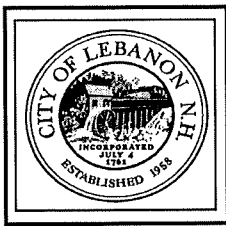


**AGENDA
PLANNING BOARD
SEPTEMBER 9, 2019**

**AGENDA ITEM #3C
CONTINUED APPLICATIONS – PUBLIC HEARINGS**

**TWIN STATE SAND &
GRAVEL CO, INC., C/O
WARREN AMES,
ELM STREET WEST
(Tax Map 116, Lots 2 & 3),
zoned IND-RA & R-3
PB2019-06-EXT**



CITY OF LEBANON ~ PLANNING & DEVELOPMENT

PLANNING BOARD

September 9, 2019 Meeting

Staff Memorandum – #PB2019-06-EXT – *continued from 8/12/19*

APPLICATION INFORMATION

Agenda Item: 3.C

Application ID#:
#PB2019-06-EXT

Application Type:
Request for Extension of Final
Major Subdivision & Conditional
Use Permit for a Planned
Business Park

Property Location:
Elm Street West, Seminary Hill, &
South Main Street,
West Lebanon

Property Owner/Applicant:
Twin State Sand & Gravel Co.
Inc.

Property Size:
+/-64.7 Ac. (116-2)
+/-26.5 Ac. (116-3)

Zoning District(s):
Industrial Rail Access (IND-RA)

Overlay District:
Wetlands Conservation District

HEARING NOTICE

TWIN STATE SAND & GRAVEL CO, INC., C/O WARREN AMES, ELM STREET WEST (Tax Map 116, Lots 2 & 3), zoned IND-RA: Request for an extension of time in order to satisfy conditions-precedent and to record the subdivision plan for the Iron Horse development, a phased 13-lot Planned Business Park and Major Subdivision, originally approved on September 24, 2012 (#PB2011-31-FMAJ). #PB2019-06-EXT

APPLICATION MATERIALS AND OTHER ATTACHMENTS

- ▶ New materials:
 - Letter from Megan Carrier, Esq., of Sheehan Phinney, to City staff, dated August 20, 2019
 - Application for Waivers
 - Attachment to Application for Waivers
- ▶ Materials included in the 8/12/19 agenda packet, available on-line at: <https://lebanonnh.gov/AgendaCenter/ViewFile/Item/6799?fileID=14352>
- ▶ Materials included in the 6/10/19 agenda packet, available on-line at: <https://lebanonnh.gov/AgendaCenter/ViewFile/Item/6460?fileID=13866>
- ▶ Materials included in the 5/13/19 agenda packet, available on-line at: <https://lebanonnh.gov/AgendaCenter/ViewFile/Item/6316?fileID=13733>

WAIVER REQUEST

Subsequent to the Planning Board's discussion on August 12th, the applicant submitted a request per Section 7.15 ("Waiver of Regulations") of the Subdivision Regulations to waive the requirements of Section 7.12.D which restricts subsequent extensions unless the City's legal counsel determines, in essence, that the applicant has obtained constitutionally vested rights to complete the project.

Pursuant to Section 7.15, the Board may grant a waiver from any portion of the regulations if it finds that (A) strict conformity would pose an unnecessary hardship to the applicant and a waiver would not be contrary to the spirit and intent of the regulations; or (B) 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.

STAFF RECOMMENDATIONS

The Board should consider whether the conditions for a waiver are met here, and if so, whether it is appropriate to waive for some definite period the time limitations that would normally apply for satisfaction of the conditions precedent.

If disposed to granting a waiver, the Board should determine the period of time within which the applicant must complete all conditions precedent or the approval will expire. The Board may also want to consider setting milestones for completion of particular conditions and/or submission of particular documents within that time.

If the Planning Board moves to approve this request, the Planning & Development Department recommends that the Planning Board approve the application with the following conditions:

1. The applicant shall comply with all conditions of the Planning Board's Notice of Action for the Twin State Sand & Gravel Co., Inc., c/o Warren Ames for the development of the Iron Horse Park, a 13-lot Planned Business Park dated September 24, 2012 and amended as April 22, 2013.
2. A Final Plat shall now be approved and recorded for the project by [*date to be determined by the Planning Board*].
3. The waiver is not granted as an extension under Section 7.12(D) of the Subdivision Regulations and no vested rights have been obtained related to this project.

