From:	Vinton Tompkins
To:	Danica Melone
Subject:	for the members of the Planning Board for its January 10, 2022 meeting
Date:	Friday, January 7, 2022 9:28:38 AM

From: Kim Sands and Mike Tompkins; 369 Middle Hancock Road, Peterborough NH 03458

To: Danica Melone, Town Planning Officer and members of the Planning Board
Peterborough Town House, 1 Grove Street, Peterborough, New Hampshire 03458

Regarding: the proposed development of Walden Eco-Village at 360 Middle Hancock Road, parcel # R01-005-001, located in the rural district

January 7, 2022

Dear Danica and respected members of the Planning Board:

We are abutters to the proposed Walden Eco-Village development referenced above.

As you know, at the Town Meeting in May 2021 the final sentence of the then OSRD part of the Peterborough zoning ordinance was repealed. This meant that after last May's repeal, under the OSRD going forward, it is no longer possible for there to be lots smaller than ¾-acre in the rural district.

The question then arises: Is the Walden Eco-Village application, which has lots of ¼-acre in size and was initially submitted to the Planning Board before last May's repeal, "grandfathered in" for ¼-acre lots?

A careful reading of an online article from the New Hampshire Municipal Association (see excerpts below), of RSA 674:39 (see below), and of the relevant paragraphs of *Chasse v. Candia*, 132, N.H. 574 (1989) (see below) suggests to us that the Walden Eco-Village application may not be grandfathered in for lots smaller than ¾-acre.

As we noted in a previous letter to the Planning Board, it is common for there to be no "grandfathering" in such cases when there is no established use, and that seems to be the case with the Walden Eco-Village application.

As you can see, the Court's decision in *Chasse v. Candia* found that the exemption provided by RSA 674:39 from the lot size restriction of the recently enacted zoning ordinance "applies only to a 'plat approved by the planning board and properly recorded in the registry of deeds … .'"

We suggest that the Walden Eco-Village application presents a somewhat similar case. The applicant would have lots smaller than what is currently allowed under the zoning ordinance because his application was submitted prior to the zoning ordinance change adopted in May 2021, but, as was the case in *Chasse v. Candia*, his plat has neither been approved nor recorded and therefore his application may not qualify to be considered for "grandfathering."

Therefore, we suggest that the Planning Board seek a clear opinion on this matter from the Town Attorney before the Board decides on the application, and further ask that the Board and

Town Planning Officer emphasize to the Town Attorney that he thoroughly research the matter before rendering his opinion. We say the latter because it may be likely that an off-the-cuff, inadequately researched response would support such grandfathering when in fact a thorough study of New Hampshire law and precedents might well find otherwise, as we have suggested above.

We note that approving the Walden Eco-Village application without a thoroughly researched legal opinion on this matter might well lead to an appeal either to the ZBA or to the Superior Court, a process costly to the Town in time and money that could prudently be avoided.

Thank you for your attention and kind assistance.

Respectfully yours,

Kim Sands and Mike Tompkins
emails: kpsands.sands@gmail.com (Kim) and vtompkins112@gmail.com (Mike)
tels.: 603-593-2443 (Kim) and 469-305-8228 (Mike)

THREE APPENDICES:

APPENDIX I—quotation from an article in NEW HAMPSHIRE MUNICIPAL ASSOCIATION, MAY 2008, reprinted online. Reference: https://www.nhmunicipal.org/town-city-article/it%E2%80%99s-grandfathered-six-common-myths-about-nonconforming-uses. By C. Christine Fillmore, Esq. (at the time of writing, Staff Attorney with the New Hampshire Local Government Center's Legal Services and Government Affairs Department; currently with DrummondWoodsum, Attorneys at Law, 670 N. Commercial Street, Suite 207, Manchester, NH 03101; current email: cfillmore@dwnlaw.com; current phone: 603-716-2895.)

"The term 'grandfathering' is heard regularly in local government. Planning boards, zoning boards of adjustment, building inspectors, selectmen, code enforcement officers—all may be called upon from time to time to determine whether certain land uses are allowed, whether they may continue, and in what form. Often, these officials are met with the assertion that a building or business or activity is "grandfathered" and must be allowed.

"Is this true? If it is, what does that mean? Can local officials regulate a grandfathered use at all? Or, is it time to throw up our hands and walk away? In this article, we will try to provide an explanation of what grandfathering really is, and to dispel a few of the most common myths about how it works. Admittedly, many aspects of this subject are complex and have no simple solutions. There are far more questions than there are answers. However, a firm understanding of the basic meaning of grandfathering is a great place to begin."

