

**Haverhill Planning Board Minutes                      Feb. 26, 2013**  
**Draft Subject to Review, Correction, and Approval at Following Meeting**

1.                      **Call to Order**

Chairman Don Hammond called the meeting to order at 7:08p.m.

Planning Board members present:

    Don Hammond  
Mike Bonnano  
Tom Friel  
Tara Krause  
Mike Simpson

Bill Daley asked to be excused because of a conflicting meeting.

Also present: Ed Ballam, Clerk

There were no members of the public present.

**2. Designation of Alternates**

No alternates to designate

**3. Agenda Approval**

Tom F. made a motion to accept the agenda as presented. Seconded by Mike S. The vote was unanimous.

**4. Approve Minutes of Previous Meeting**

Skipped over – perhaps it was oversight – should be done at the March 26 meeting.

**5. Scheduled Public Appearances**

None

**6. Correspondence/Communications**

Ed B. mentioned there was communications from the Department of Transportation regarding the removal or replacement of the bridge on Mill Street. There will be a public hearing on that topic on Feb. 28 at the Woodsville Emergency Services building 6:30 to review the project and 7 p.m. for a public hearing.

**7. Reports of Committees**

None

**8. Pending Business**

Jack Brill Case was discussed. Mike S. asked if the business needed to be done in non-public session. Ed B. said he had spoken with the attorney, Darrell Hotchkiss, and it did not need to be done in non-public.

Ed B. said Darrell Hotchkiss provided material to support the board's decision which should become part of the record and read into the minutes of the meeting and discussed as necessary.

The board voted to briefly go into a non-public session to discuss procedure on a legal matter at 7:15 p.m. The board came back out of non-public session at 7:27 p.m. with no decisions made.

The board then read and added to the record the decision and background information regarding Jack Brill's lawsuit.

On February 27, 2012, the Haverhill Planning Board (the "Board") received a letter from Attorney Colin W. Robinson on behalf of Jack Brill, Trustee of the Brill Family Trust ("Mr. Brill") requesting that ... "the Board ratify its 1987 action, and cause the p(l)an (sic) to be signed so that Jack can record it."

The action requested to be ratified was the Board's approval of a three-lot subdivision application at a meeting held on August 18, 1987. The application was for the creation of two addition lots within an approximately 1.5 acre tract - one containing 11,475 sq. ft. ±; the other containing 12,350 sq. ft. ±. The third lot comprised the remainder of the original tract. Although the area of the third lot has never been shown on any plan submitted to the Board, it is assumed to be approximately 41,500 sq. ft.

The Board considered Mr. Brill's request at its February 28<sup>th</sup> and March 20<sup>th</sup>, 2012 meetings, and voted unanimously to deny the request at the March 20<sup>th</sup> meeting. In the Notice of Decision denying the request dated March 27<sup>th</sup>, 2012, the Board cited that it found no statutory authority or authority in the Haverhill Subdivision Regulations to grant the request.

Mr. Brill appealed the Board's denial to the Grafton Superior Court. The Court vacated the Board's decision by Order dated October 16, 2012 on grounds that the decision did not satisfy "the planning board's statutory responsibility to identify the particular aspects of the proposed project that it found were deficient under the governing criteria." The Order directed the Board to consider whether it has equitable authority to consider the equitable doctrine of laches, and if so whether laches is applicable to the present matter.

The Board reconsidered its prior decision on the basis of the available records and submissions from Mr. Brill's 1987 three-lot subdivision application, a prior decision in which the Board authorized the recording of a final plat prepared by a licensed surveyor in 1987 but not certified and submitted by a licensed surveyor until 2007 for a two-lot subdivision approved in 1986 (the 1987 Sanel

subdivision), and the issues presented in Mr. Brill's subsequent Superior Court appeal.

The Board made the following findings:

1. The Haverhill Subdivision Regulations were initially adopted in 1970, and subsequently amended in 1982 and 1991.
2. The Subdivision Regulations in effect at the time of the 1987 subdivision approval were the Regulation as amended in 1982 (the '82 Regulations").
3. The Board's actions with regard to the Brill 1987 three-lot subdivision are governed by the '82 Regulations and the New Hampshire statutes governing planning and land use regulation in effect in July and August, 1987.
4. The Brill 1987 three-lot subdivision was permissible under the '82 Regulations which contained no minimum lot size requirements, but not permissible under the Regulations as amended in 1991 (the '91 Regulations') which established minimum lot sizes based upon soil classification, since the three lots created by the 1987 subdivision did not comply with the minimum lot size requirements of the "91 Regulations".
5. The 1987 Sanel subdivision was in full compliance with both '82 Regulations and the '91 Regulations when the Board in 2007 authorized the recording of the Sanel subdivision final plat in 2007.
6. Under Section 3.5.2.d of the '82 Regulations, the following was required to constitute a Completed Application:
  - “d. Three paper print copies of the Preliminary Layout in accordance with and accompanied by the information required in Section 5.” *See '82 Regulations attached as Exhibit A.*
7. Mr. Brill satisfied the Preliminary Layout requirement of the '82 Regulations on August 18, 1987, the date on which his Completed Application for a three-lot subdivision was accepted and deemed complete by the Board, and the Brill three-lot subdivision approved by the Board. *See Application for Subdivision Approval attached as Exhibit B and Haverhill Planning Board Meeting Minutes - Tuesday, August 18, 1987 attached as Exhibit C.*

