

North Smithfield Zoning Board of Review
January 14, 2014, 7:00pm
Kendall Dean School
83 Green St., Slatersville, RI

The Chair called the meeting to order at 7:08 pm.

1. Roll Call

Present: Chair William Juhr, Scott Martin, Mario DiNunzio, Paul Pasquariello and Vincent Marcantonio. Absent: Vice Chair Steve Scarpelli. Also present was Building and Zoning Official Robert Benoit, Assistant Town Solicitor Stephen Archambault, Town Solicitor James Lombardi and Town Planner Robert Ericson.

2. Mr. Juhr made disclosure of no compensation or pension credits are received by the board members.

3. Approval of minutes, December 10, 2013.

Mr. Marcantonio made a motion to approve the minutes of December 10, 2013. Mr. Martin seconded the motion, with all in favor.

4. Election of Officers: Each year the board elects its officers the first meeting of the year. Nominations for 2014 Chairman: Mr. DiNunzio nominated Mr. Juhr, seconded by Mr. Marcantonio. Nominations were closed. Roll call vote was as follows: YES: Mr. Pasquariello, Mr. Martin, Mr. Marcantonio, Mr. Juhr; Motion passed unanimously, with a vote of 4-0.

Nominations for the Vice Chairmanship for the 2014 zoning board: Mr. Scarpelli was the Vice Chairman for the past year. Mr. DiNunzio nominated Mr. Scarpelli, seconded by Mr. Martin. Nominations were closed. Roll call vote was as follows: YES: Mr. DiNunzio, Mr. Marcantonio, Mr. Pasquariello, Mr. Martin, and Mr. Juhr. Motion passed unanimously, with a vote of 5-0.

Nominations for the Clerk: Scott Martin was the Clerk for the past year. Mr. DiNunzio nominated Mr. Martin, seconded by Mr. Pasquariello. Nominations were closed. Roll call vote was as follows: YES: Mr. DiNunzio, Mr. Marcantonio, Mr. Pasquariello, Mr. Juhr and Mr. Martin. Motion passed unanimously, with a vote of 5-0.

5. Continuation of the Application by Valley Alliance for Smart Growth, Inc., (VASG) appeal of the Zoning Official and Planning Director's decision to deny the complaint against Dowling Village, LLC. VASG alleged non-compliance of the Town of North Smithfield's Major Land Development approval. The allege non-compliance involves the Town approval's terms and conditions, the Zoning Ordinance/Soil Erosion and Sediment Control, and this subdivision Land Development and subdivision Regulation.

Mr. Archambault stated at the last hearing date, there were two matters before the board. The first matter involved an appeal from the Zoning Officer decision regarding the VASG, and the vote was to dismiss that appeal. The second issue is an appeal from the Town Planner with respect to VASG's appeal, and the public meeting was closed, and it was 2-2 vote, which means the motion failed. That is the issue tonight.

Mr. Archambault said for procedural purposes – the board could proceed in a manner that gets into the merits of the argument because the motion failed last time. The hearing had been closed to public comment, and the board took a vote on the matter. Mr. Archambault suggested the hearing be open to the attorneys who are the advocates for the parties and not back to public comment. Mr. D'Ovidio is the moving party, and would have a right to present his case and his argument. Mr. Kelly's office also, through Bucci, has a new set of arguments. Mr. Archambault stated that any motion to reconsider can only be made by a member of the original four who voted. Then there would have to be a new motion either to approve the application or deny the application, and then that would have to get a second to be voted on. That's with respect to the 45-day issue from before. If none of that happens, the board can proceed, and listen to the applicant and VASG and what their argument is because the old motion failed on the 45-day rule.

