

CHRISTOPHER C. GALLAGHER
MICHAEL R. CALLAHAN
DONALD E. GARTRELL
W. JOHN FUNK
MICHAEL D. RUEDIG
ANNE G. SCHEER
DENIS J. MALONEY
DAVID A. GARFUNKEL

DONALD J. PFUNDSTEIN
ANDREW B. EILLS
DONALD R. SAXON
SUSAN B. HOLLINGER
ANDREA K. JOHNSTONE
MICHAEL D. RAMSDELL
DODD S. GRIFFITH
WALTER L. MARONEY
ARI B. POLLACK

SETH L. SHORTLIDGE
LYNMARIE C. CUSACK
JEANNE P. HERRICK
CELIA LEONARD WAGNER
INGRID E. WHITE
JAMES D. KEROUAC
JON M. GARON
OF COUNSEL
ROBERT E. KIRBY
1961-1996

March 17, 2003

N.H. Community Loan Fund
Manufactured Housing Park Program
7 Wall Street
Concord, NH 03301

RE: Pepperidge Woods
Opinion re: Subdivision of Manufactured Housing Community Build-Out

Dear Sir/Madame:

We act as counsel to the New Hampshire Community Loan Fund ("Loan Fund") in connection to the above-captioned proposed development project ("Project"). In that capacity, we provide the following analysis with respect to the proposed subdivision of the Barrington Oaks Mobile Home Park into two separate manufactured housing communities in connection with the proposed build-out of new units and a community center on a previously undeveloped portion of the property.

The Project consists of the "build-out" of forty-four (44) manufactured homes and a community center on land now owned by the Barrington Oaks Cooperative ("Cooperative"). The Cooperative purchased the land ("Property") with the assistance of the Loan Fund from PRM Holdings, LLC (owned by Mr. Peter Milnes, "PRM") in March 2002. The Property was formerly known as "Ayvaz Mobile Home Estates" and is now known as the "Barrington Oaks Cooperative". The Loan Fund is a non-profit organization that, among other things, assists the residents of manufactured home parks in the purchase of their community. The Property is benefited by a right to build out up to fifty-two (52) new sites on the Property, as permitted by a variance granted in 1973 ("Variance").¹ The Cooperative, PRM and the Loan Fund have entered

¹The history and provenance of the Variance is as follows:

On September 25, 1973, the Barrington Zoning Board of Adjustment ("ZBA") granted Ayvaz Mobile Home Estates, Inc. ("Ayvaz") a conditional Variance from Articles 7-1 through 7-4 of the Barrington Zoning Ordinance, as then in effect, to construct the Project. The Variance was conditioned upon each lot having a minimum of seventy-five (75) feet of frontage and occupying at least 7,500 square feet of land area. Ayvaz completed construction of mobile home units on 49 lots on the southerly portion of the Property.

Pursuant to the Variance, Ayvaz was also permitted to construct on an additional 52 lots on the Northerly portion of the Property. The Barrington Zoning Ordinance of 1972 was in effect when the ZBA granted the Variance. The current Barrington Zoning Ordinance was adopted in 1997. We have not reviewed the 1972 version of the Ordinance. Under the current version of the Ordinance it appears that the proposed mobile home park is located in the General District and the proposed mobile home park would be a prohibited use. See Town of Barrington Zoning Ordinance § 302.03.2 ("General District: Prohibited Uses").

GALLAGHER, CALLAHAN & GARTRELL, P.A.

214 NORTH MAIN STREET · P.O. BOX 1415 · CONCORD, NEW HAMPSHIRE 03302-1415

TEL 603-228-1181 · 800-528-1181 · FAX 603-224-7588 · 603-224-7588

gcglaw.com

memo -
3/17/2003

may, absent other countervailing considerations, enjoy the benefit of the 1973 Variance.³ See also, *Lawlor v. Town of Salem*, 116 N.H. 61 (1976) (right to non-conforming use continues for subsequent owner of land, absent abandonment or waiver); *Arsenault v. Keene*, 104 N.H. 356, 358-59 (1962).

