

**LINCOLN PLANNING BOARD  
REGULAR MEETING MINUTES  
WEDNESDAY, JULY 23, 2014 – 6:00PM  
LINCOLN TOWN HALL - 148 MAIN STREET, LINCOLN NH**

**APPROVED**

**Present:** Chair R. Patrick Romprey, Vice-Chairman Jim Spanos, Clerk John Hettinger, Paula Strickon, OJ Robinson (Selectmen's Representative), Callum Grant (Alternate), and Taylor Beaudin (Alternate)

**Members Excused:** Norman Belanger (Alternate)

**Members Absent:** None

**Staff Present:** Planning and Zoning Administrator Carole Bont, and Town Manager & Town Planner Alfred "Butch" Burbank, and Wendy Tanner (recorder)

**Town Attorney Present:** Attorney Peter Malia of Hastings & Malia Law Office, PA, 376 Main Street, P.O. Box 290, Fryeburg, ME 04037-0290

**Guests:**

- **Presenters for Verizon Wireless**
  - **Tom Hildreth** Attorney for McLane, Graf, Raulerson & Middleton, PA, 900 Elm Street, PO Box 326, Manchester, NH 03105-0326, representing Applicant Cellco Partnership d/b/a Verizon Wireless
- **Abutters to Proposed Telecommunications Site**
  - Douglas Smith, abutter and President of Westwood Homeowners Association and homeowner in Westwood, PO Box 1413, Lincoln, NH 03251
  - Rossana Nigrosh, abutter who with a second home at 24 Governor's Lane, Map 124, Lot 028, owned by Kevin M. Sargis, Trustee of Hunter Realty Trust, 44 Old Princeton Road, Fitchburg, MA 01420. Sargis also owns abutting lot M124, Lot 027 on Governor's Lane. Nigrosh lives at 3 Battery Wharf, Boston, MA 02109.
  - Daniel Nigrosh abutter who with a second home at 24 Governor's Lane, Map 124, Lot 028, owned by Kevin M. Sargis, Trustee of Hunter Realty Trust, 44 Old Princeton Road, Fitchburg, MA 01420. Sargis also owns abutting lot M124, Lot 027 on Governor's Lane. Nigrosh lives at 3 Battery Wharf, Boston, MA 02109.
- **Presenter – for Mount Coolidge Construction, LLC doing work for New Jefferson Holdings, LLC for "The Pines At Forest Ridge" project**
  - Richard K. Elliott, of 3 Amalia Drive, Nashua, NH 03063 – one of the developers of Forest Ridge, a principal owner of JORI Properties, LLC and Lincoln Development c/o Richard K. Elliott, 3 Amalia Drive, Nashua, NH 03063 & Elliott Custom Homes and one of the investors in Richard K. Elliott Family, LLC and Mount Coolidge New Jefferson Development, LLC.
- **Presenter – Herbert Lahout**
  - Herbert Lahout of 64 Sunset Hill Road, Sugar Hill, NH 03586, owner of 31 Main Street, Lincoln, NH (Map112, Lot028) location of the former Bill & Bob's Famous Beef House building and 33 Main Street, Lincoln, NH (Map112, Lot027) location of the former Quiltstead Building.
- **Other Guests**
  - David Beaudin, resident of 10 Louis Lane, Lincoln, NH 03251(Tax Map 116, Lot 004)

- A reporter who worked in the past for newspaper The Littleton Courier, 33 Main Street, PO Box 230, Littleton, NH 03561-0230

*(There may have been others present who did not sign in on the sign-up sheet.)*

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## **I. CALL TO ORDER:**

*Chair Romprey called the meeting to order at 6:00pm*

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## **II. CONSIDERATION OF DRAFT MEETING MINUTES FROM: July 9, 2014**

**Motion: To approve the minutes of June 9<sup>th</sup>, 2014, as amended.**

**Motion: OJ Robinson      Second: John Hettinger**

**Motion carries unanimously by all members present (5-0).**

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## **III. CONTINUING AND OTHER BUSINESS. (Staff and Planning Board Member/Alternates).**

*See later in the meeting after "New Business".*

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## **IV. NEW BUSINESS**

- **6:00 pm. Site Plan Review for a Proposed Telecommunications Facility Under Land Use Plan Ordinance Article VI-A Telecommunications Equipment and Facilities**
  - 1. Application (SPR 2014-02)**
  - 2. Property:** Tax Map 126, Lot 20, (60 Loon Mountain Road)
  - 3. Proposal:** John F. Weaver Esq. of McLane, Graf, Raulerson & Middleton, PA, of 900 Elm Street, Manchester, NH 03101 on behalf of his client, Cellco Partnership d/b/a Verizon Wireless ("VzW") of 400 Friberg Parkway, Westborough, MA 01581, filed an Application for Planning Board Site Plan Review Approval for a Proposed Telecommunications Facility Under Land Use Plan Ordinance Article VI-A Telecommunications Equipment and Facilities. VzW is proposing to construct a 100 foot monopole within a 40'X40' fenced-in compound located to the southwest of the Governor's Lodge at Loon Mountain Ski Resort, at the end of Governor's Lane at 60 Loon Mountain Road (Tax Map 126 Lot 020). The monopole will host 12 panel antennas with a centerline height of 97'. The monopole will be supported by a 12'X26' equipment shelter with an internal diesel generator located within the compound. The structures will be in the General Use (G.U.) District. The property is owned by CLP Loon Mountain, LLC (formerly known as CNL Income Loon Mountain, LLC), 60 Loon Mountain Road, Lincoln, NH 03251. No quorum on April 9, 2014. Hearing was at the continued to April 30, 2014, and then again to May 28, 2014, and then again to June 25, 2014, and now again to July 23, 2014. [The location of the facility and the size of the facility have been changed since the original application.]

Attorney Tom Hildreth, attorney for Celco Partnership d/b/a Verizon Wireless, asked for an extension so that, as their new attorney, he could get up to speed in his representation of Verizon. He requested that their case be continued to August 13<sup>th</sup>.

