

**TOWN OF POUND RIDGE PLANNING BOARD
MINUTES OF THE MEETING
Thursday, April 12, 2012**

Board Members Present: *Clay Fowler, Chairman*
 Andrew Brodnick
 Peter Efremenko
 Judy Kennedy
 Steve Kushner
 Sam Mlynar

Also present: *James Sullivan, Town Attorney*
 Michael Landler, Planning Consultant
 Karen Taft, Administrator

Absent: *John Bria*

The meeting commenced at 7:30 p.m.

Oceanus Navigation Corp., Rolling Meadow Lane and High Ridge Road, Block 9320, Lots 13 & 83. Decision on application for preliminary approval for a proposed conservation/cluster subdivision of a 105.68 acre parcel into 15 proposed lots (12 residential, 2 open space parcels and one storm water parcel. There are two existing residences on the property. The property is located in an R-2A and R-1A zoning district.

Previous meeting dates: Informal hearings on 06/24/10, 09/23/10, 12/09/10 Board walked property: 04/12/11, 04/30/11
Hearings on: 01/27/11, 02/24/11, 04/26/11, 05/26/11, 06/23/11, 09/22/11, 10/27/11, 01/26/12, 02/23/12, 03/22/12
Public hearing on preliminary opened: 09/22/11 Public hearing on preliminary closed: 10/27/11
Application denied: 03/22/12
Extension of time granted for decision: 11/17/11, 01/26/12, 02/23/12, 2-wk. verbal extension to 04/12/12

Present at the meeting were Ms. Ruth Roth, attorney, Cuddy and Feder LLP, and Mr. Jim Ryan, John Meyer Consulting.

Mr. Fowler said that the special meeting was held to discuss the decision of March 22, 2012. Mr. Sullivan said that the Board can get the resolution vacated at this meeting. Ms. Roth requested that the Board review another resolution that had been prepared by the applicant. Mr. Sullivan said no. Mr. Fowler said that discussion of the subdivision is finished unless the decision is changed.

Mr. Sullivan directed the Board to vacate what they had previously done, and then take into consideration what is now before them. Mr. Brodnick said that if they took that action, he wanted to be sure that the applicant will not take a position that having vacated the previous decision constitutes a failure by the Board to timely act, and therefore constitutes an approval by default. Ms. Roth accepted that, stating that they would prefer to have a decision rather than a denial that was based on failure to get an extension because they weren't present at the March 22, 2012 meeting. She believed that there was a lack of communication. Mr. Kushner said that it is normal to file an extension with the Secretary

of the Planning Board. Ms. Roth said that they did not ask for the extension. Mr. Sullivan said that he had asked Ms. Roth for an extension of time for decision, and she confirmed it in an e-mail to Mr. Sullivan. At that time a meeting was scheduled for April 12, 2012.

Mr. Efremenko said that, with the understanding that the Board had an extension of time to that evening, he moved that the Board vacate their decision from March 22, 2012. Mr. Kushner wanted it noted that “until that evening” includes through and including that day. Mr. Mlynar seconded the motion. Mr. Fowler polled the Board, and the voting was as follows:

Clay Fowler – aye
Sam Mlynar – aye
Andrew Brodnick – aye
John Bria (absent)

Peter Efremenko – aye
Judy Kennedy – aye
Steve Kushner – nay

The motion passed 5 – 1.

Mr. Fowler said that the matter could now be discussed. He said that there has been discussion in terms of the resolution itself, primarily focused around public access to Lots 15 and Lot 4.

Ms. Roth said that she understood the confusion concerning whether there should be public access on Lot 15, which is the issue. The Board expressed over the last couple of months that one of the reasons they supported the cluster subdivision was for the purpose of public access on Lot 15. Ms. Roth believed that the cluster plan that was submitted to the Board was consistent with §278 of the Town Law. She said that approval of the cluster subdivision should be based on all the goals and objections of that enabling statute, which was clearly set forth in the plans submitted to the Board. Ms. Roth said that her plan does not only meet those standards, but is the very essence of whether a cluster subdivision should be approved.

Ms. Roth understood the Board’s motivation, but she believed that approval of the subdivision should rely on the fact that they meet the objectives and goals of Town Law §278, which states: “cluster development enables structures to be constructed on the most sustainable portions of the property, thereby resulting in the preservation of tracks of land in their natural state.” She said that they could create 12 oversized conventional lots on the Oceanus property. A conventional plan had been submitted to the Town which was required in order for consideration of a cluster subdivision.

