chair Jon Ham cannot stay for the entire hearing because he has a contract negotiation session as part of the School Board of which he is also a member so he has to leave by 6:30 PM and will not be available to participate in the public hearing. Alternate Myles Moran is out of the country. Alternate James Martin just returned from vacation and is unavailable tonight.

Right to Five Member Board

Planner Bont said Petitioner Holub has the right to have a five-member board if he wishes. If Petitioner Holub chooses to request a five-member Board, the current Board of Selectmen will have to choose two (2) more people to appoint temporarily to the ZBA, such as past ZBA members or other former Planning Board members who have experience with the Land Use Plan Ordinance.

Concern About "Bias"

Petitioner Holub said he is concerned about bias in any appointed members. He said, "I have spent quite a few days at the town hall. Over public record, I am being called dishonest. I am the most honest person in the world. I am an Eagle Scout. All four of my boys are Eagle Scouts. They volunteer at NE Disabled Sports. I am philanthropic, but in the public files of your Town, there are statements of people within this argument calling me a liar, calling me dishonest, and I want the Town to understand what I don't think they understand. They think I lied about getting a building permit so many years ago, which I never did. They think I'm trying to sneak something under their nose, which I never did."

Beaudin said, "I think we are getting out of our parameters."

Continue the Hearing to a Date Certain and Petitioner's Request that Don Landry Re-Consider Whether He Should Recuse Himself

Beaudin said, "If you want to continue the hearing, continue the hearing."

Petitioner Holub insisted that the ZBA let him pitch his case to the three (3) present members and then have another full hearing on another day.

Planner Bont and Beaudin told Petitioner Holub that he cannot really do that as every member of the ZBA who is going to hear his case has the right to hear everything Petitioner Holub has to say and should be present for the entire presentation and public hearing. Beaudin said that from Petitioner Holub's perspective that is a good thing. Petitioner Holub should want everyone to hear everything he has to say.

Attorney Zimmerman said she and Petitioner Holub drove up to Lincoln New Hampshire in blizzard conditions for this meeting and she cancelled a business trip to New York for work to be here. She took a hit for work to be here, because this hearing was that important to her and Petitioner Holub. Attorney Zimmerman said she and Petitioner Holub knew that D'Amante and

Daly were recused. Attorney Zimmerman said, in terms of disrespecting others' time, they really wanted to approach this honestly and give the ZBA full information, and she wanted the ZBA to "function transparently". She said the Town has a lot of misinformation. Petitioner Holub and she have a lot of materials to present to the ZBA, so the Town can make a fair decision. Going forward, if the Town is going to cancel a public hearing, Attorney Zimmerman and Petitioner Holub want the Town to let them know ahead of time so they can make arrangements. They are really trying to do everything that would make the Town happy.

Beaudin said that with the information the Town knew, and with the information Petitioner Holub and Zimmerman knew, maybe they should have said, "Hey look, it sounds like we're not going to have a quorum, should we postpone?" Petitioner Holub and Zimmerman disagreed; Petitioner Holub said he did not know that information.

Beaudin said the Town did not know for certain that the other two (2) alternates were not going to show up. He knew that Don Landry had a possible conflict and that the ZBA members may have to vote on whether or not to recommend that Landry recuse himself.

Petitioner Holub requested the Board, as currently comprised, vote on whether or not Don Landry has a conflict and make the decision to either go home or come back.

Zimmerman said she and Petitioner Holub will be traveling a lot in the next six (6) weeks and they are not assenting to a date uncertain.

Beaudin and Bont affirmed that they would be recessing and reconvening to a date certain.

Petitioner Holub and Zimmerman briefly left room to confer and then returned.

When Petitioner Holub and Zimmerman returned, there was some discussion between Petitioner Holub and Don Landry about whether Don Landry should recuse himself. Petitioner Holub argued that although Don Landry delivers wood to his place and provides catering services to the events at Holub's house that Don Landry does not have a conflict of interest because they barely know one another. After further discussions, Don Landry said he did not think he would have a problem with his own conflict of interest as Landry said he thought he could be fair.

However, based on Chair Ham's time conflict, needing to be at the negotiating table in twenty (20) minutes, the Board, Petitioner Holub and Zimmerman decided to reconvene at a future date.

Petitioner Asserts There is No Homeowners Association

Petitioner Holub said he is trying to talk to the representative for the Declarant of South Peak Resort, Ed Wendler, Jr.

