

**Town of Epsom
Zoning Board of Adjustment
1/19/11**

In Attendance: Glenn Horner, Chairman; Rick Belanger, Vice Chairman; Mark Riedel (Alternate); John Dodge, Planning Board Liaison; Alan Quimby; George Carlson; Mike Hoisington; Darlene Phelps Recording Secretary

Also in Attendance: Jeffrey Brem; Dan Chasse; Rachel Goldwasser; David Fiorentino; Michael Cretella; Jay Hickey; Mike Gruette; Scott Snedeker; Ken Stiles; Larry Barton; Fred Potter; Len Gilman; Joe Connelly; Rob Topik; Simon Leeming; Cindy Belanger; Andrew Walton; John Klose

7:00 PM Glenn opened the meeting and introduced the members of the board. Glenn explained the procedure for the meeting. Minutes of 1/4/11 were reviewed. Rick made a motion to approve the minutes as amended. John seconded the motion. All in favor.

Case 2010-03 (Coldan Landholdings, LLC) - [Continuance Hearing] Dan Chasse of Coldan Landholdings, LLC has applied for a Special Exception in accordance with Article II, Section C. [Table of Uses] Part 19a [Multi-Family Residence (three units or more)] to permit the construction of nine (9) multifamily townhouses, each containing ten (10) single family units, as a clustered development on adjoining properties of over 170 acres. The properties are located on the Suncook Valley Highway (Rte. 28) in the Residential/Agricultural and Residential/Light Commercial Zones and are identified on Epsom Tax Map R7 as Lots 2, 5, 13, & 16 and on Tax Map U11 as Lot 22.

Glenn gave a brief history on this case. Dan Chasse said he reviewed the draft decision from our last meeting and is mostly agreeable to it. One issue is that he does not want the road to be private. He feels that for safety reasons he wants public road, not a private road. He also doesn't want to use the entire frontage along Route 28 in order to create a private road, in case there is an opportunity to expand in the future. He does not want to limit his opportunity for further development by using his entire frontage along Route 28. Glenn stated he could come back for a variance in the future, but Dan doesn't want to do this.

Dan also asked about the expiration of the Special Exception of 24 months. Glenn indicated that there should not be a problem to extend that expiration date to 36 months. Glenn stated that he understands Dan's concerns about the public vs. private road, and the Board will take those concerns under advisement, but also stated that Dan has the right to appeal any conditions that may be placed upon the decision.

Glenn asked if there are any members of the public in favor of the proposal. Being none, Glenn asked if there are any members of the public opposed. Being none, Glenn asked if Jay has any input. Jay suggested that in order to meet the needs of the applicant, the road could be built to town specs, and it be kept as a private road until the time that there is further expansion and the applicant could then ask for it to be accepted as a public roadway. Glenn explained that in the future, he could request that the road be accepted as a public roadway and then he would have the frontage that he needs for commercial development. Mark expressed concern that this appears that the Board may be promising something they cannot guarantee will be approved in the future. There was a brief discussion about the wording for the decision, which may need to be sent to Attorney Soltani before a final decision is made.

Dan suggested dedicating the road as a public road with a clause that makes him responsible for all maintenance until further development is done in the front.

Glenn passed out copies of a draft decision he has prepared.

The Special Exception will be granted with the following conditions:

- 1. Approval of the multifamily townhouse complex (Complex) shall be obtained from the Epsom Planning Board through Non-Residential Site Plan Review application;**
- 2. Existing Lots 2, 5, 13, 16 referenced on Tax Map R7 and Lot 22 referenced on Tax Map U11 shall be merged and reconfigured into:**
 - a. One multifamily residential lot comprised of a minimum of 8 developed acres containing the Complex with a minimum of 300 feet of existing public road frontage and 80 acres of backland restricted from further development.**
 - b. The remainder of the property (approximately 82 acres) as a separate lot reserved for a future use consistent with the Epsom Zoning Ordinance regulations.**

A notice of merger/reconfiguration document shall be submitted for review and approval by the Epsom Planning Board. The approved document shall be recorded in the Merrimack County of Registry of Deeds. A copy of the document shall be provided with application for zoning compliance (building) permit;