Mr. Brodnick said that this was not the issue. He stated that an offer was made to allow public access to Lot 15 and Lot 4 during the entire application process which was pulled out within the last 2 or 3 months of the hearings. Ms. Roth said that she had submitted a letter explaining their position after conferring with the applicant. She stated that it is his property, and she cannot bind him. The Oceanus Corporation is the only one who can bind activities, reservations or anything with respect to the property. Mr. Brodnick said that in prior meetings, the offer of public access was “on the table”. He said it is not right that any applicant who comes before a Board offers something for two years during the approval process then takes the offer off the table because the applicant’s representatives supposedly could not bind an applicant. Mr. Brodnick found this to be offensive.

Mr. Efremenko said that Mr. Brodnick had pointed out at the last meeting that this is now a different application. He recommended that the application be denied, and the applicant could submit a new application with clear terms. Ms. Roth said that there were other statements on the record that no public access would be provided. Mr. Brodnick said that no statements of this kind were made prior to 2012.

Ms. Roth explained that it is their opinion that 12 conventional subdivision lots could be established on the property, whereby they would be oversized and there would never be any open space. Mr. Fowler agreed that a conventional subdivision had been presented, but he did not agree that the 12 lots would not be subject to conservation easements. Ms. Roth said that there would be easements because there are wetlands and steep slopes on the property. Mr. Fowler said that they agree that Ms. Roth's client does not want public access. He said that this was a good time to recap where they have been over the last 10 days.

Mr. Kushner stated that Ms. Roth said that more recently than when the statements were originally made that the owner of the property said that she had no authority to offer access. Ms. Roth said that was not true. She said that Mr. Hsu wanted to make an attempt to resolve the issue, and attempt a compromise. Ms. Roth said that since the last meeting on March 22, 2012, they did attempt to have a compromise. She had a conversation with Mr. Hsu, who is currently in the Orient. Ms. Roth had met with Mr. Fowler, Mr. Warshauer and Mr. Sullivan on March 28, 2012 to formulate a compromise. The applicant then drafted a revised conservation easement containing language that they would provide access with what was considered to be "historic trails" to the public. Mr. Ryan sent a surveyor to the site to attempt to locate them. Ms. Roth said that it was found that no trails existed on Lot 15.

Mr. Kushner asked if there is no authority to offer access to either Lot 15 or Lot 4. Ms. Roth said that the issue did not include Lot 4. Statements were made throughout the process that access would be granted. Mr. Kushner asked on what authority those statements were made. Ms. Roth said that as far as she understood, there was discussion along the line of the possibility of accessibility for a cell tower on Lot 4. That possibility was aborted because there was no interest on the part of the applicant for a possible cell tower.

Mr. Fowler said that Ms. Roth's client's position is different than what they had construed it to be. Ms. Roth agreed. Mr. Kushner said that it was explicit, not construed, and it was stated. Ms. Roth said that they will have to go back and review the minutes.

Ms. Roth said that they never considered access to Lot 4. Mr. Efremenko asked why a driveway was drawn on the map providing access to Lot 4. Mr. Ryan believed it may have been drawn for testing. Mr. Fowler said that in the resolution, there is clear reference to the driveway access to Lot 4. He said that to say that no access was proposed is not true.

Aside from discussion of Lot 4, Mr. Fowler said that Lot 15 on the other hand, is a different issue in that they feel that there was communication, proof positive in fact, that there was to have been access to it. He said that this is the issue that has to be resolved.

Mr. Fowler said that what was proposed at the March 28, 2012 meeting with Mr. Sullivan, Mr. Warshauer and Ms. Roth is no longer being proposed. He had received an e-mail from Ms. Roth on April 10, 2012 stating that the contention was that there are no existing trails on Lot 15 that come from the Bye Preserve that would have granted historical access. Ms. Roth said that was what was told to her by the office of John Meyer Consulting. Mr. Fowler noted that she was referring to trail access, not access in general.

Mr. Efremenko asked when they had visited the site to look at the trails. Mr. Ryan said that he had looked at the Bye Preserve map that was on the website indicating the trail system. They verified those trails at the site. The surveyor said that the trails marked on the map do not encroach into the Hsu property on Lot 15. Mr. Efremenko said that in mid-morning on a Saturday, they may have met with people who were hiking. Mr. Ryan said they weren't at the site to observe people, only the map relative to the trails. Mr. Kushner asked the significance of whether there was or was not historical access. Ms. Roth said that the issue came up because when they met on March 28th, it was discussed that the conservation easement was to be drafted reflecting public access over historic trails.