8. Section 3.7.3 of the '82 Regulations requires that the Board review approve a recordable final plat.
9. Section 6 of the '82 Regulations sets forth final plat requirements. *See attached Exhibit E - Page 13 of Exhibit A.*
10. Section 3.3.3 of the '82 Regulations provides that after review of the Preliminary Layout, the Board shall "...request that the subdivider prepare a final Plat as required in Section 6."
11. There is no audio or written evidence in the Board's records of the Brill 1987 three-lot subdivision that Mr. Brill was requested to prepare a final Plat. When in 2012, Mr. Brill first asserted the existence of the 1987 three-lot subdivision approval, no member of the Board serving twenty-four years previously was available for inquiry as to whether any such verbal or written request was made.
12. The Preliminary Layout drawn by Mr. Brill in 1987 and traced in 2012 by a licensed surveyor, Harry Burgess, P.E., does not comply with the final plat requirements of Section 6.1 of the '82 Regulations. The Board notes, however, that compliance is easily achievable at this time.
13. Neither the '82 Regulations nor state law provide a required period within which a final plat must be submitted to the Board for review and approval.
14. The Brill 1987 three-lot subdivision application and the Minutes of the August 18, 1987 Meeting indicate that the Preliminary Layout plan submitted at that meeting was revised to address the Board's concern at the July 21, 1987 public hearing that access to proposed Lot #2 be from Old Dartmouth College Highway (Ralston Road), and not at its southeast corner from the "old town right-of-way off the Swiftwater Road".
15. At all times relevant, the authority of the Board to authorize the filing of a final plat is subject to the filing requirements of the Grafton County Registry of Deeds which are governed by the following pertinent provision of RSA 674:37:

“ ...no plat shall be filed or recorded unless it is prepared (emphasis added) and certified by a licensed land surveyor since 1981...”

16. Mr. Brill has never submitted a final plat of the '87 three-lot subdivision required by the '82 regulations to be in compliance with RSA 674:37.
17. Mr. Brill prepared the final plat he submitted twenty-four years after his 1987 three-lot subdivision approval.
18. Mr. Brill is not licensed land surveyor.
19. The final plat Mr. Brill prepared in 1987 with a materially qualified "certification" added by a licensed land surveyor in 2011 is not recordable because of the RSA 634:7 provision that "no plat shall be filed or recorded unless it is prepared and certified by a licensed land surveyor since 1981."
20. The certification of the 2011 final plat by a licensed land surveyor, Harry J. Burgess, LLS, is materially qualified in that it states only that the plat "is an exact copy of a plat...prepared by Mr. Brill", and that "(T)his plat is stamped for recording purposes only".
21. The stamp of a licensed land surveyor does not circumvent the statutory recording requirement that the final plat be both prepared and certified by a licensed land surveyor to be recorded.
22. In 2011, Mr. Brill submitted to the Board a survey compliant with RSA 634:7 (the "2011 Survey") properly prepared and certified by Harry J. Burgess, LLS in connection with a lot line adjustment proposed by Mr. Brill. *See attached Exhibit F.*
23. The 2011 Survey showed a proposed adjustment to the boundary between a single 1.5 acre lot (which Mr. Brill subsequently maintained in his 2012 Request to the Board was not a single lot, but rather three separate lots created by the 1987 subdivision approval) and an adjoining parcel at the southeast corner of Brill Hill Road and Ralston Road acquired as a separate parcel by deed dated January 17, 1986 and recorded in the Grafton County Registry of Deeds at Book 1584, Page 902 (the Brill Homestead Parcel).
24. Both the 1.5 acre lot and the Brill Homestead parcel are shown on a plan recorded in the Grafton County Registry of Deeds as Plan No. 436. *See attached Exhibit G.*
25. The 2011 Survey prepared and certified by a licensed land surveyor discloses a number of distance discrepancies with the 1987 final plat prepared by Mr. Brill in 1987 and traced by a licensed land surveyor in 2012.

