

# Town of Windham

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## MEMO

DATE: July 15, 2016

TO: Windham Town Council  
THROUGH: Tony Plante, Town Manager  
FROM: Ben Smith, Planning Director *BWS*  
Cc: Amanda Lessard, Planner  
Doug Fortier, Director of Public Works  
Heather McNally, Director of Code Enforcement  
Stephen Langsdorf, Preti Flaherty  
Kevin Haskins, Preti Flaherty

RE: Private Road ordinance & policy work

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Attached is draft ordinance language that specifies that when any development on a Private Way or Road results in the creation of one or more dwelling units, all Private Roads and Ways between that development and the closest Public Street must meet a Town Private Road standard.

### Overview

The Town Council discussed several changes to the Land Use Ordinance dealing with Private Roads and Ways at the meeting on June 21, 2016. Town staff members were joined by the Town's attorneys Kevin Haskins and Stephen Langsdorf via speakerphone for that discussion.

As a result of that meeting, ordinance language was sent to the Planning Board for review and recommendation relative to:

- Requiring all new Private Roads and extensions of existing Private Roads and Ways to go through site plan review with the Planning Board or Staff Review Committee, and
- Adjusting the existing Minor and Major Private Road standards so that a Major Private Road standard would apply after 5 or more lots, rather than the existing standard of 10 or more lots.

The Council also directed staff to work with the Town attorney to draft language related to the requirements for ensuring that existing private roads meet today's private road standards when new dwelling units are proposed on private roads. This was a result of the conversation around the understanding of what "grandfathered" status means relative to existing roads that serve increasing levels of home building and development. The staff memo dated June 10, 2016, was the starting point of that discussion, and is attached for reference. Note that the attachments referenced in that memo are not included in this packet.

## **Proposed Ordinance Change Summary**

### Section 800

- Change Section 802.A.11, to specify that any upgrades required in order to receive a building permit for a new dwelling unit on a Private Road or Way are subject to site plan review.
  - Please note that this proposed change is reflect by the bold, red-lined item number 11 in the middle of ordinance page number 8-3. The remaining red-lined text in Section 800 are the proposed changes that the Council reviewed in June and have been sent to the Planning Board for review. They have been left in this version of this ordinance for context.
  - The determination as to whether such upgrades would be classified as Minor or Major Site Plans would be based on the amount of Development. See Sections 805.1.c and 805.2.c, related to the Classification of Projects.

### Section 1000

- Change Section 1002.A, to add language that ensure that new homes built on Private Roads or Ways are accessed over roads that meet Town standards. This proposed language makes any applicant for a building permit that adds one or more dwelling units accessed by a Private Road or Way responsible for any required upgrades to that road or road network back to the closest Public Road.

## 801 Purpose

The site plan review provisions set forth in this Section are intended to protect the public health and safety, promote the general welfare of the community, and conserve the environment by assuring that nonresidential and multifamily construction is designed and developed in a manner which assures that adequate provisions are made for traffic safety and access; emergency access; water supply; sewage disposal; management of stormwater, erosion, and sedimentation; protection of the groundwater; protection of the environment, wildlife habitat, fisheries, and unique natural areas; protection of historic and archaeological resources; minimizing the adverse impacts on adjacent properties; and fitting the project harmoniously into the fabric of the community.

## 802 Applicability

- A. A person who has right, title, or interest in a parcel of land shall obtain site plan approval prior to commencing any of the following activities on the parcel, obtaining a building or plumbing permit for the activities, or undertaking any alteration or improvement of the site including grubbing or grading:
1. The construction or placement of any new building or structure for a nonresidential use, including accessory buildings and structures, if such buildings or structures have a total area for all floors of all structures of two thousand (2,000) square feet or more measured cumulatively over a five (5) year period.
  2. The expansion of an existing nonresidential building or structure, including accessory buildings, if the enlargement increases the total area for all floors within a five (5) year period by more than twenty (20) percent of the existing total floor area or two thousand (2,000) square feet, whichever is greater.
  3. The conversion of an existing building in which two thousand (2,000) or more square feet of total floor area are converted from residential to nonresidential use.
  4. ~~The establishment of a new nonresidential use even if no buildings or structures are proposed, that involves the~~ Development of more than twenty-five thousand (25,000) square feet of land. This includes uses such as gravel pits, cemeteries and; golf courses, ~~and other nonstructural nonresidential uses.~~
  5. The conversion of an existing nonresidential use, in whole or in part, to another nonresidential use if the new use changes the basic nature of the existing use such that it increases the intensity of on- or off-site impacts of the use subject to the standards and criteria of site plan review described in Section 812 of this Section.