Attorney Malia stated that after checking the Planning Board schedule with Bont, August 13<sup>th</sup> was the better of the two dates in August to continue this hearing. The Planning Board has not received the updated RF report of Ivan Pagacik of IDK Communications which we expected to receive today. Attorney Malia will get in touch with Ivan Pagacik on Thursday, July 24<sup>th</sup> to find out where the report is. It would be tough to go forward without Ivan Pagacik's report. Furthermore, Verizon Wireless did grant an extension of the deadline for the town to September when the town asked for it.

**Motion: To grant the extension of Verizon Wireless hearing to August 13<sup>th</sup>.**

**Motion: Jim Spanos                      Second: OJ Robinson**

**Motion carries unanimously by all members present (5-0).**

Attorney Malia stated that the only other order of business on this case that he was aware of is that Planning and Zoning Administrator Bont received a request from US. Cellular at some point over the past 30 days to increase the height of the cell tower on top of the Octagon Lodge on Loon Mountain. Bont sent a letter to their site acquisition consultant. Attorney Malia recommended that Bont forward that information to Ivan Pagacik of IDK Communications because the Planning Board has asked Pagacik to look at other towers. Pagacik should be aware of this new request from US Cellular. Malia recommended that the Planning Board instruct Bont to forward her letter to Ivan Pagacik for his information to keep him in the loop on what is happening with other towers in town that he is taking a look at. Bont will share the letter with the other parties and the public as well.

**Motion: To have Bont forward letter sent to US Cellular site acquisition consultant to Ivan Pagacik of IDK Communications.**

**Motion: Jim Spanos                      Second: OJ Robinson**

**Motion carries unanimously by all members present (5-0).**

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## **V. OTHER BUSINESS**

*Chair Romprey recused himself, stepping down to sit with the general public in the audience. Vice Chair Jim Spanos became Acting Chair.*

### **Conceptual Presented by Herbert Lahout for his two merged lots - 31 Main Street (Map 112, Lot 027) and 33 Main Street (Map 112, Lot 028)**

Herbert Lahout assured the Planning Board that he would not take more than 10 minutes of the Planning Board's time. Lahout noted that Carole had been very helpful. Lahout appreciated the Planning Board's Site Plan Review approval for the retail and office space for the lot Lahout bought at 31 Main Street (Map 112, Lot 027) and 33 Main Street (Map 112, Lot 028).

Lahout explained his legal dispute with David Rodgers over access to Lahout's two merged lots - 31 Main Street (Map 112, Lot 027) and 33 Main Street (Map 112, Lot 028).

Right now customers can drive their cars off the Kancamagus Highway (NH Route 112) through a state approved curb cut and up a driveway located on land now owned by David Rodgers. To the right of the driveway you will find the Pinestead Building and then Bill & Bob's Restaurant building. Both buildings are located on property now owned by Herb Lahout. For the last 25 years, customers for both the Pinestead Quilt building and the Bill & Bob's Restaurant building have been driving their cars in through the curb cut and up a short distance into the driveway on land owned by David Rodgers. Then the customers turn right and park, facing those two buildings in parking spaces located facing the side of the buildings on the Lahout Lot.

David Rodgers is the new owner of the lot with the curb cut and driveway. According to Lahout, David Rodgers claims, based on the language of the right-of-way in the deeds, that customers for the two Lahout buildings should really be coming into the lot along the driveway for at least 20 feet or more along the far end of Lahout's lot before turning right into the Lahout lot to park. David Rodgers is claiming that Lahout's customers have no right to turn right immediately to park facing the two buildings after accessing the lot through the curb cut and entering the driveway.

Lahout complained that David Rodger's position is "such a frivolous legal thing." He used an example to illustrate his point. What if a neighbor wanted to block Butch from building a house so the neighbor said, "Hey, you know this used to be our land." Does that mean the Planning Board should just say, "No. We cannot give Butch a building permit."? Or can the Planning Board "grant conditional approval based upon this legal stuff being worked out"? Otherwise, anyone would have the ability to block anything on the Planning Board just by having an attorney send a letter about the applicant "saying some crazy notion". Then does the Planning Board just say "Hands off. You have to settle this thing before we can do anything?" Lahout complained that it was not fair. Lahout said he could understand the Planning Board looking at the restaurant plans, the parking and all that, and then granting a conditional approval. Lahout is concerned that this legal dispute could get dragged out and he could "really just sort of be screwed".

Strickon asked about the site map Lahout handed out. In looking at the map, Strickon suggested that the access to parking was never a road, but a driveway. Lahout confirmed that it was a driveway.

Strickon asked whether any prior owners had blocked the access from the right of way to the Lahout lots on the Lahout side. Lahout repeated that for 25 years cars have just been pulling in all along the driveway and pulling into the Lahout lot to park.

Strickon then asked if there was a parking lot in the back of the facility. Lahout replied that the parking lot was on the neighbor's (David Rodgers) property.



Strickon asked if the parking lot in back on David Rodger's property was ever used for Bill & Bobs Restaurant. Lahout replied that Bill & Bob's Restaurant should not have done that because the parking lot in back did not belong to the Bill & Bob's Restaurant, but instead was part of the neighbor's property (now Rodger's property).

Lahout then asked, "Is it that simple to block an application just by coming up with a letter from a lawyer?"

Attorney Malia explained that he did not come prepared to speak to this issue, however he gave an opinion a couple of months ago. Malia said that somebody could try to block an application just for the sake of blocking it without any legal grounds for blocking it, however then that person runs the risk of getting sued for acting in bad faith, including being slapped with attorney's fees and damages. It is probably not that simple unless somebody wants to be completely fraudulent and create disputes where none really exist.