Although no case law in the State of New Hampshire specifically addresses the issue of whether a variance, once granted, continues to run with a parcel which is subdivided, authority from at least one other jurisdiction supports the proposition that the subdivision of the Property into two separate manufactured housing communities may be done without losing the benefit of a previously approved Variance.

In the Connecticut case of *Scandia Constr. & Dev. Corp. v. Planning and Zoning Comm'n. of the Town of Ridgefield*, 2001 Conn. Super. LEXIS 3260 (Conn. Super. Nov. 16, 2001) the developer obtained a variance for nonconforming lot size and density in a five-lot subdivision. The developer completed development on four out of five of the lots at that time without using the benefit of the variance. Later, the developer sought to subdivide the fifth lot into two lots in conformance with the previously issued variance. See *id.* The fifth lot, if further subdivided, would have been out of compliance with both current zoning and subdivision lot size and density requirements. See *id.* In reversing a ZBA Order denying subdivision approval, the court held that the planning board could not deny a subdivision application on the basis of nonconformity with the municipality's zoning ordinance if a variance from the relevant zoning regulations was already obtained by the applicant. See *id.* Thus, so long as the subdivision application complied with the variance, which acted as the "applicable zoning regulation for the subject property," the subdivision application was required to be granted and the variance sustained as to the subdivided lots. See *id.*; see also *Camp v. Planning and Zoning Comm'n of the Town of Bethel*, 1995 Conn. Super LEXIS 2869 (Conn. Super., Oct. 13, 1995) (upholding lot size variance in application to subdivide parcel).

In short, the decision in the *Scandia* case supports the proposition that a variance survives subdivision of the land subject to the variance. Although that decision is not controlling law in New Hampshire, the court's rationale was based on the principle that a variance runs with the land. See 2001 Conn. Super. LEXIS 3260, at 6; see also Conn. Gen. Statutes §8-6(b). New

³ Such "countervailing considerations" could include applications of the doctrines of abandonment or waiver to invalidate the existing 1973 Variance.

Abandonment of a variance takes place when: (1) there is an intention to abandon or relinquish the use, and (2) there is some overt act or failure to act, which implies that the owner neither claims nor retains any interest in the use for which the variance was granted. See *Lawlor v. Salem*, 116 N.H. 61, 62 (1976). "The decisive test is whether the circumstances surrounding [the] cessation of use are indicative of an intention to abandon the use and the vested rights therein." *Id.* at 63.

A landowner may waive its right to a previously granted variance if the landowner expresses its interest to forego its right to the nonconforming use "in explicit language...or [through] conduct under the circumstances justifying an inference of a relinquishment of [the variance]." *NCES v. Bethlehem*, 146 N.H. 348, 354 (2001).

For reasons discussed below, we do not view future application of those doctrines as a significant threat to enjoyment of the benefits of the 1973 Variance.

a three-party agreement (the "Agreement") wherein the Loan Fund has a two year option to develop the build-out of the Project on the Northerly portion of the Property. The right to develop will revert to PRM/Mr. Milnes and his assigns if the Loan Fund defaults or fails to proceed in developing the Project in a timely fashion.

The Loan Fund has developed an extensive plan calling for construction of 44 sites and a community center on the northerly portion of the Property (the "Parcel"). On or about October 16, 2002, the Loan Fund (in the name and on behalf of the Cooperative) submitted to the Barrington Planning Board an Application for Subdivision and Site Plan Review fully disclosing the projected build-out. On December 5, 2002, after public hearing, the Planning Board granted subdivision approval for the Project, subject to certain conditions that are not material to this discussion. To date, the Loan Fund has invested roughly \$150,000 in the development of the Property, including engineering, permitting, constructing a road to the well site and drilling two wells.