Ed Wendler, Jr., is formerly Development Manager and currently Manager of Acquisitions and Development, works for Cypress Real Estate Advisors the company that owns CRVI Loon Mountain TRS, Inc., 301 Congress, Suite 1100, Austin, TX 78701. CRVI Loon Mountain TRS, Inc. is the current successor-developer of South Peak Resort and owner of yet-undeveloped properties within South Peak Resort. According to the Cypress website, Ed Wendler is a Manager of Acquisitions and Development at Cypress Real Estate Advisors, where he is responsible for development and construction activities on "numerous assets". Mr. Wendler currently manages a portfolio of residential lot developments in Texas and Colorado, directing the design and construction of subdivision infrastructure and coordinating the builder programs. Mr. Wendler also

manages subdivision development activities at Denargo Market in Denver Colorado, including all aspects related to design and construction of subdivision infrastructure.

<https://www.zoominfo.com/p/Ed-Wendler/1807977724>

<https://www.crefirms.com/firms/cypress-real-estate-advisors>

Attorney Zimmerman said that legally, the Board should be aware there is no HOA (Home Owners' Association) for South Peak Resort.

Beaudin said that any documents or materials on that issue that Attorney Zimmerman and Petitioner Holub would like the members of the ZBA to examine before the hearing should be given to Planner Bont to forward to the ZBA. Petitioner Holub said he has given materials to Bont.

Zimmerman said just to be clear, she is Petitioner Holub's significant other and she is functioning as such, not as Petitioner Holub's lawyer.

Petitioner Holub asked Planner Bont whether she shared his concerns about David Yager with the ZBA. [Town staff has been informed that David Yager is/was the President of the South Peak Resort Community Association, Inc. that the Town understands to be the Homeowners Association for South Peak Resort. Petitioner Holub disputes this.]

Planner Bont replied that Petitioner Holub is alleging there is no legal homeowners' association (HOA) for South Peak Resort as there have not been enough sales of lots to trigger the creation of the HOA. Planner Bont told Petitioner Holub that he needs to give her some kind of proof or documentation of proof. The ZBA cannot just take his word for it. Petitioner Holub asked Planner Bont whether she had the "CCR".

The acronym "CCR" stands for a set of rules establishing the individual and collective rights and obligations of the property owners within a particular community or subdivision.

<http://www.businessdictionary.com/definition/covenants-conditions-and-restrictions-CCR.html>

Planner Bont replied that it was not the Town staff's responsibility to read and interpret the 90-page legal documents entitled "Declarations, Covenants, Conditions and Restrictions" as well as the many amendments for each and every homeowners association in Town and make a legal assessment of those documents.

Petitioner Holub said he would like to explain to the ZBA that there is no HOA at South Peak Resort. The South Peak Resort is still under the "declarant control period".

What is a "Declarant Control Period"? A "Declarant Control Period" means any period of the declarant control of the association, established in the declaration. For purposes of the declaration and other governing documents, "Declarant Control Period" refers to the period during which the declarant shall have the right to control the association and appoint all of the Board of Directors. In the declaration for the association, the "Declarant Control Period" will be set to expire on the first to occur of whatever the declarant has determined will be the triggering event, for example: (1) a specific date; or (2) a specific time period after the date on which the Declarant has conveyed a certain percentage of the units to owners other than the declarant; or (3) a certain period after the specified period following the date on which the Declarant terminates the Declarant Control Period by a recorded document or amendment to the declaration.

“THE ANATOMY OF A COMMUNITY ASSOCIATION TURNOVER MEETING: BEST PRACTICES IN PLANNING AND EXECUTING A SUCCESSFUL TRANSITION OF CONTROL” By Margaret A. Rolando, Esq., Shutts & Bowen, Miami, FL

Petitioner Holub said “There’s only a declarant – which is Cypress.” According to Petitioner Holub, until Cypress sells enough of the units, and goes away as the declarant, there is no official Homeowners Association (HOA). Consequently, everything has to be authorized through the declarant. Therefore, “they” are in legal talks with the Declarant. Petitioner Holub said “We have an attorney, who is talking with their attorney; their attorney said something to you (the Board), we’re butting heads.” Petitioner Holub said that although David Yager has been held out as the President of the HOA, there is no president of the HOA.

Petitioner Holub said that David Yager and he are business partners up at Forest Ridge Resort. They are “adversarial business partners” – along with Ray D’Amante [in New Jefferson Holdings, LLC]. [New Jefferson Holdings, LLC owns most of the undeveloped property within Forest Ridge Resort.] Petitioner Holub said there are five (5) of us investors in Forest Ridge Resort total.