Lahout asserted that anyone who had ever visited Bill & Bob's Restaurant in the past would know that the parking lot had been used for parking at Bill and Bob's Restaurant and the Pinestead Quilt Building. For 25 or 30 years customers came through the curb cut and up the driveway located on land now owned by Rodgers. According to Lahout, his attorney advised him to gather pictures and document the parking use. Lahout said that he has this kind of documentation. According to Lahout's attorney, the case for using the parking area is "a slam dunk". Lahout then complained that he should not have to go to that legal expense and headache just because "this guy is just swinging the bat". Lahout further complained that his neighbor (David Rodgers) should take the prerogative and "come at him" to "slow his application down" instead of sending the Planning Board a two page letter from "some random attorney". Lahout did not think it was "fair".

John Hettinger asked if David Rodgers owned the property that the driveway was on. Lahout insisted that the deeds included a right of way that states Lahout shares the driveway with Rodgers. John Hettinger asked if the right of way was in David Rodgers deed. Lahout confirmed it was in the deed.

Beaudin asked Lahout what the purpose of the right of way was. Lahout said the right of way gave him access to the back of the lot. Acting Chair Spanos was surprised that was all the deed said. Lahout owns two adjacent lots (now merged), and the right of way allegedly only services the back of one of the lots. Lahout stated that the two lots are abutting. The right of way was written to service one lot. Now that the two lots are merged, Lahout contends that the right of way extends to the whole lot – comprised of the two merged lots. Town Manager Burbank indicated that the right of way issue has been going on for a while. Burbank remembers that some of the earliest deeds talked about people walking to the back of the lot.

Lahout complained that his neighbor is making his life miserable "just to have a go at him". Lahout didn't think it was fair. Attorney Malia reminded Lahout that the letter from David Rodgers' attorney sets forth a legal claim. Lahout said he thought that Rodger's attorney had the two lots mixed up in the letter.

Malia re-read the legal opinion he had given to the Planning Board back in May. At that time, the Planning Board asked Malia if the Board could find the application to be complete. Malia said the Planning Board can find the application to be complete, however, he did not recommend this. Malia recommended that the Planning Board accept the application as complete, start the public hearing and make it clear to the applicant that there is a dispute over the legal status of the right of way. The dispute is a matter between the applicant and a private person, Mr. Rodgers. Mr. Rodgers is claiming that the right of way does not allow the access required for this proposed use. The answer to this question depends on the application of certain rules of law to the particular facts of the case. The determination of the extent and purpose of the right of way is a judicial function. That decision about the right of way is not within the jurisdiction of the Planning Board. Unless the applicant can either resolve the dispute with Mr. Rodgers or prove to the Planning Board that a legitimate dispute does not exist, the best way to do this is with a court order. The planning board will most likely be forced to deny the application when the time comes to vote on it. Malia should have this conversation with Mr. Lahout before the board finds the application to be complete. Malia suggested that perhaps Lahout would want to hold off submitting his application for Site Plan Approval for a change or expansion of use until he either works something out with Mr. Rodgers or goes to court and gets a court order that proves that he can use the right of way for the intended purpose. The Planning Board has seen this happen before with Bunker Lane. Two parties had a dispute over the road and went to court. The parties got a court order. They came back to the Planning Board and the Planning Board made a decision.

Lahout argued that to do so would be putting the horse before the wagon [*sic*]. Lahout asked the Planning Board to give him conditional approval. The condition would depend on the outcome of the court case. Lahout argued that then he should not have to wait to start a 10 month Planning Board process to get a restaurant approval until after a court decision about the right of way came down. Why doesn't the Planning Board do a conditional approval?

Attorney Malia stated a conditional approval would not become final until the issue was resolved. Malia thought that Lahout would be wasting his money investing time in the planning board process without resolving the right of way issue. Lahout stated he did not mind doing that. Attorney Malia then stated if Lahout lost the court case then Lahout would have wasted all that money. The condition would have to be fulfilled before he could open a restaurant or start building. Lahout just wants to get the restaurant approval over with. In Lahout's opinion, the Planning Board has been kind to grant approval for office and retail space. Now Lahout just "wants to put a fork in this thing" and get the restaurant space conditionally approved and then get on with marketing the property, etc.

Acting Chair Spanos asked Malia if it would be his recommendation that the Planning Board hear Lahout's application. Spanos was concerned that the Planning Board not get involved in a legal dispute.

Attorney Malia recommended that the Planning Board not get involved in this legal dispute either. Malia said that if that is the way Lahout wants to proceed, it would not be Malia's choice, but Malia would recommend to Lahout to get the right of way issue clarified and then come in and file the application. Malia went on to say that it was possible for the Planning Board to grant

a conditional approval based on the right of way dispute being resolved. However, the court process is time consuming so the applicant and the Planning Board will have this conditional approval sitting out there unsatisfied for a fair amount of time. If somebody else were to buy the property thinking they had approval to start a restaurant with this lawsuit pending that they might not know about.

Hettinger asked if that would also be the case for the parking issue. Acting Chair Spanos stated that the issue of adequate parking would have to be addressed during the Site Plan process.

Beaudin asked if the Planning Board were to grant conditional approval in this way would that bring the town in on the dispute. Attorney Malia opined that if the Planning Board were to grant a conditional approval and then David Rodgers appealed the Board's decision, the town might become a defendant.

Lahout stated that the neighbor could have/should have appealed the Planning Board decision within 30 days.

Strickon emphasized that Lahout could put all this time and money into this application and the court decision may not find in his favor. Lahout responded that he did not mind doing that. Lahout said he has tried his best to come to terms with his neighbor. He stated that he is "not a young bunny at this real estate thing". Lahout said that he has tried to resolve this dispute but that it is not "going anywhere". "It's just slowing up the approval of the restaurant."

Strickon stated that Lahout was going to build a restaurant with no access. Lahout replied "No." He was not going to do anything. Lahout confirmed that the conditional approval was for his own benefit so he could "start planning".

Strickon pressed Lahout, "So you start planning and you get your plans all in line and you still can't build?" Lahout replied "No." Lahout said that he would have gone through the six or twelve months of "crazy 3 or 4 meetings" in order to get this restaurant approved. Lahout was also concerned that the whole Planning Board membership might change in a year. Strickon stated that the issue is not whether membership on the board changes, but rather the issue is his problem with Mr. Rodgers over the scope and extent of the right of way. Lahout agreed saying that the reason Lahout was going about solving his problem via the Planning Board was because the other party is not being accommodating or helpful.