Subsequently, the Loan Fund has been informed by the Barrington Oaks Cooperative that its preference is that additional units subject to the Agreement be developed and governed as a separate and independent cooperative. The Loan Fund has concluded that the most effective way of accommodating the preference of the existing Cooperative members is to subdivide the Barrington Oaks Cooperative Park into two separate parcels. The subdivision would result in one park consisting of the previously developed units in Barrington Oaks and a second parcel (i.e., the Parcel) consisting of the units built as part of the 44 unit build-out. The build-out Parcel would be called Pepperidge Woods Mobile Home Park ("Pepperidge Woods").²

The Loan Fund has requested an analysis of whether the Property can be subdivided into two separate tracts of land for the purpose of accommodating the wishes of existing homeowners without sacrificing the benefit of the approval with respect to the portion of the Property on which the build-out will take place.

New Hampshire case law follows the general rule that a variance, once granted, applies to a parcel of property, not to the party who applied for the variance. *See Carbonneau v. Exeter*, 119 N.H. 259, 262 (1979). As such, a variance "runs with the land" to any subsequent owner of the parcel. *See id.* at 263 (citing 3 R. Anderson, AMERICAN LAW OF ZONING § 18.30, at 218 (2d ed. 1977)); *see also*, N.H. PRACTICE, "Land Use Planning and Zoning": Chapter 24 VARIANCES § 24.05 (variance runs with land); *accord*, 3 K. Young, Anderson AMERICAN LAW OF ZONING, § 20.02 (1996). Accordingly, and in view of the Barrington Planning Board's approval of the Cooperative's/Loan Fund's Application for Site Plan and Subdivision Review, there appears to be no question that either the Cooperative or any subsequent owner of the land

² Alternatives to subdivision include the creation of separate cooperatives on jointly owned land, and/or the granting by the existing Cooperative of a long term ground lease to residents of the additional sites. Each of these options is viewed as less favorable to the Project than outright subdivision of the parcel.

Hampshire adheres to that principle and, therefore, the rationale applied in the *Scandia* decision may be persuasive in this state.

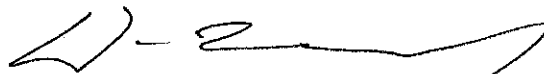
Under this reasoning, the Variance effectively establishes the applicable zoning regulation for the entire Property. By its terms, the Variance authorizes the construction and maintenance of manufactured housing sites on the Property, subject to the express conditions that “[e]ach lot shall have a minimum frontage of 75 feet and occupies [sic] at least 7500 square feet.” The Barrington Planning Board has already effectively confirmed the continued application of the Variance to the Property by approval of the Cooperative’s/Loan Fund’s Site Plan and Subdivision application to construct an additional 44 sites and a community center on the northerly portion of the Property. Thus the proposed subdivision of the Property into two separate tracts of land, each containing a cooperative manufactured housing community, appears consistent with the terms of the applicable zoning regulation of the entire parcel represented by the Variance. The proposed subdivision of the Property into two adjacent manufactured housing communities will not in any way alter the character of the use permitted by the Variance.

Moreover, the fact that the Loan Fund has engaged in site work and otherwise incurred expenses in reliance on the 1973 Variance and the recent approval by the Town of the Application for Subdivision and Site Plan Review supports the proposition that the right to construct the additional manufactured housing park is vested. *See, generally*, N.H. PRACTICE, “Land Use Planning and Zoning”: Chapter 24, § 11.02 (Common Law Vesting).

Accordingly, assuming that the proposed subdivision of the Property is itself consistent with current zoning and subdivision ordinances, that act, by itself, should not invalidate the underlying Variance to use the Property for purposes of establishing manufactured housing sites. This is so because: (i) no existing New Hampshire law supports the proposition that a proposed subdivision of the Property would result in per se invalidation of the Variance as to use of the Property to construct manufactured housing sites; (ii) there exists a solid rationale, consistent with New Hampshire law, for continued validity of the Variance; and (iii) the investment made and site work already completed by the Loan Fund may operate to vest further rights to develop the Property in conformity with the Town’s approval of the Application for Subdivision and Site Plan Review and the Variance.

Please feel free to contact us directly with your questions and comments.

Very truly yours,



Walter L. Maroney