According to Petitioner Holub the investors in New Jefferson Holdings, LLC are:

1. Brian Holub;
2. Ray D’Amante;
3. John Imbrescia – “his very best friend”;
4. Michael Shepard; and
5. David Yager.

According to Petitioner Holub four (4) of the investors vote against David Yager every time so David Yager does not like them. Consequently, David Yager has been very biased toward him and his home at South Peak, and he continues to be. David Yager is only the homeowners’ representative of the Architectural Review Board (ARB). Petitioner Holub said he has “document after document that shows no one else has had problems, but I have a million problems.” “Right now, the Town of Lincoln is in my way. I just want my building permit. I’m not going to build, but I want my building permit.”

Petitioner Holub said “There is no HOA, and that has been recognized by the declarant’s attorney, and my attorney, who has talked to your town counsel. “There is a complete circle of aptitude there.” “I feel as if there is still a lot of confusion about who the parties are.”

Right to Five Member Board

Beaudin asked whether Petitioner Holub wanted a full board to hear his case.

Petitioner Holub the applicant replied that yes, he wants a full board of five (5) board members present. However, if only four (4) are present that will do. As long as the fourth member of the ZBA have experience.

Petitioner Wants Jack Daly to Reconsider His Recusal

Petitioner Holub also requested that the Board ask Jack Daly to participate again because although they both volunteer at New England Sports together they are not that close. [Jack Daly has recused himself.]

Continue the Hearing to a Date Certain

Petitioner Holub and the members of the ZBA discussed possible dates to reconvene.

Petitioner Holub continued that his only dilemma is because his company has ten thousand (10,000) people and he is number two (#2). He is not number one (#1) because he has a CEO; if he tells the CEO he has to change his plans he will be told “no”. Mr. Holub continued that he has two hundred sixty (260) locations in twenty-seven (27) states so he travels a lot.

Further discussion about setting a date to continue the hearing.

Arguments – Just Give Me A Permit

Petitioner Holub said:

“We are really talking about a procedural issue:

- one that says you don’t get in the way of private covenants
- one that says that I need to get a letter from the HOA that says I’m not violating a private covenant.

“We suggest that you drop one of those two lines. We are suggesting you drop the second line.”

Beaudin said that when the Town Attorney arrives to advise the ZBA, the Town Attorney may have a different opinion than what Petitioner Holub’s attorney is advising.

Petitioner Holub said that “The Board’s attorney has already advised you to give me the permit, because I found that in the public record. In the public record, you can see the email from Peter Malia, telling the town to ‘just give Brian his permit’. I did not get my permit. This issue has become much bigger than it needs to be.”

Request that the Town Preserve All South Peak Records and Holub Records

Attorney Zimmerman asked the Town to preserve all of Holub’s records. Attorney Zimmerman said “There is an active dispute going on with David Yager which we do not want [the Town] to be involved with. Once the corporation is speaking, we will get this resolved. However, the Town is under an obligation to preserve records and not destroy anything.”

Petitioner Holub requested that the Town throw away nothing that has to do with South Peak properties. Attorney Zimmerman asked if they had thrown anything like that away in the last month or two?

Planner Bont replied that office staff has been cleaning out all the files, trying to graduate to the digital files and get rid of multiple copies we have.

Petitioner Holub asked again that the Town staff “throw no South Peak materials away, because there are little notes on some document copies that are really important and useful.”

Attorney Zimmerman said they love the Town of Lincoln, and there is a very clear-cut way for this to all get resolved. Petitioner Holub said he will be completely transparent with the Board. He intends to happily live his life out here.

Attorney Zimmerman said that she appreciates the time spent by the ZBA volunteers and their effort.

Motion to reschedule the ZBA Public Hearing meeting for April 4, 2018 at 6:00 PM.

Motion: Beaudin.

Second: Don Landry.

Motion passes. 3-0.

V. OTHER BUSINESS – ZBA members/alternates, Zoning Board Staff

VII. PUBLIC PARTICIPATION AND OTHER BUSINESS: Public comment and opinion are welcome during this open session. However, comments and opinions related to development projects currently being reviewed by the ZBA will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate.

V. OTHER BUSINESS – ZBA members/alternates, Zoning Board Staff

VIII. ADJOURNMENT

Motion to Adjourn.

Motion: Beaudin.