Strickon agreed that the Planning Board might decide to review his application for a restaurant, but asked if Lahout would rather have an agreement with Mr. Rodgers before he starts planning. Lahout replied "No." Lahout would rather have a Planning Board's conditional approval "however the town attorney wants to write it". Then Lahout would have "some meat to approach the neighbor causing the dispute and get this legally resolved". Lahout realizes that it would be only a conditional approval. Lahout felt that a conditional approval would mean that at least he was done with town approvals. He realizes that the dispute with the neighbor still needs to be resolved. Strickon rejoined that it was not the town attorneys' job to go to bat with Lahout's neighbor.

Hettinger asked if the Planning Board was allowed to approve something that the Planning Board knew was being contested.

Robinson asked if the Planning Board granted conditional approval, how long would the applicant have to take action on implementing that plan? Doesn't the applicant have to dig or do something within 12 months?

Malia replied that it varies from town to town. Most towns require action within one year.

TOWN OF LINCOLN, NEW HAMPSHIRE, SITE PLAN REVIEW REGULATIONS

ARTICLE IX. Action on Completed Application

C. Conditional Approval:

3. All conditional approvals granted by the Board shall expire one (1) year from the date of conditional approval, if the condition is not satisfactorily fulfilled within the time limit or such other such time period as the Board may have imposed.

Robinson stated that he saw that the Planning Board had granted approval for 2 years recently.

Bont pointed out that the Planning Board granted a two year extension for RiverWalk. The Town Manager Burbank agreed, but that was a special case.

Robinson reminded Lahout that from the date the application was conditionally approved Lahout (the applicant) would only have one year to build. If the court process takes longer than that, the conditional approval will expire and the whole conditional approval will disappear.

Attorney Malia stated that there were two ways to resolve this dispute:

- (1) Negotiation. However, based on Lahout's representations, negotiation does not seem like a viable option; or
- (2) Legal action in Grafton County Superior Court. Malia did not see how having a conditional approval was going to get the David Rodgers to negotiate with Lahout if Rodgers is not willing to negotiate now. Malia thought that eventually Lahout was going to have to go to Grafton County Superior Court.

Lahout said he was trying to be efficient with his time. Lahout felt that it was not a difficult case for the court to determine and that he was wasting time. Lahout felt that his time could be better spent presenting his case to the Planning Board. Lahout felt that even if the Planning Board were to not approve his plan, that at least he would have his time in front of the Planning Board finished. If the Planning Board turned down his plan, that would at least save him the time of going to court. Lahout felt that he was wasting time waiting for this his neighbor, David Rodgers, to act. Lahout felt as if he "was being held hostage by his neighbor".

Beaudin asked Lahout why Lahout did not put his time into fighting the battle with his neighbor. Lahout stated that he had already spent considerable time on trying to negotiate the dispute. He was coming to the Planning Board as a last resort. Lahout wanted to get a conditional approval based on whatever conditional wording the town attorney would advise. Lahout then went on to



say that potential renters were “calling to inquire about the restaurant constantly, asking if they can rent the space as a restaurant”. Lahout would like to give them something. For example, Lahout would like to be able to say the site has been approved for a restaurant. He would like to be able to say that the Planning Board has said the site is limited to 35 or 65 or 100 seats, but the dispute with David Rodgers is not going to be resolved for a year and a half. Now if someone calls Lahout and asks if the property can be used for a restaurant, Lahout has to tell them that the Site Plan Review application has not even been approved by the Planning Board.

Strickon suggested that Lahout explain that the Planning Board is not holding up his application, but it is his issues with his neighbor (David Rodgers). Lahout prefers that the Planning Board either approve the application and put lots of conditions on the application or disapprove it. Lahout stated he was “willing to waste time and do all these plans and with no hard feelings”. Lahout was willing to market the property with a conditional approval. He thought that if someone wanted to buy this property with a conditional approval, any buyer’s due diligence would be able to find out about the dispute with the neighbor. Although Lahout was creating work for himself he was more than happy to take on the extra work.

Robinson was concerned that if the Planning Board were conditionally to approve this application with conditions, it would set a precedent for other situations. The Planning Board has not typically gotten involved in legal disputes between abutters.

Acting Chair Spanos stated that if the Planning Board does not take the case because of the dispute the Planning Board is getting involved. The Planning Board is involved by saying the Planning Board is not going to take this case until you solve the legal dispute. Now the Planning Board is involved. If the applicant wants to come before the Planning Board and get a ruling on the application with a conditional approval, Spanos does not see why the Planning Board would not do that. The conditions are going to be stated right in the approval that we are aware of right of way situations that the applicant has to resolve. Spanos thought that this case was “not a shoe-in approval process”. The applicant has set back issues, parking issues, and off street parking issues. What if the Planning Board came back and said “no, you can’t build it”? In Spano’s opinion, it would be more fair to the applicant to tell him he cannot have a restaurant sooner rather than later - after the applicant spends time and money pursuing a legal claim at Grafton County Superior Court. What if the court determines that the applicant has a right to enter his property through this piece of land?

Town Manager Burbank stated just from the enforcement perspective, the wording would have to be crafted explicitly so that Bont and the Town Manager would have clear language that they can enforce. Burbank was also concerned about the potential buyers. What if Lahout finds a buyer who buys the land from Lahout with a conditional approval on the land. Then Lahout is gone. Lahout has the money and leaves town. Now the town is dealing with a buyer who was not involved in the Site Plan Review approval process. Town Manager Burbank wants to be sure that the Planning Board’s wording in the conditions will give the town staff some clear conditions to work with.

Acting Chair Spanos suggested that the Planning Board record the conditions at the Grafton County Register of Deeds. If the town records the conditions, any buyer who performs a title search would be aware of these conditions.