- 3. The maximum number of dwelling units within the multi-family development shall be restricted to 40 units or less as determined by the Epsom Planning Board in accordance to the Epsom Town Zoning Ordinance (Article III, Section G Residential Single and Multi-Family Residence Requirements, Subsection 3 Multi-Family Residences with Three or More Units, Subsection "c" Minimum Lot Size and Overall Density);**
- 4. A minimum of twenty percent (20%) of the dwelling units within each building shall contain 1 bedroom with the remaining units containing 2 bedrooms. All building requirements contained in Epsom Town Zoning Ordinance shall be met (i.e. Article III, Section G Residential Single and Multi-Family Residence Requirements, Subsection 3 Multi-Family Residences with Three or More Units, Subsection "e" Building Requirements);**
- 5. A private road shall be constructed to provide access to the Complex from NH Route 28S meeting or exceeding all Town Road specifications. The private road shall be maintained by the Complex owner;**
- 6. The residential dwelling access driveways off the private road and parking lots for multi-family residences shall be in accordance with the Epsom Town Zoning Ordinances for the multifamily residential lot (Article III, Section G Residential Single and Multi-Family Residence Requirements, Subsection 3 Multi-Family Residences with Three or More Units, Subsection "i");**
- 7. A reserved subsurface disposal site or sites shall be located on the property. The Epsom Planning Board shall approve the location of the reserved field(s) based upon suitable engineering data provided by the applicant;**

8. **Water supply (capacity and quality) shall meet or exceed the requirements of NH Department of Environmental Services. The well shall have a wellhead protection radius of not less than one hundred and fifty (150) feet. A reserve well site shall also be designated on the property. State approval of water supply shall be provided to the Epsom Zoning Compliance Officer prior to the issuance of the Zoning Certificate of Occupancy. Water quality testing shall be completed at a minimum once each calendar year and results provided to the Epsom Health Officer;**
9. **An environmental assessment of the properties long term potential as a water supply for the Complex shall be provided to the Epsom Planning Board for their review and approval.**
10. **The existing sand and gravel excavation area shall be re-graded sufficiently to remove unstable slopes creating safety hazards on the property to the satisfaction of the Epsom Planning Board;**
11. **The traffic study for this proposal shall be reviewed and further evaluated by the Epsom Planning Board. If deemed necessary, it shall be supplemented by a separate study as permitted under RSA 674:39-a. Should further study determine improvements along this section of NH Route 28S are warranted, the improvements shall be completed prior to or at the time of application for Zoning Compliance (building) Permit;**
12. **Emergency (i.e. fire, police, and ambulance) personnel access to each residential unit in the Complex shall be designed to minimize their response time and optimize their capabilities. The design shall include a fire lane and fire truck turn around at the northwest corner of the Complex driveway. Emergency personnel access improvements shall be reviewed and approved by the Epsom Planning Board;**
13. **A full storm water facility shall be designed and constructed to contain and control runoff such that no additional runoff from that currently existing from the site is created following completion of Complex construction. The design shall be reviewed and approved by the Epsom Planning Board;**
14. **A financial capital reserve account shall be established by the Complex owners to cover the cost for road maintenance, annual maintenance and replacement of the fire protection systems, water supply, septic systems and other items that may be deemed necessary by the Epsom Planning Board. A copy of the legal documents establishing the means for financial security shall be approved by Town Counsel prior to issuance of Zoning Certificate of Occupancy;**
15. **Temporary water pollution controls during construction shall be utilized that meet or exceed the best management practices for site developments and shall be approved by Epsom Planning Board. Special attention shall be given to runoff impact and mitigation plans for Lot 28 referenced on Tax Map U11;**
16. **The exterior lighting within the site shall be designed for “downward” illumination and shall be designed to have minimal intrusion into the neighboring parcels unless the property owner consents in writing;**