Second: Don Landry.

Motion passes. 3-0.

Respectfully submitted,

Ellyn Gibbs, Recorder

Date Approved: ____/____/____



Jonathan Ham, Chairman

Notes

DECLARANT CONTROL VERSUS RESERVED DECLARANT RIGHTS: IS THERE REALLY A DIFFERENCE?

During the continued nationwide economic issues, more associations every day are discovering the answer to that very question, and discovering the answer is a resounding yes.

Declarant Control relates to the Declarant's right to control the operation of an association by means of appointing members to the Board of Directors. The Declarant Control provision permits the Declarant to establish budgets, execute contracts, retain vendors, etc. This authority allows the Declarant to maintain costs related to the operation of the community.

The Declarant Control period phases out over the course of the development, with final termination occurring upon the earliest to occur of: (i) the sale of 75% of the units that may be created to owners other than the Declarant; (ii) two years after the last time the Declarant added property to the community; or (iii) two years from the date the Declarant last sold a unit.

Reserved Declarant Rights are rights that the Declarant may retain to ensure the community is completed. Reserved Declarant Rights typically include the right to annex additional property into the community, the right to expand the community, the right to amend the Declaration, and the right to maintain sales offices, signs and perform marketing for the community.

Reserved rights do not expire upon the expiration of the Declarant Control period but, rather, may continue for a number of years after the Declarant surrenders control of the property.

If the Declarant is unable to complete the community, the Reserved Declarant Rights may be assigned to a subsequent developer. The new developer will then have a period of time to complete the development. This means that a community may lie dormant for a number of years and then become active again.

As indicated above, Declarant Control is the right for the Declarant to control the operation of the Association while the developer is building the community.

Reserved Declarant Rights, on the other hand, are reserved rights to complete the community. With the slow-down in construction, these rights may be used by a subsequent developer in the future

<http://www.hindmansanchez.com/resources/article/declarant-control-versus-reserved-declarant-rights-there-really-difference/>

THE ANATOMY OF A COMMUNITY ASSOCIATION TURNOVER MEETING: BEST PRACTICES IN PLANNING AND EXECUTING A SUCCESSFUL TRANSITION OF CONTROL

By Margaret A. Rolando, Shutts & Bowen, Miami, FL

I. WHAT IS TURNOVER?

A. Some state statutes and many community governing documents include provisions allowing the developer to retain control of the association and appoint or elect the board of directors after a majority of the units or lots have been sold. Typically, the developer or declarant is not required to relinquish control until a certain percentage of units or lots have been sold, a specific period of time has elapsed or certain other events have occurred. This period is often referred to as the “declarant control period” or “developer control period.” Turnover occurs when a majority of the board members are elected by the owners other than the developer and the developer relinquishes control of the association, delivers the official records of the association and satisfies other contractual, statutory and regulatory requirements for turnover. The term “developer” is used in this paper; however, the terms “declarant” or “sponsor” are also commonly used.

B. Not just an election but a process – best practices

II. WHEN IS IT TIME FOR TURNOVER? When is the time for “Turnover” of control for the property in a community development from the Declarant (developer) to the association?

A. Statutory: In some states the developer’s right to control the association and duty to relinquish control is based on statutes or codes.

B. Contractual: In many instances, the governing documents for a common interest ownership community, such as a condominium or planned community, grant the developer or declarant control rights until set percentage of units or parcels are sold or for a specific period of time.

“Declarant Control Period” means any period of Declarant control of the Association, established in this Declaration. For purposes of the Declaration and other Governing Documents, “Declarant Control Period” refers to the period during which the Declarant shall have the right to control the Association and appoint all of the Board of Directors. The Declarant Control Period shall expire on the first to occur of the following events:

1. [specific date, such as January 1, 2025]; or
2. Three (3) months after the date on which Declarant has conveyed 75% of the Units that will ultimately be operated by the Association to owners other than the Declarant [or a Builder] (expressly including any additional property which may be annexed or added to the Community pursuant to Article 2 of this Declaration); or
3. Three (3) months following the date on which the Declarant terminates the Declarant Control Period by a recorded [document] [amendment to this Declaration].

“THE ANATOMY OF A COMMUNITY ASSOCIATION TURNOVER MEETING: BEST PRACTICES IN PLANNING AND EXECUTING A SUCCESSFUL TRANSITION OF CONTROL” By Margaret A. Rolando, Esq., Shutts & Bowen, Miami, FL.