Town Manager Burbank does not think the Planning Board had done this type of conditional approval before. This would be setting a new precedent for the Planning Board. Beaudin said he thought it sounded like Lahout did the same thing that the town does not want the next buyer to do. Lahout did not do his due diligence before purchasing the property.

Attorney Malia recommended that the Planning Board require Lahout to clear up the right of way issues before the Planning Board deliberates to make a decision. However, there is no specific requirement that the Planning Board has to do it that way. It is possible to go through the Site Plan Review process as Lahout is asking the Planning Board to do. If everything else complies with the ordinance the Planning Board can grant a conditional approval, but the Planning Board should make it clear that its approval is conditional upon the right of way issue being resolved in favor of the applicant's property. No Land Use Permit can be issued until the Planning Board is satisfied that that has been accomplished. Malia offered to help work up some language.

Acting Chair Spanos wanted to be sure that no legal liabilities could arise against the town for going forward in this manner. Malia described the problems that arise when the Town has "a conditional approval out there floating around on a property that may be for sale". Somebody buys the property not fully understanding the conditions. The new owners find out that they are facing a two year court battle to clarify access. Then the new owners bring the Planning Board and the Town of Lincoln into a lawsuit.

Acting Chair Spanos suggested that the town record the conditional approval at the Grafton County Register of Deeds. It is the buyer's responsibility to do due diligence – i.e., to do a title search to discover any defects, conditions or restrictions in the title.

Attorney Malia reiterated his opinion that Lahout should resolve the legal issue involving the right of way access before the applicant does any more work on a Site Plan Review application. Lahout interrupted saying that the Planning Board had already approved the office and retail space. This right of way issue is the same for that use as it would be for a restaurant use. The neighbor (David Rodgers) did not appeal the Planning Board's decision (Notice of Decision) within the 30 day appeal period.

Hettinger asked if Lahout and the Planning Board knew that the right of way was an issue when the Planning Board granted its approval for the Retail and Office space. They did not.

Bont was not aware of the date when Lawrence (Chopper) Hartle, Jr.'s sold his land to David Rodgers.

- 3/17/2014 Deed to David Rodgers.
- 3/26/2014 Planning Board approved the application with conditions.

- 5/7/2014 Town received notice of a Right of Way problem from Attorney William T. Burdin, PO Box 44, Windham, NH 03087, representing David Rodgers.

Lahout stated that David Rodgers owned the property during the appeal process and Rodgers should have appealed the Planning Board decision. Lahout argued that the Planning Board approved another project with the exact same parking scheme.

Hettinger stated that the office/retail space was approved before. Hettinger stated that the Planning Board did not know at that time that the David Rodgers would not grant Lahout access.

Acting Chair Spanos believed that office and retail space was approved, but the Planning Board did not approve a restaurant. From the audience, guest Pat Romprey stated that when Lahout got Site Plan Approval it was prior to the Planning Board receiving notice of a land dispute between Lahout and Rodgers on the adjacent property.

Lahout complained that the approval makes no sense. The office and retail was approved with the same parking scheme, yet the application is being held up on the restaurant for the same parking scheme.

Spanos explained that the largest issue was not parking, but access. Lahout agreed, but he did not understand why David Rodgers did not appeal the Site Plan Review decision.

Attorney Malia replied that they do not know why Mr. Rodgers did or did not do something. The fact that Mr. Rodgers did not appeal may be held against him if Mr. Rodgers goes to challenge this in court. This issue is an issue that the Grafton County Superior Court is going to have to decide, not the Town of Lincoln or the Planning Board. Malia stated that when the Planning Board issued that approval, the Planning Board did not yet have this letter from David Rodgers' attorney setting forth this dispute.

Lahout asked if he were to open a Lahouts store on the property immediately, would the Planning Board say that Lahout cannot open the store because the right of way issue had not been resolved. Bont reminded Lahout that there were still conditions that needed to be met. Attorney Malia said that as soon as you meet these conditions, the approval becomes final.

Lahout asked what the conditions were.

Bont read the conditions from the Notice of Decision:

*The Planning Board voted to accept the Site Plan Review application as complete pending Lahout's providing the following within two weeks from March 26, 2014:*

- 1. Plan views of all buildings, either existing, or proposed, with their use, size, location and floor elevations indicated.*
- 2. A typical elevation view of all existing and proposed buildings indicating their height and signing.*

3. *The size and location of existing and proposed public and private utility connections, including provisions for fire protection.*

*Provided Lahout provides the rest of the application so that it is complete as set forth above, the Planning Board approved the Voluntary Lot Merger and approved the Application for Site Plan Review:*

1. *For Retail/Office Space as proposed; or*
2. *For Restaurant Space provided the building is reconfigured to accommodate sufficient parking.*
3. *In addition, the 991 square feet being demolished can be rebuilt as shown on the approved Site Plan.*
4. *If the building is reconfigured to accommodate the restaurant and the addition is less than 990 square feet, those square feet are grandfathered for the additional footage up to 991 square feet.*

Guest Pat Romprey interjected there was no dispute about access prior to the Planning Board's granting conditional approval.

Lahout asked the Planning Board if he provided the architectural plans with schematics to Bont, would Lahout have any problems with opening a Lahouts store tomorrow. Strickon asked for confirmation that Lahout was looking for office and retail space, not a restaurant. "There is a big difference between a retail store and a restaurant." Spanos explained that Lahout just wants to meet the conditions of the approval. Lahout protested. "Use has nothing to do with it. It's access to the property."

Town Manager Burbank reminded the Planning Board members that they did not have knowledge that there was an access issue when they approved the Site Plan Review application. In effect, the Planning Board was not supplied with all the information it needed.

According to Lahout, in some towns all of the abutters receive a mailed copy of the Planning Board's Site Plan Review approvals – Notices of Decision. In the Town of Lincoln, the town posts the Notice of Decision. David Rodgers had owned his property for a long period of time when the Notice of Decision came out. Lahout feels he "just got lucky that he [David Rodgers] didn't appeal the Planning Board's decision". Lahout reiterated that "We are not really talking use, we are talking access to the property. If you had a dog house there it is the same access [problem]."