- 17. The backland created as part of the final Complex design shall be protected from further development with allowance for passive public recreational access such as hiking and other similar uses as approved by the Complex owners. Access through the restricted land for hunting shall be permitted with limitations as deemed necessary by the Complex owners;**
- 18. A firewall shall be provided between each unit and each unit shall have its own fire sprinkler system. The design of a sprinkler reserve holding tank for each building (or group of buildings) shall be approved by the Epsom Fire Department and shall be operational prior to the issuance of the Zoning Certificate of Occupancy. An annual inspection of the fire protection system shall be undertaken in conjunction with the Epsom Fire Department;**
- 19. A fire protection cistern shall be constructed within the developed area of the Complex. The number of tanks, capacity and location shall be approved by the Epsom Fire Department and established on the site plan. Engineering hydraulic analysis shall be provided to the Epsom Planning Board and Epsom Fire Department to establish the method(s) for filling the cistern tanks. Annual inspection of the cistern(s) shall be made or as directed by the Epsom Fire Department;**
- 20. All necessary State and Federal permits shall be obtained prior to commencing project construction. Copies of these permits shall be provided to the Zoning Compliance Officer prior to or at the time of application for Zoning Compliance (building) Permit;**
- 21. The applicant shall proceed to “Non-Residential Site Plan Review” with the Epsom Planning Board within twelve (12) months from the date of this “Record of Decision;” and all town fees, including but not limited to escrow for construction oversight shall be paid as deemed necessary by the Epsom Planning Board;**
- 22. This special exception shall expire two (2 years) from the date of this “Record of Decision” should no substantial development occur meaning and intending to include the completion of the binder coat on the access drive, approval of the septic design through New Hampshire Department of Environmental Services and the construction of the first building foundation;**
- 23. This “Record of Decision” shall be recorded at the Merrimack County Registry of Deeds, Concord, NH with reference to the property’s deed(s) book and page number, and copy of the recorded document provided to the Epsom Zoning Compliance Officer prior to or at the time of application for Zoning Compliance (building) Permit.**

After some further discussion regarding the road, it was decided to close the Public Hearing and consult Attorney Soltani for input.

George made a motion to close the public hearing. Rick seconded the motion. All in favor.

The board will meet on February 1st at 7:00 PM to make a final decision.

8:05 PM Case 2010-06 (Wolverine) - David A. Gruette of Wolverine Management Inc. has applied for an Administrative Appeal of the Zoning Compliance Officer's (ZCO) findings with regard to conditions placed on a prior Variance and Special Exception approval (Case 2008-09). Specifically the appeal seeks to overturn the ZCO's decision to limit the business development on the property to that which does not increase the scope and impact of the permitted use. The applicant also seeks to change the conditions placed on the approval of Case 2008-09. The property is located on the north side of Route 4 (Dover Road) within the Residential/Commercial Zoning District and is identified on Epsom Tax Map U-6 as Lot 16.

Glenn stated that he received a request from the applicant's attorney for a continuance. George made a motion to continue to March 1, 2011. Alan seconded the motion. All in favor.

8:10 PM Case 2010-07 (Fiorentino) - David Fiorentino has applied for an Administrative Appeal of the Zoning Compliance Officer's (ZCO) findings with regard to conditions placed on a prior Variance approval (Case 2008-18). Specifically the appeal seeks to overturn the ZCO's interpretation of conditions to limit the type of commercial vehicles which can be stored on the property and parking restrictions on the truck containing bulk paving/seal coat material. The applicant also seeks clarification or modification as necessary of the conditions pertaining to commercial use placed on the approval of Case 2008-18. The property is located on White Birch Lane within the Residential/Agricultural Zoning District and is identified on Epsom Tax Map U-2 as Lot 4.

Glenn stated that tonight's meeting was properly posted in two public places and in the Concord Monitor. All return receipts have been received back except for Eleanor Noyes, which had an incorrect address.

Rick Belanger recused himself as he is an abutter. Mark will be sitting in as a voting member for this case. Mark indicated that Orr & Reno is his corporate attorney; however he is able to be impartial.

Attorneys Rachel Goldwasser and Mike Cretella from Orr & Reno are representing Dave Fiorentino. Atty. Goldwasser highlighted that there are 2 conditions from the ZBA prior decision of 12/16/08 that they are requesting modification of, and/or overruling the Administrative Decision and the fines that have been assessed.

Atty. Goldwasser stated that the only visible abutter is the Ponderosa Enterprises Transfer Station and the Belanger property. She presented pictures of the Ponderosa property to show what Dave can see from his property.

Atty. Goldwasser would like to address Condition # 3. **"The vehicle containing bulk paving/sealing material shall be parked on a paved location which is bermed to contain spillage of this material."** She indicated that when the truck has material in it, he parks on the bermed area, which is located beside the garage but does not park there when the truck is empty. He only parks his truck on that bermed area during warm months – as there is no material in his truck during the cold water months. During the winter months, Dave removes the berm (a sand berm) and he is able to plow that paved area. If he parks the truck beside the garage with the berm in winter months, it becomes a snow/ice issue. Atty. Goldwasser said she had a discussion with Jay Hickey about placing a condition requiring the truck to be parked on the bermed area from June 1st to October 1st. Glenn's concern is that there is no way for the ZCO to know if there is material in the truck. Jay agreed that the timed bermed area is a workable solution. He also stated that the ZBA did not specify that he needed to put the bermed area beside the building; he could move it to another area. Atty. Goldwasser said that it would be a

lot more convenient for Dave if he could park beside his garage so he is closer to his tools, etc.. Mark expressed concern that this may burden the town further by requiring Jay to do more on-site inspections.