6. The construction of a residential building containing three (3) or more dwelling units.
  7. The modification or expansion of an existing residential structure that increases the number of dwelling units in the structure by three (3) or more in any five (5) year period.
  8. The conversion of an existing nonresidential building or structure, in whole or in part, into three (3) or more dwelling units within a five (5) year period.
  9. The cumulative Development of an area equal to, or greater than, one (1) acre within any three (3) year period. The applicability of this section does not include the construction of streets that are reviewed as part of a subdivision application under the standards of Section 900 of this Ordinance. *For Developments of less than one (1) acre, the standards of Chapter 142 Surface Water Protection Ordinance may apply.*
  - 10. All new Private Roads and extensions of existing Private Roads and Private Ways.**
  - 11. All upgrades to existing Private Roads and Private Ways required as a condition of obtaining a building permit when no new roads or extensions are required, pursuant to Section 1002.**
- B. The following activities shall not require site plan approval. Certain of these activities will, however, require the owner to obtain a building permit, plumbing permit or other state or local approvals:
1. The construction, alteration, or enlargement of a single family or two-family dwelling, including accessory buildings and structures.
  2. The placement, alteration, or enlargement of a single manufactured housing or mobile home dwelling, including accessory buildings and structures on individually owned lots.
  3. Agricultural activities, including agricultural buildings and structures.
  4. Timber harvesting and forest management activities.
  5. The establishment and modification of home occupations.
  6. Activities involving nonresidential buildings or activities that are specifically excluded from review by the provisions of this section.

### **803 Review and Approval Authority**

- A. Application Classification. The review and approval authority for site plans shall depend on the classification of the project:
1. Major Developments. The Planning Board is authorized to review and act on all site plans for major developments. In considering site plans under this section, the Planning Board may act to approve, disapprove, or approve the project with such conditions as are authorized by this section.

2. Minor Developments. The Staff Review Committee is authorized to review all site plans for minor developments and may approve, disapprove, or approve the project with such conditions as are authorized by this Section. In addition, the Committee may reclassify a minor development as a major development, due to the scope or anticipated impacts of a project, and forward it to the Planning Board with its recommendations for Planning Board action. (*See Sec. 805 Classification of Projects*)
- B. Staff Review Committee Established. There is hereby created a Staff Review Committee. The Staff Review Committee shall consist of the Director of Planning (Planner), Director of Code Enforcement, Fire Chief, Director of Public Works, or their designees, and a designee of the Town Manager.
  - C. Operation of the Staff Review Committee. The Planner shall serve as Chair of the Staff Review Committee and shall be responsible for calling meetings of the Committee, presiding at its meetings, and maintaining the records of the Committee. In the absence of the Planner or his/her designee, the Director of Code Enforcement shall serve as chair pro tem.
    1. Attendance. If any member of the Staff Review Committee is unable to attend any meeting of the Committee, he/she shall designate another member of that department to serve in his/her place. Such designation shall be in writing and shall apply only to that meeting. This designee shall have the same power and authority as the member.
    2. Meeting Dates. The Staff Review Committee shall meet once each month as needed. The Committee may schedule additional meetings, as needed.
    3. Advertisement. Meetings of the Committee shall be advertised in the same manner as those of other Town committees and shall be open to the public.
    4. Vacancy. If a vacancy exists in any of the positions serving on the Committee, the Town Manager shall name an interim committee member with appropriate expertise in the respective department, until such vacancy is filled.
    5. Quorum. A quorum is necessary to conduct any official meeting of the Committee, and a quorum shall consist of at least three (3) members.
    6. Voting. A majority vote of the quorum is required to constitute an action (passage or denial) on any motion before the Committee. Should a Committee member need to be recused due to a conflict once a quorum is established and a meeting is in session, the meeting may proceed and the Committee may take action on any motion before the Committee with less than three (3) voting members present. In this event, the applicant shall have the right to have a vote postponed to the next Committee meeting.
    7. Minutes. The Staff Review Committee shall keep a record of its proceedings.
  - D. Attendance of Applicant. The Planning Board or Staff Review Committee shall not review any site plan application unless the applicant, or his duly authorized

representative, attends the meetings for which the application has been placed on the agenda. Should the applicant or applicant's representative fail to attend, the Planning Board or Staff Review Committee shall reschedule the review of the application to its next available meeting.

#### 804 Joint Application and Hearing

- A. If an application requires any combination of site plan review, subdivision review, or conditional use approval, the procedures for all applicable application reviews shall be met in order to initiate the fair hearing process. The procedures for the applicable reviews may occur simultaneously.