Mr. D'Ovidio asked the four members that were at the last meeting to reconsider the motion to dismiss Valley Alliance's appeal of the Zoning Officer's decision. The planner matter is a motion that was voted in favor of the motion to dismiss, and the appeal was dismissed. Mr. D'Ovidio asked the board to reconsider. New information as part of the SWPPP requirements is that there is a reporting, that Bucci Development needs to provide an annual report, the water quality report, the SWPPP annual report, a copy to DEM, a copy to the town, and a copy to Valley Alliance. The 2013 annual report was just received. There is partial compliance with the allegations of the violations that VASG alleged in the complaint, what Mr. Benoit and Mr. Ericson ruled on in their decision. If the board were to reconsider and deny the motion, Valley Alliance is in a position to look more towards the legal issue which, is whether or not the town of North Smithfield has a legal obligation to enforce SWPPPs. Mr. Lombardi indicated last time, he disagrees with the DEM letter that says its concurrent jurisdiction, and that there is an enforcement obligation on behalf of the town. The town maintains they don't have a legal obligation with respect to some sedimentation issues not being properly addressed. Mr. D'Ovidio presented the motion in written format, for the record.

Mr. Juhr entered this as Exhibit P9.

P9) - Document dated at the top left corner, hearing date January 14, 2014, Town of North Smithfield, Valley Alliance for Smart Growth, appellate, versus Town of North Smithfield, appellee, versus Bucci Development, Incorporated, intervenor.

Mr. D'Ovidio stated the primary issue does the town have the legal responsibility and authority to enforce the SWPPP. The town has maintained that they have no legal responsibility, or authority to go and inspect the substantive issues. From the point of the decision that DEM has sole and exclusive jurisdiction to inspect, enforce, and otherwise deal with the SWPPP; the town does not have that authority and they allege that they don't have the resources. Mr. Lombardi stated DEM had no finds of damages.

Mr. Goodier on behalf of Bucci Development, stated there is no reason to revisit the last decision made at the last hearing to dismiss the appeal filed with respect to Mr. Benoit's decision. Bucci has completely fulfilled its obligations pursuant to all of the approvals. They can go to Superior Court and request a declaratory judgment with respect to the rights under these contracts and approvals. That is the appropriate forum and/or to go to the town council and request that certain legislation or ordinance be enacted to create this mechanism or appellate process to have the board decide legal questions.

Mr. Archambault cited the 45-day rule issue from last time. The scope of the hearing is restricted to the appeal that's been presented, whether the board agrees with Bucci or whether the board agrees with VASG. Testimony is presented around the jurisdiction of who oversees the enforcement of SWPPP right now, and that is within the scope of the appeal from the town planner. The town planner's denial was based largely upon the non-compliance with the 45-day rule.

Robert Ericson, Town Planner was sworn in. Mr. Ericson stated this appeal was not taken in 45 days as per both state law and our local land development subdivision regulations. It was very clear that the 45 days starts with the submission to the town clerk. That would have made it expire sometime in March, last March. This has been almost a year now, this cloud hanging over the town of Dowling Village. Last December, a letter was sent to Brian Lafaille, the PE for DEM, and said that we're concerned now about new sedimentation from dust, dust control issue, which had been probably their biggest problem.

A letter or email was received from Eric Beck, stating: The operator may rely on the department for assistance in enforcement of MS4 provision if, of the construction site, if the construction site fails to comply with local and state requirements of the permit and the non-compliance results, or has the potential to result in significant adverse environmental impacts. What that means is if you call us in, we're not going to do as much for you, even, as we would do for ourselves. In fact, while they were writing this letter, they sent out an inspection team to check the site and found that it had no violations, it had no deficiencies, and that was the end of that. They responded and gave us this principle that if we have to come out for anything you ask for, you're not going to get the same level of enforcement that we would give to ourselves.

It's our position that exclusive refers to the fact that we were excluded at every level. We were excluded from the negotiations between Valley Alliance and Bucci and the Department of Environmental Management. DEM didn't even want to see our reports. DEM does their own inspections, does their own enforcements on five-plus, and they exclude town participation.

Mr. Pascarelli asked who did the inspections. Mr. Ericson said they hired an engineering firm, Pare Corporation, and go out on a weekly basis or more if there is an issue that comes up. Mr. Ericson goes out with the inspector, probably once every two months, just to keep tabs of how things are going. The reporting goes to planning. The annual report is a different issue. The annual SWPPP report does not embody all of Pare's inspections and doesn't go into an annual report. That's separate from SWPPP compliance. That's state law and they have to enforce it.