26. 1987 final plat provides no internal common boundary courses between any of the three lots. No pins are shown to establish the corners of any of the three lots to be created to by the approved Brill 1987 subdivision.
27. In contrast to the 1987 final plat, the 2011 Survey establishes actual courses and distances for most of the perimeter boundaries of the single 1.5 acre tract approved in 1987 for subdivision into three lots.
28. Much of the effort and expense for a licensed land surveyor to properly prepare and certify a recordable final plat of the 1987 three-lot subdivision properly should already have been incurred for the work previously performed by Mr. Brill's licensed land surveyor in the development of the 2011 Survey.
29. The 1987 final plat and Plan No. 436 indicate the existence of two structures on Lot #3. The 2011 Survey indicates that one of these structures has been removed.
30. The 2011 Survey 1987 indicates that a single structure exists on Lot #2 on the 1987 final plat.
31. The 2011 Survey indicates that a structure has been erected mostly upon Lot #1, but significantly encroaching onto Lot #3 on the 1987 plat. *See attached Exhibit H mark-up of 2011 Survey showing boundaries of Lot #1 in red and boundaries of Lot 3 in blue.*

### Discussion

Mr. Brill's requests are clearly based on his desire to complete the three-lot subdivision approved in 1987, since the '91 Regulations would prohibit the subdivision of the 1.5 acre tract into no more than two lots. The Board notes that in 1987, RSA 674:39 exempted "every subdivision plat approved by the planning board and properly recorded in the registry of deeds (emphasis added) from all subsequent changes in subdivision regulations...for a period of 4 years after the date of approval..." (currently, the exemption is five years).

If promptly after securing subdivision approval in May, 1987, Mr. Brill had submitted a recordable plat under RSA 674:37 to the Board for signature, and the signed final plat had been recorded, he would likely have had the benefit of RSA 674:39's protection from the '91 Regulations' minimum lot size requirements.

However, a final subdivision plat was never submitted to the Board, nor was it ever properly recorded.

Despite Mr. Brill's failure to record a final plat prior which is a clear pre-requisite for RSA 674:39 protection, the Board considers the denial of that protection to be inequitable. This issue of equity was not presented in the Board's 2007 Sanel subdivision decision to authorize the recording of a final plat prepared by a licensed surveyor (since deceased) and certified by licensed surveyor. The 1987 Sanel subdivision fully complied with the original, the '82 and the '91 Regulations, i.e. the protection afforded by RSA 674:34 was unnecessary.

The Board's notes that even if Mr. Brill had recorded a final plat, the protection of RSA 673:39 is conditioned upon certain conditions including:

1. That active and substantial development or building have taken place within 12 months. The only development contemplated by the Brill 1987 subdivision development was the installation of a septic system and an access from Old Dartmouth College Highway to serve the mobile home placed on Lot #2. Both appear to have been done within a reasonable period following subdivision approval, albeit not final plat approval;
2. That the development does not violate regulations which protect public health standards. It is the Board's understanding that the permanent structures within the 1987 subdivision are served by public water and sewer systems, and that the mobile home utilizes the septic system approved as a condition of the 1987 subdivision approval.

#### Laches - Abandonment.

The Board next considered whether Mr. Brill's having "slept on his rights" for twenty-four years should deny him the benefit of his subdivision approved, but never properly completed, in 1987. Application of the equitable doctrine of laches is "a question of fact for the trier of fact."

The Board considered the following in concluding that laches should not preclude him from finalizing his 1987 three-lot subdivision:

1. Although Mr. Brill has had the benefit of having the three lots taxed as a single parcel and has never asserted that they should have been taxed separately, he has been taxed on the buildings and improvements on all three lots. The Town of Haverhill was not in

error to tax the three lots as a single parcel, since the 1987 subdivision was never completed, and although recorded intra-familial transfers of the single parcel have been made since 1987, those transfers were of a single parcel with no reference to separate lots. Furthermore, none of the three lots were separately transferable in the absence of a recorded survey prepared and certified by a licensed land surveyor and signed by the Board.

2. Except for Mr. Brill's disregard of the common boundary between Lot #1 and Lot #3 by locating a structure on Lot #1 which encroaches significantly upon Lot #3, Mr. Brill's development of the 1.5 acres parcel is in general conformity with the development contemplated for the parcel approved for subdivision into three lots twenty-four years ago. The Town of Haverhill does not have a zoning ordinance which might otherwise establish minimum setbacks.
3. Mr. Brill has not developed two or more of the three lots in such a manner as would indicate his abandonment of the subdivision he proposed in 1987.