Ms. Roth reiterated that the proposal was sent to Mr. Hsu who said it was not acceptable under the facts that Mr. Ryan was able to obtain. Mr. Fowler said that the discussion that was held the previous week was that a proposal be put forth as an accommodation that historic use of the property would be continued. He said that this was a proposal bearing from the Board's resolution that had been prepared after two years of study and discussion that required access to Lots 15 and 4 and a recreation fee. Mr. Kushner said that the resolution made no reference to historical use. Mr. Fowler said that when the proposal went before the owner, it was not unacceptable. He asked that if the Board wants to respond to the owner in a fashion that is more favorable to him, it is their decision. Mr. Fowler said that the position is fairly clear that the applicant wants no access.

Mr. Brodnick asked if the applicant would challenge any approval granted if it included public access to Lot 15. Ms. Roth confirmed that they would challenge any such approval. Based upon the applicant's position, Mr. Brodnick made a motion to deny the application on the basis that if the resolution were approved with the provision that the applicant would provide public access to Lot 15 would be an exercise in futility. Mr. Kushner asked for a small amendment including "throughout the course of the process, such access was a material inducement in the Board's consideration of approval".

Mr. Fowler noted that Mr. Landler drafted the resolution based on the Board's directions. Mr. Landler explained that the resolution was drafted with consideration of all the materials submitted and all meetings held on behalf of the application until the time of the draft resolution. He said that it was his understanding that there would be an easement granted over the open space lots, and there would be no development on those lots.

Mr. Brodnick amended the motion as follows: In light of the fact that the public access to Lot 15 was a material inducement to the Planning Board's approving the

subdivision, and since the applicant had advised them that under no circumstances will they consent to providing public access to Lot 15, he moved to deny the application. Mr. Efremenko seconded the motion.

Mr. Kushner asked Ms. Roth if the applicant had another proposal that she would like for them to consider. Ms. Roth said that she did not. She said that the record will speak for whatever transpired. Ms. Roth said that the record was established by her correspondence dated March 5, 2012 that was requested by Mr. Sullivan to state their position in writing. She noted that their position that evening was consistent with that letter. Mr. Efremenko read the March 5, 2012 letter from Ms. Roth, addressed to the Planning Board, as follows:

“On February 23, 2012 I appeared before your Board on behalf of our client Oceanus Navigation Corp., Ltd (“Oceanus”) in order to obtain Preliminary Subdivision approval. In discussing a proposed Resolution, your Board again raised the issue that was previously discussed at your January 26, 2012 meeting, with respect to including a condition in the Resolution to create a Conservation Easement. This Easement would permit the public to access Lot 15 designated as Open Space on the preliminary cluster subdivision map for passive recreation purposes.

When this issue was raised at your previous meeting, we discussed it with a representative of Oceanus and for several reasons this proposed arrangement was not found acceptable. It was felt that to create a Conservation Easement which would make Lot 15 available to the public would affect the use and enjoyment of the Oceanus property, would expose Oceanus to third-party liability and impose enormous responsibilities on them for the care and maintenance of Lot 15. I conveyed their sentiment to your Board at the February meeting and you requested that we again discuss this issue with Oceanus and see if any compromise could be reached to address the Board’s concerns.

Oceanus was again made aware of the Board’s request and we attempted to evaluate other legal arrangements which would allow the public use of Lot 15. As the Board is aware, the right to exclude someone from one’s property is an inherent property right. At the present time, Oceanus is not interested in conveying title to Lot 15. Furthermore, to create a Conservation Easement which would permit the public access to Lot 15 for passive recreation purposes, would impose an unreasonable burden upon Oceanus. We are unable to find a solution that would limit the owner’s exposure to third-party liability, assure their continued uninterrupted enjoyment of their property and not impose additional responsibilities on them with respect to the maintenance and care of Lot 15.

We have given serious consideration to your request, but have been unable to find a compromise that will satisfy Oceanus’ serious concerns.

We respectfully request that the Board review the entire record and in particular the efforts by Oceanus to be a good neighbor and develop a parcel of property that is sensitive to the environment and responsive to the needs of the community.”