Robinson reiterated that the Planning Board's decision had already approved the property for restaurant space, provided the building was completed in such a way as to accommodate sufficient parking. He expects Lahout to come back and prove that he has sufficient parking. Lahout responded, "We have already done that."

Robinson asked, "So we have already approved this as a restaurant as long as you satisfy the conditions?" Lahout reminded the Planning Board that the Board had scheduled a field trip



down to the site and the parking lot behind his brothers' Lahout Stores. At the prior scheduled Planning Board hearing, the town attorney recommended that the Planning Board not listen to Lahout's case (that he had satisfied the requirements for off street parking for a restaurant) until his dispute with David Rodgers about access had been resolved. Lahout asked to get on the Planning Board's agenda to bring in the parking scheme for the restaurant. He wants either a denial or a conditional approval.

Attorney Malia asked whether Lahout is trying to meet the conditions of his approval or whether Lahout is submitting a new application for a new use. Town Manager Burbank explained that Lahout is before the Planning Board just for a conceptual. Robinson explained that Lahout wants to come in to show the Planning Board that he has found sufficient parking to meet the conditions of his Site Plan Approval. (See Notice of Decision.)

Lahout explained that at the last meeting, he withdrew his application because the Town Attorney recommended that the Planning Board not hear the case until the access issue was resolved. He had his brother's parking lot striped and spray painted for the Planning Board's anticipated site visit.

Hettinger explained to Lahout that as it stands now Lahout does not have adequate parking for a restaurant. The Planning Board's conditional approval for the restaurant is "null and void until he gets that [parking] squared away anyway". Robinson reiterated that the condition for the approval was to provide adequate parking, not the access. Hettinger pointed out that even if the conditions are found to be met for adequate parking, Lahout's customers still cannot get to the parking. Lahout pointed out that the disputed parking spaces are only three spaces, not his whole property. "We are talking like Mickey Mouse parking spaces."

Attorney Malia pointed out that the approval was granted on March 26, 2014. "...March 26<sup>th</sup> after a duly noted public hearing the planning board voted to approve with conditions." Then on April 29, 2014, Bont emailed Malia to say that Lahout was coming in for second site plan review because although he got site plan approval to put in a combination of retail and office space in the building he now has a potential tenant that wants to put in a 96 seat restaurant. Lahout came in for a conceptual on April 29, 2014. This case was presented to Attorney Malia as a new application for a 96 seat restaurant. That is when he gave his advice that there was a legal dispute he suggested that Lahout resolve the access problem first.

Bont said that perhaps she should not have characterized the application as a separate Site Plan Review, but rather a follow-up on imposed conditions. The Planning Board knew when they granted the approval that approving the restaurant as well would be problematic. At the time members of the Planning Board suggested to Lahout that he come back when he had somebody that wanted to rent it as restaurant space. However, Lahout persisted and the Planning Board was accommodating. They knew that conditional approval of the restaurant would be a problem. Perhaps this should have been noticed for a second site plan review, but rather a public hearing for oversight that the conditions had been met.

*The Planning Board took a five minute recess.*

Attorney Malia redirected the Planning Board's attention to the Notice of Decision. On the top of page 2 it reads:

“...provided Lahout provides the rest of the application so that is complete as set forth above, the Planning Board approves the Voluntary Lot Merger and approves the Application For Site Plan Review”

He thinks that the problem is with paragraph number 2:

“2. For Restaurant Space provided the building is reconfigured to accommodate sufficient parking.

What the Planning Board should have done is either approve office/retail space **or** restaurant space – not both. Instead the Planning Board left the door open for the property to potentially be converted to a restaurant. That is a lot to accomplish in a condition. The Planning Board would need some sort of separate Site Plan Review to reconfigure a building to accommodate parking. You would require public notice and an opportunity for abutters to take a look at what was going on.

In Malia's legal opinion, the language in paragraph 2 creates confusion as to what was actually approved. Was Lahout already approved for a restaurant? In which case he does not have to submit a new application for a restaurant, he just has to meet these conditions.

Speaking from the audience as a guest, Pat Romprey clarified for Attorney Malia that “the reconfiguring involved was tearing down a shed which was on a site plan. [*The shed*] was not an extension of the original building. The shed was 3 feet back after the portion of his building that was on somebody else's property was torn off. That was the only reconfiguration.”

Bont explained further that Lahout wanted to retain the option of recreating the same number of square feet of building that he would have demolished. When the Planning Board talked to Lahout the Board explained that Lahout might not be able to get the number of parking spaces he would need for a restaurant if he rebuilt the 991 square feet. Lahout might have to make the building smaller in order to give himself enough parking spaces for a restaurant.

Acting Chair Spanos asked whether or not the reconfiguration of the building and the parking could be done administratively. Attorney Malia admonished the Planning Board, saying that the Board should not be reconfiguring buildings and planning parking administratively without giving abutters an opportunity to voice their opinion.

Acting Chair Spanos asked Attorney Malia whether Lahout needed to come back with an application to change the use of the building to a restaurant and to reconfigure parking. Attorney Malia asked the Planning Board members what they thought they were approving. Were they approving a restaurant or retail/office space or whatever he wanted to put in there?

- Romprey said he did not honestly remember a restaurant as part of the approval. He remembered approval of the retail/office space. At the time of the Site Plan Review hearing, Lahout was not sure what the use was going to be. He did not have a tenant lined up.

- Beaudin said the approval was crafted in such a way so that Lahout “could do it all in one package”.
- Bont agreed that the Board had talked about approving restaurant space as well as retail and office space.

Attorney Malia recommended the Planning Board have Lahout submit whatever information he feels he needs to submit to satisfy these conditions and then schedule Lahout for a public hearing. Rodgers and other abutters would get notice. If Rodgers wants to object he can. The Board could review the information submitted to satisfy the conditions at a public hearing.