[Ms. Fillmore then writes about what she calls six "myths." Myth #4 seems pertinent to the Walden Eco-Village application currently before the Peterborough Planning Board.]

"Myth #4: An owner with planning board approval is protected from changes in zoning ordinances or regulations.

"This is only true if the owner meets some conditions. A lot that is (a) part of an approved and recorded subdivision, may be protected from later changes in local zoning if (b) "active and

substantial construction" has begun on the project within 12 months after the approval, and (c) the project is “substantially completed" within four years after approval. RSA 674:39; Chasse v. Candia, 132 N.H. 574 (1989). These rights can also be passed on to subsequent owners of the lots. Morgenstern v. Rye, 147 N.H. 558 (2002). Of course, as with everything else involving grandfathering, it is slightly more complicated than that. If the subdivision plan was never recorded, as happens from time to time, then RSA 674:39 does not protect the owner. Such an owner might find himself in limbo between RSA 676:12 (protecting some applicants from proposed zoning changes) and RSA 674:39 (protecting those who have received approval and have recorded the plan). In addition, even grandfathered properties are not protected from later-enacted or increased impact fees. RSA 674:39.”

APPENDIX II—RSA 674:39

TITLE LXIV
PLANNING AND ZONING
CHAPTER 674
LOCAL LAND USE PLANNING AND REGULATORY POWERS
Regulation of Subdivision of Land
Section 674:39
I. Every subdivision plat approved by the planning board and properly recorded in the registry of deeds and every site plan approved by the planning board and properly recorded in the registry of deeds, if recording of site plans is required by the planning board or by local regulation, shall be exempt from all subsequent changes in subdivision regulations, site plan review regulations, impact fee ordinances, and zoning ordinances adopted by any city, town, or county in which there are located unincorporated towns or unorganized places, except those regulations and ordinances which expressly protect public health standards, such as water quality and sewage treatment requirements, for a period of 5 years after the date of approval; provided that:
(a) Active and substantial development or building has begun on the site by the owner or the owner's successor in interest in accordance with the approved subdivision plat within 24 months after the date of approval, or in accordance with the terms of the approval, and, if a bond or other security to cover the costs of roads, drains, or sewers is required in connection with such approval, such bond or other security is posted with the city, town, or county in which there are located unincorporated towns or unorganized places, at the time of commencement of such development;
(b) Development remains in full compliance with the public health regulations and ordinances specified in this section; and
(c) At the time of approval and recording, the subdivision plat or site plan conforms to the subdivision regulations, site plan review regulations, and zoning ordinances then in effect at the location of such subdivision plat or site plan.
II. Once substantial completion of the improvements as shown on the subdivision plat or site plan has occurred in compliance with the approved subdivision plat or site plan or the terms of said approval or unless otherwise stipulated by the planning board, the rights of the owner or the owner's successor in interest shall vest and no subsequent changes in subdivision regulations, site plan regulations, or zoning ordinances, except impact fees adopted pursuant to RSA 674:21 and 675:2-4, shall operate to affect such improvements.
III. The planning board may, as part of its subdivision and site plan regulations or as a condition of subdivision plat or site plan approval, specify the threshold levels of work that shall constitute the following terms, with due regard to the scope and details of a particular project:

(a) "Substantial completion of the improvements as shown on the subdivision plat or site plan," for purposes of fulfilling paragraph II; and
(b) "Active and substantial development or building," for the purposes of fulfilling paragraph I.
IV. Failure of a planning board to specify by regulation or as a condition of subdivision plat or site plan approval what shall constitute "active and substantial development or building" shall entitle the subdivision plat or site plan approved by the planning board to the 5-year exemption described in paragraph I. The planning board may, for good cause, extend the 24-month period set forth in subparagraph I(a).
Source. 1983, 447:1. 1989, 266:17, 18. 1991, 331:1, 2. 1995, 43:5; 291:7, 8. 2004, 199:1. 2009, 93:1. 2011, 215:1, eff. June 27, 2011.

APPENDIX III—Relevant paragraphs from *Chasse v. Candia*, 132 N.H. 574 (1989)

"7. Zoning—Ordinances—Vested Rights The common law doctrine of vested rights entitles a landowner to complete his object when he has made a substantial contribution or incurred substantial liabilities in good faith reliance upon the absence of regulations prohibiting the project.

"• The plaintiff next argues that RSA 674:39 provides him with a four-year exemption from the
lot size restrictions of the recently enacted zoning ordinances. We note, however, that the exemption provided by RSA 674:39 applies only to a 'plat approved by the planning board and properly recorded in the registry of deeds …' RSA 674:39. Because the plaintiff conceded that the Benjamin plan is neither approved nor recorded, the statute is inapplicable here, and provides him with no relief."