Mr. Brodnick noted that Ms. Roth had mentioned “our request” for public access while in fact it was the applicant’s offer. He said that if counsel does not have the authority to make statements on behalf of their client, then they shouldn’t come before the Planning Board.

Mr. Fowler said that there was a motion on the floor that had been seconded, but is still being discussed. He noted that it was proposed that third party liability insurance, which was one of the applicant’s objections, can be resolved. The Town is willing to do so. The issue regarding limited access could also be discussed. Mr. Fowler suggested that no access for public benefits and remittance of the full recreation fee be considered.

Mr. Fowler said that over the last couple of months the applicant is developing a different opinion of what he wanted to do with the open space, differing from what was the case earlier in the process, is very discomfoting to the Board. He did understand and respected individual property rights that should be considered.

Mr. Kushner stated that he never heard any discussion in any of the meetings relating to reduction or elimination of the recreation fees. The resolution of approval that was drafted included both access to Lot 15, Lot 4 and payment of recreation fees. Thus, in weighing the relative values of access and fees, he did not see anything to balance.

Mr. Efremenko suggested that a 65-day extension be granted to explore if the applicant would agree to what was originally proposed. Mr. Brodnick said that he would be amenable to some sort of compromise, but it appeared that the applicant was not agreeable to any compromise. Ms. Kennedy said that up until the last couple of months, the applicant and the Board were working well together. She noted that a fantastic development had been proposed, and she was disappointed to see it defeated. Unfortunately, it doesn’t appear that the applicant would offer a compromise. Mr. Fowler noted that they had attempted to compromise through a reduction in the access of Lot 15 and a reduction in the recreation fees. Mr. Kushner said that in addition, any activity on Lot 4 was taken off the table by the Board. He said that the Board has made many efforts to be flexible.

Mr. Kushner asked again if there could be any compromise on the side of the applicant. Ms. Roth asked that the record be clarified. She said that they were not present at the March 22, 2012 meeting. At the prior meeting on February 23, 2012, they were given a copy of the resolution. That resolution did not include anything pertaining to access. At the February 23rd meeting, it was agreed that the matter would be put off to revise the resolution and to discuss other matters. Mr. Landler had revised that resolution, dated March 22, 2012 which was circulated to the Planning Board as well as the applicant.

Ms. Roth did not know which resolution that the Board intended to adopt. She said that the Board is asking for a compromise, but she did not understand what is on the table other than the fact that they want public access with no limitations, in terms of Lot 15. Ms. Roth also mentioned that she had presented to the Board copies of case law which involved the authority of the Planning Board to request a property right without compensation. Mr. Kushner again noted that access was not a request on the part of the Board, but an offer on the part of the applicant.

Referring to the case law that Ms. Roth provided, Mr. Brodnick recalled that in the case cited by the applicant, a Planning Board at the end of the process made a requirement of the applicant that they donate a certain amount of open space. Ms. Roth said that was correct. In addition, Mr. Brodnick said that after that case was decided, Town Law Section 278 was amended to provide that a Planning Board could require that either recreational space be placed on a subdivision or in lieu of that, that a recreation fee be paid. Ms. Roth did not agree. She said that Section 278 applies to a cluster development. Ms. Roth said that the Town is allowed to request from an applicant that they provide recreational areas on a particular property based on a map and plan that the Planning Board has created showing that recreational land is needed. Or, she said, in the alternative, if no land on a particular property is acceptable, then the Board can request cash in lieu thereof.

Mr. Sullivan said that the record indicates the facts in this case. He stated the importance of the records. Ms. Roth agreed.

Mr. Kushner once again asked, pertaining to the issue of access to Lot 15, if there was any possibility of compromise on the part of the applicant. Ms. Roth replied no. Ms. Kennedy asked if there could be if they were given an extra 65 days. Ms. Roth said that they have spent a huge amount of money and costs to retain consultants for the applicant as well as for the Town, and acquired the Santa Maria property in an attempt to preserve the nature and quality of life of the neighbors, as well as proximity. The applicant would not grant another extension of time.

Voting on the motion to deny the application, which had been seconded, was as follows:

Steve Kushner - aye
Andrew Brodnick – aye
Sam Mlynar – aye
John Bria (absent)

Peter Efremenko – aye
Judy Kennedy – aye
Clay Fowler - nay

The meeting adjourned at 9:00 p.m.

Respectfully submitted,

Karen Taft, Administrator
Planning Board