#### 805 Classification of Projects

- A. The Planner shall classify each project as a major or minor development. Minor developments are smaller scale projects for which a minor review process is adequate to protect the Town's interest. Major developments are larger, more complex projects for which a more detailed review process and additional information are necessary. The following thresholds shall be used by the Planner in classifying each project. However, the Planner may, due to the scope or anticipated impacts of a project, classify any project as a major development.
1. Minor developments shall include those projects involving:
    - (a) The cumulative construction or addition of fewer than five thousand (5,000) square feet of gross nonresidential floor area.
    - (b) Any individual or cumulative construction or addition of five thousand (5,000) square feet or more of gross nonresidential floor area within an approved subdivision.
    - (c) ~~The establishment of a new nonresidential use even if no buildings or structures are proposed, that involves the~~ Development of more than twenty-five thousand (25,000) square feet but less than one (1) acre of land.
    - (d) A new Private Road or an extension of an existing Private Road or Private Way of less than five hundred (500) feet in length within a five (5) year period.
  2. Major developments shall include projects involving:
    - (a) The individual or cumulative construction or addition of five thousand (5,000) or more square feet of gross nonresidential floor area on a lot that is not part of an approved subdivision,
    - (b) Projects involving the creation of five (5) or more dwelling units in a five (5) year period,

- (c) The individual or cumulative Development of one (1) acre or more land, unless the Development is part of a site plan application in an approved subdivision (see Section 805 A.1.b. above.)
  - (d) Projects that also require subdivision (*see Sec. 900*) or conditional use approval (*See. Sec. 500*),
  - (e) A new Private Road or an extension of an existing Private Road or Private Way of five hundred (500) feet or more within a five year period, or
  - (fe) Other projects requiring review which are not classified as a minor development.
3. An applicant may request that the Planner classify an application prior to its submission. In this case, the applicant shall make a written request for a classification. This request shall include the following information:
- (a) The names and addresses of the record owner and the applicant and the applicant's legal interest in the property.
  - (b) The location of the project, including the tax map and lot number.
  - (c) A brief description of the proposed activities in such detail as to allow a classification to be made.
4. When the Planner classifies a project based upon a request for classification rather than an application, the subsequent application shall be consistent with the activities described in the request for classification.
- (a) The Planner shall review such application to determine if the classification is still correct and may reclassify the application if the scope of activities has been changed.
- B. Within ten (10) working days of the receipt of a site plan application or a request for a classification, the Planner shall notify the applicant, and the Chair of the Planning Board of the classification of the project in writing.

## 806 Review Procedures for Minor Developments

- A. Preapplication Conference. Applicants for site plan review of a minor development are encouraged to schedule a preapplication conference with the Planner. The purpose of this meeting is to familiarize the applicant with the review procedures and submission requirements, and approval criteria, and to familiarize the Planner with the nature of the project.
- 1. Such review shall not cause the plan to be a pending application or proceeding under 1 M.R.S.A. §302. No decisions relative to the plan may be made at this meeting.
  - 2. To request a preapplication conference the applicant shall submit, at a minimum, a brief narrative describing the project, the location of the project on a US Geologic

## SECTION 1000 - ADMINISTRATION

### Sections

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### **1001 Duty of the Code Enforcement Officer**

- A. It shall be the duty of the Code Enforcement Officer to enforce the provisions of this Ordinance.
  - 1. The Code Enforcement Officer, with the advice and consent of the Town Manager, is authorized to institute or cause to be instituted by the Town Council, in the name of the Town of Windham, any and all actions, legal or equitable, that may be appropriate or necessary for the enforcement of this Ordinance; provided, however, that this section shall not prevent any person entitled to equitable relief from enjoining any act contrary to the provisions of this chapter.
- B. The Code Enforcement Officer shall be authorized to grant the following:
  - 1. Building permits,
  - 2. Certificate of Occupancy, (*See Current Building Code*)

### **1002 Building Permit**

- A. Building Permit: The Code Enforcement Officer shall not issue a building permit for the construction, alteration, enlargement, or moving of any building, structure or part thereof, unless the plans and intended use indicate that the building, structure, or premises are to conform in all respects with the provisions of this Ordinance.
  - 1. Applications for building permits required by the Building Code shall also serve as applications for permits required by this Ordinance.
  - 2. Any applicant for a building permit after [effective date] that adds one or more dwelling units accessed by a Private Road or Private Way shall be responsible for bringing all of the roads or ways from the nearest public road into compliance with the specifications for private roads in Section 911.M.5, "Traffic Conditions and Streets," notwithstanding that other lots served by the private road or way may already have been built upon. Compliance with specifications for private roads



applies to all private ways and roads from the nearest public road up to and including that portion of the road or way that provides Frontage for the applicant's lot.