Mr. D'Ovidio said he only wanted a motion to reconsider. He presented documentation to show that on October 22nd, there were two violations. An inspection is done by DEM, and five issues were found of non-compliance. They conclude by saying, please be aware the RIPDES program, DEM program is currently involved in this case, referral to the DEM office of compliance and inspection for formal enforcement. You need to do something within seven days. Mr. D'Ovidio submitted a letter dated October 3rd, 2012 from the DEM, certified mail to Brian Bucci, the president, of their inspections, and identifying five deficiencies that they said, if you don't fix, we're going to come out and do formal enforcement. I just want to make it totally clear that everything is not perfect up there.

Mr. Jühr entered this Exhibit.

P10) Letter dated November 19, 2012 on the State of Rhode Island Providence Plantations Department of Environmental Management letterhead, Interoffice Memo, to wetlands file 07-0236, from Alisa Richardson, PE, principal engineer, Dowling Village water monitoring study is the subject. Ten page document.

Mr. Jühr entered this Exhibit.

P11) Department of Environmental Management letterhead, dated October 3, 2012, certified mail, addressed to Mr. Brian Bucci, President of Bucci Development. The subject is Dowling Village, North Smithfield, Rhode Island, RI DEM, freshwater wetlands permit number 07-0236. Three page document.

Mr. Archambault said one point of clarification, for a legal analysis to keep this on track procedurally. Mr. D'Ovidio has made his point about his allegations of prior non-compliance. You heard Bucci's objection. I think procedurally now, you should get to the deeper merits of why Mr. D'Ovidio wants you to reconsider the motion.

Mr. Jühr stated we have before us a motion to reconsider the motion to dismiss the building official's decision that was voted on at the last meeting. He asked the Board if they wanted to make a motion to reconsider this motion to dismiss. Hearing no motion, the appellate's motion to reconsider dies with a lack of a motion.

Carolyn Shumway was sworn in.

Mr. Archambault stated that Mr. D'Ovidio seemed to put the board on notice that tonight they didn't feel that this was the right forum for relief at this juncture, and they're going to regroup, re-file the notice to Mr. Benoit, go to the EPA, take other measures, and now they're going to continue with that train of thought through Dr. Shumway,

Carolyn Shumway, 76 Great Road, North Smithfield, Rhode Island. Ms. Shumway said she had no issues with this board. This appeal was entered for substantive reasons and not frivolous ones. They have real concerns with the storm water issues of Dowling Village and the lack of town enforcement on these issues. The lack of enforcement affects the drinking water at Reservoir 3 and Crook Fall Brook. One-fourth of the residents in this town depend on that water for their drinking water. It matters for the health of Booth Pond, one of the town's top ten conservation resources, both the land trust and the town are entering to buy that, hopefully it will close next week. Concerns about the drinking water because of residents' alleged problems with their water

after Dowling Village blasting as noted by the Valley Breeze. Mr. Albert Breean (phonetic) is here, and he would be willing to make a statement on this issue because of the homeowners that can't move back into their house because their drinking water is contaminated. The black-and-white issue of non-compliance of the SWPPP, the fresh water well was permitted in town approval, because the developer did not put groundwater wells in place prior to construction. It's black and white. DEM wrote that letter in November last year, that's why we filed the complaint in December last year, and they finally put them in. Three years after construction is already in place. They can't possibly satisfy bringing in a baseline because they brought it in two years later.

Ms. Shumway said we had concerns about the sediment because of the lack of timely response by the construction firm to Pare Engineering sediment concerns. On average, Pare Engineering did a good job, but there is a difference between inspection and enforcement. Pare Engineering did the inspection, duly noted the problems. Those reports went nowhere for almost six months, until checked with the planner, and then he finally started sending them to DEM, they were going nowhere. They were just going to the planner, and then I started to request copies, and copies went to me. I calculated how long it took the contractors to respond to the Pare's thoughtful and thorough inspection. It took two months on average for major violations that Pare, deficiencies that is Pare noted, two months. A complaint was made because of our concerns about the sediment due to the Pare reports, and also because our experts documented sedimentation on the wildlife, the snakes at Booth Pond, and the plants at Booth Pond.