Glenn asked if there are any members of the public who would like to comment in favor of what the applicant has requested.

John Klose is in favor of requiring the truck to be parked on the bermed area from June – October only. Fred Potter asked if the material is not toxic, then why can't it be parked anywhere on his property? Glenn replied that there is the possibility of it contaminating the river. Larry Barton said if it is placed on the road to begin with, then it makes no sense that is being prevented from being put on the ground. Ken Stiles commented that the material goes on the ground anyway, and he also is concerned about the ZBA is opening itself up to a lawsuit. Andrew Walton stated that Jay Hickey only investigates when he receives a complaint. Rob Topik asked about the bermed area. Dave replied that the bermed area is paved, with the garage being one side and sand being the other 3 sides of the berm.

Glenn asked if there are any members of the public who would like to comment that are opposed to Dave's request.

Simon Leeming represents the Belangers and his concern is that this issue has been ongoing for 2 years.

Jay Hickey said the issue came about because of the wording of the Planning Board condition, which stated that the truck had to be parked on the bermed area at all times. When Jay went up there & saw the truck not parked on the bermed area, it caused concern.

8:55 PM – 9:02 PM Break

Atty. Goldwasser stated that the second issue is the description of the commercial use of the site. She said that Dave's business "Fiorentino Asphalt" is comprised of many different elements, which is necessary in this economy. She said all of his businesses are operated under one name, with the same employees, one checking account and the same Tax ID number. She said a truck was seen on the property that was lettered with "Spray Foam Insulation" however it also has the Fiorentino Asphalt sticker on it. They are not asking for any physical changes to the property or any change in hours. They are asking to be allowed to continue operating his business which encompasses the following functions: Seal Coating & Paving, Landscaping, Masonry (concrete sidewalks, patios, etc.), Insulation and Other General Contractor Services.

Atty. Goldwasser asked that the ZBA clarify if the conditions were based upon the one business, and if so, is asking the Board to allow the other businesses to be operated on his property.

In reviewing the prior decision, it is clear that Dave did not indicate there was more than one function (seal coating) being operated under that business name.

Atty. Goldwasser calls attention to the fact that the ZBA did find that Dave met all the criteria necessary in order to grant the variance for a commercial business. She agreed that although there may be a different label on the truck, it is still the same business. She also stated that this is not a typical Residential/Agricultural area, as there is a Transfer Station right next door.

Atty. Goldwasser reviewed the 5 elements:

1 – Not contrary to Public Interest... the ZBA already agreed that it was not contrary and the applicant is not asking for anything more than was already granted.

Dave is employing people of Epsom. Dave's business is complementary to the business in his neighborhood instead of spreading them around town.

2 – Spirit of the Ordinance.... Does not impact character of neighborhood, does not impact the environment.

3 – Substantial Justice...if the variance is denied, it has to be weighed against the benefit to the community. In her opinion, the change of the conditions will not be detrimental to the community.

4 – Value of Surrounding Properties – This minor change which will allow for more variety of services that Dave can provide, will not change the number of vehicles, or the amount of traffic, and so will not diminish the surrounding property values.

5 – Hardship – The ZBA previously found that Dave was permitted to operate his business at this site; The proposed uses all fit together with the site of the Transfer Station next door; The denial of this change will not bring this property back to a traditional Residential/Agricultural area; The proposed use must be reasonable – and Dave is certainly being reasonable in trying to keep his business going in a tough economy and continue to make a living.

George asked where the insulation material comes from. Atty. Goldwasser replied that the material is typically delivered in 50 gallon barrels which are delivered 2 at a time, and are either loaded directly into the truck or into the garage and Dave can load his truck later. George asked where he stores his masonry supplies. Dave said he only has a couple bags of mortar on site and a very small amount of bricks. He only purchases enough material to complete a job, and sometimes has a very small amount left over.

Attorney Goldwasser requests that the ZBA overturn the Zoning Compliance Officer's decision & revoke the fines assessed. Glenn indicated that the ZBA does have the authority to overturn the ZCO decision, but does not get involved in the issuance of or revoking of fines. It was suggested that if the ZBA acts on the ZCO's Administrative Decision, he can bring that action before the BOS for reconsideration of the fines.