Lahout asked Attorney Malia if he was suggesting that the Board revisit the conditional approval. Attorney Malia explained that there are some conditions that Lahout needs to satisfy in order to make this a final approval. If Lahout wants to make his building into a restaurant, one of the conditions says that he needs to reconfigure the building to accommodate sufficient parking.

Lahout reiterated that he has parking plans he prepared for the last meeting. He has the plan for the building and the parking scheme using the parking area located behind his brothers’ building. The Planning Board was going to do a site visit to look at it. Strickon reminded Lahout that he could not have a restaurant with just two parking spots, referring to the two on-street parking spots in front of the two merged lots.

Strickon asked Lahout how he planned to get to the last 3 parking spaces as shown on his sketch. Lahout directed his attentions to Attorney Malia and said, “You are a lawyer. When it says ‘the back of the lot’, does that mean it extends to the back 50 percent of the lot? What does ‘the back of the lot’ mean? How much of the lot is considered ‘the back of the lot’?”

Acting Chair Spanos reminded the Planning Board that this hearing is a conceptual hearing, not a Site Plan Review hearing. Spanos asked if the Planning Board should consider a new application from Mr. Lahout to reconsider parking even though litigation is pending.

Attorney Malia answered that there is presently no litigation pending because no lawsuit has been filed in court. There is a dispute. The salient question is will the Planning Board allow Lahout to submit the information that he deems necessary to satisfy the conditions? Or is the Planning Board going to require him to submit a whole new application for site plan review for the restaurant? Even if the Planning Board accepts the documentation and plans that Lahout thinks are sufficient to satisfy the conditions, the Planning Board should still schedule it for a public hearing.

Acting Chair Spanos asked Strickon if she was comfortable with Attorney Malia’s advice. Strickon does not think taking the offered legal advice will address the access issues. The problem is that Lahout has no other access route.

Robinson suggested that the Planning Board make it a condition that Lahout submit a plan, the Planning Board would look at the plan and if the Planning Board decides to approve the restaurant, the approval will be conditional.

Beaudin asked Attorney Malia if all the Planning Board needed to do was to make sure that Lahout met the four conditions.

Lahout chimed in that the four conditions apply only to the retail and office use. He promised to get the requirement documentation to meet those four conditions to the Town immediately.

Beaudin corrected Lahout, saying the four conditions apply to “for Retail/Office Space as proposed or for Restaurant Space”.

Attorney Malia recommended that Lahout just submit the documentation he needs to satisfy the conditions. The Planning Board will schedule a public hearing. David Rodgers will get notice and have an opportunity to come if he wants to and talk about the access issue. The Planning Board can look at the parking issue as well as the access issue and can make a decision. If the Planning Board approves it, the Planning Board can make its approval contingent upon the access issue being resolved in favor of the applicant. Malia will help the Planning Board with some language.

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### **III. CONTINUING AND OTHER BUSINESS. (Staff and Planning Board Member/Alternates).**

*Pat Romprey left the audience and resumed his position as Chair of the Planning Board.*

- A. Richard Elliott on behalf of Mount Coolidge Construction, LLC, asked to speak with the Planning Board about the conditions imposed in their approval of Site Plan Review of a project called “The Pines at Forest Ridge” – 12 duplexes or 24 housing units on property owned by New Jefferson Holdings, LLC, formerly JORI Properties, LLC (Map 114, Lot 080).**

**On June 25, 2014, after duly-noticed public hearing the Planning Board voted to APPROVE WITH CONDITIONS the Site Plan Review Application for “The Pines at Forest Ridge”.**

**CONDITIONS OF APPROVAL:**

- 1. The Applicant and/or Property Owner shall bond the “fixing” and construction of Woodland Loop Road.**
- 2. The Site Plan shall be subject to third party “peer” review by the town engineers. (In this case the Town will use the services of HEB Engineers, Inc.)**
- 3. The Applicant and/or Property Owner shall provide a new separate recycling center and make separate provisions for trash removal for “The Pines at Forest Ridge”. The Pines at Forest Ridge shall not use the present recycling center for the Forest Ridge Development located on Tax Map 117, Lot 007 per the February 21, 2011, Planning Board decision.**
- 4. Prior to issuance of any Land Use Permit or Subdivision Approval or Site Plan Review Approval the applicant shall obtain all applicable state and federal permits and approvals and shall provide copies to the Town, including any permits obtained from NHDES and any documentation will be provided to the Town.**



**a. HEB Review of NH DES Approved Drainage**

Rick Elliott pointed out that one of the conditions of the Planning Board's approval was third party peer review by the Town engineers – HEB Engineering ("HEB"). According to Elliott, Mount Pleasant Construction, LLC, has gone through the peer review document prepared by HEB and they have made corrections. Most of the things on the peer review report were "a piece of cake" and they "have done it". However, there are a couple of things Elliott wanted to review with the Planning Board and ask the Board's opinion on.

First, HEB asked to review the drainage the DES approved after DES (Department of Environmental Service) approved the drainage. Elliott does not want to pay for that because DES is the final authority.

According to Elliott, HEB says they do not want to approve the drainage until DES approval is 100 percent complete. Elliott agrees with that. Then HEB says that this will ensure that the towns engineer reviews and approves the final drainage. Elliott says that if DES has approved the final drainage he does not think his company should have to pay for HEB to review it.

Chair Romprey explained that if the Planning Board waives that requirement in this situation the Planning Board would have to do it in other situations and it might not be quite as inimitable. In other words, this is a process that we started for a particular reason. If we could let you out of it, we would to let everyone else out of it. Elliott reluctantly said, "Okay."

Town Manager Burbank explained that there is a policy in place. The Town is not intending to pick on Rick Elliott and Mount Pleasant Construction, LLC, but the Town is getting sensitive now about downstream effects. Burbank explained that the Town of Lincoln has had some downstream issues by the town community center with the brook that comes down from Forest Ridge overtopping and flooding homes below. On behalf of the Town, Burbank asked HEB as its third party reviewer to be diligent on water retention. NH DES might not address that.