Finally, we had concerns about the sediment due to the black-and-white issue, again, of non-compliance by the developer to do what was required in the SWPPP, which was two lines of silt fence because it was such a sensitive area. They almost never had two lines. There's one place where it's behind the Lowe's where they have two lines. I just looked at the current reports, but almost everywhere else, they had one line even though they required two. They were required not to use hay bales because hay bales have invasive species in them, and because Booth Pond is a unique habitat. They used hay bales. They were required to use straw bottles, which are those sausage (phonetic) things you might have seen in Massachusetts, you might have seen them, they're heavy, they're weighed down, and they're very good for sediment. They never used them; I never saw sediment straw bottles.

Ms. Shumway stated we tried to work with the town for over a year to address these concerns to no avail. We e-mailed the town planner repeatedly, to get the water quality reports when they were due, the town never initiated it, the town was party to that, the town, DEM and Valley Alliance. The reports didn't come on time. We tried to settle. In good faith, we tried to settle. We filed the appeal in February, we met with the Town Solicitor, we had a letter from our attorney noting the confirmation that we tried to settle, which is why we did not follow through with taking it to this case, and we met with the developer's engineers, DiPrete. We wanted to have the town acknowledge their responsibilities under the MS4 permit, which is their obligation under their storm water permit to enforce. It's the town's obligation. I called the EPA and they are astonished the town is not doing anything. So, the settlement discussion is over because the town refused to concede that they're responsible for enforcing SWPPPs despite DEM's legal counsel stating that they are.

Now, despite our good and decent board, we have been confronted in this appeal process by the following: a zoning officer who repeatedly assured us, verbally, all three of us, verbally and in writing, that our notice of appeal was complete. You have seen that copy, last week. Our notice of hearing was complete. The zoning solicitor then says that our notice is incomplete. How does an average resident deal with this? The zoning officer told all three of us that everything is there. We had it in writing that everything is there. The confirmation that our notice of appeal and our notice of hearing was complete and was conveniently missing from the record. The same page that certified in the zoning officer's writing was complete and appears to be whited out because a different copy was used by Mike Kelly's office that doesn't acknowledge that they said the hearing is complete. The zoning officer who delayed the hearing past the 45 days, it wasn't our fault, the delay of the hearing, and the reason in February why we stayed it was because we had in good faith trusted that we were working with a settlement with the town, and so we stayed the notice of appeal.

The zoning officer doesn't even have the abutters list which we filed in February. Conveniently, Mike Kelly's office has that same exact abutters list. Now how does that office get the abutters list that we filed in February but it's not in the record? Then we have a town solicitor who assures us that the town will not initiate dismissal of the appeal while the town planner is whispering in the ear of the zoning solicitor; then we have a zoning solicitor so biased last time that he initiated the argument to dismiss the subdivision plan of appeal, even Kelly's office was not requesting to dismiss the subdivision plan of appeal. I have never in the ten years of doing this seen a zoning solicitor so biased that he would push to initiate dismissal of an appeal when neither the town nor the intervenor is asking for that.

The remaining issue that the construction company is still not addressing sediment problems in a timely manner. It's clear that sediment is not being addressed. We have come to the conclusion because of the bias here of the way we've been treated, that it is impossible to get the town to do the right thing at this level, and we will now pursue enforcement with the higher agencies.

Mr. D'Ovidio formally withdrew the appeal, the motion of the planner, the zoning administrator.

Mr. Juhr asked Mr. D'Ovidio if he was withdrawing the decision of the town planner and Mr. D'Ovidio said correct. That was our allegation that the final plan approval required full compliance with the SWPPP, and we're not able to effectively demonstrate the non-compliance and/or violations of the SWPPP. They violated their final plan approval. So, we are going to be withdrawing this appeal.

Mr. Lombardi stated he spent more time on this case than any other issue that's been in town trying to resolve this. He read: VASG is preparing a settlement proposal, this is February 21st, 2013, VASG is preparing a settlement proposal which we intend to submit to DiPrete Engineering and this was never submitted. This should have been resolved back in February of 2013. So the town did not sit on their hands. I disagree with Ms. Shumway's statements, and I disagree that we didn't do a lot to try to resolve this.

6. Mr. DiNunzio made a motion to adjourn at 8:37 pm. Mr. Pasquariello seconded the motion, with all in favor.