**B. Submission Requirements**

1. A plan of the lot containing the following information shall be submitted to the Department of Code Enforcement to obtain a building permit:
  - (a) Building permit application form,
  - (b) Dimensions of the lot,
  - (c) Location of all existing and proposed buildings or structures,
  - (d) Location of all required yards for setback purposes,
  - (e) Location and dimensions of all existing and proposed parking spaces,
  - (f) Location and dimensions of all existing and proposed loading areas,
  - (g) Location of all exterior storage areas,
  - (h) Base flood elevation data.

**1003 Certificate of Occupancy**

- A. Certificate of Occupancy: A certificate of occupancy shall be obtained from the Code Enforcement Officer after the building, structure, or part thereof has been completed, altered, enlarged or moved, and before the same may be occupied or used.
  1. Certificate Required: A certificate of occupancy shall be required for the following:
    - (a) An increase in the number of dwelling units in a building,
    - (b) Establishment of a Home Occupation,
    - (c) Change of a nonconforming use, per Section 203.C,
    - (d) Occupancy, use, or change of use of vacant land, except for raising of crops,
    - (e) Change of use of an existing building, whether or not alterations are involved, from any use in the following list to any of the uses on said list:
      - (1) Business or Professional Office,
      - (2) Distribution Center,
      - (3) Dwelling,
      - (4) Industry, Heavy,

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## MEMO

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FROM: Ben Smith, Planning Director *BWS*  
Cc: Amanda Lessard, Planner  
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RE: Private Road ordinance & policy work

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Attached is draft ordinance language that requires all new private roads to be reviewed by the Planning Board and presents a single private road standard. The memo also offers feedback on a few Council ideas that are likely not feasible and presents the issue for discussion of when it may make sense to require upgrades of existing private ways.

### Overview

On February 16, 2016, the Town Council held a special meeting to discuss issues associated with private roads in Town. After discussing issues that have arisen in Windham the Town Council directed staff to present the Council with options regarding the policy areas which appear as numbered items below. Staff comments appear as bullet points under each item.

1. Require road damage bonds for any construction on property accessed by an existing private way (pre-2009).
  - This approach to ensuring that the state of a private way remains the same after construction activities is problematic. From a legal standpoint, the existence of a public easement in a private way would likely resolve the issue identified by the MMA opinion dated March 29, 2016, and attached to this memo, but the Town would still need to identify the public purpose to be served (e.g. provision of emergency services) before requiring road damage bonds on private ways where no such public easement exists. However, even if requiring road damage bonds were a legal possibility, it would likely be impractical from from an administrative standpoint given the amount of time that staff would need to

expend on what would probably be very fact-specific issues. For example, for any particular Private Way or Road, it would be problematic for staff to establish the amount of a bond, assess the its condition of the prior to any construction and assessing its condition through construction and completion of construction activities, and to attribute any road damage to bonded activities. Such activities are best left to a road association.

2. Require all new private roads and extensions of existing private ways to be engineered and approved by the Planning Board.
  - This has been done and ordinance language is attached.
3. Simplify the ordinance to one private road standard.
  - This has been done and ordinance language is attached. Please note however, that staff feels comfortable that the existing standards are adequate for safety, access, and stormwater management purposes. If the Town Council would like to see paving occur earlier in the development process than after the 10<sup>th</sup> lot, then that item alone is a relatively simple adjustment to the Minor Private Way standard.
4. Require the establishment of a homeowners association or road association on any existing private way if none exists, or if one exists on the private way providing access to a property being developed, that the new development join the association.
  - This approach to ensuring the long term maintenance of a private road is problematic from a legal and practical standpoint. The Planning Board currently requires draft homeowners or road association documents to be submitted as part of subdivision review, but cannot require a condition of approval tying permits to membership in an association. That is a private matter among the property owners on a private road. Furthermore, the Town cannot compel participation in the association activities or payment of annual dues into the association, which presumably is the ultimate goal of such a requirement. That again is a private matter between property owners.
  - The idea from the public we can build on would be to have the Town serve as a technical resource or clearinghouse of information on how to form and run associations and may be worth further investigation in the pursuit of the goal to keep private roads well maintained.
5. Develop a scoring/grading/classification system for existing private ways (in existence prior to October 2009 and not built to town standards) and require contributions proportional to the proposed development for improvements to the private way(s) affected.
6. Clarify the Planning Board's ability under the Land Use Ordinance, including Section 911.M.2.c, to determine whether an existing private way provides adequate access, with "adequate" being defined as meeting either the existing private road standard or some other minimum threshold standard to be developed.
  - Items 5 and 6 are perhaps best addressed together. Since the introduction of road standards in 2009, existing roads have been "grandfathered," which has meant that any road existing in a 50-foot right-of-way prior to the establishment of standards has been considered free from any expectations for upgrades. The standards apply to new roads and the extension of existing roads, but not the existing roads themselves, regardless of the amount of new development along their length or as part of a larger road network. This is not the typical