Attachments

cc: Twin State Sand & Gravel Co. Inc., applicants/property owners (via e-mail)
Rod Finely, P.E., Pathways Consulting, LLC (via e-mail)
Megan Carrier, Esq., Sheehan Phinney (via e-mail)
File

SHEEHAN PHINNEY

Manchester, NH | Concord, NH | Hanover, NH | Boston, MA

Megan C. Carrier, Esq.
Direct Dial: 603-627-8103
mcarrier@sheehan.com

Reply to: Manchester Office
1000 Elm Street, 17th floor
Manchester, NH 03101

August 20, 2019

VIA EMAIL (corwin@lebanonnh.gov)

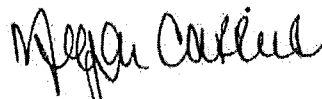
Tim Corwin
Senior Planner
City of Lebanon, New Hampshire
51 North Park Street
Lebanon, NH 03766

Re: Twin State Sand & Gravel Co, Inc., c/o Warren Ames, Elm Street West (Tax Map 116, Lots 2 & 3), zoned IND-RA & R-3

Dear Mr. Corwin:

Pursuant to the Planning Board's discussion at the August 12, 2019 meeting, as well as our correspondence on August 16, 2019, enclosed please find Twin State Sand & Gravel Co., Inc.'s Request for Waivers. Please do not hesitate to contact me if you have any questions or require additional information.

Very truly yours,



Megan C. Carrier

Enc.

cc: David Brooks
Twin State Sand & Gravel Co., Inc.
Pathways Consulting, LLC



City of Lebanon, New Hampshire APPLICATION FOR WAIVERS

Office Use Only Date Received: _____ File No.: _____

PROJECT INFORMATION

Name of Applicant: Twin State Sand & Gravel Co., Inc.
Project Name: Iron Horse Park
Project Address: Elm Street West, Tax Map 116, Lots 2 and 3, Lebanon, NH

WAIVER REGULATIONS

In order to grant a Waiver from a requirement of the City of Lebanon Site Plan Review or Subdivision Regulations, the Planning Board must find that the Waiver is justified under one of the following criteria (See Article VII of the Site Plan Review Regulations and Section 7.15 of the Subdivision Regulations):

Criteria A. 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

Criteria B. Specific circumstances relative to the site plan, or conditions of the land in such site plan, indicate that the waiver will properly carry out the spirit and intent of the regulations.

WAIVER REQUEST(S)

I (we) hereby request a Waiver from:

[You can respond in the space provided, or attach a separate statement. Please be prepared to address each request during your public hearing. You must show that you have justified granting the Waiver(s).]

1. Section ^{7.12(D)} of the (circle one) ~~Site Plan Review~~ / Subdivision Regulations. A Waiver of this Section meets (circle one) Criteria A / Criteria B because _____

2. Section ^{4.10(C)} of the (circle one) Site Plan Review / ~~Subdivision Regulations~~. A Waiver of this Section meets (circle one) Criteria A / Criteria B because _____

3. Section ___ of the (circle one) Site Plan Review / Subdivision Regulations. A Waiver of this Section meets (circle one) Criteria A / Criteria B because _____

4. Section ___ of the (circle one) Site Plan Review / Subdivision Regulations. A Waiver of this Section meets (circle one) Criteria A / Criteria B because _____

5. Section ___ of the (circle one) Site Plan Review / Subdivision Regulations. A Waiver of this Section meets (circle one) Criteria A / Criteria B because _____

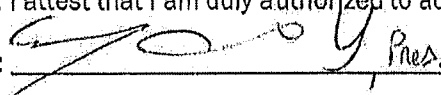
6. Section ___ of the (circle one) Site Plan Review / Subdivision Regulations. A Waiver of this Section meets (circle one) Criteria A / Criteria B because _____

7. Section ___ of the (circle one) Site Plan Review / Subdivision Regulations. A Waiver of this Section meets (circle one) Criteria A / Criteria B because _____

8. Section ___ of the (circle one) Site Plan Review / Subdivision Regulations. A Waiver of this Section meets (circle one) Criteria A / Criteria B because _____

SIGNATURE

I (we) hereby submit this application to the Planning Board and attest that to the best of my (our) knowledge all of the information on this application form and in the accompanying application materials and documentation is true and accurate. As the applicant or as the agent of the applicant, I attest that I am duly authorized to act in this capacity.