Elliott protested that HEB already did those calculations because Burbank asked them to. What it says is, "HEB reviewed the calculations indicating adequate consideration for onsite drainage and off site flow". In other words, Elliott's company – Mount Coolidge Construction, LLC – is letting less water off slower. Elliott complained, "So what you are saying is that that is what the rules say and you cannot *[deviate from that rule]*."

**b. Granite Curbing**

Elliott commented that the HEB requests on the first page of the HEB report are fine, however, he objected to Section 5.06 where HEB asked for granite curbing. Elliott wanted to express his opinion about granite curbing. The ordinance says vertical sloped or asphalt; it does not say granite. Elliott asked the Planning Board if they would entertain a motion to waive the requirement of curbing for the intersections.

Elliott had four reasons why he would like to not use granite or not use curb at the intersections.

1. The entire design is an open drainage.

2. It is going to concentrate water, instead of letting the water go off and be filtered the way they want it to be. It is going to concentrate water. In the summer it is going to encourage erosion. In the winter it's going to encourage freezing at the intersections which is the last place I want it to happen.
3. There is no curbing anywhere inside of the development.
4. Curbing is something for the plow to hit.

Town Manager Burbank asked if he and Bont could discuss that requirement with HEB first. Burbank saw that requirement and does not know why the requirement for curbing was in the ordinance. Burbank would like to talk with HEB and find out the reason why the ordinance would call for curbing. Elliott protested that it is the Planning Board that should decide that type of thing normally.

Chair Romprey stated that if they change the rules, the change will need to be based on information and feedback. The Board will discuss it. Town Manager Burbank urged the Board to get that feedback as soon as possible.

Elliott said that in his response to the Planning Board he would ask for a waiver on the requirement that they install granite curbing.

Robinson explained that the HEB peer review letter is just a letter to the Planning Board with HEB's recommendations. If the Planning Board decides they do not need curbing there is no waiver involved.

Elliott explained that he did not think granite curbing at intersections was an improvement for the project. If he thought curbing would improve the project he would put it in without asking the Planning Board about it. However, Elliott thinks granite curbing at intersections is a detriment not an improvement.

Chair Romprey asked Taylor Beaudin (who is also a contractor) what his thoughts on the granite curbing requirement were. Beaudin agreed with Elliott. Granite curbing at intersections "just congregates all the water".

Bont explained that if HEB is asking Elliott for granite curbing at intersections to respond to the requirement in the ordinance, then the town should have that conversation with HEB. Once McAllister from HEB knows what Elliott's concerns are about the granite curbing and McAllister looks at the project with that perspective then perhaps his recommendation would change. Based on his conversation with the Board, Elliott will inform HEB that he is asking for an exemption from that requirement and give HEB the reasons he is asking for one.

Elliott pointed out that the only source for the requirement that HEB cites is the town's ordinance or regulation. Strickon suggested there may have been a good reason for the requirement. She pointed out that the New Pines at Forest Ridge is very close to wetlands. Elliott will be putting in an enormous amount of concrete right up to the edges of the wetlands. According to Elliott, "What they want there, ma'am, is that DES wants it to drain off."

Beaudin asked Elliott, “Why is it only 50 feet *[from the intersection]*?” Elliott explained that it is only 50 feet because they want to make sure that the corner doesn’t erode away. The stone that Elliott has “...on those corners will allow that filtration to get down and clean the water. It does what it is supposed to do and it does it well.”

Elliott thinks that in this case the town specs are better waived. HEB only cites the town Road Regulations. Apparently the Road Regulations say “Major and minor collector streets require granite curbing within 50 feet of the intersection” and then they call these two “intersections”. Burbank commented that this is probably an easy thing to solve if HEB is simply reacting to our ordinance. Attorney Malia pointed out that HEB might very well say that a waiver is appropriate.

Town Manager Burbank commented that there are places in town where you see curbing and places where there is no curbing. Apparently enforcement of the requirement has not been consistent. Elliott explained that where there is curbing there is closed drainage. In The Pines at Forest Ridge, with granite curbing the water is not going to have any place to go so it is going to shoot water right out into the intersection.

Elliott commented that he has shown the location of the hydrants to the water department and fire department and “they are both very happy with it”.

**c. Fire Department and Public Works Department Concerns**

Elliott also pointed out that the Public Works Director and the Fire Chief made a comment about creating a hammerhead or a turn around. They showed the Fire Chief the planned turn around and the Chief “is happy with us”.

*Elliott showed Chair Romprey where the hydrants were on the map.*

Town Manager Burbank acknowledged that Fire Chief Ron Beard and Jarod were in. He pointed out the 140 foot what turned into being a driveway from the hammerhead. The Fire Chief said he was fine with that. He can get his fire equipment and apparatus in and back out.

Chair Romprey suggested that Elliott attempt to resolve the two main issues he has with Town Manager Burbank.

**B. Rescheduling the Joint Meeting of the Planning Board and the Board of Selectmen on Monday, August 11, 2014, at 5:30 pm.**

Robinson reminded the Planning Board to change the date of the joint meeting of the Planning Board and the Board of Selectmen for a site visit of the proposed site of the Skate Board Park. Chair Romprey suggested that as many Planning Board members as possible go on the site visit with the Selectmen to the Skate Board Park on Monday, August 11, 2014. Town Manager Burbank suggested that the two boards meet at 5:00pm at the Town Offices and go over together. The Board of Selectmen will open the meeting and then go to the site.

**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 Planning Board will be heard only during a scheduled public hearing when all interested parties have the opportunity to participate.

**VIII. ADJOURNMENT**

**Motion to end the meeting.**

**Motion: OJ Robinson**

**Second: Jim Spanos**

**All in favor. (5-0)**

*The meeting was adjourned by 7:30*

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Respectfully submitted,

Wendy Tanner, Planning and Zoning  
Recorder

Dated: July 23, 2014



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R. Patrick Romprey, Chairman