Dave said that the masonry work, the landscaping & the paving/seal coating are all very closely related. He said he is just trying to keep him & his employees busy. He is agreeable to have a condition limiting his ability to sell to customers on site.

Mark asked for MSDS on the spray foam insulation. Atty. Goldwasser noted that Dave has attended certification training for spray foam insulation.

Glenn asked for public input in favor of the 5 elements of Dave's business. Rob Topik noted that there is a provision in the ordinances that allows a typical homeowner to own a pick up truck with tools. Len Gilman lives on Old Turnpike Road and feels it is a very commercialized area of town and does not think that this change will impact the area.

Glenn indicated that one issue is that this is being operated on a private road.

Ken Stiles agrees with Len Gilman.

Glenn asked for public input opposed to Dave's request. Atty. Leeming stated that the Belangers have owned the Ponderosa property since 1985. In 2008, when Dave came before the ZBA – the Belangers were in support of his request.

Atty. Leeming provided a copy of the Registration for a Trade Name which was submitted to the State of NH in October 2008. This Trade Name application notes that the only business function is the asphalt seal coating. There is no mention of any of the other 4 functions.

He stated that Dave went to the Planning Board for Non-Residential Site Plan Review.

He said that Dave contends that this will not increase the intensity of land use; however he feels it will most definitely increase the impact. He does not agree that more benefit should be given to Dave under the pretense of the state of the economy.

Atty. Leeming passed out copies of the criteria that must be met. He noted that under Unnecessary Hardship – it states that the property must have special conditions that distinguish it from other properties in the area. Atty. Leeming says that Dave has already received a variance and does not meet these criteria.

He stated that one of the conditions was that the business only be operated from 6 AM – 6 PM Monday-Saturday. The Belangers have kept a log beginning in March 2009 which notes that there have been 85 times that he was not in compliance. Attorney Leeming requests that the ZBA not loosen the conditions on this property. He also stated that there have been 23 letters going back and forth between Dave & Jay Hickey. Attorney Leeming also stated that an Approval for Construction on a septic system was obtained, but he does not see that that septic system has been installed and wonders if a properly installed septic system is on the property.

Attorney Leeming said that in regard to the private road issue, the Belangers do the majority of maintenance to the road.

Attorney Leeming contends that Dave Fiorentino has not acted in good faith many times. Attorney Leeming said that the commercial business has negatively impacted the residents in this area. The problems began after the building was built. Attorney Leeming presented pictures that show work being done on the property on Sundays and various work being done.

Attorney Goldwasser said in response to Atty. Leeming's client's complaints about working after hours; the things that are noted as violations are not functions of his business... working on a sedan in his garage on a Sunday, having an electrician in his house all night, or burning trash after 6 PM are not business functions... he was not driving his asphalt truck after 6 PM at night. These things were done as a homeowner on his own property.

She stressed that Dave really needs to be able to operate the spray foam insulation business in order to earn a living. She also said he has not acted in bad faith – he has kept open communication throughout this entire process. She reiterated that this property is unique because of where it is located and the businesses that surround it. She also stated that even if the business and commercial use were not there, all of the things that are being complained about are things that are allowed as a homeowner.

Glenn stated that the problems all arose after allowing a business to be operated on a residential piece of property, and now Dave is requesting that the ZBA allow him to do more on this property.

Jay Hickey stated he received calls about noise on Sundays, and sometimes there was nothing he could do about it. He said he has only fined Dave for not parking his truck on the bermed area.

Dave said he works all week and so he does work around his house on Sundays. He said he has never operated his business outside of the allowed time ever since he was granted this variance.

Len Gilman, Rob Topik, Ken Stiles & Andrew Walton all agree that the bulk of the discussion tonight all revolves around a falling out between neighbors and that is not the issue at hand tonight. The main issue is that Dave wants to be able to operate his insulation business.

Scott Snedeker asked if the work is being done off-site, why it matters. Glenn said because it's a commercial business that has a different truck than allowed under the approved condition.

George made a motion to close the public hearing. John seconded the motion. All in favor.

Alan made a motion to meet on Tuesday, February 1st at 7PM for decision. George seconded the motion. All in favor.

10:55 PM Alan made a motion to adjourn. George seconded the motion. All in favor.