Signature of Applicant:  Pres. Date: 8/22/19

Attachment to Application for Waiver

I. Introduction

Twin State Sand & Gravel Co., Inc. (“Twin State”) hereby respectfully requests that the Planning Board grant it a waiver of the requirement, set forth in Section 4.10(C) of the City’s Site Plan Regulations and in Section 7.12(D) of the City’s Subdivision Regulations, that “[t]he Board shall grant no more than one extension for any Subdivision [or site plan], unless it determines, based on legal advice, that such extension is required in order to prevent a violation of constitutional rights” (the “Constitutional Violation Requirement”).

Twin State submits this request in connection with the extension requests it submitted on March 11, 2019 (the “Extension Requests”) respecting the Iron Horse Park project (the “IHP Project”). Specifically, during discussion of the Extension Requests at the Planning Board’s August 12, 2019 meeting, the Planning Board suggested that Twin State submit this waiver request. Twin State does not, by submitting this waiver request, waive its argument that the Extension Requests must be granted in order to prevent a violation of constitutional rights. On the contrary, Twin State continues to maintain that position, for all of the reasons set forth in the materials Twin State has provided to the City in connection with the Extension Requests as well as the arguments made verbally at the Planning Board meetings which took place on May 13, 2019, June 10, 2019, and August 12, 2019. Even if the Planning Board were to find that a decision granting the Extension Requests is not required in order to avoid a violation of constitutional rights, a waiver of the requirement that the Planning Board make that finding is appropriate under the circumstances, such that the Extension Requests should be granted.

II. Analysis

Section 7.1 of the City’s Site Plan Regulations, and Section 7.15 of the City’s Subdivision Regulations, provide in relevant part as follows:

Upon written request from the Applicant, the Planning Board may, at its discretion, waive or modify any part of these Regulations, other than those regulations required by State law. The basis for any such waiver or modification granted by the Board shall be recorded in the minutes of the Board. The Board may only grant a waiver or modification of these Regulations if the Board finds, by majority vote, that:

- A. 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
- B. Specific circumstances relative to the subdivision [or site plan], or conditions of the land in such subdivision [or site plan], indicate that the waiver will properly carry out the spirit and intent of the regulations.

All written requests for waiver or modifications of these Regulations shall address items A and/or B above, depending on which criteria are being relied upon to justify the request.

For the reasons set forth below, the requested waivers are justified under both criterion A and criterion B.

Criterion A

Assuming the Planning Board finds that a denial of the Extension Requests would not constitute a violation of Twin State's constitutional rights, strict conformity to the Constitutional Violation Requirement would pose an unnecessary hardship to Twin State and a waiver of that requirement would not be contrary to the spirit and intent of the regulations.

First, strict conformity with the Constitutional Violation Requirement would pose an unnecessary hardship to Twin State. While the standard for "unnecessary hardship" is unclear from the City's regulations, in the context of a variance request, an unnecessary hardship exists where no fair and substantial relationship exists between the general public purposes of the provision and the specific application of that provision to the property, and the proposed use is a reasonable one. Both of those requirements are met here, as follows:

- There is no fair and substantial relationship between the general public purposes of the provision and the specific application of that provision to the property. The regulations provide that the Planning Board may grant one 2-year extension for any given approval, after which, the Constitutional Violation Requirement kicks in. The general public purpose of these regulations appears to allow an applicant a reasonable amount of time to complete required conditions, without allowing applicants to obtain an indefinite number of extensions. As Twin State has pointed out in connection with the Extension Requests, these one-size-fits-all timeframes appear to have been created with much smaller scale projects in mind. As the Planning Board is aware, there are fourteen (14) conditions precedent to the signing and recording of the mylar, and ten (10) conditions precedent to the issuance of a building permit for each lot or phase of the IHP Project. The public infrastructure requirement that has been tied to this project exceeds that which is typically tied to a project of this size, not to mention the smaller projects that were likely contemplated when the Constitutional Violation Requirement was drafted. Given the substantial work that is contemplated by the conditions precedent, it is simply not possible for Twin State to complete the work within timeframes that are really only appropriate for smaller scale projects. Under these circumstances, the specific application of the Constitutional Violation Requirement to the IHP Project—a very large project to which an atypically large public infrastructure requirement has been tied—would not further the general purposes of the Constitutional Violation Requirement because, under the circumstances, it would not allow Twin State a reasonable amount of time to satisfy the required conditions. On the contrary, strict application of the Constitutional Violation Requirement in this case could have the unintended effect of discouraging future developers from agreeing to complete needed public infrastructure

improvements, for fear that failure to do so within a rigid timeframe that is not appropriate for the scale of the project could result in loss of their approvals.

