LIPB Minutes 2008-02-19
Attachment #2

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Date: Tue, 19 Feb 2008 12:35:38 -0500

From: "Rob Crawford" <rcrawford@bernsteinshur.com>

Subject: RE: Planning Board

To: "EMILY JACOB" <coveview@verizon.net>

CC: jnag70@maine.rr.com

Emily:

Summary of performance dnd defect guarantees and inspection fees follows. I copied Jim so he is apprised of your questions and since he is the official involved in reviewing and helping establish the amounts of the performance and defect guarantees and inspection fees.

Article 11, Section G(j) requires a proponent of a subdivision to demonstrate adequate financial and technical capacity to meet the standards for a subdivision.

Financial Capacity.
Usually the financial capacity is demonstrated through the submission of letter from a bank or other financial institution. The letter should (and generally do) include the following:

1. Authored by an officer of bank lending or similar financial institution (usually a VP, sometimes the President),
2. Officer attests to past and ongoing positive relationships with developer
3. Officer attests to creditworthiness of developer
4. Officer states the estimated cost of the proposed development and attests that developer has financial means to secure that amount of funds as necessary to support the expected costs of the development as demonstrated by account or other experiences of the bank or institution with the developer

Such letters are always a little waffly because the bank does not want to have the letter be construed as loan commitment letter. However, the Town is within its rights to secure solid evidence of financial capacity.

Technical Capacity.
To demonstrate technical capacity, developers usually provide the planning authority a letter summarizing his or her experience or the experience of his or her engineers, contractors, architects. etc. with such development projects. Will the applicant be his or her own general contractor or is he or she planning to use some one else's services, who will be his or her contractors? The idea is to ensure that the development will be completed professionally and with some degree of dispatch.

Performance and defect guarantees.
Performance guarantees are financial resources to ensure that that construction of required improvements, once commenced can be completed if the developer calls it "quits" before the project comes to completion. Defect guarantees are for use later on if an improvement needs to be fixed or replaced some period after the construction is completed. Both resources are to ensure that in these cases the Town does not have to foot the bill to pay for the costs of completion or repair.

The performance and defect guarantee provisions under your ordinance, Article 11, Section I and J, are drafted to secure the installation and operation of what are known as "public improvements" such as required roadways, walkways, piers, required drainage and erosion control measures and improvements, required landscaping or vegetative buffering, lighting, etc.

Both of these guarantees are required to be set up before the final approval of a subdivision (by release of signed plat, see Article 11, part I.)but are usually not negotiated finally until everything else in a proposed project has been reviewed, refined and all but finally approved.

The performance guarantee can be in the form of funds, a letter of credit or bonds. The performance guarantee must be maintained until the project is completed and cannot be released until the defect guarantee amount is funded. Usually there is a succession of one by the other at a mildly reduced amount, but it all depends on the estimated costs of fixing versus replacing a covered improvement.

Section I(6) incorporates in the performance guarantee amount the estimated expenditures required for the completion of improvements that may be required for a project outside of those specified in Section I. It also allows the board to waive imposition of a performance guarantees under limited circumstances. It is not exactly clear what elements or criteria the board is authorized to waive though the ordinance seems to read that a waiver is only applicable to the requirements under subsections J(3) and J(4), and further, only when the developer has a proven track record of satisfactory performance and also has sufficient financial capability. I usually recommend that waivers of performance or defect guarantees not be granted as to do so leaves the Town at risk if the unexpected happens.

Inspection Fees
The ordinance also includes the requirement for the developer to fund the costs of inspections. These terms are fairly typical in subdivision ordinances. The amount of the deposit required, how overages are to be handled, the refund process of left over fees, etc. are all specified in the terms of Article 11, Section J(7) of the ordinance.

Please let me know your and Board questions or concerns.

Regards.

Rob Crawford

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From: EMILY JACOB [mailto:coveview@verizon.net]
Sent: Thursday, February 14, 2008 10:34 AM
To: Rob Crawford
Cc: Janet Davis
Subject: Planning Board

Morning Rob and Janet:

The PB is still working on the preliminary review of the requirements of the site plan and subdivision application from Mr. Wary. (Ripley's Believe it or Not).