#### Equitable Jurisdiction.

The Board notes that RSA 674:36, II (n) specifically authorizes the adoption of subdivision regulations which may:

“ Include provision for waiver of any portion of the regulations. The basis for any waiver granted by the planning board shall be recorded in the minutes of the board. The planning board may only grant a waiver if the board finds, by majority vote, that:

(1) Strict conformity would pose an unnecessary hardship to the applicant and waiver would not be contrary to the spirit and intent of the regulations;

or

(2) Specific circumstances relative to the subdivision, or conditions of the land in such subdivision, indicate that the waiver will properly carry out the spirit and intent of the regulations.

As stated previously, neither the Regulation nor State law include a provision establishing a time period within Mr. Brill was to submit a recordable final plat. Although there is no provision for the Board to waive, the Board maintains that the plain language of RSA 674:36, II(n) recognizes the jurisdiction of the Board to consider equitable matters.

Section 7.1. “Power to Waive” of the ‘82 Regulations and Section 8.A. “Modifications” of the current Regulations provide:

“The requirements of the foregoing regulations may be modified when, in the opinion of the Board, specific circumstances surrounding a subdivision...indicate that such modifications will properly carry out the purpose and intent of the master -plan and these regulations.”

The Board recognizes that its authority to enact subdivision controls is strictly confined to the terms of the enabling legislation (*see Lemm Dev. v. Town of Bartlett, 133 N.H. 618 (1990)*). Here, the enabling statute and the Regulations themselves provide the Board with equitable authority and the circumstances under which that authority may be exercised.

The issue of the equitable jurisdiction of the Board arose in the Board’s Answer to Mr. Brill’s appeal to the Grafton Superior Court in asserting as a defense the equitable doctrine of laches one which the Board no longer is asserting. Mr. Brill’s attorney has stridently advised the Board’s counsel that he denies that the Board has equitable jurisdiction. His attorney may overlook the facts that a Board vested with equitable jurisdiction can either grant or deny equitable relief. It is ironic that equitable jurisdiction is a pre-requisite for the granting of Mr. Brill’s requests - whole or in part.

The Board’s authority is strictly limited to that provided by the enabling statute. The Board does not have authority to waive the statutory requirements of RSA 674:37. The Board does not have the authority to waive the RSA 674:39 requirement that a final plat of an approved subdivision be recorded to afford the subdivision four-year protection from subsequent amendments to subdivision regulations.

### **Decision**

**TED**      Request to Ratify 1987 Three-Lot Subdivision Approval:      **GRAN**

Request to Sign Mylar of 2012 Final Plat      **DENIED**

However, the planning board agreed to have the chairman of the board sign a new final plat reflecting the approved 1987 configuration subject to the requirement of Section 3.7.3 of the 1982 Regulations that the Board review approve a recordable final plat. Further, the board requests the submission of a final plat prepared and certified by a licensed surveyor including:

1. Meets and bounds of the boundaries of all three lots;
2. The location of pins set:
  - a. at the corners and along the northerly boundary of Lot #1;

- b. at the northeast and northwest corners of the 15' "drive"
- c. at the northeast corner of Lot #2; and
- d. at the point where the arc along the northerly boundary of Lot #2 extending easterly from the "drive" intersects with the remainder of the northerly boundary of Lot #2 extending in a straight line to its northeast corner.

- 2. A notation that the "drive" on Lot # 1 is the sole access to Lot #2.

Don H. asked for a motion to ratify the 1987 subdivision approval. Motion was made by Mike S. and seconded by Tom F. The vote was unanimous.

Don H. asked for a motion to deny the request to sign the 2012 mylar tracing of the original 1987 final plat. Mike B. made the motion which was seconded by Mike S. The vote was unanimous.

9. **New Business (Applications)**

none

10. **Other New Business**

none

11. **Public Appearances (Not Previously Scheduled)**

None

12. **Comments of the Clerk**

None

13. **Comments of the Planning Board**

Don H. had one comment about the meeting date. He would like to have the board meet on the fourth Tuesday of the month. That way it will not conflict with the North Haverhill Precinct meeting which meets the third Tuesday. He said he usually attends the precinct meeting. He said if there is no conflict, he would like to move it to the fourth Tuesday. A polling of the board said there were no conflicts. The board asked that Bill D. be consulted about the new meeting date.

Ed B. said a new schedule will have to be made.

Don H. said he does not think the board will need two meetings a month as it had in the past.

14. **Other**

None

15. **Adjournment/Next Regular Meeting**

The next meeting will be March 26. The meeting adjourned at 8:10.

**Respectfully submitted,**

Ed Ballam, Planning Board Clerk