understanding of what it means to be “grandfathered.” Much more typically, grandfathering is an understanding that anything existing prior to new rules, codes, ordinances or statutes being established are fine as they exist at that time. This is what is meant when referring to “legally non-conforming” lots, buildings, and land uses. They pre-existed updated standards, and it isn’t fair to go back on building and property owners when they played by the rules at the time. However, when conditions change or when buildings are upgraded or new development is proposed, grandfathered status goes away and the current standards apply.

As there were no road standards prior to 2009, the Planning Board was in a position of negotiating with developers of subdivisions on a project by project basis for any improvements deemed necessary by the Board to existing private ways. Since standards were established, the Board was advised that when the ownership of the private way is different from the land being subdivided, the Board’s authority was limited. This is because the road owners, whether an individual or an association, are hardly ever party to the subdivision application and the Town could not compel another individual or group of owners to make improvements to benefit the party that is subject to the application. Further, it may be that the developer may not have rights to make improvements to the property of others. Both of these scenarios have put the Board in difficult positions in the past.

The Town Council should have a conversation about what it means to have a “grandfathered” private way in Windham and under what conditions upgrades to those roads are appropriate. This conversation is also relevant to the Major and Minor Private Ways constructed since 2009 if and when the private road standards change in the future, since these roads would be required to make upgrades when new development occurs.

- i. Should the Town require upgrades of pre-2009 private ways to today’s standards when new development is proposed along their length or on an extension of that private way?
- ii. Should the Town require upgrades for just the subject private way or for the subject private way and any other private ways back to the nearest public street?
- iii. Are there certain private roads, based on their length, condition, amount of development, or other criteria that would be exempt from upgrade requirements?

The answers to these questions may have a profound impact on how and where future development occurs in Windham. Issues of development and access to that development are closely intertwined.

## **Proposed Ordinance Change Summary**

### Section 300

- Defining “Driveway” as serving no more than 2 lots and clarifying that Driveways do not provide Frontage.
- Deletion of “Lot, Frontage” as this duplicated the definition of “Frontage” which remains.
- Deletion of “Lot Width” as this is no longer a dimensional standard that appears in the ordinances.
- Update of Street Classification definitions. Note that the updates are for definitions of the current street classes. Collector Street has been deleted, Major and Minor Local Streets have been added and Major and Minor Private Roads have been added.

### Section 500

- Developable Land standards have been changed to delete reference to Backlots.
- Driveway performance standards have been deleted. The performance standards describe how Driveways existing prior to October 2009, could provide Frontage for up to four (4) lots. It also says that for a pre-2009 driveway to provide frontage to five (5) or more lots, it must meet a road standard, which is already stated in the Streets performance standards. If this section is deleted, Driveways that provide frontage to 3 or 4 lots would become legally non-conforming.
- Lot, Backlot performance standards have been deleted. These standards require backlots created after March 2012, to be accessed by streets built to a standard within a 50-foot right-of-way, which may be an easement over property so that the easement area can count toward minimum lot size requirements of the zoning district it is in. Such arrangements would not be allowed without this standard, and all existing situations would become legally non-conforming.
- Streets performance standards have been amended so that all private streets not part of a subdivision application would require site plan approval by the Staff Review Committee or Planning Board as applicable.

### Section 800

- Change 802.A.4., so that any Development over 25,000 square feet is subject to site plan review, whether or not a new nonresidential use is established.
- Add 802.A.10, making it explicitly clear that all new Private Roads and extensions of existing Private Roads and Ways are subject to site plan review.
- Change 805.A. 1 and 2 so that new Private Roads or extensions less than 500 feet in length in a 5 year period are classified as Minor Site Plans, which are reviewed by the Staff Review Committee and that new streets or extensions of 500 feet or more in a 5 year period are classified as Major Site Plans, which are reviewed by the Planning Board.