- As evidenced by the Board's decision to grant the original approvals for the IHP Project, Twin State's proposed use of the property is a reasonable one.

Second, a waiver of the Constitutional Violation Requirement would not be contrary to the spirit and intent of the regulations. With respect to the spirit and intent of the Constitutional Violation Requirement, Twin State directs the Board to the unnecessary hardship analysis above. More broadly, a decision to waive the Constitutional Violation Requirement under these circumstances is consistent with the spirit and intent of the regulations as a whole. For example, the Subdivision Regulations provide that the provisions "shall be administered to ensure orderly growth and development and to supplement and facilitate the provisions of the City of Lebanon's Master Plan, Zoning Ordinance, and capital budget." Strict enforcement of the Constitutional Violation Requirement in this case will have the opposite effect by stifling a large scale redevelopment that would represent appropriate growth and development; it would also be inconsistent with numerous provisions of the City's Master Plan, which reflects support for smart growth and sustainability principles that are directly furthered by the IHP Project. The Subdivision Regulations, for their part, include the following stated purposes, among others:

- "To guide the future growth and development of the City in accordance with the Master Plan."
- "To protect the character and social and economic stability of all parts of the City and to encourage the orderly and beneficial development of all parts of the City."
- "To provide the most beneficial relationship between the uses of land and buildings and the circulation of traffic throughout the City, having particular regard to the avoidance of congestion in the streets and highways, and the pedestrian traffic movements appropriate to the various uses of land and buildings and to provide for the proper location and width of streets and building lots."

Given the benefits that the City and its residents will realize by the completion of the IHP Project, and the extent to which the IHP Project is directly in line with the City's goals as set forth in the Master Plan, all of these stated purposes, among others, would be thwarted by a decision to strictly enforce the Constitutional Violation Requirement in this case. For this reason, a waiver of the Constitutional Violation Requirement is appropriate in this case.

Criterion B

Even if Twin State were unable to satisfy Criterion A to support a waiver of the Constitutional Violation Requirement, a waiver of that requirement is still appropriate because several specific circumstances relative to the IHP Project indicate that a waiver of the Constitutional Violation Requirement will properly carry out the spirit and intent of the regulations. Specifically, as noted above, the IHP Project is large in size and scope and an atypically large public infrastructure requirement has been tied to it. Specifically, in connection with the subdivision approval, there are fourteen (14) conditions precedent to the signing and recording of the mylar, and in connection with the Planned Unit Development, there are ten (10) conditions precedent to the issuance of a building permit for each lot or phase. Given these factors, it will naturally take

more time for Twin State to satisfy all of the conditions precedent in question. All of that being said, it is the size and scope of this project, and the extent to which it contemplates completion of numerous public improvements, which support the conclusion that the project is directly in line with the City's growth and development goals as set forth in the Subdivision and Site Plan Regulations, as well as the Master Plan. Accordingly, a decision to deny this waiver request and strictly enforce the Constitutional Violation Requirement would be contrary to the spirit and intent of the City's regulations because it would discourage future developers from pursuing larger scale projects, or agreeing to complete a large number of public infrastructure improvements, which would benefit the City in a manner that is consistent with the spirit and intent of the regulations.

III. Precedential Value

The IHP Project presents an extreme situation. Few, if any, projects are comparable to the IHP Project in terms of size, number and scope of conditions precedent and/or public infrastructure requirements, and potential future benefit to the City and its residents. As a result, a decision to grant the requested waivers will not create a precedent that makes it difficult for the Planning Board to enforce the City's regulations governing extensions in the future.

IV. Conclusion

For the foregoing reasons, Twin State respectfully requests that the Planning Board grant its request for waivers of the Constitutional Violation Requirement as set forth in Section 4.10(C) of the City's Site Plan Regulations and in Section 7.12(D) of the City's Subdivision Regulations.